

Memorandum from Payne to Ryan re: Hillsborough
Brief Section (Draft)

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MEMORANDUM

TO: John Payne
Ed Lloyd

FROM: Jim Ryan

RE: Hillsborough Brief Section (Draft)

DATE: December 3, 1996

John asked me to jot down what I had found to support an argument that COAH should not be able to approve development in Planning Areas 4 and 5 if land in that area is excluded when COAH calculates a municipality's fair share obligation. Although there are still holes in my argument that need filling, it seemed more efficient simply to draft a section of the brief rather than write a memo describing what I might include in a draft of the brief. Thus, a rough, skeletal draft follows. (By the way, John, this time I took more than a passing glance at Warren Township; your instincts were right -- it's directly on point).

I. COAH'S CERTIFICATION OF DEVELOPMENT IN PLANNING AREAS 4 AND 5, ABSENT A SHOWING THAT A MUNICIPALITY CANNOT OTHERWISE MEET ITS FAIR SHARE OBLIGATION, VIOLATES THE FAIR HOUSING ACT.

The "central purpose" of the Fair Housing Act ("FHA" or "Act") is to provide "affordable housing on a regional basis consistent with both sound planning concepts and the Mount Laurel doctrine." In re Warren Township, 132 N.J. 1, 28 (1993). COAH is charged with implementing the Fair Housing Act and is entrusted with "broad powers" to implement the statutory goals of the Act. Id. at 27. "The breadth of COAH's discretion in selecting methodologies to implement the Fair Housing Act, however, does not dilute COAH's duty to adopt regulatory methods that are consistent with the statutory goals." Id. at 28. Thus, "[n]otwithstanding the deference to which COAH is

entitled in adopting regulations to implement the expansive goals of the Fair Housing Act," its regulations will be invalidated if they do not "further[] those legislative policies."

Id.

COAH's action in this case is inconsistent with the Fair Housing Act's purpose of providing affordable housing on a basis "consistent with . . . sound planning," and it fails to give "appropriate weight" to the SDRP, as required by the Act. See N.J.S.A. 52:27D-307. In calculating Hillsborough's obligation to provide low- and moderate-income housing, COAH reduced that obligation based on the amount of land in Planning Areas 4 and 5 that is located in Hillsborough. [Need evidence of this]. Such a reduction in a municipality's fair share obligation is required by COAH's current regulations, see N.J.A.C. 5:93 App. A, and it is consistent with the New Jersey Supreme Court's decision in South Burlington Cty N.A.A.C.P. v. Mount Laurel Twp, 92 N.J. 158, 215, 226-27 (1983) (Mount Laurel II) (holding that housing obligation only extends to municipalities with "growth" areas as shown on State Development Guide Plan). See also Van Dalen v. Washington Tp., 120 N.J. 234, 242-44 (1990) (approving COAH's conclusion that the size of the growth area in a municipality should be used to determine the municipality's fair share obligation)

Having reduced Hillsborough's obligation to provide low- and moderate-income housing based on the amount of land in Planning Area 4, COAH acted inconsistently in then approving development on that very land as a means of satisfying Hillsborough's fair share obligation. It is fundamentally inconsistent to reduce a municipality's fair share obligation because the municipality has land designated for limited or no growth,

and then to approve development on the same land used to reduce the municipality's obligation in the first place. At the very least, COAH should require a municipality to demonstrate that no viable alternatives to development in Planning Areas 4 and 5 exist before allowing development in such areas to be used to satisfy the municipality's fair-share obligation.

COAH's action in this case bears a striking resemblance to COAH's adoption of occupancy preferences, which was invalidated in In re Township of Warren, 132 N.J. at 28. In Warren, the Court invalidated a COAH regulation that authorized municipalities seeking substantive certification of regional fair-share plans to set aside 50% of their low- and moderate-income housing for income-eligible households that resided or worked in the municipality. Id. Relying on reasoning that is perfectly applicable to this case, the Court invalidated the occupancy-preference regulation because it was "inconsistent with and undermine[d] the methodology adopted by COAH for calculating and allocating regional fair share of low- and moderate-income housing." Id. at 28. The inconsistency arose from the fact that those who would end up living in the municipality's low- and moderate-income housing were not among those counted when the municipality's fair share obligation was calculated. See id. at 28-29. As the Court observed, "to the extent the occupancy preference favors local residents, the likelihood is that the housing needs of those who benefit from the preference were not considered in calculating the prospective regional need for affordable housing." Id. at 30. Accordingly, the Court held that the regulation could not be "sensibly reconciled with the overall regulatory scheme that has been adopted by COAH to implement the Fair

Housing Act and therefore cannot coexist within the present regulatory framework." Id.
at 31.

A similar inconsistency exists in this case and requires the invalidation of COAH's substantive certification of the Hillsborough PAC. Because the land in Planning Area 4 was "not considered in calculating the prospective regional need for affordable housing," id. at 30, it is fundamentally inconsistent to approve development on that land -- at least in the absence of any showing that no alternatives were available. Indeed, allowing development in Planning Area 4 and 5 under the circumstances of this case runs counter to the purposes of both the SDRP and the Fair Housing Act. It is contrary to the Plan because it allows development in an area where the Plan seeks to restrict it. And it is contrary to the Fair Housing Act, because it allows some municipalities to shirk their full responsibility to provide a fair share of affordable housing.

John:

I recognize that this is pretty rough, and it needs a concluding paragraph, but I'm going to send it over now so you have some idea of the argument's potential. Let me know whether you think it is worth pursuing, and I'll put some more time in later this week or early next week.