Hillsborough Litigation ?

Brief of Respondent Township of Hillsborough

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5349-95-T1

IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY DOCKET NO. A-5349-95-T1

CIVIL ACTION

BRIEF OF RESPONDENT TOWNSHIP OF HILLSBOROUGH

FRANK N. YURASKO, ESQ.
63 Route 206 S.
PO Box 1041
Somerville, NJ 08876
(908) 231-0220

Attorney for Respondent
Township of Hillsborough

EDWARD A. HALPERN, ESQ.
503 Omni Drive
Somerville, NJ 08876
(908) 359-4333

On The Brief

N.J.
7/97 ?

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COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Hillsborough Township is recognized by COAH as a "complying municipality" which has always accepted and respected its Mt. Laurel responsibilities. Indeed, its first cycle obligations were met and exceeded long before COAH rules would have mandated. Its present Petition for Substantive Certification was filed on February 28, 1995 (Aa77a)[2] simultaneously with submission of its housing element and fair share plan without delaying for the 2 year period (from plan submission) permitted by COAH rules. Because Hillsborough Township is such a complying municipality, it is entitled to receive the benefit of maximum flexibility with respect to COAH certification (principle #10-COAH/OSP (Office of State Planning) memorandum of understanding), (Aa58a).

In 1991, Hillsborough Township set about developing the foundation for this PAC/HCF. Its motivation, as declared in the preamble provisions of its Ordinance, was a recognition that:

> "...it is important to provide housing and to otherwise meet the needs of our elder citizens for health care, support services and recreation in an overall community atmosphere."
>
> "All such senior citizens, irrespective of their economic standing, should be able, to the extent possible, to live a respected and productive life with assurances that their health care and other related lifestyle support service needs are met in a dignified manner." (HRa1)

Interwoven within this goal was the objective of developing a plan that would meet future

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[1] Because these two sections are intricately intertwined, they have been combined for the sake of clarity.

[2] Reference to Appellant's appendix shall be as follows: Aa page # . Reference to Respondent Hillsborough's appendix shall be as follows: HRa page # .

Township Mt. Laurel obligations without substantial economic burden on its school system. Further, development of the PAC/HCF had the added benefit of bringing substantial tax ratables into a municipality sorely lacking in commercial ratables because of the absence of a major highway. Its approach was the classic example of a municipality meeting community needs by taking responsibility for planning its own future (a benefit flowing directly from the principle of Home Rule).

Its plans and objectives were set into motion and finalized between the Spring of 1991 and the Spring of 1992, prior to the adoption of the SDRP in June of 1992. All of its municipal actions were taken in conformance with NJ law at that time and with a recognition of COAH rules and a dialogue with COAH to facilitate insure compliance.

The PAC/HCF Ordinance was adopted in June 1991. In January of 1992, the developer received its General Development Plan approval (Aa178a). The Township Master Plan was amended in 1992 to reflect the goal of "establishing the necessary framework for providing housing, health care, and specific needs for the growing number of senior citizens". A key component of the 1992 Master Plan was the 10 year plan map which included PUDs for adult communities and related health facilities for senior citizens. The land area chosen was on the western fringe of the already developed portions of Hillsborough Township to the west of Route 206 within reasonable distance of the Municipal Complex, library, police and YMCA. The land area was planned to receive the benefits of both public water and public sewage treatment facilities. The adopted Master Plan also included specific recommendations for road improvement and road re-alignment. Finally, the Township took part in the State Planning Commission's cross acceptance process and the PAC/HCF was identified as a village center in

the SDRP adopted in June of 1992.

All of the elements of what would become the Hillsborough Township Fair Share Plan were in place in 1994 when the Plan was developed and ultimately finalized in early 1995. A 12 year COAH obligation of 482 units was reduced to 160 because of the Township commitment to compliance which resulted in a 315 unit credit utilizing COAH's rental bonus and substantial compliance rules. Its 160 unit obligation (plus 7 unit rehabilitation component) would be met through the construction of 96 senior citizen units and 40 non-age restricted rental units within the PAC/HCF which would produce a 24 unit rental bonus credit.

The PAC/HCF itself became further refined in 1995 by virtue of COAH/OSP input and direction. The "final product" included far more that the 136 Mt. Laurel units referenced in Appellant's recitation of facts. The life care community would consist of 3,000 residential units to be developed over an expanded time build-out. 15% or 450 of the 3,000 units would be reserved for Mt. Laurel households. This would not only take care of the second cycle COAH obligation, but a third and fourth cycle obligation as well made up of senior citizen and non-age restricted households as determined by COAH formula. However, the PAC/HCF goes beyond COAH requirements. The Ordinance, General Development Plan approval and Developer's Agreement (Aa40a) require one-half of the units to consist of least cost housing (approximately 1,500 minus 450 Mt. Laurel units). Least cost housing is to consist of housing whose prices are stratified between Mt. Laurel values and market values. In addition, the developer will be required to provide certain health care facilities and related support services such as a hospital, public health center, diagnostic center, rehabilitation center, extended care facility, nursing home, elder care center, out patient clinic, intermediate care facility, respite care center,

congregate care facilities or other related medical support facilities. (Hra2)

Hillsborough Township was well aware that much of the PAC/HCF lay in planning area 4 and would need either center designation from OSP or a waiver therefrom from COAH, if the Fair Share Plan was to be approved. However, a careful review of COAH rules and policies amply demonstrated that the Township was entitled to that waiver. Not only did COAH agree, but so did OSP. A review of the COAH compliance report (Aa27a) sets forth 12 reasons which cumulatively justify the waiver. Indeed, most of those 12 reasons were cited by Herbert Simmens (OSP Director) in his 1/31/96 letter to COAH Executive Director Shirley Bishop (Aa62a). Not only did he not object to the wavier, but, citing State Plan Policy 20 and the Memorandum of Understanding, he concluded that since the PAC/HCF lay in planning areas 2 and 4, the criteria for planning area 2 applied and thus center designation was not needed. Further, he stated that his recommendation to SPC (State Planning Commission) would be that the areas encompassing the PAC/HCF and its surrounds be re-designated as planning area 2. Whether SPC does this or not, these conclusions lend ample support to the reasonableness of the COAH decision to grant the waiver.

COAH reasoning, both separately and cumulatively, in support of the waiver included:

1. The site was jointly proposed by the developer and the Township pursuant to the COAH informal waiver policy. (Aa51a)

2. The site had water and sewer capacity and accessibility. Public water service would be provided by Elizabethtown. The entire tract was within the sewer service area of the collector system of the Hillsborough Township Municipal Utilities Authority (HTMUA). The tract is included in the Somerset County Waster Water Management Plan which is under review

by NJDEP. Upon DEP approval, sewage from the tract would be carried to the SRVSA regional waste water treatment plant.

3. Infrastructure may be easily extended to the site.

4. The site is available, approvable, suitable and developable.

5. There are no environmental constraints.

6. The Hillsborough Township Fair Share Plan fosters the development of affordable housing.

7. Not granting the waiver would place an unfair hardship on Hillsborough Township since its ordinance and General Development Plan approval preceded the SDRP.

8. Since the site exists in planning areas 2 and 4, the criteria for planning area 2 applies thus, justifying the waiver and even justifying a re-designation of the tract into planning area 2 according to the report of Herbert Simmens Director of OSP.

9. Pursuant to principle #1 of the Memorandum of Understanding, the matter was submitted to OSP for their direction and guidance and the result was the letter of non-objection from the OSP Director.

10. The PAC/HCF was identified in the SDRP as a village center.

11. OSP has no regulations or guidelines regarding the designation of senior citizen centers.

12. As a complying municipality, Hillsborough Township is entitled to maximum flexibility with regard to the granting of Substantive Certification in accordance with principle #10 of the Memorandum of Understanding.

Contrary to Appellant's position, all of these factors make the granting of the waiver not

only reasonable, but compelling.

Despite careful advanced planning by Hillsborough Township and compliance with COAH rules, one objector/developer came forward seeking for his site the increased density afforded to an inclusionary development. Unhappy with the existing zoning density, he had proposed to the Township, over the past four years, a high density, non-age restricted development, then a massive commercial shopping center and then returned to the high density non-age restricted development at the start of mediation. As a result of mediation, his objections were addressed and disposed of by COAH as lacking merit.

COAH concluded that the objector was not entitled to site specific relief based on N.J.A.C. 5:91-3.6 (HRa3) and the complying municipality was entitled to the widest latitude in determining how and where it would meet its obligation. As to his other objections, COAH concluded that the granting of a waiver from center designation was appropriate and infrastructure could be easily extended and sewer capacity and accessibility existed based on the reasoning recited above. It further concluded that the Fair Share Plan did provide for the full Fair Share obligation and the Developer's Agreement demonstrated the developer's commitment to construct the 136 affordable housing units within the COAH 6 year imposed time frame. During the 14 day comment period which followed the mediation report and the compliance report, the objector did not pursue his objections by filing any comments.

After all issues and concerns were resolved and compliance with all COAH rules established, at the 25th hour, Appellant New Jersey Future Inc. (hereinafter "Future") entered the picture. Approximately 2½ weeks before COAH was scheduled to grant Substantive Certification, Future submitted its letter opposing certification (Aa70a). More than a year had

elapsed since Hillsborough Township first petitioned for Substantive Certification and the time frame for filing as an objector to the plan had expired some 11 months earlier. Query, on what basis did Future have standing to even advance its position. At what point can a municipality safely rely on its compliance with COAH procedural and substantive rules and be free from another entity's self interest agenda and attacks on a municipality's Fair Share Plan.

Future argued essentially that the PAC/HCF did not yet have DEP sewer approval, was not consistent with the State Plan and did not provide the "realistic opportunity" (for affordable housing). These were the very same issues that COAH had already considered and resolved favorably to Hillsborough Township.

The site was accessible to the HTMUA sewer collector system, the SRVSA had acknowledged its capacity to treat the sewage (Aa222a) and the tract was included in the Somerset County 208 Plan Amendment which had been submitted to NJDEP prior to Substantive Certification and returned to the County in early 1996 for revisions and resubmission. [3]While the Township rethought the Hillsborough portion of the County 208 Plan over the past six months, the PAC/HCF still remains a part of the County Plan which is scheduled for resubmission to DEP.[4] Ironically, "but for" Future's late entry into the foray, DEP sewer approval might well have been a formality, especially in view of the granting of Substantive

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[3] In the hope of expediting NJDEP sewer approval before substantive certification, the PAC/HCF site was included in a Township 208 Plan Amendment (with County approval). However, aggressive opposition by the developer/objector quashed any likelihood of expediency occurring. The Township Plan was withdrawn and the PAC/HCF site was submitted to DEP as part of the County 208 Plan Amendment in 1995.

[4] The Hillsborough Township Planning Board reaffirmed the inclusion of the PAC/HCF site in the County Plan on April 3, 1997. (HRa4) The Township Committee is scheduled to consider the matter on June 10, 1997. (HRa6)

Certification.

COAH amply considered the issue of the SDRP. Pursuant to principle #1 of the Memorandum of Understanding, OSP input, advice and opinion was actively solicited and incorporated in large part into the COAH decision. There was substantial collaboration and discussion among COAH, OSP and Hillsborough Township in the fall of 1995 in recognition of the existence and goals of the SDRP. By the same token, cognizance was taken of the fact that the Township Ordinance and General Development Plan Approval predated adoption of the SDRP. Of key significance is the fact that the developer had every right to develop the PAC/HCF without ever seeking COAH or OSP acquiescence if the site were not part of the Township Fair Share Plan. [5]Lastly, COAH could not ignore and was obliged to consider that the PAC/HCF would accomplish the three-fold purpose of providing 3 cycles of affordable housing (450 units), address the need for senior citizen housing and provide substantial rental units. The PAC/HCF met the COAH directives and the goals of the Fair Housing Act in a very meaningful way.

It is clear that the Mt. Laurel mandate is to provide a "realistic opportunity" for affordable housing; not a guarantee, but a realistic opportunity. That realistic opportunity exists here and is well on its way to becoming a reality with DEP sewer approval. That is why COAH granted Substantive Certification on April 3, 1996. COAH simply did not allow itself to become a tool of Future to be used to sabotage DEP sewer approval and jeopardize the very realistic opportunity Hillsborough Township had worked so diligently to create.

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[5]Indeed, if the COAH Certification was overturned, it is conceivable that the absurd result of a high density PAC/HCF development without any Mt. Laurel housing (for which the Township could receive credit against its fair share obligation) could occur.

Hillsborough Township endeavors, here, reflect the highest of ideals and goals. A commitment to the housing, health and lifestyle needs of the regions senior citizens was made. At the same time, the Township took steps to plan for its future development that would allow for growth, deliver sizable clean tax ratables, not burden the school system or municipal services, address the lifestyle needs of its senior citizens and plan for the productive development of an emerging area of the Township.

The Plan represents a responsiveness of municipal government to the needs of its people. It is what Home Rule is about. The opposition of New Jersey Future and the reasons it advances are a puzzlement to the municipality. The Township is a strong proponent of open space preservation and the protection of the environment[6]. It is also sensitive to the needs of an important segment of the region's population and the pleas of its overburdened taxpayers. Ultimately, it must be allowed the freedom to chart the course of its own community development. How can something conceived and developed to accomplish so much good be made to demonstrate its worthiness "one more time" based on the belated interest of a private environmental group whose issues have already been resolved by COAH with significant input from OSP?

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[6] The Township recently adopted an Open Space Trust Fund Ordinance in 1995 and is now actively engaged in the acquisition of land for open space and greenway purposes.

ISSUE PRESENTED

Appellant's arguments are based on 3 fallacious premises which need to be clarified and corrected.

1. The SDRP is not a binding obligatory mandatory document. Rather, it is a reference document, certainly to be acknowledged and respected, but intended to encourage growth in a certain manner with the assistance of OSP and decisions by SPC. Compliance with it, after due consideration, is voluntary whether it be by a municipality, a developer or even a state agency.

2. COAH, by acknowledging the SDRP as a valid planning document and referencing it in its rules, has not so married itself to the Plan that it has compromised its independent authority. It is not an enforcement agency for the SDRP. Consideration of the SDRP has not resulted in the creation of unwaivable rules. COAH retains its statutory discretion to make decisions in accordance with its Legislative directive: the creation of affordable housing. It is not powerless when it comes to exercising its authority - including the power to grant waivers in the face of SDRP preferences and guidelines.

3. An inclusionary development in a Fair Share Plan need not have DEP sewer approval in order to create the "realistic opportunity". In fact, COAH rule N.J.A.C. 5:93-5.3(b) (Aa142a) only requires that the inclusionary development be included in an Amendment to the County Waste Water Management Plan submitted to DEP for approval prior to Substantive Certification.

Appellant's brief, on these fundamental issues, reflects neither an accurate exposition of the law nor a valid interpretation thereof. It represents Appellant's "wishful thinking" on the subject. The SDRP is not mandatory or regulatory. COAH retains its broad discretion in deciding under what circumstances Substantive Certification is appropriate (despite incorporating SDRP principles into its rules). DEP sewer approval of an inclusionary development is not a precondition to Substantive Certification.

The issue in the case is not novel, unique or in need of Appellate overhaul of the law. It is the simple, mundane, straight forward issue that is presented in the typical appeal of administrative agency determinations. Did COAH exercise its discretion appropriately under the circumstances present? Is there an adequate factual basis for the decisions that it made here? Respondent Hillsborough Township submits that there is and that the COAH Compliance Report is replete with substantial factual support and rationale for the granting of Substantive Certification.

POINT I

WHILE COAH, THROUGH ITS REGULATIONS RECOGNIZES A DUTY TO CONSIDER THE SDRP, IT ALSO UNDERSTANDS AND ACKNOWLEDGES THE NON-BINDING NATURE OF THAT DOCUMENT AND ITS OWN AUTHORITY AND OBLIGATION TO MAKE INDEPENDENT DECISIONS INTENDED TO ACHIEVE ITS MANDATE WHICH IS THE CREATION OF AFFORDABLE HOUSING

COAH regulations accorded to the SDRP the respect that the Supreme Court and the Legislature envisioned while at the same time preserving onto itself its autonomy and independent decision making power. Neither the Courts nor the Legislature annointed or viewed the SDRP (or its predecessor, the SDGP) as being an obligatory mandatory document. Rather, they viewed it as a guide or reference point to be acknowledged and considered. This conclusion is reflected in the State Planning Act, State Planning Commission Rules, the SDRP itself and the Fair Housing Act. COAH simply followed this conclusion in deciding the Hillsborough Township Petition for Substantive Certification. How could COAH possibly make obligatory that which the State Planning Commission and the SDRP's own enabling Legislation did not. Appellant Future's seeks to imbue the State Planning document with a power it simply does not possess.

The State Planning Act speaks for itself on this issue. There is absolutely no mandatory language in the Act binding a municipality or a state agency to implement it. To consider it - yes; to be duty bound to follow it - no. The Act is replete with use of words like encourage, assist, recommend, use as a tool, etc. The Legislature was very careful with the language that it used so as not to impinge on the autonomy of state agencies or the doctrine of Home Rule. See State Wide Planning in New Jersey: Putting Some Teeth Into The State Planning Act. 20 Rutgers Law Journal 721 (1998-1989) which reluctantly admits to this fact.

N.J.S.A. 52:18A-196 sets forth the Legislative findings and declarations of the State Planning Act. Among those declarations, it states:

> "(c)...It is of urgent importance that the SDGP be replaced by an SDRP designed for use as a tool for assessing suitable locations for infrastructure, housing, economic growth and conservation;"
>
> "(f)...Since the overwhelming majority of New Jersey land use development review occurs at the local level, it is important to provide local governments in this State with the technical resources and guidance necessary to assist them in developing land use plans..."

The Committee Statement following this section of the Act, in delineating the intentions of the SDRP, states that it is to guide policies concerning economic development. It states that among the duties of the Office of State Planning is to "provide advice and assist local planning units".

N.J.S.A. 52:18A-199 sets forth the powers and duties of the State Planning Commission. These include power to:

> "(d) Provide technical assistance to local governments in order to encourage the use of the most effective and efficient planning and development review data, tools and procedures."
>
> "(e) Periodically review state and local government planning and relationships and recommend to the Governor and the Legislature administrative or legislative action..."

N.J.S.A. 52:18A-201 states that OSP shall (3) "provide assistance to county and local planning units".

The State Planning Commission rules follow and respect this "guideline, encouragement assistance" approach as opposed to the "obligatory spin" that Appellant wishes to place on the Plan. Indeed, the rules make it clear that the State Planning Commission process is not to have regulatory effect. Concerning Letters of Clarification, N.J.A.C. 17:32-6.1 (HRa7) states:

"(a) For the SDRP to serve as a useful guide to officials in both the public and private sectors...it must be well understood and accurately interpreted."

"(b) Neither the SDRP nor its Resource Planning Management Map is regulatory and neither should be referenced or applied in such a manner. It is not the purpose of this process to either validate or invalidate a specific code, ordinance, administrative rule, regulation..."

Concerning the Voluntary Submission of Plans for Consistency Review, N.J.A.C. 17:32-7.1 (HRa8) states:

"(a) The State Planning Act recommends, but does not require, that municipal and county plans be consistent with the SDRP."

"(b) Neither the SDRP, nor its Resource Planning and Management Map is regulatory and neither should be referenced or applied in such a manner."

N.J.A.C. 17:32-7.2(b) (HRa8) regarding Eligibility states:

"Nothing in these rules shall be interpreted to mean, however, that the staff of OSP and the Commission may not provide technical assistance and advice to agencies at any level of government on matters falling under the mandates of the Commission. This principle is reiterated again in N.J.A.C. 17:32.8.2 concerning Amendments of the Resource Planning and Management Map."

"(b) Neither the SDRP nor its RPMM is regulatory and it is not the purpose of this process to provide for amendments to the Map to reflect or validate land use changes or to serve as a legal basis for making such changes. There is no site specific change of land use that is inherently inconsistent with the State Plan."

"(c) Municipalities, counties and state agencies also are encouraged to voluntarily petition the Commission for a review of consistency pursuant to 17:32-7.1 et seq...."

Perhaps the most relevant aspect of the State Planning Commission's rules to COAH action in the case sub judice is contained in N.J.A.C. 17:32-7.1(c) (HRa8). It states:

"No municipality, county, regional or state agency should delay any decision making process due to a pending review of their plans by OSP for consistency with the SDRP."

The voluntary/assistance/encourage approach found in the State Planning Act and State

Planning Commission rules is not surprising or new. Its roots lay as far back as the Mt. Laurel II decision, Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158 (1983). While Chief Justice Wilentz made it clear that the Court viewed the SDGP as the blueprint for future development (id at page 225) and strongly encouraged its use, he refused to make it mandatory (except as to the issue of a municipality's fair share housing obligation). The same verbiage of guidance and assistance is used. The same goal is found: that the Plan be considered, not mandated. On page 227, it was said:

> "The administrators who carried out the legislative requirement to prepare such a plan...for the future improvement and development of the state, interpreted the statute to require a plan that would guide and influence the location of future development, including residential development."
>
> "The plan is "comprehensive", its intent is to guide...the future development and its purpose...is to be achieved by, amount other things, stimulating, assisting and coordinating local, county and regional planning activities." (id. at page 228).

The Supreme Court decision acknowledged that its intent in recognizing the SDGP was that it would be considered; not that it would be mandated. On page 223, it was said:

> "...It is clear that municipal master plans, pursuant to the statutory mandate, have considered the SDGP; that many seem to view it as a helpful guide; that some consciously attempt to conform their proposed development to that suggested in the Plan; that others comply with it out of a concern that needed public funds will not be forthcoming unless they do; and that others simply note their consideration in a pro forma manner. The overriding fact, however, is that the SDGP is being used, to a greater or lesser extent, by municipalities in planning for their future development..."

Confirmation that the Supreme Court did not view and would not endow the SDGP with mandatory implementation can be found in at least two places in the Mt. Laurel II decision. On page 228, it was said:

> "...It required all municipalities to consider the relationship of their master plan to the SDGP, each master plan to include a specific policy statement indicating

the relationship of the proposed development of the municipality as developed in the master plan to...the SDGP...while it did not mandate conformance of the municipal master plan or the development of the municipality to the SDGP, the legislative intent was clear: municipalities were encouraged to guide their development in conformance with the State Plan to make it more likely that through voluntary municipal action, the future development of the entire state would be in accordance with comprehensive sound planning."

Finally, it summed up its position that it would not mandate compliance with the SDGP on page 247 of that decision:

"There is nothing, however, that prevents municipalities from encouraging growth, including residential growth in areas designated by the SDGP as limited growth, agricultural or conservation areas. Uninhibited by any statutory restrictions, municipalities may, for a variety of reasons, plan their future in a manner totally inconsistent with the State's Plan, bringing factories, retail shopping centers, large scale housing development, including lower income housing, into areas where their presence runs completely counter to the objectives of the SDGP. Except for protective legislation (such as that pertaining to the Pine Lands in certain costal areas) limited to particular ecologically sensitive areas, the State has imposed no prescriptions against development. While conformity of the constitutional obligation to the design of the Plan unquestionably advances the State's purpose, the absence of such proscriptions against development may, in the long run, undermine the regional planning objectives of the SDGP whether we limit the Mt. Laurel obligation to growth areas or not."

These same principles and conclusions are reaffirmed by the Legislature in its passage of the Fair Housing Act. The Fair Housing Act does not require that the development of a fair share plan be compliant with the SDRP. The Act acknowledges the importance of the SDRP in determining what a municipality's fair share obligation should be. However, it does not mandate where, in the municipality, the fair share housing must be located. The same language of due consideration and assistance is used in N.J.S.A. 52:27D-307 which states:

"In carrying out the above duties, including but not limited to present and prospective need estimations, the Council shall give appropriate weight to...implementation of the State Development and Redevelopment Plan. To assist the Council, the State Planning Commission established under that Act (State Planning Act) shall provide the Council annually with economic growth,

development and decline projections for each housing region for the next 6 years."

N.J.S.A. 52:27D-303 declares that the statutory scheme comprehends a housing plan in accordance with sound planning principles. However, this does not equate with automatic mandating of the SDRP. N.J.S.A. 52:27D-311 states that a municipality may provide for its fair share...by means of any technique...which provides a realistic opportunity. N.J.S.A. 52:27D-314 states that, absent an objector, Substantive Certification shall issue if COAH finds that the fair share plan is consistent with the rules and criteria adopted by the Council. In sum, the Fair Housing Act is void of any language mandating that a fair share plan be compliant with the SDRP. The Fair Housing Act goal is the "realistic opportunity for affordable housing" and COAH, as the administrative agency, has wide discretion in determining what factors to consider in granting certification and what weight to be given to those factors. The Fair Housing Act leaves COAH autonomy and independent decision making power in tact.

In the enactment of the State Planning Act and the Fair Housing Act, the Legislature could have made the SDRP mandatory in terms of compliance, yet it did not. There were many reasons expressed and implied in the Mt. Laurel II decision to support the mandatory approach. Yet, first the Supreme Court and then the Legislature decided not to make it mandatory. While the Supreme Court reasoned it would not make the SDGP mandatory because it was not drafted with Mt. Laurel goals in mind, no such limitation existed with the Legislature. The State Planning Act and the Fair Housing Act were both drafted with affordable housing in mind. Yet, the "jump" was not made. This evidences a clear legislative desire not to break with the past on this issue. The SDRP would be prepared and utilized on a voluntary basis. Assistance, guidance and encouragement would be its approach. The "due consideration" and "appropriate

weight" would have to be given to it. However, mandatory compliance with it would not be required.

What then is COAH's obligation with respect to implementation of the SDRP as it reviews municipal fair share plans? The answer lay in the two enabling statutes, SPC's own rules and the Mt. Laurel II dictum. They all stop short of requiring automatic mandatory compliance. There is no doubt that it must be used as a tool, a technical resource and a guide with OSP offering assistance, encouragement and input. It cannot be ignored and must be seriously considered. As the Fair Housing Act states, appropriate weight must be given. However, as the State Planning Commission rules state, it is not a regulatory document either. No statutory or case law support exists for the proposition that it is mandatory and binding (not even the recent decision in Sod Farms Associates v. Springfield Township Planning Board, Docket #A3162-95T3 (12/18/96).

COAH must tap into this resource, seriously consider it and apply it to the facts of a particular fair share plan. At the same time, since it is not mandatory and since COAH has it own mandate, COAH is free to consider a whole variety of factors, unrelated to the SDRP as well. Ultimately, the law gives COAH the latitude to exercise wide discretion and to utilize its authority as a state agency to make an independent decision in order to achieve its goal: the creation of affordable housing. It is with this background and approach and the non-binding nature of the SDRP that COAH's actions must be evaluated.

POINT II

COAH'S ACTION IN GRANTING SUBSTANTIVE CERTIFICATION TO HILLSBOROUGH TOWNSHIP COMPORTED WITH THE FAIR HOUSING ACT DIRECTIVES, WAS CONSISTENT WITH ITS OWN REGULATIONS AND THE MEMORANDUM OF UNDERSTANDING, WAS THE APPROPRIATE SUBJECT OF A WAIVER FROM CENTER DESIGNATION AND OTHERWISE REPRESENTED A VALID EXERCISE OF COAH DISCRETION

Point I, through its review of the relevant Legislation, State Planning Commission rules, and Court decisions, has demonstrated that the SDRP has not been endowed with mandatory or regulatory effect. Thus, the issue for Point II become whether COAH has done something in its own rules and in the Memorandum of Understanding to obligate itself to the SDRP to a degree beyond which the law does not require and, in the process, has stripped itself of its own discretion. The answer to this question is clearly no. While COAH has committed itself to giving appropriate weight to the SDRP (as called for by N.J.S.A. 52:27D-307) and has recognized its unique relationship with OSP/SPC (i.e., Memorandum of Understanding), it has always retained the right to make its own decisions based on its evaluation of the facts and to follow the dictates of its statutory mandate.

COAH has not violated the Fair Housing Act by granting a waiver of center designation. There is nothing in the Fair Housing Act that even specifically address sites in various planning areas, center designations or waivers. All the Act provides on the issue is a general statement that COAH give appropriate weight to the SDRP in making its decisions. This, COAH has done. The Fair Housing Act also says, however, that a municipality may provide for its fair share by means of any technique...which provides a realistic opportunity for the provision of the

fair share. N.J.S.A. 52:27D-311. Indeed, N.J.S.A. 52:27D-314 states that Substantive Certification must be granted if a municipal Fair Share Plan is consistent with the rules and criteria adopted by COAH (assuming no objection).

Appellant places much reliance on COAH rule N.J.A.C. 5:93-5.4(c) (Aa142a). It never considers N.J.A.C. 5:93-5.4(d) (Aa142a) and it ignores N.J.A.C. 5:93-15 (Aa146a) which permits a waiver of all COAH substantive rules under appropriate circumstances. Let us examine these rules.

N.J.A.C. 5:93-5.4(c) does require sites in Planning Area 4 to be located within centers and requires a municipality to make the appropriate application to the State Planning Commission for center designation. However, the subsection is subject to the waiver provision of N.J.A.C. 5:93-15.1. It is not an unwaiveable requirement as Appellant asserts. The waiver was granted here based on a myriad of justifiable reasons. Once again, Appellant's "wishing" to make the rule unwaiveable does not make it so.

COAH's informal waiver policy (Aa51a) makes it clear that a waiver is appropriate to consider and may be granted where the site is jointly proposed by the municipality and the developer, has water and sewer capacity and is available, approvable, suitable and developable. The policy, developed with OSP involvement and acquiescence, acknowledges that subsection (c) had erroneously assumed that sites in Planning Areas 4 and 5 would not have infrastructure. It serves no one for an erroneous assumption to go unaddressed. Even though the policy was enunciated by reference to Section 13 (Site Specific Relief), it naturally follows that if a waiver could be granted there, it certainly could be granted where the site is proposed by a complying municipality in its Fair Share Plan.

N.J.A.C. 5:93-15.1(b) is COAH's formal waiver rule. Just as N.J.A.C. 5:93-5.4(c) uses the word "shall" (in describing the requirement for center designation), so too does the waiver rule used the "will" in describing when waivers are to be granted:

> "The Council will grant waivers from specific provisions of its rules if it determines:
>
> 1. That such a waiver fosters the production of low and moderate income housing;
>
> 2. That such a waiver fosters the intent of, if not the letter of, its rules; or
>
> 3. Where the strict application of the rule would create an unnecessary hardship."

If the test is met, the waiver must be granted - even from subsection (c).

The circumstances justifying the waiver both separately and cumulatively amply exist here and demonstrate that the COAH decision was clearly within its sound discretion. These facts are enunciated on pages 4 though 7 of the COAH Compliance Report (Aa-27a), the counter statement of facts in this brief and in the discussion of the facts contained in this Respondent's counter argument to Point IV (waiver).

An examination of the Memorandum of Understanding (Aa58a) reveals COAH's commitment to due consideration of the SDRP and a working relationship with OSP/SPC. However, it does not reflect any abandonment of its discretion to make independent decisions based on all the facts which it deems pertinent in order to meet its statutory mandate. A comparison of the facts in the case at bar to the 10 principles in the Memorandum reveals that they were all honored by COAH in its evaluation of the Hillsborough Township Fair Share Plan. COAH shared all information regarding the Fair Share Plan with the Office of State Planning

and requested an OSP opinion. OSP, ultimately, responded that it had no objection to the Plan. As to principle #2, communications and procedures have been set up between the two agencies that insured dialogue on all SDRP issues. As to principle #3 and the Resource Planning Management Map, a collaboration between the two executive directors acknowledged that the site fell within two planning areas and the criteria for the lower planning area applied. The OSP Executive Director even advised that an amendment of the Map to move the planning area boundary line to include all of the PAC/HCF would be appropriate. COAH also inspected the site and reviewed technical data before concluding that no environmental constraints existed. COAH and OSP were also aware that infrastructure (sewer, water and roads) could be easily extended to the site and the PAC/HCF site was in the County 208 Plan Amendment awaiting NJDEP approval.

As to principle #4, COAH noted that the site exists within two planning areas (2 and 4), would maximize existing infrastructure near the site and that the residential units had been reduced to 3,000. As to principle #5, at COAH and OSP request, the developer downsized the PAC to 3,000 units to explore center designation. In dealing with this principle, it was appropriate for COAH to consider that an age-restricted development might not achieve center designation which required a diversity of uses, but that center designation would not be needed under SDRP planning policy because the site straddled two planning areas and the site met the criteria for Planning Area 2. As to principle #6, the waiver decision considered the goals and objectives of affordable housing, the needs of senior citizens and the commitment of the municipality and developer to the site.

As to principle #7, each agency accepted the definitions, rules (including waiver) and

policies of the other. As to principle #8, COAH considers the SDRP in allocating regional housing need. As to principle #9, COAH is aware of County planning initiative and assistance in identifying centers. As to principle #10, it bears repeating on the waiver issue because of its relevance to the Hillsborough Township Fair Share Plan:

> "Municipalities that are consistent with the State plans, goals, objectives and policies and that petition the Council within 2 years of filing a housing element with the Council, will receive the benefit of maximum flexibility with respect to Council certification."

COAH clearly then has lived up to its obligations in the Memorandum of Understanding. Just as importantly, these obligations, while requiring each agency to work with the other, never removes the ultimate evaluation and discretion decision making process from the other. COAH can and does meet its obligations under the Memorandum but, after due consideration, retains the authority to make its own decisions.

Lost in the preoccupation of Appellant with N.J.A.C. 5:93-5.4(c) is the significance of N.J.A.C. 5:93-5.4(d) (Aa142a). It states:

> "In municipalities that are divided by more than 1 planning area, the following principles shall apply:
>
> 1. The Council shall encourage and may require the use of sites in Planning Areas 1 and 2 prior to approving inclusionary sites in Planning Areas 3, 4 and 5 that lack sufficient infrastructure;
>
> 2. The Council shall encourage and may require the use of sites in Planning Area 3 prior to approving inclusionary sites in Planning Areas 4 and 5 that would require the expansion of existing infrastructure;
>
> 3. The Council shall encourage and may require the use of sites to which existing infrastructure can easily be extend prior to approving inclusionary sites that require the creation of new infrastructure in an area not presently serviced by infrastructure."

In essence, N.J.A.C. 5:93-5.4 has four independent parts. Subsection (a) deals with COAH discretion in locating sites and centers in Planning Areas 1 and 2. Subsection (b) deals with COAH discretion in locating sites and centers in Planning Area 3. Subsection (c) addresses the requirement of locating sites in centers in Planning Areas 4 or 5. Subsection (d) addresses the priority use of sites in all planning areas where a municipality is divided by more that one planning area. While subsection (c) is phrased as a requirement (subject of course to waiver), subsections (a), (b) and (d) are not. COAH uses the words "encourage and may require" denoting even more discretionary power. Most importantly, subsection (d) would seem to be the section of N.J.A.C. 5:93-5.4 that is most appropriate and should be applied to Hillsborough Township. Not only is the PAC/HCF site divided by two planning areas, but the entire municipality is divided by Planning Areas 2 through 5.

Applying subsection (d) to Hillsborough Township would seem to be the most appropriate. Turning to (d1), COAH may utilize its discretion to encourage use of sites in Planning Areas 1 and 2 only if the sites in Planning Areas 3, 4 and 5 lack sufficient infrastructure. This is not mandatory, but purely discretionary and the use of a waiver is not even needed. Subsection (d2) states that COAH may utilize its discretion to encourage utilization of sites in Planning Areas 3 only if sites in Planning Areas 4 and 5 require expansion of existing infrastructure. Once again, use of (d2) is purely discretionary with COAH. Subsection (d3) states that COAH may utilize its discretion to encourage sites to which infrastructure can easily be extended before turning to sites that require the use of new infrastructure. On the basis of subsection (d), which is certainly applicable to Hillsborough Township and the PAC/HCF, COAH has wide latitude to approve inclusionary sites in Planning Area 4 to which infrastructure

can be easily extended. Even if subsection (d) is found not to be separate and exclusive from subsection (c), but is to be read in para materia, the rationale of subsection (d) can certainly provide the basis for a waiver of subsections (c) especially in conjunction with the many other relevant factors described in this brief and in the COAH Compliance Report.

This exploration of COAH rules and the Memorandum of Understanding leads to certain obvious conclusions. COAH always gave appropriate weight and due consideration to the SDRP and the Office of State Planning. They were always factors of serious significance that had to be addressed. However, this never meant that COAH was giving away its independent authority. Once the SDRP and OSP's viewpoint was acknowledged, considered and addressed, COAH retained its discretion to consider all other relevant factors (some related to the equities of the municipality; some related to COAH's mandate to create affordable housing, etc.) and make its own independent judgment. This was never vacated either in its rules or the Memorandum of Understanding. Finally, an examination of all the facts demonstrates that COAH properly exercised its discretion in accordance with reason and fairness.

The Courts must respect this exercise of discretion. As was said in Van Dalen v. Washington Township, 120 N.J. 234,244-245 (1991):

> "Our review of an administrative agency's action is limited in scope...we will not substitute our judgment for that of the agency unless the action is arbitrary or capricious...Moreover, an administrative agency's exercise of statutorily - delegated responsibility is accorded a strong presumption of validity and reasonableness. The presumption is even stronger when the agency has been delegated discretion to determine the specialized procedures for its tasks."

POINT III

COAH'S POLICY ON SITES WITH INFRASTRUCTURE IN PLANNING AREAS 4 AND 5 WAS NOT AN ADMINISTRATIVE RULE PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT WHICH WOULD REQUIRE NOTICE AND HEARING.

When COAH originally drafted the centers requirement for planning areas 4 and 5 there was an incorrect assumption with regard to the presence of infrastructure in these planning areas. As a result of the mistaken assumption, COAH drafted the internal policy "Sites with Infrastructure in Planning Areas 4 and 5" to provide towns with direction for new proposed sites in planning areas 4 and 5. This policy provides that in certain situations COAH will entertain requests for waivers for the centers designation in planning areas 4 and 5. This policy is not administrative rulemaking.

An administrative rule is defined in N.J.S.A. 52:14B-2(e) as:

> "each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases."

In Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984), the court set forth a six part test to determine if an agency action constitutes rulemaking.

> "[A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow or select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is prospectively; (4) prescribes a legal standard or directive that is

not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Id. at 331-332.

Not every action of a State agency, including informal action, is subject to the formal notice and comment requirement of N.J.S.A. 52:14B-4. State v. Garthe, 145 N.J. 1, 7 (1996). In Garthe, a defendant convicted of driving while intoxicated appealed his municipal court conviction. The principal question on appeal was "whether the standards and procedures for testing the breathalyzer used in the prosecution of drunk driving cases must be set forth in regulations adopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -24." Id. at 3. The court considered the six factors in Metromedia and concluded that the regulations for the testing of breathalyzer machines "is more like an intra-agency memorandum than rulemaking." Id. at 7. The court added that "[r]egulations generally are needed when the affected public must conform its conduct with the governmental directive." Id.

In John Doe v. Poritz, 142 N.J 1 (1995), the Attorney General guidelines with regard to the implementation of the registration and notification requirements of the sex offender registration and community notification statutes were challenged on the grounds that they must be adopted in conformance with the notice and hearing requirements of the Administrative Procedure Act. The court applied the Metromedia factors and found that the guidelines "are intended to have wide coverage, to be applied uniformly and to operate prospectively, thereby satisfying the first three Metromedia factors." Id. at 97. The court found, however, that the remaining factors do not point to rulemaking and they deserve the most attention. In applying the fourth factor, the court found that the "guidelines are to a great extent merely a formalization

of the classification requirements explicitly set forth in the statute." Id. The court also found that the fifth and sixth factors of Metromedia did not apply.

In this case, the COAH policy was intended to correct a factual inaccuracy and provide guidance to municipalities for new sites in planning areas 4 and 5. The policy is more like an intra-agency memorandum than rulemaking. The policy is not a governmental directive with which the public must conform its conduct. Additionally, although the policy is intended to be applied uniformly and operate prospectively, the other factors of Metromedia do not apply. Contrary to the appellant's argument, COAH's policy does not ignore the rules regarding waivers and centers designation. Rather, the policy simply provides guidelines to municipalities.

POINT IV

COAH'S FORMAL WAVIER POLICY IS CONSTITUTIONAL AND WAS PROPERLY APPLIED TO WAIVE THE CENTER REQUIREMENT.

"A strong presumption of validity attaches to administrative regulations." Waste Management v. State, DEPE, 278 N.J. Super. 56, 64 (App. Div. 1994). In judicial review of agency action, there is a presumption of reasonableness and validity. In Re Township of Warren, 132 N.J. 1, 26 (1993). "This principle of judicial deference to agency action is particularly well suited to our review of administrative regulations adopted by COAH to implement the Fair Housing Act, 'a new and innovative legislative response dealing with a statewide need for affordable housing.'" Id. at 27 Citing Van Dalen v. Washington Township, 120 N.J. 234, 246 (1990).

Appellant argues that the waiver policy in N.J.A.C. 5:93-15.1(b) is facially unconstitutional. Appellant argues that the formal waiver provision violates due process and is vague and without enforceable standards. "A statute that is challenged facially may be voided if it is 'impermissible vague in all its application,' that is, there is no conduct that it proscribes with sufficient certainty." State v. Cameron, 100 N.J. 586, 593 (1985). As an example, the court noted that "a law that forbade three or more persons to gather on sidewalks and "annoy" passers-by was considered to have no ascertainable standard for inclusion or exclusion by which to determine if particular conduct was forbidden, and was thus wholly void for vagueness." Id.

It is fundamental that administrative regulations must not only be within the scope of the delegated authority but also must be sufficiently definite to inform those subject to them as to what is required. At the same time, regulations must be flexible enough to accommodate the day

to day changes in the area regulated. N.J. Ass'n of Health Care Facilities v. Finley, Supra. 83 N.J. 67, 82 (1980). "[T]he standard to determine the vagueness of a law is not one that can 'be mechanically applied. The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and enforcement - depends in part on the nature of the enactment.'" State v. Cameron, 100 N.J. at 591 (1985).

In N.J. Ass'n of Health Care Facilities v. Finley, the plaintiff challenged Department of Health regulations which required as a condition of licensure that long term care facilities make available "a reasonable number of its beds to indigent persons" on the grounds that this language was unconstitutionally vague. The Court upheld this regulation concluding that the terminology challenged was definite enough to satisfy the requirements of due process. The Court found that the Department of Health Regulations which contained six criteria for determining whether or not there was a reasonable number of beds for indigent care was adequate criteria. The Court concluded that "the standards used in the regulations are definite enough to be understood and followed and yet flexible enough to give the Department the necessary discretion to proceed on an individual basis weighing the particular circumstances of each nursing home." Id. at 82-83.

The formal waiver provision in N.J.A.C. Sec. 5:93-15.1 (b) provides:

(b) The Council will grant waivers from specific provisions of its rules if it determines:

1. That such a waiver fosters the production of low and moderate income housing;

2. That such a waiver fosters the intent of, if not the letter of, its rules; or

3. Where the strict application of the rule would create an unnecessary hardship.

The waiver policy is not devoid of any safeguards, standards, principles and criteria which inform the public or guide the agency in undertaking its discretionary duties. Rather the three criteria set forth in the policy are definite enough to be understood and provide the flexibility to COAH to use its discretion in considering each individual application for a waiver. Additionally, the application of the criteria to Hillsborough's request for a waiver was proper.

The first criteria provides that the waiver foster the production of low and moderate income housing. This is a clear and definite standard. In the "COAH COMPLIANCE REPORT-Substantive Certification" (Aa27a), COAH noted that the site proposed by Hillsborough not only provides for all of Hillsborough Township's new 12 year cumulative obligation but the developer agreed to provide an additional 15 percent of affordable units for Hillsborough's future fair share obligations. The provision for the additional 15 percent of affordable units for the future is part of a signed developers agreement between Hillsborough Township and the developer. Therefore, waiver of the center requirement would foster the production of low and moderate income housing in the present and in the future.

The second criteria of N.J.A.C. 5:93-15.1(b) provides that a "waiver fosters the intent, if not the letter of, its rules". The Court in In re Warren, 132 N.J. at 27, noted that the Fair Housing Act "'deals with one of the most difficult constitutional, legal and social issues of our day--that of providing suitable and affordable housing for citizens of low and moderate income.'" Id. at 27. Citing Hills Development Co. v. Bernards Township, 103 N.J. at 21. The Court took note of the broad powers entrusted to COAH in implementing the statutory goals of the Fair Housing Act.

The intent of the rules promulgated by COAH is to implement the statutory goals of the

Fair Housing Act, which is to provide suitable and affordable housing for citizens of low and moderate income. COAH has broad discretion in promulgating these rules. In considering an application for a waiver, pursuant to the second criteria, that waiver must foster the intent of the rules. In this case, COAH noted that the rule requiring center designation was based upon a misunderstanding regarding the availability of infrastructure in Planning Areas 4 and 5. Additionally, Hillsborough's plan shows that the site is within two planing areas and that there is an SDRP policy that if a site falls within two planning areas, the criteria in the lower planning area prevails. In this case, the site is in Planning area 4 and 2 and sites in planning areas 2 do not need center designation. Therefore, the policy which Hillsborough is asking a waiver from, which requires a center designation for planning areas 4 may not be applicable in the present case and if it is, granting the waiver of the center requirement would foster the intent of the rules because it would result in the production of low and moderate housing.

A third basis for the granting of a waiver is that strict application of the rule would create a hardship. COAH noted that since June 1991 Hillsborough has been proceeding in good faith to ensure that the PAC site would meet COAH's regulations and policy to be included in the 12 year plan. Hillsborough petitioned COAH for Substantive Certification and mediation was conducted. To deny Certification, after more than five years, would create a hardship for Hillsborough especially since the proposed site is in two planning areas and may not be required to have center designation.

In light of the judicial deference given to agency action in general and in particular to administrative regulations adopted by COAH, it is clear that the formal waiver policy is not unconstitutionally vague and was properly applied in this case to grant the waiver.

POINT V

BASED ON THE SDRP ITSELF AND THE OSP DIRECTOR'S ANALYSIS, THE PAC/HCF SITE MUST BE VIEWED IN ACCORDANCE WITH SDRP PLANNING AREA 2 POLICY OBJECTIVES AND CRITERIA. ACCORDINGLY, COAH'S DECISION ELIMINATING CENTER DESIGNATION FOR THIS SITE AND, IN THE ALTERNATIVE, GRANTING THE WAIVER WERE APPROPRIATE.

The COAH Compliance Report (Aa-27a) on page 7 states:

"COAH's review of the Hillsborough Plan indicates that the site is within two planning areas and that there is an SDRP plan policy that states that if a site falls within two planning areas, that the criteria in the lower planning area prevails. Therefore, sites in Planning Area 2 do not need center designation."

SDRP Policy 20 (Aa298a) states:

"In instances where municipalities and counties identify a center at the intersection of two or more planning areas, the center will be designated as lying within the planning area of lowest numerical value."

The issue then is straightforward: Does Policy 20 eliminate the need for center designation?

There are valid arguments to support the proposition that it does. The preamble paragraph to the 23 policies of the SDRP (Aa292a) states on page 22:

"Municipalities and counties should use the policies set forth below for the identification and designation of centers in the State Plan. These policies should be applied to achieve the objectives set forth for the planning area."

At the least then, Policy 20 justifies identifying the PAC/HCF site as belonging in Planning Area 2. Policy 20 states that the identified center "will be" designated as lying within the planning area of the lowest numerical value. It does not say "may"; it says "will be". Moreover, what does Policy 20 mean by the word "designated"? Is it to be used in common parlance to be read

together with the words "will be" so that it is to be viewed as belonging in Planning Area 2 or does it mean that center designation is required?

Appellant argues that it means center designation is required. Yet it could just as easily be interpreted the other way. Indeed, how can it mean center designation is required since the SDRP is not mandatory and neither the municipality nor the developer is required to apply for center designation. Were it not for COAH and Substantive Certification, the project could be built without the need to apply for center designation.

Let us examine the Herbert Simmens/OSP letter (Aa62a). He recites Policy 20 and then states:

> "Therefore, any center designation for the PAC/HCF would be looked at under the Planning Area 2 policy objectives and criteria. Under the Memorandum of Agreement between COAH and the SPC, sites in Planning Area 2 are not required to be located in designated centers."

The first sentence acknowledges that a center designation request may not be forth coming (since it cannot be forced - except perhaps by COAH). The second sentence supports the proposition that this site, located as it is in Planning Areas 2 and 4, need not be located in a designated center. The second paragraph of page 1 of his letter talks about the relationship between COAH, the State Planning Commission and the SDRP and states at its conclusion:

> "Affordable housing, (should) be located in compact centers to the greatest extent possible."

Once again, it reaffirms that it will not be located in centers in all cases. While this is obviously true for sites in Planning Areas 1 and 2, it is obvious that his letter response to Shirley Bishop's correspondence (Aa65a) is addressing the PAC/HCF site specifically and the fact that it is partially located in Planning Area 2.

Accordingly, it does not necessarily follow that Policy 20 assumes an application for center designation to the State Planning Commission. Rather, it can just as easily, if not more logically, be argued that the PAC/HCF is to be identified and viewed as if it belongs in Planning Area 2 and that no center designation is required. Indeed, if its designation as a Planning Area 2 center is a given, why the need to apply to begin with (Appellant's reason is obvious - so it can be struck down because the SDRP did not address age restricted centers).

The above exercise points out the real issue here. Does it really matter, under all of the circumstances of this case, whether the site receives State Planning Commission center designation or not? All agree that the site either belongs in Planning Area 2 or Planning Area 2 criteria apply. Policy 20 says if "they" apply, "they" should get it. Herbert Simmens says the policies and criteria of Planning Area 2 apply here. He goes on to recite how the PAC/HCF site seemingly meets all the criteria for Planning Area 2:

> "If a center designation petition were filed, I believe a reasonable case could be made that the project could meet many of the criteria for center designation, particularly if incorporated into a somewhat larger community development area. The PAC/HCF appears to meet many of the policy objectives of Planning Area 2. The PAC/HCF is consistent with many of the design characteristics of a planned village including a range of housing types, sufficient density...and intensity of use, a pedestrian oriented commercial core and green, and adequate internal pedestrian linkages. Commercial and health care related employment is accommodated. The project is identified in local and county plans. Adequate transportation capacity would have to be demonstrated."

In talking about the site meeting many of the criteria for Planning Area 2, Mr. Simmens goes on to state:

> "The proposed extension of sewer infrastructure, if approved by the Department of Environmental Protection, would not extend very far beyond existing sewer infrastructure."

He then goes on to conclude that it would indeed be appropriate to amend the SDRP Map

so as to relocate the boundary line between Planning Area 2 and 4 to include the PAC/HCF:

> "...the Office would recommend to the State Planning Commission that areas encompassing and immediately surrounding the PAC/HCF be given consideration by the Commission for redesignation as Planning Area 2."

At the heart of the matter lay the fact that the SDRP simply does not address the concept of age restricted centers. That oversight in the SDRP is what creates the stumbling block here. Mr. Simmens knows this and suggests that this issue be addressed and resolved when the SDRP is reviewed again by the State Planning Commission as opposed to having that Commission deal with the issue within the narrow context of the PAC/HCF site:

> "The age restricted nature of the great majority of the proposed development is, however, problematic. The State Plan does not explicitly address age restricted centers. While this issue needs to be addressed by the SPC, I believe it should be addressed as part of the preparation of the preliminary State Plan, not at the time of this waiver request. In this way, age restricted housing will be reviewed in the context of a full State Plan review and any policies recommended will be subject to cross acceptance review."

The facts, the SDRP and the equities all demonstrate that center designation for the site should not be required. The SDRP Policy 20 says if they apply they should get; yet, because the Plan does not deal with age restricted centers, they probably would not get it. Yet all agree that Planning Area 2 criteria should apply and all agree that the boundary should be changed. Logic and fairness both dictate here that if the criteria for Planning Area 2 are met (and they apparently are) the lack of center designation should not be fatal to this inclusionary development and the Hillsborough Fair Share Plan. The failure of the Plan to deal with age restricted centers aside, the site belongs approved by OSP standards, SPC standards and SDRP criteria.

The above recitation also serves to corroborate COAH action in granting the waiver. COAH discretion in granting the waiver was obviously appropriate here if Planning Area 2

criteria are to be applied. Appellant states that COAH advanced the argument that center designation is not needed because that it knew that its waiver approach was "fatally defective". Just the opposite is true. COAH may have advanced this argument both on its own merits and because it supports and corroborates the reasonableness of granting a waiver of center designation in these circumstances.

Some additional comments by Appellant on this Point V merit response. It argues in footnote 18 that the waiver issue should have been taken to SPC. Yet, N.J.S.A. 52:18A-199, reciting SPC powers, does not either expressly or impliedly recite this particular power or duty. Its primary duties are to develop and revise the SDRP and develop procedures to facilitate cooperation between agencies. N.J.S.A. 52:18A-201 recites the duties of OSP which include providing planning services to other agencies and representing the Commission before government agencies. A fair reading of the State Planning Act demonstrates that the day-to-day "nuts and bolts" work is done by OSP as the Commission's day-to-day arm in matters of planning. Mr. Simmens states in the first paragraph of his letter:

> "Under the policies agreed to by COAH and the Office of State Planning, any waiver request would be referred to OSP for comment prior to final COAH action."

Appellant also asserts that to let Planning Area 2 principles govern here where only a small percentage of the site is located in Planning Area 2 results in the "tail wagging the dog". This is not true. The site meets the SDRP policy objectives and criteria of Planning Area 2. As Mr. Simmens points out, sewer infrastructure can easily be extended to the site. From a suitability standpoint, the site is adjacent to compatible uses and contiguous to roadways. There is a reason why Policy 20 states that in line straddling centers, the center will be designated as

belonging in the lower planning area. That reasoning is present here and is why the tail is not wagging the dog as Appellant suggests.

Appellant lastly speaks of manipulation and "plan busting". It is not the property owner who draws the property line; it is the State. The property owner owns the property; it is the State here which split the property up into somewhat arbitrary boundary lines. Perhaps in the future, a developer can purchase land with an eye towards manipulation of planning areas. Here, however, the amalgamation of property owners occurred before the State Plan boundaries were ever finalized. Insofar as plan busting is concerned, how can you "bust a plan" that is neither mandatory nor regulatory. Moreover, all the municipality seeks here is a fair and equitable approach such as that presented in Mr. Simmen's letter.

In sum, if the site meets the criteria of Planning Area 2, if the SDRP declares that it should be viewed as Planning Area 2, if adjustment of the boundary line is appropriate here and if center designation could not be given because age restricted centers are not addressed in the SDRP, why should the site not be treated based on Planning Area 2 principles? This is what COAH did in eliminating the need for center designation and alternatively arguing that the reasoning recited herein supports its determination that a waiver here was appropriate.

POINT VI

THE COMPUTATION OF A MUNICIPALITY'S FAIR SHARE OBLIGATION IS AN INDEPENDENT MATTER SEPARATE AND DISTINCT FROM THE ISSUE OF WHERE AN INCLUSIONARY DEVELOPMENT MAY BE LOCATED. ACCORDINGLY, THE EXCLUSION OF LAND IN PLANNING AREA 4 FROM THE MUNICIPAL FAIR SHARE OBLIGATION DOES NOT PRECLUDE ITS INCLUSION AS PART OF A MUNICIPAL FAIR SHARE PLAN.

Where you place a fair share obligation in a municipality has little to do with how you compute what that obligation is. Although both may involve Planning Area 4, the theories for excluding it from the obligation while including it in the Fair Share Plan are different and yet each is justifiable in its own way. The fact that it is not in a growth area justifies its exclusion from the obligation issue. The fact that it may have or be near infrastructure, enjoy center designation, straddle two planning areas and a multitude of other reasons can at the same time fully justify its inclusion in a Fair Share Plan. The significance Appellant places on how Planning Area 4 is utilized on these two issues and its reliance on the In Re Township of Warren, 132 N.J. 1 (1993) decision are misplaced.

The decision in the Warren case was based on the Municipal Occupancy Preference Rule being inconsistent with the underlying Mt. Laurel regulatory scheme. That scheme is based on the premise that the "need" is a regional need and a municipality's affordable housing must be filled with people from that region. The Municipal Occupancy Preference would fill half those units with people from the municipality, not from the region.

There is only one basic issue in the Warren case: who gets to occupy the units. The inconsistency between the rule and the underlying scheme is obvious. However, the case at bar

is different. There are two separate and distinct issues here: where do you put the units and how do you compute what the municipal unit obligation is? Each has its own underlying regulatory legislative scheme. Planning Area 4 does not represent some type of common denominator between the two which would preclude providing Hillsborough Township with Substantive Certification. The computation methodology used for Hillsborough and the inclusionary development used in its Fair Share Plan are both consistent with the separate underlying schemes applicable to each.

The Hillsborough fair share obligation is computed based on growth areas which equate to land available for development. This is consistent with both N.J.A.C. 5:93APP A and the Fair Housing Act N.J.A.C. 52:27D-307(c2). The Mt. Laurel II decision confirmed that computation of a municipal obligation should be based on growth areas as reflected in the SDGP. Likewise, permitting a Fair Share Plan to include an inclusionary development in Planning Area 4 is also consistent with the Fair Housing Act and does not violate the SDRP. As discussed in Points I and II, the SDRP is not a mandatory binding document and thus, cannot preclude development in Planning Area 4 given the COAH formal and informal waiver rule and policy which preserved COAH discretion on the matter. This is a fact of life which Appellant must accept. In this vein, the Fair Housing Act only states that COAH must give appropriate weight to the SDRP. N.J.S.A. 52:27D-307. N.J.A.C. 52:27D-311 and 314 allow a municipality to meet its obligation by means of any technique which provides for the "realistic opportunity" so long as it is consistent with COAH rules.

Despite these distinctions, Appellant argues that if the land is not in the growth area used for computation of the obligation, you cannot use it in the Fair Share Plan. This is contrary to

both reason and reality. It is an inherent reality and anticipated by COAH within its rules that from time-to-time a Fair Share Plan will have an inclusionary development in Planning Areas 4 or 5. Indeed, when COAH computes a municipality's fair share obligation, how can it even know at that time how and where that obligation will be fulfilled?

A development in Planning Areas 4 or 5 may have infrastructure or infrastructure may be easily extended there. The site may be consistent with sound planning principles based on its proximity to similar and supportive uses, based on the layout of the site itself and the absence of environmental constraints. The site may be the appropriate subject of a waiver. It may fit within the litmus test of COAH's informal waiver policy and formal waiver rule. That rule and policy acknowledged that from time-to-time sites in Planning Area 4 may be appropriate for inclusion in a Fair Share Plan. Indeed, a municipality might apply for center designation and receive it in connection with its Fair Share Plan. To simply say that a site in Planning Area 4 can never be included in a Fair Share Plan because it was not considered in the computation of the obligation is erroneous. Ironically, Appellant argues on the one hand that if Hillsborough Township applied for and received center designation, Substantive Certification of the Fair Share Plan would be appropriate. Yet on the other hand, Appellant now argues that the site's absence from the computation of the municipal obligation is fatal to its utilization in the Fair Share Plan.

The only reasonable answer is that sites in Planning Areas 4 and 5, under certain circumstances (including the granting of a waiver), can and will be deemed an inclusionary development validity included in a Fair Share Plan. This does not mean that it cannot be included in the computation of a municipality's fair share obligation. It may have to wait until the next cycle to be so included. However, the issue, if there is one, can be addressed. Indeed,

that may be the only logical way to address it since COAH can never know prior to the computation of a municipal obligation if land in Planning Areas 3, 4 or 5 will be used.

The Warren decision, itself, did not preclude any and all types of municipal occupancy preferences in all circumstances. It only struck down the municipal occupancy preference before it. It went on to state that there other ways in which municipal concern for local residents could be addressed. So long as a municipality addressed its regional need, it could go on to address other related issues such as the needs of its local residents. Likewise, the PAC/HCF site, if it does present a problem in terms of the fair share obligation, can always be addressed in the calculation of the municipality's next cycle obligation.

POINT VII

THE PAC/HCF SITE WAS INCLUDED IN THE COUNTY AMENDMENT TO THE WASTE WATER MANAGEMENT PLAN REVIEWED BY NJDEP PRIOR TO SUBSTANTIVE CERTIFICATION AND IS ALSO ADJACENT TO COMPATIBLE LAND USES AND STREETS AND HAS NO ENVIRONMENTAL CONSTRAINTS. THEREFORE, THE SITE IS DEVELOPABLE AND SUITABLE AND, APPROVAL BY COAH, WAS APPROPRIATE.

N.J.A.C. 5:93-5.3(b) (Aa142a) sets forth two alternatives concerning a site's inclusion in a Waste Water Management Plan to be approved by DEP. One alternative requires DEP approval for consistency review prior to Substantive Certification. The other requires the site to be included in an Amendment to the 208 Plan. Either alternative satisfies the rule. In the case sub judice, the PAC/HCF site has long since been included in an amendment to the 208 Plan. Moreover, approval by DEP in advance for purposes of consistency review is no longer applicable since DEP will automatically conduct that review. Most importantly, there is nothing in the rule that requires DEP sewer approval of the site itself prior to Substantive Certification. The only appropriate consideration is whether the site is included in the Plan Amendment and it is.

A. The PAC/HCF Site Meets the COAH Definition of Suitable Despite its Location Primarily in Planning Area 4.

As was said in the COAH Compliance Report (Aa27a), the site is suitable. It is adjacent to compatible land uses such as the municipal complex, the library, the police department and the YMCA. It has vehicular access via Amwell Road, River Road and Mill Lane. Moreover, COAH conducted a site visit and reviewed technical data before concluding that the site had no environmental constraints (see pages 5 through 7 of the Compliance Report).

Appellant apparently acknowledges these facts but argues that these compatible uses and adjacent streets cannot be considered by COAH because they are just across the Planning Area 4 boundary line. They argue that the line must be drawn someplace and must be respected. Yet, that line is the product of the SDRP, which, although subject to appropriate weight, is not mandatory or binding or dispositive of the issue. COAH has the latitude to consider all relevant factors in exercising its discretion. Drawing a planning boundary line is not an objective clear cut act. It is highly subjective and fact sensitive. Therefore, flexibility and acknowledgement of the facts surrounding the site are important. Proximity of a senior citizen development to the municipal complex, library, police, YMCA and adjacent roads should not be ignored. Ultimately, it led COAH to the conclusion that the site was suitable.

B. The PAC/HCF Site Meets the COAH Definition of Developable, has Consistently Been Included in 208 Plan Amendments Seeking DEP Approval and, Therefore, Does Meet the "Realistic Opportunity" Test.

Developable site means that the site has access to appropriate water and sewer infrastructure. As was said on page 5 of the COAH Compliance Report (Aa-27a):

> "Public water service will be provided by the Elizabethtown Water Company and the entire tract is within the sewer service area of the Hillsborough Township Municipal Utilities Authority. The tract is included in the Somerset County Waste Water Management Plan which is under review by the New Jersey Department of Environmental Protection. Upon DEP approval, sewage from the tract will be carried to the Somerset Raritan Valley Sewerage Authority Regional Waste Water Treatment Plant in Bridgewater Township."

At the time Substantive Certification was granted by COAH, the County Waste Water Management Plan Amendment had already been submitted to DEP which had reviewed it, made comments and returned the Plan to the County for refinement and resubmission. Clearly this requirement has been met.

The COAH definition also states that the site must have received water consistency approvals from DEP. What this means is reflected in COAH rule N.J.A.C. 5:93-5.3(b) and was discussed above. Reference to approval for water consistency review is no longer applicable. DEP does not deny request for consistency review. Thus, the real litmus test for COAH is whether the site is included in an Amendment to the Waste Water Management Plan (as per the last sentence of the rule). DEP sewer approval is not required.

The PAC/HCF site has consistently been included in 208 Plan Amendments since 1994. Appellant's characterization of the history of the site's inclusion as "checkered" is both unfair and incorrect. The site was initially placed in the County Plan Amendment on the basis of the Township Master Plan, Zoning Ordinance and General Development Plan Approval granted by the Planning Board. It was only removed into the Township Plan Amendment in mid 1994 so as to expedite the DEP process since the County Plan was not ready for submission. The Township Plan was only abandoned in 1995 because of the COAH developer/objector aggressive opposition to the site motivated by a desire to obtain COAH density for himself. The site was ultimately returned to the County Plan which was submitted to DEP at years end. The history, through the time of Substantive Certification, only reflects the municipality's desire to obtain DEP sewer approval in an expeditious fashion preferably before the time of Substantive Certification.

From the time of Substantive Certification to the present, the site has remained in the County Plan Amendment. For a five month period from 11/7/96 through 4/3/97, the Township asked that the Somerset County Planning Board cease further review of and defer action on the Hillsborough portion of the Plan while the Township studied proposed changes and corrections

(Aa236 and 237a). The PAC/HCF was included in this deferral so that it could be determined whether "all of the lands contained within the overlay zone" need "be added to the sewer service area" (see Planning Board resolution Aa-237a). However, during this five month period, the PAC/HCF site remained included within the County Plan. Ultimately, the Hillsborough Township Planning Board adopted a resolution on April 3, 1997 which made certain corrections to the Hillsborough portion, but did not modify in any way the PAC/HCF site which remained in the County Plan in the manner it had always been (HRa4). Appellant seeks to make much of this fact by describing it as "fits and starts", yet there is nothing fundamentally wrong with the Township Governing Body and Planning Board taking another look at the Hillsborough portion of the County Plan. The status of the County Plan Amendment as it relates to the PAC/HCF site is the same at this writing as it was when Substantive Certification was granted.[7]

An understanding of N.J.A.C. 5:93-5.3(b) and the history of the site's inclusion in 208 Plan Amendments reaffirmed the appropriateness of COAH's decision. The site was developable at the time Substantive Certification was granted. The municipality had complied with all COAH requirements, County requirements and DEP requirements as it related to the inclusion of the site in an appropriate Plan Amendment. It is now up to the County to resubmit the Plan and for DEP to take action on it. The "realistic opportunity" still exists even though DEP approval is still pending. Moreover, there are ample arguments in support of DEP approval which confirm the existence of the realistic opportunity. In this vein, DEP Rule 7:15-5.18(b)1 should be noted (HRa9). It states that:

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[7] However, the Township Committee by resolution of 4/22/97 (HRa6) has declared that it will provide its opinion regarding inclusion of the site in the County Plan by June 10, 1997.

> "Waste water service areas shall be identified in such a manner as to provide adequate waste water service for...land uses allowed in zoning ordinances that have been adopted..."

Appellant argues that DEP sewer approval should be a pre-condition to Substantive Certification. The reality is that it is not. The COAH rule simply requires the site's inclusion in the 208 Plan Amendment for the realistic opportunity to be met. COAH does not require the municipality to act as a guarantor; only that it take the steps necessary to bring the matter before DEP. The history of the site shows it continual inclusion in the 208 Plan Amendment since 1994. Accordingly, the site remains suitable and developable with the realistic opportunity created.

POINT VIII

COAH'S GRANT OF SUBSTANTIVE CERTIFICATION TO HILLSBOROUGH TOWNSHIP WAS CONSISTENT WITH THE MT. LAUREL MANDATE BECAUSE THE TOWNSHIP FAIR SHARE PLAN DID CREATE THE REALISTIC OPPORTUNITY FOR AFFORDABLE HOUSING

Appellant's argument is that the realistic opportunity was not created here because 1) DEP sewer approval should be a pre-condition to Substantive Certification; and 2) the existence of an inclusionary development in Planning Area 4 without center designation is contrary to the Mt. Laurel mandate. Both arguments are without merit and ignore the discretion afforded to COAH by the Courts.

N.J.A.C. 5:93-5.3(b) does not require DEP sewer approval as a pre-condition to Substantive Certification. It does require that the site be included in a 208 Plan Amendment submitted to DEP for approval. Appellant argues that this is not enough and cites the Hillsborough reconsideration of the PAC/HCF site's inclusion in the 208 Plan between November 7, 1996 and April 3, 1997. His reliance on this fact is misplaced.

Hillsborough's actions during that period have nothing to do with the appropriateness of COAH granting Substantive Certification in April 1996. At that time, the site was in the County Plan, the County Plan had been submitted to DEP, DEP had returned it with comments and the County was addressing those comments before resubmitting the Plan. These facts amply justify the granting of Substantive Certification. The municipality cannot guarantee the affordable housing; neither can COAH rules. What both can do is create the realistic opportunity and that realistic opportunity did exist on April 3, 1996.

Appellant relies heavily on the events of the past 5 months to support its argument.

However, let us examine what occurred. The Township wished to review certain portions of its plan for errors and to re-think whether the entirety of the PAC/HCF site needed to be included in the sewer service area. Both were reasonable concerns. Both were addressed and resolved and the Planning Board resolution of April 3, 1997 reaffirmed the commitment to the PAC/HCF site in tact. No harm was done, the Township satisfied its inquiry and the PAC/HCF continued as part of the County Plan Amendment. Local opposition to a development is nothing new, either for an inclusionary development site, or any site for that matter. If it causes a Governing Body or Planning Board to reexamine its decisions or the reasoning behind it, that is simply being responsive to its citizens and can ultimately result in a reaffirmation such as that which was done here by the Hillsborough Planning Board. What occurred here simply does not support an argument that DEP sewer approval is needed as a pre-requisite to Substantive Certification.

Appellant talks of COAH oversight in letting a six month review period pass without a status report from Hillsborough. This is simply untrue. COAH requested that status report and the Township provided it in a letter dated 10/22/96 (HRAa10). Six months later COAH again inquired and the Township responded with a status report dated of 4/8/97 (HRAa11). The process of finalizing a County Waste Water Management Plan is time consuming, but both the Township and the County are committed to it. The resubmission of the County Plan Amendment will occur and will include the PAC/HCF site as it always had (unless the Township Committee does not endorse the Planning Board resolution in its June 10 meeting - see Point VII). Appellant is simply grasping at straws to justify striking down COAH rule N.J.A.C. 5:93-5.3(b). All the facts still reflect that the realistic opportunity existed on 4/3/96 and little has changed within the following year.

Appellant's argument that there can be no realistic opportunity if the SDRP is violated by COAH is equally without merit. The SDRP is not mandatory. COAH need only give appropriate weight to it. Therefore a Fair Share Plan, under appropriate circumstances, may not meet all the policies and criteria of the SDRP and still fulfill the Mt. Laurel mandate. COAH reserved four pages in its Compliance Report to explain all the justifications for the waiver. Most importantly, the exercise of the waiver did just the opposite in terms of the realistic opportunity. It made the realistic opportunity stronger by giving support to a site that was developed over a five year period by the municipality and the developer, enjoyed General Development Plan Approval, was the basis of a Developer's Agreement and has an application for preliminary subdivision approval pending. The waiver made the creation of the realistic opportunity greater, not less.

The dialogue between Appellant and Respondent on this issue leads to three conclusions:

1. A realistic opportunity is just that; it is not a guarantee nor was it meant to be. Moreover, a site enjoying General Development Plan Approval and a Developer's Agreement comes far closer to a reality then a site which has merely been rezoned for affordable housing.

2. The real test is whether the municipality did all it could do to make the site a reality. The history of Hillsborough Township regarding the site reflects that everything that had to be done was done. All that now remains is for DEP sewer approval.

3. In deciding whether the realistic opportunity was created, COAH has wide discretion. As was said in the case of In Re Township of Warren, Supra on pages 26 and 27:

> "The long standing and well established principles governing judicial review of agency action require that we accord an administrative regulation, a presumption of reasonableness and validity...our strong inclination, based on the principle that the coordinate branches of government should not encroach on each other's

responsibilities, is to defer to agency action that is consistent with the legislative grant of power...As we observed in Williams v. Department of Human Services, Courts...act only in those rare circumstances when it is clear that the agency action is inconsistent with the legislative mandate."

"This principle of judicial deference to agency action is particularly well suited to our review of administrative regulations adopted by COAH to implement the Fair Housing Act, a new and innovative legislative response to deal with the state wide need for affordable housing."

The Supreme Court in the Warren decision citing Hills Development Co. v. Bernards Township, 103 N.J. 19-20, stated the following:

"The Council is further empowered, on application, to decide whether proposed ordinances and related measures of a particular municipality will, if enacted, satisfy its Mt. Laurel obligation, i.e., will they create a realistic opportunity for the construction of that municipality's fair share of the regional need for low and moderate income housing...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."

The Warren Court then went on to state the following on page 28:

> "In reviewing administrative 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 policy; and 3) whether, in applying the legislative policies to the facts, the agency clearly errored by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors."

Utilizing the legal principles applicable to a review of this COAH decision leads to the conclusion that the realistic opportunity was indeed created.[8]

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[8] There is a certain irony in Appellant's argument here which merits expression. The Township has done everything in its power to create the realistic opportunity: The PAC/HCF Zoning Ordinance, the General Development Plan Approval, inclusion of the site in the Fair Share Plan, inclusion of the site in the County Waste Water Management Plan Amendment, execution of a Developer's Agreement and consideration of apending application for preliminary subdivision approval. Appellant Future appears belatedly before COAH, files this appeal, encourages local opposition and vows to fight DEP sewer approval. In essence, Appellant Future has done everything in its power to try and destroy the very realistic opportunity which the Township has created and COAH has recognized. To the extent that there is even an issue of realistic opportunity (and Respondent Hillsborough Township denies that there is), it is Future who created it. Depending upon one's point of view, it may be argued that it is Future's conduct which has violated the Mt. Laurel mandate.

CONCLUSION

For all of the foregoing reasons, this Court should affirm COAH's grant of Substantive Certification in this case.

Respectfully submitted,

FRANK YURASKO, ESQ.

By: _____
EDWARD A. HALPERN, ESQ.
on the Brief

mtlaurel\brief\1

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5349-95-T1

IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY DOCKET NO. A-5349-95-T1

CIVIL ACTION

APPENDIX OF RESPONDENT TOWNSHIP OF HILLSBOROUGH

FRANK N. YURASKO, ESQ.
63 Route 206 S.
PO Box 1041
Somerville, NJ 08876
(908) 231-0220

Attorney for Respondent
Township of Hillsborough

EDWARD A. HALPERN, ESQ.
503 Omni Drive
Somerville, NJ 08876
(908) 359-4333

On The Brief

APPENDIX OF RESPONDENT TOWNSHIP OF HILLSBOROUGH

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ORDINANCE 91-6

AN ORDINANCE AMENDING CHAPTER 77 (DEVELOPMENT REGULATIONS) OF THE MUNICIPAL CODE OF THE TOWNSHIP OF HILLSBOROUGH, COUNTY OF SOMERSET, STATE OF NEW JERSEY SO AS TO PERMIT DEVELOPMENT OF PLANNED ADULT RESIDENTIAL RETIREMENT COMMUNITIES, BOTH INCLUSIONARY AND NON-INCLUSIONARY, INTENDED TO MEET THE HEALTH CARE AND LIFESTYLE NEEDS OF SENIOR CITIZENS, WITHIN AND WITHOUT THE DEVELOPMENT, THROUGH THE CREATION OF HEALTH AND RELATED SUPPORT FACILITIES AND SERVICES OR THE IMPOSITION OF FEES FOR THAT PURPOSE, SUBJECT TO REGULATIONS TO BE PROMULGATED HEREIN.

PURPOSE: This Ordinance shall foster within the Municipality the development of Planned Adult Communities both with and without related health care facilities that will address the needs of all senior citizens including those with limited economic resources. It recognizes that it is important to provide housing and to otherwise meet the needs of our elder citizens for health care, support services and recreation in an overall community atmosphere. In order to achieve these goals and to insure the inclusion of lower income senior citizen households within these developments, the Ordinance requires a collaboration of both the public and private sectors. In this manner, the obligation to provide housing, both affordable and responsive to the needs of this segment of our population, can be met.

WHEREAS, it is necessary and appropriate for a municipality to provide for the needs of the growing number of senior citizens within its borders as well as within the state of New Jersey; and

WHEREAS, the municipal obligation to provide affordable housing applies to senior citizens as well; and

WHEREAS, all such senior citizens, irrespective of their economic standing, should be able, to the extent possible, to live a respected and productive life with assurances that their health care and other related lifestyle support service needs are met in a dignified manner; and

WHEREAS, the Township recognizes there is a need to adjust densities within planned adult residential communities in order to provide affordable housing for senior citizens to meet the needs aforementioned; and

WHEREAS, the utilization of land for the purpose of developing planned adult residential communities reduces the amount of land available for affordable housing thereby requiring the developers of such planned adult residential communities to either provide mandatory set asides for low and moderate income housing or, in lieu thereof, to provide contributions in the form of development fees which shall be held in trust by the municipality for the development of low and moderate income senior citizen housing and related services elsewhere in the municipality; and

WHEREAS, the Federal Fair Housing Act (42 U.S.C. 3607) encourages the development of age-restricted housing for senior citizens 55 years of age or older; and

WHEREAS, the development of Planned Adult Residential

B. Planned Adult Community/Health Care Facilities (PAC/HCF) defined:

A PAC/HCF shall not only meet the definition of a PAC as described in Subsection A hereinabove, but shall also be required to contain within its borders the requisite health care facilities and related support services necessary to address the physical and psychological well being of its adult residents. A PAC/HCF must also contain one or more parcels of land with a continuous total acreage of at least 450 acres forming a land block to be dedicated for the use of a Planned Retirement Community.

Requisite health care facilities and related support services shall mean facilities, whether public or private, principally engaged in providing services for health maintenance, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, including, but not limited to, a general hospital, special hospital, public health center, diagnostic center, treatment center, rehabilitation center, extended care facility, nursing home with at least 150 beds, intermediate care facility, outpatient clinic, elder care center, respite care center, congregate care facilities and other related medical support facilities. A determination as to which health care facilities and related support services shall be required in a specific PAC/HCF shall be made by the Planning Board at the time of submission of an applicant's general development plan.

II. 77-91.1B Application procedure, sub division and/or site development plan approval, development plan approval and approval procedure.

1. Applications for development of a PAC or a PAC/HCF shall require the following approvals:

   a) Classification by the Planning Board as PAC or PAC/HCF

   b) General Development Plan approval

   c) Preliminary subdivision and/or site plan approval

   d) Final subdivision and/or site plan approval

2. The application and approval procedure for the approvals delineated in the preceding paragraph shall be in accordance with Article V of the Development Regulations of the Municipal Code of the Township of Hillsborough and N.J.S.A. 40:55-D-45.1 and 45.2.

3. General development plan approval may remain in effect (a) provided the applicant/developer returns to the Planning Board within five (5) years of the general development plan approval for the purpose of obtaining preliminary subdivision and/or site plan approval as to at least one (1) phase and (b) Provided progress reports are submitted every five (5) years to the satisfaction of the Planning Board demonstrating compliance with the terms of the general development plan. Preliminary subdivision and/or site plan approval as to any phase shall remain in effect for such length of time as set forth by the Planning Board in accordance with N.J.S.A. 40:55D-49 but in no event shall such approval remain in effect for less than five (5) years. Final subdivision and/or site plan approval

5:91-3.5 Owners of sites designated for low and moderate income housing

At the time it files its petition for substantive certification, a municipality shall provide the Council with the names and addresses of the owners of record of the sites designated in its housing element and fair share plan for low and moderate income housing. The owners of sites designated in the municipal submission shall be given individual written notice by the Council of the filing of the petition, may participate in mediation and shall have the rights granted to objectors of the municipal submission.

5:91-3.6 Municipal/developer incentives

(a) When a municipality files a housing element and fair share plan and either petitions for substantive certification or is sued for exclusionary zoning within two years of filing its housing element, the municipality shall not be subject to a builder's remedy and the Council shall not award relief to a developer except in extraordinary situations. Extraordinary situations include, but are not limited to, the lack of suitable alternative sites in the municipality to produce the required low and moderate income housing. If contested issues are transferred to the Office of Administrative Law pursuant to N.J.A.C. 5:91-8, the burden of proof shall be on the objectors to the municipal housing element, unless the Council determines that such an extraordinary situation exists and that the burden of proof is with the municipality.

(b) The Council shall consider awarding relief to a developer who objects to a municipal plan when:

1. The municipality has filed a housing element and petitions for substantive certification prior to an exclusionary zoning lawsuit but more than two years after filing its housing element and fair share plan;

2. The Council determines the municipal plan does not adequately address the municipal fair share; and

3. The objector offers a site that is available, approvable, developable and suitable, pursuant to N.J.A.C. 5:92-1.

(c) If an exclusionary zoning lawsuit is filed against a municipality prior to a municipal petition for substantive certification and the case is transferred to the Council by the Court, the Council shall presumptively require the municipality to include

RESOLUTION OF THE HILLSBOROUGH TOWNSHIP PLANNING BOARD

Subject Matter:
Proposed Changes to the Waste Water Management Plan

WHEREAS, The Township Committee requested that the Planning Board assume the responsibility of delineating areas of the Township for proposed sewer facilities in the Waste Water Management Plan as part of the Hillsborough Master Plan; and

WHEREAS, the Planning Board has proposed an Amendment to the Hillsborough Master Plan adding a list of principles to govern future requests for amendments to the Waste Water Management Plan and changes in the proposed sewer facilities map; and

WHEREAS, the Planning Board will utilize these principles to meet the Township Committee requirement to evaluate suggested changes to the sewer facilities map in the CDZ and O5 zones in the industrial corridor, the PAC/HCF zone in the vicinity of Mill Lane, the land along East Mountain Road and other areas for which amendments to the current plan have been requested.

NOW, THEREFORE, BE IT RESOLVED, by the Planning Board of the Township of Hillsborough on this 3rd day of April, 1997:

1. That those areas in the Eastern and Southern portion of the Township that are in the industrial corridor including the CDZ and O5 zones and the land in the Mountain and R1 zones along East Mountain Road remain as delineated in the 1988 Map showing Existing and Proposed Sewer Facilities. The proposed changes are not justified by other infrastructure changes, changes in zoning, or changes in dedicated open space. There do not appear to be any health and safety conditions that would warrant additions at the time or for the next six year planning period.

2. That the PAC/HCF overlay zone in the area of Mill Lane be added to the proposed sewer facilities area to bring this zone into compliance with the current Master Plan and the State Plan which designates this site as a Planned Village. In the event the current application for development on property in the area of Mill

Lane receives approval and proceeds to development in a timely manner, then it is appropriate that this area remain in the sewer facilities area. However, in the event this property is not developed in accordance with the overlay zone, and development of the land reverts to the underlying zone regulations, then it is appropriate that the added area of the current PAC/HPC zone be deleted from the sewer facilities area.

3. That the remaining changes identified in the Hillsborough Township Waste Water Management Plan submitted previously to the County be accepted based on being in conformance to the principles so stated. Those areas shall be identified on the revised map of Existing and Proposed Sewer Facilities for Hillsborough Township. The revised map will be delineated by lot line in conformance with DEPE regulations and the Hillsborough Master Plan.

4. That the principles for removing land from the sewer service areas shall be applied to the land areas subject to the application process so as to be consistent with the Township Growth Management Plan in the Master Plan.

5. That a copy of this resolution and subsequently the revised map shall be forwarded to the Hillsborough Township Committee, New Jersey Department of Environmental Protection, Somerset County Planning Board and the Hillsborough Township Municipal Utilities Authority.

Certified to be a true copy of a Resolution adopted by the Planning Board of Hillsborough Township at a public meeting held on April 3, 1997.

Thomas Bates,
Chairman of the Board

CONSIDERATION 3

Township of Hillsborough

COUNTY OF SOMERSET
MUNICIPAL BUILDING
AMWELL ROAD
NESHANIC, NEW JERSEY 08853

(908) 369-4313

RESOLUTION REQUESTING THE SOMERSET COUNTY PLANNING BOARD DEFER CONSIDERATION OF THE HILLSBOROUGH PLANNING BOARD RESOLUTION DATED APRIL 3, 1997 PROPOSING CHANGES TO THE WASTEWATER MANAGEMENT PLAN.

WHEREAS, by resolution of September 24, 1997, the Hillsborough Township Committee reserved for itself the endorsement of any amendments to the Wastewater Management Plan; and

WHEREAS, by another resolution of January 28, 1997, the Hillsborough Township Committee named the Planning Board Chairman or his designee to be the Hillsborough Township representative to the Somerset County Wastewater Advisory Council; and

WHEREAS, the latter resolution did not repeat the reservation indicated in the September 24, 1997 resolution thereby leading the Planning Board Chairman to believe he was to submit Wastewater Management Plan amendments directly to the County; and

WHEREAS, on April 3, 1997, the Planning Board adopted by resolution an amendment to the Wastewater Management Plan and forwarded it to the County for inclusion in the Somerset County/Upper Raritan Watershed Wastewater Management Plan.

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Hillsborough, County of Somerset, State of New Jersey, that the Somerset County Planning Board is to defer any action on the Planning Board resolution until such time as the Hillsborough Township Committee has reviewed and endorsed it; and

BE IT FURTHER RESOLVED that the Hillsborough Township Committee will endorse, or overrule, the Planning Board's resolution on or before June 10, 1997.

SUBCHAPTER 6. LETTERS OF CLARIFICATION

17:32-6.1 Purpose

(a) For the State Development and Redevelopment Plan to serve as a useful guide to officials in both the public and private sectors in making planning and investment decisions, it must be well understood and accurately interpreted. The purpose of this section, therefore, is to enhance this understanding and to assure that clarifications of the State Plan reflect as closely as possible the intentions of the State Planning Commission in its approval of the Plan. This purpose is served by creating a process for these officials and the general public to obtain clarification of these provisions.

(b) Neither the State Development and Redevelopment Plan nor its Resource Planning and Management Map is regulatory and neither should be referenced or applied in such a manner. It is not the purpose of this process to either "validate" or "invalidate" a specific code, ordinance, administrative rule, regulation or other instrument of plan implementation.

17:32-6.2 Eligibility

(a) Any individual or organization, public or private, may petition the State Planning Commission for a letter of clarification regarding any goal, strategy, objective, policy, criterion or definition contained in the State Development and Redevelopment Plan.

(b) The State Planning Commission will not issue letters of clarification that involve the application of State Plan provisions to specific parcels of land or that seek to either "validate" or ""invalidate" a specific code, ordinance, administrative rule, regulation or other instrument of plan implementation.

17:32-6.3 Procedures

(a) The individual or organization shall submit the petition in writing to the Director of the Office of State Planning, who shall act as agent for the State Planning Commission in the administration of these rules, citing:

1. The exact provision of the State Development and Redevelopment Plan on which the clarification is being requested;

2. The nature of the provision that makes it unclear to the petitioner; and

3. As much detail as possible on the specific circumstances surrounding the potential application of the provision that makes its application of interest or concern to the petitioner.

(b) Except as provided in (c) below, the Director of the Office of State Planning shall provide a clarification in writing to the petitioner within 60 days of receipt of the petition.

(c) Where the purposes of these rules are served, the Director of the Office of State Planning may, prior to rendering a clarification to the petitioner, seek the counsel of the State Planning Commission, one of its duly authorized subcommittees, if any, a State

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SUBCHAPTER 7 VOLUNTARY SUBMISSION OF PLANS FOR CONSISTENCY REVIEW

17:32-7.1 Purpose

(a) The State Planning Act recommends but does not require that municipal and county plans be consistent with the State Development and Redevelopment Plan. During the cross-acceptance process, however, many government officials and citizens expressed concern, given the complexity of public plans and processes in general and of the State Plan in particular, about how agencies at each level of government would know whether their plans are consistent with the State Plan. It is the intention of the State Planning Commission through the Office of State Planning, to assist all levels of government in achieving the highest possible degree of consistency with the State Plan. To that end, this subchapter outlines a voluntary review process which will analyze local, county, regional and State agency plans and provide findings and recommendations regarding the subject plan's incorporation of the various provisions of the State Plan.

(b) Neither the State Development and Redevelopment Plan nor its Resource Planning and Management Map is regulatory and neither should be referenced or applied in such a manner. It is not the purpose of this process to either "validate" or "invalidate" a specific code, ordinance, administrative rule, regulation or other instrument of plan implementation.

(c) No municipal, county, regional or State agency should delay any decision making process due to a pending review of their plans by the Office of State Planning for consistency with the SDRP.

(d) For purposes of this subchapter, "consistency," as defined in N.J.A.C. 17:32-1.4, shall also include the notion of "compatibility," also defined in N.J.A.C. 17:32-1.4.

17:32-7.2 Eligibility

(a) Any municipal or county governing body, commissioner or secretary of a State department, regional, or interstate agency may petition the Office of State Planning for a review of the consistency between its plan and the State Development and Redevelopment Plan.

(b) The master plans of municipalities (including elements as defined in the Municipal Land Use Law), and counties (as defined in the County Planning Enabling Act), functional plans of State agencies, and the adopted comprehensive plans of regional and interstate agencies are eligible for review by the Office of State Planning under these rules. Codes, ordinances, administrative rules, regulations and other instruments of plan implementation are not eligible for review. Nothing in these rules shall be interpreted to mean, however, that the staff of the Office of State Planning and the Commission may not provide technical assistance and advice to agencies at any level of government on matters falling under the mandates of the Commission or Office, as set forth in the State Planning Act, N.J.S.A. 52:18A-196 et seq.

ing or new comprehensive regional DTW or regional management where appropriate. Upgrading or expansion of existing regional DTW is generally preferable to construction of additional DTW that would produce additional direct discharges to surface water at new locations.

2. On a case-by-case basis, the Department may require *[governmental units or other persons that have wastewater management plan responsibility]* *wastewater management planning agencies* to examine specific wastewater management alternatives as part of the preparation of the wastewater management plan. The Department may require such examination to include analysis of critical economic, social, environmental, or institutional factors pertaining to such alternatives.

(b) *[Where municipal or county master plans have been adopted and are in effect under N.J.S.A. 40:55D-28 or N.J.S.A. 40:27-2]* *Subject to the requirements, qualifications, and exceptions listed in (b)3 through 8 below*, wastewater service areas and DTW shall, to the maximum extent practicable, be identified in such a manner as to provide adequate wastewater service for *[the future land uses shown in such master plans, and to be consistent with any sewerage provisions in such master plans. The wastewater management plan shall list all of the municipal and county master plans on which the wastewater management plan is based. However, the requirements of this subsection are subject to the following qualifications and exceptions]*:

*1. Land uses allowed in zoning ordinances that have been adopted and are in effect under N.J.S.A. 40:55D-62; or

2. Future land uses shown in municipal or county master plans that have been adopted and are in effect under N.J.S.A. 40:55D-28 or N.J.S.A. 40:27-2. If such master plans are used, wastewater service areas and DTW shall, to the maximum extent practicable, be identified in a manner consistent with any sewerage provisions in such master plans.

3. The wastewater management plan shall list all of the zoning ordinances, municipal master plans, or county master plans on which the wastewater management plan is based. If any zoning ordinance is used, the documentation for the wastewater management plan shall include a copy of the map of the districts in that ordinance, and of the regulations in that ordinance which specify the type, density, and intensity of land use allowed in each district. If any master plan is used, documentation for the wastewater management plan shall include a copy of the map of proposed future land uses contained in that master plan, a copy of any text in the master plan which is needed to interpret the map, and a copy of any provisions in the master plan that address sewerage and waste treatment.*

*[1.]**4.* Due regard shall be given to *the degree of likelihood that land development allowed in zoning ordinances will occur in the 20-year period, and to* any substantial differences between dates associated with future land uses shown in *[such]* master plans and the dates *[corresponding with the 20-year periods required by this section]* *on which the 20-year periods end*.

*[2.]**5.* If, for particular locations, a zoning *[ordinance or]* variance under *[articles 8 or]* *article* 9 of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., allows land development that would generate more wastewater than would the development *allowed in the zoning ordinance or* shown in *[such]* *the* master *[plans]* *plan*, then for some or all of those locations the wastewater management plan may be based on the zoning *[ordinance or]* variance rather than on *[such]* *the zoning ordinance or the* master *[plans]* *plan*.

*[3.]**6.* If, for particular locations, preliminary or final subdivision or site plan approvals under article 6 of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., have allowed land development that would generate more wastewater than would the development *allowed in the zoning ordinance or* shown in *[such]* *the* master *[plans]* *plan*, then for those locations the wastewater management plan shall be based on such approvals rather than on *[such]* *the zoning ordinance or the* master *[plans]* *plan*.

*[4.]**7.* Wastewater management plans relating to the New Jersey Coastal Zone, the Hackensack Meadowlands District, the Pinelands Area, or the Pinelands National Reserve are subject to the requirements of N.J.A.C. 7:15-3.6 or 3.7, as appropriate.

*[5.]**8.* The wastewater management plan may be inconsistent with *[such]* *zoning ordinances or* master plans for other compelling reasons, provided that the wastewater management plan specifically identifies such inconsistencies and sets forth such reasons with adequate documentation.

(c) Each wastewater management plan shall include maps of future wastewater service areas, and of specified categories of future DTW, that are necessary to meet anticipated wastewater management needs at the end of the 20-year period*, and at the end of any shorter or longer period identified under (a) above*. These maps shall depict the following:

1. The location, within or outside the wastewater management plan area, of each existing, expanded, or new DTW, if any, that would not be a sewer or a pumping station, but that would receive sewage that would arise within or be conveyed into or through the wastewater management plan area, if such DTW would require a NJPDES discharge permit and:

i. Directly discharge to surface waters, or onto the land surface (for example, spray irrigation or overland flow facilities); or

ii. Have a design capacity of 20,000 gallons per day or larger, and store or dispose of sewage by any means;

2. The location of each discharge to surface or ground water from each DTW mapped within the wastewater management plan area under (c)1 above;

3. The location of each existing, expanded, or new pumping station and major interceptor and trunk sewer, if any, that would convey sewage within the wastewater management plan area;

4. The sewer service area, within or outside the wastewater management plan area, for each DTW mapped within the wastewater management plan area under (c)1 above, distinguishing the separate area to be served by each DTW;

5. The sewer service area, within the wastewater management plan area, for each DTW mapped outside the wastewater management plan area under (c)1 above, distinguishing the separate area to be served by each DTW; *[and]*

6. The area, if any, within the wastewater management plan area that would be served only by either or both of the following:

i. Individual *[septic]* *subsurface sewage disposal* systems for individual residences; or

ii. Other DTW that would have a design capacity of less than 20,000 gallons per day, and use either subsurface disposal systems or other sewage disposal systems that would have no *direct* discharge to surface water*[.]* *or onto the land surface; and*

7. The area, if any, within the wastewater management plan area that would be served only by either or both of the following:

i. Individual subsurface sewage disposal systems for individual residences; or

ii. Other DTW that would have a design capacity of less than 2,000 gallons per day, and use either subsurface disposal systems or other sewage disposal systems that would have no direct discharge to surface water or onto the land surface.

(d) For each DTW mapped within the wastewater management plan area under (c)1 above, each wastewater management plan shall further identify the future DTW that are necessary to meet wastewater management needs by providing, in narrative, outline, or tabular form, the following information applicable to such DTW at the end of the 20-year period*, and at the end of any shorter or longer period identified under (a) above*:

1. Owner and, where known, name of the DTW;

2. Name of any other governmental unit or corporation, if any, to be responsible for operating the DTW;

3. Location of the DTW within municipality, county, and WQM planning area, and within any existing district;

4. *[Latitude and longitude, and, where]* *Where* known, NJPDES permit number for any discharges from the DTW;

5. Name of present or proposed NJPDES permittee and any copermittee for any discharges from the DTW;

6. Name and present classification, under N.J.A.C. 7:9-4 and N.J.A.C. 7:9-6, of any surface and ground waters that would receive any discharges from the DTW;

7. Estimate of residential population to be served by the DTW within and outside the wastewater management plan area, *disag-

October 22, 1996

Ms. Shirley M. Bishop, P. P.
Executive Director
Council on Affordable Housing
CN 813
Trenton, N. J. 08625-0813

Re: Six month Status Report on Hillsborough Township's Substantive Certification

Dear Ms. Bishop,

As you are aware, satisfaction of Hillsborough Township's Fair Share Plan is dependent on DEP approval of the Somerset County/Upper Raritan Watershed Wastewater Management Plan which includes the extension of the sewer area to the PAC/HCF tract. That Plan is being finalized by Somerset County and should be submitted for review by DEP in November.

In July, 1996, a developer, U. S. Homes Corporation, submitted an application for preliminary subdivision approval to the Hillsborough Township Planning Board. That application included the construction of the elements of our Fair Share Plan. In August, 1996, the application was withdrawn.

If you need more information on this matter, please let me know.

Sincerely,

John D. Middleton
Township Administrator

cc: Hillsborough Township Committee
Ed Halpern, Township Attorney
Frank Scarantino, Township Engineer

April 8, 1997

Ms. Shirley M. Bishop, P. P.
Executive Director
Council on Affordable Housing
CN 813
Trenton, N. J. 08625-0813

Re: Twelve month Status Report on Hillsborough Township's Substantive Certification

Dear Ms. Bishop,

As you are aware, satisfaction of Hillsborough Township's Fair Share Plan is dependent on DEP approval of the Somerset County/Upper Raritan Watershed Wastewater Management Plan, which includes the extension of the sewer area to the PAC/HCF tract. In November, 1996, the Township Committee requested that County and DEP review of the WWMP be deferred six months so that the Planning Board could review it and possibly modify it. That review has been completed and the Planning Board, at its April 3, 1996 meeting, passed a resolution requesting that the entire PAC/HCF tract be included in the WWMP.

In July, 1996, a developer, U. S. Homes Corporation, submitted an application for preliminary subdivision approval to the Hillsborough Township Planning Board. That application included the construction of the elements of our Fair Share Plan. In August, 1996, the application was withdrawn. In December, 1996, the application was resubmitted and is now being considered by the Planning Board.

If you need more information on this matter, please let me know.

Sincerely,

John D. Middleton
Township Administrator

cc: Hillsborough Township Committee
Ed Halpern, Township Attorney
Frank Scarantino, Township Engineer