

Draft argument for "going after COAH"

w/ 2-4-97 - research

w/ 2-11-97 - research

w/ 2-12-97 research

Pgs. 14

Confidential ?

HI 000028D

John and Ed: Here is a draft of an argument that attempts to go after Herb Simmens a bit. The only way I could figure to accomplish that goal was to fashion an argument that touches on one made in John's brief and earlier memos from John and Ed: that the waiver in this case amounted to an amendment to the Planning Map, which is beyond the authority of COAH, the OSP and Herb Simmens. This argument overlaps some with arguments made in John's draft, and I think it should probably be incorporated as a subpoint in that draft. Let me know what you think.

I. COAH LACKS AUTHORITY TO WAIVE CENTER DESIGNATION IN PLANNING AREAS 4 AND 5.

A. COAH And The Office Of State Planning Violated The State Planning Rules By Effectively Amending, Without Authority, The Resource Planning And Management Map.

As explained above, the designation of centers and the limitation of development to such centers in Planning Areas 4 and 5 were critical, perhaps the critical, aspects of the State Development and Redevelopment Plan ("State Plan"). The limited development allowed in Planning Areas 4 and 5 serves as a sound compromise between the competing goals of open-space preservation and municipal development. Given the importance of centers to this compromise, it is not surprising that the designation of such centers is governed by strict procedural rules, which serve to ensure that the balance of interests struck by the State Plan is maintained. See N.J.A.C. 17:32 (State Planning Rules). As will be shown below, the informal waiver policy adopted by COAH and the tacit agreement of the Office of State Planning ("OSP") to waive center designation in this case amount to a circumvention of the State Planning Rules and should for that reason be deemed invalid.

The State Plan provides that development within Planning Areas 4 and 5 must occur within centers that are designated on the Resource Planning and Management

Map ("Planning Map"). [NB: This seems true from piecing together various sections of the State Planning Rules, but is there one specific citation that establishes this point directly?]. COAH's own regulations recognize and abide by this requirement. See N.J.A.C. 5:93-5.4(c) ("In Planning Areas 4 or 5, as designated in the State Plan, the Council [on Affordable Housing] shall require inclusionary development to be located in centers."). In their Memorandum of Understanding ("MOU"), moreover, both COAH and the State Planning Commission ("Planning Commission") agreed that "[c]enters are the preferred mechanism for accommodating growth and inclusionary developments in each planning area, in a manner consistent with the goals, objectives, and policies of the State Plan." MOU ¶ 6.

The State Planning Commission, which is charged with implementing the State Plan, has adopted State Planning Rules, "which establish[] detailed procedures for the participation of appropriate governmental units at all levels in the formulation and implementation of the State Development and Redevelopment Plan." N.J.A.C. 17:32-1.2(a)(5). The State Planning Rules "apply to all activities and actions of municipal and county governments, the State Planning Commission, State agencies, and any negotiating entity designated by the Commission in the preparation, review and implementation" of the State Plan. N.J.A.C. 17:32-1.3. Pursuant to the State Planning Rules, if any State agency, county or municipal governing body, or private citizen wishes to develop land within Planning Areas 4 or 5, but outside of designated centers, the organization or citizen must petition the State Planning Commission for an amendment to the Planning Map. See N.J.A.C. § 17:32-8.3(a).

The Planning Rules require that specific procedures be followed by those seeking such an amendment. Those petitioning for the amendment must, inter alia, state their interest in the land under consideration, describe how the amendment would promote local, regional and State goals, explain why the amendment cannot await the next revision of the State Plan, and describe how the amendment is consistent with the State Plan and with municipal and county plans. See N.J.A.C. § 17:32-8.5(b)(2)-(4). Each petitioner must also receive proper authorization or endorsement; for example, if the petitioner is a state agency, the petition must “include a transmittal letter on letterhead from the departmental Commissioner or Secretary requesting consideration of the petition.” N.J.A.C. § 17.32-8.5(b)(6)(ii).

In addition to establishing the procedural requirements for amendments to the Planning Map, the Planning Rules also clearly establish that “[o]nly the [State Planning] Commission may dispose of a petition,” except in delineated circumstances where the Director of the OSP is authorized to disapprove petitions to amend the Planning Map. N.J.A.C. 17:32-8.5(d)-(f) (emphasis added). What this means, of course, is that only the Commission -- not the OSP, and certainly not COAH -- is allowed to grant petitions to amend the Planning Map. Before doing so, moreover, the Commission must hold meetings in conformance with the Open Public Meetings Act, at which opportunity for public comment must be provided prior to action being taken. N.J.A.C. 17:32-8.5(h).

In their MOU, COAH and the Planning Commission recognize and pledge to adhere to the procedural requirements set forth in the Planning Rules. As COAH and Planning Commission agreed: “As provided for in the State Planning Rules (N.J.A.C.

17:32.8), immediately after adoption of the State Plan the Commission will accept petitions to have identified centers receive designation.” See MOU ¶ 6. The import of this agreement is perfectly plain, and quite significant for purposes of this case. Specifically, the MOU demonstrates that both COAH and the Planning Commission understand that development in Planning Areas 4 and 5 cannot occur outside of designated centers, that the designation of centers requires an amendment to the Planning Map, and that the Planning Rules set forth the procedural steps that must be followed in order to obtain such an amendment.

When one contrasts the rather elaborate and well thought out rules governing development in Planning Areas 4 and 5 with what occurred in this case, it is easy to see how COAH and the OSP have rendered the State Planning Rules (and the State Plan) a nullity. By waiving center designation, with the approval of the OSP, COAH has essentially succeeded in amending the Planning Map, without submitting to the requirements of the State Planning Rules. Neither COAH nor the OSP, however, has any authority either to circumvent the State Planning Rules or to approve amendments to the Planning Map. The State Planning Rules grant such authority exclusively to the State Planning Commission -- which, significantly, did not authorize COAH's waiver in this instance.

Accordingly, the informal waiver process adopted by COAH -- which purportedly allows COAH, with comment from the OSP, to waive center designation in Planning Areas 4 and 5 -- cannot be sustained.¹ Allowing COAH to waive center designation,

¹ John and Ed: Interestingly, the informal waiver policy, at least the copy that I have, indicates that COAH will grant waivers to N.J.A.C. 5:93-13.4. This provision, however, only sets out the requirements for site

and thereby effectively to amend the State Planning Map, contravenes the State Planning Rules and subverts the process established to ensure that amendments to the Map are only made by the State Planning Commission after deliberation and consideration of public comment. Obtaining the approval of the director of the OSP, as COAH did here, does not cure this deficiency, as neither the director nor the OSP itself has any authority to approve Planning Map amendments. Herb Simmens' approval, in other words, is no substitute for either the requirements of the State Planning Rules or the ultimate disposition by the State Planning Commission.

B. COAH'S Formal Waiver Policy Cannot Be Applied To Center Designations.

As an alternative to relying upon its "informal" waiver policy, discussed above, COAH also cited its formal waiver policy, which is set forth at N.J.A.C. 5:93-15.1. Pursuant to Section 5:93-15.1(b), COAH is permitted to grant specific waivers from 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.

specific relief, which is irrelevant to this case. The relevant provision is N.J.A.C. 5:93-5.4, which states that COAH will require inclusionary development to be located in centers. Significantly, the informal waiver policy does not cite to § 5:93-5.4. Unless I have an old copy of the policy, therefore, it would appear that COAH's informal waiver policy, even if it were valid, should not have applied in this case. There is an additional reason why that policy should not have been applied: it states that "this direction [the waiver policy] only pertains to sites that have infrastructure." As I understand it, the PAC/HCF does not have infrastructure.

Id. COAH concluded that Hillsborough's waiver request met these three criteria. Thus, COAH waived its own rule, requiring inclusionary development within Planning Areas 4 and 5 to be in designated centers. See N.J.A.C. 5:93-5.4. COAH's waiver standards and their applicability to this case are discussed below.

As an initial matter, however, New Jersey Future contends that COAH should be prohibited from using its own waiver policy to waive center designation. COAH is responsible for ensuring that each municipality meets its obligations under the Fair Housing Act and Mount Laurel. The State Planning Commission, in turn, is responsible for ensuring the sound implementation the State Plan. When granting a waiver of COAH's own regulations will allow a municipality to accomplish its general fair share obligations, COAH can and should be entitled to grant such waivers. [Cite examples]. In this instance, however, COAH's waiver amounted to a waiver of the State Planning Rules regarding center designation and amending the State Planning Map. COAH, in other words, effectively waived rules and regulations it has no authority to waive; as discussed above, only the State Planning Commission has authority to designate centers and amend the State Planning Map.

Accordingly, COAH's formal waiver policy should be deemed inapplicable to center designations. To allow COAH, within the context of granting substantive certification, to waive center designation would entitle COAH to circumvent the authority of the State Planning Commission, as well as the elaborate procedural mechanisms designed to implement and maintain the Plan. Such a result is at odds with COAH's own regulations, the State Planning Rules, and Supreme Court precedent, which

requires “that the imposition of fair share obligations will coincide with the State’s regional planning goals and objectives.” Mount Laurel II, 92 N.J. at 225.

Even if COAH’s formal waiver policy could be applied to center designation, it should not have been applied in this case. Continue with discussion in John’s draft at 10-16 . . .

To: COAH Team

From: Sarah Rees

Re: Requirements for Consistency Review
under § 208.

Date: 2/12/97

Background:

The COAH regulations require that a developable site obtain approval by the DEP or designated agency from a consistency review with the Area Water Quality Management Plan under § 208 of the Clean Water Act prior to substantive certification. N.J.A.C. 5:93-5.3(b). The proposed PAC/HCF project in Hillsborough has not yet obtained an approved consistency review. Examining the requirements for obtaining a consistency review or and amendment to the WQM plan provides a direction for reviewing the DEP file on Hillsborough and understand their determination.

Consistency Reviews

NJDEP's procedure for performing § 208 consistency reviews is governed by N.J.A.C. 7:15 rules on Water Quality Management Planning. Under this framework, the applicant for a consistency review must submit information including, but not limited to the following:

a narrative description of the project, the type of development or activity involved, the number of dwelling units, anticipated population, anticipated wastewater flow, availability and identification of existing treatment works, and proposals for new treatment works. N.J.A.C. 7:15-3.2(a)(1).

Looking at this information, the Department must then base its decision on factors including, but not limited to, the following:

- i Population forecasts
- ii Wastewater flow projections
- iii Availability of DTW (domestic treatment works)
- iv Identification of appropriate DTW
- v Identification of appropriate wastewater service area
- vi Identification of appropriate project management agency
- vii Use of BMP for pollution control
- viii Identification of areas suitable or unsuitable for development with consideration of environmentally sensitive areas
- ix Other water quality based policies, goals, objectives or recommendations.

See N.J.A.C. 7:15-3.2(c)(1).

The Department shall complete the consistency review within 90 days after receiving the request, with a single 30 day extension allowed. N.J.A.C. 7:15-3.2(c)(2). The Department shall then issue a determination that the project is either consistent, inconsistent, or not addressed on the WQM plan. However, if the

Department finds that the project is consistent or not addressed, it can issue the permit without issuing a consistency determination. N.J.A.C. 7:15-3.2(c)(4). As the definition of "permit" includes approvals, certifications or similar actions, arguably the DEP would not have to issue a formal consistency determination if it approved the consistency review prior to COAH granting substantive certification. See N.J.A.C. 7:15-3.1(a).

Amendments to WQM Plans

Procedure

If after a consistency review the Department determines that the project is inconsistent, the applicant can apply for an amendment to the WQM plan to eliminate the inconsistency. In requesting an amendment, the applicant shall include, but is not limited to the following information: a detailed description of the proposed amendment, including documentation substantiating the need for the amendment and other documentation as determined by the Department. N.J.A.C. 7:15-3.4(g)(2).

Within 90 days of receipt of the proposed amendment, the Department shall either disapprove the proposal, proceed with the proposal, or return the proposal to the applicant for additional information. Id. If the Department decides to proceed, the applicant must request written statements of consent and give public notice. N.J.A.C. 7:15-3.4(g)(3).

Considerations

When evaluating the proposed amendment, the Department shall consider effluent limitations, schedules of compliance and TMDL's if applicable as part of the WQM plan. N.J.A.C. 7:15-3.4(i) & (j). The evaluation shall also be guided by established policies, including the use of existing DTW where use is cost-effective, environmentally sound and technically feasible. N.J.A.C. 7:15-3.4(l). Expansion or upgrading of existing regional DTW is favored over the construction of new DTW that would produce additional direct discharges to surface water. Id.

To: COAH Team
Re: Agency Deference/Due Process
Argument for COAH Brief

From: Sarah Rees
Date: 2/11/97

The following is a rough draft of the arguments I picked up from the COAH brief. The cases used have been culled from existing clinic briefs, and I have also performed supplemental research to check the validity and update the caselaw used. All of the arguments fit in the materials on pages 9-11 of the brief. Please review the arguments and let me know your questions and/or comments.

I An Agency is Bound to Follow its Own Rules (Informal Waiver Policy)

As an administrative agency, COAH's establishment of an informal waiver policy violates accepted procedure of administrative practice. See In re Twp. of Warren, 132 N.J. 1, 27 (1993) (declaring that COAH is an administrative agency). COAH's arbitrary decision to ignore its own formal waiver regulation and grant the waiver on the basis of an outside policy not consistent with its regulations defies procedural safeguards of administrative power (insert p.9, 2d full para). Unless a regulation is repealed, an agency is bound to follow. In re Waterfront Development Permit, 244 N.J. Super. 426, 435 (App. Div. 1990). Moreover, the Courts have held that an agency may not just adopt an internal policy regarding one of its own regulations; it must instead follow ordinary rulemaking procedures. See Woodland Private Study Group v. State, 107 N.J. 62, 74 (1987). In a recent case, the Appellate Division prohibited the DEP from waiving substantive requirements for development of non-oceanfront islands without first promulgating regulatory standards for that waiver. In re CAFRA, 290 N.J. Super. 498 (App. Div. 1996). COAH's granting of an informal waiver is directly analogous to CAFRA's waiver policy, and therefore demands "substantive and procedural standards" to govern the exercise of the waiver power. Id. at 512. This rulemaking is required to safeguard against the risk of arbitrary agency action and to provide the public with a meaningful mechanism to "shape the regulatory criteria that ultimately will affect its interests." Id. at 512-13 (citing Crema v. New Jersey Dep't of Env'tl. Prot., 94 N.J. at 302). It is precisely this duty to inform the public, and "assure the faithful effectuation of the legislative mandate" that is requested in this case. Holmdel Builders Assoc. v. Township of Holmdel, 121 N.J. 550, 577-78 (1990).

II COAH's Formal Waiver Policy is Invalid by Failing to Provide Meaningful Standards to Satisfy Due Process.

As a general principle, "exceptions in a legislative enactment are

to be strictly but reasonably construed, consistent with the manifest reason and purpose of the law." Service Armament Co. at 558-59 (emphasis added). To allow exemptions to be otherwise broadly construed without reasonable boundaries would serve to "abusive the interpretive process and to frustrate the announced will of the people." Id. at 559 (quoting Phillips v. Walling, 324 U.S. 490, 493 (1945)). In this case, COAH's formal waiver policy outlined at N.J.A.C. 5:93-15.1(b) is unclear and therefore subject to determination.

COAH's duty is to implement the Fair Housing Act, the central purpose of which is to provide "affordable housing on a regional basis consistent with both sound planning concepts and the Mount Laurel doctrine." In re Twp of Warren, 132 N.J. 1, 28 (1993). COAH's regulations adopted in furtherance of this goal must be interpreted in light of these legislative policies. Id. However, on its face the formal waiver provision appears to apply the three criteria in disjunctive form. Such a reading would allow COAH to grant a waiver even though it did not foster the production of low and moderate income housing, or it was contrary to the spirit and letter of the established rules. Interpreting N.J.A.C. 5:93-15.1(b) in such an open-ended way would defeat COAH's fundamental legislative objectives, and must therefore not be permitted.

Such an interpretation would also fly in the face of principles of fundamental due process, lacking "substantive and procedural standards governing the exercise of waiver authority" that is "critical to the exercise of that power in the public interest." In re CAFRA Permit, 290 N.J. Super. 498, 512 (App. Div. 1996). The exercise of an agency's waiver power requires a structural framework with standards sufficient for the exercise of that power. In re CAFRA at 517. Reflecting this policy, there are numerous agency regulations providing standards for waivers in other contexts. See, e.g., N.J.A.C. 7:7A-7.2 (regulating the waiver of freshwater wetlands transition area rules); N.J.A.C. 7:50-4.63 (defining the waiver of strict compliance with the Pinelands Comprehensive Management Plan due to extraordinary hardship). These waivers are quite detailed, and spell out precisely the reasons for which the agency can grant a waiver. This does not serve to place a burden on the agency - all that is required is that COAH articulate definite standards clarifying when an exemption could be granted.

Moreover, a disjunctive application of the provisions of the formal waiver regulation would be unconstitutional under the "realistic opportunity" standard of Mount Laurel II, which governs both the Fair Housing Act and N.J.A.C. 5:93. A waiver policy that permits avoidance of otherwise applicable fair share obligations without an offsetting production of affordable housing, without being within the "spirit" of the rules, and without hardship, evidences an unconstitutionally empty approach to policing the realistic opportunity standard.

III No Deference is Due to COAH's Decision Pursuant to Its

Informal Policy or Formal Waiver.

It is well recognized that "[a]n appellate tribunal is...in no way bound by the agency's interpretation of...a strictly legal issue." Board of Ed. of Neptune v. Neptune Twp. Ed. Assoc., 144 N.J. 16, 31 (1996); Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973). Further, the concept of agency deference does not require the court to abdicate its responsibility "to assure that agency rulemaking conforms with basic tenets of due process and provides standards to guide both the regulator and the regulated." In re CAFRA at 515 (quoting Lower Main Street Assoc's v. New Jersey Housing & Mortg. Fin. Agency, 114 N.J. at 236. The deference to agency "expertise" urged by DEP does not come into play where the issue is the construction of the agency's regulation. "The construction of statutes is a judicial, not an executive function" and "a court is bound to override an administrative construction contrary to the plain meaning of the statute." Service Armament Co. v. Hyland, 70 N.J. 550, 561-62 (1976). Courts have not permitted administrative agencies to escape their own regulations in the past. See Frisby v. U.S. Dep't. of Housing & Urban Development, 755 F.2d 1052 (3d Cir. 1985) (upholding HUD's reliance on its own regulations in granting a waiver for the sale of housing); Kelly v. Railroad Retirement Bd., 625 F.2d 486, 491 (3d Cir. 1980) (finding that the Board violated applicant's rights guaranteed by its regulations in denying annuity benefits); In re Waterfront Development Permit, 244 N.J. Super 426 (App. Div. 1990).

The great deal of deference classically applied to agency decisions only arises after "the specific requirements of the law are met." Mary Washington Hosp., Inc. v. Fisher, 635 F.Supp. 891, 896 (E.D. Va. 1985).

To: COAH Team

From: Sarah L. Rees

Re: Legislative history results NJAC
5:93-5.3(b) & 15.1.

Date: 2/4/97

These sections of the COAH regulation apply to the the formal waiver policy (NJAC 5:93-15.1) and consistency review (NJAC 5:93-5.3(b)). I reviewed the legislative history of these provisions by tracing back the provisions through the NJ Register, focusing on comments published at the time the provisions were proposed

25 NJR 5763(a) (Dec 1993)

Formal Waiver: covers exclusions from 5:91, 5:92 and 5:93 May be requested as part of a municipal petition. Must be made consistent with COAH procedural rules at NJAC 5:91 (check these). Unsure what the definition of "hardship" is in this provision, or whether the three elements are conjunctive or disjunctive.

The formal waiver provision was added in this iteration. The public hearing was January 4th, 1994. The only commentary is that 5:91-1.3 & 5:92-13.1 were accordingly amended to provide the requisite framework for the council to waive a specific rule where such waiver would not contravene provisions of the Fair Housing Act. 25 NJR 5788(12).

Consistency Review: All sites designated for low & moderate income housing shall receive approval for consistency review, as set forth in § 208 of the Clean Water Act, prior to substantive certification. Where a site is denied consistency review, the municipality shall apply for an amendment to its § 208 plan to incorporate the designated site. (unsure whether this means before or after the site is designated).

25 NJR 1118(a) (March 15, 1993)

In this iteration, the new COAH regulations at 5:93 were proposed. Public hearings were held on April 14, 15 and 22 in 1993. According to the explanatory text of the proposal, subchapter 5 outlines the Council's criteria for reviewing various approaches for addressing the municipal fair share. The menu of acceptable approaches is not necessarily all inclusive. The Council believes that the detailed criteria provided will help demystify the process of preparing a housing element and fair share plan and enhance the municipal ability to respond.

25 NJR 5775 Comment 161

Comment: NJAC 5:93-5.3(b) seems to require all municipal sites to be within a 208 planning area. This is too drastic.

Response: In general, inclusionary sites will require infrastructure. In the context of sound policy, the Council believes it is prudent to require sites to be within a 208 planning

area or to require a 20 plan amendment.