Hillsborough Lit.

1-2-97

- CL re: draft briefs enclosed

w/ DRAFT brief re: NJ Future v. COAH

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VIA FEDERAL EXPRESS

To: Susan Lederman
Leonard Liberman
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James Gilbert
Barbara Lawrence
Jim Ryan

From: Ed Lloyd
John Payne

Re: Tuesday's (January 7th) meeting on New Jersey Future v. Council on Affordable Housing, Township of Hillsborough et al.

Date: January 2, 1997

Enclosed please find three background documents to help you prepare for our meeting on Tuesday, January 7th at 3:00 p.m at Jim Ryan's office at Crummy, DelDeo, on the 16th floor of the Riverfront Plaza/Legal Center in Newark adjacent to Penn Station. Included are a five-page memorandum dated January 2, 1997 regarding a policy framework for settlement discussions in the above case, a 19-page initial draft of the brief in the case dated December 30, 1996, and a 4-page memorandum dated December 3, 1996 regarding an additional section of the brief. If you have any questions, please contact us. Hope to see you at the meeting.

Edward Lloyd, Esq.
Director

Lisa Hendricks Richardson, Esq.
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Therese Langer, Ph.D.
Staff Scientist

D-R-A-F-T HILLSBOROUGH BRIEF
December 30, 1996
Privileged and Confidential Lawyer-Client Work Product

I. THE SUBSTANTIVE CERTIFICATION OF HILLSBOROUGH TOWNSHIP SHOULD BE SET ASIDE BECAUSE THE TOWNSHIP'S HOUSING ELEMENT AND FAIR SHARE PLAN IS BASED COMPLETELY ON THE PAC/HCF SITE IN PLANNING AREAS 4 AND 5, WHICH LACKS INFRASTRUCTURE AND IS NEITHER "SUITABLE" NOR "DEVELOPABLE" NOR APPROVABLE WITHIN THE MEANING OF N.J.A.C. 5:93-1.3 AND N.J.A.C. 5:93-5.3(b).

1. The PAC/HCF site is not "suitable" for development because it is squarely located in an area designated by the State Development and Redevelopment Plan to be withheld from intensive development.

2. The PAC/HCF site is not "developable" because it is not consistent with the existing Section 208 infrastructure plan for sewers, hypothetical future amendments to the 208 Plan are irrelevant, and in any event the irregular "grace period" allowed by COAH in this case has lapsed without demonstrable commitment on Hillsborough's part towards obtaining the necessary amendment to the 208 Plan.
3. It is doubtful that the PAC/HCF site is "approvable" because, after the receipt of substantive certification, the municipality initiated a review of whether development on the PAC/HCF site is appropriate.

4. Summary: The priority for sites with infrastructure.

Introduction. N.J.A.C. 5:93-5.3(b), which governs *Mount Laurel* compliance plans involving new construction, provides:

> Municipalities shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93-1. In reviewing sites, the Council [on Affordable Housing] shall give priority to sites where infrastructure is available. All sites designated for low and moderate income housing shall receive approval for consistency review, as set forth in Section 208 of the Clean Water Act, 33 U.S.C. 1251 et seq., *prior to substantive certification*. Where a site is denied consistency review, the municipality shall apply for an amendment to its Section 208 plan to incorporate the denied site. [emphasis added]

Petitioner New Jersey Future does not question COAH's conclusion that the site is "available," as defined in N.J.A.C. 5:93-1, in that the developers of the PAC/HCF site control it, either through ownership interests or options. COAH's conclusion that the site meets the other three criteria as defined in §5.1 is not sustainable, however.

1. The PAC/HCF site is not "suitable" for development because it is squarely located in an area designated by the State Development and Redevelopment Plan to be withheld from intensive development. N.J.A.C. 5:93-1 defines "suitable" as "...a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4." As we note in more detail in the footnote, it is questionable whether the site has appropriate street access.[1] Even apart from this consideration, however, it is clear that the PAC/HCF site is not "adjacent to compatible land uses," when that aspect of the definition of "suitable" is read, as it must be, in context with requirement of consistency "with the environmental policies established in N.J.A.C. 5:93-4." 95% of the site is on the Planning Areas 4 and 5 side of the boundary line established by the State Development and Redevelopment Plan to delineate the difference between developable and non-developable areas.[2] By definition, land just inside the boundary of Planning Areas 4 or 5 will be "adjacent

[1] It is also questionable whether the site has "access to appropriate streets;" COAH's compliance report does not adequately address this issue. What can be said is that, while the site is not landlocked, the surrounding roads are clearly inadequate at present to handle a development of 3,000 residential units. [cite the Environmental Commission's objections?] Mill Lane, which bisects the property, is a narrow, poorly maintained dead end street. At its eastern end, where it connects to the Hillsborough road system, it is already built up with single family residences which face the prospect of a huge increase in "neighborhood" traffic. At its western end it stops at an abandoned railroad bridge. COAH attempts to minimize these problems by emphasizing the age-restricted nature of the development and its proximity to the municipal complex and other services. [quote specific language from compliance report.] The inference, of course, is that the elderly residents will not have any visitors, will never have to leave the grounds, and will not want to go anywhere except the nursing home or the municipal building, both of which are within walking distance. All of this is fanciful; the PAC/HCF tract is [give distance in miles] from east to west and [distance] from north to south. The municipal building is [distance] more from the eastern end of Mill Lane, and the nearest full service shopping area is that the intersection of *** and Route 206, some * miles east of the site. [To be truly nasty, give the distance to the nearest shopping mall, such as Bridgewater Commons] Since the development is to be marketed as a golf course community, the residents presumably will be active enough to be highly mobile traffic generators, all of which COAH ignores. [work out the details on this if we keep this footnote.]

[2] Development in Planning Areas 4 and 5 is permitted by the SDRP so long as it is in designated "centers." The parties agree that there is no designated center within which the PAC/HCF site lies. COAH's unsuccessful attempt to avoid the "centers" requirement is addressed in Point II below.

to" land in Planning Areas 1, 2, or 3 at some point, and therefore will be "adjacent to" land that is already developed or appropriate for development That is the case here, where low density, single-family residential development and the low-rise Foothills Acres Nursing Home [correct name?], all mapped by the SDRP in Planning Area 2, form a fringe around part of the eastern and southern boundaries of the PAC/HCF site. If the policies of the State Plan are to mean anything, the boundary between Planning Areas must suffice as a matter of law to break the chain of "compatibility" of "adjacent" land uses.

Even apart from this consideration, it is an undeniable fact that the PAC/HCF site is the gateway to a much larger concentration of Planning Area 4 and 5 land to the north and west. [Refer to a map in the Appendix?] All of this land is undeveloped and is therefore "incompatible with" development on the PAC/HCF under the policies of the SDRP. Even were a center to be designated somewhere in this area, the basic concept of the State Plan is that development in the "center" should be concentrated at relatively high densities, so that the surrounding Planning Area 4 or 5 lands can continue to serve their primary purposes as argicultural or environmental reserves.[3]

2. The PAC/HCF site is not "developable" because it is not consistent with the existing Section 208 infrastructure plan for sewers, hypothetical future amendments to the 208 Plan are irrelevant, and in any event the irregular "grace period" allowed by COAH in this case has lapsed without demonstrable commitment on Hillsborough's part towards obtaining the necessary amendment to the 208 Plan . N.J.A.C. 5:93-1 defines "developable" as "a site that has access to appropriate water and sewer infrastructure, and has received water consistency approvals from the DEP or its designated agent authorized by law to issue such approvals." This language must be read in conjunction with the body of §5:93-5.3(b), *supra*, which amplifies "developable" by giving a priority to sites where infrastructure is "available" and by requiring Section 208 approval "*prior to* substantive certification." [emphasis added]

It is uncontested that the PAC/HCF site does not now, in fact, have sewer service in place, nor is it (with the exception of a very small piece) presently included in a sewer service area approved as part of a Section 208 Plan. Thus, the site is literally "not developable" within the meaning of §§5:93-1 and 5:93-5.3(b), because the developer and the municipality did not, and could not have, passed the "consistency review" required by §5.3(b) *prior to substantive certification.*

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[3] Need an explanation here or somewhere about the specific language of §5.4, whose environmental policies govern. The language is somewhat obscure.

Section 5.3(b) also provides, somewhat ambiguously, that "Where a site is denied consistency review, the municipality shall apply for an amendment to its Section 208 plan to incorporate the denied site." On its face, this provision does not require that the amendment be applied for, or approved by DEP, prior to the grant of substantive certification, as is required for the initial consistency determination. To not require prior approval of any necessary amendment, however, renders the prior consistency review determination an all but meaningless step, since in most cases it will be obvious to the municipality and to any would-be developer whether a site is within the 208 Plan area or not, i.e., whether it is or is not "consistent." On the principle that rules should not be given a construction that renders them meaningless, [cite], §5.3(b) should not be construed to require, before substantive certification, only the meaningless step of consistency review. The clear purpose of §5.3(b) is that the constitutional "realistic opportunity" standard be met by insuring, *before substantive certification,* that a development included in the compliance plan actually can go forward (which it cannot in the absence of §208 waste water plan consistency or approval of a plan amendment). Therefore, §5.3(b) must be construed to require that any pertinent amendment be obtained *before* substantive certification is granted.

Judging by its decision in the Hillsborough case, COAH apparently construes §5.3(b) to permit substantive certification without an approved 208 Plan amendment, so long as the amendment is pending at the time of certification, and rapid decision by DEP is anticipated. COAH specifically stated its expectation that the 208 amendment would be forthcoming within two months of the substantive certification, this is, by June *, 1996, [cite to record], and it gave Hillsborough an outside date of October *, 1996, to wrap up this "detail" or face further COAH action. [cite to record]

While this may not, on its face, appear to be an unreasonable procedure, the subsequent history of Hillsborough's 208 plan amendment reveals clearly why the "prior to substantive certification" phrase should be applied to all aspects of determining whether a site is "developable" within the meaning of §5.3(b) and why, if §5.3(b) is not interpreted this way, the provision is unconstitutional under *Mount Laurel II* as being in violation of the "realistic opportunity" standard.

COAH granted substantive certification on April 3, 1996, but, because the sewer consistency approval was not it place, it established a six-month deadline (to October 3, 1996) after which the substantive certification might be revoked, and it stated that it "expected' [quote exact language of resolution] that the necessary 208 Plan amendment would be completed within two months, that is, by June 3, 1996. Apparently because of strong community opposition to development on the PAC/HCF site (opposition which either was not known to the municipality or was not brought to COAH's attention prior to substantive certification), the Hillsborough Planning Board began having second thoughts about the PAC/HCF site immediately after

substantive certification was granted[4] and reevaluated its commitment to including the PAC/HCF development in its package of 208 Amendments that would be part of Somerset County's overall submission to DEP of plan amendments affecting the county. Finally, at a working session on October 24, 1996, the Planning Board decided that "the inclusion of the PAC/HCF overlay needs to be deferred since the PAC HCF ordinance is currently being reviewed for revision."[5] When this decision was embodied in a formal resolution on November 7, 1996, the Board voted 8-1 "[t]o defer action on the PAC HCF overlay zone of Hillsborough Township for at least six (6) months ... contingent upon consultation with Township Attorney Halpern about whether this jeopardizes COAH certification."[6]

This local decision is significant. Although, in theory, the county could act independently of its constituent municipalities, and DEP could act independently of both, in practice the Department of Environmental Protection will not consider, let alone approve, a 208 Plan amendment that is not requested by both the municipality and the county concerned. [is this accurate? Cite? Has Township Council ratified this decision?] And indeed, the PAC/HCF site is not included in the Somerset County Wastewater Management Plan amendments, submitted to DEP on [date]. What this means is that, instead of a quick approval by June 3, 1996, as anticipated by COAH, the PAC/HCF site is not presently eligible to be sewered, and it will not be eligible to be sewered until at least some indeterminate date *after* May 7, 1997, the unilaterally determined six-month period of deferral after which Hillsborough *may* decide to take action on requesting that the site become 208 consistent.

Note, moreover, that COAH's November 3, 1996, reporting date for assessing the status of Hillsborough's sewer plan amendment passed silently (observed mainly in the breach by adopting the "deferral" resolution three days later). Hillsborough obviously has no motivation to call its own default to the attention of COAH, and the Council apparently does not have sufficient

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[4] There is no evidence in the record from which it could be concluded that Hillsborough was acting in bad faith when it petitioned for substantive certification, i.e., that it had no intention of following through with the necessary sewer amendment so that the site could be considered "developable." It is obvious, however, that COAH's lax procedure in allowing prospective approvals is an invitation to bad faith delaying tactics on the part of other municipalities.

[5] Hillsborough Township Planning Board Resolution 96-1694, page 1, November 7, 1996. [attached as an Appendix?; added to the stated recrd?]

[6] *Id.*, page 2. The "contingent upon" phrase is added by hand at the bottom of the typed resolution.

monitoring and oversite capacity to police these requirements on its own. This is why, as a matter of sound policy and good administration, §5.3(b)'s "developable" standard should be interpreted to require that infrastructure capacity be in place *before* substantive certification is granted.[7] Only in this way will municipalities like Hillsborough have the incentive to follow through on the commitments they make at the time the fair share plan is being considered, including the commitment to deal with the political consequences of the plan that may generate local opposition, as happened here.

Moreover, COAH's "expectation" that the sewer plan amendment would be forthcoming within two months undercuts any argument that the time delay is *de minimis*. If COAH and Hillsborough were correct in their optimistic projection, then it would do little harm to wait the extra two months and have the availability of infrastructure a certainty. As we have just demonstrated, the risk of delay beyond the initial, optimistic expectation, is a serious one, and it works to the detriment of creating a "realistic opportunity" for the provision of low and moderate income housing. [cite to ML2] Unless §5.3(b) is construed, as we suggest, to incorporate the pre-substantive certification requirement in all cases, then it is unconstitutional under the "realistic opportunity" standard of *Mount Laurel II*, not only as applied in the specific Hillsborough situation, but facially, because the risk of interminable delay and failure of oversight that we have described above is inherint in the process and constitutionally unacceptable.

3. It is doubtful that the PAC/HCF site is "approvable" because, after the receipt of substantive certification, the municipality initiated a review of whether development on the PAC/HCF site is appropriate. The PAC/HCF site was granted a General Development Approval pursuant to the Municipal Land Use Law, N.J.S.A. 40:55d-**, on [date], 1991, amended on [date] to reduce the size of the development from the original, gargantuan 11,000 housing units to "only" 3,000. To the extent that these approvals are valid and honored by Hillsborough, the site is not only "approvable" by "approved." However, it is far from clear that this approvale is either valid nor being honored by Hillsborough. As we noted above, substantial community opposition to development on the PAC/HCF site has erupted since COAH's substantive certification of the

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[7] The situation may be different where, because of limited land availability or financial constraints on the provision of new infrastructure, an unsewered site is the only one practically available for inclusion in a compliance plan. It is obviously preferable to include such a site and "gamble" that infrastructure will become available later, rather than exclude it and lose the opportunity to provide needed affordable housing altogether. But COAH's regulations already deal elaborately with this situation [cite]. And, in any event, this is not Hillsborough's problem; the township is huge, and there are numerous potential compliance sites in Plan

Hillsborough housing element and fair share plan in April, 1996, and in consequence, the site's developer, U.S. Home Corporation, withdrew its application for preliminary subdivision and site plan approval of the first phase of the proposed development on August **, 1996. [put the documents and news clippings in an Appendix, or add them to the record?] Moreover, the community group opposed to this development, Friends of Hillsborough, has raised a significant legal question as to whether the "floating zone" provision of the Hillsborough Zoning Ordinance, under which the PAC/HCF development is said to be "approvable," is valid under the Municipal Land Use Law. [collect some of Trombadore's citations in a footnote?] Finally, we note that more than five years has passed since the original General Development Approval, without any development activity at all. [develop the argument that the approval may have lapsed -- I don't have the cites or source law available].

This court need not resolve whether the developer has vested rights against Hillsborough sufficient that it could compel, as a matter of law, either that the township proceed with future approval of the development, or financial compensation for any damage done to the developer's interest. The point is that Hillsborough, by its own actions in listening to the complaints of local citizens, has raised a considerable doubt about whether this project will ever be built, certainly in its present proposed form. While it has been held that a municipality is not constitutionally bound to approve the "best" development in its compliance plan, [cite], it has also been recognized that as between a development with a good likelihood of being built, and one with a very shaky prospect, the "realistic opportunity" standard requires that the more certain development be chosen. [cite -- I'm pretty sure there are Skillman/Serpentelli decisions on this point]

4. Summary: The priority for sites with infrastructure. Shorn of its Alice-in-Wonderland attempt to show that the PAC/HCF site has infrastructure "available" by defining "available" as "not available but might be, maybe, sometime, " the grant of substantive certification to Hillsborough Township is squarely in violation of the plain meaning of §5.3(b): "In reviewing sites, the Council [on Affordable Housing] shall give priority to sites where infrastructure is available." Infrastructure is not available to the PAC/HCF site, and it is anyone's guess whether it will become available during the current six-year fair share cycle, more than half of which has now expired. Infrastructure is just as plainly available at other "available, suitable, developable and approvable" sites within Hillsborough, including the objector site that was offered during the mediation phase of COAH's procedures, and COAH, by its own rules, should have given some such site "priority" for inclusion in the compliance plan. Instead, COAH brushed off the objector site with a flaccid explanhation that Hillsborough "did not prefer" it. Both the Council's own rules and the Constitution as interpreted in the *Mount Laurel* cases require more, much more, than this.

II. THE SUBSTANTIVE CERTIFICATION OF HILLSBOROUGH TOWNSHIP SHOULD BE SET ASIDE BECAUSE THE TOWNSHIP'S HOUSING ELEMENT AND FAIR SHARE PLAN IS BASED COMPLETELY ON THE PAC/HCF DEVELOPMENT IN PLANNING AREAS 4 AND 5 THAT, PURSUANT TO BOTH COAH AND STATE PLANNING COMMISSION RULES, SHOULD BE IN A DESIGNATED CENTER, AND THE PURPORTED "WAIVER" OF THAT CENTER REQUIREMENT IS INVALID BECAUSE:

1. COAH's Policy of Granting Informal Waivers Violates the Established Rules of Administrative Procedure; and

2. The Waiver for the PAC/HCF Site Fails to Meet the Formally-Established Criteria in the COAH Rules for Granting Waivers; and

3. The Attempt to Avoid the Center Designation by Applying the No-Centers Policy of Planning Area 2 is Irrational as a Matter of Law.

Background: The Centers Policy. The key compromise that permitted consensus agreement on the SDRP was the adoption of the "centers" policy. The earliest draft versions of what became the Plan were built around the so-called "push down/pop up" approach, in which development on environmentally sensitive agricultrual and open space land would have been prohibited or discouraged ("pushed down"), and more intensive development would have been encouraged ("popped up") in or near existing urbanized areas, where infrastructure was available or could be provided effciently. While the rationale for preserving open land and encouraging compact development remains the central premise of the SDRP, the "push down/pop up" approach was anathema to undeveloped municipalities who felt, not without some justification, that the plan would deprive them of the tax ratables and employment opportunities without which their viability might be in jeopardy. Hence, the "centers" compromise, under which development would be permitted throughout the state, even in areas earmarked for significant efforts to preserve agricultural or environmentally sensitive land, but in these areas -- Planning Areas 4 and 5 in the final SDRP -- "sprawl" development would be replaced as much as possible with development in "communities of place," compact areas (centers) where infrastructure was available or could be provided efficiently. So critical is this concept of compact development in centers with a diversity of uses closely interconnected that "communities of place" became the formal title under which the State Development and Redevelopment Plan was presented to the public and, ultimately, adopted.

The Centers requirement. The COAH Regulations purport to be consistent with the SDRP. NJAC 5:93-5.4(c) unambiguously requires 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 accomodate 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.* [Emphasis added.]

There are two significant aspects of this regulation. First, the language is mandatory: COAH *shall* require compliance in centers; no exceptions are provided for. Second, the regulation underscores the importance of the SDRP centers policy by requiring (again, the mandatory *shall*) that new or expanded centers be designated *by the State Planning Commission* if necessary to meet the municipality's own fair share proposal. In terms of measuring compliance with COAH's own regulations, it is of no significance that the PAC/HCF site has been "included" in the Resource Planning and Management Map of the SDRP, or that it has been "identified" as a prospective "center" by unilateral action of the municipality. Until the site is in fact designated as a center by the full State Planning Commission (not its staff), it cannot be included in a Compliance Plan that meets the criteria of §5.4(c). [This needs work based on Irene's memo -- I can't find the specific "identify" language]

COAH's informal waiver policy is invalid. The Compliance Report, p.4, acknowledges the mandatory nature of §5.4(c) and indicates that Hillsborough has requested a waiver of that procedure. Although the COAH regulations provide specific criteria for granting waivers of the regulations, see N.J.A.C. 5:93-15.1, COAH's Hillsborough Compliance Report all but ignores its own waiver provisions, and instead places primary reliance on what it describes as a "policy" implemented independently of the formal regulations. Compliance Report, p. 5. Pursuant to this purported "policy," a site may approved in Planning Areas 4 or 5 without a center designation if it is proposed jointly by the developer and the municipality, has water and sewer capacity, and is available, approvable, suitable and developable. COAH acknowledges that this "policy" has not been formally adopted as an exception to N.J.A.C. 5:93-5.4(c), see Compliance Report, p.6. Instead, it baldly describes an "agreement" reached after "a meeting" with "representatives" of the State Planning Commission and the Office of State Planning that it would *not* amend the Regulations, but instead would "articulate" its policy, which it apparently did at its December, 1994, meeting and, thereafter, by publishing the purported "policy" in its Newsletter.

This extraordinarily cavalier approach to administrative practice is completely invalid. Having adopted a rule, §5.4(c), which requires development in centers, and having futher adopted a rule, §15.1, governing waiver of §5.4(c), it cannot simply ignore these rules and adopt informally a "policy" which is completely at variance with the formal Regulations. An agency

is required to follow its own rules ... [Matt Garamone][8]

Applying the informal policy. Even if one were to accept for sake of argument that COAH's informal waiver policy can be applied to the PAC/HCF site, it would be inapplicable to the PAC/HCF site because, as we have demonstrated in Point * above [or below], the PAC/HCF site does not in fact have water and sewer capacity and did not have it at the time of substantive certification.

COAH's formal waiver policy. Shorn of the spurious reliance on the invalid, unadopted non-regulation, COAH's certification of the Hillsborough fair sharee plan and housing element must be defended, if at all, on COAH's actual waiver regulation, set forth in N.J.A.C. 5:93-15.1. COAH turns to this almost as an afterthought ("moreover," bottom of p.5), perhaps recognizing that this, too, is a slender reed. Section 5:93-15.1(b) (which does not contain any stated exceptions for informal "policies"), establishes the standards that COAH must apply in considering waiver requests. It is broad enough to allow COAH a great deal of flexibility in

[8] The embodiment of this "policy" is a COAH memorandum dated March 10, 1995, which is included as Appendix B to the Hillsborough Compliance Report. In the Compliance Report itself, p.6, COAH states that the "policy" offers two specific categories of waivers, of which the second is said to apply to Hillsborough. Unfortunately, these two "categories" are not clearly identified in the policy memorandum, and numbered paragraph (2) on the second page of the policy clearly does not apply to Hillsborough, since it deals with objector sites and does not establish clear criteria for a waiver. Rather, numbered paragraph (1) appears to be applicable, since this deals with sites proposed jointly by the developer and the municipality, which is the Hillsborough situation. These ¶¶1&2 are apparently intended to be understood as subcategories within a larger category of "new" applications, which is preceded in the policy memorandum by a brief statement about waivers for "previously certified" (i.e. "old") sites in Planning Areas 4 and 5. Note further that ¶1, the provision that COAH appears to be relying on for the Hillsborough waiver, on its face applies only to waivers of §13.4, not §5.4. Section 13.4 deals with site specific relief to objectors, i.e. builder's remedy situations, and thus is facially inapposite, because the only formal developer-objector in the Hillsborough case was Anatole Hillier. It was Hillsborough which proposed the PAC/HCF site, to which the developer agreed (see Appendix *), so there is no basis for it to be an objector.

The greivous ambiguity in this purported "policy memorandum" might have been avoided had the "policy" been proposed as an amendment to the rules and subjected to public comment. But of course, had COAH chosen to procede this way, as it should, it could realistically have anticipated opposition to the policy of Planning Area 4 waivers itself, which it neatly avoided by resorting to irregular and invalid informal procedures of adoption.

administering its rules, but it is not completely without substance:

> (b) 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 an unnecessary hardship.

Note below:[9]

On its face, §15.1(b) appears to apply the three criteria in disjunctive form; any one of the three would do. If it actually was COAH's intent in drafting the rule that any one of the three criteria would suffice to justify a waiver, the waiver provision would be unconstitutional. If any one of the three criteria will suffice, then a waiver could be granted even though it did not foster the production of low and moderate income housing, or it was contrary to the spirit, as well as the letter, of the rules, or compliance without a waiver would entail no hardship at all. So open-ended a rule, which essentially permits COAH to waive anything it wants whenever it wants, is fundamentally at odds with the requirements of constitutional due process, which requires that the agency be bound by meaningful standards. [Insert Ed's boilerplate here on due process.] Moreover, even apart from these general due process considerations, disjunctive application of the provisions of §15.1(b) would be unconstitutional under the "realistic opportunity" standard of Mount Laurel II, which governs both the Fair Housing Act and NJAC 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.

These constitutional difficulties can be avoided, however, by construing §15.1(b) conjunctively rather than disjunctively. This apparently is how COAH intends them to be treated, since in the Hillsborough Compliance Report it argues that Hillsborough satisfies all three standards. An agency's interpretation of its own rules is entitled to deference, [citation; any cases involving implicit interpretations?] especially where necessary to avoid constitutional questions.

[9] Note to Ed, Jim and Barbara: the italicized paragraphs which follow are revised from the prior draft, to incorporate Ed's suggestion that we pitch the conjunctive/disjunctive problem in terms of basic due process. This revision saves a place for the change. Ed will have to come up with the specifics, however. (There are no other major changes in the prior draft.)

While we agree with COAH that §15.1(b) should be read conjunctively, we strongly disagree with its conclusion that Hillsborough meets all three criteria for the granting of a waiver. On the contrary, it satisfies none of them.

An approach to evaluating waiver requests affecting the SDRP. Without commenting one way or the other on waiver requests that may affect other important statutory or constitutional goals, we suggest most strenuously that when the waiver request has a demonstrable impact on the State Development and Redevelopment Plan, as does Hillsborough's request that COAH ignore the Plan's centers policy, the request must be justified by considerations sufficiently strong to overcome the "appropriate weight" that the State Planning Act [cite] mandates be given to the SDRP. [elaborate on this a bit?]

We consider each of the three criteria established by §15.1(b) in the light of this enhanced standard of persuasiveness for granting a centers designation waiver:

1. Fostering the production of housing. COAH argues that the waiver "fosters" production of housing by allowing the PAC/HCF site to satisfy Hillsborough's fair share obligation. This is hopelessly circular reasoning, because, by definition, *any* housing approved within a fair share plan will "foster" the production of housing. We submit that on its face, this basis for granting a centers waiver is insufficient.

To constitute a genuine reason for granting a centers waiver,[10] COAH should be required to conclude that the housing produced as a result of the waiver will enable the municipality to satisfy a portion of its fair share *that otherwise could not be produced.* Even then, we suggest, housing production alone should not be sufficient to justify a waiver; the gain in housing would have to be balanced against the damage done to the policies of the state plan, and clearly outweigh such damage.

Neither COAH nor Hillsborough can satisfy this suggested standard, because the record demonstrates that there are other sites in Hillsborough that could easily satisfy Hillsborough's obligation within Planning Area 2, where infrastructure is available, where the SDRP

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[10] As we indicated above, the enhanced standard of justification applicable in the context of a waiver that adversely affects the state plan, might not have to applied when evaluating other categories of waiver requests, e.g., minor deviations from the density standard of §___ or the mandatory minimum percentage set-aside requirement of §___. The Court need go no further in this case than to declare the housing production criterion partially invalid, rather than striking it in toto from the body of N.J.A.C. 5:93.

contemplates further development, and where a center designation is not required. Nor is it relevant that one such site, that controlled by Anatole Hillier, who participated as an objector during the mediation phase, was withdrawn after Hillsborough (with COAH's backing [may need to explain this]) "chose" [cite to Report pg.] the PAC/HCF site over the Hillier site. If this is all that is needed to demonstrate that a waiver can be granted (particularly if the three criteria are disjunctive), then the waiver provisions of §15.1(b) are essentially self-executing on the part of the municipality and the COAH regulations have virtually no substance at all.

Intent of the rules. COAH next argues that granting a centers designation waiver for the PAC/HCF site conforms to the intent, if not the precise letter, of its Regulations. Of course, the waiver does not conform in any way with the letter of the rules; it is explicitly contradictory to the requirement of §5.4(c) that there be a center designation in Planning Area 4 or 5. It would be the grossest kind of doublespeak to suggest that the "intent" of the Regulations is furthered by flatly ignoring them. Instead, COAH concludes that the waiver is consistent with the intent of the rules because it is consistent with the informal "policy" of granting center waivers in Planning Areas 4 and 5. As we have already demonstrated, the purported "policy," never subjected to public notice and comment and then formally adopted, cannot be a legally valid basis either for acting independently of §15.1(b) or for demonstrating consistency with the intent of the Regulations as required by §15.1(b)(2).

Nor can COAH demonstrate consistency with the spirit of the rules by arguing that the six criteria it applies in its informal policy are themselves consistent with either the letter or the intent of the formal regulations. The six criteria are:
[insert]

It is irrelevant, we submit, that the waiver site (the PAC/HCF site in this case) is part of a 12-year compliance plan, and that it is available, approvable, developable, and suitable. These are requirements for inclusion of *any* site in a certified housing element and fair share plan and thus, stripped of their rhetorical trappings, justifying the waiver of the PAC/HCF site on the basis of these criteria says nothing more than that COAH can grant any waiver it wants, so long as the site would be approvable but for the pesky requirement of the center designation. So open-ended an approach can hardly be justified under the "intent of the rules" criterion of §15.1(b)(2).

Nor, we note, would the waiver be appropriate in any event under the circumstances of this case, even if these vacuous criteria were to be applied. The PAC/HCF site is not developable without water and sewer approval which, as we have demonstrated, see Point * above, was not the case when substantive certification was granted and is not the case now. Nor is the site suitable. It is not in a designated center, see §5.4(c), and it is hopelessly circular to justify waiver of the center designation on the ground that once waived, the site is by definition suitable.

Putting aside these unworkable criteria, the real rationale for COAH's informal waiver policy, and it claim that the informal policy is consistent with the "spirit" of the rules, becomes apparent. It is that the site requiring the waiver be *jointly proposed by the developer and the municipality.* COAH's basic regulatory strategy, which permeates all of its rules, not just the waiver provision and the informal policy before the court in this case, is to encourage municipal participation in the COAH process by bending the standard of compliance with the fair share obligation established in *Mount Laurel II* to the absolute minimum that the constitution will allow.[11] It is indicative of COAH's true mindset that, in the informal policy, it "offers" a waiver to municipalities, as if compliance with the constitution is a bargain to be struck at the lowest common denominator.

Apparently, in COAH's view, the overriding concern of its regulations, and the reason why a Planning Area 4 or 5 waiver is consistent with the spirit of the regulations, is to induce participation in the process itself, ultimately without regard to how many needed units of housing are built (the "substantial compliance" reduction) or how much damage is done to the State Development and Redevelopment Plan (the waiver provision at issue in this case). This approach is akin to that of the merchant who builds store traffic on an off day by offering double coupons on Wednesday. To "reward" municipalities for coming "voluntarily" to COAH, they are offered the opportunity to simply ignore the rules.

This rationale for granting a centers waiver is nakedly logical. If the sole purpose of COAH and its regulations is to induce municipal participation in the process, and if municipalities prefer to develop without bothering to comply with the centers designation process, as Hillsborough apparently does, then the waiver is consistent with the intent of the rules and within their spirit in that it makes participation more attractive to Hillsborough. But such a construction of the "spirit of the rules," we submit, makes them patently unconstitutional as a violation of *Mount Laurel II*'s realistic opportunity standard. Again and again in *Mount Laurel II*, the

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[11] To give but one example, in this case Hillsborough was granted a 20% reduction in its obligation, a reduction of 40 units of fair share housing, for no other reason than that it had "substantially complied" with its constitutional obligation during the first fair share period, 1986-92. These are not 40 units that were actually built, in Hillsborough or elsewhere, despite the fact that they are 40 units that COAH's methodology has determined need to be built, in Hillsborough or elsewhere. The *sole* reason that Hillsborough is exclused from providing a realistic opportunity for the construction of these 40 units is that it didn't *violate* the constitution by refusing to provide a realistic opportunity for other needed units the last time around.

Supreme Court expressed its frustration with municipalities "going through the motions" ("papered over with ..." quote here). The constitutional requirement, the court stressed, was that municipalities create a *realistic opportunity* for an objectively established *fair share*. It is neither realistic or fair to construe the COAH rules so laxly that any compliance, without regard to the quality of that compliance, is within the "spirit" of the rules.

Even if it were otherwise, such a vapid approach to the "intent" of the rules would be incompatible for, as we have suggested above, the standard for waiver requests that impede effectuation of the state plan must be stricter than "nakedly logical." Even if one concedes, for the sake of argument, that encouraging municipal particpation, without more, justifies a waiver of some of the rules, that rationale cannot meet the requirement of the State Planning Act that COAH give "appropriate weight" to the State Plan when making its decisions. At very least, COAH must make a showing that compliaaince with its fair share obligations cannot be achieved with less damage to the state plan. And that neither COAH nor Hillsborough can do where, as here, there are readily available and approvable sites in Planning Area 2 that can supply the municipality's fair share. COAH's compliance report is devoid of any reason for Hillsborough's rejection of the Anatole Hillier site, which is located in Planning Area 2 where further development is not only appropriate but encouraged under the State Plan; Hillsborough simply said "no" and COAH accepted this self-serving reason as adequate because of its "policy" of giving municipalities their way to encourage "participation" at all costs. The state planning process, we confidently submit, requires more than this. Thus, the waiver for the PAC/HCF site cannot be granted under §15.1(b)(2) because it is not in keeping with any legitimate "intent" or "spirit" of the COAH Regulations.

Unnecessary hardship. Finally, COAH argues that without a waiver, there would be an "unnecessary hardship" (§15.1(b)(3)).[12] It gives no explanation of what the term "unnecessary hardship" means, and the term is not further defined in the Definitions section of the regulations, NJAC 5:93-1.3. From the internal evidence of COAH's Hillsborough Compliance Report, it seems to equate "unecessary hardship" with "good faith," since that is the only evaluative term used in its analysis of this waiver criterion. Unfortunately, other than ritual incantation of the phrase "good faith," COAH offers no persuasive demonstration that Hillsborough will encounter

[12] We note that §15.1(b)(3) does not specify "hardship" to whom, but in the Hillsborough Compliance Report, COAH treats the provision as applicable to the municipality rather than to the developer. This is the only plausible reading, since the developer has no constitutional or statutory "right" to have its site chosen for inclusionary zoning, and the municipality has both a statutory and a constitutional obligation to comply with the *Mount Laurel* doctrine.

any hardship if it is required by COAH to select a compliance site compatible with the State Plan from amongst those readily available in Planning Area 2.[13]

It bears recalling the wisdom of *Mount Laurel II*, that good faith in and of itself is insufficient to excuse a municipality from complying with the constitutional obligation. [cite] Translated to this issue, we suggest that good faith can be relevant to the question of waiver only to the extent that the municipality *relied* in good faith on an authoritative invitation to include the PAC/HCF site in its compliance plan, and that as a result of the reliance, it lost in some way an opportunity to include an alternate, better site. [does this make sense?] Here, the COAH Compliance Report strains to suggest that Hillsborough somehow relied in 1991 on COAH's regulations for compliance with the 12-year fair share obligation that was not even adopted by regulation until 1992[correct date?]. (Note that Hillsborough did not include the PAC/HCF site in its 6-year compliance plan, the one running from 1988-92, and that when it did include it in the 12-year, 1993-99 plan, the SDRP had been adopted, thus negating any claim of good faith reliance. Nor does the Compliance Report establish any factual basis for the claim of good faith; Hillsborough's fond wish that it include this site in some future COAH plan is hardly the basis for a hardship waiver.

Thus, we submit, the case for waiving center designation for the PAC/HCF site utterly fails. It complies with none of the three formal waiver criteria established in §15.1(b), and the informal "policy" on which COAH places greatest reliance is legally irrelevant because it has not been properly adopted; even were the informal "policy" to be considered, the PAC/HCF site fails to qualify for a waiver because sewer infrastructure is not in fact available to the site.

3. COAH's ingenious attempt to sidestep the centers requirement altogether. As if in anticipation that the waiver approach is fatally defective, as we have just shown to be the case, COAH (with the unfortunate complicity of the Director of the Office of State Planning) offers a second rationale for including the PAC/HCF site in the compliance plan, namely, *that a center designation is not required at all, even though 95% of the the site concedely lies in Planning Areas 4 and 5.*

This astonishing argument unfolds in the following fashion: The State Plan, it is argued,

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[13] As we have already explained, the failure of Anatole Hillier to pursue his objection to the proposed substantive certification in the light of COAH's manifest acquiescence in Hillsborough's preference for the PAC/HCF site does not indicate that the site is not available, but only that it would have been economically foolish to have pursued a losing cause within the COAH process.

provides that where a designated center lies across the boundary of two different planning areas, the policies of the lower-numbered area will apply in the center. [State Plan Policy #20, p.28.] Five percent of the PAC/HCF site lies in Planning Area 2. [cite to record] Centers need not be designated in Planning Area 2 [cite].[14] Therefore, the PAC/HCF site need not be designated a center.

The technical fallacy is in this argument is readily apparent. State Plan Policy #20, on which Director Simmens relies,[15] applies to *already designated centers*, not to the process of *designating* a center. [is there anything in the SPC Regs which contradicts this statement?] Thus, if the PAC/HCF site were already a designated center (it is not, which is the central awkwardness in this case for COAH, Hillsborough, and Director Simmens), then the substantive policies of planning area 2 would apply, for instance [give an example from the PA2 rules]. But it makes nonsense of the rules and policies to interpret them to mean that in figuring out which ones to apply to a line-straddling center, we can conclude that the need for a center disappears, so that there no longer is a line-straddling center as to which we need figure out which rules apply.

It is also readily apparent why a center designation is not required in Planning Area 2. There, sufficient development has already taken place, and sufficient infrastructure has already been provided, that the Plan has made an *a priori* policy judgment that further development is to be permitted, indeed encouraged in preference to "sprawl" development in Planning Areas 4 and 5. [what about 3?] One way to encourage development where it is most desirable is to make it simpler to achieve, i.e. by eliminating the extra procedural step and substantive provisions of center designation that are applicable in Planning Areasa 4 and 5.

The pernicious effects of the "interpretation" proposed by Director Simmens and acquiesced in by COAH are evident in the Hillsborough example. 705 acres (95%) of this 742 acre site lie in Planning Areas 4 or 5, where center designation is required by the SDRP before development takes place. Only 37 acres lie in Planning Area 2, where intensive development is encouraged throughout the planning area. Yet this miniscule tail wags the dog and, in the OSP/COAH view, allows development of all 742 acres *as if it were* Planning Area 2, not because

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[14] Simmens letter, p.2, says that the no center in PA2 comes from the MOA, but not so. He must mean that it comes from the SP, which MOA says they will obey.

[15] We emphasize the personal role of the Director of the Office of State Planning, Herbert Simmens, because the record indicates that "waiver" of center designation for the PAC/HCF site was opposed by OSP staff [cite Tom Dallessio letter if we can] and never reviewed or approved by the members of the State Planning Commission, the policy-making body charged with ultimate responsibility for the State Plan.

it has been designated as a Planning Area 4/5 Center, but because it doesn't have to be a center at all. In effect, the OSP/COAH approach permits *de facto* amendment of the mapped planning areas by the unilateral action of a private developer who takes care to assemble a corridor from Planning Area 4 back to Planning Area 2.[16] It is a bit like the medieval practice of purchasing indulgences, after which anything goes.

This may sound initially like an extreme and overstated description of the consequences of the Simmens/COAH approach, but the actual Hillsborough facts demonstrate how unprincipally manipulable the approach can be. Either fortuitously or by careful strategic planning, the developers who assembled the PAC/HCF site not only ended up to their advantage with a vestigial 5% of their land in Planning Area 2, but a significant part of that vestige [give specific number of acres if possible] i*s already developed* with the Foothills Acres Nursing Home [correct name?]. Thus, the "HCF" (Health Care Facility) part of the PAC/HCF label for this site actually makes no new contribution at all to the much vaunted objective of "meeting the needs of an aging population in Hillsborough."[17] (quote and cite accurately). Shorn of its window dressing, this is primarily a "PAC" (Planned Adult Community), complete with gates, golf courses, and up-scale condominiums. Apparently it is not even eligible for designation as a "center" because of its age-restricted nature. [cite Simmens letter] But none of that matters; the State Plan itself hardly seems to matter. Under the Simmens/COAH approach, owners of boundary-line parcels in Planning Area 2 can anticipate a windfall in value, because controlling such a site in conjunction with adjacent (or connected) land in Planning Area 4 will unlock the riches of plan-busting development without the inconvenience of addressing the centers policy of the State Plan.

Conclusion. COAH's grant of substantive certification to Hillsboro Township, based either on the formal waiver criteria of §15.1(b), on the purported "policy" of waivers in Planning Areas 4 and 5, or the spurious Simmens/COAH reasoning that a center is not a center so long as a little bit of Planning Area 2 can be bought, amounts to a massive repudiation of the State Plan and, indeed, of the concept of rational land use that undergirds the Plan. Despite nominal obeisance to the Plan ("While COAH confirms its support of the SDRP and encourages center designation..."[COAH Compliance Report, p.5]), its action neither "supports" the plan nor "encourages" development in compact centers. It instead blasts a 742-acre hole through the

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[16] Add a footnote giving the technical details on how a PA map amendment is supposed to be made according to the statute or the SPC Regulations

[17] Because the General Development Plan approved for the overall PAC/HCF site is quite vague, it is impossible t6o tell whether other "Health Care Facilities" will be newly-developed. It is highly unlikely, however, that additional nursing home beds will be provided. -- we need more precise info on what will be included in the overall development.

planning process which, if allowed to stand, will "confirm" only that the planning process is moribund in New Jersey. In order to save the State Plan from total collapse, the substantive certification of Hillsborough Township's housing element and fair share plan must be rejected decisively by this court.

III. [Add Jim Ryan's section here, about COAH methodology -- not on disk]