

Hillsborough Litigation

9/25/97

Letter brief from Twp of Hillsborough to Bishop re: Petition for Substantive
of the Housing Element and Fair Share Plan of the Twp of Hillsborough.

9 pgs

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September 25, 1997

Ms. Shirley Bishop, Executive Director
 Council on Affordable Housing
 101 South Broad Street
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 Trenton, NJ 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

Dear Ms. Bishop,

Please accept this letter brief in lieu of a more formal brief on behalf of the Township of Hillsborough in opposition to the emergent application by petitioner Hillsborough Alliance for Adult Living, L.L.P. and U.S. Home Corp. ("HAAL") returnable October 1, 1997 before the New Jersey Council on Affordable Housing ("COAH").

STATEMENT OF FACTS

Hillsborough petitioned for substantive certification of its Housing Element and Fair Share Plan on February 27, 1995. COAH granted conditional substantive certification by resolution dated April 3, 1996. The substantive certification was conditional upon the project area being included in its district's Water Quality Management Plan. The resolution provided that if the project site was not capable of being sewered, Hillsborough would be required to amend its Housing Element and Fair Share Plan to address its Fair Share Plan allocation in another manner.

New Jersey Future filed a Notice of Appeal from the Council's grant of substantive certification.

The developer of the project has petitioned DEP for inclusion of the project site in the Waste Water Management Plan by petition dated June 11, 1997. Hillsborough has chosen to let that petition proceed without any action by the township.

Hillsborough introduced Ordinance Number 97-28 and entitled "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" on August 12, 1997. Ordinance Number 97-28 was further amended on September 10, 1997 and is presently scheduled for public hearing and adoption on October 14, 1997.

LEGAL ARGUMENT

POINT ONE

THE APPELLATE DIVISION, NOT COAH, HAS JURISDICTION

COAH's resolution granting conditional substantive certification has been appealed to the Superior Court, Appellate Division and is presently pending in Docket No. A-005349-95 T1. It is a clear rule of law that the appeal from the agency decision has taken the matter out of the hands of the agency until there is a final decision by the reviewing court.

R.2:9-1(a) provides:

(a) Control prior to Appellate disposition. 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 of certification shall be in the Appellate Court from the time the appeal is taken or the Notice for Petition for Certification filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and other 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.

Judge Pressler notes in her annotations to the Court Rule that "except to the extent of enforcement and except as otherwise expressly provided for by rule, the ordinary effect of the filing of the Notice of Appeal is to deprive the court below of jurisdiction to act further in the matter under appeal unless directed to do so by the Appellate Court." Pressler, N.J. Court Rules, comment R.2:9-1, (Gann)

In In re Plainfield - Union Water Co. 14N.J.296, 302 (1954) the Court wrote:

The filing of the Notice of Appeal invokes the jurisdiction of the Appellate Tribunal. (Citations omitted) ... and by the same token, the appeal divests the lower court of jurisdiction save as reserved by statute or rule. (Citations omitted)

See also Orloski vs. Borough of Shipbottom 226 N.J. Super. 666, 670 (L.1988); Manalapan Realty vs. Township Committee, 140 N.J. 366, 376 (1995); Rolnick vs. Rolnick, 262 N.J. Super 343, 365-366 (App Div 1993)

COAH should go no further in hearing motions regarding the Hillsborough matter and its substantive certification until there is a decision or other ruling from the Appellate Division directing COAH to consider some specific matter.

POINT TWO
THE SUPERIOR COURT, NOT COAH, HAS
JURISDICTION TO DETERMINE WHETHER
HILLSBOROUGH MUST APPROVE AMENDMENTS
TO THE WATER QUALITY MANAGEMENT PLAN

The petitioners here are plaintiffs in a case brought against Hillsborough in the Superior Court Law Division under Docket No. SOM-L-1239-97 PW. The relief sought in that Superior Court action is the same relief petitioner hopes to obtain by its emergent application before COAH. That is improper. No matter should proceed on parallel courses before two jurisdictional bodies at the same time for obvious reasons. It is a waste of economies and more importantly, might result in conflicting decisions.

Petitioners here have chosen their forum by filing the action in the Superior Court. The Court Rules provide HAAL with mechanisms for seeking interim relief or emergent orders, provided the appropriate standards are addressed and met by the applicant for that relief. There is no need to seek redress from COAH, and indeed the attempt to do so is inappropriate.

This is not a matter specifically within the domain of expertise of COAH in spite of the tangential relationship of sewer capacity to land developability. The issue of sewer capability is better left to the New Jersey Department of Environmental Protection pursuant to the Water Quality Act, N.J.S.A. 58:11(a)-1 et seq.; the associated regulations

found at N.J.A.C. 7:15-5.1 et seq.; the agencies of Somerset County with waste water management responsibility in the Upper Raritan watershed; and the courts.

Petitioner cites N.J.A.C. 5:93-4.3(c)2 for the proposition that COAH may and should order Hillsborough to endorse the applications for sewer service. The township contends that the cited regulation has been taken out of the context in which it appears. The cited section comes from Subchapter 4. Municipal Adjustments. The purpose and background of the subchapter is set forth at N.J.A.C. 5:93-4.1 as follows:

(a) Subchapters 2 and 3 delineate the criteria for determining the municipal housing obligation. However, there may be instances where a municipality can exhaust an entire resource (land, water or sewer) and still not be able to provide a realistic opportunity for addressing the need for low and moderate income housing as determined by the Council. This subchapter outlines standards and procedures for municipalities to demonstrate that the municipal response to its housing obligation is limited by the lack of land, water or sewer. The procedures in the subchapter shall not be used to reduce or defer the rehabilitation component.

It is clear from the purpose and background of subchapter 4 that it is a mechanism for the municipality to reduce its final Fair Share obligation. It was not promulgated to be used as a hammer by COAH to force municipalities to put sewer in virgin areas.

Likewise petitioner's reference to N.J.A.C. 5:93-5.1(b)10 comes from subchapter 5 of the substantive regulations entitled "Preparing a Housing Element." The cited provision standing alone seems to imply that municipality must make applications pursuant to the Federal Clean Water Act. In reality the provision says:

...the housing element shall include the municipality's strategy for addressing its present and prospective housing needs and should contain the following:

...

10. Copies of the necessary applications for sewer service and water quality management plans submitted pursuant to Sections 201 and 208 of the Federal Clean Water Act, 33U.S.C. §1251, et seq.

...

Petitioner cites N.J.A.C. 5:93-5.3(b). That section reads:

Municipalities shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93-1. In reviewing sites, the Council shall give priority to sites where infrastructure is available. All sites designated for low and moderate housing shall receive approval for consistency review, as set forth in Section 208 of the Clean Water Act U.S.C. 1251 et seq., prior to substantive certification. Where a site is denied consistency review, the municipality shall apply for an amendment to its Section 208 plan to incorporate the denied site.

That last cited provision militates against petitioner's position. It provides that the substantive certification should not have been granted until there was Section 208 approval. It also requires municipalities to select available developable sites where infrastructure is available. Hillsborough concedes that was not done.

The subject site is a low density zone which the Township has historically protected from high density development. The County Master Plan shows the subject site as one to be preserved for agricultural operations. The State Development and Redevelopment Plan ("SDRP") also seeks to protect rural areas of the state. Most of the subject property is located in the SDRP Planning Area 4 for which a policy objective is the enhancement of agricultural viability and rural character. That policy objective is to be implemented by guiding development into "Centers" while insuring that agricultural areas be protected from whole scale development; maintaining large areas of open space is a mantra of the SDRP.

The development agreement does not require Hillsborough to obtain or assist in obtaining sewer approvals. The contingent substantive certification provides only that if the site is not approved for inclusion in the sewer plan amendment Hillsborough must find an alternative way to address its Fair Share obligation. The onus for pursuing septic approval is placed on the developer. Paragraph 14 reads:

The developer shall continue to pursue in every way possible sewer approval from N.J.D.E.P.

It cannot be gainsaid that COAH's own regulations encourage development in planning areas 1 and 2 and then area 3 while preserving the other planning areas that lack the requisite infrastructure. N.J.A.C. 5:93-5.4(d) 1, 2 and 3

Petitioner cites In the matter of the Township of Denville, A-4152-93 T3, (App. Div. April 21, 1995) (attached to petitioner's letter brief as Exhibit E) as authority that COAH may require Hillsborough to seek sewer approval. First of all, unreported cases have no precedential value in the State of New Jersey. Second of all, what the Court ordered in Denville, supra, had nothing to do with water and sewer approvals; it ordered Denville to transfer property it had purchased to the Morris County Housing Authority in accordance with its substantive certification. After recognizing that the Township some seven years after substantive certification had not formulated an alternative plan; that Morris County Housing Authority had spent a quarter of a million dollars in reliance upon its agreement with Denville; that New Jersey had allocated over a million dollars and HUD almost seven million dollars towards the project, the Court said:

We cannot say 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, despite the invalidity of the residency provision, was not a reasonable exercise of the enforcement powers of COAH. Township of Denville, supra, at p3 (emphasis added)

Petitioner does not argue such a unique and peculiar set of facts. COAH does not have jurisdiction to order Hillsborough to sewer agrarian land.

POINT THREE
COAH IS WITHOUT JURISDICTION TO
ENJOIN HILLSBOROUGH FROM ADOPTING
ORDINANCE NUMBER 97-28

Petitioner writes "it is unquestionable that a municipality cannot change the terms of an existing certification by changing the zoning of the underlying property." (Pb9)¹ If Petitioner argues, as it does, that the zoning ordinance change will not affect its substantive certification, then why does it need COAH intervention in municipal matters? Petitioner's property is not the only property in the Township of Hillsborough affected by Section 91.1 regulating the PAC/HCF Planned Adult Community/Healthcare Facilities. The PAC/HCF zone is an overlay zone encompassing many residential districts

¹ Pb is Petitioner's brief

throughout Hillsborough and affecting a great deal of property. COAH has no say with respect to municipal zoning provided that the municipality's zoning provides for the Township's fair share of meeting the region's low and moderate income housing need. Naturally, planned adult communities are not the only way of meeting that need. Section 77-91 of Township's zoning regulations provides for the MZ, AG, RA, RS, R, R1, CR, AH, RCA, TC and PD residential districts. The purpose of those districts includes language which reads:

The standards are intended to offer maximum flexibility and site design and the selection of dwelling units types in order to offer a balanced housing pattern attractive to all income and age segments of the community as part of the Township's fair share of meeting the region's low- and moderate-income housing need.

Clearly without the PAC/HCF zone, Hillsborough continues to provide for affordable housing in all its residential districts. The zoning code also contains the following sections:

- Section 77-58.1 Affordable Housing Rental Regulations
- Section 77-58.2 Affirmative Marketing Plan
- Section 77-58.3 Housing Rehabilitation Program
- Section 77-58.4 Affordable Housing Board
- Section 77-58.5 Affordable Housing Development Fees

Again, the proper forum for Petitioner's action is Court. In Alexander's vs. Paramus Borough 125 N.J. 101, 112 (1991) the Court found:

However, we disagree with COAH's expansive reading of its jurisdictional powers. Neither the plain language of its authorization ("[COAH] shall have the primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this state," See N.J.S.A. 52:27D-304) nor the purpose of the statutory grant ("to produce ordinances and other measures that will fit together with a statewide plan ... that provides a real chance ... for the construction or rehabilitation of lower income housing," Hills Dev. Co., Supra, 103 N.J. at 22, 510 A.2d 621) indicates a legislative intent that COAH should oversee those claims that involve issues of municipal administration. The entire body of regulations adopted by COAH addresses

specific aspects of the achievement of affordable housing and not general concerns of the overarching legality of municipal proceedings.

The Court in Alexander's found that the challenge would be appropriate by an action in lieu of prerogative writ in the Superior Court, Law Division. The same would apply here. The Petitioner cites In the matter of the Petition of Howell Township in Monmouth County for substantive certification of its Housing Element and Fair Share Plan, Docket No. COAH 95-711(a), which Petitioner attaches as Exhibit F to its brief. Howell Township had questioned COAH's jurisdiction and COAH in the order attached to petitioner's brief requires the parties to submit briefs and certifications with regard to the jurisdictional issues. In any event, Alexander's has greater precedential value than the COAH order and supports Hillsborough's position that COAH is without jurisdiction with respect to ordinance 97-28. Exhibit F simply does not support Petitioner's argument that COAH has jurisdiction; Exhibit F merely contemplates arguments as to whether COAH has jurisdiction.

Petitioner gives no valid reason for interfering with the Township's ordinance adoption. There is a strong presumption in favor of municipal ordinances. Thornton vs. Village of Ridgewood 17 N.J. 499 (1995). The burden of establishing the invalidity of an ordinance is on the challenger. Vickers vs. Township Committee of Gloucester Township 37 N.J. 232 (1962) cert. denied 371 U.S. 232 (1963). The challenger must show that the ordinance bears no reasonable relationship to public health, morals, safety or welfare and must show that the ordinance is arbitrary, capricious or unreasonable or plainly contrary to fundamental principals of zoning. Bow and Arrow Manor vs. Town of West Orange 63 N.J. 335, 343 (1973). If an ordinance is debatable it should be upheld. Bow and Arrow, Supra 343. In this case, petitioner has done nothing that would meet its required burden -- especially in light of its own contention that the ordinance does not affect the project site. Juxtaposition of Petitioner's position that it would not be affected by the repeal of the ordinance with the fact that the proposed ordinance affects many more properties than petitioner's renders HAAL's attempts at challenger's Ordinance 97-28 totally insufficient.

POINT FOUR
PETITIONER'S ACTION IS NOT EMERGENT

In spite of petitioner's contention that emergent relief is required, there is no support for its position. The ordinance has not been adopted and it is speculation on HAAL's part that it will be adopted. An ordinance as introduced is really nothing more than a

determination by the governing body that the public and Township Committee want an opportunity to discuss proposed legislation to determine whether it should be enacted. The Court Rules provide for a challenge to be made by an action in lieu of prerogative writ within 45 days after the ordinance is adopted and published.

Likewise, HAAL has not demonstrated how it will be irreparably harmed. There is a very broad issue left for the Courts to decide as to whether or not HAAL's project is preserved even with the overlay zone repealer; again, that is an issue that the Courts must resolve, and not COAH.

HAAL has not argued its likelihood of success which it must do in order to obtain the emergent relief it seeks from COAH. Furthermore, Petitioner does nothing to balance the interests of the respective parties and demonstrate that the balance weighs in HAAL's favor; Petitioner makes no attempt to address this required standard. Finally, Petitioner must demonstrate that the law is well settled and as previously argued in this brief, the law is anything but well settled in this area. HAAL has not met the requisite burden for obtaining emergent relief.

CONCLUSION

For all the reason argued above, COAH should deny Petitioner HAAL's motion.

Respectively submitted,

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Attorneys for the Township of Hillsborough

By


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