

- Brief of Amicus Curiae New Jersey Builders Association
- Cover letter to Clerk re inclusion of the following docs:
 1. Notice of Motion for Leave to Appear
 2. Supporting Cert
 3. Letter Brief

Pgs. 29

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IN RE PETITION FOR SUBSTANTIVE
CERTIFICATION OF THE HOUSING
ELEMENT AND FAIR SHARE PLAN
OF THE TOWNSHIP OF
HILLSBOROUGH, SOMERSET
COUNTY, SUBSTANTIVE
CERTIFICATION 31-99.

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

CIVIL ACTION

ON APPEAL FROM A DECISION,
OF THE COUNCIL ON
AFFORDABLE HOUSING:

BRIEF OF AMICUS CURIAE NEW JERSEY BUILDERS ASSOCIATION

Of counsel and on the brief:
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7/7/97

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INTRODUCTION

This is an appeal by New Jersey Future, Inc., from a final decision by respondent the New Jersey Council on Affordable Housing ("COAH") approving a plan for the provision of low and moderate income housing submitted by respondent Township of Hillsborough in satisfaction of its fair share housing obligation under the Fair Housing Act of 1985, N.J.S.A. 52:27D-301 et seq. New Jersey Future specifically attacks that portion of the plan that would give Hillsborough credit against its fair share housing obligation for 450 units of low and moderate housing for senior citizens and non-senior citizen families¹ to be included in a development project comprised of approximately 3000 housing units plus extensive health care facilities proposed by respondent Hillsborough Alliance for Adult Living, LLP. New Jersey Future asserts that this portion of the plan violates the State Development and Redevelopment Plan ("SDRP") prepared by the State Planning Commission pursuant to the State Planning Act, N.J.S.A. 52:18A-196 et seq. It asserts that the COAH is obligated to enforce the SDRP against low and moderate income housing so as to prevent development of a site that lies partially in so-called "planning areas" 4 and 5 but has not been designated as a so-called "center."

This appeal is part of a broader campaign by New Jersey Future--an advocacy organization favoring centralized planning in land use matters--to seek to impose the SDRP as a binding regulatory standard on all land uses in the State. To that end, New

¹136 of the lower income units are to be credited against the municipalities fair share obligation for the current six-year COAH planning cycle. The remainder would be available for credit of the municipal housing obligation for future planning cycles. N.J.A.C. 5:93-3.1(f).

Jersey Future is also currently appearing as amicus curiae in New Jersey Builders Association v. New Jersey Department of Environmental Protection, Dkt. No. A-244-96T1, supporting an attempt by the Commissioner of the DEP to impose the SDRP as a regulatory standard by administrative order.

As set forth in detail in the briefs of the various respondents, the specific facts of this case make it an unusually poor one to advance New Jersey Future's broader legal agenda. With the respondents, NJBA urges the Court to decide the case, not on the basis of abstract principles, but on the basis of the particular facts that the COAH had before it.

Underlying New Jersey Future's contention, however, is a fundamentally erroneous characterization of the SDRP and of the relationship between the SDRP and the Council on Affordable Housing. In this brief, amicus will address only that point.

STATEMENT OF FACTS

Amicus adopts the statements of facts set forth in the briefs of respondents Hillsborough and Hillsborough Alliance for Adult Living, LLP. The interest of the New Jersey Builders Association is set forth in the certification of Patrick O'Keefe (NJBAa2).

PROCEDURAL HISTORY

Amicus adopts the procedural history set forth in the briefs of respondents Hillsborough and Hillsborough Alliance for Adult Living, LLP. The Court granted the motion of the New Jersey Builders Association to appear as amicus and file briefs (NJBAa1).

ARGUMENT

THE SDRP IS NOT DESIGNED OR INTENDED TO ESTABLISH STANDARDS FOR SITE-SPECIFIC DECISION MAKING AND IS NOT LEGALLY BINDING UPON THE COAH

Contrary to the assertions of New Jersey Future, the SDRP is not designed or intended to establish standards--binding or otherwise--for site-specific decision making. This is clear both from the State Planning Act and from the SDRP itself.

In the State Planning Act, the Legislature declared that New Jersey requires "sound and integrated Statewide planning in order to conserve its natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable cost while promoting beneficial economic growth, development and renewal." N.J.S.A. 52:18A-196(a). To facilitate the goals and objectives enunciated in the Act, the Legislature created New Jersey State Planning Commission and its staff arm, the Office of State Planning. N.J.S.A. 52:18A-197. The Commission is authorized to formulate a state development and redevelopment plan so as to "provide a coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State." N.J.S.A. 52:18A-199(a).

The State Planning Act establishes the legal status and significance of the SDRP. There are two things that are especially significant about the statute. First, unlike other statutes that mandate regionwide planning, nothing in the State Planning Act mandates that any public or private actor conform its actions to the terms of the SDRP. Second, the State Planning Act does not establish a procedure for binding

review of state, county or local plans or site-specific land development plans for conformity with the SDRP. Indeed, it does not grant any public agency the power to apply the SDRP. The Pinelands Act, the Hackensack Meadowlands Reclamation and Development Act, and the Coastal Area Review and Facilities Act all empower state or regional agencies to engage in regionwide planning. Those statutes expressly require conformity by both other public entities and by private persons with those plans and expressly provide for state enforcement of this conformity *requirement*. See N.J.S.A. 13:18A-12 (Pinelands); N.J.S.A. 13:19-5 (CAFRA); N.J.S.A. 13:17-12 to 19 (Hackensack Meadowlands). Where the Legislature has intended to require conformity with regionwide plans and to authorize enforcement of that requirement, it has expressed that intent in clear and unambiguous language.

By contrast, the State Planning Act provides that the SDRP and other documents prepared by the State Planning Commission are merely to provide "coordination," "guidance," and "technical assistance" to state and local government. N.J.S.A. 52:18A-199, 200. It does not require conformity by state or local entities. Indeed, the statute expressly recognizes that some state and local governmental policies may continue to be inconsistent with the SDRP. It provides that the SDRP is to be formulated through a process of negotiated cross-acceptance between the State Planning Commission and other governmental entities, which, among other things, will document the extent to which various governmental entities have elected not to conform their policies with those of the State Planning Commission. N.J.S.A. 52:18A-202(b). The State Planning Act is similarly entirely silent as to any obligation of any private person to conform to policies, goals or objectives compiled in the SDRP.

The State Planning Commission is empowered to adopt regulations governing the process of formulating the SDRP. N.J.S.A. 52:18A-203. Significantly, however, the State Planning Act does not grant either the State Planning Commission or any other agency the power to adopt regulations enforcing conformity with the SDRP. In the face of nonconformity with the SDRP, the only action authorized by statute is a report by the State Planning Commission to the Legislature "evaluating [the reasons for the occurrence and determining] if changes in Plan targets or policies are warranted." N.J.S.A. 52:18A-202.3(b), (c).

The limited function of the SDRP reflects the Legislature's conception of the nature of this statewide plan. Unlike the plans formulated the Pinelands Commission, CAFRA, or the Hackensack Meadowlands Development Commission (or, indeed, municipal master plans), the SDRP is not intended to be a detailed land use regulation. It is a compilation of general policy objectives, targets and guidelines in a wide variety of public policy areas. N.J.S.A. 52:18A-200. Its generalized contents are not intended to set site-specific standards or to be utilized as a regulation.

In 1992, after many delays, the State Planning Commission published the State Development and Redevelopment Plan (SDRP). The plan went through two prior complete drafts that were circulated for public comment. The final version is shorter than either of those prior drafts. Among the differences between the final version and the earlier drafts is the omission of the earlier ambitious--and, in light of the statutory provision outlined above, inappropriate--effort to establish highly specific land use standards. In its final version, the SDRP consists of 135 pages (plus appendices) of general policies in 17 different policy areas. Consistent with the statutory mandate, it

does not purport to establish site-specific standards. Rather, it sets forth policies cast in broad and general terms, appropriate to its function of providing general policy guidance to assistance state, county, and local agencies as they engage in their own planning.

The limited role of the SDRP is explicit in the SDRP itself, which declares:

New Jersey's first State Development and Redevelopment Plan, including the Resource Planning and Management Map (RPMM) should be used only to guide municipal and county master planning, State agency functional planning and infrastructure investment decisions. It is not appropriate to use the State Plan directly to formulate codes, ordinances, administrative rules or other "regulations." [SDRP at ii.]

The State Planning Commission has codified this limitation on the use of the SDRP in its regulations:

17:32-6.1 Purpose

(b) Neither the State Development and Redevelopment Plan nor its Resource Planning and Management Map is regulatory and neither should be referenced or applied in such a manner. It is not the purpose of this process to either "validate" or "invalidate" a specific code, ordinance, administrative rule, regulation or other instrument of plan implementation.

Although the State Planning Commission has by regulation established a procedure for the refinement of the SDRP through "letters of clarification," N.J.A.C. 7:32-6.1 et seq., it has been very careful to make it clear it does not intend that procedure to become indirectly a mechanism for enforcing the SDRP in a regulatory fashion upon specific sites or development proposals.

17:32-6.2 Eligibility

(a) Any individual or organization, public or private, may petition the State Planning Commission for a letter of clarification regarding any goal, strategy, objective, policy, criterion or definition contained in the State Development and Redevelopment Plan.

(b) The State Planning Commission will not issue letters of clarification that involve the application of State Plan provisions to specific parcels of land or that seek to either "validate" or "invalidate" a specific code, ordinance, administrative rule, regulation or other instrument of plan implementation. (emphasis added)

The regulations of the State Planning Commission are similarly explicit that the SDRP is not intended to have any legally binding effect. Although the State Planning Commission as by regulation established a procedure for review of state, county and local planning efforts for consistency with the SDRP, it has been careful to make it clear that the SDRP is not binding and any efforts on the part of any other government agency to maintain consistency are voluntary.

17:32-7.1 Purpose

(a) The State Planning Act recommends but does not require that municipal and county plans be consistent with the State Development and Redevelopment Plan. During the cross-acceptance process, however, many government officials and citizens expressed concern, given the complexity of public plans and processes in general and of the State Plan in particular, about how agencies at each level of government would know whether their plans are consistent with the State Plan. It is the intention of the State Planning Commission through the Office of State Planning, to assist all levels of government in achieving the highest possible degree of consistency with the State Plan. **To that end, this subchapter outlines a voluntary review process** which will analyze local, county, regional and State agency plans and provide findings and recommendations regarding the subject plan's incorporation of the various provisions of the State Plan.

(b) Neither the State Development and Redevelopment Plan nor its Resource Planning and Management Map is regulatory and neither should be referenced or applied in such a manner. It is not the purpose of this process to either "validate" or "invalidate" a specific code, ordinance, administrative rule, regulation or other instrument of plan implementation.

(c) No municipal, county, regional or State agency should delay any decision making process due to a pending review of their plans by

the Office of State Planning for consistency with the SDRP.
(emphasis added)

The SDRP itself spells out in florid language that its function is merely advisory and hortatory--to provide in its own terminology "a context, a vision, and a process" rather than establishing a regulatory standard. The final section of the SDRP declares:

D. Relationship of the State Plan to Other Plans

Unlike the provisions of other "greater-than-local" State and regional planning statutes, the State Planning Act is based on the nobility of reason and coherence. It relies upon the sense of responsibility and conscience of New Jersey's public and private sectors at the State and local levels to understand and embrace a coherent plan for New Jersey's future. From one perspective, the State Development and Redevelopment Plan is a set of recommendations to the people of New Jersey and their elected representatives. The State Plan creates a vision or design for the future that is based on the mandates of the State Planning Act. The Goals, Strategies and Policies of the Plan and its supporting documentation constitute an agenda and guide for the State to make the vision or design become a reality.

From another perspective, the State Development and Redevelopment Plan is a process that respects the interests of the public and private sectors. This process recognizes that responsibility for the future of the State of New Jersey is shared by the public and private sectors and at the State, regional and local levels. The statewide planning process needs to be collaborative, involving the public and private sectors at all levels of interest. The ultimate success of the State Development and Redevelopment Plan depends on the participation and cooperation of the citizens of New Jersey.

The State Development and Redevelopment Plan is not a substitute for functional State agency plans or local master plans. The Plan in fact would have little meaning or effect without such plans. The State Plan provides a context, a vision and a process within which these more specific plans can be developed and implemented to achieve commonly derived goals. [SDRP at 128-29.]

The SDRP uses the vocabulary of "planning areas" and "centers." The SDRP and its accompanying map broadly divides the state in five planning areas and outlines

general planning goals for each of these planning areas. Among other policies, the SDRP seeks to encourage efforts to channel new residential development into some 600 or more "centers".² These planning area and center policies must be read in context of the SDRP as a whole. Like everything else in the SDRP, they are merely generalized planning policies; they are non-regulatory, non-binding and non-site specific.

In a few special instances, the Legislature has expressly sought to give more force to the SDRP than is provided in the State Planning Act. Where the Legislature has intended this result, it has so provided by express statutory language. For example, in 1993 amendments to CAFRA, the Legislature specifically directed the DEP to adopt new regulations governing development in the coastal zone that would "be closely coordinated with the provisions of the State Development and Redevelopment Plan." N.J.S.A. 13:19-17(b). Similarly, in authorizing the establishment of Transportation Development Districts in 1989, the Legislature specifically mandated that plans for transportation district conform to the SDRP. N.J.S.A. 27:1C-4, 5.

It is thus clear that the Legislature gave thought to the legal status and significance of the SDRP and deliberately chose not to generally require conformity or to empower any state agency to enforce conformity. Thus, New Jersey Future's effort to present the SDRP as a statutorily-mandated device for centralized planning and control of land use in the state is a profound distortion of both the State Planning Act and the SDRP itself.

²The concept of "centers" as described in the SDRP is not envisioned, authorized, or mandated by the State Planning Act. It solely a creature of the SDRP.

The Legislature gave particular thought to the relationship between the SDRP and the COAH. Although the implementation of State Planning Act has since followed its own independent trajectory and developed its own separate constituency not necessarily sympathetic with the purposes of the Fair Housing Act as expounded by the Supreme Court in Hills Development Corp. v. Bernards Township, 103 N.J. 1 (1986), in its origins it was closely linked to the Fair Housing Act. The two statutes were introduced and enacted together. They cross reference each other. Historically, the State Planning Act was motivated by a desire to create a mechanism to replace the former State Development Guide Plan (SDGP). The SDGP had been utilized by the Supreme Court in Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 225-248 (1983), to establish which municipalities had a duty to create housing opportunities to meet a portion of the needs of the region's poor in addition to their own indigenous poor and to determine how large that obligation should be. See generally, Van Dalen v. Washington Township, 120 N.J. 234 (1990).

The Fair Housing Act directs the COAH to "give appropriate weight to" implementation of the State Development and Redevelopment Plan" in performing the same functions: establishing which municipalities have a fair share housing obligation and determining the magnitude of that obligation. This is spelled out in N J.S.A. 52:27D-307.

N J.S.A. 52:27D-307. Duties of council

It shall be the duty of the council . . . to:

- a. Determine housing regions of the State;
- b. Estimate the present and prospective need for low and moderate

income housing at the State and regional levels;

c. Adopt criteria and guidelines for:

(1) Municipal determination of its present and prospective fair share of the housing need in a given region. . . .

(2) Municipal adjustment of the present and prospective fair share based upon available vacant and developable land, infrastructure considerations or environmental or historic preservation factors and adjustments shall be made whenever:

(a) The preservation of historically or important architecture and sites and their environs or environmentally sensitive lands may be jeopardized,

(b) The established pattern of development in the community would be drastically altered,

(c) Adequate land for recreational, conservation or agricultural and farmland preservation purposes would not be provided,

(d) Adequate open space would not be provided,

(e) ***The pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c. 398 (C. 52:18A-196 et seq.),***

(f) Vacant and developable land is not available in the municipality, and

(g) Adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided; and

In carrying out the above duties, including, but not limited to, present and prospective need estimations the council shall give appropriate weight to pertinent research studies, government reports, decisions of other branches of government, ***implementation of the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c. 398 (C. 52:18A-196 et seq.)*** and public comment. To assist the council, the State Planning Commission established under that act shall provide the council annually with

economic growth, development and decline projections for each housing region for the next six years. The council shall develop procedures for periodically adjusting regional need based upon the low and moderate income housing that is provided in the region through any federal, State, municipal or private housing program. (emphasis added).

Thus the COAH is required to give appropriate weight to the SDRP in all the steps leading to the determination of the municipal housing obligation: delineating housing regions, N.J.S.A. 52:27D-307(a); determining the gross housing need for each region, N.J.S.A. 52:27D-307(b); establishing the criteria for determination of municipal housing obligations, N.J.S.A. 52:27D-307(c)(1). Finally, the COAH is to give appropriate weight to the SDRP in determining what adjustments should be made to the municipality's overall housing obligation. N.J.S.A. 52:27D-307(c)(2)(e).

For purposes of this proceeding, what is notable about this statutory directive is that it concerns only the overall determination as to which municipalities have housing obligations and how large those obligations are. Consistent with the general scheme of the State Planning Act, the Legislature did not direct the COAH to utilize the SDRP to make site specific determinations or as a set of regulatory standards for determining the permissible use of land on any particular site. Indeed, if the pattern of development in the municipality is inconsistent with the SDRP, the COAH is directed to make an appropriate overall adjustment to municipal housing obligation, not to alter the permissible uses of specific sites. N.J.S.A. 52:27D-307(c)(2)(e).

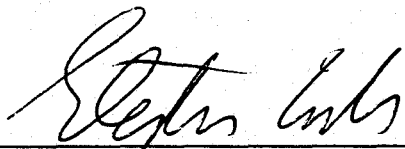
Thus, the contention of the New Jersey Future that COAH is bound by statute to utilize the SDRP to make site specific determinations--or for any purpose other than to determine whether Hillsborough has a housing obligation and the magnitude of that obligation--is without any basis in the law. To the contrary, in making site-specific

determinations, the COAH is free to formulate its own regulatory policies as to what use it will make of the SDRP and to vary those policies on a case-by-case basis by suitable waivers depending upon the specific facts of the case. As set forth in the briefs of the respondents, the COAH has properly done so in the present matter based upon the particular and idiosyncratic facts before the agency concerning Hillsborough and its plan.

CONCLUSION

For the foregoing reasons, amicus curiae New Jersey Builders Association respectfully urges the Court to reject the erroneous characterization of the State Development Guide Plan and of the relationship between the SDRP and the Council on Affordable Housing presented by appellant New Jersey Future, Inc.

Hill Wallack
Attorneys for Amicus Curiae
New Jersey Builders Association

by: 
Stephen Eisdorfer, Esq.

Dated: July 7, 1997

A-5349-95 T1

ORDER ON MOTION

RECEIVED NOV 25 1996

IN THE MATTER OF THE PETITION FOR
SUBSTANTIVE CERTIFICATION OF THE
HOUSING ELEMENT AND FAIR SHARE PLAN
OF THE TWP OF HILLSBOROUGH ET AL

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -005349-95T1
MOTION NO. M -001171-96
BEFORE PART: A
JUDGE(S): LONG
CUFF

MOTION FILED: OCTOBER 09, 1996 BY: NJBA
ANSWER(S) FILED:

REC'D
APPELLATE DIVISION

SUBMITTED TO COURT: NOVEMBER 13, 1996

NOV 19 1996

ORDER

R. Smiley Cox
Clerk

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS
15 DAY OF November 1996, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT
- TO APPEAR AS AMICUS CURIAE

GRANTED (✓) DENIED () OTHER ()

SUPPLEMENTAL:

NOV. 13 1996

R. Smiley Cox
Clerk

I hereby certify that the foregoing is a true copy of the original on file in my office.

R. Smiley Cox

Clerk

FOR THE COURT:

Virginia Long
VIRGINIA LONG P.J.A.D.

JUKFS1

la

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IN RE PETITION FOR SUBSTANTIVE	:	SUPERIOR COURT OF NEW JERSEY
CERTIFICATION OF THE HOUSING	:	APPELLATE DIVISION
ELEMENT AND FAIR SHARE PLAN	:	DOCKET NO.
OF THE TOWNSHIP OF	:	CIVIL ACTION
HILLSBOROUGH, SOMERSET	:	ON MOTION SEEKING CERTIFICATION
COUNTY, SUBSTANTIVE	:	OF, OR LEAVE TO APPEAL FROM,
CERTIFICATION 31-99.	:	AN ORDER OF THE COUNCIL ON
	:	AFFORDABLE HOUSING:
	:	
	:	CERTIFICATION IN SUPPORT OF
	:	NOTICE OF MOTION FOR LEAVE
	:	TO APPEAR AS <i>AMICUS CURIAE</i>

I, Patrick J. O'Keefe, of full age, hereby certify as follows:

1. I am the Executive Vice President and Chief Executive Officer of the New Jersey Builders Association ("NJBA").
2. The NJBA is a statewide trade association comprised of approximately 1,800 members. The membership is comprised of builders, developers, consulting professionals, suppliers, subcontractors, and others involved in residential and light commercial development.
3. Our members are active in all regions of the state and many own property in areas that have been designated "Planning Areas 4 and 5" in the State Development and Redevelopment Plan.
4. Historically, the preponderance of the low and moderate income housing built in furtherance of the state's "Mount Laurel Doctrine" has been constructed by members

Ja

of the NJBA and it is expected that this will continue to be the case in the future.

5. The NJBA is actively engaged in providing legislative and legal services for the benefit of its members and acts as a statewide clearinghouse for its members with respect to all regulatory, legislative, and legal matters affecting the building industry in New Jersey.

6. The NJBA, through its officers and staff, testifies regularly before the Legislature and the administrative agencies which regulate and affect the industry, and provides information and regularly gives advice to its members through seminars, publications, and in response to individual requests with respect to members' obligations under Federal and State law.

7. The NJBA has also been before New Jersey's courts as a proponent of the interests of its members and an advocate on behalf of those needing shelter in New Jersey.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.


PATRICK K. O'KEEFE

Dated: 25. 1. 1986

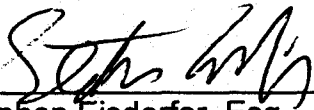
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CERTIFICATION OF SERVICE

I certify that copies of the foregoing brief and appendix were served on all parties this day by sending copies to counsel by overnight courier at the addresses shown on the annexed service list.

I certify that foregoing statements made by me are true. I am aware that if any of the statements made by me are wilfully false, I am subject to punishment.



Stephen Eisdorfer, Esq.

July 7, 1997

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FILE NO.: 3903\0092\330600

October 7, 1996

Emille R. Cox, Clerk
Superior Court of New Jersey
Appellate Division Clerk's Office
Hughes Justice Complex
25 West Market Street, CN-006
Trenton, New Jersey 08625-0006

Re: In Re Petition for Substantive Certification of the Housing Element & Fair Share Plan of the Twp. of Hillsborough, Somerset Cty., Substantive Certification 31-99

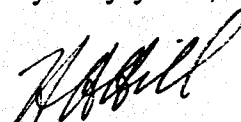
Dear Mr. Cox:

In connection with the above matter, enclosed please find for filing the following:

- (X) Notice of Motion for Leave to Appear as *Amicus Curiae* (original and five copies)
- (X) Supporting Certification (original and five copies)
- (X) Letter Brief (original and five copies)
- (X) Check in the amount of \$25.00.

Kindly return a "filed" copy of the same in the enclosed envelope. Thank you.

Very truly yours,



Henry A. Hill

HAH:cld

Enclosures

cc: Peter G. Verniero, A.G. (w/enc-2 copies)
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FILE NO.: 3903\0092\331843

October 7, 1996

Superior Court of New Jersey
Judges of the Appellate Division
Hughes Justice Complex
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CN-006
Trenton, New Jersey 08625-0060

Re: In Re Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, Substantive Certification 31-99.

Dear Judges of the Appellate Division:

On behalf of movant New Jersey Builders Association ("NJBA"), please accept this Letter Brief in support of the within application for leave to appear as *amicus curiae* in the above-referenced matter.

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PROCEDURAL AND FACTUAL BACKGROUND

On April 13, 1996, the Council on Affordable Housing (hereinafter "COAH") granted substantive certification of Hillsborough Township's Housing Element and Fair Share Plan, acting pursuant to the New Jersey Fair Housing Act, N.J. Stat. Ann. 52:27D-301 et seq. and N.J.A.C. 5:93. The Housing Element and Fair Share Plan are premised on development of the Planned Adult Community/Health Care Facility (hereinafter "PAC/HCF") site, which COAH found to be "available, approvable, suitable and developable." [COAH Compliance Report, p.5].

On or about May 20, 1996, appellants New Jersey Future, Inc. (hereinafter "NJF") filed a Notice of Appeal with this Court pursuant to New Jersey Court R. 2:2-3(a)(2). NJF challenges the inclusion of the PAC/HCF site in the certified Housing Element and Fair Plan. The NJF appeal is now pending before this Court.

The NJF contends that COAH committed reversible error by approving a plan which is inconsistent with State Development and Redevelopment Plan (hereinafter "SDRP"). NJF's position appears to be that the SDRP is binding upon all state agencies in granting approvals and licenses and, in particular, upon COAH.

The Attorney General has not yet filed the statement of items pursuant to R. 2:5-4.

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LEGAL ARGUMENT

- I. THE NJBA'S INVOLVEMENT IN THIS MATTER WILL ASSIST IN THE COURT'S RESOLUTION OF THE CRITICALLY IMPORTANT ISSUES RAISED BY THIS CASE, AND THIS APPLICATION IS OTHERWISE IN CONFORMANCE WITH R. 1:13-9 AND SHOULD BE GRANTED.

Application for leave to appear as *amicus curiae* are governed by R. 1:13-9, which reads as follows:

An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby. The order granting the motion shall define with specificity the permitted extent of participation by the *amicus* and shall, where appropriate, fix a briefing schedule. An *amicus curiae* who has been granted leave to appear in a cause may, without seeking further leave, file a brief in an appeal taken to any court from the judgment therein entered.

The criteria set forth in the Rule are next addressed in turn.

With respect to the identity of the applicant, the NJBA is a membership organization consisting of approximately 1,800 residential builders and developers throughout the state. Its members will be affected by the outcome of the appeal in this matter. It represents the interests of residential builders and developers before the courts, administrative agencies, and the

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legislature. *See, i.e.*, Strawn v. Canuso, 271 N.J. Super. 88 (1994); Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216 (1994); and Matter of Egg Harbor Associates, 94 N.J. 358 (1983).

If granted leave to appear as *amicus*, NJBA would address three issues raised in NJF's application: (1) the effect of State Development and Redevelopment Plan; (2) the procedures and standards used by COAH to approve projects in Planning Areas 4 and 5; and (3) COAH's standards and procedures involving plans negotiated between builders and developers.

This appeal raises novel issues of public importance concerning the proper standards for approval by the COAH of municipal housing plans under the Fair Housing Act, N.J.S.A. 52:27D-301, et seq., involving sites in so-called "planning areas" 4 or 5 as designated by the State Development and Redevelopment Plan, the legal effect of the State Development and Redevelopment Plan, the relationship between the Fair Housing Act and the State Planning Act, N.J.S.A. 52:18A-196, et seq., and the significance of the memorandum of understanding between the Council on Affordable Housing and the State Planning Commission and the regulations of the COAH.

Again, NJBA is uniquely equipped to provide this Court with input concerning such consequences. For similar reasons, NJBA has a special interest, involvement and expertise with respect to these questions, and NJBA will assist the Court in the Resolution of such issues of public importance, all as required by R. 1:13-9.

With respect to the timeliness demanded by R. 1:13-9, NJBA has moved promptly before

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the Court for leave to appear as *amicus*. The Attorney General has not filed the Statement of Items pursuant to R. 2:5-4. No party has yet filed any briefs. NJBA will file its brief simultaneously with Respondent or upon such other schedule as the Court establishes. No party to this matter will be unduly prejudiced by NJBA's appearance as *amicus*. Should this Court grant this motion, NJBA is fully prepared to brief the merits of this matter within whatever briefing schedule is applied to the Respondents. In other words, NJBA would not delay the outcome of this matter in any way. However, NJBA would certainly provide this Court with an industry wide perspective on issues which are of extreme importance to its members and, indeed, the public at large.

CONCLUSION

For the reasons advanced above, NJBA respectfully submits that it meets the criteria set forth in R. 1:13-9 and that this application for leave to appear as *amicus curiae* should therefore be granted. The NJBA should be permitted to appear, file briefs, and present oral argument.

Respectfully submitted,
HILL WALLACK
Attorneys for Movant, New Jersey Builders
Association

By: _____


HENRY A. HILL

Enclosures

cc: (All with enclosures)

Peter G. Verniero, A.G.
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Edward Lloyd, Esq.

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IN RE PETITION FOR SUBSTANTIVE
CERTIFICATION OF THE HOUSING
ELEMENT AND FAIR SHARE PLAN
OF THE TOWNSHIP OF
HILLSBOROUGH, SOMERSET
COUNTY, SUBSTANTIVE
CERTIFICATION 31-99.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
CIVIL ACTION

ON MOTION SEEKING CERTIFICATION
OF, OR LEAVE TO APPEAL FROM,
AN ORDER OF THE COUNCIL ON
AFFORDABLE HOUSING:

NOTICE OF MOTION FOR LEAVE
TO APPEAR AS *AMICUS CURIAE*

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PLEASE TAKE NOTICE that, on behalf of the New Jersey Builders Association
("NJBA"), undersigned counsel hereby move before the Appellate Division of the Superior Court

for entry of an Order granting NJBA leave to appear as *amicus curiae* for the purpose of permitting NJBA to brief the issues on the merits.

PLEASE TAKE FURTHER NOTICE that, in support of this motion, NJBA shall rely upon the Letter Brief and Certification filed and served herewith and oral argument.

Respectfully submitted,
HILL WALLACK
Attorneys for New Jersey Builders Association

By: 
HENRY A. HILL

Dated: *October 7, 1996*

CERTIFICATION OF SERVICE

I hereby certify that, on this date, I caused two (2) copies of the within Notice of Motion, Letter Brief, and Certification to be served via regular mail upon all counsel to whom said Notice of Motion is directed at the addresses set forth on the face page of the Notice of Motion.

I further certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

By: 
HENRY A. HILL

Dated: *October 7, 1996*

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of the NJBA and it is expected that this will continue to be the case in the future.

5. The NJBA is actively engaged in providing legislative and legal services for the benefit of its members and acts as a statewide clearinghouse for its members with respect to all regulatory, legislative, and legal matters affecting the building industry in New Jersey.

6. The NJBA, through its officers and staff, testifies regularly before the Legislature and the administrative agencies which regulate and affect the industry, and provides information and regularly gives advice to its members through seminars, publications, and in response to individual requests with respect to members' obligations under Federal and State law.

7. The NJBA has also been before New Jersey's courts as a proponent of the interests of its members and an advocate on behalf of those needing shelter in New Jersey.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.



PATRICK K. O'KEEFE

Dated: 29. June 1996

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