

Hillsborough Litigation

9/25/97

Appellant - NJ Future's letter brief in opposition to HAAAL's motion

14 pgs

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September 25, 1997

VIA FAX 609-633-6056

Ms. Shirley Bishop, Executive Director
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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, COAH DOCKET NO. - COAH 97-905.**

Dear Ms. Bishop:

Enclosed please find Appellant New Jersey Future's letter brief in Opposition to
Movant Hillsborough Alliance for Adult Living, L.L.P., 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.

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COAH MUST DENY THE DEVELOPER'S MOTION BECAUSE JURISDICTION OVER THIS MATTER LIES IN THE APPELLATE DIVISION AND NOT WITH COAH.

"The supervision and control of the proceedings on appeal or certification shall be in the appellate court from time the appeal is taken or the notice of petition for certification filed." New Jersey Rules of Court, R. 2:9-1(a). In the instant case, New Jersey Future filed a Notice of Appeal challenging COAH's decision to grant substantive certification of Hillsborough's Housing Element and Fair Share Plan on May 20, 1996. The Notice of Appeal transferred jurisdiction over the issue of substantive certification from COAH to the Appellate Division. R. 2:9-1(a). COAH, therefore, has no jurisdiction to entertain the motion filed by the developer in this matter.

New Jersey Rules of Court, R. 2:9-1(a) provides that,

Except as otherwise provided by R. 2:9-3, 2:9-4 (bail), 2:9-5 (stay pending appeal), 2:9-7 and 3:21-10(d), the 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 filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to R. 1:10 and as otherwise provided. The appellate court may at any time entertain a motion for directions to the court or courts or agencies below or to modify or vacate any order made by such courts or agencies or by any judge below.

There is no question that under the New Jersey Court Rules and the relevant case law that jurisdiction of the instant matter lies with the Appellate Division and not with COAH. "The ordinary effect of the filing of a notice of appeal is to deprive the trial court of jurisdiction to act further in the matter unless directed to do so by an appellate court, or jurisdiction is otherwise reserved by statute or court rule." Manalapan Realty v. Tp. of Manalapan, 140 N.J. 366, 376 (1995)

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(citations omitted); Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66 (App. Div. 1993); Pressler, Current N.J. Court Rules, comment 1 on R. 2:9-1(a)(1997).

Indeed, the Appellate Division has so ruled in this very matter. On July 21, 1997, COAH filed a Motion for Remand with the Appellate Division in the instant matter "so that jurisdiction over Hillsborough's fair share plan could be returned to the Council." Bishop Certification at ¶4." COAH's Letter Brief in Support of Its Motion to Remand, p. 11. In fact, COAH sought remand from the Appellate Division for precisely the reasons that HAAL now seeks relief from COAH. COAH sought remand so that "[o]nce jurisdiction is returned, the Council may then consider the effects on Hillsborough's certified fair share plan of Hillsborough's recent decision to not actively support the inclusion of the PAC/HCF site in the Somerset County water quality management plan and to overrule the planning board's support of the inclusion of the PAC/HCF site in the county plan." Id. Appellant New Jersey Future, Inc. and Respondent Township of Hillsborough supported COAH's request for a remand of jurisdiction in this matter to COAH. Incredibly, HAAL opposed the motion to remand jurisdiction to COAH and now asks COAH to exercise jurisdiction it does not have. The Appellate Division denied COAH's motion for a remand without opinion. Thus, HAAL's convoluted argument that somehow the Appellate Division denial supports its request to COAH here is totally baseless. On the contrary, the only conclusion that can fairly be drawn from the Appellate Division denial of the remand motion is that it retained jurisdiction over this matter and intends to render a decision on the merits after the completion of briefing and oral argument.

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SHOULD COAH DECIDE TO REACH THE MERITS OF HAAL'S MOTION, IT SHOULD DEFER CONSIDERATION UNTIL ADEQUATE TIME HAS BEEN PROVIDED TO BRIEF THE ISSUES RAISED BECAUSE THERE IS NO URGENCY THAT JUSTIFIES DECIDING THE HAAL MOTION ON AN EXPEDITED BASIS.

Whatever HAAL's perception of the urgency of the issues it seeks to have addressed in this motion, it has been aware of the "alleged harm" for over seven weeks and only now seeks relief on an emergency basis. There is no urgency to the issues raised in this motion, and New Jersey Future strenuously objects to the extremely limited time that it has been given to respond to the motion. HAAL delayed filing the instant "emergent" motion for seven weeks and now expects COAH and the parties to this matter to respond on short notice because of its procrastination.

On August 1, 1997, fifty days before it filed "its emergency motion," HAAL stated in its brief in opposition to COAH's Motion to Remand before the Appellate Division that it "intends to move soon before COAH to force it to exercise its power to enforce its certification." HAAL's Letter Brief in Opposition to COAH's Motion to Remand, August 1, 1997, p. 6-7. Moreover, the Hillsborough ordinance that HAAL seeks to have COAH review was introduced on first reading before the Hillsborough Township Committee on August 12, 1997. HAAL delayed filing the instant "alleged" emergent motion concerning this proposed ordinance for thirty-eight days and now expects COAH and the parties to this matter to respond on just several days notice to "HAAL's emergency."

To add insult to injury, HAAL did not serve its papers on New Jersey Future until it was directed to do so by COAH. Counsel received HAAL's papers on Monday, September 22 and has been directed by COAH to file and serve any response not later than Thursday, September 25. Thus, New Jersey Future and the other parties to this matter have been given three days to reply to an

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“alleged emergency” motion that HAAL delayed filing for 38 to 50 days. New Jersey Future requests that if COAH does not deny the motion on jurisdictional grounds, consideration of this motion be deferred until the parties are given an adequate amount of time to brief the issues raised in the motion.

The concerns that HAAL has raised are legal concerns that can be remedied by a court after-the-fact if necessary. HAAL will suffer no irreparable harm if the instant motion is not decided next week. Nor will it suffer any irreparable harm if Hillsborough repeals its ordinance on October 14. The court can remedy any harm that might befall HAAL at a future date. Indeed, HAAL has already filed suit against Hillsborough in the Superior Court and any remedy it seeks here is more appropriately directed to the Superior Court.

CONTRARY TO HAAL'S REQUEST, COAH HAS NO JURISDICTION TO REVIEW MUNICIPAL ORDINANCES.

COAH must reject HAAL's request that it review or take any action regarding Hillsborough's pending ordinance. COAH has no authority to review or rule on the propriety of a municipal ordinance, even if the issue is related to obtaining or implementing substantive certification. As the New Jersey Supreme Court has held:

In determining the scope of COAH's jurisdiction, we find significant that although the FHA authorizes COAH to promulgate regulations regarding compliance with Mt. Laurel, it does not empower COAH to decide the underlying ordinances or the prerequisites to the ordinances' enactment. Although COAH has authority to determine whether a municipality's fair share plan truly provides a realistic opportunity for affordable housing,

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we agree with the Appellate Division that “[s]uch a determination does not ordinarily include a ruling whether a proposed ordinance and developer’s agreement satisfy substantive and procedural legal standards generally applicable to such municipal actions whether or not they are taken in a Mt. Laurel setting.” Alexander’s v. Borough of Paramus, 243 N.J.Super. 157, 167, 578 A.2d 1241 (App.Div.1990).

* * *

Both the plain language and underlying objectives of COAH’s mandate in the FHA direct COAH’s energies toward providing realistic opportunities for development of low- and moderate-income housing. Questions regarding the legality of municipal actions outside of COAH proceedings, although related, would unnecessarily distract COAH’s full attention from regional planning in New Jersey. The governing statute and COAH’s developed expertise support our longstanding view that COAH should make factual determinations regarding the quality of municipal fair-share proposals. At the same time, the existence of the action in lieu of prerogative writs as well as the Law Division’s expertise in deciding general legal questions strengthen our view that challenges to municipal actions ... belong in the Law Division and not before COAH.

Alexander’s v. Borough of Paramus, 125 N.J. 100, 112-113, 116 (1991).

Thus, COAH has no authority or jurisdiction to review or rule upon any proposed ordinance that may be considered by the Township of Hillsborough. HAAL has filed an action in Superior Court raising “generally applicable” questions of law regarding these ordinances. Whatever the merits of that Complaint, the Superior Court is the proper forum under Alexander’s for resolving them.

COAH HAS NO AUTHORITY UNDER ITS REGULATIONS TO COMPEL HILLSBOROUGH TO ENDORSE A WASTEWATER MANAGEMENT PLAN.

The Fair Housing Act is silent on what, if anything, happens to a substantive certification after it has been granted, other than that it provides effective immunity from exclusionary zoning

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litigation in the Superior Court. Nor is there any express provision in COAH's detailed regulatory scheme for "enforcement" of certifications as HAAL requests.

Contrary to HAAL's argument, the COAH regulation upon which HAAL attempts to base its request for enforcement, N.J.A.C. 5:93-4.3(c)(2), has nothing whatsoever to do with enforcement of substantive certifications. Rather, it is part of Subchapter 4 of COAH's regulations, titled Municipal Adjustments, which deals at length with the procedures that a municipality must follow if it wishes to qualify for an adjustment in its fair share obligation due to the lack of land or infrastructure. See id. §4.1(a). Appropriately, §4.3 requires, inter alia, that municipal officials take steps to acquire water and sewer infrastructure in order to have the benefit of a reduction in the municipality's fair share. Hillsborough has not sought a reduction in its numerical obligation under Subchapter 4, and in any event the provision relied upon addresses the calculation of the fair share obligation, not the subsequent certification of the plan to address the resulting number of low- and moderate- income units. HAAL's reliance on this section is totally misplaced.

The COAH regulations, §§5:93-5.1(b)(10) and 5.3(b), to which HAAL makes passing reference, are likewise off the mark. Subchapter 5 governs the preparation of a housing element, prior to the petition for substantive certification, and specifies what it must contain in order to be acceptable. Both sections appropriately require that if the municipality chooses to include in its plan a site that does not yet have infrastructure in place, the municipality must back up its proposal by showing that the "necessary" processes are in progress to create a realistic opportunity for the

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development of the site. Again, neither section speaks at all to COAH's obligation to do anything, once the plan has been submitted. It is further ironic that HAAL relies to this extent on § 5.3(b), the very provision that New Jersey Future contends COAH violated in this case by not requiring sewer consistency approval prior to substantive certification.

HAAL also ignores specific regulations which explicitly address the relief that is available to developers subsequent to substantive certification. See N.J.A.C. 5:93-10.4, 10.5. For example, “[d]evelopers may provide notice to the Council of the date they filed their development application with the municipality.” N.J.A.C. 5:93-10.4(a). “Developers and/or municipalities that cannot agree on specific standards that apply to a specific inclusionary development may request the Council to provide a mediator to resolve the dispute.” N.J.A.C. 5:93-10.4(b). “Inclusionary developers may seek an administrative order to expedite the municipal review of a development application” N.J.A.C. 5:93-10.4(c). Finally, “[I]nclusionary developers may request the Council to act as an advocate for inclusionary developments that require permits from DEPE and DOT.” N.J.A.C. 5:93-10.4(d).

If these specific remedial steps fail to produce results, the ultimate remedy is the revocation of substantive certification. N.J.A.C. 5:93-10.5 provides as follows:

A Council determination after a hearing conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development may result in Council action revoking substantive certification.

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The heart of HAAL's complaint against Hillsborough is that the Township is "delaying and obstructing" the HAAL project by not cooperating on the sewer issue. Given the failure of COAH's regulations to otherwise provide explicitly for enforcement actions beyond those discussed here, COAH in its regulations chose revocation of substantive certification (and exposure to exclusionary lawsuits in court) to be the appropriate form of remedy.

The same approach can be inferred from Subchapter 13 of COAH's regulations, "Amendment of Substantive Certification." N.J.A.C. 5:93-13.1(a) provides in part that "[a]mendments may be required by the Council as a result of facts that were not apparent at the time of substantive certification." At the time of the Hillsborough certification, the Council apparently believed (unwisely, in New Jersey Future's view) that Hillsborough would proceed expeditiously to obtain sewer approvals. New facts demonstrate that that confidence was unwarranted, and the Council can, at an appropriate time, require that the plan be amended. Formal procedures are required, and "[a]pproval of any such amendment shall be solely in the discretion of the Council." *Id.* If the Council can approve, it can disapprove, in effect terminating the certification of the original plan.

The foregoing remedies comprise the universe of relief available to developers subsequent to substantive certification pursuant to COAH's regulations. Under the doctrine of exclusio unius est exclusio alterius [mention of one thing necessarily implies exclusion of all others; see Martinez v. Martinez, 282 N.J.Super. 332, 343 (Ch. Div. 1995)], no other remedies are available to developers

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after the grant of substantive certification.

Additional evidence that COAH has not provided in its regulations for any further enforcement of substantive certification after it has been granted, is found in other COAH regulations that unambiguously and explicitly set forth specific instances in which COAH will enforce the substantive certification. Thus, N.J.A.C. 5:93-6.5(b) provides for enforcement of Regional Contribution Agreements (RCAs), as follows:

The Council shall take such actions as may be necessary to enforce an RCA with respect to the timely implementation of a project by the receiving municipality. In implementing its enforcement responsibilities, the Council may... [there follows a specification of four types of enforcement actions].

N.J.A.C. 5:91-11.6 contains the same provision in slightly different wording. See also N.J.A.C. 5:93 -8.1 8(b) (enforcement of development fee agreements); N.J.A.C. 5:91 - 10.1 (restraining orders to preserve scarce resources).

Nor does the Denville case cited by HAAL confer the broad enforcement powers on COAH that HAAL suggests. The Denville case is limited to its facts. The Appellate Division in Denville explicitly held that "under the peculiar and unique circumstances here the order to transfer the property which does no more than fulfill the purpose of the acquisition the Township has already made and accomplish what it has already agreed to" was not unreasonable. In the Matter of the Township of Denville, A-4152-93T3 (App. Div. April 21, 1995) at p. 3.

In the light of the formal regulatory framework just discussed, COAH does not, at the present time, have the power to enforce a grant of substantive certification as HAAL requests.

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This does not suggest, however, that COAH is without constitutional or statutory power to adopt an enforcement regulation of some sort. Enforcement by COAH is consistent with (if not necessarily mandated by) the constitutional "realistic opportunity" standard and, as we have demonstrated above, there is nothing in the Fair Housing Act that prohibits COAH from doing so. The new Jersey Supreme Court's Mount Laurel decisions, including Hills, confirm the breadth of COAH's power in this regard. Moreover, as we have also pointed out, COAH has in fact asserted its enforcement power in certain targeted aspects of its process.

Formal rulemaking should be required, however, before COAH extends its enforcement power as HAAL suggests. See Appellant New Jersey Future's Appellate Brief in this matter at pp. 32-35. When the Supreme Court affirmed the concept of development fees in Holmdel, it insisted that COAH adopt formal rules. This is a complex area involving rights and interests that are not always coterminous. The enforcement questions should be fully explored through the rulemaking process rather than in an ad hoc litigation process, as at present. We ask that COAH deny the motion and await the outcome of the pending appeal before proceeding further.

COAH SHOULD IMPOSE SANCTIONS UPON HAAL AND AWARD COSTS AND ATTORNEYS' FEES TO NEW JERSEY FUTURE AND OTHER PARTIES WHO WERE FORCED TO RESPOND ON SHORT NOTICE TO HAAL'S FRIVOLOUS NON-EMERGENT MOTION.

HAAL filed this frivolous motion in the wrong place. It filed the motion without even discussing the Court Rule that governs the appropriate venue for the motion. It filed a motion that it claimed was emergent after delaying the filing of the motion for fifty days. Those

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responding to the motion were forced to prepare their responses in three days when HAAL delayed the matter for fifty days. HAAL failed to cite the Alexander's case which is the controlling New Jersey Supreme Court law governing the relief that it sought. It failed to cite the COAH rules that govern relief subsequent to substantive certification. Instead, it cited COAH rules that have no relevance to the relief it sought. It has wasted the valuable time of COAH and the parties to this action. The Rules of Professional Conduct state: "A lawyer shall not knowingly:

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." RPC 3.3 Candor Toward the Tribunal.

This rule is applicable to New Jersey attorneys by New Jersey Court Rule 1:14. For all of these reasons, COAH should impose sanctions on HAAL and award costs including attorneys' fees to those who were forced to respond to HAAL's frivolous motion on extremely short notice.

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CONCLUSION

For all of the aforementioned reasons, COAH should deny movant HAAL's motion to enforce COAH's Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, impose sanctions on HAAL, and award costs, including attorneys fees to New Jersey Future.

Respectfully submitted,

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