

Hillsborough Lit.

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Policy framework for settlement
discussions in NJ Future v. COAH

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PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

To: Barbara Lawrence

From: Ed Lloyd
John Payne
Jim Ryan

Re: Policy Framework for settlement discussions in New Jersey Future v. Council on Affordable Housing, et al.

Date: January 2, 1997

As we discussed at our December 21st meeting, what follows is a discussion of the policy issues raised by the COAH decision in the Hillsborough case and the policy framework which New Jersey Future expects to construct through the litigation. We hope that the following discussion of the issues raised in the case will help New Jersey Future decide how best to achieve its policy objectives either through litigation or possibly settlement of the case with COAH, Hillsborough, and the developer. This memo may also raise other issues regarding the implications of the COAH decision that New Jersey Future may wish to pursue in other forums, i.e., whether State Plan Policy #20 should be changed to provide that the policies of the higher-numbered planning area applies to centers designated at the border of two planning areas.

I. COAH MUST TIGHTEN AND CLARIFY ITS POLICIES WITH REGARD
TO INCLUSIONARY DEVELOPMENT IN CENTERS TO ASSURE THAT SUCH
DEVELOPMENT IS LIMITED TO DESIGNATED CENTERS.

COAH regulations appear on their face to require that inclusionary development be limited to centers, but the application of those regulations in the Hillsborough case and elsewhere has permitted development outside of designated centers. COAH regulations unambiguously require that inclusionary developments located in Planning Areas 4 or 5 be in designated centers:

In Planning Areas 4 or 5, as designated in the SDRP, the Council *shall* require inclusionary development to be located in centers. Where the Council determines that a municipality has not created a realistic opportunity within the development boundaries of a center to accommodate that portion of the municipal inclusionary component that the municipality proposes to address within the municipality, *the*

Council shall require the municipality to identify an expanded center(s) or a new center(s) and submit the expanded or new center(s) to the State Planning Commission for designation. [N.J.A.C. 5:93-5.4^o (Emphasis added).]

COAH must clarify and recommit itself to strictly enforce this regulation to limit inclusionary development to designated centers.

II. COAH MUST AGREE TO APPLY STATE PLAN POLICY #20 AND ITS STANDARD OF USING THE LOWER NUMBERED PLANNING AREA ONLY TO CENTERS WHICH HAVE ALREADY BEEN DESIGNATED AT THE BORDER BETWEEN TWO PLANNING AREAS.

State Plan Policy #20 provides that where a designated center lies across the boundary of two different planning areas, the policies of the lower-numbered area will apply to the center. In the Hillsborough case, five percent of the proposed development (approximately 37 acres) is in Planning Area 2 while the remaining 95% of the development (some 705 acres) lies in Planning Areas 4 and 5. Moreover, a substantial portion of the tract which lies in Planning Area 2 has already been developed with the Foothills Acres Nursing Home (the Health Care Facility ("HCF") of the proposed "PAC/HCF" (Planned Adult Community). Despite these facts, COAH certified the inclusionary development on a tract of 742 acres without the requirement that it be in a designated center. COAH's convoluted reasoning for the certification goes as follows: Because State Plan Policy #20 provides that where a designated center lies across the boundary of two different planning areas, the policies of the lower-numbered area will apply to the center; since 5% of the proposed PAC/HCF development lies in Planning Area 2; and centers need not be designated in Planning Area 2, then the inclusionary development need not be in a designated center. The flaw in this analysis is readily apparent. It rests upon the fiction that a center had been designated across the boundaries of two planning areas when in fact no center designation exists for this site. COAH (and OSP which concurred in COAH's convoluted interpretation of the State Plan policy in the Hillsborough case) must abrogate the circular reasoning used in the Hillsborough case with respect to centers at the boundaries of planning areas and limit the use of State Plan Policy #20 which by its own terms applies only to designated centers at the boundary of two or more planning areas.

III. COAH MAY WAIVE THE STRICT APPLICATION OF ITS RULES REGARDING CENTER DESIGNATION ONLY WHERE COAH OR THE MUNICIPALITY DEMONSTRATES THAT THERE IS NO FEASIBLE ALTERNATIVE TO DEVELOPMENT OUTSIDE OF A DESIGNATED CENTER.

COAH has both "informal" and formal "waiver" policies pursuant to which it waives

the application of its general rules. The criteria for when these waivers may be invoked are expansive, vague, open-ended, and subject to abuse. COAH admits in its April 3rd decision in the Hillsborough case that it developed an "informal" waiver policy with respect to its center designation requirement in Planning Areas 4 and 5 after the adoption of its rules because it understood when it adopted its rules that sites in Planning Areas 4 and 5 did not have infrastructure. COAH Compliance Report, p. 6. COAH and the Office of State Planning apparently agreed in the Fall of 1994 that COAH would not amend its rules to reflect its "new understanding" but would instead offer a waiver to towns that fell into two categories. *Id.* This informal waiver policy was "articulated" at COAH's December, 1994 meeting and published in its newsletter. *Id.* Any policy "amendment" to COAH's rules may only be accomplished by formal rulemaking after public notice and opportunity for comment; thus, COAH's informal waiver policy is void. COAH must formally propose rule changes through the proper legally-sanctioned procedures. More importantly, the substance of any waiver provision should be strictly limited as set forth below.

COAH's formally-adopted waiver policies are found in its regulations at N.J.A.C. 5:93-15.1. The regulations set forth the following waiver policy:

(a) The Council will grant waivers from specific provisions of the 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 unnecessary hardship.

[N.J.A.C. 5:93-15.1(b)].

Quite apart from the fact that this waiver provision may be impermissably overbroad and does not provide a legitimate basis for the grant of the substantive certification in the Hillsborough case, the waiver provision as written and as applied in the Hillsborough case does not adequately protect the integrity of either the State Plan or the constitutional mandates of Mount Laurel II or the Fair Housing Act. The first provision of the COAH waiver regulation provides no substantive guidance for applying the waiver because any decision granting substantive certification *ipso facto* fosters low income housing. The second provision is equally void of substantive guidance and to the extent that it could be read to allow violation of COAH regulations is illegal. Finally, the "hardship" criteria might provide a basis for a waiver were the hardship to the municipality somehow

defined, but no such demonstration has been made in the Hillsborough case. In any event, COAH must agree that the standards for waiver of the center designation requirements of the COAH regulations and waiver of the requirements of the State Plan must be strictly limited to only those circumstances where a municipality has demonstrated that there is no feasible non-center alternative available to the municipality to meet its housing obligations. Thus, only where the municipality can demonstrate that without development outside of a designated center a municipality would be unable to provide its fair share of affordable housing, should it be eligible for a waiver from the designated center requirements of the COAH regulations and the State Plan.

IV. COAH MUST ONLY CONSIDER A SITE DEVELOPABLE ONLY AFTER A CONSISTENCY DETERMINATION HAS BEEN MADE THAT THERE IS APPROVED SEWER CAPACITY AVAILABLE AT THE PROPOSED SITE

COAH regulations require that all sites designated for low and moderate income housing shall receive approval for consistency review, as set forth in §208 of the federal Clean Water Act, prior to substantive certification. N.J.A.C. 5:93-5.3(b). Put more simply, NJDEP must have determined that sewer capacity from existing or planned sewerage facilities is available to the proposed development site prior to COAH's grant of substantive certification of a housing plan including that site. In the Hillsborough case, contrary to the requirements of its own regulations, COAH assumed that simply because an amendment to the Hillsborough wastewater management plan which would provide for the needed sewer capacity was being considered by NJDEP, the proposed development was consistent with the plan that was before NJDEP. Not only does COAH's assumption that NJDEP would approve the amended sewer plan violate its own regulations, it also violates the "realistic opportunity" constitutional standard and the Fair Housing Act. COAH must strictly adhere to its requirement that sewer capacity is currently available to proposed developments to meet its own statutory and constitutional duty to provide needed low income housing.

V. COAH MAY NOT APPROVE INCLUSIONARY DEVELOPMENT IN PLANNING AREAS 4 OR 5 WHERE THE LAND IN AREAS 4 AND 5 WAS EXCLUDED IN CALCULATING HILLSBOROUGH'S PROSPECTIVE REGIONAL NEED FOR AFFORDABLE HOUSING.

In calculating Hillsborough's obligation to provide low income housing, COAH reduced that obligation based upon the amount of land in Planning Areas 4 and 5 that is located in Hillsborough. This reduction is required by COAH's regulations. N.J.A.C. 5:93 App. A. This reduction is also consistent with Mount Laurel II's holding that housing obligations only extend to municipalities with 'growth' areas as shown on the State Plan. To allow inclusionary

development on the very land that was excluded from the calculation of regional housing need contravenes these principles. Inclusionary development on these excluded lands should not be permitted absent a showing that there is no alternative development available to the municipality to meet its low-income housing obligation and only after the regional housing need for the municipality has been recalculated to include these lands.

VI. COAH MUST RESCIND THE SUBSTANTIVE CERTIFICATION AND PERMIT HILLSBOROUGH TO RESUBMIT ITS APPLICATION CONSISTENT WITH THE PROVISIONS ARTICULATED ABOVE.

Because of the violations of COAH's own regulations in granting substantive certification to the Township of Hillsborough, COAH must rescind its grant of substantive certification and remand the matter to Hillsborough to allow the municipality to resubmit an application for substantive certification consistent with the principles set forth above. Because the Township has relied on COAH's interpretation of its rules in submitting and pursuing its application, the Township should be given six months in which to resubmit its application and should be afforded protection from the builder's remedy during the preparation, submission, and consideration of its amended application.

VII. HILLSBOROUGH MUST ELIMINATE ITS "FLOATING PAC/HCF ZONE" AND AMEND ITS MASTER PLAN AND ZONING ORDINANCES TO PERMIT ADULT COMMUNITY DENSITIES ONLY IN AREAS WHERE THESE DENSITIES ARE CONSISTENT WITH THE MASTER PLAN AND OTHER SITE-SPECIFIC ZONES

One of the primary reasons that the inclusionary development proposal to construct thousands of units in Planning Areas 4 and 5 has been able to progress as far as substantive certification is the existence of a Hillsborough ordinance which arguably permits "PAC/HCF" developments which exceed the development densities otherwise allowed under the Township's other zoning ordinances and Master Plan. This "floating zone" ordinance may itself violate the Municipal Land Use Law, but it must, regardless, be repealed in order to protect Planning Areas 4 and 5 from being the target of the proposed development absent the low-income portion of the development. In short, even if Hillsborough meets its COAH obligations elsewhere in Hillsborough, the development proposed could proceed in Planning Areas 4 or 5 under the floating zone ordinance even without the low income portion.