

Hillsborough Litigation

9/29/97

Letter to Bishop from Schepps

encl: Letter Brief of HAAL in response to letter briefs of Hillsborough Twp in opposition to HAAL's motion to Enforce NJ CoAH's Substantive Certification of Hillsborough's Housing Element and Fair Share Plan.

↳ Certification

17 pages

note = double-sided pages

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REPLY TO

WOODBIDGE

VIA HAND DELIVERY
September 29, 1997

Ms. Shirley Bishop, Executive Director
Council on Affordable Housing
101 South Broad Street
CN-813
Trenton, New Jersey 08625-0813

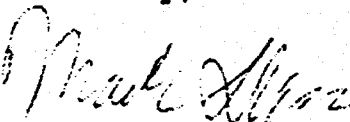
RE: IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF
THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF
HILLSBOROUGH, SOMERSET COUNTY,
SUBSTANTIVE CERTIFICATION 31-99, DOCKET NO.

Dear Ms. Bishop:

Enclosed please find and original and sixteen (16) copies of petitioners Hillsborough Alliance for Adult Living, L.L.P.'s and U.S. Home's letter brief in response to the opposition to petitioners' 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, which is returnable on October 1, 1997, and certifications of Peter A. Buchsbaum and Robert B. Heibell in support thereof.

Please return a stamped filed copy of one of each of these documents to our waiting messenger. Thank you for your courtesy and cooperation.

Sincerely,



MARK H. SCHEPPS

MHS/pas

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cc: William P. Malloy, D.A.G.
Gregory Bonin, Hillsborough Township Clerk
James A. Farber, Esq., Hillsborough Township Special Counsel
William Sutphen, Hillsborough Township Planning Bd. Attorney
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Frank Yurasko, Esq., Hillsborough Township Attorney
Ronald L. Shimanowits, Esq., PEC Builders, Inc.
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REPLY TO

WOODBRIDGE

VIA HAND DELIVERY
September 29, 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. ("HAAL") in Reply to the Letter Briefs of Respondent Township of Hillsborough, Appellant New Jersey Future, and PEC Builders, Inc. in Opposition to HAAL's 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 reply to the letter briefs of respondent Township of Hillsborough, appellant New Jersey

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Future, and PEC Builders, Inc., in opposition to HAAL's 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 Robert B. Heibell 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 arguments in those papers are similar, they have not been repeated in full here.

PRELIMINARY STATEMENT, PROCEDURAL HISTORY, AND STATEMENT OF FACTS

HAAL relies upon the Preliminary Statement, Procedural History, and Statement of Facts contained in its September 19, 1997 letter brief 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.

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POINT ONE

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 Properly Has Jurisdiction Over HAAL's Motion.

Both respondent Township of Hillsborough and appellant New Jersey Future cite to New Jersey Rules of Court Rule 2:9-1(a) for the proposition that the Appellate Division, and not COAH, has jurisdiction over the substantive certification at issue because New Jersey Future filed an appeal. A plain reading of R. 2:9-1(a) reveals that this position is utterly without merit. The Rule reads as follows:

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 is filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders

R. 2:9-1(a) (emphasis added). 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.

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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). It is undisputed that the certification granted by COAH has not been stayed pending New Jersey Future's appeal, and is therefore still in full force and effect.

All of the authority cited by both the respondent and the appellant are thus inapplicable to the present case, since they all concede that the Appellate Division will not have jurisdiction to act in situations such as the one here, where jurisdiction is reserved for the lower tribunal (COAH) by statute or court rule. See Manalapan Realty v. Tp. of Manalapan, 140 N.J. 366, 376 (1995); Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66 (App. Div. 1993); In re Plainfield-Union Water Co., 14 N.J. 296, 302 (1954); Pressler, 1997 New Jersey Rules of Court, comment 1 on Rule 2:9-1(a). Accordingly, since the certification is still in full force and effect, COAH has the authority to enforce the terms of the certification so as to effectuate compliance with COAH regulations.

Appellant New Jersey Future misinterprets the Appellate Division's decision to deny remand of the certification to COAH. Remand was denied precisely because, as HAAL argued in its papers opposing remand, pending a decision by the Appellate Division in this matter, COAH had authority to enforce the certification so that a remand was unnecessary. Enforcement of the certification is precisely the relief HAAL now seeks. New Jersey Future's

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conclusion that the Appellate Division's decision means that it retained jurisdiction over the enforcement of the COAH certification is overbroad and unsupported by the facts or by the relevant case law and court rules, and flies in the face of the successful arguments made against a remand. Denial of COAH's Motion for Remand by the Appellate Division means that, pending further action by the Appellate Division, and pending a stay of the certification, COAH must enforce the certification as it was granted on April 3, 1996.

B. HAAL's Action Is Emergent.

Appellant New Jersey Future comes to this tribunal with unclean hands, claiming the HAAL should be denied emergent relief because HAAL took seven weeks to prepare its motion papers. The fact is that New Jersey Future had taken no part in the development of Hillsborough's Fair Share Plan and Housing Element over a long period of time, had never challenged any of the approvals on which the plan was based, had never challenged the zoning sanctioning such approvals, and had never filed any objection or otherwise participated in the open mediation process of the Council on Affordable Housing's ("COAH"). The Plan had been carefully formulated, received by the Council on Affordable Housing without objections, and was ready for final substantive certification. Only at the eleventh hour, after all this had taken place, did Appellant first claim that issues of deep principle involving the relationship between COAH and the State Plan have to be resolved in

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this case. After what literally has amounted to a delay of several years, New Jersey Future now has the temerity to argue that HAAL should be denied emergent relief because of what might be characterized as a slight delay in the filing of its motion.

The fact is, however, that the issue did not become emergent for HAAL until quite recently. Once the issue did become emergent, HAAL acted at once to file its Motion for Enforcement of the COAH Certification. The ordinance introduced before the Hillsborough Township Committee on August 12, 1997 exempted the HAAL site from the repeal of PAC zoning. It was only a later amendment to the ordinance, enacted on September 10, 1997, and which only very recently came to HAAL's attention, which repealed the PAC zoning in its entirety, including the HAAL site.

This ordinance is presently scheduled for public hearing and adoption on October 14, 1997. It is crucial to the preservation of HAAL's vested rights to develop its site in accordance with the COAH certification that Hillsborough not be allowed to subvert the COAH Certification process by changing the zoning of the property in question by repealing the PAC zoning. To preserve the status quo, it is therefore necessary for COAH to immediately take the necessary action to ensure that the substantive certification granted in April, 1996 is enforced. This action includes preventing Hillsborough from changing the zoning of the site.

If the new zoning ordinance is approved by the Township, presumably any application filed by U. S. Homes and HAAL which

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involves any substantial change in the prior General Development Plan approval will be rejected by the Planning Board as being inconsistent with the zoning. Thus, the developers will not be able to proceed, even though the site remains in the housing plan.

Emergent relief is also necessary to prevent the final draft of the Somerset County Wastewater Management Plan from being enacted without making a provision for the PAC/HCF site. As HAAL and U. S. Home were just advised, the final draft of the Wastewater Management Plan will be filed with the New Jersey Department of Environmental Protection on or before October 1, 1997. See Heibell certification. It is therefore crucial that COAH take whatever action possible within its power to ensure that Hillsborough complies with the substantive certification it was granted in April, 1996. This action must include the inclusion of the PAC/HCF site in the Somerset County Wastewater Management Plan, if it within Hillsborough's power to so include the site. Thus far, Hillsborough has done nothing to procure the necessary water and sewer approvals as is required under the terms of the certification. It is therefore incumbent upon COAH to take the necessary action, on an emergent basis, to ensure that Hillsborough complies with the terms of the certification by seeking the inclusion of the PAC/HCF site in the final draft of the Wastewater Management Plan.

- C. COAH Clearly Has Jurisdiction To Review Municipal Ordinances And To Compel Sewering.

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Respondent's and appellant's claim that Alexander's v. Paramus Boro., 125 N.J. 100 (1991), somehow bars COAH action is absurd. As the very quote on pages 5 and 6 of appellant's letter brief indicates, the Fair Housing Act authorizes COAH to promulgate regulations regarding compliance with Mt. Laurel. Alexander, supra, 125 N.J. at 112-13. Such authority includes the right to determine whether a housing plan is realistic. Id.

Moreover, COAH clearly has jurisdiction to issue orders addressed to sewerage, where such sewerage is essential for the construction of low or moderate income housing. Hills Corp. v. Twmsp. of Bernards, 103 N.J. 1, 61-62 (1986). In Hills, the Supreme Court held that COAH had the power to bar all sewerage connections needed to protect the vital resource of sewer capacity. In addition, Tocco v. Council on Aff. Housing, 242 N.J. Super. 218 (App. Div. 1990), certif. den. 122 N.J. 403 (1990), cert. den. 499 U.S. 937 (1991), the Appellate Division upheld a ban on connections to sewerage needed to protect capacity for low or moderate income housing a COAH ban.

The relief sought here is far less drastic. Plaintiffs are only requesting that COAH require that communities with substantive certification facilitate developments they have certified by signing applications for sewerage capacity. Certainly that is a logical and even necessary concomitant of COAH's powers, as set forth in Hills, to ensure compliance with Mt. Laurel's constitutional mandate of a realistic opportunity for affordable

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housing. Thus, Alexander's, supra, restrictions on COAH's ability to determine such matters as compliance with the Open Public Meeting Act or contract zoning, are utterly irrelevant to this matter. What is relevant is COAH's clear jurisdiction to protect sewerage capacity to the extent necessary to prevent interference with the provision of a realistic opportunity for affordable housing construction, as mandated by both the Fair Housing Act and the Mt. Laurel case.

In addition, this reasoning also clearly applies to COAH's jurisdiction regarding the rezoning of a site which is already subject to a substantive certification. Decisions of an administrative agency are accorded a presumption of correctness by New Jersey courts. In Van Dalen v. Washington Tp., the New Jersey Supreme Court stated that "[o]ur review of an administrative agency's action is limited in scope." Van Dalen v. Washington Tp., 120 N.J. 234, 244 (1990) (citing Gloucester County Welfare Bd. v. New Jersey Civil Serv. Comm'n. 93 N.J. 384, 390 (1983)). Van Dalen dealt with a developer's appeal from a Resolution of the Council on Affordable Housing which granted substantive certification of a township's Housing Element and Fair Share Plan pursuant to the Fair Housing Act. Van Dalen v. Washington Tp., 120 N.J. at 236-37. In rendering its decision to reject the developer's appeal, the Court stated that:

We will not substitute our judgment for that of the agency unless the action is arbitrary or capricious. Moreover, an administrative agency's exercise of statutorily-delegated responsibility is accorded a strong

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presumption of validity and reasonableness. The presumption is even stronger when the agency has been delegated discretion to determine the specialized procedures for its tasks.

Id. at 244 (citations omitted).

The Appellate Division reached the same conclusion regarding the presumption of correctness of administrative decisions in Englewood Cliffs v. Englewood, 257 N.J. Super. 413, 455-56 (App. Div. 1992), aff'd, 132 N.J. 327, cert. denied, 510 U.S. 991, 114 S. Ct. 547, 126 L. Ed. 2d 449 (1993). In Englewood Cliffs, sending and receiving school districts challenged the State Board of Education's decision denying the termination of the sending-receiving relationship between the two school districts. Id. at 422. The Appellate Division affirmed the State Board of Education's decision, stating:

As long as the action [taken by the agency] is within the fair contemplation of the enabling statute, that action must be accorded a presumption of validity and regularity. If there is any fair argument in support of the agency's action or any reasonable ground for difference of opinion among intelligent and conscientious officials, "the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal." Where special expertise is required, as in this case, an even stronger presumption of reasonableness exists.

Id. at 455 (citations omitted). The court added that:

[W]here an agency is responsible for enforcing a statute, its interpretation will "be accorded considerable weight" on appeal.

Id. at 456 (citations omitted). It is thus clear that, absent arbitrary and capricious conduct, New Jersey courts are loath to upset the determinations of administrative agencies. Respondent

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would now have COAH believe that while a court cannot upset the determination of an administrative agency, a municipality can by rezoning an already certified site. The municipality clearly cannot do this, and COAH is well within its rights to take whatever action is necessary to prevent this arbitrary and capricious conduct on the part of Hillsborough Township.

D. COAH Has The Authority To Require Hillsborough Township To Act In A Manner Consistent With Its Certification.

The Substantive Certification granted by COAH to Hillsborough Township on April 3, 1996, states in relevant part:

BE IT FURTHER RESOLVED that any change in the facts upon which this certification is based or any deviation from the terms and condition of this certification which affects the ability of the municipality to provide for the realistic opportunity of its fair share of low and moderate income housing and which the municipality fails to remedy may render this certification null and void. [Emphasis added].

The facts have not changed. HAAL's site is currently still in Hillsborough's General Development Plan. 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 was stated in HAAL's September 19, 1997 letter brief, 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. See also In The Matter of the Township of Denville, A-4152-93T3, (App. Div. April 21, 1995), attached as Exhibit E to HAAL's September 19, 1997 letter brief.

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As long as the HAAL site is in Hillsborough's General Development Plan, Hillsborough must comply with the terms and conditions of COAH's Substantive Certification. Howell and Denville, supra, stand for the proposition that COAH does indeed have the authority, contrary to Respondent's and Appellant's contention, to force Hillsborough to do so.

Furthermore, as long as the HAAL site is in Hillsborough's General Development Plan, PEC Builders, Inc., has no grounds upon which to inject itself into this controversy by suggesting the appropriate action for Hillsborough to take at this time is to amend its Plan to include the Gateway at Sunnymeade site. As already stated, the appropriate action for Hillsborough to take is to comply with the terms and conditions of its certification by seeking the necessary water and sewer approvals, and by not rezoning the site. Since Hillsborough is unwilling to unilaterally take the appropriate action, it is incumbent upon COAH to utilize its power to force Hillsborough to comply with its certification.

E. It Would Be Improper To Impose Sanctions Upon HAAL Or To Award Costs And Attorney's Fees To Parties Who Responded To HAAL's Emergent Motion.

Appellant New Jersey Future engages in inappropriate ad hominem argument. Suffice it to say that the Alexander's case, for the reasons stated above, is not controlling. Appellant itself has failed to cite the controlling authorities, namely Hills and Tocco. Moreover, it has utterly failed to deal with the presumption of

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validity that is accorded to administrative actions and indeed with the doctrine that an administrative agency's interpretation of its own statutory mandate is given deference by the Court unless it is clearly contrary to the statute's intent. See Emmer v. Merin, 233 N.J. Super. 568 (App. Div.), certif. den., 118 N.J. 181 (1989); Golden Nugget Atlantic City Corp. v. Atlantic City Elec. Co., 229 N.J. Super. 118 (App. Div. 1988). It would seem unlawyerly for a party to take a single case out of context, and criticize the other party for not citing it while the complaining attorney has ignored the real key cases.

For these reasons, Appellant's request for sanctions and costs should be denied.

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POINT TWO

IN LIGHT OF THE TOWNSHIP'S RECENT ACTION, COAH SHOULD PROVIDE A MEDIATOR ON A EMERGENT BASIS, TO ADVANCE THE RESOLUTION OF THIS MATTER, PURSUANT TO N.J.A.C. 5:93-10.4(b) AND 5:91-12.4(a).

As this motion has made clear, HAAL and U.S. Homes, on one hand, and the Township on the other, are now at opposite poles on the subject of the zoning of this property. In order to avoid unnecessary delay in the processing of HAAL's and U. S. Home's development application, HAAL and U.S. Homes respectfully request that COAH appoint a mediator to resolve the disputes between these parties on an emergent basis. The need for this is emergent, since the improper ordinance has already been introduced.

N.J.A.C. 5:93-10.4(b) specifically provides that "[d]evelopers 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." HAAL respectfully submits that such an appointment is appropriate here. If the new zoning ordinance is approved by the Township, presumably any application filed by U. S. Homes and HAAL which involves any substantial change in the prior General Development Plan approval will be rejected by the Planning Board as being inconsistent with the zoning. Thus, the developers will not be able to proceed, even though the site remains in the housing plan.

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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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