

Hillsborough Lit.

12-17-91

- Letter re. Cert & letter brief
- encl. Letter brief re. Supplemental record
- encl. Attorney Cert. w/ attachments

Pgs. 23

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REPLY TO

WOODBIDGE

December 17, 1997

VIA HAND DELIVERY

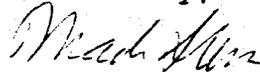
Emille R. Cox, Clerk of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
CN - 006
Trenton, NJ 08625
ATTENTION: MICHAEL MALLOY, CASE MANAGER

RE: In the Matter of the Petition for Substantive Certification of
the Housing Element and Fair Share Plan of the Township of
Hillsborough, Somerset County, Substantive Certification
33-99, Docket No. A-005349-95T1

Dear Mr. Cox:

Enclosed for filing please find an original and five (5) copies of Respondent Hillsborough Alliance for Adult Living, L.L.P.'s Certification and Letter Brief in Opposition to Appellant New Jersey Future, Inc.'s Motion To Take Judicial Notice and for Supplementation of the Record on Appeal, as well as a Certification of Service with regard to same. Thank you for your attention to this matter.

Sincerely,


Mark Schepps

MS:cmb

Enclosures

cc: William M. Malloy, Deputy Attorney General
(2 copies via Federal Express)
Edward Lloyd, Esq. (2 copies via Federal Express)
Frank Yurasko, Esq. (2 copies via Federal Express)
Ronald L. Shimanowitz, Esq. (2 copies via Federal Express)
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REPLY TO

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VIA HAND DELIVERY

Emille R. Cox, Clerk of the Appellate Division
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ATTENTION: MICHAEL MALLOY, CASE MANAGER

RE: In the Matter of the Petition for Substantive Certification of
the Housing Element and Fair Share Plan of the Township of
Hillsborough, Somerset County, Substantive Certification 33-99,
Docket No. A-005349-95T1

Dear Mr. Cox:

Please accept this letter brief pursuant to R. 2:6-2(b) in lieu
of a more formal brief in response to Appellant New Jersey Future,
Inc.'s Motion to Take Judicial Notice and for Supplementation of the
Record on Appeal in the above referenced matter.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

This case is now ripe for scheduling of oral argument. At this point, the time for filing all briefs has concluded, since Appellant's reply brief was due on November 23, 1997. Appellant has neither filed its reply brief nor filed a motion to extend time with respect to that brief, even though more than three weeks have elapsed since the due date. In addition, two months have elapsed since the Attorney General's brief was filed. Appellant has been

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advised by Hillsborough Alliance for Adult Living, L.L.P. ("HAAL") that HAAL will oppose any motion for additional time at this point.

It has taken considerable time to get to this point. Though the Notice of Appeal in this matter was filed on May 20, 1996, a delay of several months in responding to Appellant's first motion to supplement the record resulted in its brief not being filed until March 21, 1997. While the Township and HAAL filed their briefs relatively soon thereafter, the Attorney General obtained several extensions with respect to its brief, and did not file same until October 10, 1997. At that time the Attorney General filed a further motion to supplement the record which was not decided until November 12, 1997. See Exhibit A to Certification of Peter A. Buchsbaum.

As a result of the above, Appellant has had six months from the filing of the initial statement of items comprising the record to the filing of its merits brief. It has had a further two months to file its reply brief, yet it still has neither filed this brief nor sought leave for an extension to do so. Further, there have already been two motions filed to supplement the record in this matter, one of which was filed by this Appellant.

These delays, combined with the prior submission of two earlier motions to supplement the record, suggest that Appellant has had more than an adequate opportunity to address the record with respect to this matter.

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ARGUMENT

I. THIS COURT SHOULD DENY APPELLANT'S MOTION FOR JUDICIAL NOTICE, WITH LIMITED EXCEPTIONS.

On this date, some eighteen months after the appeal was initiated, Appellant seeks to supplement the record with twenty-one new items. See ALb at 6-8.¹ These items predate, some by several years, the filing of Appellant's initial brief in March, 1997. They also predate the filing of Appellant's first motion to supplement the record in November, 1996. Appellant gives no explanation as to why they were withheld from the Court's consideration earlier, or why they were not filed when Respondents could have dealt with them in their briefs. In addition, Appellant does not explain why the record is inadequate without these items.

A. This Court Should Not Take Judicial Notice Of Hillsborough Township's Resolutions, Items 1 Through 3.

Based on the above and the further considerations set forth below, Respondent HAAL opposes judicial notice being taken of Items 1, 2 and 3. These Hillsborough Township Resolutions deal with sewerage and date back to 1995 and 1996. There is a history of papers passing back and forth with respect to sewerage, as will be developed further below. Appellant has already made extensive arguments with respect to sewerage in its initial brief. There is absolutely no reason why these older materials have to be noticed at

¹ ALb refers to Appellant's letter brief in support of the within motion.

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this point. Furthermore, by requesting that judicial notice be taken of such material, Appellant is in effecting requesting this Court to give it an unfair advantage with respect to these proceedings. HAAL and the other Respondents have already filed their briefs and have no right of reply with respect to these documents. There is no justification for Appellant's request for this Court to take judicial notice of such cumulative materials at this point in the proceedings. There is a point at which the record is simply closed to evidence which is not new.

Respondent HAAL does not, however, object to judicial notice being taken of Items 4 through 7. Further, these relate to events that have occurred subsequent to the filing of the initial briefs in this matter. These materials have already been presented to the Court in connection with the COAH motion for remand, which this Court denied in August 1997. In addition HAAL and the other Respondents have had the opportunity to deal with these materials through their briefs and submissions in connection with the motion to remand, which are now part of the record. Therefore, inclusion of Items 4 through 8 will not put Respondent in the position of having to file additional briefs and further delay the resolution of this matter. Accordingly, since these matters are recent, have been placed before the Court already, and have been responded to, there is no objection to notice being taken of them.

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B. This Court Should Not Take Judicial Notice Of The Alleged Determinations, Items 8 Through 11.

HAAL objects to judicial notice being taken of Items 8 through 11 on several grounds. First, none of them are determinations as claimed. Item 8 is a summary of a plan, not a determination of any kind. Item 9, a Somerset County document relating to State Plan cross-acceptance, is even more inappropriate. The cover letter submitted with it indicates that it is not even a document which was meant to have been made public. At most, it is informal staff advice of a tentative nature. It is certainly not a determination of official action.²

The same is true with respect to Items 10 and 11. These are, in effect, staff reports with respect to the status of sewer planning and State Plan designation. They are not official determinations.

Further, with respect to all four items, Appellant has not provided any indication of an adoption process to support its claim that these documents are in fact determinations, when they certainly on their face do not appear to be.

Third, several of these documents, such as items 1 through 3, date from 1996 or earlier. No reason is given as to why they were not provided earlier. Finally, these items are not stated to be necessary in connection with any arguments Appellants have, or will

² See Certification of Peter A. Buchsbaum for his representation that he reviewed the County's public cross-acceptance files, pursuant to a Right to Know request in October, 1997, and did not see this document in the official file.

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make. There is no doubt as to the adequacy of sewerage and the water quality management plan. Those issues have been thoroughly briefed by both Appellant and Respondents. Thus, there is no indication that these items are necessary at this extraordinarily late date. In any event, they are not determinations which are properly the subject of judicial notice.

II. THIS COURT SHOULD DENY APPELLANT'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD, WITH LIMITED EXCEPTIONS.

As correctly pointed out by Appellant, Rule 2:5-5(b) governs the supplementation of the record on appeal from an administrative agency. That Rule states as follows:

At any time during the pendency of an appeal from a state administrative agency, if it appears that evidence unadduced in the proceedings below may be material to the issues on appeal, the appellate court, on its own motion or on the motion of any party, may order, on such terms as it deems appropriate, that the record on appeal be supplemented by the taking of additional evidence and the making of findings of fact thereon by the agency below or, in exceptional instances, by a judge of the Superior Court especially designated for that purpose.

Id. The Appellate Division, however, has ruled, in connection with an application to supplement the record, that such a supplementation is not warranted when the evidence sought to be included was available to the applicant at the time of the initial hearing. In re Marvin Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977). It is clear that this ruling of the Appellate Division in Gastman is applicable to the case at bar. As a result, documents which were previously available to Appellant during its several previous

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filings should not be allowed to be entered into the record at this late date.

Notwithstanding Gastman, Appellant appears to believe that it can rewrite the record for its benefit. It has attempted to use this rule, R. 2:5-5(b), which deals with allowing timely supplementation of an inadequate record, as a justification for placing before this Court cumulative documents, which were known to Appellant long ago, which documents are argumentative in nature, and which are being submitted to the Court long after the time in which Respondents can answer them has elapsed. Moreover, there has been no assertion by Appellant that the record in this matter is inadequate.

A. This Court Should Not Allow The Administrative Record To Be Supplemented To Include Items 12 Through 17 (Sewerage Correspondence).

There is no justification for the supplementation of the record with any of Items 12 through 17. All of these items were in existence well before Appellant filed its initial brief in this matter. As stated above, the sewerage issue was intensively briefed by Appellant. Items 12 through 17 certainly could have been included or referred to in Appellant's brief in order to give Respondents an opportunity to respond.

Moreover, as noted above, these items are only part of an extremely extensive series of correspondence, documentation and interaction with respect to sewerage. There have been huge amounts

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of subsequent filings since these documents were prepared. In addition, there is undoubtedly correspondence, plans and extensive other documents that Appellants have not put into the record.³

It should be further noted in this regard that Item 14, a 1995 letter on behalf of a competing developer, is particularly inappropriate for supplementation of the administrative record. This document is an extensive series of legal arguments, submitted by a planner, with respect to the Hillsborough Wastewater Management Plan. These are just the type of arguments that Appellant has made in its initial brief, and could have been made in the reply brief it has never filed. These arguments have no official status whatsoever, but are simply a statement of position by HAAL's competition. Inclusion of this document in the record would serve to constitute an additional brief on behalf of Appellant by a party, PEC Builders, whose own participation in this matter has been suppressed by the Appellate Division due to its failure to file its own brief. See Exhibit B to Certification of Peter A. Buchsbaum. Appellant's attempt to supplement the record with this document is

³ For example, there are numerous objections, notices, and filings with respect to DEP's present proceedings, separate from this case, concerning Hillsborough's Wastewater Management Plan. The DEP has stated in a hearing notice that it will consider an amendment to the Hillsborough Wastewater Management Plan at future date in response to a petition filed by HAAL and U.S. Home as contract purchaser with respect to same. See Exhibit C to Certification of Peter A. Buchsbaum. The petition, the correspondence, and HAAL/U.S. Home's objections as to DEP procedures constitute several volumes which Appellant has chosen not to include.

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nothing more than a transparent end run around normal appellate procedures.

Finally, there is no indication that any of the sewer materials now sought to be included in the record were provided to COAH during its decision making process. Appellant did submit an objection to COAH. Yet none of these materials accompanied that objection. Thus, Appellant is in effect attempting to bypass, not only appellate procedures as to a record, but agency procedures as well, by now attempting to include documents in the record that were never provided to the agency that was involved in the decision making in this case.

B. This Court Should Not Allow The Administrative Record To Be Supplemented To Include Item 18.

As Appellants concede, COAH received official correspondence from the Office of State Planning dated January 31, 1996, with respect to the waiver of center designation. This correspondence is part of the existing record. See Aa62-65.⁴ It contained an exhaustive study of the facts relating to the center designation issue and an exhaustive analysis as to why the waiver of center designation was not appropriate in this instance.

Now, Appellants attempt to insert into the record Item 18, a letter written approximately one year later. HAAL is unfamiliar with the circumstances surrounding this letter. It was never

⁴ This is a reference to Appellant's Appendix to its brief dated March 21, 1997.

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provided to COAH or to Respondents. As a result, it was never placed in the administrative record, nor was it ever exposed to the glare of public analysis, as was the official letter sent by the Office of State Planning in January, 1996.

Moreover, the letter does not in any way further evaluate the facts presented in January, 1996 or state that any factual assertions or analysis contained in the January, 1996 letter were inaccurate. It further appears to be nothing more than an informal expression of opinion which neither contradicts nor really has anything to do with the issues addressed in the January, 1996 official transmission from the Office of State Planning. It should be ignored, even were it timely presented.

Item 18 has not, however, been timely presented to this Court. Since New Jersey Future has described itself as an organization intensely concerned with the State Plan, it is impossible to imagine that it was unaware of this correspondence, and could not have provided it to the Court when it filed its brief in this matter. The inclusion of Item 18 at this late stage, after Respondents have filed their briefs, appears to be yet another attempt to bypass appellate and COAH procedures by belatedly conscripting others to make arguments which could have been, but were not made, in Appellant's initial brief.⁵ Allowing the Appellant to abuse the Court Rule which allows for a supplementation of an inadequate

⁵ Furthermore, the time for filing of a reply brief by Appellant has long since expired.

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record will result in great prejudice to the various Respondents while adding nothing substantial to the case.

C. This Court Should Allow The Administrative Record To Be Supplemented To Include Items 19 Through 21.

Items 19 through 21 appear to have been inadvertently omitted from the State's October 10, 1997 motion to expand the record with respect to the emergent relief proceedings that were held before COAH. There is no objection to these items being included since they simply complete the appellate file on a matter which has already been placed for this Court's consideration, specifically the motion for emergent relief filed with COAH and heard by it on October 1, 1997.

CONCLUSION

For the above stated reasons, this Court should deny the requests for judicial notice and for expansion of the record, except with respect to Items 4 through 7 and Items 19 to 21, which have already been essentially placed before this Court. All of the items sought to be excluded by HAAL are cumulative and unnecessary. They either are being submitted far too late for inclusion in the record or for judicial notice, are argumentation on behalf of a party not in the case because its time to file a brief has expired, do not represent official determinations of any kind, or do not otherwise qualify for inclusion in the a record whose adequacy is not challenged.

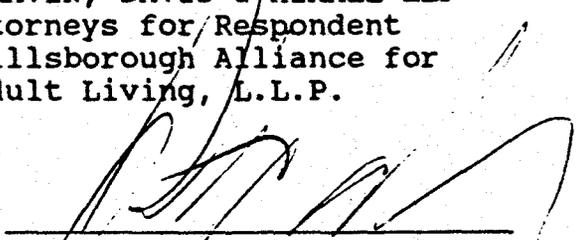
GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP

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This Court should not tolerate such an abuse of the appellate process. It is disturbing that these documents have been presented to the Court at this late stage in the case. This Court ought not to sanction their use in this matter.

Respectfully submitted,

GREENBAUM, ROWE, SMITH,
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Attorneys for Respondent
Hillsborough Alliance for
Adult Living, L.L.P.

By: 

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Attorneys for Respondent, Hillsborough Alliance for Adult Living, L.L.P.

IN THE MATTER OF THE PETITION
FOR SUBSTANTIVE CERTIFICATION
OF THE HOUSING ELEMENT AND
FAIR SHARE PLAN OF THE
TOWNSHIP OF HILLSBOROUGH,
SOMERSET COUNTY, SUBSTANTIVE
CERTIFICATION 31-99

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-5349-95-T1

CIVIL ACTION

CERTIFICATION OF PETER
A. BUCHSBAUM IN
OPPOSITION TO MOTION TO
TAKE JUDICIAL NOTICE AND
FOR SUPPLEMENTATION OF
THE RECORD ON APPEAL

PETER A. BUCHSBAUM, of full age, certifies and says:

1. I am an attorney-at-law of the State of New Jersey and a member of the firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP, attorneys for Respondent Hillsborough Alliance for Adult Living, L.L.P. ("HAAL"). As such, I have knowledge of the facts set forth below.

2. This certification is submitted in opposition to Respondent New Jersey Future Inc.'s Motion To Take Judicial Notice and for Supplementation of the Record on Appeal.

3. On or about October, 1997, I reviewed the Somerset County's public cross-acceptance files, pursuant to a Right to Know request, and did not see the letter or report from the Somerset County Planning Board to the Office of Environmental

Planning which is included as Item 9 in the Certification of Edward Lloyd dated December 4, 1997.

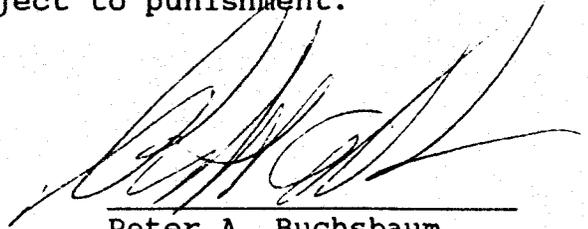
4. Attached hereto as Exhibit A is a true copy of the Appellate Division Order dated November 12, 1997 granting COAH's Motion to Supplement the Record.

5. Attached hereto as Exhibit B is a true copy of the Appellate Division Order dated November 21, 1997 suppressing the brief of Anatol Hiller.

6. Attached hereto as Exhibit C is a true copy of an October 17, 1997 letter from Paul H. Schneider, Esq. to Daniel Van Abs, Ph.D. regarding inclusion of the PAC/HCF site in the Somerset Raritan Valley Sewerage Authority's sewer service area.

CERTIFICATION

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

A handwritten signature in black ink, appearing to read 'Peter A. Buchsbaum', written over a horizontal line.

Peter A. Buchsbaum

Dated: December 17, 1997

ORDER ON MOTION

NOV 24

IN THE MATTER OF THE PETITION FOR
SUBSTANTIVE CERTIFICATION OF THE
HOUSING ELEMENT AND FAIR SHARE PLAN
OF THE TWP OF HILLSBOROUGH ET AL

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A -005349-95T3
MOTION NO. M -001289-97
BEFORE PART: A
JUDGE(S): LONG
KIMMELMAN

MOTION FILED: OCTOBER 10, 1997
ANSWER(S) FILED: OCTOBER 23, 1997

BY: COAH
BY: NJ FUTURE INC

REC'D
APPELLATE DIVISION

NOV 18 1997

SUBMITTED TO COURT: NOVEMBER 10, 1997

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS
12 DAY OF November, 1997, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT
- TO SUPPLEMENT THE RECORD

GRANTED (/) DENIED () OTHER ()

SUPPLEMENTAL:

FILED
APPELLATE DIVISION

NOV 18 1997

R. Kimmelman
Clerk

PS 33-99

FOR THE COURT:

UMTM

Virginia Long
VIRGINIA LONG P.J.A.D.

IN THE MATTER OF THE PETITION FOR
SUBSTANTIVE CERTIFICATION OF THE
HOUSING ELEMENT AND FAIR SHARE PLAN
OF THE TWP OF HILLSBOROUGH ET AL

ORDER SUPPRESSING BRIEF

FILED
APPELLATE DIVISION

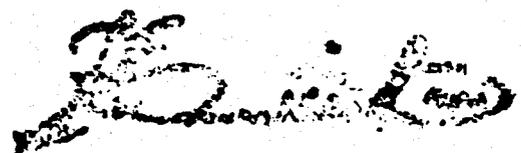
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R. Emille Cox
Clerk

This matter being opened to the Court on its own motion and it
appearing that respondent ANATOL HILLER
has failed to file a timely answering brief;

It is HEREBY ORDERED that no brief on behalf of said respondent
will be accepted for filing.

WITNESS, the Honorable Sylvia B. Pressler, Presiding Judge for
Administration, at Trenton, this 21 day of November, 1997.


EMILLE R. COX
CLERK OF THE APPELLATE DIVISION

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October 17, 1997

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PHILIP D. FORLENZA
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FILE NO.

VIA FEDERAL EXPRESS

Daniel Van Abs, Ph.D.

Assistant Director

Department of Environmental Protection

Office of Environmental Planning

401 East State Street

2nd Floor, West Wing

P.O. Box 418

Trenton, NJ 08625-0418

Re: Hillsborough Planned Adult Community/Greenbriar at the Village
Petition of U.S. Home Corporation and Hillsborough Alliance for Assisted Living, L.P.
Somerset County/Upper Raritan Watershed Wastewater Management Plan

Dear Mr. Van Abs:

This is in response to your letter of September 26, 1997 concerning the above matter.

In your letter, you acknowledged receipt of the Petition of U.S. Home Corporation and Hillsborough Alliance for Assisted Living, L.P. (collectively, the "Petitioners") to include the site of the Village Planned Adult Community/Health Care Facility (the "PAC/HCF Site") situated in the Township of Hillsborough in the Somerset Raritan Valley Sewerage Authority's sewer service area, in conjunction with the amendments to the Somerset County/Upper Raritan Watershed Wastewater Management Plan ("WMP") that are now under consideration. In your letter, you indicate that the PAC/HCF Site will not be considered for inclusion in the WMP at this time. Your letter states that "if [Hillsborough]

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Township decides to zone the Mill Lane area in favor of the PAC/HCF, the WMP must be amended to include the area." Your letter goes on to state that, regardless of the Township's zoning decision, "the project will be evaluated against the State Development and Redevelopment Plan, the Council on Affordable Housing (COAH) actions on this project, Administrative Order 1996-06, and the Water Quality Management Planning Regulations. . ." However, as set forth below, each of those factors warrants inclusion of the PAC/HCF Site in the WMP now, as part of the current plan amendment process.

The PAC/HCF Site is currently zoned for development as a Planned Adult Community/Health Care Facility under §77-91.1 of the Hillsborough Township Code (a "PAC/HCF"), and has been so zoned since June, 1991. Since January, 1992, the PAC/HCF Site has been approved for development as a PAC/HCF under a General Development Plan. As currently amended, the General Development Plan for the PAC/HCF Site contemplates the development of 3,000 residential units (the "Project"). Further, pursuant to an agreement between Petitioners and the Township of Hillsborough dated February 1, 1996, the New Jersey Council on Affordable Housing ("COAH") granted substantive certification to the Township's Housing Element and Fair Share Plan which contemplates the development of a number of low and moderate income residential units as part of the Project.

Accordingly, as set forth in the Petition and detailed in prior correspondence, the Project General Development Plan is consistent with Hillsborough's current zoning and has received approval from Hillsborough Township. Thus, there is no basis for awaiting future zoning decisions. Rather, as stated in your letter, because the Township has zoned the PAC/HCF Site for the Project, "the WMP must be amended to include the area."

Moreover, in light of the fact that the Project has received General Development Approval pursuant to the Municipal Land Use Law ("MLUL"), the Project has vested rights, so that it may proceed even if the zoning of the PAC/HCF Site should change in the future. See N.J.S.A. 40:55D-45.1(a). Because of the current zoning and General Development Plan approval by Hillsborough, this Project now enjoys vested rights, and you are quite correct in stating that "the WMP must be amended to include the area." Thus, the DEP must proceed to include the Project and the PAC/HCF Site in the WMP at this time.

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In addition, the issue of consistency with the State Development and Redevelopment Plan has also been resolved by the approval by the Office of State Planning of a waiver of center designation, and by the action of COAH in accepting that waiver and granting Hillsborough substantive certification of its housing plan, which expressly includes the Project. Because this is a Mt. Laurel site, and because COAH and the Office of State Planning are the lead agencies in dealing with this issue, these actions by the Office of State Planning and COAH constitute authoritative determinations as to both the consistency of this Project with the State Plan and the suitability of the PAC/HCF Site for the Project. Similarly, because consistency with the State Plan has already been addressed by COAH and the Office of State Planning, this resolves any issues under Executive Order 1996-06.

Finally, the Water Quality Management Planning Regulations also require that the Project be considered in conjunction with the pending amendments to the WMP. These regulations require that, to the maximum extent practicable, wastewater service areas shall be identified in such a manner as to provide adequate wastewater service for land uses allowed in zoning ordinances that have been adopted and are in effect under N.J.S.A. 40:55D-62, as well as for projects that are not consistent with local zoning ordinances but which have secured vested rights under the MLUL. See N.J.A.C. 7:15-5.18(b). As noted above, the Project and the PAC/HCF Site satisfy both of these criteria. Thus, the regulations referred to in your letter also require that the Petition be granted.

Accordingly, we reaffirm our Petition that DEP include the PAC/HCF Site in the Somerset Raritan Valley Sewerage Authority sewer service area as part of the current process of amendments to the Somerset County/Upper Raritan Watershed Wastewater Management Plan. Because we believe a failure by DEP to proceed in this matter would be arbitrary and unreasonable and otherwise contrary to law, we must look to the public participation process and other available procedures to protect our client's rights.

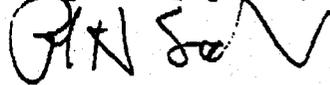
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Thank you for your consideration of this matter.

Very truly yours,



PAUL H. SCHNEIDER

PHS/sba

cc: Mr. Harry Smith
Mr. Robert Heibell
Gregory Synder
Township Clerk, Township of Hillsborough
County Clerk, County of Somerset