

Hillsborough Litigation

8/1/97

Cover letter

Letter brief in opposition to remand

Certification of Peter A. Buchsbaum

Certification of service

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REPLY TO

WOODBIDGE

VIA FEDERAL EXPRESS

August 1, 1997

Emille R. Cox, Clerk
Superior Court of New Jersey
Appellate Division
R. J. Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

RE: IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF
THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF
HILLSBOROUGH, SOMERSET COUNTY,
SUBSTANTIVE CERTIFICATION 31-99, DOCKET NO. A-5349-95-T1

Dear Mr. Cox:

Enclosed for filing please find an original and five copies of Respondent, Hillsborough Alliance for Adult Living, L.L.P.'s, Letter Brief in opposition to Respondent New Jersey Council on Affordable Housing's motion to remand; Certification of Peter A. Buchsbaum, Esq.; and Certification of Service.

Kindly return a copy of the pleading marked "filed" to my office in

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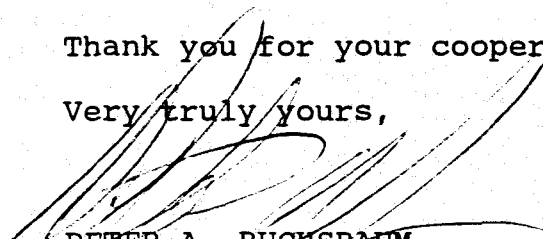
GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP

August 1, 1997
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the enclosed stamped, self-addressed envelope.

Thank you for your cooperation in this matter.

Very truly yours,



PETER A. BUCHSBAUM

PAB/pas
Enclosures

cc: Edward Lloyd, Esq.
John Payne, Esq.
Frank Yurasko, Esq.
Ronald Shimanowitz, Esq.
Stephen Eisdorfer, Esq.
Edward Halpern, Esq.

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August 1, 1997

Emille R. Cox, Clerk
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RE: IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF
THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF
HILLSBOROUGH, SOMERSET COUNTY,
SUBSTANTIVE CERTIFICATION 31-99, DOCKET NO. A-5349-95-T1

Civil Action: Motion for Remand

Letter Brief of Respondent, Hillsborough Alliance for Adult
Living, L.L.P. in Opposition to Respondent, New Jersey Council
on Affordable Housing's Motion for Remand

Dear Mr. Cox:

Please accept this letter brief, pursuant to R. 2:6-2(b), in lieu of a more formal brief on behalf of respondent Hillsborough Alliance for Adult Living, L.L.P. ("Alliance") in opposition to COAH's Motion for Remand.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Alliance generally adopts the procedural history and statement of facts of COAH to the extent that said history and statement do not in fact represent legal argument. See, e.g., COAH Motion brief, paragraph beginning at bottom of p.3 and p.4. The salient points are that COAH granted substantive certification of Hillsborough's Housing Element and Fair Share Plan on April 3, 1996; that this certified plan relied on respondent Alliance's site for all of its new construction of affordable housing; that there was an appeal of that certification; that Hillsborough subsequently, on June 24, 1997, decided not to pursue petitioning DEP for inclusion of the PAC/HCF site in question in its Wastewater Management Plan ("WWMP"), despite the resolution of the Hillsborough Planning Board that the site be so included; and that now COAH requests that this Court remand this appeal of the grant of the certification to COAH for further action as to the Alliance's site, since the affordable housing called for in the certification requires access to water and sewer service at the site.

**GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP**

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It is Alliance's position that COAH has the obligation to enforce the substantive certification that it has already granted. Therefore, remanding this proceeding to COAH for a general reconsideration of the Hillsborough Fair Share Plan and the inclusion of the Alliance's site therein is unnecessary and inappropriate.

LEGAL ARGUMENT

THE COURT SHOULD DENY COAH'S MOTION FOR REMAND.

On the failure to obtain a stay of an order pending appeal, the execution or enforcement of the judgment or order is not stayed. 4 C.J.S. Appeal and Error § 410 (1993). Moreover, New Jersey's Court Rules provide that:

[T]he supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders

R. 2:9-1(a). COAH's actions, through the authority given it by both the Legislature and the New Jersey Supreme Court, see Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 32 (1986); Holmdel Builders Ass'n v. Tp. of Holmdel, 121 N.J. 550, 574 (1990); Van Dalen v. Washington Township, 120 N.J. 234, 245 (1990), are analogous to those of a court of law. As such, the substantive certification of Hillsborough's Housing Element and Fair Share Plan is entitled to the same effect as an order by a court.

It is undisputed that the certification granted by COAH has not been stayed pending New Jersey Future's appeal. The certification is therefore still in full force and effect. Accordingly, COAH has the authority, without a remand, to enforce the terms of the certification so as to effectuate compliance with COAH regulations.

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Further, it is clear that Hillsborough has violated COAH regulations respecting the Alliance site. COAH's own regulations provide as follows:

Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.

N.J.A.C. 5:93-4.3(c)(2) (emphasis added). By a simple reading of COAH's own regulations, it is thus clear that COAH is mandated to require Hillsborough Township officials to endorse all applications for water and sewer service upon which a COAH certification of a Housing Element and Fair Share Plan is dependent.

To date, this has not occurred. What has occurred is that Hillsborough Township is now backing away from a commitment it made when seeking COAH's certification to obtain water and sewer approvals for the PAC/HCF site. Hillsborough Township does not have the right unilaterally to take this action and opt out of its own certification. Such action is illegal under N.J.A.C. 5:93-4.3(c)(2), and it severely prejudices the vested rights of Alliance, with whom Hillsborough Township signed a development agreement. Aa40-49.¹ To allow this action to go unchecked, through a general remand to reconsider the entire certification, renders

¹ Reference to Appellant's Appendix shall be as follows: Aa page #; reference to Appellant's Brief shall be: Ab page #; reference to Respondent Township of Hillsborough's Brief shall be: HRb page #; reference to Respondent Township of Hillsborough's Appendix shall be: HRa page #; and reference to Respondent Hillsborough Alliance for Adult Living's Appendix shall be LRa page #.

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the entire COAH substantive certification process meaningless. By its request for a general remand, COAH is apparently asserting that the certification can be subverted, and a development site removed from a plan, as a result of unilateral municipal action, at any time, even sixteen months after certification was granted and a developer's agreement signed with the municipality and endorsed by COAH.

The end result of this assertion is an apparent default on the part of COAH with regard to its obligation to superintend the municipal provision of affordable housing. Further, in the case at bar, a developer who has voluntarily worked with Hillsborough and has relied on the status of its project as a COAH substantively certified site, suddenly risks being denied the opportunity to provide affordable housing to a community due to a sudden unilateral shift in the political winds in that community. This result simply be allowed, given COAH's responsibility for enforcing the constitutional obligation for provision of affordable housing. See generally, Hills Development, supra.

In view of the above, COAH's motion for remand is an inappropriate response to Hillsborough's apparent violation of COAH regulations. COAH has the power and the authority to require Hillsborough to seek the water and sewer approvals pursuant to its commitment when substantive certification was granted. See Hills Development, supra, 103 N.J. at 57-58. Alliance intends to move soon before COAH to force it to exercise its power to enforce its

**GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP**

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certification. It is therefore unnecessary for COAH to be granted a general remand at this time. The proper action for COAH to take at this time is for it to exercise its authority under N.J.A.C. 5:93-4.3(c)(2) to order Hillsborough to seek the necessary water and sewer approvals to move the PAC/HCF site development along pursuant to the development agreement it executed with Alliance on February 27, 1996. Had Hillsborough officials pursued inclusion of the PAC/HCF site in the WWMP in good faith, and had said inclusion been denied by a third party such as the NJDEP despite this good faith effort, then remand of the certification in question to COAH might be appropriate. Since such a good faith effort has not yet been expended, however, a general remand to COAH to reconsider the Alliance's site is inappropriate at this time.

GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP

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CONCLUSION

For all of the aforementioned reasons, this Court should deny
COAH's motion for remand.

Respectfully submitted,

GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP
Attorneys for Respondent
Hillsborough Alliance for
Adult Living, L.L.P.

By: 

PETER A. BUCHSBAUM

cc: William P. Malloy, Esq. (2 copies each)
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Frank Yurasko, Esq.
Ronald L. Shimanowitz, Esq.
Stephen Eisdorfer, Esq.
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IN THE MATTER OF THE 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-5349-95-T1

CIVIL ACTION

CERTIFICATION OF PETER A.
BUCHSBAUM IN OPPOSITION TO
MOTION FOR REMAND

PETER A. BUCHSBAUM, of full age, certifies and says:

1. I am an attorney-at-law of the State of New Jersey and a member of the firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP, attorneys for Respondent Hillsborough Alliance for Adult Living, L.L.P. ("Alliance"). As such, I have knowledge of the facts set forth below.
2. This certification is submitted in opposition to COAH's motion for remand of this appeal to its jurisdiction.
3. On April 3, 1996, COAH formally issued substantive certification to Hillsborough's Housing Element and Fair Share Plan.
4. This certification assumed that the PAC/HCF site would be included in a 208 plan amendment to bring sewer and water service to the site, and according that Hillsborough would facilitate such service.

5. On April 8, 1997, the Hillsborough Township Planning Board passed a resolution requesting that the PAC/HCF site at issue here be included in the Somerset County/Upper Raritan Watershed Wastewater Management Plan (WWMP), which would provide sewer and water service to the site.

6. On June 27, 1997, the Township of Hillsborough informed COAH that it was overruling its Planning Board's recommendation, and not requesting that the County include the site in the WWMP.

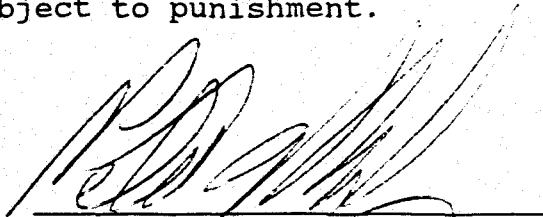
6. COAH's regulations, see N.J.A.C. 5:93-4.3(c)2, require that municipal officials endorse all applications to the DEP or its agent to provide water and/or sewer capacity to a site which will provide low and moderate income housing pursuant to a Housing Element and Fair Share Plan.

7. No purpose will be served by granting COAH's motion for remand, since COAH will still be bound to enforce the substantive certification that it granted to Hillsborough Township on April 3, 1997.

8. Since COAH is required to adhere to its own regulations and therefore enforce the substantive certification that it granted to Hillsborough Township on April 3, 1997 by ordering Hillsborough Township to endorse and submit an application for the PAC/HCF site to be included in the WWMP, Alliance respectfully requests this Court deny COAH's motion for remand.

CERTIFICATION

I 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.



Peter A. Buchsbaum

Dated: August 1, 1997

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & HIMMEL LLP
Metro Corporate Campus One
99 Wood Avenue South
Iselin, New Jersey 08830
(732) 549-5600

Attorneys for Respondents Hillsborough Alliance for Adult
Living, L.L.P.

IN THE MATTER OF THE PETITION
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SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-5349-95-T1

**CERTIFICATION OF
SERVICE**

PATRICIA A. SYLVIA, of full age, upon her certification,
says:

1. I am a legal secretary employed by the law firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP, attorneys for Respondent Hillsborough Alliance For Adult Living, L.L.P., with offices located at Metro Corporate Campus I, 99 Wood Avenue South, Iselin, New Jersey 08830-9998.

2. On August 1, 1997, I caused to be served by Federal Express on Emille R. Cox, Clerk, Superior Court of New Jersey, Appellate Division, CN - 006, Trenton, NJ 08625, an original and five (5) copies of Respondent's Certification and Letter Brief in Opposition to COAH's Motion for Remand.

3. On August 1, 1997, I caused to be served by Federal Express, two copies of Respondent's Certification and Letter Brief in Opposition to COAH's Motion for Remand on the following:

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Newark, NJ 07102-3192

William P. Malloy, Deputy Attorney General
Office of the Attorney General
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25 West Market Street
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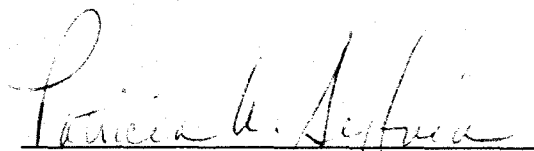
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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


PATRICIA A. SYLVIA

Dated: August 1, 1997