

Hillsborough Lit.

9-8-97

Re. proposed repeal of PAC/HCF ordinance

Pgs. 8

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September 8, 1997

Via Federal Express and Telecopy

Hon. Brett Radi, Mayor, and
Members of the Township
Committee of Hillsborough Township
c/o Mr. Gregory Bonin, Clerk
Hillsborough Township Municipal Building
555 Amwell Road
Neshanic, New Jersey 08853

Re: Proposed Repeal of PAC/HCF Ordinance (Ordinance 97-28)
(SKP Land/Hillsborough)

Dear Mayor and Members of the Township Committee:

We represent SKP Land, Inc., developer of the property designated as Block 140, Lot 1, and Block 141, Lots 2.01, 7.01, 30 and 31.02, comprised of some 240.2 acres, situated along Route 206, Falcon Road, and Sunnymead Road (the "Property"). We are writing, at this time, to assert our objection to the proposed adoption of Ordinance No. 97-28 which would have the effect of repealing the provisions of the Hillsborough Township Ordinance which currently allow Planned Adult Community/Health Care Facilities ("PAC/HCF") development in various residential zones (as set forth more particularly in Chapter 77-91.1 of your ordinances) (the "PAC/HCF Ordinance").

The Property referenced above is situated in the RA and R zones where PAC/HCF development is currently a permitted use. In fact, we currently have pending before the Hillsborough Township Planning Board a variance application which seeks relief from the 450-acre minimum lot size requirement of the current PAC/HCF

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ordinance in order to enable a PAC/HCF project to be developed on the Property.*

The repeal of the PAC/HCF Ordinance would be illegal and violative of sound, well-established principles of planning and zoning. More specifically, the appeal of this ordinance would, at the very least:

1. Violate the federal Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601, et seq.;
2. Be inconsistent with the purposes of the Hillsborough Township Master Plan;
3. Constitute illegal, arbitrary and capricious action; and
4. Represent a violation of the Mt. Laurel doctrine.

Set forth below is a brief explanation of the reasons why the proposed repeal of the PAC/HCF Ordinance would be illegal. This letter is submitted with full reservation of all of my client's rights, and with reservation of the right to assert any and all claims resulting from repeal of the current PAC/HCF Ordinance.

* This variance application also seeks certain relief from a 50% set aside of "low, moderate, and least cost housing" (and proposes, instead, a much more reasonable 10% set aside of "low and moderate income" housing), as well as limited relief from the thirty foot height limitation (to allow a sloped roof having a height of some 32.9 feet). We reserve, of course, our rights with respect to these variance applications and the current ordinance.

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I. THE PROPOSED REPEAL OF THE PAC/HCF ORDINANCE WOULD VIOLATE THE FEDERAL FAIR HOUSING AMENDMENTS ACT OF 1988, 42 U.S.C. §3601, ET SEQ.

The proposed PAC/HCF development to be developed by SKP Land, Inc. ("SKP Land") on the Property would include, as shown in the plan submitted to the Planning Board, a total of 240 health care facilities beds, i.e., 120 assisted living residences and 120 skilled nursing care beds. The project would also include some 800 total dwelling units, 95% of which would be age restricted for senior citizens in accordance with the current ordinance.

It is against this backdrop that one must bear in mind that the Fair Housing Amendments Act of 1988, 42 U.S.C. §3601, et seq. (the "Fair Housing Act") makes it unlawful for municipalities to discriminate against or fail to make reasonable accommodations for housing for disabled or handicapped individuals. This includes refusing to make reasonable accommodations through local land use ordinances, rules, policies, and practices. By repealing the PAC/HCF Ordinance, the Township would be preventing SKP Land from constructing the very housing accommodations contemplated, and mandated, by the Fair Housing Act. See, e.g., Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3rd Cir. 1996) (holding that a nursing home is a "dwelling" for purposes of the Fair Housing Act).

Moreover, by repealing the PAC/HCF Ordinance, the Township would be preventing SKP Land from providing necessary housing to senior citizens -- the very persons whom the Fair Housing Act seeks to protect. See Hovsons, supra (holding that a resident of a nursing home is a handicapped person for purposes of the Fair Housing Act); see also Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F. Supp. 1152, 1168 (D. Puerto Rico 1990), vacated in part, 988 F.2d 252 (1st Cir. 1993); "K" Care, Inc. v. Town of Lac du Flambeau, 181 Wis. 2d 59, 67 (Ct. App. 1993) (stating that where a person's physical or mental condition does not permit them to "eat, bathe, walk or use a toilet without

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assistance" and prohibits them from living "independently" and from performing major life activities such persons are "handicapped" under the Fair Housing Act); United States v. City of Taylor, Michigan et al., 798 F. Supp. 442, 446 (E.D. Mich. 1992), rev'd and remanded on other grounds, 13 F.3d 920 (6th Cir. 1993), on remand, 872 F. Supp. 423 (E.D. Mich. 1995), aff'd in part, rev'd in part, 102 F.3d 781 (6th Cir. 1996) (aging persons who "suffer from Alzheimer's Syndrome, senile dementia and organic brain syndrome, along with physical problems associated with the elderly, such as hypertension and hip replacements" are handicapped under the Fair Housing Act as they are unable to perform major life activities).

SKP Land clearly has standing to challenge this proposed repeal of the PAC/HCF Ordinance under the Fair Housing Act, to ensure that reasonable accommodations to senior citizens are afforded in the Township of Hillsborough. See 42 U.S.C. at §3613 (a); see also Horizon House Dev. Servs., Inc. v. Tp. of Upper Southampton, 804 F. Supp. 683, 692 (E.D. Pa. 1992), aff'd 995 F.2d 217 (3d Cir. 1993) (holding that "[c]ourts have explicitly held that a person who is not himself handicapped, but is prevented from providing housing for handicapped persons by a municipality's discriminatory acts, has standing to sue under the [Fair Housing Act]").

In conclusion, and as confirmed by the leading, recent Third Circuit decision in Hovsons, Inc. v. Township of Brick, supra (which binds New Jersey courts), the repeal of the PAC/HCF Ordinance would violate the federal Fair Housing Act. In this regard, it must be noted that a violator of the Fair Housing Act may be liable for actual and punitive damages, as well as the prevailing party's legal fees. See 42 U.S.C. at §3613(c)(1) and (2).

II. REPEAL OF THE PAC/HCF ORDINANCE WOULD BE INCONSISTENT WITH THE PURPOSES OF THE HILLSBOROUGH TOWNSHIP MASTER PLAN.

It is, of course, elementary that the Municipal Land Use Law requires zoning provisions to implement the land use and housing elements incorporated into the local master plan. In this

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regard, it should be noted that long-standing goals of the Hillsborough Township Master Plan include the provision of affordable housing for senior citizens and the provision of healthcare facilities for senior citizens. See, e.g., Hillsborough Township Master Plan, Goals and Objectives, Section 1-5, p.7 and Housing, Sections 3-2 and 3-5, pp. 2 and 6 (affordable housing); Goals and Objectives, Section 1-4, p.6 (health care).

The Property proposed to be developed by SKP Land is ideally suited for a PAC/HCF development, as documented quite clearly in the enclosed Planner's Report prepared by David Kinsey, Ph.D., AICP, PP, in support of the pending variance application (the "Planner's Report").

This Planner's Report makes it clear that the Property has direct access to existing sewer infrastructure, with existing sewer lines practically surrounding the tract. The Property is entirely within the NJDEP approved sewer service area. The Property also has direct access to existing water mains within Route 206, and other required utilities. The Property is well suited for the proposed development from a planning perspective, with the entire tract having been placed in Suburban Planning Area (PA 2) in the State Development and Redevelopment Plan adopted by the State Planning Commission in 1992.

* While there is one known owner/applicant who proposes to provide senior housing in the Township on a tract which has received general development plan approval, but not site plan approval, that proposed development appears, at this juncture, to be quite speculative. Since it is currently embroiled in litigations concerning (a) sewer which the Township has failed to accommodate in the relevant 208 plan or wastewater management plan, and (b) Mt. Laurel issues, in connection with which the suitability of the development site has been subjected to serious challenges due, inter alia, to the site not having the appropriate planning designation under the State Development and Redevelopment Plan.

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Moreover, the proposed development of the Property would, as also explained in detail in the enclosed Planner's Report, result in an annual fiscal surplus to Hillsborough Township of some \$1.5 million. Surely, a fiscal benefit of this magnitude should not be lightly disregarded. While zoning should not, of course, be based purely on fiscal criteria, by the same token, where, as in this case, there are any number of appropriate reasons for zoning to allow a particular use, i.e. PAC/HCF development, it is not inappropriate for a municipality to consider fiscal impact in its long range planning. Additionally, as indicated in the Planner's Report, the PAC/HCF Ordinance would also result in contribution toward the relocation and improvement of the intersection of Valley Road and U.S. Route 206, an intersection currently in need of improvement.

In short, the proposed repeal of the PAC/HCF Ordinance would frustrate the goals of the Hillsborough Township Master Plan of providing affordable housing and healthcare facilities for senior citizens. It is as a result of the current PAC/HCF Ordinance that SKP Land is on the verge of being able to provide such facilities (in connection with its pending application before the Planning Board). The repeal of the PAC/HCF Ordinance would clearly frustrate accomplishment of these important Master Plan objectives; such a measure does not appear to be defensible.

III. THE PROPOSED REPEAL OF THE PAC/HCF ORDINANCE WOULD BE ARBITRARY AND CAPRICIOUS.

It is beyond dispute that any proposed zoning measure must promote the public health, safety, morals or the general welfare and, in particular, must promote the purposes of Municipal Land Use Law (and a duly adopted Master Plan).

The repeal of the PAC/HCF Ordinance fails to measure up to this standard in two very specific respects. First, the PAC/HCF Ordinance includes the only general development plan approval provisions set forth in the Hillsborough Township Ordinance. These provisions were intended to implement the 1987 amendments to the Municipal Land Use Law, and are set forth in Chapter 77-91.1.C. By repealing these provisions of the general development

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plan ordinance, the Township would clearly be "throwing out the baby with the washwater," i.e., repealing a workable general development plan ordinance because, apparently in the Township's eyes, there is some problem associated with the PAC/HCF development provisions.

Moreover, as indicated above, and as set forth in the enclosed Planner's Report, the PAC/HCF development represents a forward thinking, particularly suitable proposal for the Property, posing any number of public and social benefits, with virtually no detriment. The wholesale striking of this permitted use for the Property can only be said to be arbitrary and capricious, in clear violation of all applicable law.

IV. THE PROPOSED REPEAL OF THE PAC/HCF ORDINANCE WOULD VIOLATE THE MT. LAUREL DOCTRINE.

As stated above, the project proposed on the Property would include a set-aside of ten percent of the total 800 dwelling units for low and moderate income housing required pursuant to the Mt. Laurel doctrine, i.e., a set-aside of 80 units. As explained above, this proposal represents a very realistic means of providing these units, in comparison to other much more problematic and speculative development bogged down in litigation involving sewerage and Mt. Laurel complexities. The Mt. Laurel doctrine requires every municipality to provide the realistic opportunity for the development of its fair share of low and moderate income housing. The project proposed by SKP Land on its Property certainly meets this standard. It would represent a violation of the Mt. Laurel doctrine for Hillsborough Township to preclude the proposed, realistic development, while claiming Mt. Laurel compliance, based upon other, much more questionable, proposed development.

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CONCLUSION

For all the foregoing reasons, it is respectfully requested that Hillsborough Township decline to pass Ordinance No. 97-28 which would repeal the current PAC/HCF Ordinance.

Respectfully submitted,
SHANLEY & FISHER, P.C.


Glenn S. Pantel

GSP/wpc
Enclosure

cc: Mr. Greg Bonin, Township Clerk (7 copies, w/enc.) via fax and Federal Express
Edward A. Halpern, Esq. (w/enc.) via fax and Federal Express
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