

Brief of Appellant New Jersey Future, Inc.

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

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

CIVIL ACTION

BRIEF OF APPELLANT NEW JERSEY FUTURE, INC.

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## INTRODUCTION

This case presents an issue of first impression that will significantly influence the future of sound land use planning, growth management, and natural resource conservation in New Jersey.

In its formally adopted regulations and in its Memorandum of Understanding ("Memorandum") with the State Planning Commission ("Planning Commission"), the Council on Affordable Housing (COAH) has fully embraced the policies and procedures of the State Development and Redevelopment Plan ("State Plan") and has promised to abide by them. By granting substantive certification to Hillsborough Township's Housing Element and Fair Share Plan, however, COAH violated two key provisions of its own regulations that are intended to effectuate the policies and principles of the State Plan. COAH approved a massive sprawl development on working farmland in Planning Areas that the State Plan has classified as rural and environmentally sensitive. It did so without even a pretense of requiring that the development attempt to qualify as a "Center" under its own regulation, N.J.A.C. § 5:93-5.4(c), which implements the State Plan's "Communities of Place" philosophy. Compounding this error, COAH approved a development that does not have sewer infrastructure available and does not have any realistic prospect of obtaining sewer in the foreseeable future, thus violating N.J.A.C. § 5:93-5.3(b), which implements the State Plan's policy on efficient provision of infrastructure. COAH's attempts to "waive" the rules it is breaking are unconstitutionally vague, procedurally improper, standardless, and in any event factually inapposite.

This case should be decided solely on COAH's failure to follow its own regulations. Supplementing and reinforcing that conclusion, however, are the constitutional imperatives that flow from the Mount Laurel doctrine. COAH's constitutional task, confirmed by statutory mandate through the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., is to insure that municipalities provide a "realistic opportunity" for the production of low and moderate income housing, and one key aspect of this "realistic opportunity" standard is that "sound planning" principles be respected. The conclusion is straightforward: either this Court must find that COAH is in violation of its own regulations, or it must find that the grant of substantive certification to Hillsborough is invalid and unconstitutional.

In Point I, we present the constitutional and statutory background of the "sound planning" standard. Points II and V demonstrate how COAH violated its "Centers" regulation, while Points III and IV address the constitutional flaws in and the misapplication of COAH's waiver policies. Point VI documents the inappropriateness of allowing affordable housing to be constructed on lands that COAH excluded when it calculated the housing needs for the region. Point VII describes COAH's failure to ensure that sewer infrastructure is available for the site. Point VIII concludes by returning to the constitutional issue that could have been avoided had COAH simply followed its own regulations faithfully.

STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1/</sup>

The Township of Hillsborough proposed to meet its constitutional Mount Laurel obligation for the years 1996-2002 by filing a petition for "substantive certification" of its Housing Element and Fair Share Plan (Fair Share Plan) with the Council on Affordable Housing (COAH) on February 28, 1995. 3Aa77.<sup>2/</sup>

Hillsborough proposed construction of 96 age-restricted units and 40 family rental units in a Planned Adult Community/Health Care Facility ("PAC/HCF" or "Adult Community") with a total of 3,000 units on a 742-acre site located primarily on actively farmed land in the rural Planning Area 4 under the State Development and Redevelopment Plan ("State Plan"). 2Aa20; 22Aa231-2.

At issue in this case is the relationship between the State Plan, COAH's regulations, and the Memorandum of Understanding agreed to by COAH and the Planning Commission with respect to these issues. Appellant presents a brief description of these documents before exploring the detailed facts of this case.

The State Development and Redevelopment Plan

The State Planning Commission adopted New Jersey's first State Development and Redevelopment Plan (State Plan) on June 12, 1992. 8Aa157. The State Plan delineates five Planning Areas which "serve a pivotal role in the State Plan." State Plan at p.

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

2/ References to Appellant's appendices are presented in the following format: "TAapppp," where "T" is the tab number, "Aa" refers to "Appellant's appendix", and "ppp" is the page number in the appendix.

5; 28Aa286. Planning Areas 1 through 3 are designated for additional development. Planning Area 2, for instance, is classified as a Suburban Planning Area where development outside of designated Centers is permitted. Id. at 105; 28Aa305. Planning Area 4 is classified as a Rural Planning Area where development is to be limited and confined to designated "Centers." State Plan at 112; 28Aa312. Planning Area 5 is an Environmentally Sensitive Planning Area where development is also to be confined to Centers. Id. at 114-15; 28Aa314-315.

The State Plan created the concept of Centers as the organizing planning principle for achieving a more effective and efficient pattern of development in New Jersey .... [N]ew growth and development should be organized into compact development in the form of Centers surrounded by carefully controlled environs by way of municipal master plans and regulations and through public investment policy.

[ State Plan at 21; 28Aa291].

The adoption of the "Centers" policy was the key compromise that permitted consensus agreement on the State Plan. So critical was 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 Plan was presented to the public and, ultimately, adopted. Id. at 93; 28Aa300. The State Plan permitted development throughout the state, even in agricultural or environmentally sensitive land, but in these areas - Planning Areas 4 and 5 in the final State Plan - "sprawl" would be replaced as much as possible with development in "communities of place" or "Centers," where infrastructure was available or could be provided efficiently. Id.

## COAH's Regulations

There are two COAH regulations that lie at the heart of this matter. The first unambiguously requires that proposed affordable housing developments located in Planning Areas 4 or 5 be in designated centers:

In Planning Areas 4 or 5, as designated in the SDRP [State Plan], 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(c) (emphasis added).]

Simply put, when affordable housing is proposed to be constructed in planning areas designated as rural or environmentally sensitive by the State Plan, it shall be located in "Centers." If such housing is proposed for development in these planning areas outside of Centers, COAH shall require the municipality to identify and submit the Center to the Planning Commission for designation.

The second COAH regulation at issue requires that a municipality seeking to meet its fair share obligation by building new residential units "shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. § 5:93-1." N.J.A.C. § 5:93-5.3; 6Aa142. A

"[d]evelopable site means 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." N.J.A.C. 5:93-1.3 (emphasis added). The requirement that a site be "developable" is amplified by N.J.A.C. 5:93-5.3(b), which requires that "[a]ll 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 prior to substantive certification." (Emphasis added).

Section 208 (33 U.S.C. § 1288) of the Federal Clean Water Act, 33 U.S.C. § 1251 et seq., requires States to provide for areawide waster quality management plans. The plans are prepared pursuant to the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq. They are referred to as "208" plans. The Water Quality Planning Act prohibits DEP from granting "any permit which is in conflict with an adopted areawide plan." N.J.S.A. 58:11A-10. NJDEP requires a "wastewater management plan" to map sewer service areas and be adopted as an amendment to an areawide water quality management plan (208) plan. N.J.A.C. 7:15-5.1.

As will be more fully set forth below, the facts are that no DEP approvals have been obtained in this case despite COAH's requirement in its regulation that the approvals precede COAH's grant of substantive certification for Hillsborough's fair share housing plan.



COAH's Memorandum of Understanding  
with the State Planning Commission

In October, 1992, COAH and the State Planning Commission <sup>3/</sup> entered into a Memorandum Of Understanding:

to develop a cooperative planning process that will enable the Council to meet its constitutional and legislative mandates to develop a planning and financing mechanism for low and moderate income housing that is in accordance with regional considerations and sound planning concepts, and that will ensure that the Commission maintains, revises and sees implemented a State Plan that promotes a distribution of low and moderate income housing throughout New Jersey in locations and patterns that are consistent with the goals of the State Planning Act. Memorandum, N.J.A.C. § 5:93, App. F. 7Aa148.

In the Memorandum, COAH and the Planning Commission agreed to ten Basic Principles. Id. The Planning Commission accepts COAH's definitions of Mount Laurel compliance sites as developable, available, approvable, and suitable, and COAH accepts the Planning Commission's State Plan definitions for infrastructure, Centers and environs, identified and designated Centers, and critical environmental/historical sites. Id. Principle #7; see also N.J.A.C. 5:93-1.3; N.J.A.C. 17:32-1.4. COAH and the Planning Commission further agreed that the Centers policy would guide development in each planning area, "in a manner consistent with the goals, objectives, and policies of the State Plan" (Principle #5), and this agreement has been implemented by COAH in N.J.A.C. 5:93-5.4 and 13.1. The parties

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<sup>3/</sup> The State Planning Commission is charged with "preparing, revising, and updating the State Plan, and with facilitating implementation of the Plan through "cooperation and coordination among state agencies and local governments." N.J.S.A. 52:18A-199 and id. § 199(c)

also acknowledged that the Planning Commission's Resource Planning and Management (RPMM) system establishes Planning Areas and Centers, and is the "mechanism of the [State Plan] to effectuate the [State Planning Act's] mandates to provide a coordinated, integrated, and comprehensive plan for growth, development, renewal and conservation of the State and its regions, and to identify areas for growth, agriculture, open space conservation and other appropriate designations . . . ."

Memorandum; N.J.A.C. §§ 5:93-5.4, 13.1; 7Aa148. In addition, COAH agreed to the Planning Commission's Centers designation policy, as provided for in the State Planning Rules, N.J.A.C. 17:32-8. Principle #6; 7Aa149. This is memorialized in N.J.A.C. 5:93-5.4(c).

Hillsborough's Proposed "Adult Community" Site

The 742-acre site at issue was originally planned as an 11,000 unit, age-restricted development. The development was later reduced to 3,000 units. The site is zoned as agricultural land under Hillsborough's zoning ordinance. 30Aa330. Hillsborough has approved the massive development on the site pursuant to a "floating" "PAC/HCF" zoning ordinance which permits these high densities anywhere in the Township. 4Aa106.

Approximately 90 percent of the site lies within the rural Planning Area 4 on the State Plan. 22Aa231. An additional five percent of the site lies within the environmentally sensitive Planning Area 5. 22Aa231. The remaining five percent of the site contains an existing nursing home and lies within the Suburban Planning Area 2. 22Aa231.

It is undisputed that the "Adult Community" site has not been designated a Center by the State Planning Commission. In 1992, Hillsborough had "identified" the Adult Community site as a Planned Village Center in the State Plan Cross Acceptance process. "Identification" is a unilateral and informal procedure which precede a formal proposal to the Planning Commission to "designate" a Center. Hillsborough also discussed Center designation for this tract with COAH during mediation in 1996. 27Aa272. The designation was not pursued when the objector to the Hillsborough housing plan argued that the "Adult Community" site could not meet the requirements for Center designation. COAH Mediation Report, 27Aa273; see also 3Aa63.

#### COAH's Waiver of its "Centers" Requirement

Because the Adult Community site is located primarily in rural Planning Area 4, and because development in Planning Area 4 is required to be in Centers, Hillsborough requested a waiver of the "Centers" requirement. 3Aa38. COAH granted Hillsborough's request when it approved Hillsborough's plan on April 3, 1996. 2Aa11.

COAH based its waiver primarily on an "informal policy" (3Aa51-52) that resulted from "a meeting" with "representatives" of the Planning Commission and the Office of State Planning, where an "agreement" was reached that COAH would not amend its regulations, but instead would "articulate" its policy, which it apparently did at its December 1994 meeting. 3Aa51 COAH's informal waiver policy has never been officially published or subject to public comments through administrative procedures.

Instead, COAH published the purported "policy" in its newsletter. 3Aa34.

COAH's informal waiver policy facially applies only to waivers of N.J.A.C. 5:93-13.4. 3Aa51. However, N.J.A.C. 5:93-13.4 is not at issue in this case, because it addresses site specific relief when a developer has successfully challenged a municipality's plan. The "Adult Community" site developer is not challenging Hillsborough's plan. Thus, COAH's informal waiver policy does not apply to the facts of this case.

Under COAH's informal waiver policy, a site may qualify for an informal waiver of Center designation if "it has water and sewer capacity and accessibility." Id. It is undisputed that the site does not currently have sewer infrastructure nor has the DEP approved a plan for the site to be served by the regional sewerage treatment plant. See 33a; see also infra at p.11-13. In complete contradiction of these facts, COAH concluded that "[t]he site has water and sewer." 3Aa33 (emphasis added).

Pursuant to its informal waiver policy, COAH sought the advice of the Office of State Planning ("OSP") regarding Hillsborough's request to waive Center designation. The OSP Director<sup>4/</sup> responded that "[w]hile I am quite troubled by the loss of farmland which would result from the construction of the PAC at this site, I do not formally object to COAH action to waive center designation for this project." 3Aa62. The OSP

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<sup>4/</sup> The Office of State Planning (OSP) "shall assist the Commission (SPC) in the performance of its duties . . ." N.J.S.A. 52:18A-201(b). It is a staff agency, not a policy-making body. See generally id. § 201.

Director rationalized his acquiescence by relying on State Plan Policy #20, which states that "[i]n instances where municipalities and counties identify a Center at the intersection of two or more Planning Areas, the Center will be designated as lying within the Planning Area of least numerical value . . . ." (emphasis added) 8Aa159-160. Ignoring the fact that State Plan Policy #20 applies to designating a center, OSP reasoned that since the Adult Community site overlaps Planning Areas 2 and 4 and since development in Planning Area 2 need not occur in Centers, a Center designation is not necessary for the site. 3Aa62-63.

Finally, COAH also based the waiver of its Centers requirement on its waiver regulation, N.J.A.C. 5:93-15.1(b) which provides that:

- (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.

Appellant demonstrates in Point IV below why this regulation is unconstitutionally vague and without meaningful standards and, in any event, inapplicable to the facts of this case. See infra at p. 46.

The Absence of Sewer Infrastructure and the Unavailability of Sewer Capacity for the Site

Except for a small parcel within Planning Area 2, the Hillsborough "Adult Community" site is not sewerred, nor has the

DEP approved a plan for the site to be served by the regional sewerage treatment plant. 25Aa237 It is an undisputed fact that the "Adult Community" site did not receive either a wastewater management plan consistency approval or an approved amendment to the Somerset County Wastewater Management Plan from the DEP prior to substantive certification.

Hillsborough Township and Somerset County have had a checkered history since 1994 of submitting and then withdrawing 208 plans that include the Adult Community site. Hillsborough withdrew its 1994 plan submission in 1995 because objections were received by DEP during the public comment period. 13Aa206; 14Aa208. The first county wastewater management plan that included the "Adult Community" site at its present size (3,000 instead of 11,000 units) was submitted on May 31, 1996, nearly two months after COAH granted substantive certification to Hillsborough. There is at least a serious question regarding whether any plan was before DEP on April 3, 1996 when COAH granted substantive certification to Hillsborough.

In any event, the proposed county wastewater management plan that included the "Adult Community" site was before DEP for only four months. On September 24, 1996, the Hillsborough Township Committee requested that the county 208 plan be amended to remove the "Adult Community" site.<sup>5/</sup> In November 1996, the Hillsborough

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<sup>5/</sup> The Hillsborough Township Committee adopted a resolution requesting that Somerset County and NJDEP "cease any further review of the Hillsborough Township portion of the Somerset County/Upper Raritan Wastewater Management Plan." 24Aa236. Pursuant to N.J. R. Evid. 201(a) and 202, Appellant hereby requests that the Court take judicial notice of this resolution and the Hillsborough Township

Township Planning Board adopted a resolution similarly "petition[ing] the Somerset County Board of Freeholders to modify the Wastewater Amendment Plan as it applies to Hillsborough Township to ... defer action on the PAC HCF overlay zone of Hillsborough Township for at least six months ... contingent upon consultation with Township Attorney Halpern about whether this jeopardizes COAH certification."<sup>6/</sup> 25Aa237. Thus, as this brief is filed, there is no pending request at DEP for a wastewater management plan amendment regarding the "Adult Community" site nor can the Adult Community site be "approved for inclusion in the 208 plan amendment," which COAH required as a condition of its granting substantive certification. 2Aa19; 2Aa15.

Rejection of an Alternative Hillsborough Site  
for Affordable Housing

After Hillsborough petitioned COAH for approval of its fair share plan, a developer, Anatol Hiller, proposed that a 143-acre site be included in Hillsborough's plan in place of the "Adult Community" site. Mr. Hiller's site is located entirely within Planning Area 2 and has both water and sewer infrastructure available. 3Aa36. Mr. Hiller argued that the "Adult Community" site lies mostly within Planning Area 4 and thus must apply for Center designation, and that the site is not suitable for development because 95 percent of it lacks infrastructure. Id. COAH responded to the first objection by stating that the "site

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Planning Board Resolution 96-1694, dated November 7, 1996 (25Aa237).

<sup>6/</sup> The "contingent upon" phrase is added by hand at the bottom of the typed resolution.

meets the COAH criteria for a waiver." Id. As for the second objection, COAH stated that the Adult Community site was included in Somerset County's amendment to its wastewater management plan, which was pending before the DEP. Id.

Having rejected a 143-acre site in Planning Area 2 in favor of a 742-acre site primarily in Planning Area 4 (2Aa15), and having recommended that Center designation for the latter site be unilaterally waived (3Aa38), COAH staff recommended that Hillsborough Township be granted substantive certification. 3Aa38. This recommendation initiated a fourteen day comment period, during which one group - Appellant, New Jersey Future, Inc. - submitted objections.<sup>2/</sup>

#### Objections By New Jersey Future

New Jersey Future, Inc. ("NJF") is a non-profit organization with supporters throughout the State of New Jersey including those who own property in Hillsborough Township adjacent to the "Adult Community" site. NJF is committed to the principle of sensible and organized growth and development. It believes that the State Plan is the most important public tool New Jersey has to provide for a safe, healthy, and equitable quality of life for future generations. It also firmly concurs in the New Jersey Supreme Court's recognition that affordable housing and sound

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<sup>2/</sup> The Office of State Planning ("OSP") also requested that COAH condition its grant of substantive certification on two conditions: (1) a request from the Township for a consistency review of its master plan by the OSP, which would examine whether the Township's plan was consistent with the State Plan; and (2) that OSP be given the opportunity to review and comment upon the design of the Adult Community site. COAH rejected OSP's proposed conditions. 2Aa17.



planning can and should go hand in hand. See, e.g., Southern Burlington Co. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 225 (1983) (Mount Laurel II). Given that state agencies are still learning how to work with the State Plan, NJF views the Hillsborough case, and other early cases, as critical tests of the viability of the State Plan. It thus felt that it was important to provide COAH with its comments on the proposed grant of substantive certification to Hillsborough.

NJF submitted written comments on March 15, 1996, declaring that COAH's decision to grant substantive certification was premature. 3Aa72. NJF urged that COAH defer its decision pending resolution of three major issues. First, it noted that only the State Planning Commission is authorized to amend the State Planning Map; neither COAH nor the OSP is authorized to do so. Allowing development to occur outside of a designated Center in Planning Area 4 would effectively amend the Planning Map. Accordingly, NJF questioned whether COAH had the authority to waive Center designation and requested that substantive certification await approval from the State Planning Commission of an amendment to the Planning Map. 3Aa72.

Second, the Adult Community site was neither sewered nor had approval for sewers at the time of the petition for substantive certification. NJF asserted that it was improper for COAH to grant substantive certification absent sewer approval. 3Aa72-73. It thus requested that COAH await decision by the DEP regarding Somerset County's proposal to amend its wastewater management plan to include the Adult Community site. 3Aa72-73. Finally,

NJF requested that COAH await a determination by the State Planning Commission regarding Center designation. 3Aa73. Given the age-restricted nature of the development, NJF argued that it was unlikely that the State Planning Commission would designate the site as a Center. 3Aa75-76.

NJF maintained that COAH's proposed certification essentially supplanted decisions delegated to two other state agencies, namely the State Planning Commission and the DEP. Id. at 72-73. Only the Planning Commission is authorized to amend the State Planning Map and designate Centers; COAH's proposed unilateral waiver of Center designation thus supplanted the authority of the Planning Commission. Likewise, only the DEP can amend wastewater management plans; COAH's proposed substantive certification essentially assumed that DEP would grant the pending amendment. Moreover, the decisions that COAH supplanted would have required public input had they been decided by the relevant agencies. COAH's unilateral actions effectively quashed opportunity for public comment regarding these important concerns.

#### COAH's Grant of Substantive Certification

COAH rejected NJF's request that substantive certification be delayed, and on April 3, 1996, it granted substantive certification to Hillsborough Township. 2Aa24. COAH incorporated and relied upon its Compliance Report in granting substantive certification. 2Aa20. Significantly, COAH conditioned the grant on one of NJF's objections, that "[i]n the event that the PAC/HCF site is not approved for inclusion in the

[Somerset County wastewater management] plan amendment, Hillsborough shall be required to amend its housing element and fair share plan to address the 160 units in another manner."

2Aa22. Moreover, COAH required Hillsborough Township to report to COAH regarding the status of the amendment within "six months from the date of this grant of substantive certification (Oct. 3, 1996)." Id. The October 3, 1996 deadline by COAH has passed, and as far as Appellants are aware, Hillsborough Township has not reported to COAH regarding the status of the Wastewater Plan Amendment.

On May 20, 1996, New Jersey Future, Inc. filed a Notice of Appeal with this Court challenging this final agency action pursuant to New Jersey Court R. 2:2-3(a)(2). On October 9, 1996, COAH filed the Statement of Items Comprising the Record On Appeal ("SICRA"). On November 23, 1993, Appellant New Jersey Future, Inc. filed a motion with COAH to add items to the record. On February 4, 1997, COAH filed an Amended SICRA.

#### ARGUMENT

- I. COAH'S REGULATIONS ARE BASED UPON AND FORMALLY INCORPORATE KEY ELEMENTS OF THE STATE PLANNING ACT, THE STATE PLANNING RULES, AND THE STATE DEVELOPMENT AND REDEVELOPMENT PLAN.

The State Development and Redevelopment Plan shall be designed to represent a balance of development and conservation objectives best suited to meet the needs of the State. The plan shall . . . establish Statewide planning objectives in . . . land use, housing, economic development, transportation, natural resource conservation, agriculture and farmland retention ....  
N.J.S.A. 52:18A-200.

The massive, 3,000-unit, age-restricted golf-course community that Hillsborough has proposed to meet its Mount Laurel

compliance obligation and that COAH has substantively certified, is located almost completely in Planning Areas 4 and 5, planning areas that the State Plan has designated for rural preservation and environmental protection. State Plan at p. 110; 115.

28Aa310; 28Aa315 On its face, COAH's certification has destroyed the "balance of development and conservation objectives" that the State Planning Act has as its central objective.

COAH has incorporated the mechanisms of the State Plan process into its formal regulations, see N.J.A.C. 5:93-5.4(c). In doing so, it has effectuated the intent both of the Legislature and the Supreme Court that the Mount Laurel Doctrine be implemented in accordance with principles of sound planning. This connection between sound planning and fair housing is so important that COAH must be held strictly to implementing the State Plan policies that it has built into its regulations. It is irrelevant to speculate whether COAH might have implemented the Plan through a different regulatory approach or even, under some extremely hypothetical circumstances, whether it could disregard the Plan altogether. It has not done so (except in this case), and its substantive certification of the Hillsborough compliance plan is invalid because it violates its own Plan-implementing regulations.

A. The COAH Regulations. N.J.A.C. 5:93-5.4 (captioned "New construction; conformance with the State Development and Redevelopment Plan") meticulously tracks the distinctions drawn by the State Plan as to development in Planning Areas 1 through 5, "encouraging" but not requiring location in Centers in the

lower numbered Planning Areas, see N.J.A.C. 5:93-5.4(a), (b), but "requiring" that in Planning Areas 4 and 5, inclusionary developments either be in Centers or that the municipality petition the State Planning Commission for the formal designation of a new Center or Centers. Id. § 5.4(c). See also Point II, infra at p.24. The regulation even provides for municipalities divided between Planning Areas. Id. § 5.4(d). These provisions are reinforced by N.J.A.C. 5:93-5.6(b), which requires that in COAH's review of a compliance site, it determine, inter alia, "the site's conformance with the State Development and Redevelopment Plan pursuant to N.J.A.C. 5:93-5.4."<sup>8/</sup> The linkage to the State Plan is so clear and definitive that COAH displayed it in its regulations in graphic form as a flow chart. See N.J.A.C. 5:93, App. F, 7Aa150. Hillsborough proposes a major new development in Planning Areas 4 and 5 that is not in a designated Center. The proposal facially violates N.J.A.C. 5:93-5.4(c).

B. The legislative and judicial background. The importance of strictly enforcing COAH's regulatory version of the Centers requirement derives from the close constitutional relationship between the state planning process and the Mount Laurel doctrine.

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<sup>8/</sup> Although not directly at issue in this case, the COAH regulations likewise commit the Council to respecting the State Plan in one of its most sensitive and controversial tasks—the decision whether to permit "site specific" relief, i.e. a "builder's remedy." Recognizing the potentially deleterious effects of preempting normal land use processes when a litigant has prevailed over a recalcitrant municipality, N.J.A.C. 5:93-13.1(b) et seq. again meticulously tracks the distinctions drawn by the State Plan as to development in Planning Areas 1 through 5, generally requiring a much higher showing of appropriateness (including location in a Center) in sensitive Planning Areas 4 and 5.

One of the most significant decisions made by the Supreme Court in 1983, in the attempt to put "steel," see 92 N.J. at 200, in the Mount Laurel doctrine, was to allocate Mount Laurel's fair share obligations statewide in accordance with the delineation of "growth areas" mapped in a planning document entitled the State Development Guide Plan ("Guide Plan"). Chief Justice Wilentz described the Guide Plan as "the only official determination of the state's plan for its own future development and growth" and the "blueprint for the implementation of the Mount Laurel doctrine." Mount Laurel II, 92 N.J. at 225-226.

In response to Mount Laurel II, the Legislature adopted not only the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., but also the State Planning Act, N.J.S.A. 52:18A-196 et seq. The Legislature recognized that the linkage between these two laws was so important that it declared that the Planning Act "shall remain inoperative until the Fair Housing Act . . . becomes operative." N.J.S.A. 52:18A-196, Historical and Statutory Notes. The State Planning Act is founded on Legislative findings and declarations that:

It is of urgent importance that the State Development Guide Plan be replaced by a State Development and Redevelopment Plan designed for use as a tool for assessing suitable locations for infrastructure, housing, economic growth and conservation [and] . . . [a]n adequate response to judicial mandates respecting housing for low- and moderate-income persons requires sound planning to prevent sprawl and to promote suitable use of land. N.J.S.A. 52:18A-196(c), (h).

Thus, not only did the Legislature embrace the Supreme Court's tight linkage of the Mount Laurel doctrine to a policy plan for management of growth, but it sought to ensure that the new round

of compliance under the Fair Housing Act would be in accordance with an updated and rethought version of the state's sound planning policy. To this end, the Fair Housing Act specifies that COAH "shall give appropriate weight to ... implementation of the SDRP." N.J.S.A. 52:27D-307(e). This mandate recognizes the distinct regulatory role of COAH, but at the same time expresses the Legislature's insistence that COAH "implement" the State Plan, rather than defy it, as it has done in the Hillsborough situation. See also Van Dalen v. Washington Twp., 120 N.J. 234, 244 (1990) (declaring the State Plan as the successor to the Guide Plan).

As the Supreme Court understood in Mount Laurel II, it is the role of state planning (originally in the Guide Plan, now the State Plan) to express a comprehensive vision of the state's growth, redevelopment and land conservation policies. This vision is then to inform the specific work of the regulatory agencies at the state, county and municipal level.

This complex relationship between the State Plan as an authoritative expression of general state policy with respect to growth, redevelopment and conservation, and various state agencies, counties and municipalities as specific regulators of land use, is codified by the State Planning Act in a unique process called "cross-acceptance." N.J.S.A. 52:18A-202(b). During cross acceptance, state agencies, counties, and local governments were required to identify areas of agreement and disagreement with the draft State Plan so that, ultimately, the Plan would reflect realistic, rather than pie-in-the-sky goals

and objectives. Id. Moreover, by requiring review and updating every three years, id. § 199(a), the Legislature anticipated a more or less continuous process of dialogue. In cross-acceptance the Legislature found a politically acceptable mechanism for translating the State Plan's policies into working regulations utilizing the agencies that already possess regulatory authority.

Buttressed by cross-acceptance, however, the State Plan remains the authoritative expression of the state's overall approach to growth, redevelopment and conservation. And as such, it is the authoritative source to which the courts must look in evaluating challenges to agency decisions. This is exactly the course taken by the Supreme Court in Mount Laurel II, when it recognized the Guide Plan despite its lack of regulatory force. See Mount Laurel II, 92 N.J. at 233-34. As described in Mount Laurel II, an agency may attempt to persuade the Court to disregard the State Plan by force of reason, id. at 239-43, but it may not do so simply by asserting its power to disregard the State Plan altogether and that, in effect, is what Hillsborough and COAH have attempted to do in this case.<sup>2/</sup>

The Legislature actually wrote a specific example of the intended relationship into the Fair Housing Act itself. It required COAH to adopt criteria and guidelines for, inter alia, municipal adjustment of the present and prospective fair share

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<sup>2/</sup> For a current example of the use of the State Plan to guide a judicial decision, see Sod Farm Assoc's v. Springfield Twp. Planning Bd., 1996 WL 737011 (N.J. Super. Law Div. Nov. 8, 1995), aff'd o.b., 1996 WL 734880 (N.J. Super. App. Div. Dec. 18, 1996) (both opinions included at 29Aa318).



whenever the "pattern of development is contrary to the planning designations of the State Development and Redevelopment Plan . . . . ."  
N.J.S.A. 52:27D-307(c)(2)(e) This provision presumes that the municipal fair share is to be calculated in a way that is consistent with the State Plan, but if, in a given case, the actual pattern of development deviates from the Plan (for whatever reason), the municipality pursuant to guidance from COAH may adjust its fair share. This section does not mean that COAH is free to disregard the State Plan; on the contrary, it assumes that COAH will follow the Plan and instructs COAH not to do so when development has, in fact, occurred in violation of plan policies.<sup>10/</sup>

C. Conclusion. The Mount Laurel doctrine, the relevant statutes, and COAH's regulations are saturated with concern that the future of New Jersey not be lost through poor planning. Just as all three branches have confirmed the constitutional mandate that municipalities create a realistic opportunity for provision of their fair share of the regional need for low and moderate income housing (see Point VIII infra at pp. 57-64), so too have all three branches demonstrated that the requisite realistic opportunity is to be created in a manner that is consistent with

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<sup>10/</sup> If it were clear that an age-restricted adult community would in fact be built in the Planning Areas 4 and 5 land in Hillsborough, it would follow that COAH could appropriately certify a housing element and fair share plan that incorporated this growth-in-fact. As we shall show below, however, it is extremely speculative whether this development can or will be approved, and even if it were, COAH would be required to *increase* Hillsborough's fair share obligation proportionally, which it has not done. See Point VI, infra at p.49.

sound planning, as evidenced first in the Guide Plan and now in the State Plan. Indeed, a purported Fair Share Housing plan that is manifestly at odds with the State Plan does not and cannot create a "realistic opportunity" within the common constitutional, statutory and administrative senses of that term unless it can bear the very heavy burden of demonstrating that there is a superior alternative to the State Plan. There is no "realistic opportunity" in a plan that should not be approved.

Such is the problem faced by the Hillsborough Housing Element and Fair Share Plan. In blatant defiance both of the State Plan and of COAH's regulations requiring adherence to the State Plan's policies, and absent a coherent proposal for supplying infrastructure to its compliance site, the grant of Substantive Certification to Hillsborough is invalid, either because it violates COAH's binding regulations or because those regulations are unconstitutional as applied.

II. IN GRANTING SUBSTANTIVE CERTIFICATION TO HILLSBOROUGH TOWNSHIP, COAH VIOLATED THE FAIR HOUSING ACT AND ITS OWN REGULATIONS BY FAILING TO FOLLOW THE UNWAIVABLE REQUIREMENT THAT DEVELOPMENTS IN PLANNING AREAS 4 AND 5 BE LOCATED IN CENTERS THAT ARE FORMALLY DESIGNATED BY THE STATE PLANNING COMMISSION.

The Fair Housing Act requires that, in order to grant substantive certification, COAH "shall find that: a. [t]he municipality's fair share plan is consistent with the rules and criteria adopted by the council . . . ." N.J.S.A. 52-27D-314. COAH violated the Fair Housing Act and its own rules in granting substantive certification to Hillsborough by sanctioning

development outside of a designated Center in Planning Areas 4 and 5.

- A. Centers are the organizing planning principle upon which the State Plan is based.

The State Plan describes the concept of Centers as "the organizing planning principle for achieving a more effective and efficient pattern of development in New Jersey . . . ." State Plan at 21, 28Aa291. Encouraging growth in designated Centers optimizes and protects the characteristics of geographical areas, such as environmentally sensitive areas. State Plan at 93; 28Aa300. Particularly in Planning Areas 4 and 5, growth should be funnelled towards designated Centers to minimize the impact of development on the surrounding lands. State Plan at 112, 115, 28Aa312, 28Aa315. Centers are designated by the Planning Commission following a successful petition to amend the Resource Planning and Management Map. See N.J.A.C. § 17:32-8.1 et seq.

The adoption of the "Centers" policy was the key compromise that permitted consensus agreement on the State Plan. Rather than almost totally prohibit development in rural areas, the suggestion of which had caused much opposition when the first staff draft of the plan was published, the Plan as adopted permitted development throughout the state, even in agricultural or environmentally sensitive land, but in these latter areas- Planning Areas 4 and 5 in the final State Plan development would occur in "communities of place," compact areas called Centers where infrastructure was available or could be provided efficiently. See State Plan, 93, 28Aa300; cf. New Jersey State

Planning Commission, Preliminary State Plan, 20-21 (Nov. 1988),

B. COAH violated its own regulations by approving a Fair Share Housing plan based on a development site in Planning Areas 4 and 5 that is conceded to be outside a designated Center, and by failing to require that a new Center be proposed to the State Planning Commission for possible designation following the formal procedures which COAH bound itself to accept.

1. In violation of its own rules, COAH approved a compliance site that is conceded to lie outside a designated Center.

The COAH regulations, which are consistent with the State Plan, 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(c) (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 State Plan's Centers policy by requiring (again using the mandatory shall) that new or expanded Centers be submitted to and designated by the State Planning Commission if necessary to meet the municipality's fair share proposal. COAH amplified the requirement in this rule- that a Center must be designated by the State Planning Commission prior to the grant of substantive certification -in a flow chart

which it appended to and made a part of its formal regulations.  
See N.J.A.C. § 5:93, App. F, 7Aa152.

Since Hillsborough, COAH and the Planning Commission concede that the "Adult Community" site is not within a designated Center, 3Aa32-35, the substantive certification of Hillsborough's plan by COAH is facially in violation of its own rules.<sup>11/</sup> Until the site is in fact designated as a Center by the State Planning Commission, it cannot be included in a Compliance Plan that meets the criteria of section 5.4(c).

2. COAH violated its own regulations by failing to require that Hillsborough seek and obtain a Center designation pursuant to the State Planning Commission's statutory authority to designate Centers and amend the State Resource Planning & Management Map.

COAH might have avoided this facial violation by invoking the clearly established mechanisms of the Planning Commission which permit the designation of new centers in Planning Areas 4 and 5.

COAH's rules explicitly define the procedure which a municipality must follow where it is not proposing the inclusionary development within a Center. In that circumstance, the COAH rules unambiguously require that COAH "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(c) (emphasis

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<sup>11/</sup> New Jersey courts have clearly held that agencies are bound to follow their own regulations. See, e.g., Woodland Private Study Group v. New Jersey Dep't of Env'tl. Prot., 109 N.J. 62, 74 (1987).

added). COAH regulations also graphically depict this procedure in a flow chart which clearly demonstrates the requirement that a municipality must apply to the State Planning Commission for designation of a center before COAH may grant substantive certification. N.J.A.C. § 5:93, App. F., 7Aa152.

The COAH/Planning Commission Memorandum of Understanding amplifies that COAH will adhere to the procedural requirements set forth in the Planning Commission Planning Rules: "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." Memorandum, BP #6, N.J.A.C. 5:93, App. F.; 25 N.J. Reg. 1212 (March 15, 1993), Technical Appendix F, 7Aa149. The import of this agreement is perfectly plain, and quite significant for purposes of this case. Specifically, the Memorandum 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.<sup>12/</sup>

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<sup>12/</sup> The State Planning Rules cover all levels of government in the formulation and implementation of the State Plan, N.J.S.A. 52:18A-196; N.J.A.C. § 17:32-1.2(a)(5), and "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. Those petitioning the State Planning Commission 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

In the instant case, the Court need not determine whether COAH was obligated by the State Planning Act and Fair Housing Act, or by the Mount Laurel doctrine, to have entered into this agreement and to have written its regulations as it did. COAH, in its regulations, bound itself to defer to the Planning Commission's primary authority over Centers designation, and the caselaw makes it clear that in such a situation, an agency must respect the formal allocation of decision-making power unless and until it is formally reallocated-even where the second agency is a subdivision of the first agency.

In In re Waterfront Dev. Permit, 244 N.J. Super. 426 (App. Div. 1990), cert. denied, 126 N.J. 320 (1991), the DEP was not permitted to override the decision of its own Division of Coastal Resources (DCR) to decline to issue a permit for waterfront development because DEP had previously delegated its authority in that area by its own regulations to the DCR. Despite DEP's argument that the DCR was only a subdivision of the DEP, this Court upheld DCR's exclusive authority to issue waterfront development permits. Id. In the instant case, COAH has acknowledged in its regulations and in the Memorandum that COAH lacks the authority to designate a Center or amend the State Planning Map. That authority belongs to the State Planning Commission alone. See N.J.S.A. 52:18A-202(d) (giving the Commission the authority to make final revisions to the State

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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).

Plan, including the Map). If an agency is not permitted to override the authority of one of its own subdivisions, then it certainly cannot tread on the authority of a sister agency. Therefore, COAH cannot be permitted to perform a de facto amendment of the State Plan map by refusing to require Hillsborough to seek Center designation from the Planning Commission.

A particularly important consequence of requiring compliance with the State Planning Rules is that they clearly establish that "[o]nly the [State Planning] Commission may dispose of a petition," N.J.A.C. § 17:32-8.5(d) (emphasis added), except in delineated circumstances where the Director of the OSP is authorized to disapprove petitions to amend the Planning Map. Id. at § 8.5(f) (emphasis added). As the Supreme Court well understood in Mount Laurel II, sound planning is a broad concept which includes, but is not limited to, sound housing policies, and it is the Planning Commission, not COAH, that is statutorily charged with developing the expertise necessary to make sound planning decisions. Moreover, the Planning Commission is a large body broadly representative of key government agencies and private interests, and it is thus able to bring political and policy-making insight to its task. Just as the Supreme Court preferred legislative to judicial administration of the Mount Laurel doctrine, it is easy to appreciate why both this Court and the legislature should prefer administration of the critical "Centers" policy by the body that best understands the policy and



planning consequences of its decisions.<sup>13/</sup>

The importance of enforcing COAH's commitment to following the Planning Commission's rules is underscored by considering what would happen if the "Adult Community" site were to be proposed for designation as a Center. It is questionable whether the age-restricted development proposed in Hillsborough would qualify as a Center, because, as OSP Director Simmens acknowledged in his January 31, 1996 letter to COAH, 3Aa62, an age-restricted development is incompatible with the principle of a diversity of uses in Centers. 3Aa63.

Thus, in granting substantive certification in this case COAH violated its own rules, ignored the Memorandum with the Planning Commission, and circumvented the Planning Commission's rules governing Center designation. Not only did it do all of this without good reason (or any reason at all), it affirmatively harmed the delicate balance that is struck in the State Plan between the interests of land preservation and land development. (As we shall show below, COAH and Hillsborough did not need to certify this particular development in order to achieve legitimate fair share housing goals, because there are an ample number of alternative compliance sites. (Infra at p.44.) This court must reverse COAH's illegal actions and order COAH to abide

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<sup>13/</sup> In 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.S.A. 52:18A-202(d) (requiring the Commission to take fully into account the testimony from public hearings when revising the preliminary plan and adopting the final plan only after the final public hearing); N.J.A.C. § 17:32-8.5(h).

by its duly adopted regulations.

III. COAH MAY NOT WAIVE ITS CENTERS REQUIREMENT PURSUANT TO AN "INFORMAL" WAIVER POLICY WHICH IS INVALID BECAUSE IT WAS DEVELOPED WITHOUT PUBLIC NOTICE AND OPPORTUNITY FOR COMMENT.

Formal rulemaking is required when a "policy" is to be widely, uniformly, and prospectively applied, and it does not simply restate existing clear legal or administrative directives. Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 331-32 (1984) (establishing a 6-factor test for determining whether rule-making is required). See also In re Certain Amendments to Adopted and Approved Solid Waste Management Plan of Hudson Cty., 133 N.J. 206, 220 (1993) (requiring formal rule-making when rule would have a permanent effect beyond an immediate emergency).

COAH has adopted a rule which requires development in Centers, N.J.A.C. § 5:93-5.4(c), and a rule governing waivers of its regulations, N.J.A.C. § 5:93-15.1. COAH cannot simply ignore these rules and informally adopt a "policy" which is completely at variance with the formal regulations. See Woodland Private Study Group v. New Jersey Dep't of Env'tl. Prot., 109 N.J. 62, 74 (1987). In Woodland, the court found that a DEP administrative order and policy statement were intended to apply to regulated parties. Id. The order and policy were held invalid because they were unilaterally issued by DEP without any public notice or comment. Having adopted the informal waiver policy without adhering to procedural rules governing administrative rulemaking, COAH's informal waiver policy must similarly fail.

Informal regulatory policies are prohibited because they circumvent the fairness and due process safeguards built into the formal requirement of administrative rulemaking. Holmdel Builders Ass'n. v. Holmdel, 121 N.J. 550, 578 (1990) (discussing the importance of formal rulemaking in the context of COAH regulations). Due process demands that agencies limit their discretionary power by promulgating substantive and procedural standards and rules for the exercise of that power. Crema v. New Jersey Dep't of Env'tl. Prot., 94 N.J. 286, 301 (1983) (finding DEP's issuance of a vague and indefinite "conceptual" permit for a large residential development on environmentally sensitive lands void as beyond the scope of DEP regulations and issued without substantive criteria and public notice). The standards and rules delimiting agency power serve as a tool by which the public can assess whether an agency adheres to its legislative mandate. Holmdel Builders Ass'n, 121 N.J. at 577-78; Crema, 94 N.J. at 302 (noting that the public cannot give meaningful comment without firm knowledge of the factors the agency uses in making its decisions). Allowing COAH to ignore rulemaking procedures increases the risk of arbitrary agency action, and deprives the public of any meaningful mechanism to "shape the [regulatory] criteria that ultimately will affect public interest. Crema, 94 N.J. at 302.

COAH's "informal policy" has never been officially published or subject to public comments through administrative procedures. Instead, the policy resulted from "a meeting" with "representatives" of the Planning Commission and the Office of

State Planning, where an "agreement" was reached that COAH 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. 3Aa34

This extraordinarily cavalier approach to administrative practice is completely invalid. It deprives the public of the opportunity to comment on the adoption of a policy which has broad implications for the administration of COAH's rules. COAH's informal policy is in no way a restatement of an express legal standard; nor is it an attempt to deal with an emergency situation. COAH made a conscious decision to adopt an informal policy and not to amend its rules. COAH's only stated reason for the informal policy is that it misunderstood the facts when it adopted the formal rules. 3Aa34. Formal rule-making would permit the public to comment on whether there was a misunderstanding or not and, if so, how to correct it. Because COAH's practice undermines fundamental principles of administrative law, the "informal waiver policy" must be invalidated by this Court.

Moreover, even if arguendo, COAH's informal waiver policy is procedurally valid, it would be facially inapplicable to the Adult Community site. The informal policy only applies to sites that, inter alia, have water and sewer available. 3Aa52. The Adult Community site does not in fact have sewer capacity and did not have it at the time of substantive certification. See Point VII, infra, at p51. In addition, the informal policy facially

applies only to waivers of N.J.A.C. 5:93-13.4. 3Aa51-52. This section of the rules, however, deals with site specific relief when a developer has successfully challenged a municipality's plan;<sup>14/</sup> the developer of the Adult Community is most definitely not challenging Hillsborough's plan. Thus, COAH's informal waiver policy, even if it were valid, could not have applied in this case.

IV. COAH'S FORMAL WAIVER PROVISION IS FACIALLY UNCONSTITUTIONAL AND IT WOULD NOT BE APPLICABLE TO THE FACTS OF THE HILLSBOROUGH CASE IN ANY EVENT.

After relying on the informal waiver policy to justify its actions, COAH then mentioned the actual waiver provision in its regulations, N.J.A.C. § 5:93-15.1(b), 2Aa24. COAH's incidental reliance on its formal waiver provision underscores how inapposite even COAH thought it was to the Hillsborough certification. N.J.A.C. § 5:93-15.1(b) provides:

(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.

A. COAH's formal waiver provision violates due process because it is impermissibly vague and without meaningful standards.

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<sup>14/</sup> If there were extrinsic evidence that the policy was intended to apply to the instant situation, then the informal policy would fail on separate due process grounds, since that application of the policy is flatly contradicted by the specific wording of the policy itself.

Although COAH may undoubtedly adopt a waiver provision in its rules, it is a settled principle that administrative agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Crema, 94 N.J. at 301 (1983) (citation omitted). Indeed, such detail is required by due process:

[D]ue process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles, and rules. . . . This principle employs no balancing approach but simply holds that due process requires some standards, both substantive and procedural, to control agency discretion. Id. (citations omitted)].

The New Jersey Supreme Court has consistently invalidated the actions of administrative agencies when there is a significant failure to provide either statutory or regulatory standards to inform the public and guide the agency in discharging its authorized functions. See, e.g., Lower Main St. Assoc's v. New Jersey Hous. and Mortgage Fin. Agency, 114 N.J. 226, 235 (1989) (invalidating regulations forbidding prepayment without HMFA's approval for failure to specify criteria or standards to police agency discretion); Department of Env'tl. Prot. v. Stavola, 103 N.J. 425, 436-38 (1986); Department of Labor v. Titan Constr. Co., 102 N.J. 1, 12-18 (1985); Crema, 94 N.J. at 301-02.

In the instant matter, the COAH waiver regulation is devoid of any safeguards, standards, principles, and criteria which inform the public or guide the agency in undertaking its discretionary duties. The first criterion in COAH's waiver rule (N.J.A.C. § 5:93-15.1(b)(1)), that the "waiver fosters the production of low and moderate income housing," is no standard at

all because, by definition, any housing approved within a fair share plan will "foster" the production of housing. Thus, this criterion gives no guidance to the agency or the public as to what circumstance might justify the use of this provision.

The second criterion in the COAH waiver rule is equally without standards which would guide the agency's decision-making or inform the public as to when such a waiver would be appropriate. The rule provides for a waiver if it "fosters the intent of, if not the letter of, its [COAH's] rules." N.J.A.C. § 5:93-15.1(b)(2).<sup>15/</sup> COAH does not explicitly articulate what the "intent" of its rules is. The rules state their purpose broadly as "the provision of criteria to be used by municipalities in addressing their constitutional obligation to provide a fair share of affordable housing for moderate and low income households." N.J.A.C. § 5:93-1.1(b). This offers no guidance as to the circumstances in which a waiver would be appropriate to "foster the intent of the rules." The waiver provision thus fails to meet the New Jersey Supreme Court's admonition that an agency must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Lower Main St. Assoc's, 114 N.J. at 235 (citing Crema, 94 N.J. at 301).

Finally, the COAH rules provide for a waiver "where the strict application of the rule would create an unnecessary

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<sup>15/</sup> This provision cannot be read to permit a waiver to foster the letter of the rules. Waiving either the "letter" or the "intent" of the rules to foster the letter of the rules is either inherently contradictory, nonsensical, or both.

hardship." N.J.A.C. § 5:93-15.1(b)(3). COAH offers no guidance as to what constitutes a "hardship" or what might make the hardship "unnecessary," nor is the term further defined in the definitions section of the regulations. N.J.A.C. § 5:93-1.3. It is not even clear from a reading of the provision to whom the "hardship" must apply, the developer or the municipality. See infra at p. 45. In any event, this rule provides no detailed articulation of the standards which the agency will employ to guide its discretion.

COAH's waiver rule cannot provide a basis for avoiding the compliance with its other regulations, because the waiver rule violates the due process requirement that an agency must articulate in as much detail as possible the criteria, safeguards, and standards that will guide the exercise of its discretionary authority. When COAH wished to provide constitutionally adequate standards for a waiver, it knew how to incorporate them into its rules. See N.J.A.C. § 5:93-4.5(b) (waiving Municipal Adjustments regulations, including standards for "hardship" waiver); id. § 5.13(c) (waiving cap on age-restricted housing). By comparison, §15.1(b) is standardless and, therefore, void. Cf. In re Adoption of N.J.A.C. 7:26B, 250 N.J. Super. 189, 225-229 (App. Div., 1991), modified, 128 N.J. 442 (1992) (comparing standardless DEP rule to other detailed DEP waiver provisions).

- B. Even if COAH's waiver rule could survive due process attack, its three criteria must be applied conjunctively, and Hillsborough can satisfy none of them.



As with the "informal" waiver policy, the "formal" waiver policy is procedurally defective on its face. But even if one were to attempt to apply it (recognizing the difficulty of doing so when the criteria are unconstitutionally vague), Hillsborough could not prevail in its request for a waiver of the Center designation requirement.

1. In order to satisfy the requirements of Due Process and the "realistic opportunity" standard of the Mount Laurel Doctrine, the three elements of the formal waiver rule must be applied conjunctively.

On its face, § 15.1(b) appears to apply the three criteria in disjunctive form; any one of the three could justify a waiver. Had this in fact been COAH's intention when drafting the rule, 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 it would entail no hardship at all. Effectively, such an application of §15.1(b) would allow COAH to waive anything it wants, whenever it wants. Certainly, such an expansive loophole does not meet the objectives of the Fair Housing Act. Such a loose and unstructured reading is also contrary to the well established principle that waivers to regulatory rules must be strictly applied. Service Armament Co. v. Hyland, 70 N.J. 550, 558-59 (1976) (holding that statutory exemptions must be interpreted strictly); In re Hazardous Waste Facility Permit No. 0901D21HP01, 258 N.J. Super. 483, 488-89 (App. Div. 1992) (requiring DEP to strictly construe its own regulations establishing exemptions from the regulatory requirements of the SWMA). And, of course,

as we have just argued, it would violate constitutional due process requirements because each standard alone is vague and undefined and because reading them disjunctively leads to a separate due process violation.

Beyond general due process considerations, disjunctive application of the provisions of § 15.1(b) also would be unconstitutional under the "realistic opportunity" standard of Mount Laurel II. See Point VIII, infra p.57. 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 Township of Warren, 132 N.J. at 28. COAH's regulations adopted in furtherance of this goal must be applied in light of these constitutional and legislative policies. Id. 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, defeats COAH's fundamental legislative objectives, and evidences an unconstitutionally empty approach to ensuring that municipalities create a "realistic opportunity" for the production of low and moderate income housing.

But even if the formal waiver provision did not suffer from constitutional defects, it would not provide COAH with any relief. COAH states that all three standards are satisfied. 3Aa33-34. However, COAH fails to demonstrate that any of the standards have been met in the instant case.

2. The waiver does not foster the production of affordable housing.

COAH argues that the waiver "fosters" production of housing by allowing the Adult Community site to satisfy Hillsborough's fair share obligation. 3Aa33-34. This reasoning is hopelessly circular, because, as we have already pointed out, any housing approved within a fair share plan will "foster" the production of housing. The record demonstrates that there are other sites that could easily satisfy Hillsborough's obligation within Planning Area 2, where infrastructure is available, where the State Plan contemplates further development, and where a center designation is not required. In fact, one such site was offered to Hillsborough during the mediation phase. Hillsborough and COAH preemptorily rejected it without offering any substantive explanation other than that the Township "preferred" the "Adult Community" site. 2Aa21. 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.

3. The waiver does not further the intent of the regulations, insofar as the site requiring the waiver does no more than meet the criteria for inclusion in a fair share plan that any site would have to meet under the regulations.

As to the second criterion in § 15.1(b), COAH claims that granting a centers designation waiver for the Adult

Community site conforms to the intent, if not the precise letter, of its regulations. 3Aa34. The waiver does not conform in any way, "precisely" or otherwise, 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. 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, however, the purported "policy," never subjected to public notice and comment and never 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. Even if the Adult Community site in this case were part of a 12-year compliance plan, and even if it was available, approvable, developable, and suitable, compliance with these criteria is irrelevant to the granting of a waiver. These are requirements for inclusion of any site in a certified housing element and fair share plan. Therefore, justifying the waiver of the site on the basis of these criteria again says nothing more than that COAH can grant any waiver it wants, so long as the site would be approvable but for the stubborn 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).

4. The waiver violates the Fair Housing Act's "sound planning" standards insofar as it effectuates a policy of approving any compliance site chosen jointly by a developer and a municipality, a policy that does not give "appropriate weight" to the State Plan.

COAH makes a surprising claim in its waiver analysis that the real "intent" of the rules which justifies a formal waiver is to be found in the "informal" waiver policy. 3Aa34. Putting aside the circularity of this reasoning and the procedural invalidity of the "informal" policy, COAH's apparent motivation in straining to grant Hillsborough a waiver at least becomes clear.

The only element of difference in the "informal" policy is that COAH explicitly states that it will prefer sites that are jointly proposed by the developer and the municipality. 3Aa51 COAH appears to believe that 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 much damage is done to the State Plan. COAH's theory apparently is that giving municipalities their way will encourage more and more of them to participate in the process voluntarily, thus improving COAH's poor rate of participation. See Payne, Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts, 20 Vt. L. Rev. 665, 676-77 (1996).

This construction of the "spirit of the rules" violates

the Fair Housing Act's mandate to implement the Mount Laurel Doctrine in a way that gives "appropriate weight" to the State Plan. At very least, COAH must make a showing that compliance with its fair share obligations cannot be achieved with less damage to the State Plan. That is simply not the case here, as 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 Anatol Hiller 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 requires more than this. Thus, the waiver of the center requirement for the Adult Community site cannot be granted under § 15.1(b)(2) because it is not in keeping with any legitimate "intent" of the COAH rules.<sup>16/</sup>

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<sup>16/</sup> COAH's "policy" of "encouraging" municipal participation is broader than this waiver issue, and might be found to violate the "realistic opportunity" standard of Mount Laurel II. For instance, pursuant to N.J.A.C. § 5:93-3.6, Hillsborough was granted a 20% reduction in its fair share obligation, a reduction of 40 units, 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 are needed. The sole reason that Hillsborough was excluded 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. It is neither realistic or fair to construe the COAH rules so laxly that any compliance, without regard to the quantity or quality of that

5. There is no "unnecessary hardship" that justifies granting the waiver.

Finally, COAH's argument that without a waiver, there would be an "unnecessary hardship" as required by N.J.A.C. § 5:93-15.1(b)(3) is entirely without merit. COAH defines neither "hardship" nor "unnecessary" in its regulations (N.J.A.C. § 5:93-1.3) nor does it offer any explanation of either term in its Hillsborough decision. It is not even clear from a reading of the provision to whom the "hardship" must apply. Since developers have no constitutional or statutory rights to have their sites chosen for inclusionary zoning, see, e.g., Van Dalen, 120 N.J. 234, and the municipality has both a statutory and a constitutional obligation to comply with the Mount Laurel doctrine, it can only be the municipality that should be able to claim hardship. From the internal evidence of COAH's Hillsborough Compliance Report, COAH seems to equate "unnecessary hardship" with "good faith," since that is the only evaluative term used in the analysis of this waiver criterion. 3Aa34. However, the Court held in Mount Laurel II that good faith, in and of itself, is insufficient to excuse a municipality from complying with the constitutional obligation. Mount Laurel II, 92 N.J. at 215. Nor does COAH offer any evidence that

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compliance, is within the "spirit" of the rules. While the full implications of COAH's broader policy are not at issue in this case, approving COAH's "intent of the rules" interpretation as to the Hillsborough waiver would indirectly encourage a broad COAH policy that may well be found to be unconstitutional when challenged in another case.

Hillsborough will encounter 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;<sup>17/</sup>

Hillsborough's fond wish that it include this site in the plan cannot be the basis for a hardship waiver.

- V. THERE IS NO LEGAL OR FACTUAL BASIS FOR COAH'S ATTEMPT TO AVOID CENTER DESIGNATION ALTOGETHER OR TO AVOID THE NECESSITY OF WAIVING THE CENTER'S REQUIREMENT BY APPLYING THE NO-CENTERS POLICY OF PLANNING AREA 2.

As if in anticipation that the waiver approach is fatally defective, COAH (with the unfortunate acquiescence of the Director of the Office of State Planning[OSP]) offers a second rationale for including the Adult Community site in the compliance plan, namely, that a Center designation is not required at all, even though 95 percent of the site concededly lies in Planning Areas 4 and 5. 3Aa35. COAH argues that the State Plan 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, citing State Plan Policy #20, 3Aa35.

The fallacy in this argument is readily apparent. State

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<sup>17/</sup> The failure of Anatol Hiller to pursue his objection to the proposed substantive certification in the light of COAH's manifest acquiescence in Hillsborough's preference for the Adult Community site does not indicate that the Planning Area 2 site is not "available," see N.J.A.C. § 5:93-1.3 (definitions), but only that it would have been economically foolish for him to have pursued a losing cause within the COAH process.



Plan Policy #20, on which the OSP Director relies,<sup>18/</sup> applies to designating a Center, not whether a Center designation is necessary. 8Aa159-160. Thus, only if the Adult Community site were already a designated Center would the substantive policies of Planning Area 2 apply. As previously described, it is undisputed that the Adult Community site is not within a designated Center. 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.<sup>19/</sup>

The pernicious effects of the "rationalization" proposed by the OSP Director and embraced by COAH are evident in the Hillsborough example. Of this 742-acre site, 705 acres (95 percent) lie in Planning Areas 4 or 5, where Center designation is required by the State Plan before development takes place.

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<sup>18/</sup> We focus on the role of the Director of the Office of State Planning because the record indicates that "waiver" of Center designation for the Adult Community site was never reviewed or approved by the members of the State Planning Commission, the policy-making body charged with ultimate responsibility for the State Plan. N.J.S.A. 52:18A-199 (powers and duties of Planning Commission); id. § 202(d) (Planning Commission as entity responsible for revising and adopting the State Plan).

<sup>19/</sup> Nor is it of any significance that a line-straddling Center was "identified" by Hillsborough for the boundary in the cross-acceptance process of the State Plan. COAH's regulations, the Planning Commission's regulations, the Memorandum, and the policies of the State Plan itself (including the policy upon which COAH claims to rely in this instance) all refer to "designated" Centers. The Planning Commission has exclusive authority to designate a Center, see N.J.A.C. § 17:32-8.5(d), and it is undisputed that it has made no such designation for this site.

Only 37 acres lie in Planning Area 2, where intensive development is encouraged throughout the Planning Area.<sup>20/</sup> Yet this minuscule tail wags the dog and, in the COAH view, allows development of all 742 acres as if it were in Planning Area 2, not because it has been designated as a line straddling Center, but because it doesn't have to be a Center at all. In effect, the 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. See Point II, supra at p.24.

The Hillsborough facts demonstrate how unprincipled and manipulative the approach can be. Either fortuitously or by careful strategic planning, the developers who assembled the Adult Community site not only ended up to their advantage with a vestigial five percent of their land in Planning Area 2, but a significant part of that vestige is already developed with an existing nursing home. It apparently is not even eligible for designation as a Center because of its age-restricted nature. 3Aa63 But none of that matters; the State Plan itself hardly seems to matter. Under the COAH approach, owners of boundary-line parcels in Planning Area 2 can anticipate a windfall in

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<sup>20/</sup> 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. 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 Areas 4 and 5.

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.

VI. COAH MAY NOT APPROVE INCLUSIONARY DEVELOPMENT IN PLANNING AREAS 4 & 5 WHEN THOSE AREAS WERE EXCLUDED BY COAH IN ITS DETERMINATION OF THE APPROPRIATE FAIR SHARE FOR THE MUNICIPALITY.

In calculating municipal fair share obligations, COAH excludes land in Planning Areas 4 and 5 from the amount of undeveloped land which could accommodate inclusionary developments. N.J.A.C. 5:93, App. A, p. 93-53. <sup>21/</sup> In defiance of this methodology, which is intended to respect and implement the policies of the State Plan, COAH gave substantive certification to a Hillsborough plan that relies on land excluded from its fair share calculation. COAH may not undercut its own methodology in this way.

On a strikingly similar issue, the New Jersey Supreme Court invalidated a COAH regulation allowing a municipality to reserve 50 percent of its affordable housing for those who lived and/or worked in the municipality, holding that it was "inconsistent with and undermine[d] the methodology adopted by COAH for calculating and allocating regional fair share of low- and moderate-income housing." In re Township of Warren, 132 N.J. 1, 28 (1993). The inconsistency arose from the fact that those

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<sup>21/</sup> By comparison, COAH regulations provide for a full count for lands in Planning Areas 1 and 2 and a 50 percent count for lands in Planning Area 3. N.J.A.C. § 5:93, App. A, p.93-53.

who would end up living in the municipality's low- and moderate-income housing were not among those counted when the municipality's fair share obligation was calculated. Id. at 28-29. The Court observed that the regulation could not be "sensibly reconciled with the overall regulatory scheme that has been adopted by COAH to implement the Fair Housing Act and therefore cannot coexist within the present regulatory framework." Id. at 29.

In the instant case, COAH's substantive certification of the Hillsborough Adult Community site is inconsistent with its methodology for calculating the amount of land available for development in Hillsborough. In calculating Hillsborough's obligation to provide low and moderate-income housing, COAH reduced that obligation based on the amount of land in Planning Areas 4 and 5 that is located in Hillsborough. Because the land in Planning Area 4 and 5 was not considered in calculating the prospective regional need for affordable housing, In re Township of Warren at 30, it is fundamentally inconsistent to approve development on that land, at least without recalculating and proportionally increasing Hillsborough's fair share. Cf. id. at 36 (examining the alternative of revising methodology).

Allowing development in Planning Areas 4 and 5 under the circumstances of this case runs counter to the purposes of the Fair Housing Act, the State Plan, and the Mount Laurel doctrine. As the Court found in the Warren case, the "central purpose" of the Fair Housing Act is to provide "affordable housing on a regional basis consistent with both sound planning concepts and

the Mount Laurel doctrine." Id. at 28. COAH's certification of the Adult Community site is contrary to the Fair Housing Act, because it allows Hillsborough to shirk its full responsibility to provide a fair share of affordable housing, as measured by the land that it actually makes available for growth and development, State Plan or no State Plan. See N.J.S.A. 52:27D-307(c)(2) ("fair share based upon available vacant and developable land").<sup>22/</sup>

COAH's decision is contrary to the State Plan because it allows development in an area where the Plan seeks to restrict it.

Finally, it is inconsistent with the New Jersey Supreme Court's

decision in Mount Laurel II, which firmly relates housing

obligations to the State's growth management policies as shown on

the State Plan. See Van Dalen, 120 N.J. at 242-44 (approving

COAH's conclusion that the size of the growth area in a

municipality should be used to determine the municipality's fair

share obligation). This Court must overturn COAH's approval of

this site.

VII. COAH VIOLATED ITS REGULATIONS BY APPROVING A SITE THAT IS NEITHER SUITABLE NOR DEVELOPABLE BECAUSE THE SITE LACKS SEWER CAPACITY AND INFRASTRUCTURE.

N.J.A.C. § 5:93-5.3(b), governs COAH compliance plans for new construction and provides:

Municipalities shall designate sites that are available, suitable, developable and approvable, as defined in

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<sup>22/</sup> COAH tacitly understands this relationship between actual development and fair share obligations. N.J.A.C. § 5:93-4.2(g) provides that when a municipality is excused from meeting part of its fair share for lack of developable land, it may be required to adopt backup mechanisms for capturing unanticipated development that actually occurs.

N.J.A.C. 5:93-1. In reviewing sites, ... [COAH] 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]

Pursuant to this provision, COAH's determination that the Adult Community site is suitable and developable is completely without basis because no consistency review or approval has been obtained from DEP and no sewer infrastructure or sewer capacity is available for the site.

- A. The "adult community" site is not "suitable" for development because it is located in an area designated by the State Plan to be withheld from intensive development.

COAH regulations define "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." N.J.A.C. § 5:93-1. Hillsborough's 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." Ninety five percent of the site is on the Planning Areas 4 and 5 side of the boundary line established by the State Plan to delineate the difference between vastly different development policies. By definition, land just inside the boundary of Planning Areas 4 or

5 will be "adjacent 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 houses and a small nursing home, all mapped by the State Plan into Planning Area 2, form an irregular boundary around part of the Adult Community 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.

It is also undeniable that the Adult Community 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" sprawl development on the Adult Community site under the policies of the State Plan.

B. The site is not "developable."

1. COAH violated its regulations by granting substantive certification without the required DEP consistency approval.

The COAH regulations define "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."

N.J.A.C. § 5:93-1. COAH's regulations further clarify what is meant by "access" to sewer infrastructure by requiring that a site must be included in a Section 208 Water Quality Management (WQM) plan "prior to substantive certification." N.J.A.C. § 5:93-5.3(b). Thus, COAH unambiguously adopted the DEP

consistency review process as the process it will use to determine a key aspect of substantive certification. As the COAH regulations now stand, if a compliance plan violates DEP's review process, it cannot satisfy COAH's.

Section 208 (33 U.S.C. § 1288) of the Federal Clean Water Act, 33 U.S.C. § 1251 et seq., requires each State to provide for areawide waste treatment management plans. Toll Bros. v. Dept. of Env't'l. Prot., 242 N.J. Super 519, 526 (App. Div. 1990).

These areawide plans are prepared pursuant to the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq. Id. These plans are referred to as "208" plans. Id. The Water Quality Planning Act prohibits DEP <sup>23/</sup> from granting "any permit which is in conflict with an adopted areawide plan." N.J.S.A. 58:11A-10.

It is undisputed that the PAC site has not been reviewed or approved as consistent with the relevant 208 plan as amended by a wastewater management plan. It is also undisputed that the Adult Community site is not sewerred. DEP, therefore, may not issue permits to serve the Adult Community site without the consistency approval. Granting substantive certification in these circumstances is an empty promise of housing. In the absence of

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<sup>23/</sup> In adopting its rules under the Water Quality Planning Act, NJDEP explicitly stated that the consistency review determination is an "integral part of the Department permit process," especially regarding the use of consistency reviews in land use issues. 21 N.J. Reg. 3099(a), 3101, Comment 7,11 (Oct. 2, 1989). To reinforce the importance of adhering to the plans and preserve their integrity, the DEP specifically required that there be no exemptions allowed from consistency review requirements. 20 N.J. Reg. 2198(a), 2200 (Sept. 16, 1988) (providing no exemption for small business from consistency reviews, or allowing permits for small projects that conflict with area WQM plans).



its own regulatory prerequisites, COAH violated its regulation which requires that consistency approval be given prior to substantive certification.

2. The factual background of this case demonstrates why a consistency approval prior to granting substantive certification is sound policy.

COAH ignores its own regulation and accepts the hypothetical existence of sewer infrastructure on the Adult Community site on the basis that an amendment to the area 208 Plan was pending before DEP. 3Aa33. The checkered history of Hillsborough's on-again, off-again attempts to include the "adult community" site in the approved 208 plan (by a wastewater management plan) both before and after COAH's grant of substantive certification demonstrate the wisdom of the requirement for consistency approval prior to the grant of substantive certification and the danger of ignoring that requirement.

As set forth at length in the Statement of Facts and Procedural History, supra p.11-13, Hillsborough Township and Somerset County have not yet included the Adult Community site in a DEP-approved wastewater management plan as an amendment to the "208" plan, despite numerous false starts since at least 1994. Of particular relevance to the issue of substantive certification, both the Hillsborough Township Committee and the Township Planning Board adopted resolutions withdrawing the Adult Community site from active review by the County or DEP, months after receiving substantive certification and promising to move

promptly to obtain the necessary consistency review. 24Aa236;  
25Aa237.

At the very least, the fits and starts that have defined the history of Hillsborough's attempts to obtain DEP approval of sewer capacity for the site demonstrate considerable confusion and uncertainty regarding the status of infrastructure to supply the Adult Community site. Thus, the site is literally "not developable" within the meaning of N.J.A.C. § 5:93-1 and 5:93-5.3(b), because the developer and the municipality have not met the "consistency approval" requirement of COAH's regulations (5:93-5.3(b)) prior to (or even now a year after) substantive certification.

3. Failing to require a consistency approval prior to substantive certification violates the constitutionally required "realistic opportunity" standard, because the inherent potential for delay in gaining necessary approvals may render a plan illusory and offer opportunities for abuse.

COAH's grant of substantive certification prior to consistency approval with a DEP-approved wastewater management plan also fails to ensure that the Mount Laurel "realistic opportunity" standard for low and moderate income housing is met. The clear purpose of N.J.A.C. § 5:93-5.3(b) is that the constitutional "realistic opportunity" standard be met by ensuring, before substantive certification, that a development included in the compliance plan actually can go forward (which it cannot in the absence of wastewater management plan consistency

or approval of a plan amendment). COAH's grant of substantive certification violates the realistic opportunity standard See Point VIII below.

VIII. COAH'S GRANT OF SUBSTANTIVE CERTIFICATION TO HILLSBOROUGH VIOLATES THE CONSTITUTIONAL MANDATE THAT MUNICIPALITIES MUST PROVIDE A REALISTIC OPPORTUNITY OF AFFORDABLE HOUSING.

Although the Court need not reach this issue if it invalidates COAH's grant of substantive certification to Hillsborough based upon COAH's violation of its regulations, COAH's decision in this case violates the constitutional requirement for municipalities to provide a realistic opportunity for affordable housing.

- A. The "Realistic Opportunity" standard is constitutionally mandated and has been implemented by the legislature and COAH's own regulations

Each of New Jersey's three constitutional branches of government has affirmed that a municipality must create a "realistic opportunity" for the construction of its fair share of low/moderate income housing.

The obligation was first stated by the Supreme Court in the two Mount Laurel decisions. See Mount Laurel II, 92 N.J. 158, 221-222 (1983); Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 174, appeal dismissed, cert. denied, 423 U.S. 808 (1975) (Mount Laurel I). Creating a "realistic opportunity" is "the core of the Mount Laurel doctrine." Mount

Laurel II, 92 N.J. at 205. The responsibility for determining whether a municipality's housing element can be considered a "realistic opportunity" for provision of affordable housing is shared by the Council on Affordable Housing (COAH) and the courts. See generally Alexander's Dept. Stores of New Jersey, Inc., v. Paramus, 125 N.J. 100 (1991). It is the responsibility of COAH and, in turn, the courts, to determine whether the fair share plan in fact provides the requisite "realistic opportunity."

In the two Mount Laurel decisions, the Court firmly established the underlying constitutional basis for the "realistic opportunity" mandate, but it also emphasized the legislative preeminence in the area of housing policy, so long as the Legislature acts in accordance with the terms of the Constitution. Mount Laurel II, 92 N.J. at 213-14. The Legislature's response to the Court's request for action was the enactment of the Fair Housing Act in 1985, N.J.S.A. 52:27D-301 et seq., which represented a "comprehensive planning and implementation response to [the] constitutional obligation" recognized in Mount Laurel I and II." N.J.S.A. 52:27D-302(c). The Fair Housing Act is the Legislature's express acknowledgement of the constitutional obligation of every municipality to provide a realistic opportunity for a fair share of regional affordable housing needs. See N.J.S.A. 52:27D-302(a); In re Township of Warren, 132 N.J. 1, 12 (1993).

The statutory scheme which the Fair Housing Act created "comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court." N.J.S.A. 52:27D-303. The Act "represents a substantial effort by the other branches of government to vindicate the Mount Laurel constitutional obligation." Hills Development Co. v. Bernards Twp., 103 N.J. 1, 21 (1986). "The clear and recurring theme of the Act is the recognition and implementation of the requirement that municipalities must provide through their zoning ordinance a realistic opportunity to satisfy their fair share. . . ." In re Township of Warren, 132 N.J. at 12. This is codified in no less than nine sections of the Fair Housing Act. See N.J.S.A. 52:27D-302(a), (h), 311(a), 312(b), (c), 314(b), 317(a), (b), 328. In In re Township of Warren, the Supreme Court reiterated the "paramount importance" of Mount Laurel compliance efforts and also its belief that if the Fair Housing Act worked in accordance with the expressed Legislative intent, "it [would] assure a realistic opportunity for lower income housing in all those parts of the state where sensible planning calls for such housing." In re Township of Warren, 132 N.J. at 27, citing Hills Development Co. v. Bernards Twp., 103 N.J. 1, 21 (1986).

COAH is an agency within the Executive Branch that was created by the Legislature to carry out the constitutional mandate and its statutory codification. N.J.S.A. 52:27D-305; see

also Calton Homes, Inc. v. Council on Affordable Hous., 244 N.J. Super. 438 (App. Div.), cert. denied, 127 N.J. 326 (1991) (summarizing the COAH process). The Fair Housing Act endowed COAH with wide-ranging powers to establish statewide housing regions, estimate the need for low- and moderate-income housing, adopt criteria and guidelines for municipal fair-share determinations and adjustments, and perform related tasks. N.J.S.A. 52:27D-302(a)-(c), 307. See generally id. at §§ 305-329.

COAH, in executing the legislative intent, has expressly adopted the "realistic opportunity" standard as the basis for implementing the Fair Housing Act and the constitutional Mount Laurel obligation. COAH's administrative regulations define a "fair share plan" as a "plan ... by which a municipality proposed to satisfy its obligation to create a realistic opportunity to meet its fair share of low and moderate income housing needs...." N.J.A.C. 5:93-1.3. (emphasis added). Numerous other COAH regulations expressly impose the realistic opportunity standard as a condition of compliance. N.J.A.C. 5:93-3.1(b), 3.5(a), 4.1(a), 5.4(c), 5.14(a), 8.10(c), 14.1, Appendix E at 93-106, and Appendix F at 93-119. (6Aa138, 7Aa148).

In a Memorandum of Understanding with the State Planning Commission, COAH has confirmed its constitutional obligation that every municipality provide a realistic opportunity for a fair share of affordable housing, as well as its responsibility for administration of the obligation. Memorandum of Understanding, N.J.A.C. § 5:93. 3Aa58.

Thus, all three branches of government are in complete agreement that the applicable standard for evaluating Hillsborough Township's Housing Element and Affordable Housing Plan is whether it provides a "realistic opportunity" for the construction of the township's fair share of the regional need for low and moderate income housing. It is not remarkable that the three branches agree, for the standard is at its base a constitutional one.

The underlying constitutional basis for the "realistic opportunity" standard cannot be ignored. Our Supreme Court has repeatedly stated (and acted on) its "preference" for legislative action to implement the constitutional mandate. Hills Development Co., 103 N.J. at 25; Mount Laurel II, 92 N.J. 158, 213-214. At the same time, however, neither the Supreme Court nor this Court has hesitated to invalidate COAH regulations on the basis that they violate both statutory requirements and the constitutional norms that the Fair Housing Act adopts and codifies. See In re Township of Warren, 132 N.J. at 28 (invalidating a COAH regulation which "does not comport with the Fair Housing Act's central purpose of providing affordable housing on a regional basis consistent with both sound planning concepts and the Mount Laurel doctrine."). In Calton Homes, this Court held that COAH's actions were inconsistent with the policies established by the Legislature. Calton Homes, Inc., 244 N.J. Super. at 450-453 (holding that COAH's 1000-unit cap was arbitrary and unreasonable because it undermined the intent of

the Fair Housing Act, and may have overburdened other municipalities which have met their fair share requirements).

- B. COAH did not create a Realistic Opportunity for the provision of affordable housing when it left the infrastructure on which the housing depends subject to speculative and uncertain future decisionmaking.

COAH apparently construes N.J.A.C. § 5:93-5.3(b), the infrastructure provision, 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. 3Aa33. COAH granted substantive certification on April 3, 1996, but, because the sewer consistency approval was not in place, it established a six-month deadline (to October 3, 1996) at which time Hillsborough was to report on the status of the 208 plan amendment. As indicated in §2, supra, the Adult Community site is not presently eligible to be sewerred, and it will not be eligible to be sewerred 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 plan consistent. 24Aa238.

The risk of delay beyond the initial, self-serving estimate of a few months is obviously a serious one, and it defeats any credible claim that a "realistic opportunity" has been created. See Mount Laurel II, 92 N.J. at 298 (no "realistic opportunity" where lack of water and sewer would delay development for five or



six years). Unless § 5.3(b) is correctly construed to incorporate the pre-substantive certification requirement in all cases, the regulation violates the constitutional mandate 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 inherent in the process and constitutionally unacceptable.

Moreover, so far as the record reflects, COAH's Oct. 3, 1996, reporting date for assessing the status of Hillsborough's sewer plan amendment passed silently. Hillsborough obviously had no motivation to call its own default to the attention of COAH, and COAH apparently does not have sufficient monitoring and oversight capacity to police these requirements on its own. This an additional reason why, as a matter of sound policy and good administration, § 5.3(b)'s "developable" standard requires that infrastructure capacity be in place before substantive certification is granted. 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.

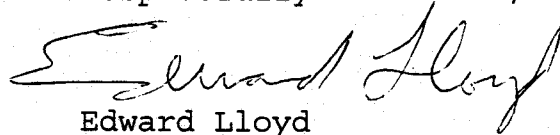
- C. COAH Did Not Create a Realistic Opportunity For Affordable Housing When It Ignored Its Centers Requirement and Applied Its Waiver Rules.

COAH's failure to require compliance with the requirement that development in Planning Areas 4 and 5 be limited to Centers violates the constitutional mandate to provide a realistic opportunity for affordable housing as well as the constitutional mandate to base its decisions on sound planning. See Points I and II supra. Both Hillsborough Township and COAH have failed to satisfy the merged constitutional and statutory standard. They have presented and approved a plan based on a compliance site that violates the letter and spirit of the State Plan, respect for which is an essential element of the "realistic opportunity" standard. Moreover, COAH's use of waivers from the requirements of its regulations in this case also violates these same constitutional mandates. See Points III-IV, supra at p. 31-46. Thus, if the Court does not invalidate COAH's grant of substantive certification in this case based upon COAH's violation of its regulations, the Court must invalidate the decision for violating the constitutional mandates of the Mount Laurel Doctrine.

CONCLUSION

For all of the foregoing reasons, this Court should overturn COAH's grant of substantive certification in this case.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Edward Lloyd".

Edward Lloyd  
Counsel for Appellants

March 21, 1997