

Brief of Respondent Council on Affordable Housing

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5349-95TI

IN THE MATTER OF THE PETITION FOR)
SUBSTANTIVE CERTIFICATION OF THE)
HOUSING ELEMENT AND FAIR SHARE) Civil Action
PLAN OF THE TOWNSHIP OF)
HILLSBOROUGH, SOMERSET COUNTY)

BRIEF OF RESPONDENT
COUNCIL ON AFFORDABLE HOUSING

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PRELIMINARY STATEMENT

Defendant New Jersey Council on Affordable Housing ("Council" or "COAH") is the administrative body empowered under the Fair Housing Act, N.J.S.A. 52:27D-301 to -329, to administer disputes involving exclusionary zoning so as to assure that a municipality meets its Mount Laurel obligation to provide a realistic opportunity for a fair share of its region's present and prospective need for low and moderate income housing.

In this brief, the Council at Point I defends its grant of substantive certification to the housing element and fair share plan of the Township of Hillsborough (Aa11* to Aa26; Aa40 to Aa76). The plan, for which certification was vigorously sought by the Township and for which the Township had been planning since 1992 (Aa104 to Aa107), required a waiver of the center designation requirement of N.J.A.C. 5:93-5.4(c) because the PAC/HCF site was in rural Planning Area 4. The Council granted that waiver and appellant New Jersey Future, Inc. ("NJF") here asserts the primacy of "good planning" as reflected in the policies and goals of the State Development and

* Aa_ refers to the appendix filed by appellant New Jersey Future with its brief in this matter.

Ab_ refers to appellant's brief.

HRA_ refers to the appendix filed by respondent Township of Hillsborough with its brief in this matter.

HRb_ refers to Hillsborough's brief.

LRA_ refers to the appendix filed by respondent Hillsborough Alliance for Adult Living, L.L.P. with its brief in this matter.

CRA_ refers to the appendix filed with this brief.

Redevelopment Plan ("SDRP") in its challenge to that waiver decision. However, the waiver decision was most reasonable and in accord with the standards of the Council's waiver rule, N.J.A.C. 5:93-15.1(b). The waiver decision, moreover, was made after consultation with the Office of State Planning ("OSP"), and did not violate the policies and goals of the SDRP, which is primarily a guidance document [see N.J.S.A. 52:18A-196(f), N.J.A.C. 17:32-6.1(b), N.J.A.C. 17:32-7.1(b), N.J.A.C. 17:32-7.2(b); Aa62 to Aa64] and which includes as one of its goals the creation of safe, decent and affordable housing (CRA78).

However, subsequent to the Council's substantive certification decision, Hillsborough stopped supporting the PAC/HCF site as a site for affordable housing (CRA43, CRA44; CRA54 to CRA57). The Township has refused to endorse the provision of sewer service to the site and recently introduced an ordinance to amend the PAC ordinance that affects the HAAL site. Therefore, at Point II of this brief, the Council requests that this matter be remanded to the Council, so that it may take appropriate action with regard to Hillsborough's fair share plan. A motion to supplement the record with material pertaining to the events subsequent to the Council's April 3, 1996 certification decision accompanies this brief.

**PROCEDURAL HISTORY AND
COUNTERSTATEMENT OF FACTS**

This is a Mount Laurel case. See Burlington City N.A.A.C.P. v. Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I), and Southern Burlington County N.A.A.C.P. v. Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II).

Hillsborough filed its housing element and fair share plan and petitioned for substantive certification of that plan on February 27, 1995 (Aa77 to Aa125). The Township had a cumulative 12-year fair share obligation of 482 affordable housing units: 21 indigenous units and 461 inclusionary units* (Aa101, Aa102). In its fair share plan the Township requested reductions for a Regional Contribution Agreement (RCA) of 79 units, which it had entered into with the Town of Phillipsburg in compliance with its first round fair share obligation (Aa111). A reduction was also requested for two inclusionary developments, Crestmont Hills and Heritage Green, which were included in Hillsborough's first round plan and for which building permits had been issued at the time of the petition for 91 units of affordable family rental housing (Aa112, Aa113). Further, a 2-for-1 rental bonus credit was requested for the Crestmont Hills and Heritage Green family rental units pursuant to N.J.A.C. 5:93-5.14(d) (Aa111, Aa112). Also, a substantial compliance reduction pursuant to N.J.A.C. 5:93-3.6 was requested for a 20% reduction of Hillsborough's calculated fair share number, because Hillsborough had completed 100% of the affordable units included in its first round obligation (Aa113, Aa114). Therefore, when all credits and reductions were taken into account, Hillsborough claimed that it was responsible for addressing a fair share obligation of 181 affordable units, 160 inclusionary units and

* Indigenous need" is the deficient housing currently occupied by low and moderate individuals within a municipality. The "inclusionary component" represents the municipal obligation to provide for its regional share of affordable housing. See, N.J.A.C. 5:93-1.3 and N.J.A.C. 5:93 - Appendix A.

21 indigenous units to meet its 12-year cumulative obligation (CRa1 to CRa4; but see Aa29 to Aa38).

Hillsborough proposed to address its entire inclusionary component of 160 units of affordable housing in the Planned Adult Community/Health Care Facility ("PAC/HCF") site (Aa106 to Aa108, Aa116 to Aa120). 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 (Aa118). The Township proposed that 101 units of age-restricted housing and 49 units of family rentals be located within the PAC/HCF (CRa3).

The filed housing element explained that the PAC/HCF development was created in response to a 1992 Hillsborough Master Plan (Aa104 to Aa106), which set forth as one of its enumerated goals "Establish the necessary framework to provide housing, health care, and specific needs for the growing number of senior citizens" (Aa105) in Hillsborough. During 1991, a general development plan was submitted to the Hillsborough Township Planning Board for approval under the Municipal Land Use Law N.J.S.A. 40:55D-45.1 to -45.8. On January 29, 1992, the planning board adopted a resolution memorializing the approval of the General Development Plan for the PAC/HCF development (Aa107). The approval, actually granted by the planning board on December 19, 1991, was for a 742 acre tract of land, 484 acres of which would be developed for residential uses, 74 acres for medical facilities, 47 acres for commercial purposes, 277 acres for recreation and open space and 60 acres for roads (Aa107).

Approximately 11,000 units of housing could be built within the planned development (Aa271). The site of this acreage was on the western fringe of the already developed portions of Hillsborough to the west of Route 206 and within walking distance of the municipal complex (Aa108). 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")*. Aa119. Hillsborough stated that in order to expedite DEP's approval of sewer service to the PAC/HCF tract "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 (Aa119).

The petition noted that the PAC/HCF site was within Planning Area 4 and directly adjacent to Planning Area 2 as defined by the New Jersey State Development and Redevelopment Plan ("SDRP") (Aa108; Aa280 to Aa317 at Aa286, Aa287). All of the designated Planning Area 2 of the PAC/HCF site was within a sewer service area. Id. Further, the site was described as being "indicated" on the State Development and Redevelopment Plan as a "planned village" named "Hillsborough Village Square" (Id.; see also, LRa48). The petition discussed the Hillsborough plan's compliance with the SDRP (Aa108 to Aa110) and

* Section 208 (33 U.S.C. §1288) of the Federal Clean Water Act, 33 U.S.C. §1251 et seq., requires States to provide areawide water quality management plans. The plans are prepared pursuant to the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq. The plans are also referred to as "208 plans".

noted that Hillsborough's land area was within four of the five planning areas denominated by the SDRP and that a substantial portion of the Township, primarily within the northwestern area of the Township, was in Planning Area 4 (Aa108). Also, seven "Centers", as the term is used in the SDRP (Aa285, Aa286), had been designated within Hillsborough; there were four existing "Hamlets" -- Zion, Cloverhill, Neshanik and South Branch; and two existing "Villages" -- Flagtown and the Hillsborough Town Center (Aa109). All were recognized on the "Resource Planning and Management Map" ("RPMM") of the SDRP and were in addition to the planned village of Hillsborough Village Square (Aa109; LRa48).

The petition further noted that the four existing Hamlets were not designated as areas of extensive future development, because of the lack of "capacity of the natural resources . . . to support significant additional development" (Aa110). In addition, none of the existing Hamlets were served by existing public or private sewage treatment plants. Id. The existing Villages of Flagtown and Hillsborough Town Center were substantially developed, according to the petition, and there were no large vacant parcels of land available to accommodate a large inclusionary development in these existing Villages. Id. Therefore, Hillsborough had determined to accommodate "the major component of its current and anticipated future 'fair share' housing obligations for 'low' and 'moderate' income housing . . . in the designated "Planned Village" named Hillsborough Village Square located on the PAC/HCF site (Aa110). Hillsborough recognized that N.J.A.C. 5:93-5.4 of the Council's rules required that

inclusionary developments in Planning Area 4, such as the PAC/HCF site, were required to be designated as "Centers" (Aa109, Aa110), but requested a waiver of Center designation for the PAC/HCF site (Aa120, Aa121).

The petition listed ten reasons supporting the requested waiver of Center designation for the PAC/HCF site (Aa120, Aa121). Hillsborough argued that the planned adult community had been approved by the planning board prior to the adoption of the SDRP and that the land had been designated as a "Planned Village" on the RPMM of the SDRP. Both public water and sewage treatment facilities "are available" to the tract, which the petition stated was a "suitable site" as defined by COAH's rules. Additionally, an amendment to the Somerset County Wastewater Management Plan had been approved, which included the subject tract in the sewer service area. Hillsborough claimed that the site provided a reasonable opportunity for the construction of affordable housing and "meets all of the current Mt. Laurel II and COAH requirements which should be the only benchmark" for the granting of substantive certification. The Township also argued that it should not "be penalized" because it "took affirmative land use planning, legislative and application approval actions" in anticipation of its second cycle fair share housing obligations "prior to the finalization and adoption of the [SDRP]". Finally, Hillsborough argued that it was a basic underlying principle of COAH's rules that a municipality which voluntarily sought to comply with its affordable housing obligations "should be given the widest latitude in determining how it meets that housing obligation" (Aa120, Aa121).

Hillsborough published notice of its Petition for Substantive Certification on March 6, 1995. The publication initiated a 45-day comment period, which ended on April 19, 1995 (CRa1). One objection to Hillsborough's housing element and fair share plan was filed by a Hillsborough developer, Gateway at Sunnymeade, Inc. ("Gateway"), which sought to build affordable housing on its site (CRa16). Consequently, mediation pursuant to N.J.S.A. 52:27(D)-315 was scheduled. Prior to the first mediation session, a COAH report was issued on May 26, 1995 reviewing the Hillsborough housing element and fair share plan and requesting additional information (CRa1 to CRa16).

The May 26 COAH report, after reviewing Hillsborough's fair share plan (CRa1 to CRa5), concluded that Hillsborough's plan had addressed its 12-year cumulative obligation of 482 units of affordable housing (CRa8). However, the report listed eight items of missing information and documentation which had to be submitted to COAH within 60 days (CRa8 to CRa11). The report also discussed and analyzed Hillsborough's reasons given for the requested waiver of center designation and concluded that Hillsborough had demonstrated that the PAC/HCF site met the criteria for a waiver of center designation adopted by the COAH board on December 7, 1994 (CRa5, CRa6; CRa13, CRa14). The December 7, 1994 COAH policy captioned "Sites with Infrastructure in Planning Areas 4 and 5" was attached to the report as Exhibit A (CRa13, CRa14). Therefore, the report recommended that the requested waiver of Center designation be granted (CRa6).

The December 7, 1994 COAH policy attached to the May 26 COAH report dealt specifically with N.J.A.C. 5:93-13.4, which pertained to the status of objector's sites located in Planning Areas 4 and 5 that were offered for inclusionary developments (CRA13, CRA14). However, the May 26 COAH report applied this policy to the analogous situation of the status of the PAC/HCF site under N.J.A.C. 5:93-5.4(c). The December 7, 1994 policy directive stated that when COAH originally drafted N.J.A.C. 5:93-13.4 "...it was assumed that Planning Areas 4 and 5 contained no sewer and/or water. Since then COAH has learned that there are sites in Planning Areas 4 and 5 that do have infrastructure and COAH has no information on the number of sites that may fall into this category." Therefore, COAH adopted the policy directive to pertain to previously certified and new sites with infrastructure located in Planning Areas 4 and 5 that "should be the focus of a waiver request so that center designation for these sites would not be a prerequisite." With regard to new sites, the policy stated that COAH "will entertain a waiver" of center designation if (a) the site is jointly requested by a municipality and a developer and is in Planning Area 4 or 5, or (b) has "water and sewer capacity and accessibility" and it is determined to be available, approvable, suitable and developable, as those terms are defined at N.J.A.C. 5:93-1 et seq. (CRA13). Additionally, if a developer "offers a new site" in Planning Areas 4 or 5 with "access to infrastructure", that developer will have "status as an objector", but COAH was "unclear as to the criteria for evaluating the site" and was equally unclear as to

"whether any waiver will be permitted" to the center designation requirements of N.J.A.C. 5:93-13.4 (CRa14).

Moreover, the December 7, 1994 COAH policy stated that the extent of the availability of water and sewer in Planning Areas 4 and 5 was "unclear", as was the number of new sites that could fall into this category. Therefore, the report stated that COAH had determined that the waiver and/or objector process would be utilized "to see the extent of the situation and after careful review, will assist in determining if a rule change is necessary" (CRa14). Finally, the directive stated that the Office of State Planning ("OSP") would review and comment on sites in Planning Areas 4 and 5 that fall into the categories covered under the policy and concluded: "It is further understood that this direction only pertains to sites that have infrastructure and meet COAH's criteria for an inclusionary site." (CRa13, CRa14).

Prior to the start of mediation, Gateway forwarded to COAH on July 17, 1995 a report of David N. Kinsey, Ph.D., AICP, PP, which listed seven objections to the Hillsborough fair share plan (CRa17 to CRa21). The objections included that the waiver of center designation requirement was inappropriate with regard to the PAC/HCF site, that the PAC/HCF site was neither realistic nor suitable under COAH's criteria and that the phasing schedule of the PAC/HCF site would defer construction of the first affordable unit for a decade "given the site's projected 40 year build out" (CRa19). Further, the objector proposed that its 117 acre site should be used as an alternative to the PAC/HCF site because the Gateway tract was in Planning Area 2 and

was otherwise suitable and realistic for low and moderate income housing (CRA19). The cover letter of the report made clear that Gateway objected to the PAC/HCF site because it did not conform to the SDRP and requested COAH to reconsider the staff conclusion that center designation be waived for the PAC/HCF site. CRA17.

Mediation concluded on November 14, 1995 (Aa271). On January 17, 1996, James Cordingly, Mediator, issued a report which described the mediation and its results (Aa271 to Aa279). Participants in the mediation were representatives of Hillsborough; Gateway, including its owner, Anatol Hiller; and Hillsborough Alliance for Adult Living, L.P. ("HAAL"), the owner of the PAC/HCF site. The report stated that in December 1994, Hillsborough prepared and submitted a 208 plan amendment for DEP review and approval on behalf of the developer and other property owners of the PAC/HCF site. When Hillsborough received an objection from Anatol Hiller at DEP, the Township withdrew the amendment request, stating that it was not "appropriate to sponsor a Waste Water Management Plan amendment involving individual property owners where objections have been filed since issues essentially involved disputes between the objector and the developer." (Aa272; CRA22 to CRA25).*

The Mediation Report stated that an issue in mediation had been the fact that the PAC/HCF site was located predominantly in Planning Area 4 and that the objector claimed the site needed designation as a center consistent with the policies of the SDRP. In

*Subsequently, on September 12, 1995, an amendment of the Wastewater Management Plan was submitted to DEP by the developers of the PAC/HCF site. See, CRA24, CRA25.

response to this objection, Hillsborough and HAAP met during mediation with the OSP to discuss center designation and HAAP agreed to apply for center designation by December 14, 1995 (Aa274). Subsequent to learning this, however, the objector sent new objections on November 13, 1995 (CRa26 to CRa33), which in addition to reiterating Gateway's request that COAH staff reconsider its recommendation that a waiver of center designation be granted to the PAC/HCF site, took the position that the PAC/HCF site was not eligible to be a center because it did not comply with the SPC's criteria for a center (Aa278). Pointing to the fact that the PAC/HCF site was primarily to be developed as an age-restricted development, the objectors claimed that the OSP criteria that a center be both mixed-residential and mixed use did not permit an age-restricted development to be designated as a center (CRa31, CRa32; Aa275, Aa278). Thereafter, Hillsborough reiterated its request that center designation be waived pursuant to the COAH policy directive (Aa278).

The Mediation Report also noted that Hillsborough and HAAL had agreed during mediation to amend the 1991 general development plan approval for the site so that the developer could build a maximum of 3,000 residential units on the PAC/HCF site, including the 136 low and moderate income units. Originally, zoning on the PAC/HCF site could have yielded as many as 11,000 units of housing (Aa271). The Mediation Report concluded that no substantial amendments were needed to the Hillsborough housing element and fair share plan prior to certification by the Council and that there were no outstanding

contested issues of fact requiring a referral to the Office of Administrative Law for resolution (Aa279).

Attached to the Mediation Report was a letter to Herbert Simmens, Director, Office of State Planning, dated January 5, 1996, from Shirley M. Bishop, P.P., Executive Director of the Council, requesting that OSP support the waiver of center designation for the PAC/HCF site and also requesting "OSP's written concurrence that a map change to reflect Planning Area 2 would be appropriate and endorsed by OSP during the upcoming cross-acceptance period." (CRa34 to CRa37 at CRa37). In the letter, Bishop reviewed the components of the Hillsborough fair share plan, the status of the PAC/HCF site within that plan and listed ten reasons for OSP's requested support for waiver of center designation (CRa35 to CRa37).

On January 31, 1996, Simmens responded on behalf of the OSP to Bishop's January 5 letter (Aa62 to Aa64). Although "quite troubled by the loss of farmland which would result from the construction of the PAC/HCF," Simmens did not "formally object to COAH action to waive center designation" (Aa62). Simmens stated that subject to discussions with the DEP, the Department of Transportation, Somerset County and other agencies "regarding the adequacy of current or proposed infrastructure improvements", the OSP "would recommend to the State Planning Commission that areas encompassing and immediately surrounding the PAC/HCF be given consideration by the State Planning Commission for redesignation as Planning Area 2" (Aa64).

Simmens based his conclusion not to object to the waiver of center designation for the PAC/HCF project on nine "facts and

circumstances": (1) State Plan policy number 20 stated that "In instances where municipalities and counties identify a center at the intersection of two or more planning areas a center will be designated as lying within the planning area of lowest numerical value." Therefore, he continued ". . . any center designation for the PAC/HCF would be looked at under the Planning Area 2 policy objectives and criteria. Under the Memorandum of Agreement between COAH and the SPC, sites in Planning Area 2 are not required to be located in designated Centers" (Aa62, Aa63). (2) "Hillsborough Village Square" was identified as a "planned village" in the State Plan. (3) The general development plan for the PAC/HCF was given initial approval in 1991, prior to the adoption of the State Plan. (4) The proposed extension of sewer infrastructure, if approved by DEP, would not extend very far beyond existing sewer infrastructure. (5) The request to include the site as part of the Township's fair obligation was made jointly by the developer and the municipality. (6) The representation in Bishop's January 5 letter that COAH rules regarding the timely filing of a Petition of Substantive Certification by Hillsborough would preclude the granting of a builder's remedy or site specific relief to an objector to the Hillsborough plan. (7) The principle in the MOU between COAH and OSP which states "Municipalities that are consistent with the State Plan's goals, objectives and policies, and that petition the Council within two years of filing a housing element with the Council, receive the benefit of maximum flexibility with respect to Council certification (Aa63)." (8) The "vigorous plan" for acquisition of open space and easements by Hillsborough, Somerset

County, a neighboring Hunterdon County community and Hunterdon County would, consistent with the intent of Planning Area 4, "serve to create an open space green belt including much of the undeveloped lands in proximity to the PAC/HCF site" (Aa83). (9) If the center designation petition were filed, "a reasonable case" could be made that the project would meet many of the criteria for center designation, "particularly if incorporated into a somewhat larger community development area". However, the age-restricted nature of the great majority of the proposed development was "problematic" because "The State Plan does not explicitly address age restricted Centers" and Simmens felt that the best way to address this issue would be during the preparation of the next preliminary State Plan, not in the context of a waiver request (Aa63).

Simmens emphasized that his recommendation was based upon a weighing of all nine factors and that no single factor was sufficient to be determinative. Therefore, his letter should not be seen as precedent for future waiver requests by other municipalities. Finally, Simmens requested that COAH condition its approval of the center designation waiver on two actions: (a) that the Township request a consistency review of its Master Plan by the OSP and (b) that OSP be given the opportunity to be "fully involved" in the PAC/HCF design review process and have its comments "given appropriate consideration by the developer and the Township" (Aa62 to Aa64).

On February 27, 1996, Hillsborough and HAAL signed a "Municipal Development Agreement" with regard to the development of the PAC/HCF site (Aa40 to Aa49). A draft version of this agreement

had been attached to the mediation report as Attachment E (Aa278). The agreement set forth that the developer could build a maximum of 3,000 single-family residential units on the PAC/HCF site, 15% of which would be set aside for affordable housing, and that 136 of the affordable units would be built in the six-year period of substantive certification (Aa44). The agreement contained a statement that ". . . substantive certification by COAH, and any obligation of the developer to proceed is premised upon the fact that sewers shall be made available to the site. . ." and listed the following as the reasons why the parties agreed that sewer would be provided to the site: (a) the site had received general development plan approval from Hillsborough prior to the adoption of the SDRP; (b) the site was included "in its entirety" in the Somerset County Waste Water Management Plan, "which has received preliminary comments by NJ DEP and is presently being reviewed by Somerset County for resubmission to DEP by April 1996"; and © there were assurances given to COAH by the OSP, which had reviewed the PAC/HCF site, that the site would be recommended for classification as Planning Area 2 during OSP's next cycle of cross acceptance (Aa45).

Because the approval of sewer service for the project was essential for development to begin and the affordable housing to be produced, the agreement provided that if the developer were not able to build the project and produce the required affordable units within the six-year period of substantive certification, the developer should notify Hillsborough prior to December 31, 1998 "so that alternative plans . . . may be instituted either by the developer and/or the

Township" to provide the required affordable housing (Aa46). Moreover, if circumstances "beyond the control of the developer" occurred which prevented the developer from building the affordable units within the six-year period of substantive certification, the developer agreed to "reserve and convey to the Township up to ten (10) acres of land with sewer availability" for the construction of the 136 required units for affordable housing (Aa46, Aa47).

On March 4, 1996, a COAH compliance report recommending substantive certification to Hillsborough's housing element and fair share plan was issued (Aa27 to Aa57). Attached to the compliance report was the signed February 27, 1996 agreement between Hillsborough and HAAL (Aa40 to Aa50). The report analyzed the Hillsborough fair share plan and concluded that Hillsborough's 12-year calculated need of 482 affordable units could be reduced to 167 units of affordable housing, 160 new construction inclusionary units and 7 rehabilitation units after taking account of credits and reductions for Hillsborough's past affordable housing production and compliance (Aa29 to Aa31). With regard to the rehabilitation units, the report concluded that Hillsborough's plan of rehabilitating two units in 1997 and one unit each year thereafter met the Council's requirements (Aa31). With regard to the 160 inclusionary units, all of which were to be produced on the PAC/HCF site, the report concluded that 96 affordable age-restricted units and 40 affordable family rental units, which would bring 24 rental bonus credits pursuant to N.J.A.C. 5:93-5.14(d), met Hillsborough's obligation (Aa31). The rental bonus credits were available to Hillsborough pursuant to N.J.A.C. 5:93-

5.14(d) because the signed Municipal Development Agreement between Hillsborough and HAAL met the rule requirement for a "firm commitment for the construction of the rental units". N.J.A.C. 5:93-5.14(d); Aa31, Aa32.

The March 4 compliance report gave extensive attention to the issue of whether the PAC/HCF site required designation as a center pursuant to N.J.A.C. 5:93-5.4(c) and concluded that COAH could waive center designation (Aa32 to Aa35). The report concluded that waiver of center designation was appropriate because the PAC/HCF site met the criteria articulated in COAH's December 7, 1994 policy directive with regard to sites with infrastructure in Planning Areas 4 and 5, which was attached as Exhibit B to the compliance report (Aa50, Aa51). The report noted that the PAC/HCF site was a new site meeting a twelve-year obligation and was jointly proposed by Hillsborough and the developer. The compliance report also concluded that the PAC/HCF site was "available," "approvable," "suitable" and "developable" as those terms are defined at N.J.A.C. 5:93-1.3. (Aa32, Aa33).

The PAC/HCF site was "available" in that the owner/developer of the site had acquired a clear title to the site "free of encumbrances" or had a contract interest for development of the site (Aa33; N.J.A.C. 5:93-1.3 "Available Site"). The site was "approvable" in that it "may be developed for low and moderate income housing" consistent with the Council's rules in that Hillsborough had granted general development plan approval for the site, first in 1991, and amended that approval in 1995 (Aa33; N.J.A.C. 5:93-1.3 "Approvable Site"). The site was "suitable" in that it was "adjacent to

compatible land uses" such as the municipal complex and had no environmental constraints that would preclude the 3,000 unit development (Aa33; N.J.A.C. 5:93-1.3 "Suitable Size"). Finally, the PAC/HCF site was "developable" because it had "access to appropriate sewer and water infrastructure" through the Elizabethtown Water Company and the Hillsborough Township Municipal Utility Authority (Aa33; N.J.A.C. 5:93-1.3 "Developable Site"). Further, the compliance report stated that the PAC/HCF tract "is included in the Somerset County Waste Water Management Plan which is under review" by the DEP (Aa33).

The compliance report concluded that the recommended waiver of center designation met COAH's three general waiver criteria found at N.J.A.C. 5:93-15.1(b) (Aa33, Aa34). The waiver of center designation met the first waiver criterion that the production of affordable housing be fostered by the granted waiver in that 15% of all of the housing produced on the site would be affordable housing pursuant to the February 27, 1996 "Municipal Development Agreement" signed by Hillsborough and HAAL (Aa40 to Aa49). Thereby, the site would provide affordable housing not only for the current affordable housing period, but for future fair share obligations, as well (Aa33, Aa34). The center designation waiver fostered the second waiver criterion that the waiver promote the intent, if not the letter, of COAH's rules. The report explained that COAH's rules regarding center designation in Planning Areas 4 and 5 were based upon the understanding that sites in Planning Areas 4 and 5 did not have infrastructure or access to infrastructure. However, after adopting

those rules, COAH learned that this was not accurate. A meeting between COAH, OSP and SPC took place in which it was agreed that COAH would not amend its rules with regard to Planning Areas 4 and 5 but would initially offer a waiver with regard to center designation to the specific categories of sites set out in the December 1994 policy directive. The report noted that this policy was articulated at COAH's December 1994 meeting and later published in a COAH newsletter, with a distribution list of over 3,000 individuals and organizations (Aa34; CRA91, CRA92)). The compliance report also concluded that the third criterion that strict application of COAH's center designation rule to the PAC/HCF site would create an unnecessary hardship was met, because the site was the chief mechanism by which Hillsborough intended to provide affordable housing and that since June, 1991 the Township had been proceeding in good faith to insure that the site would meet COAH's regulations and policies to be included in Hillsborough's twelve-year plan (Aa34).

The compliance report also reviewed the ten principles contained in the Memorandum of Understanding between COAH and the SPC to demonstrate how the center designation waiver gave "appropriate weight" to each of the ten principles (Aa34, Aa35). Material to this discussion was the January 31, 1996 Simmens letter stating that OSP did not object to COAH action to waive Center designation for the PAC/HCF site (Id.). The compliance report relied upon the SDRP policy that stated that if a site falls within two planning areas, the criteria of the lower numbered planning area prevail. Therefore, the report concluded that the criteria pertaining to sites in Planning

Area 2, which do not need center designation, pertain to the PAC/HCF site. Also, the report concluded that Principle 10 of the MOU applied to Hillsborough, which should "receive the benefit of maximum flexibility with respect to Council certification" (Aa34, Aa35).

The March 4 compliance report was issued for a 14-day comment period. On March 15, 1996, NJF wrote a letter of objection to the recommendation that substantive certification should be granted to the Hillsborough fair share plan (Aa70 to Aa76). This was the first time NJF had participated in this matter. NJF requested COAH "to defer its decision on this plan" until (a) the SPC approved a map amendment incorporating the PAC/HCF site into Planning Area 2, (b) the DEP amended its wastewater management plan to include the PAC/HCF tract and (c) the SPC provided center designation for the PAC/HCF tract (Aa72, Aa73). NJF stated that its objection was both "philosophical and technical" to the COAH/OSP decision to apply Planning Area 2 criteria to the PAC/HCF site (Aa74). The philosophical objection was that allowing any project in multiple planning areas to be affected by the criteria of only the lower numbered planning area would allow the state plan to be "circumvented on a case by case basis", which NJF viewed as "a recipe for sprawl" (Aa74). The technical objection was that the SPC, and not OSP*,

* The State Planning Commission ("SPC") consists of 17 appointed members, who inter alia have the responsibility to prepare, adopt and readopt every three years the SDRP. N.J.A.C. 52:18A-197, -198. The Office of State Planning "shall assist" the SPC "in the performance of its duties" and, among other services, shall provide "planning services to other agencies or instrumentalities of State government, review the plans proposed by them, and coordinate planning to avoid or mitigate conflicts between plans." N.J.A.C. 52:18A-201b(2).

approved map amendments and it was "premature" for OSP to support a map amendment "without having studied the issue carefully and gone through the appropriate map amendment process" (Aa75). NJF also objected to COAH's assumption that the site would be sewered if DEP approved Somerset County's request to amend the wastewater management plan to include the PAC/HCF tract because such an approval, in itself, violated the principles of the SDRP. Id. Finally, NJF noted that the site was unlikely to be designated as a center ". . . because of the age restricted nature of the proposed project" (Aa75, Aa76).

COAH issued substantive certification to Hillsborough's housing element and fair share plan on April 3, 1996 (Aa19 to Aa26; Aa40 to Aa76). An executive summary of the same date accompanying the proposed substantive certification resolution (Aa15 to Aa17) stated that development of the PAC/HCF site "is contingent on the site being included in a 208 plan amendment" (Aa16). The summary updated the Council as to the status of efforts to bring sewer to the site. A preliminary plan amendment including the PAC/HCF had been submitted to the DEP by the Somerset County Planning Board for review. The DEP responded with comments and the Somerset County Planning Board was working with an advisory committee to prepare a final document which would then be submitted within two months to the applicable municipalities and to the Somerset County Board of Chosen Freeholders for review (Aa16). With regard to appellant's request to defer substantive certification, the summary recommended that the Council not wait to grant certification and cited an OSP regulation that "No municipality, county, regional or State agency should delay any

decision making process due to a pending review of their plans by the Office of State Planning for consistency with the SDRP." N.J.A.C. 17:32-7.1(c) (Aa17).

In its April 3, 1996 resolution granting substantive certification to Hillsborough's housing element and fair share plan (Aa19 to Aa26), 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 (Aa22). The resolution required 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 matter;"...(Aa22). COAH conditioned its grant of substantive certification with the requirement that Hillsborough 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 (Aa26). Also, the Council granted a waiver from its center designation requirements for the PAC/HCF site in Hillsborough for the reasons set forth in the March 4, 1996 Compliance Report, which was attached and incorporated into the grant of substantive certification (Aa25; Aa29 to Aa56). Finally, the certification stated that "any changes in the facts upon which this certification is based or any deviation" from its terms and

conditions affecting realistic opportunity would render the certification "null and void." Aa26.

On May 20, 1996, appellant filed a Notice of Appeal from the Council's grant of substantive certification to Hillsborough's housing element and fair share plan (Aa1 to Aa10). In its brief on the merits filed on March 21, 1997, NJF 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 (Ab11 to Ab13 at Ab13). Hillsborough responded in its merits 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." HRb46. However, in a footnote to this statement Hillsborough states "...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." HRb46.

On April 8, 1997, John D. Middleton, Hillsborough Township Administrator, filed a letter with COAH in compliance with COAH's six month reporting requirement (CRa44). This letter 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 (CRa44).

However, on June 27, 1997 Middleton filed another letter with the Council (CRa42, CRa43). 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 Hillsborough Township Committee will be required to take action, under DEP regulations, and they will" (CRA42, CRA43).

These letters were presented to the members of the Council at the July 9, 1997 monthly COAH meeting in executive session for their information and to determine whether the Council desired to continue to defend its grant of substantive certification to Hillsborough. The Council determined that rather than file a brief in this matter a Motion for Remand would be filed so that jurisdiction over Hillsborough's fair share plan could be returned to the Council. Then, the Council would consider the effects on Hillsborough's certified fair share plan of Hillsborough's June 24 decision to not actively support the inclusion of the PAC/HCF site in the Somerset

County water quality management plan amendment and to overrule the planning board's support of the inclusion of the PAC/HCF site in the county plan. The Motion for Remand was filed with this Court on July 21, 1997 (CRa38 to CRa44). The Motion was denied without opinion on August 27, 1997 (CRa45).

On September 19, 1997, HAAL filed an emergent motion with the Council, returnable at its regular monthly meeting of October 1, 1997 requesting that the Council order Hillsborough to comply with the terms of its substantive certification and require the Township "to endorse and submit" an application for the PAC/HCF site to be included in the Somerset County/Upper Raritan Watershed Wastewater Management Plan (CRa46 to CRa51) at CRa49, CRa50). Further, HAAL requested COAH to enjoin the Township from adopting amendments to the PAC zoning that affected the HAAL site and that the Township had scheduled for public hearing on October 14, 1997 (CRa49). Finally, HAAL requested that a mediator be appointed. In response, the Township questioned the Council's jurisdiction over the emergent motion, based in part upon this Court's refusal to remand this appeal and in part upon the fact that HAAL had instituted a prerogative writ suit against the Township, Docket No. SOM-L-1239-97PW, asking for the same relief (CRa52 to CRa60 at CRa53 to CRa56).

In its brief filed before the Council in response to HAAL's emergent motion, Hillsborough took positions at odds with its posture before this Court. For example, Hillsborough argued that its "substantive certification should not have been granted until there was Section 208 approval" and stated, as does NJF in its brief, that

N.J.A.C. 5:93-5.3(b) so provides (CRA56, emphasis supplied). Moreover, Hillsborough characterized the HAAL site as "located in 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. . . ." (CRA56). These statements are in direct contradiction of positions taken in Hillsborough's brief filed before this Court. See Point VII and Point V of the Hillsborough brief.

The Council heard oral argument on HAAL's emergent motion at its meeting of October 1, 1997 from representatives of Hillsborough, HAAL and others, including NJF, that filed briefs on the matter (CRA61 to CRA73). After considering the matter, the Council denied the motion. However, in so doing, the Council was aware that Hillsborough was still obligated to comply with its substantive certification.

ARGUMENT

POINT I

THE COUNCIL ON AFFORDABLE HOUSING'S GRANT OF
SUBSTANTIVE CERTIFICATION TO THE FAIR SHARE PLAN
OF THE TOWNSHIP OF HILLSBOROUGH WAS REASONABLE
AND IN CONFORMANCE WITH THE FAIR HOUSING ACT AND
THE COUNCIL'S REGULATIONS.

- A. Hillsborough's Fair Share Plan Complied With
The Primary Requirement of the Fair Housing
Act at N.J.S.A. 52:27D-314 That The
Achievement of Affordable Housing Be
"Realistically Possible."

The Council may issue substantive certification to a
municipal fair share plan pursuant to N.J.S.A. 52:27D-314 if the
Council finds that

a. The municipality's fair share plan is
consistent with the rules and criteria adopted by
the council and not inconsistent with the
achievement of the low and moderate income hosing
needs of the region as adjusted pursuant to the
Council's criteria and guidelines adopted
pursuant to subsection c. of section 7 of this
act; and

b. The combination of the elimination of
unnecessary housing cost-generating features from
the municipal land use ordinances and
regulations, and the affirmative measures in the
housing element and implementation plan make the
achievement of the municipality's fair share of
low and moderate income housing realistically
possible after allowing for the implementation
of any regional contribution agreement approved
by the Council. [N.J.S.A. 52:27D-314].

The Council's grant of substantive certification to Hillsborough's
fair share plan was consistent with the Council's rules and criteria
and the "affirmative measures" in the plan resulted in the Council
concluding that the plan provided a "realistic opportunity" for
affordable housing in Hillsborough.

Hillsborough's twelve-year cumulative fair share obligation was determined by COAH to be 482 units of affordable housing pursuant to N.J.A.C. 5:93-1 et seq., (Aa29 to Aa31). With credits and reduction of 315 units for housing produced to meet its first round certification, Hillsborough was required to meet a calculated need of 167 affordable units, 160 inclusionary units and 7 rehabilitation units. Hillsborough's plan to address its inclusionary obligation included 96 age-restricted units and 40 family rental units for which an additional 24 rental bonus units would be awarded pursuant to N.J.A.C. 5:93-5.14(d). All of these units were to be built on the PAC/HCF site (Aa29, Aa30).

The Council in granting substantive certification on April 3, 1996 determined that Hillsborough's fair share plan did provide the realistic opportunity required by the Mount Laurel decisions and the Fair Housing Act at N.J.S.A. 52:27D-314 (Aa27 to Aa57). That decision, as set out in the COAH compliance report of March 4, 1996 (Aa29 to Aa38), fully considered the appropriateness of the PAC/HCF site as a site for the proposed inclusionary zoning and determined that the site was available, approvable, suitable and developable, according to the definitions of those terms at N.J.A.C. 5:93-1 et seq. (Aa33). Further, the report concluded that Hillsborough's requested waiver of the center requirements of N.J.A.C. 5:93-5.4(c) could be granted for the PAC/HCF site because the request met the criteria for a rule waiver found at N.J.A.C. 5:93-15.1(b) (Aa33, Aa34), as well as the policy criteria set out in the COAH policy directive of December 7, 1994 (Aa51, Aa52). In granting the

waiver, the report further analyzed the ten principles of the Memorandum of Understanding ("MOU") between COAH and SPC and concluded that the waiver decision gave "appropriate weight" to each of the ten agreed-to basic principles (Aa34, Aa35).

The compliance report also relied upon the January 31, 1996 OSP letter that did not object to the waiver of center designation, a letter that the Council viewed as being consistent with the policy of mutual cooperation set out in the MOU (Aa34). The report also emphasized the policy of the SDRP that for sites in more than one planning area, the criteria of the lower planning area "prevails," which would not require the PAC/HCF site to receive center designation because a portion of the site was in Planning Area 2 (Aa35). The report further reviewed the fact that the developer of the PAC/HCF site had contemplated seeking center designation for the PAC/HCF site, which proved "not to be feasible" because of the primarily age restricted nature of the project (Aa35). And, the report stated that Hillsborough was a COAH-compliant municipality, which had completed all units zoned in its first round and which had voluntarily petitioned the Council for approval of its second-round plan. As such, the municipality was entitled under Principle 10 of the MOU to "... receive the benefit of maximum flexibility with respect to Council certification." (Aa35).

Moreover, the Council's decision that the PAC/HCF site would provide a realistic opportunity for affordable housing, even though the site did not have sewer service at the time of certification, was predicated in part upon the cooperation exhibited during the

certification process between Hillsborough and HAAL, as reflected, for example, in the February 29, 1996 "Municipal Development Agreement" that was incorporated into the Council's grant of substantive certification. (Aa11 to Aa27 at Aa21). The Agreement, entered into under the stated authority of N.J.S.A. 40:55D-45.2(1) (Aa42), not only provided that HAAL would build all 136 units of affordable housing required by Hillsborough's plan by June 30, 2001 (Aa43, Aa44), but also stated that the units would be produced by a method alternative to the contemplated inclusionary development of the PAC/HCF site, if sewer service were not provided to the PAC/HCF site in a timely fashion (Aa45 to Aa47). Therefore paragraph 9 of the Agreement provided for the conveyance of up to 10 acres of land with sewer availability from HAAL to Hillsborough for construction of the 136 affordable units, if HAAL notified the municipality prior to December 31, 1998 that it would not be able to produce the 136 required affordable units on the PAC/HCF by the site required date (Aa46, Aa47). Additionally, the February 29 Agreement provided that 15% of all of the 3,000 units built on the PAC/HCF site would be affordable housing, thereby providing for Hillsborough's future affordable housing obligations (Aa44).

As a consequence of this Agreement, the Council was able to determine that Hillsborough's decision to include the PAC/HCF site in its plan, even though the site was not yet sewered, provided the requisite realistic opportunity for affordable housing. The municipality had been planning for the large scale development of the PAC/HCF site since prior to the 1992 approval of a "General

Development Plan," which included the PAC/HCF development, and the 1992 adoption of a municipal Master Plan which also contemplated the PAC/HCF development (Aa104 to Aa107). Further, the Hillsborough plan, as refined through the February 29, 1996 Agreement not only met, but exceeded the Council's rules by planning for the municipality's future affordable housing obligations and achieving an agreement that the PAC/HCF site provide that housing.

Finally, the Council's grant of substantive certification acknowledged that the PAC/HCF site might not receive the sewer service necessary for the site to be developed and therefore included in its substantive certification resolution that if the PAC/HCF site "is not approved for inclusion in the 208 plan amendment" that Hillsborough would be required to amend its plan "to address" the units to be provided in the PAC/HCF site "in another manner." (Aa22). In furtherance of this requirement the Township was required to report to the Council every six months with regard to the progress of sewer service being extended to the PAC/HCF site (Aa26).

It should be clear that the Council's grant of substantive certification on April 3, 1996 complied with the Fair Housing Act's requirement that Hillsborough's plan provide a realistic opportunity for affordable housing. Provisions were included in the certification resolution, and in the February 29, 1996 Agreement which was incorporated into the resolution, that provided alternative ways to produce the 136 required affordable units within the six-year certification period, even if the PAC/HCF site was not able to receive sewer service in a sufficiently timely fashion. Moreover, the

provision of sewer service to the PAC/HCF site seemed likely in April 1996, given the evident cooperation between HAAL and Hillsborough with regard to the development of the PAC/HCF site. For this and all of the other reasons set out in the March 4, 1996 compliance report, the Council determined that the Hillsborough fair share plan provided the necessary realistic opportunity for affordable housing required by N.J.S.A. 52:27D-314.

It should be noted that whenever the action of an administrative agency or official is subject to judicial review, a presumption exists that the decision is reasonable and correct and the discretion legislatively delegated to such an agency has been properly exercised. Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980); Commuter Operating Agency's Determination, 166 N.J. Super. 430, 435 (App. Div. 1979), certif. den. 81 N.J. 261 (1979). One challenging such action accordingly has the burden of demonstrating that it was arbitrary, unreasonable or capricious. Morris Cty. v. Skokowski, 86 N.J. 419, 424 (1981); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978).

Moreover, in undertaking the review of such matters, it is also well established that deference must be given to the special competence and expertise of administrative agencies with regard to matters with which such agencies and officials are concerned. New Jersey Bell Tel. Co. v. State, Dept. of Public Utilities, Bd. of Public Utility Com'rs., 162 N.J. Super. 60, 77 (App. Div. 1978). In the area of affordable housing, for example, the Council has consistently been recognized by the New Jersey Supreme Court as having

broad powers and wide discretion to resolve low and moderate income housing problems. Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 32 (1989); 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).

In Holmdel Builders Ass'n, supra, 121 N.J. 550, for example, the Supreme Court recognized the Council's broad authority over satisfaction of the fair share need and general affordable housing policy. As the Court noted,

It cannot be over stressed that the Legislature, through the FHA, intended to leave the specific methods of compliance with Mount Laurel in the hands of COAH with the municipalities, charging COAH with the singular responsibility for implementing the statute and developing the State's regulatory policy for affordable housing. [Id. at 576].

The Court further emphasized the breadth of COAH's authority finding that COAH's authority comports "... with the complexity and sensitivity of the subject of affordable housing." Id. at 577.

The Supreme Court's specific directive in Holmdel Builders Ass'n should be read together with the general proposition that all State agencies have such incidental powers as may be necessary to effectuate its statutory policies. A.A. Mastrangelo, Inc. v. Environmental Protec. Dept., 90 N.J. 666, 680 (1982). This authority should be liberally construed when the public welfare is involved. N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 79 (1980), cert. denied, appeal dismissed sub. nom. Wayne Haven Nursing Home v. Finley, ___ U.S. ___, 101 S.Ct. 342, 66 L.Ed.2d 208 (1980). In the Mount Laurel context, the public welfare is most clearly involved.

In Mount Laurel II, the Supreme Court restated its support for the constitutional obligation previously announced in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mount Laurel, supra, 67 N.J. 151 (Mount Laurel I). Specifically, the Court stated that the power to zone, delegated to New Jersey municipalities by statute, is one portion of the police power, and thus must be exercised consonant with the general welfare. Mount Laurel II, supra, 92 N.J. at 208. A consideration of the general welfare includes more than the needs of a municipality's own residents -- it also includes the housing needs of those outside the municipality but within the region contributing to housing need within the municipality. Ibid. Zoning regulations that conflict with the general welfare, as thus defined, are unconstitutional. Ibid.

The Mount Laurel obligation, as announced by the Supreme Court, requires that municipalities provide, through their land use regulations, a "realistic opportunity" for the construction of their fair share of the State-wide obligation. Id. at 205. In providing that realistic opportunity a municipality must, at a minimum, remove all municipally created barriers to the construction of its fair share. Id. at 259. Thus, to the extent necessary to meet its Mount Laurel obligation, a municipality must "remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety." Ibid.

However, the removal of such barriers does not automatically signal that a municipality has provided the requisite realistic opportunity. Rather, the Mount Laurel II Court made it clear that in

most case municipalities must go further, and provide inducements in the form of "affirmative measures" in order to insure the existence of a realistic opportunity. Id. at 261. Thus, a municipality could not simply zone a site to permit the construction of affordable housing as one of several permissible uses. In such a case, other permitted uses might prove to be more profitable, and thus no affordable housing would actually result. As stated by the Court, satisfaction of the obligation "cannot depend on the inclination of developers to help the poor." Ibid. For the opportunity to be realistic it must be "one that is at least sensible for someone to use." Ibid.

The Court suggested several possible forms of "affirmative measures," although the list was not meant to be exclusive, and encouraged other solutions. First and foremost, the Court stated that a municipality should aid in procuring available federal or state subsidies to aid in the construction of affordable housing. Id. at 262. Second, the Court held that municipalities should use inclusionary zoning devices, such as incentive zoning and mandatory set-asides. Id. at 265. Once a municipality had done these two things (removed excessive restrictions and instituted appropriate affirmative measures) "the Mount Laurel doctrine requires it to do no more." Id. at 259-60.

The Fair Housing Act incorporates the compliance test laid down in the Mount Laurel decisions. N.J.S.A. 52:27D-311(a) provides that, in adopting its housing element, a municipality "may provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic

opportunity for the provision of the fair share." Thus, the responsibility for creation of the plan, and selection of the appropriate approach, rests with the municipality. However, any plan must provide the requisite realistic opportunity.

Hillsborough selected the PAC/HCF property as the site for an inclusionary development that would produce up to 450 units of affordable housing to meet Hillsborough's current and future affordable housing obligations. Hillsborough requested the Council to waive the center designation requirement of N.J.A.C. 5:93-5.4(c) to allow the development of the PAC/HCF site to proceed. As set out in the March 4, 1996 COAH compliance report, the Council's decision to grant the waiver of the center designation requirement of N.J.A.C. 5:93-5.4(c) was reasonable and the Council's decision to grant substantive certification to Hillsborough's fair share plan was consistent with the Fair Housing Act requirement that the plan provide a realistic opportunity for affordable housing.

- B. The Council's Waiver of Center Designation for the PAC/HCF Site Was Reasonable And Was Consistent With the Policies And Principles of the State Development And Redevelopment Plan That Pertain to the PAC/HCF Site.

Appellant NJF, the statewide membership of which includes owners of property adjacent to the PAC/HCF site (Ab14), claims in this appeal that the Council must be "held strictly" to implementing the SDRP (Ab18) and that the Council's waiver of center designation for the PAC/HCF site must be overturned because the PAC/HCF site is predominately located in rural Planning Area 4 and should, therefore, pursuant to N.J.A.C. 5:93-5.4(c) be located in a "center." However, in its advocacy for the policies of the SDRP, virtually elevating them to a constitutional planning requirement equal to the Mount Laurel constitutional zoning requirement for affordable housing (Ab21 to Ab24), NJF mischaracterizes the intent of the State Planning Act ("SPA"), N.J.S.A. 52:18A-196 et seq., and thereby seeks to impose upon the Council a rigid and inflexible regulatory standard that is inappropriate to and incompatible with "... the complexity and sensitivity of the subject of affordable housing," Holmdel Builders' Ass'n, supra, 121 N.J. at 576. Rather, the Council's grant of a waiver of the center requirement found at N.J.A.C. 5:93-5.4(c) for the PAC/HCF site was reasonable in that it promoted its statutory mandate to certify municipal fair share plans which foster the production of affordable housing, while balancing that goal with and giving due consideration to the policies of the SDRP.

On January 2, 1986, the Legislature adopted the SPA, calling for the creation of a State Development and Redevelopment Plan to be

used as "a tool for assessing suitable locations for infrastructure, housing, economic growth and conservation" to bring about a "cooperative planning process" that "will enhance prudent and rational development" throughout the State. N.J.S.A. 52:18A-196(c) and (e). Because of haphazard patterns of growth (with an increasing concentration of the poor and minorities in older urban areas) the Legislature declared that in order to avoid jeopardizing the future well-being of the State, the State Plan was required to provide "sound and integrated [and coordinated] Statewide planning ... in order to conserve [the State's] natural resources, revitalize its urban centers, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable cost, while promoting beneficial economic growth, development and renewal. N.J.S.A. 52:18A-196(a) and (g). Further, the Legislature recognized in the SPA that "the overwhelming majority" of land use decisions are made at the local level and deemed it important to "assist" local government in the development of local plans "which are consistent with State plans and programs." N.J.S.A. 52:18A-196(f). Finally, the Legislature acknowledged the needs of low and moderate income individuals when it found at N.J.S.A. 52:18A-196(h) that "An adequate response to judicial mandates respecting housing for low and moderate income persons requires sound planning to prevent sprawl* and to

* NJF claims throughout its brief that the proposed PAC/HCF development constitutes "sprawl". The term "sprawl" is defined in the glossary to the SDRP as "a pattern of development characterized by zones of single-use buildings at very low density." (CRA90). Clearly, 3,000 units of housing, 15% of which are Mount Laurel housing, on 700 plus acres of land adjacent to land in Planning Area 2 and close to municipal services would not seem to be

promote suitable use of land ...". To achieve these goals, the SPA established the State Planning Commission and the Office of State Planning, N.J.S.A. 52:18A-196; -199; -200; -201(b)(6).

The Legislature envisioned that the SDRP was to be developed through a process of discussion and negotiation with the citizens of New Jersey and local governments, which process was described in the SPA as cross-acceptance. N.J.S.A. 52:18A-202. The SPC solicited public opinion from across the State through polling on how a plan should be constructed and summarized the public's preferences in the Prologue to the SDRP:

New Jerseyans believe that the cities can be revitalized, and they want as much future development as possible to occur there. They want patterns of development in suburban areas that will produce less congestion, more affordable housing and reasonable access to public transportation. They support compact development instead of sprawl in the State's major transportation corridors, and they are least supportive of development of the rural countryside. [CRA74 to CRA75 at CRA75; emphasis supplied.]

Following the completion of the cross-acceptance process, the first SDRP was adopted on June 12, 1992 (Aa280). The goals of the SDRP are taken directly from the legislative mandates of the Planning Act, while the strategies set for each goal identify the most effective approach to achieving the goal and "provide a context for policy initiatives in a broad array of substantive areas. These areas include equity, comprehensive planning, resource planning and management, public investment priorities, infrastructure investments,

"sprawl" under this definition.

economic development, urban revitalization, housing, transportation, natural and cultural resources, agriculture and areas of critical State concern." (Aa285). For example, in the planning context, one of the SDRP policies, Planning Policy 6, is to "[d]evelop plans that are integrated and coordinated with plans at all levels of government, with special attention paid to the impacts of State functional plans on land use ...". (CRA76). In the context of resource planning and management, the SDRP used planning area designations as a means of identifying large masses of land that share certain characteristics (e.g., the presence of infrastructure, natural resources and other systems such as transportation or recreation systems) that should properly be considered in planning the nature, degree and timing of development in such areas and further established a "centers" designation process to identify those locations within such planning areas where development should be encouraged in a compact and efficient manner (Aa292, Aa293).

With regard to housing, the SDRP summarized its policies and goals as:

The essential element of the Statewide Policies for Housing is to preserve and expand the supply of safe, decent and reasonably priced housing by increasing residential land availability, improving access between jobs and housing, eliminating unnecessary regulatory delays and coordinating the provision of public infrastructure with housing development, while also promoting low-and moderate-income and affordable housing through code enforcement, housing subsidies, community-wide housing approaches and coordinated efforts with the New Jersey Council on Affordable Housing. [CRA78; emphasis supplied.]

To foster these goals the SDRP adopted two housing policies, Policy 17 and Policy 18, that reflect the stated coordination between the SPC and the Council:

Policy 17

Coordination with the New Jersey Council on Affordable Housing

Support the present and prospective housing needs identified by the New Jersey Council on Affordable Housing through 1993 and collaborate with the Council on future housing allocations using the State Development and Redevelopment Plan as a guide for municipalities throughout the State.

Policy 18

Municipal Development Approvals Incompatible with the Plan

If, after the effective date of this Plan, a municipality approves development with the exception of low- and moderate-income housing that is incompatible with the State Plan's provisions for the Planning Area, then the New Jersey Council on Affordable Housing may give an affordable housing allocation to that municipality commensurate with the approved development. The New Jersey State Planning Commission and the New Jersey Council on Affordable Housing shall identify those indices of development that will precipitate those housing allocations. [CRA82; emphasis supplied.]

Throughout the SDRP it is emphasized that the plan is not intended to be "regulatory." The SDRP clearly does not mandate that any specific governmental agency be held to comply with the SDRP in the unreasoned or inflexible fashion urged by NJF when it states that COAH must be "held strictly" to the SDRP policies included in N.J.A.C. 5:93-5.4(c). Rather, the SDRP is based upon "the nobility of reason and coherence" (CRA83) and is intended to coordinate, rather than

dictate, the manner in which various activities affecting development and growth within the State should be undertaken by State and local entities (CRA83 to CRA84). While generally not statutorily mandated to comply with the State Plan, State and local agencies, consistent with their own enabling legislation, are encouraged to use their respective statutory and regulatory authority as COAH has done, to implement the State Plan (CRA83 to CRA85). The Plan notes:

One of the key purposes of the State Planning Act is to establish a "cooperative planning process" so that local, regional and State plans are consistent. State agencies, in addition to reviewing their programs, should review their individual functional plans and amend those plans to make them consistent with the Goals, Strategies, Policy Objectives and Policies established in the State Development and Redevelopment Plan. [CRA85.]

However, this "cooperative planning process" does not imply that an agency such as COAH cannot grant a waiver, as it has done here, consistent with formally adopted waiver criteria, that would allow flexibility in the application of the SDRP, especially when that waiver was granted after consultation with the OSP.

The Council, is statutorily mandated by the Fair Housing Act to utilize the SDRP at N.J.S.A. 52:27D-307, where the Council is directed to "give appropriate weight to" the SDRP when determining housing regions, estimating present and prospective need for low and moderate income housing "at the State and regional levels" and in the adoption of its methodology and rules. However, the FHA recognizes that the SDRP is not mandatory with regard to municipalities in that at N.J.S.A. 52:27D-307(c) it directs the Council to "make appropriate adjustments" when a municipal "pattern of development is contrary to

the planning designations" of the SDRP. Also, the SPC is directed by the FHA to "assist" the Council by providing statistical data for use by the Council in developing its methodology and policies. N.J.S.A. 52:27D-307.

The FHA's use of the SDRP is similar to the employment of the State Development Guide Plan ("SDGP"), the predecessor to the SDRP, by the New Jersey Supreme Court in Mount Laurel II, supra, 92 N.J. at 214 to 216; 232 to 248. There the Court directed the three newly-appointed Mount Laurel judges to utilize the SDRP in determining a municipality's affordable housing obligation in builder's remedy suits. In so doing, the court eliminated its prior rulings limiting the Mount Laurel obligation to only "developing" municipalities, imposed the Mount Laurel obligation upon all municipalities and directed that the SDRP's definition of "growth areas" be used to allocate Mount Laurel prospective need. Id. at 223 to 240. However, the Court also directed that use of the SDRP be flexible and created three categories of exception to its use in a particular municipality, including one exception allowing for the possibility that the growth area delineations of the SDGP would not be updated every three years. Id. at 240 to 243.

In Van Dalen v. Washington Twp., 120 N.J. 234 (1990), the Court upheld the use by the Council of the SDGP in its methodology for the determination of first-round growth areas of the State, even though the SDGP had been "compiled during the late 1970's and released in May 1980" (Id. at 237) and a developer had challenged the information as out of date. The Van Dalen Court reviewed the

discussion of the SDGP in Mount Laurel II, including that decision's allowance of challenges to the use of the SDGP in instances where the plan was not updated every three years. Van Dalen, supra, 120 N.J. at 240 to 244. However, the Supreme Court supported the Council's decision to use the SDGP in a decision which emphasized the limited scope of a court's review of administrative agency decisions and the deference to be allowed the "broad powers" provided to the Council by the FHA to achieve statewide compliance with the Mount Laurel obligation. Id. at 244 to 246. However, in deferring to COAH's judgment and expertise the Court admonished the Council that it must be reasonable and flexible in its administration of the Mount Laurel obligation:

As with other analogous governmental processes the method of allocating affordable housing throughout the state should be adjusted periodically to reflect demographic changes. The requirement suggests that the agency's allocation formula need not be precise, but it must be reasonable....

Of course, continued delay in the completion of the SDRP may in the future affect the reasonableness of COAH's use of the SDGP. We assume that COAH's continued reliance on the SDGP will be sufficiently flexible so as to permit the presentation of proofs demonstrating that the allocation of affordable housing on the basis of the SDGP may be flawed either statewide or in particular regions. [Id. at 247.]

The Council, consistent the FHA's requirements, has in its second round utilized the SDRP in creating its methodology and determining municipal fair share obligations. See N.J.A.C. 5:93-Appendix A, and Point I(C)(3), infra. However, the Council has gone beyond the requirements of N.J.S.A. 52:27D-307 and in furtherance of

the SDRP goal of a "cooperative planning process," has entered into a "Memorandum of Understanding" (MOU) with the SPC, dated October 27, 1992, which is incorporated into the Council's rules at N.J.A.C. 5:93-Appendix F.

The MOU sets out ten "Basic Principles," which include agreements to share information, to establish and maintain a cooperative planning process, to utilize the SDRP's RPMM in allocating affordable housing need and locating inclusionary sites, and to accept and to mutually utilize certain enumerated definitions --- including the SDRP's definition of "centers" and COAH's definitions of "developable, available, approvable and suitable" found at N.J.A.C. 5:93-1.3. Also, the Council has agreed to use the SDRP in allocating regional need based on planning areas within a municipality. However, both the SPC and COAH acknowledge in the MOU that all planning areas can accommodate growth and "commensurate housing obligations," preferably in centers. When determining the development boundaries for a center, the SPC agreed in the MOU to "take into consideration the State Plan's housing policies and objectives, including those respecting low and moderate income housing." Finally, the MOU stated in Basic Principle 10:

10. Municipalities that are consistent with the State Plan's goals, objectives and policies, and that petition the Council within two years of filing a housing element with the Council, will receive the benefit of maximum flexibility with respect to Council certification.

Consistent with this MOU, the Council has not only utilized the SDRP's planning areas in the development of its methodology, but has also referenced the policies of the SDRP, including its policies

with regard to "centers" and "planning areas," in specific regulations, including N.J.A.C. 5:93-5.4(c), which is the subject of this appeal.

N.J.A.C. 5:93-5.4(c) states:

New construction; conformance with the State Development and Redevelopment Plan (SDRP)

(c) In Planning Areas 4 and 5, as designated in the SDRP, the Council shall require inclusionary development to be located in centers. Where the Council determines that a municipality has not created a realistic opportunity within the development boundaries of a center to accommodate that portion of the municipal inclusionary component that the municipality proposes to address within the municipality, the Council shall require the municipality to identify an expanded center(s) or a new center(s) and submit the expanded or new center(s) to the State Planning Commission for designation.

However, there is nothing in N.J.A.C. 5:93-5.4(c) that states that the rule cannot be waived in an appropriate instance, consistent with the Council's waiver criteria at N.J.A.C. 5:93-15.1(b). Further, there is nothing in the SDRP that would prevent such a waiver, particularly when one of the goals of the SDRP is the promote the production of affordable housing.

In applying N.J.A.C. 5:93-5.4(c) to the PAC/HCF site and in ultimately granting a waiver of the rule, the Council was mindful of its obligation to a "cooperative planning process" and sought the guidance of the OSP and its interpretation of the SDRP prior to granting the waiver (Aa65 to Aa68). The Council then relied upon that interpretation as one of the reasons for granting the waiver (Aa32 to Aa35). The OSP's thoughtful and well-reasoned letter of

interpretation (Aa62 to Aa64) reflects a careful balancing of the SDRP's policies, including its planning and affordable housing policies. In ultimately concluding, if hesitantly, that the OSP would not "formally" object to the waiver of center designation, the OSP concluded that the balance clearly weighed in favor of the production of the significant amount of affordable housing planned to be produced on the PAC/HCF site. Many factors went into this analysis, see Aa62 to Aa64 and Counterstatement of Facts at 13 to 15. Among the factors were the fact that "Hillsborough Village Square" was identified as a planned village in the SDRP and the fact that the general development plan for the PAC/HCF site was given initial approval by Hillsborough in 1991, prior to the adoption of the SDRP (Aa63). Also, the letter referenced the SDRP's General Planning Policy 20 (Aa159, Aa160) that for a center designation of land that includes two or more planning areas, the characteristics of the lowest numbered planning area would prevail. Thus, if a center designation were contemplated for the PAC/HCF site, it would be considered under the criteria for Planning Area 2, and under N.J.A.C. 5:93-5.4(c) inclusionary developments need not be in centers (Aa62, Aa67). Finally, the letter noted that the age-restricted nature of the planned PAC/HCF development was "problematic" with regard to center designation under the SDRP because the Plan "does not explicitly address" age restricted centers. The OSP preferred to consider the issue in conjunction with the preparation of its next preliminary plan (Aa63).*

* The SDRP, adopted in June, 1992, is currently being updated. The new preliminary plan was approved for release on June 25, 1997 and cross acceptance formally began on September 2,

The letter of interpretation emphasized that it was based on the totality of the circumstances specific to the PAC/HCF site, and was not intended to serve as precedent for future waiver decisions (Aa63, Aa64). As such, this interpretation of the application of the policies and goals of the SDRP to the specific facts and circumstances of the PAC/HCF site is an example of the complexity, difficulty and sensitivity of the decisions that must be made when utilizing the SDRP and its policies in the context of affordable housing. Holmdel Builders Ass'n, supra, 121 N.J. at 576. This intelligent and reasonable letter was, therefore, important in guiding the Council in its decision to waive the center designation requirement of N.J.A.C. 5:93-5.4(c) and was one of the major factors considered by the Council in its waiver.

Such a process is precisely what is contemplated by the State Planning Rules regarding the evaluation of governmental plans for consistency with the SDRP, called a "consistency review," N.J.A.C. 17:32-7.1 et seq. These rules clearly state that the SDRP is not "regulatory", N.J.A.C. 17:32-7.1(b). Similarly, the State Planning Rules with regard to seeking an amendment of the RPMM state that the SDRP is not "regulatory" and the process should not be used to support or challenge site specific changes in land use:

Neither the State Development and Redevelopment Plan nor its Resource Planning and Management Map is regulatory and it is not the purpose of this process to provide for amendments to the Map to reflect, or "validate," land use changes or to serve as a legal basis for making such changes. There is no specific change of

1997.

land use that is inherently inconsistent with the State Plan. To the extent that such a change of use may be inconsistent with another public entity's plan, code, ordinance or regulation formulated to be consistent with the State Plan, and as a result be disapproved by that entity, resolution of the issue resides with that public entity and the interested or aggrieved party. [N.J.A.C. 17:32-8.2(b).]

Clearly, then, the Council's grant of a waiver of N.J.A.C. 5:93-5.4(c) does not contradict the policies of the SDRP, which promotes and provides for a complex, flexible and reasoned approach to both planning and affordable housing issues. The fact that the Council granted a waiver of N.J.A.C. 5:93-5.4(c) to the PAC/HCF site demonstrates merely that the Council, when confronted with a particularly compelling set of circumstances and after close consultation with the OSP, will exercise its discretion, "give appropriate weight" to the SDRP and interpret its rules in a reasonable and flexible way to further its legislative mandate to certify fair share plans that provide a realistic opportunity for affordable housing. Moreover, the Council's waiver decision can be seen to further the SDRP housing goals that residential land availability be increased, low and moderate income housing be promoted and unnecessary regulatory delays with regard to housing be eliminated (CRa78).

The Council must not be "held strictly" to implementing the SDRP, as NJF urges (Ab18), if by "strict" NJF means an unyielding and mechanistic enforcement of the SDRP's planning areas and centers policy, without also giving fair weight to other SDRP policies, such as the mutual concern of the OSP and COAH that affordable housing be

zoned for and produced in New Jersey's municipalities. The granted waiver was made in furtherance of the goals of both the Fair Housing Act and the State Planning Act and should be affirmed by this court.

C. The Council's Waiver of Center Designation for the PAC/HCF Site Was Consistent With the Clearly Articulated Standards of N.J.A.C. 5:93-15(b) and is Also In Accord With The Council's Rules, Policies and Methodology.

1. N.J.A.C. 5:93-15(b) is clear, constitutional and disjunctive.

In its attempt to overturn the Council's waiver of N.J.A.C. 5:93-5.4(c), appellant NJF challenges the Council's waiver rule, N.J.A.C. 5:93-15.1(b), as unconstitutionally vague and without "meaningful" standards. N.J.A.C. 5:93-15.1(b) states:

(b) The Council will grant waivers from specific provisions of its rules if it determines:

1. That such a waiver fosters the production of low and moderate income housing;

2. That such a waiver fosters the intent of, if not the letter of, its rules; or

3. Where the strict application of the rule would create an unnecessary hardship. [N.J.A.C. 5:93-15.1(b); emphasis supplied.]

It is axiomatic that an administrative agency may waive specific provisions of its rules pursuant to a duly adopted rule permitting such waiver. SMB Associates v. Dept. of Environ. Prot., 264 N.J. Super. 38, 55-58 (App. Div. 1993), aff'd on other grounds, 137 N.J. 58 (1994). The Council has done so at N.J.A.C. 5:93-15.1(b) and, contrary to NJF's contentions, the Council is not obligated to further refine the clear standards already contained in this rule.

N.J.A.C. 5:93-15.1(b) provides three standards by which municipal waiver requests will be judged. The standards are clear and are consistent with the intent of the Fair Housing Act that municipalities have a constitutional obligation to zone for and produce affordable housing.

NJF claims that the standards of N.J.A.C. 5:93-5.4 are vague. However, it is quite clear what the waiver standards are and it is equally clear that the standards were correctly applied with regard to the waiver of center designation for the PAC/HCF site. For example, the first standard states that a waiver will be granted if it would foster the production of affordable housing. NJF claims this is "no standard" because "by definition, any housing approved in a fair share plan will 'foster' the production of housing." Ab36; Ab41. This is at best naive, as the Mount Laurel II court recognized when it stated "it was never intended in Mount Laurel I that this awesome constitutional obligation designed to give the poor a fair chance for a affordable housing, be satisfied by meaningless amendments to zoning or other ordinances." Mount Laurel II, supra, 92 N.J. at 260. Therefore, if the zoned-for housing will be "produced" by the grant of a waiver, then the standard would be met. In the context of the center designation waiver for the PAC/HCF site, the Council viewed the "Municipal Development Agreement" that Hillsborough and HAAL had signed as insuring the production of the affordable housing and the relaxing of the center designation requirement as further fostering the production of the affordable housing on the PAC/HCF site (Aa33, Aa34).

Remarkably, NJF claims that the second waiver standard, that the intent of COAH's rules be fostered by the granted waiver, is vague because NJF cannot ascertain what is the "intent" of the COAH rules (Ab37). NJF then suggests that the intent of the rules is that inclusionary developments be located in "centers" in Planning Areas 4 and 5 and that, therefore, the second criterion cannot be used to justify a waiver (Ab41, Ab42). The intent of the Council's rules is generally found in the FAH; see, for example, N.J.S.A. 52:27D-303, -304. The intent of N.J.A.C. 5:93-5.4(c) has been explained as promoting the SDRP goals of conserving infrastructure and focusing growth in Planning Areas where there is infrastructure or access to infrastructure (Aa34). The PAC/HCF site has infrastructure in the Planning Area 2 portion of the site, and the remaining portion of the site has "access" to that infrastructure (Aa34). Therefore, because, the second waiver criterion is designed to prevent specific requirements of the Council's rules from being a bar to the creation of affordable housing, it was appropriate to apply that criterion to the PAC/HCF site and waive N.J.A.C. 5:93-5.4(c).

With regard to the third criterion, that a strict application of a Council rule would create an "unnecessary hardship," NJF claims this criterion's vagueness stems from the fact that there is no guidance as to what constitutes a "hardship" or "to whom, the 'hardship' must apply, the developer or the municipality." Ab38. NJF goes on to state that a hardship cannot be experienced by a developer, since developers have "no constitutional or statutory rights to have their sites chosen for inclusionary zoning." Therefore, it would

"only be the municipality that should be able to claim hardship."

Ab45.

The Council's analysis of this criterion states that the waiver will be granted to mitigate municipal hardship due to the fact Hillsborough had been planning to provide affordable housing on the PAC/HCF site since 1991, prior to the adoption of the SDRP (Aa34). However, there is also a third party whose hardship the Council may consider, the prospective residents of the affordable housing that could be built on the PAC/HCF site. The Council has an obligation to these low and moderate income individuals to certify fair share plans that provide a realistic opportunity for affordable housing. If the grant of a rule waiver would aid in the production of that housing, the mitigated hardship would also be the hardship of this population that is ultimate beneficiary of the COAH process.

Therefore, the Council's general waiver rule found at N.J.A.C. 5:93-15.1(b) is not vague, either facially or as applied to the PAC/HCF site. And, while the rule's criteria clearly are to be applied disjunctively, since the rule uses the word "or," even if they were applied conjunctively, as NJF suggests, the waiver of the N.J.A.C. 5:93-5.4 center requirement here was clearly consistent with the all three of the criteria of N.J.A.C. 5:93-15.1(b).

These criteria are more than adequate "to inform those subject to them as to what is required," while also according the agency "the necessary discretion to proceed on an individual basis weighing the particular circumstances" N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 82-83 (1980), cert. den. 449 U.S.

944 (1980). In fact, criteria with less specificity have been upheld by the courts. For example, standards for relaxing rules such as "good cause" and "in the interests of justice," have been upheld. Matter of Allen, 262 N.J. Super. 438, 443 (App. Div. 1993). See also, Rivera v. Board of Review, 127 N.J. Super. 578, 590 (1992) (holding that Board of Review should adopt good cause exception to administrative appeal deadlines); Mount Laurel Tp. v. Public Advocate, 83 N.J. 522, 532-33 (1980) ("public interest" standard is sufficiently definite); and Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 483-86 (1971) (the phrase "moral responsibility" is clear and need not be defined through rulemaking).

It is for this reason that the cases upon which NJF relies are inapposite. Crema v. Dept. of Environ. Prot., 94 N.J. 283, 303 (1983), involved a situation where an agency inappropriately implemented a statute through adjudication rather than by adopting regulations. In the present case, in contrast, an appropriate regulation has been adopted concerning waiver of the Council's rules. Similarly, Lower Main v. N.J. Housing & Mort., 114 N.J. 226 (1989), does not apply here. In that case, the Court invalidated a regulation which stated nothing more than that prepayment of certain mortgage loans was prohibited unless approved by the agency. Id. at 236. This regulation, which specified absolutely no standards pertaining to agency approval, is completely different from the Council's waiver rule, which does contain clear standards. Therefore, the waiver granted by the Council to the Hillsborough fair share plan from the

center requirement of N.J.A.C. 5:93-5.4(c) was decided according to the clearly articulated standards of N.J.A.C. 5:93-15.1(b).*

2. The Application of the Council's December 7, 1994 policy directive to this matter did not require formal rulemaking.

In addition to claiming that the Council's formal waiver rule is unconstitutionally vague, NJF also claims that the December 7, 1994 COAH policy directive regarding sites in Planning Areas 4 and 5 with access to infrastructure should have been the subject of formal rulemaking. However, this directive, which was announced at a COAH public meeting and later published in a COAH newsletter with a circulation of 3,000 individuals and institutions, clearly stated that the policy it contained was issued in response to the fact that it was the Council's assumption when adopting N.J.A.C. 5:93-13.4 that sites in Planning Areas 4 and 5 did not have infrastructure or access to infrastructure. However, after adoption of the rule it became clear that such was not the case, but the Council had no idea how many sites in Planning Areas 4 and 5 were in that category. Therefore, the Council decided to issue the December 7, 1994 statement that it would

NJF's suggestion that COAH's statutory and regulatory embrace of the policies and goals of the SDRP amounts to a delegation of authority to the SPC and OSP with regard to planning, such that the Council cannot waive N.J.A.C. 5:93-5.4(c) is erroneous (Ab29 to Aa31). The cited authority, In re Waterfront Dev. Permit, 244 N.J. Super 426 (App. Div. 1990), cert. denied, 126 N.J. 320 (1991), voided a permit issued by the DEP Commissioner because DEP regulations required that the permit be issued by DEP's Division of Coastal Resources. Here, COAH has waived a regulation it was empowered to waive by formally adopted regulations. While the regulation incorporates and enforces SDRP policies with regard to centers, the policies are not "regulatory" but for the Council's rule. Therefore, the Council's waiver here is not an appropriation of regulatory authority otherwise granted to another entity, as was the case in Waterfront.

use the waiver process initially with regard to such sites that were offered by objectives. This process "would be one way to see the extent of the situation and after careful review, will assist in determining if a rule change is necessary." (Aa51, Aa52).

In spite of the fact that the policy directive deals on its face with N.J.A.C. 5:93-13.4, it also provided guidance to the Council when considering the status of the PAC/HCF site under N.J.A.C. 5:93-5.4, which is why NJF is challenging the directive as an impermissible form of informal rule making. However, while the directive contributed to the Council's consideration of the waiver of center designation for the PAC/HCF site, the directive neither compelled nor required that waiver. Rather, the document was one of many contributing factors to the Council's decision to waive N.J.A.C. 5:93-5.4(c) with regard to the PAC/HCF site (Aa32 to Aa35).

As such, the directive was simply a communication to the Council's constituency, issued to promote a greater understanding of the Council's processes and to alert the public that a Council rule was based upon an assumption that in some situations might prove to be inaccurate. Such a communication can hardly be seen as violating the requirements of Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984). Formal rulemaking with regard to the directive is not needed at this time and, more importantly, should not be used to void the Council's waiver decision.

The Metromedia Court found that an agency decision will constitute a "rule" under the Administrative Procedure Act, N.J.S.A.

52:14B-1 to -15 (APA) if it exhibits "many or most" of the following six criteria:

[the decision] (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. Id. at 331 to 332.

The APA defines a rule as "each agency statement of general applicability and continuing effect that implements or interprets the law or policy, or describes the organization, procedure or practice requirements of the agency." N.J.S.A. 52:14B-2(e). If the particular agency determination constitutes a rule, as defined above, it must comply with the APA's rule making procedure to be valid. Metromedia, supra, 97 N.J. at 328. However, administrative agencies are not wholly without discretion in this area; it is recognized that agencies have a "wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdiction." Id. at 33; Bally Mfg. Corp. v. New Jersey Casino Control Comm'n., 85 N.J. 325, 338 (1981). Further, an agency may make decisions with substantive effects under certain circumstances, without the necessity of prior promulgation of

a rule or regulation. R.H. Macy & Co., Inc. v. Director, Div. of Taxation, 41 N.J. 3, 4 (1963).

The Council's December 7, 1994 directive clearly does not constitute rulemaking under Metromedia. It was intended to pertain to a narrow group of sites, the number and importance of which COAH was not aware when it issued the statement. Because of the tentative nature of the communication, none of the Metromedia criteria are evident. The Council was merely telling its constituency that sites in Planning Areas 4 and 5 may have infrastructure or access to same and, if so, COAH would analyze each site according to the general principles set out in the statement. Clearly, the requirements of the APA should not be used to void the application of the directive to the PAC/HCF site, where, in fact, it was one of many factors in the Council's waiver decision.

Moreover, even if this Court were to find that the Council should promulgate a rule in this area, as the Council stated it might in the directive, it is submitted that the appropriate approach would be to require such action in the future while still permitting the Council to apply its directive to any existing cases such as Hillsborough's. Department of Corrections v. McNeil, 209 N.J. Super. 120, 125-127 (App. Div. 1986); K.P. v. Albanese, 204 N.J. Super. 166, 180 (App. Div. 1985). While it is not clear how many sites such as the PAC/HCF site exist, the public interest supports this approach, which promotes the creation of affordable housing in appropriate sites with infrastructure or access to infrastructure located in Planning

Areas 4 and 5 that otherwise comply with the Council's rules and the policies and goals of the SDRP.

3. The inclusion of the PA/HCF site in Hillsborough's plan does not conflict with the Council's methodology.

A municipal fair share obligation has three main components--indigenous need, reallocated present need and prospective need. N.J.A.C. 5:93-Appendix A. Indigenous Need is the total deficient housing in a municipality as determined through an analysis of surrogates for housing quality derived from information provided by the 1990 U.S. Census. Where a municipality's deficient housing exceeds a regional average, the excess is sent to a regional housing pool for subsequent redistribution to municipalities in the housing region. This redistributed need is called the Reallocated Present Need. Id. The Reallocated Present Need is distributed to the other municipalities in the region using three economic and land use factors: the equalized non-residential valuation (commercial and industrial) in a municipality; an estimate of undeveloped land in a community; and the aggregate income difference between median municipal 1993 household income and the regional income. Once the reallocated present need is redistributed to a region's municipalities, the municipal Present Need has been calculated, which is the sum of a municipality's Indigenous Need and Reallocated Present Need. Id.

Prospective Need is the municipal share of the total projected households that will qualify for low and moderate income housing in the region. The Prospective Need is determined through

population projections similar to those used for the impact assessment of the SDRP. From these projections the aggregate growth in low and moderate income households is determined, summed at the county level and sent to a regional pool to be subsequently redistributed to municipalities via three allocation factors: the change in equalized nonresidential valuation from 1980 to 1990; the Council's estimate of undeveloped land in a municipality; and the difference in the municipal household aggregate income and the regional median household income. Id.

Total Need is composed of Indigenous Need, Reallocated Present Need and Prospective Need. When Total Need is added to the Prior Cycle Prospective Need (1987 to 1993) and the product is adjusted by secondary sources of supply and demand (demolitions, filtering, residential conversion and spontaneous rehabilitation) the Council's calculation of the municipal fair share obligation is complete. The term for this fair share obligation is Pre-credited Need. N.J.A.C. 5:93-Appendix A.

The allocation factors used to distribute Reallocated Present Need and Prospective Need both include an estimate of the undeveloped land in a municipality, which is compiled using land satellite imagery (LADSAT) weighted by using the SDRP's planning areas. Undeveloped land in Planning Areas 4 and 5 are not included in the estimate. Id. Because of this weighting, NJF argues that the Council's approval of a fair share plan including development of affordable housing in such planning areas violates the Council's methodology. However, available land is only one of three factors

used to allocate municipal fair share obligations. And each of the factors "operate individually," "are equally weighted" and "involve all municipalities in the region." N.J.A.C. 5:93-Appendix A "Distribution of Low- and Moderate- Income Housing Need." Therefore, just because land in Planning Area 4 and 5 is not included in the calculation does not mean that it cannot be used, if appropriate, to meet that obligation, because it is only one of several factors that go into calculating a municipal obligations.*

The NJF relies exclusively on In re Township of Warren, 132 N.J. 1 (1993), to support its argument. However, in the Warren case, a municipal preference given to local residents for Mount Laurel housing was declared unconstitutional because it conflicted with the regional basis of the Council's calculation of Mount Laurel need. Here, the undeveloped land factor is just one of three factors used to allocate present and prospective need. Moreover, the PAC/HCF land is being used to actually meet the calculated Mount Laurel regional obligation, not thwart it, as the Warren court felt was the case with the municipal residents' preference.**

* NJF further states that if the land were so used, the obligation should be recalculated and increased, citing In re Township of Warren, 132 N.J. 1, 30 (1993). However, see SDRP Housing Policy 18, quoted in full at page 42, which states that only municipal approvals which do not contain affordable housing should be so treated.

** Appellant also claims at Point VII that the Council's conclusion that the site was suitable and developable was contrary to N.J.A.C. 5:93-5.3(b), which states that sites designated for inclusionary development "shall receive approval for consistency review" prior to a grant of substantive certification. However, the rule goes on to state that "where a site is denied consistency review, the municipality shall apply for an amendment to its Section 208 plan to incorporate the denied site." Although the

POINT II

HOWEVER, HILLSBOROUGH'S ACTIONS SUBSEQUENT TO CERTIFICATION CALL INTO QUESTION WHETHER THE HILLSBOROUGH FAIR SHARE PLAN CONTINUES TO PROVIDE A REALISTIC OPPORTUNITY FOR AFFORDABLE HOUSING. IT IS, THEREFORE, NECESSARY THAT THIS COURT REMAND THIS MATTER TO THE COUNCIL SO THAT IT MAY TAKE APPROPRIATE ACTION WITH REGARD TO ITS GRANT OF CERTIFICATION.

Hillsborough has taken actions which indicate that it no longer supports the development of the PAC/HCF site as an inclusionary development for affordable housing. Hillsborough has not actively supported the inclusion of the PAC/HCF site in the appropriate wastewater management plan (CRA42, CRA43) and has introduced an ordinance to amend the zoning on the PAC/HCF site (CRA 49). Moreover, Hillsborough's legal positions recently submitted to the Council in conjunction with a motion filed by HAAL are at odds with positions taken in its brief filed with this court. Compare CRA56 with Points V and VII of Hillsborough's brief; and see Counterstatement of Facts at pages 26, 27.

By these actions Hillsborough has called into question whether its fair share plan continues to provide a realistic opportunity for affordable housing. For example, Hillsborough received 24 rental bonus credits pursuant to N.J.A.C. 5:93-5.14(d)

PAC/HCF site had not been "denied consistency review", it was the subject of an amendment application at the time of certification (Aa33). Therefore, N.J.A.C. 5:93-5.3(b) was not violated when the Council concluded the PAC/HCF site to be suitable and developable.

It should be noted that the Council has proposed to amend N.J.A.C. 5:93-5.3(b) at 29 N.J.R. 3684 and that the proposed language eliminates the requirement that consistency approval be received prior to substantive certification.

because the Council determined that there was "a firm commitment for the construction" of the 40 rental units included in its plan, as required by N.J.A.C. 5:93-5.14(d). This "firm commitment" was the Municipal Development Agreement signed by Hillsborough and HAAL. Aa31, Aa32. However, Hillsborough's recent actions have not demonstrated that its "firm commitment" to produce the rental units for which the bonus credits have been granted continues. Therefore, at the very least there is a serious question as to whether these bonus credits should continue to be granted pursuant to N.J.A.C. 5:93-5.14(d). In fact, Hillsborough seems to have willingly compromised the viability of its entire plan.

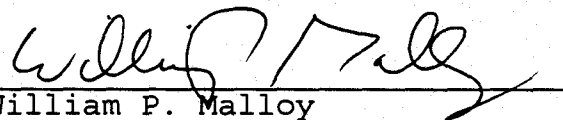
Therefore, this court should remand this matter to the Council so that it may take appropriate action with regard to its April 3, 1990 substantive certification of Hillsborough's fair share plan.

CONCLUSION

For all of the above reasons, the Council's grant of substantive certification should be affirmed. However, the matter should be remanded to the Council so that it may take further appropriate action with regard to its April 3, 1996 certification.

Respectfully submitted,

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By: 
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