

Hillsborough Litigation

9/19/97

- Letter brief on behalf of petitioner HAAZ in support of Motion to Enforce NJ Council on Affordable Housing's Substantive Certification of the Housing Element and Fair Share Plan of Hillsborough.
- attch: Hillsborough ordinance 97-28

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REPLY TO

WOODBIDGE

VIA HAND DELIVERY
September 19, 1997

Ms. Shirley Bishop, Executive Director
Council on Affordable Housing
101 South Broad Street
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Trenton, New Jersey 08625-0813

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.

Letter Brief of Petitioner, Hillsborough Alliance for Adult
Living, L.L.P. and U.S. Home Corp. in Support of its Motion to
Enforce New Jersey Council on Affordable Housing's Substantive
Certification of the Housing Element and Fair Share Plan of
the Township of Hillsborough, Somerset County.

Dear Ms. Bishop:

Please accept this letter brief in lieu of a more formal brief on behalf of petitioner Hillsborough Alliance for Adult Living, L.L.P. and U.S. Home Corp. ("HAAL") in support of its Motion to Enforce New Jersey Council on Affordable Housing's Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County. A certification of

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Peter A. Buchsbaum is also being filed herewith. We would also ask that, in reviewing these papers, COAH also consider the papers previously filed by HAAL in this case. Since the argument in those papers are similar, they have not been repeated in full here.

PRELIMINARY STATEMENT

Due to an apparent shift in the political winds in Hillsborough Township, the Township is threatening HAAL's vested and COAH approved right to build 3,000 housing units in the township, including 450 units of affordable housing. Hillsborough's refusal to act in good faith to fulfill its responsibilities under the Substantive Certification of its Housing Element and Fair Share Plan includes not taking the necessary steps to secure water and sewer approvals for the site. Furthermore, Hillsborough has recently taken the first steps to repeal the PAC/HCF zoning of the site in a further attempt to deny HAAL its vested rights under the Substantive Certification. See Exhibit A.

This approach to resolving development issues surrounding sites that are part of an approved General Development Plan have been rejected by COAH in the past. Moreover, the Appellate Division also has held that the appropriate action at this point in the litigation is for COAH to enforce the Substantive Certification, since it recently denied COAH's motion for a remand of this Substantive Certification. See Exhibit B.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Hillsborough petitioned for Substantive Certification of its Housing Element and Fair Share Plan on February 27, 1995. The Planned Adult Community/Health Care Facility ("PAC/HCF") site was included in the Plan as the primary proposed site for affordable housing. The filed petition stated that the PAC/HCF site had received a General Development Plan approval from the Hillsborough Township Planning Board, which was memorialized on January 29, 1992. Further, the petition noted that "the entirety" of the PAC/HCF tract was included in the Somerset County Amended Wastewater Management Plan "which currently is being reviewed for approval by the New Jersey Department of Environmental Protection" ("DEP"). Hillsborough stated that it expected an expedited approval by the DEP because "...the Somerset County Planning Board agreed to permit Hillsborough Township to separate its section of the County's overall 'Wastewater Management Plan' and to submit its own 'Hillsborough Township Wastewater Management Plan'" to the DEP.

In its April 3, 1996 resolution granting Substantive Certification to Hillsborough's Housing Element and Fair Share Plan, the Council acknowledged that the development of the PAC/HCF project was contingent on the site being included in the water quality management plan amendment and further noted that the Somerset County Planning Board anticipated that a finalized water quality management plan would be refiled with DEP within two months of the date of substantive certification. The resolution required

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that in the event the PAC/HCF site is not approved for inclusion in the 208 plan amendment, Hillsborough shall be required to amend its Housing Element and Fair Share Plan to address the 160 units [of affordable housing] in another manner. COAH conditioned its grant of Substantive Certification on the fact that Hillsborough Township report to COAH on the status of the water quality management plan amendment then pending at the DEP in six months from the date of the grant of Substantive Certification.

On May 20, 1996 New Jersey Future filed a Notice of Appeal from Council's grant of Substantive Certification to Hillsborough's Housing Element and Fair Share Plan. In its brief on the merits filed on March 21, 1997, New Jersey Future claimed that at the time its brief was filed "there is no pending request at DEP for a wastewater management plan amendment" including the PAC/HCF site. Hillsborough responded in its brief that "The status of the County Plan Amendment as it relates to the PAC/HCF site is the same at this writing as it was when substantive certification was granted." However, in a footnote to this statement Hillsborough stated "...the Township Committee by resolution of 4/22/97...has declared that it will provide its opinion regarding inclusion of the site in the County Plan by June 10, 1997." On April 8, 1997 John D. Middleton, Hillsborough Township Administrator, filed a letter with COAH in compliance with the six month report requirement included by COAH as a condition of Substantive Certification. See, Certification of Shirley M. Bishop, P.P. (Exhibit C). This letter

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was captioned "Twelve Month Status Report" and concerned the status of sewer services to the PAC/HCF tract. The letter stated that the Hillsborough Township Planning Board at its April 3, 1997 meeting passed a resolution requesting that the entire PAC/HCF tract be included in the Somerset County-Upper Raritan Watershed Wastewater Management Plan that was to be submitted to DEP. See Bishop Certification (Exhibit C).

On June 27, 1997, however, Middleton filed another letter with the Council. See Exhibit C. In that letter, Middleton stated that at its meeting of April 22, 1997 the Hillsborough Township Committee by resolution "reserved the right to endorse or not endorse" the Planning Board's April 3, 1997 recommendation. The letter further informed COAH that on June 11, 1997 the developer of the PAC/HCF site "independently petitioned DEP for inclusion of their lands" in the wastewater management plan. Because of the developer's petition, Middleton continued, the Hillsborough Township Committee "saw no reason to request the County to include" the PAC/HCF site in the wastewater management plan and "at their meeting on June 24, 1997, they voted to overrule the Hillsborough Township Planning Board's [April 3, 1996] recommendation". Middleton concluded that the Township Committee believed that the "public processes followed by DEP and the Hillsborough Township Planning Board should be allowed to proceed to conclusion without being prejudged. When those processes are finished, the

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Hillsborough Township Committee will be required to take action, under DEP regulations, and they will."

Most recently, Hillsborough moved, through an ordinance introduced by the Township Committee on August 12, 1997, and amended on September 10, 1997, on which public hearings are scheduled to be held on October 14, 1997, to repeal the PAC/HCF zoning for HAAL's property. See Exhibit A. For additional procedural history in this matter, see the Complaint in Lieu of Prerogative Writs which has been filed in this matter in Superior Court, and which has been attached as Exhibit D.

LEGAL ARGUMENT

THE COUNCIL ON AFFORDABLE HOUSING SHOULD ENFORCE ITS GRANT OF SUBSTANTIVE CERTIFICATION OF HILLSBOROUGH'S HOUSING ELEMENT AND FAIR SHARE PLAN.

- A. COAH'S Regulations Give It The Authority As Well As The Obligation To Enforce Its Substantive Certifications.

COAH'S 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 clear that COAH is mandated to require Hillsborough Township officials to endorse all applications for water and sewer service upon which a COAH Substantive Certification of a Housing Element and Fair Share Plan is

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dependent. See also N.J.A.C. 5:93-5.1(b)10, referring to "necessary applications for sewer service . . ." and N.J.A.C. 5:93-5.3(b), which also requires applications for sewer service to be made.

To date, this has not occurred. What has occurred is that Hillsborough Township has backed 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 HAAL, with whom Hillsborough Township signed a Development Agreement. To allow this action to go unchecked, by not enforcing its own Substantive Certification, COAH is allowing the entire Substantive Certification process to be rendered meaningless. By not acting on its power to enforce a Substantive Certification, COAH is apparently asserting that a 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

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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 cannot be allowed, given COAH's responsibility for enforcing the constitutional obligation for provision of affordable housing. See generally, Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1 (1986).

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 Id., at 57-58. See also In The Matter of the Township of Denville, A-4152-93T3, (App. Div. April 21, 1995), attached as Exhibit E.

HAAL now respectfully submits that 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 HAAL on February 27, 1996. These arguments were apparently accepted by the Appellate Division, which recently denied COAH's motion for remand on this issue. See Exhibit B. Since COAH's motion for remand was denied, the only action left for it to take is to enforce the Substantive Certification which has already been granted by taking whatever action is necessary to require

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Hillsborough to seek whatever water and sewer approvals may be necessary in order to move the PAC/HCF project forward.

B. Hillsborough Cannot Dezone A Property Which Is Included In A Site Which Has Been Granted Substantive Certification By COAH.

In addition to failing to obtain the necessary water and sewer approvals, which it is obligated to do under the terms of its Certification, Hillsborough is also now attempting to subvert the COAH Certification process by changing the zoning of the property in question by repealing its PAC zoning. See Exhibit A. It is unquestionable that a municipality cannot change the terms of an existing Certification by changing the zoning of the underlying property.

In general, the Supreme Court has held that one cannot invoke the COAH process and then refuse to enforce the results if one is unhappy with them. See, generally, Hills Dev. Co., supra. In In the Matter of the Petition of Howell Township in Monmouth County for Substantive Certification of its Housing Element and Fair Share Plan, Howell attempted to do this very same thing by rezoning a multifamily parcel for use as a single family development. See Exhibit F. The property was already subject to a COAH Substantive Certification, and COAH ordered that Howell continue to comply with the Certification, thereby frustrating Howell's attempt to circumvent the COAH Certification process through rezoning.

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The situation in the present case is precisely the same, with Hillsborough seeking to accomplish through the zoning process what it has been unable to accomplish through the legal process. The property in question has already been approved as part of Hillsborough's General Development Plan, and Hillsborough is seeking to take it out of the Plan through the use of its zoning power. This violates the terms and conditions of the Substantive Certification which has been granted by COAH. As has already been mentioned, COAH acted in the Howell case to restrain a municipality from taking a property out of a General Development Plan that has already been approved through the use of zoning.

Finally, emergent relief is request due to the fact that Hillsborough is due to act on its proposed ordinance on October 14, 1997. Hillsborough's action will irreparably harm HAAL by denying it the opportunity to build 3,000 housing units, including 450 affordable units, pursuant to a Substantive Certification granted by COAH and in which HAAL has a vested right.

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CONCLUSION

For all of the aforementioned reasons, COAH should enforce its Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County.

Respectfully submitted,

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

By: 

PETER A. BUCHSBAUM



Township of Hillsborough

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Ordinance 97-28

An Ordinance repealing Chapter 77 (Development Regulations) Section 91.1 (PAC Planned Adult Community) of the Municipal Code of the Township of Hillsborough, County of Somerset, State of New Jersey.

BE IT ORDAINED by the Township Committee of the Township of Hillsborough, County of Somerset, State of New Jersey as follows:

Section I. Chapter 77 (Development Regulations), Section 91-1 (PAC - Planned Adult Community), is hereby repealed in its entirety.

Section II. Specifically saved from repealer is the continued applicability of this ordinance to the Hillsborough Alliance for Adult Living L.P. - PAC/HCF development pursuant to its Amended General Development Plan approved by the Hillsborough Township Planning Board on December 7, 1995. This was the only General Development Plan approved by the Planning Board pursuant to the PAC Ordinance.

Section III. In the event the Hillsborough Alliance for Adult Living, L.P. amended General Development Plan Approval expires, is lawfully terminated and/or otherwise loses its validity, the above referenced saving provision contained in Section II hereinabove shall be deemed repealed and be of no force and effect.

Deleted
9/10
Pub.
Hearing
10/14

The within ordinance shall become effective upon adoption and publication and filing with the Somerset County Planning Board in accordance with New Jersey law.

I, Gregory J. Bonin, Hillsborough Township Clerk, hereby certify that the above ordinance is a true and correct copy of an ordinance introduced on first reading by the Township Committee of the Township of Hillsborough at a regular and duly convened meeting held on August 12 1997.

In witness thereof I have set my hand and affixed the seal of the Township of Hillsborough this 13th day of August 1997.