

Letter to Bishop from Shimanowitz re: Order to Show Cause;

~~and Objector's response to COATT Order to Show Cause~~

encl: objector's response to COATT order to show cause on the
1996 Hillsborough Township Substantive Certification

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OF COUNSEL

OUR FILE NO.

March 13, 1998

Via Federal Express
Shirley Bishop, P.P.
Executive Director
Council on Affordable Housing
101 South Broad Street
P.O. Box 813
Trenton, NJ 08625

Re: Order to Show Cause
Township of Hillsborough, Somerset County
Response of Objector, P.E.C. Builders, Inc./SKP Land Inc.
Gateway at Sunnymeade Site (Route 206 and Falcon Road), 240 acres
Block 140, Lot 1; Block 141, Lots 2.01, 7.01, 30 and 31.02

Dear Ms. Bishop:

This firm represents Objector, P.E.C. Builders, Inc. and SKP Land, Inc. (Anatol Hiller, et al.) with regard to the above referenced Gateway at Sunnymeade development proposed in Hillsborough Township. In response to the Order to Show Cause issued by COAH on February 5, 1998, please find enclosed herewith "Objector's Response to COAH Order to Show Cause on the 1996 Hillsborough Township Substantive Certification" prepared by David N. Kinsey, Ph.D., AICP, P.P., dated March 12, 1998.

In further response to the Order to Show Cause, please note that the developer, as an objector to the Hillsborough Township Housing Element and

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Fair Share Plan ("Plan"), proposed inclusionary development on this site in 1995. However, the Gateway site was not included in the Township's Plan when COAH granted Substantive Certification on April 3, 1996. In light of the reasons set forth in the enclosed Objector's Response and for the reasons set forth herein, it is now time for COAH to assure a realistic opportunity for the construction of affordable housing by including the Gateway Site in the Township's Plan. It is the duty of COAH to take the leading role in putting a stop to the endless litigation and resultant "piles of papers" which has come to define this matter. COAH has, in its hands, at this time, the golden opportunity to guide Hillsborough back onto a track which will actually result in the construction of affordable housing. Requiring the inclusion of the Gateway at Sunnymeade development in the Township's Plan, is indeed, the very essence of that opportunity.

The proposed Gateway at Sunnymeade development can immediately satisfy the Township's entire 160 unit new construction obligation. The site is located entirely in Planning Area 2 - Suburban Planning Area under the State Development and Redevelopment Plan. The site is located entirely within the NJDEP-approved sewer service area in the current Upper Raritan Water Quality Management Plan.

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This site has been, and still is, within the sewer service area of the NJDEP-approved Hillsborough Township Wastewater Management Plan. The site is "available, developable, suitable and approvable" as required by COAH rules for inclusionary development sites. The Gateway site fronts on Route 206, is surrounded by existing development, and has both water and sewer utilities at the site. The developer of Gateway at Sunnymeade is experienced, well-funded, and ready to build now the affordable housing needed to fulfill the Township's affordable housing obligation. In fact, prior to the Township repealing the PAC/HCF Zone, Gateway at Sunnymeade applied to the Hillsborough Township Planning Board seeking classification of its 240.2 acre tract as a PAC/HCF, which would include low and moderate income housing. The site is primed for the immediate construction of affordable housing. COAH has the authority to allow this site to produce affordable housing. COAH should, in light of the unrealistic opportunity for the current Plan to actually produce such housing, exercise its authority by invalidating the April 3, 1996 Substantive Certification. COAH should require that the Gateway at Sunnymeade site be included in the Township's revised Housing Element and Fair Share Plan.

The January 7, 1998 Appellate Division Order temporarily remands the

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Hillsborough matter to COAH. That Order requires COAH to: (a) consider all materials added to the record before the Appellate Division and such other facts as COAH deems relevant; (b) consider whether, in light of recent actions by Hillsborough Township, the grant of substantive certification remains valid; (c) consider whether any new issues requiring COAH resolution have been presented; and (d) address the issue of whether the proposed development is governed by N.J.A.C. 5:93-5.4(d) or N.J.A.C. 5:93-5.4(6). The Appellate Division, in requiring COAH to address the foregoing, has provided COAH the opportunity to resolve the complexities of this matter while simultaneously conforming to the intent of the State Development and Redevelopment Plan and providing for a realistic opportunity for the construction of the Township's entire new construction fair share obligation. COAH should view the Appellate Division Order as a clear message that the Appellate Division has serious concerns about the validity of the grant of substantive certification. Clearly the Appellate Division Order allows COAH a "last clear chance" to invalidate the grant of substantive certification prior to the Court doing so. COAH should heed the message of the Appellate Division and not miss this opportunity.

It is respectfully submitted that COAH take the following action:

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a) COAH should order and direct the Township to amend the Plan under an accelerated schedule of no more than 45 days from the date of the COAH order and require repetition to COAH for substantive certification of the new Plan that provides inclusionary rezoning for Objector's site.

b) COAH should immediately advise the Appellate Division that the 1996 substantive certification is no longer valid and that the Township has been ordered to amend its Plan and repetition within 45 days with a new Plan that creates the requisite realistic opportunity by granting relief to the Objector.

c) Upon granting substantive certification to the new Plan, COAH should then advise the Appellate Division of the resolution of the issues raised by the Appellate Division's Order of January 7, 1998, and the critical fact that the new Plan does unambiguously create, without further delay, the requisite realistic opportunity to satisfy the Township's constitutional fair share obligation.

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Thank you for your consideration of the foregoing.

Very truly yours,



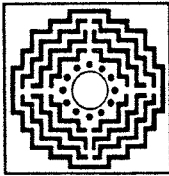
RONALD L. SHIMANOWITZ
For the Firm

RLS:pc

Enclosures

cc: Renee Reis, COAH (16 copies enclosed)
(w/encls.):
William Malloy (DAG) (via Federal Express)
James Farber, Esq. (via Federal Express)
John Payne, Esq. /Edward Lloyd, Esq. (via Federal Express)
Stephen Eisendorfer, Esq. (via Federal Express)
Peter A. Buchsbaum, Esq. (via Federal Express)
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OBJECTOR'S RESPONSE TO COAH ORDER TO SHOW CAUSE ON THE 1996 HILLSBOROUGH TOWNSHIP SUBSTANTIVE CERTIFICATION

March 12, 1998

Prepared for:

P.E.C. Builders, Inc.
812 Central Avenue
Westfield, New Jersey 07090

&

SKP Land, Inc.
90 Woodbridge Center Drive, Sixth Floor
Woodbridge, New Jersey 07095-0457

Prepared by:

David N. Kinsey

David N. Kinsey, Ph.D., AICP, PP

The original of this report was signed and sealed as required by N.J.S.A. 45:14A-12.



SUMMARY

In response to a temporary remand from the Appellate Division of Superior Court, the NJ Council on Affordable Housing ("COAH") Order to Show Cause, dated February 4, 1998, directs the Township of Hillsborough ("Township"), and allows the parties, to address five issues concerning the Township's Housing Element and Fair Share Plan ("Plan") certified by COAH in 1996.

This reports presents the responses of the Objector, the developer of an inclusionary development proposed in Hillsborough (a joint venture of P.E.C. Builders, Inc. and SKP Land, Inc.), to these five issues:

Issue No. 1 - Current Validity of the 1996 Certification of the Hillsborough Plan: The certification should no longer be considered valid. The Plan does not create the required realistic opportunity for the construction of 160 new units of housing affordable to low and moderate income households.

Issue No. 2 - New Issues Requiring COAH Resolution: No new issues require COAH resolution.

Issue No. 3 - COAH Rules on State Plan Conformance Governing the HAAL Project: N.J.A.C. 5:93-5.4(d) governs the Hillsborough Alliance for Adult Living, L.L.P. ("HAAL") development proposal, as Hillsborough is divided into four Planning Areas under the *State Development and Redevelopment Plan*. COAH should require the Township to use inclusionary development sites in its Suburban Planning Area (PA 2), before proposing sites, such as the HAAL tract, in Hillsborough's Rural Planning Area (PA 4) and Environmentally Sensitive Planning Area (PA 5). If the HAAL project is to be included in the Plan, then the Township must obtain Center designation in accordance with N.J.A.C. 5:93-5.4(c).

Issue No. 4 - Proper Disposition of this Matter: COAH should award relief, in the form of inclusionary rezoning, to the developer-Objector, whose 240.2 acre site is "available, suitable, developable and approvable" and located entirely in the Suburban Planning Area (PA 2). The developer-Objector's proposed inclusionary development can expeditiously create a realistic opportunity for the 160 affordable housing units that is the Township's outstanding new construction fair share housing obligation.

Issue No. 5 - COAH Procedures to Respond to the Appellate Division Order: COAH should require the Township to amend its Plan to include the developer-Objector's proposed inclusionary development.

Conclusions and Recommended COAH Response to the Appellate Division

1. COAH should order the Township to amend its Plan, to provide inclusionary rezoning for the developer-Objector's site, and repetition COAH for substantive certification under an accelerated 45 day timetable.
2. COAH should advise the Appellate Division that the 1996 substantive certification is no longer valid and that the Township has been ordered to amend its Plan and repetition within 45 days.
3. Upon certification of the Township's new Plan, COAH should advise the Appellate Division of the resolution of the issues.

Objector's Response to COAH Order to Show Cause on the 1996 Hillsborough Township Substantive Certification

Introduction

In response to a temporary remand from the Appellate Division of Superior Court, dated January 12, 1998 (Appendix A), the NJ Council on Affordable Housing ("COAH") issued an Order to Show Cause, dated February 4, 1998 (Appendix B), which directs the Township of Hillsborough ("Township"), and allows the parties, to address five issues concerning the Township's Housing Element and Fair Share Plan ("Plan") certified by COAH in 1996:

1. Whether the 1996 substantive certification of the Township's Housing Element and Fair Share Plan ("Plan") remains valid, in light of subsequent actions by the Township, as documented in the record now before the Appellate Division.
2. Whether any new issues requiring COAH resolution have been presented.¹
3. Whether the development proposed by the Hillsborough Alliance for Adult Living, L.L.P. ("HAAL"), is governed by *N.J.A.C. 5:93-5.4(d)* or *N.J.A.C. 5:93-5.4(c)*, on conformance of inclusionary development with the *State Development and Redevelopment Plan*.²
4. The proper disposition of this matter.
5. The procedures to be used by COAH to respond to the January 7, 1998 Order of the Appellate Division.

P.E.C. Builders, Inc. ("Objector") is a party to the pending litigation before the Appellate Division initiated by New Jersey Future. The Objector is the developer of a proposed inclusionary development in the Suburban Planning Area (PA 2) in Hillsborough, and was also the sole objector to the Plan in 1995-1996 before COAH, until after mediation was concluded.

This response by the Objector addresses each of these five issues raised by the Appellate Division and COAH in turn, after first summarizing the components of the Township's

¹ This issue is raised explicitly in the Order of the Appellate Division.

COAH-certified approach to satisfying its fair share obligation. This response concludes with three recommendations for the COAH response to the Appellate Division.

Background: 1996 COAH-Certified Hillsborough Housing Element and Fair Share Plan

The temporary remand from the Appellate Division to COAH focuses on whether the Township through its Plan has created a realistic opportunity for the Township's remaining new construction obligation of 160 units of affordable housing, as calculated below and certified by COAH in 1996:

Hillsborough Township 1987-1999 Fair Share Obligation and Plan		
		Low and Moderate Income Units
<i>Fair Share Obligation</i>		
Precredited Need		482
New Construction Component	461	
Rehabilitation Component	21	
Rehabilitation Credits		-14
New Construction Credits		-91
Rental Bonus Credits		-91
Regional Contribution Agreement		-79
Substantial Compliance Credits		<u>-40</u>
Fair Share Obligation		167
New Construction	160	
Rehabilitation	7	
<i>Fair Share Plan</i>		
Rehabilitation	7	
New Construction	136	
Rental Bonus Credits	24	
Total		167

To address the new construction obligation of 160 units, the Plan certified by COAH relied upon the Planned Adult Community/Health Care Facility ("PAC/HCF") project proposed by HAAL. This proposed 3,000 unit, age-restricted project on a 756.3 acre site surrounding Mill Lane in rural, western Hillsborough was slated, under the Plan, to build and set-aside 96 age-restricted affordable units and build 40 family affordable rental units. These 136 affordable

² This issue is also raised explicitly in the Order of the Appellate Division.

units, together with 24 rental bonus credits,³ would fulfill, at least on paper, the Township's new construction obligation of 160 units within six years, i.e., by April 2002.

At the time of COAH certification of the Plan, 90.8% of the HAAL tract was, and is still, located in the Rural Planning Area (PA 4) of the *State Development and Redevelopment Plan*. The western fringe of the tract (0.5% of its area) was, and is still, in the Environmentally Sensitive Planning Area (PA 5). Six scattered, non-contiguous parts of the eastern, developed portion of the tract (totaling 8.7% of its area) were, and are still, in the Suburban Planning Area (PA 2).⁴ The HAAL tract was not, and is not, a designated "Center" on the State Planning Commission's Resource Planning and Management Map.

At the time of COAH certification of the Plan, 98.7% of the HAAL tract was, and is still, **not in a sewer service area** in a wastewater management plan or water quality management plan approved by the New Jersey Department of Environmental Protection ("NJDEP").⁵

Issue No. 1 - Current Validity of the 1996 Certification of the Hillsborough Plan

To assess the current validity of the Hillsborough Plan, in light of the Township's actions taken since its certification by COAH, one must first identify those critical Township actions now in the record before the Appellate Division.

Two actions of the Township Committee concerning the provision of sewer service to the HAAL tract are particularly noteworthy. First, by a resolution dated September 25, 1996,⁶ the Township Committee requested deferral of the NJDEP consideration of the Hillsborough portion of the then pending Somerset County/Upper Raritan Watershed Wastewater

³ As the Township had previously received rental bonus credits for two rental projects completed under its first cycle plan, the Township was eligible for only 24 additional rental bonus credits in the 1996 Plan.

⁴ Letter from Robert B. Heibell, PE, to Peter A. Buchsbaum, Esq., April 25, 1997, page 1, Appendix 1 to the Brief and Appendix of Respondent HAAL, July 3, 1997.

⁵ Letter from Robert B. Heibell, PE, to Peter A. Buchsbaum, Esq., April 25, 1997, page 2, Appendix 1 to the Brief and Appendix of Respondent HAAL, July 3, 1997.

⁶ Tab 3 of the Certification of Appellant New Jersey Future, December 4, 1997; reproduced in Appendix C to this Objector's Response.

Management Plan. Second, nine months later, by a resolution dated June 25, 1997,⁷ the Township Committee recommended that the PAC/HCF tract of HAAL should not be included in the Hillsborough portion of the then still pending Somerset County/Upper Raritan Watershed Wastewater Management Plan.⁸

This means that the Township recommended to Somerset County and NJDEP, 14 months after the COAH certification of its Plan, that essential sewer service not be extended to the PAC/HCF tract. Without sewer service, it is obviously impossible for HAAL to develop the PAC/HCF tract as proposed and to build the 136 new affordable units that are the bedrock foundation of the COAH-certified Plan.

The action of the Township Committee to repeal entirely the Township's PAC/HCF ordinance, by resolution dated October 19, 1997,⁹ notwithstanding the outstanding General Development Plan approval granted to the PAC/HCF project in 1992 and amended in 1995, is another significant action taken since COAH granted substantive certification to the Plan. This municipal repeal strongly suggests a withdrawal of municipal support for this gigantic development proposal.

The statutory requirement under the Fair Housing Act, and the standard established in *Mount Laurel*, is that the municipal housing element and fair share plan must provide a "realistic opportunity" for the provision of the fair share housing obligation.¹⁰ According to our Supreme Court in *Mount Laurel II*, "...whether the opportunity is 'realistic' will depend on whether there is in fact a likelihood--to the extent economic conditions allow--that the lower income housing will

⁷ Tab 5 of the Certification of Appellant New Jersey Future, December 4, 1997; reproduced in Appendix D to this Objector's Response.

⁸ The Township Committee's resolution noted that on June 11, 1997, HAAL had petitioned NJDEP directly for inclusion of the HAAL tract within the sewer service area of the Somerset County/Upper Raritan Watershed Wastewater Management Plan. Both NJDEP and Somerset County declined to honor the HAAL request, and continued public processing of the county-wide wastewater management plan without including the HAAL tract. Somerset County held a hearing on the county plan on November 12, 1997. NJDEP and Somerset County are continuing to process the proposed county wastewater management plan. See 29 *N.J.R.* 4321 for the NJDEP public notice seeking public comment on the proposed county wastewater management plan.

actually be constructed.”¹¹ Without expanded sewer service, the likelihood of construction of 136 affordable units at the HAAL tract during the next four years is next to zero. Repeal of the underlying enabling PAC/HCF ordinance adds to the uncertainty of the present and future municipal development review processes for this project, which also decreases the likelihood that the 136 affordable units certified in the Plan by COAH will indeed be built in a timely manner.

As the Plan clearly no longer creates the requisite realistic opportunity for the provision of the Township’s new construction obligation of 160 units,¹² consequently, the 1996 grant of substantive certification by COAH to the Plan should no longer be considered valid.

Issue No. 2 - New Issues Requiring COAH Resolution

The Appellate Division directed COAH to consider “whether any new issues requiring COAH resolution have been presented [in the supplemented record].” From the perspective of the Objector, no additional new issues requiring COAH resolution have been presented. The fundamental issue is simply whether the Plan creates a realistic opportunity to address the Township’s fair share housing obligation. As discussed above under Issue No. 1, the Objector believes that the Plan does not create the requisite realistic opportunity and should no longer be considered valid.

⁹ Tab 6 of the Certification of Appellant New Jersey Future, December 4, 1997.

¹⁰ N.J.S.A. 52:27D-311.a.

¹¹ 92 N.J. 158 (1983) 222.

¹² In the pending litigation, New Jersey Future challenges whether the Plan ever created the requisite realistic opportunity.

Issue No. 3 - COAH Rules on State Plan Conformance Governing the HAAL Project

The Appellate Division directed COAH to address the issue of whether the development proposed by HAAL is governed by *N.J.A.C. 5:93-5.4(d)* or *N.J.A.C. 5:93-5.4(c)*, on conformance with the *State Development and Redevelopment Plan*.

N.J.A.C. 5:93-5.4(d) provides that:

In municipalities that are divided by more than one Planning Area, the following principles shall apply:

1. The Council [COAH] shall encourage and may require the use of sites in Planning Areas 1 and 2 prior to approving inclusionary sites in Planning Areas 3, 4, and 5 that lack sufficient infrastructure;
2. The Council shall encourage and may require the use of sites within Planning Area 3 prior to approving inclusionary sites in Planning Areas 4 and 5 that would require the expansion of existing infrastructure; and
3. The Council shall encourage and may require the use of sites to which existing infrastructure can easily be extended prior to approving inclusionary sites that require the creation of new infrastructure in an area not presently serviced by infrastructure.

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

In Planning Areas 4 or 5, as designated in the SDRP [State Development and Redevelopment Plan], 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.

It is helpful to read these two rules together.

It is undisputed that Hillsborough Township is "divided by more than one Planning Area" on the official Resource Planning and Management Map of the 1992 *State Development and Redevelopment Plan*. In fact, Hillsborough Township contains four of the five Planning Areas: Suburban Planning Area (PA 2), Fringe Planning Area (PA 3), Rural Planning Area (PA 4), and Environmentally Sensitive Planning Area (PA 5). Appendix E, a map reproduced from the

Township Master Plan, shows how Hillsborough is divided by Planning Areas (and also shows the location of the HAAL tract and the Objector's tract). Consequently, *N.J.A.C. 5:93-5.4(d)* should govern the proper review of the HAAL project.

Application of the "principles" adopted in *N.J.A.C. 5:93-5.4(d)* leads inescapably to using inclusionary sites in Planning Area 2 in Hillsborough, before using sites in Planning Areas 3, 4, and 5 that lack sufficient infrastructure. It is undisputed that 91.3% of the HAAL tract was, and is, in Planning Areas 4 and 5. It is also undisputed that 98.7% of the HAAL tract was, and is, outside of a NJDEP-approved sewer service area and, therefore, lacks "sufficient infrastructure".

The question then arises whether the HAAL tract, of which only 8.7% is located in Planning Area 2, conforms with the *State Development and Redevelopment Plan* as a site for inclusionary development under *N.J.A.C. 5:93-5.4(d)*. The inclusionary development proposed by HAAL and the Township in the Plan was proposed for the full 757 acre HAAL tract, not just its six non-contiguous parcels totaling 65.8 acres located in Planning Area 2. COAH did not require, in certifying the Plan in 1996, that the inclusionary development be located in only the small Planning Area 2 portion of the huge tract. Rather, COAH certified a site without sufficient infrastructure that was 91.3% in Planning Areas 4 and 5. It appears that COAH allowed the very small portion of the HAAL tract in Planning Area 2 to bootstrap the overwhelming majority of the tract that is in Planning Area 4 into some kind of merger with Planning Area 2 in order to appear to comply with this COAH rule.¹³ This is hardly the letter or spirit of the rule.

¹³ In certifying the Plan in 1996, COAH acted as though the entire HAAL tract was in Planning Area 2. According to the COAH Compliance Report, dated March 4, 1998, "COAH's review of the Hillsborough plan indicates that the site [HAAL tract] is within two planning areas [actually it is within three Planning Areas] and that there is an SDRP policy that states that if a site falls within two planning areas, that the criteria in the lower planning area prevails. Therefore, sites in Planning Area 2 do not need center designation." at page 7. There is no such SDRP policy. Rather, there is a SDRP policy on "Centers Located at Intersections of Planning Areas" which states "In instances where municipalities and counties identify a Center at the intersection of two or more Planning Areas, the Center will be designated as lying within the Planning Area of lowest numerical value (e.g., if a Center is intersected by Planning Areas 2 and 3, it is designated as lying within Planning Area 2)." Policy 20, 1992 SDRP, at pages 28-29.

If indeed *N.J.A.C. 5:93-5.4(d)* governs the HAAL project, then the Township should be encouraged and perhaps required by COAH to use inclusionary sites in the Planning Area 2 (Suburban Planning Area) portions of Hillsborough, before using the HAAL tract, which is 91.3% in Planning Areas 4 and 5 and lacks sufficient infrastructure. It is important to note that this COAH rule is not mandatory, as COAH reserved to itself some discretion, i.e., "The Council shall encourage and *may* require..." (emphasis added)

However, if *N.J.A.C. 5:93-5.4(d)* does not govern the HAAL project, by some exercise of COAH discretion, then presumably *N.J.A.C. 5:93-5.4(c)* governs. And, *N.J.A.C. 5:93-5.4(c)* authorizes no discretion, as it directs that "...the Council *shall* require inclusionary developments to be located in centers ...[in Planning Areas 4 or 5]." (emphasis added) It is undisputed that the HAAL tract is not in a Center designated by the State Planning Commission and that COAH did not require the Township to submit a Center designation petition for the HAAL tract to the State Planning Commission.

The Appellate Division directed COAH to address whether the development proposed by HAAL is governed by *N.J.A.C. 5:93-5.4(d)* or *N.J.A.C. 5:93-5.4(c)*. The rule for municipalities divided by more than one Planning Area (*N.J.A.C. 5:93-5.4(d)*) clearly governs in Hillsborough. COAH improperly ignored this rule in its 1996 certification. Alternatively, if COAH's action in 1996 was an exercise of its discretion under *N.J.A.C. 5:93-5.4(d)*, then *N.J.A.C. 5:93-5.4(c)*, the rule for municipalities in Planning Area 4 or 5, applies in Hillsborough. However, the HAAL tract clearly does not comply with *N.J.A.C. 5:93-5.4(c)*, because it was not, and is not, in a designated Center. And, in any case, COAH acted, in its 1996 grant of substantive certification, as though Hillsborough was entirely in the Suburban Planning Area

The COAH rule on conformance with the SDRP in Planning Area 2 encourages but does not require inclusionary development within Centers.

(PA 2), and subject to N.J.A.C. 5:93-5.4(a), even though only 8.7% of the HAAL tract's area is in Planning Area 2!

The logical and fact-based response to the Appellate Division's inquiry must be that N.J.A.C. 5:93-5.4(d) governs the HAAL development proposal, as Hillsborough is divided into four different Planning Areas. The presumption of this COAH rule must be that new inclusionary development in Hillsborough should be located in the Suburban Planning Area (PA 2), before considering sites elsewhere in Hillsborough, such as the HAAL tract, in the Rural Planning Area (PA 4). COAH should now correctly exercise its discretion under N.J.A.C. 5:93-5.4(d) and require the Township to use inclusionary development sites in the Suburban Planning Area of Hillsborough, before proposing sites, such as the HAAL tract, that lie in Hillsborough's Rural Planning Area and Environmentally Sensitive Planning Area.

Issue No. 4 - Proper Disposition of this Matter

Justice delayed is justice denied. In 1995, the Objector asserted before COAH that the Plan did not create the requisite realistic opportunity to satisfy the Township's constitutional fair share housing obligation, in part because the HAAL tract was outside the NJDEP-approved sewer service area. The objector also asserted that the proposed inclusionary development of the HAAL tract did not conform with COAH rules on the *State Development and Redevelopment Plan*. Now, almost three years later, the Township is not one step closer to fulfilling, realistically, its obligation to provide 160 new affordable units in Hillsborough. The Objector's prophecy has become reality.

The proper disposition of this matter is for COAH to take decisive action to require the Township to create promptly the requisite realistic opportunity so that the Township can at long last satisfy its constitutional fair share housing obligation, by awarding relief, in the form of inclusionary rezoning, to the developer-Objector who originally objected to the Plan.

This developer is ready, willing, and able to fulfill promptly all of the Township's new construction affordable housing obligation by means of an inclusionary development located squarely in the Suburban Planning Area (PA 2), as shown on the map in Appendix C, at a site that is entirely in a NJDEP-approved sewer service area.¹⁴

The project, known as Gateway at Sunnymede, is proposed for a 240.2 acre, essentially undeveloped tract in generally developed, central-eastern Hillsborough, with frontage on U.S. Route 206, as shown on the site location map in Appendix F.

The developer proposes to develop the entire tract into a planned adult community with a total of 800 dwelling units and 240 beds in health care facilities, together with 36% green areas and open space, at a net buildable area density of 7.0 units per acre. The project includes non-age restricted apartments for families and some commercial development. To satisfy fully the Township's fair share obligation, the developer proposes to set-aside 96 age-restricted rental affordable apartments and 40 family rental affordable apartments. The family rental affordable apartments would qualify for the 24 remaining rental bonus credits for which the Township is eligible. In total, the developer would fill the current 160 unit hole in the Township's Plan by providing 136 new affordable units and generating 24 rental bonus credits. Appendix G presents more detailed project information.

The Gateway site and project are "available, suitable, developable and approvable," as required by COAH rules.¹⁵ The Gateway site and project conform unequivocally with the *State Development and Redevelopment Plan*, as the tract is 100% located in the Suburban Planning Area (PA 2), where inclusionary development is not required by COAH rules to be located in designated Centers.¹⁶ Appendix H presents a suitability analysis of the Gateway tract.

¹⁴ Letter from Ronald L. Shimanowitz, Esq., to Shirley Bishop, COAH, September 25, 1997; Tab 21 of the Certification of Appellant New Jersey Future, December 4, 1997.

¹⁵ N.J.A.C. 5:93-5.3(b).

¹⁶ N.J.A.C. 5:93-5.4(a).

The developer is a joint venture of P.E.C. Builders, Inc., the original objector to the Plan, and SKP Land, Inc., the owner of an adjacent 123 acre property. The combined larger, 240.3 acre tract has been formally proposed for inclusionary development by the joint venture since August 1997, when the developer submitted an application to the Hillsborough Township Planning Board under the Township's Planned Adult Care/Health Care Facilities Ordinance. The repeal of the ordinance by Township Committee in October 1997 rendered the application moot. Appendix I presents reductions of the plans for this project, as submitted to the Township Planning Board in August 1997, to demonstrate the readiness of this developer to develop expeditiously this inclusionary development.

Issue No. 5 - COAH Procedures to Respond to the Appellate Division Order

In its 1996 "Resolution Granting Hillsborough Township, Somerset County, Substantive Certification No. 31-99," COAH presciently established a procedure for the events that have since unfolded:

"WHEREAS, in the event that the PAC/HCF site is not approved for inclusion in the 208 plan amendment [i.e., the pending wastewater management plan that would expand the NJDEP-approved sewer service area to include the HAAL tract], Hillsborough shall be required to amend its housing element and fair share plan to address the 160 units in another manner..." at page 4

As the PAC/HCF site has not, two years later, been included in a NJDEP-approved wastewater management plan, and in fact has been excluded by the Township from such a plan, now is the time for COAH to invoke the terms of the COAH substantive certification, by granting relief to the Objector and requiring the Township to amend the Plan to provide inclusionary rezoning for the Objector's site and thereby address the Township's new construction obligation of 160 units.

Furthermore, COAH's 1996 "Resolution Granting Hillsborough Township, Somerset County, Substantive Certification No. 31-99" also contained a final, standard requirement that establishes a procedure that COAH should use in this matter:

"BE IT FURTHER RESOLVED that any change in the facts upon which this certification is based or any deviation from the terms and conditions of this certification which affects the ability of the municipality to provide for the realistic opportunity of its fair share of low and moderate income housing and which the municipality fails to remedy may render this certification null and void." at page 8

The Township's actions since the grant of substantive certification, as discussed above under Issue No. 1, are clearly a "change in the facts" upon which COAH based the certification. However, instead of decertifying the Township, and subjecting the Township to the risk of builder-plaintiff litigation, COAH should instead grant relief to the Objector and require the Township to amend the Plan to provide inclusionary rezoning for the Objector's site as the mechanism to address the Township's new construction obligation of 160 units.

Conclusions and Recommended COAH Response to the Appellate Division

1. COAH should order and direct the Township to amend the Plan under an accelerated schedule of no more than 45 days from the date of the COAH order to the required repetition to COAH for substantive certification of the new Plan that provides inclusionary rezoning for the Objector's site.
2. COAH should immediately advise the Appellate Division that the 1996 substantive certification is no longer valid and that the Township has been ordered to amend its Plan and repetition within 45 days with a new Plan that creates the requisite realistic opportunity by granting relief to the Objector.
3. Upon granting substantive certification to the new Plan, COAH should then advise the Appellate Division of the resolution of the issues raised by the Appellate Division's Order of

January 7, 1998, and the critical fact that the new Plan does unambiguously create, without further delay, the requisite realistic opportunity to satisfy the Township's constitutional fair share obligation.

APPENDICES

- A: Appellate Division Order of January 12, 1998
- B: COAH Order To Show Cause, February 4, 1998
- C: Hillsborough Township Committee Resolution, dated September 25, 1996, requesting deferral of NJDEP consideration of the Hillsborough portion of the Somerset County Wastewater Management Plan
- D: Hillsborough Township Committee Resolution, dated June 25, 1997, recommending exclusion of the PAC/HCF zone (HAAL project) from the Somerset County Wastewater Management Plan
- E: Map of Planning Areas in Hillsborough Township under the 1992 *State Development and Redevelopment Plan*
- F: Site Location Map, Gateway Tract, Hillsborough, New Jersey
- G: Project Information - March 1998 - Gateway at Sunnymeade Project, Hillsborough, New Jersey
- H: Site Suitability Analysis, Gateway Tract, Hillsborough, New Jersey
- I: Plans for Gateway at Sunnymeade Project, Hillsborough, New Jersey, August 1997

Appendix A: Appellate Division Order of January 12, 1998

A 1077913

ORDER ON MOTION

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 -002158-97
BEFORE PART: A
JUDGE(S): LONG
KIMMELMAN
KLEINER

MOTION FILED: DECEMBER 05, 1997 BY: NJ FUTURE INC
ANSWER(S) FILED: DECEMBER 16, 1997 BY: COAH
DECEMBER 17, 1997 BY: HILLSBOROUGH ALLIANCE

SUBMITTED TO COURT: JANUARY 05, 1998

REC'D
APPELLATE DIVISION

JAN 12 1998

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS

7 DAY OF January, 1998, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT
- TO SUPPLEMENT THE RECORD

FILED
APPELLATE DIVISION

JAN 12 1998

GRANTED DENIED OTHER
(X) () (X)

SUPPLEMENTAL:

The motion to supplement the record is granted. The matter is temporarily remanded to COAH to consider all of the materials we have allowed to be added to the record before us (see our order on M-1289-97) along with such other facts as COAH deems relevant. See R. 2:5-5(b). Among other things, COAH shall consider whether, in view of recent actions by Hillsborough Township, the grant of substantive certification remains valid and whether any new issues requiring COAH resolution have been presented. COAH should also address the issue of whether the proposed development is governed by N.J.A.C. 5:93-5.4(d) or N.J.A.C. 5:93-5.4(c). Jurisdiction is retained.

CBS 33-99

FOR THE COURT:

JUMTM

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

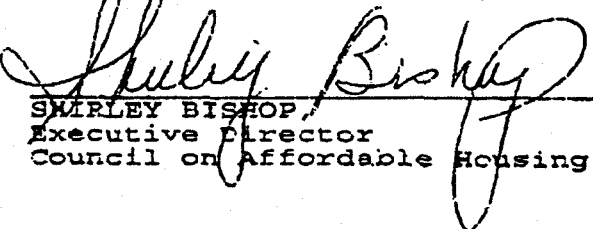
Appendix B: COAH Order To Show Cause, February 4, 1998

IN THE MATTER OF THE PETITION) NEW JERSEY COUNCIL ON
FOR SUBSTANTIVE CERTIFICATION) AFFORDABLE HOUSING
OF THE HOUSING ELEMENT AND FAIR)
SHARE PLAN OF THE TOWNSHIP OF)
HILLSBOROUGH, SOMERSET COUNTY) ORDER TO SHOW CAUSE

Please take notice that the Council on Affordable Housing ("COAH" or "the Council") hereby orders the Township of Hillsborough ("Hillsborough"), through its representatives, to appear before the Council at its regularly scheduled meeting of March 4, 1998 at the office of the New Jersey Housing and Mortgage Finance Agency, 637 South Clinton Avenue, Roebbling Complex, Trenton, New Jersey, at 10:30 A.M. to Show Cause whether the grant of substantive certification by the Council dated April 3, 1996 to the housing element and fair share plan of Hillsborough remains valid as a consequence of actions by Hillsborough subsequent to the grant of certification with regard to the Planned Adult Community ("PAC") site, as those actions have been documented in the briefs and appendices, as supplemented, filed in In the Matter of the Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, Superior Court of New Jersey, Appellate Division, Docket No. A-005349-95T3, which matter has been remanded temporarily to COAH by order dated January 7, 1998, attached.

Please take further notice that Hillsborough and all parties to A-005349-97T3 may file written submissions with COAH on or before February 19, 1998 with regard to this Order to Show Cause and may, in those written submissions, also address all substantive

issues raised by the January 7, 1998 order, including what COAH's proper disposition of this matter should be. Further, Hillsborough and all parties may also present their positions as to the procedures to be employed by the Council to effectively and expeditiously respond to the January 7, 1998 order. All written submissions must be received at the COAH office on or before February 19, 1998 and, absent further order by COAH, no reply to other parties' submissions may be filed or will be considered in response to this Order to Show Cause. All parties who file submissions may be allowed to address the Council on March 4, 1998.


SHIRLEY BISHOP
Executive Director
Council on Affordable Housing

DATED February 5, 1998

Appendix C: Hillsborough Township Committee Resolution, dated September 25, 1996, requesting deferral of NJDEP consideration of the Hillsborough portion of the Somerset County Wastewater Management Plan



Township of Hillsborough

COUNTY OF SOMERSET
MUNICIPAL BUILDING
AMWELL ROAD
NESHANIC, NEW JERSEY 08853

(908) 369-4313



KENNETH C. SCHERER
MAYOR

BRETT A. RADI
DEPUTY MAYOR

COMMITTEE

HELEN HAINES
GLENN VAN LIER
DAVID REDLAWSK

WHEREAS, pursuant to the New Jersey Water Quality Planning Act (N.J.S.A. 58:11-1 et seq.), Hillsborough Township is included in the Somerset County/Upper Raritan watershed Wastewater Management Plan; and further

WHEREAS, pursuant to the Water Quality Planning Act and Implementation Process Regulations (N.J.A.C. 7:15-3.4 et seq.), Hillsborough Township is included in the Somerset County/Upper Raritan Watershed Wastewater Management Plan; and

WHEREAS, the Hillsborough Township Committee believes that the aforesaid Plan contains errors which should be corrected before NJDEP publishes the Plan in the New Jersey register.

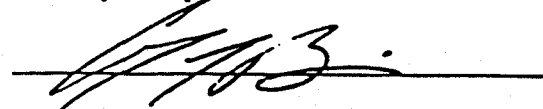
NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Hillsborough, County of Somerset, State of New Jersey as follows:

1. Somerset County and the NJDEP are requested to cease any further review of the Hillsborough Township portion of the Somerset County/Upper Raritan Wastewater Management Plan until such time as the staffs of Hillsborough Township and the Hillsborough Township Municipal Utilities Authority can review the plan, find the errors and recommend corrections.

2. No amendment to the Hillsborough Township Wastewater Management Plan shall be endorsed without the consent or by affirmation of the Hillsborough Township Committee.

I, Gregory J. Bonin, Hillsborough Township Clerk, hereby certify that the above resolution is a true and correct copy of a resolution adopted by the Township Committee of the Township of Hillsborough at a regular and duly convened meeting held on September 24, 1996.

In witness thereof I have set my hand and affixed the seal of the Township of Hillsborough this 25th day of September 1996.



Appendix D: Hillsborough Township Committee Resolution, dated June 25, 1997, recommending exclusion of the PAC/HCF zone (HAAL project) from the Somerset County Wastewater Management Plan

Township of Hillsborough



COUNTY OF SOMERSET
MUNICIPAL BUILDING
555 AMWELL ROAD
NESHANIC, NEW JERSEY 08853

TELEPHONE
(908) 369-4313

RESOLUTION REGARDING THE STATUS OF THE PAC/HCF OVERLAY ZONE IN THE MILL LANE AREA IN THE HILLSBOROUGH TOWNSHIP WASTEWATER MANAGEMENT PLAN

WHEREAS, on April 3, 1997, the Hillsborough Township Planning Board adopted a resolution recommending changes to the Hillsborough Township portion of the Somerset County/Upper Raritan Watershed Wastewater Management Plan; and

WHEREAS, by resolution of April 22, 1997 the Hillsborough Township Committee requested that the Somerset County Planning Board defer any action on the Hillsborough Township Planning Board resolution of April 3, 1997 until such time as the Hillsborough Township Committee has a chance to review and endorse it; and

WHEREAS, as part of that resolution, the Hillsborough Township Planning Board recommended including the PAC/HCF overlay zone in the Mill Lane area in the Hillsborough Township Wastewater Management Plan; and

WHEREAS, U. S. Homes and the Hillsborough Alliance for Assisted Living have applied for preliminary approval of a major subdivision in the Mill Lane area to be known as Greenbriar at the Village; and

WHEREAS, on June 11, 1997, the developer petitioned the New Jersey Department of Environmental Protection for inclusion of their lands in the Somerset County/Upper Raritan Watershed Wastewater Management Plan; and

WHEREAS, both the Hillsborough Township Planning Board and the New Jersey Department of Environmental Protection have clearly defined public processes for reaching their decisions; and

WHEREAS, the Hillsborough Township Committee believes both processes should be allowed to proceed to conclusion.

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Hillsborough, County of Somerset, State of New Jersey, that the changes recommended by the Hillsborough Township Planning Board relative to the PAC/HCF zone are overruled and the PAC/HCF zone should not be included in the Hillsborough Township portion of the Somerset County/Upper Raritan Watershed Wastewater Management Plan.

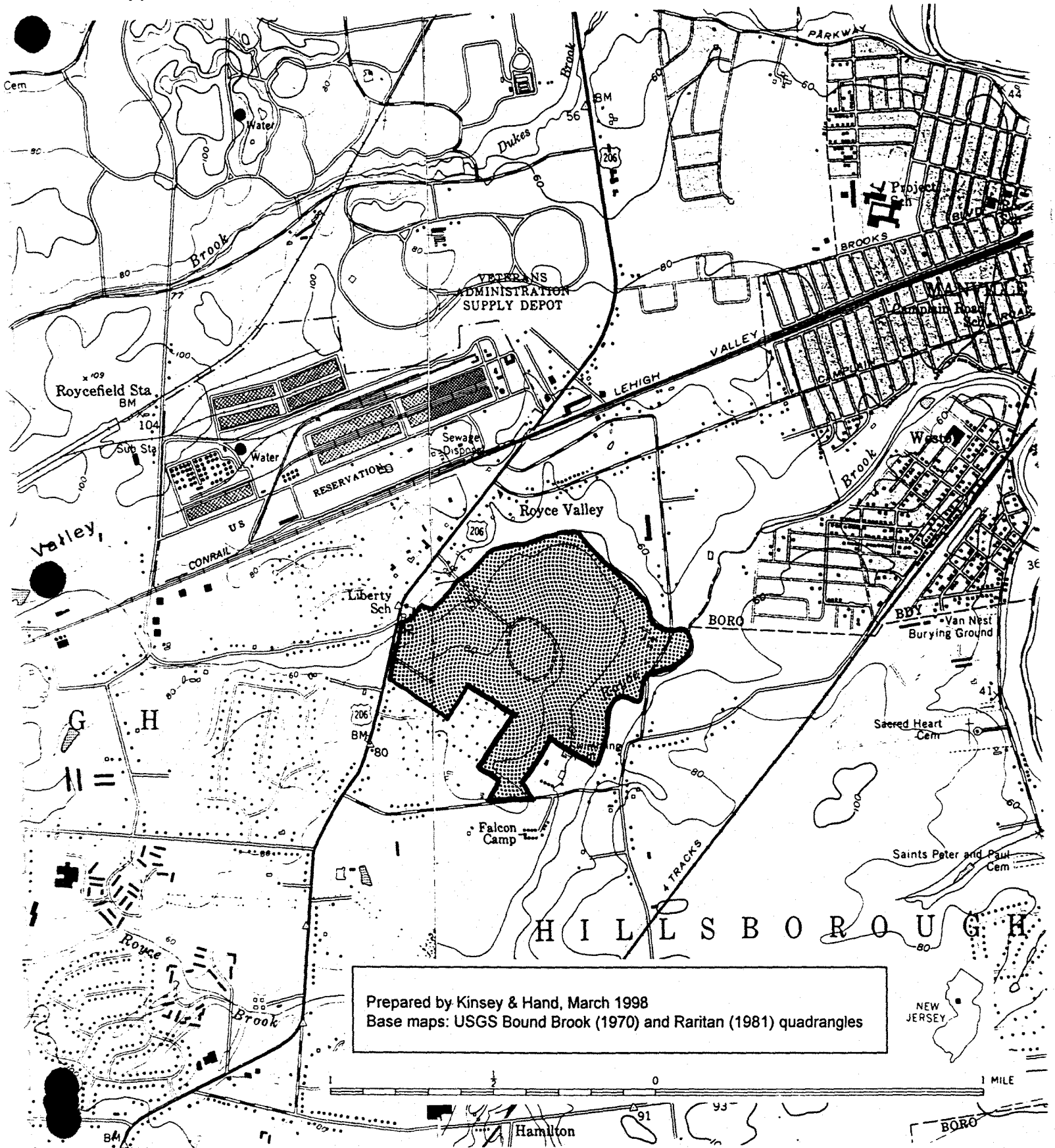
I, Gregory J. Bonin, Hillsborough Township Clerk, hereby certify that the above resolution is a true and correct copy of a resolution adopted by the Township Committee of the Township of Hillsborough at a regular and duly convened meeting held on June 24, 1997.

In witness whereof I have set my hand and affixed the seal of the Township of Hillsborough this 25th day of June 1997.

SCHEDULE B Page 4

**Appendix E: Map of Planning Areas in Hillsborough Township under the 1992 State
Development and Redevelopment Plan**

Appendix F: Site Location Map, Gateway Tract, Hillsborough, New Jersey



Appendix G: Project Information - March 1998 - Gateway at Sunnymede Project, Hillsborough, New Jersey

Project Information - March 1998
Gateway at Sunnymede Project, Hillsborough Township, Somerset County, NJ

Land Use Summary

	acres
1 Health Care and PAC/HCF Land Use (assisted living and skilled nursing)	10.0
2 Senior Independent Living and Family Apartments	9.0
3 Senior Villas (attached - 28' wide)	30.0
4 Senior Cottages (detached - 55'x100' lots)	74.0
5 Green Area or Open Space	
6 Conservation (wetlands, flood plains, buffers)	66.0
7 Usable common space (paths, uplands, recreation center, etc.)	<u>5.9</u>
8 Total Green Area or Open Space	71.9
9 Municipal Use	2.5
10 Circulation (Roads and Rights-of-Way)	13.3
11 Remaining Parcel (commercial)	<u>29.5</u>
12 Total Tract Area	240.2
13 Net Buildable Area	144.7
(Total Tract Area - Conservation Area - Remaining Parcel for Commercial Development)	

Development Program

	beds	units
Health Care Facilities		
14 Assisted living residence*	120	100
15 Skilled nursing facility*	<u>120</u>	<u>120</u>
16 Total	240	220
	units	
17 Senior Independent Living Apartments (gross density of 25 units/acre)	150	
18 Family Apartments (non age-restricted) (gross density of 16 units/acre)	40	
19 Senior Villas (attached at gross density of 6.7 units/acre)	200	
20 Senior Cottages (detached - 55'x100' lots - gross density of 5.6 units/acre)	<u>410</u>	
21 Total Dwelling Units	800	
22 Total Units for Density Calculation Only (line 16 + line 21)	1,020	
23 Recreation Center (building, pool, field, shuffle board, bocci, tennis)		

Density and Open Space

23 Proposed Net Buildable Area Density (line 22/line 13)	7.0
24 Proposed Green Area or Open Space (line 8/(line 12 - line 10 - line 11))	36.4%

Low and Moderate Income Housing Set-Aside

	units
25 Proposed Age-Restricted Rental Affordable Apartments	96
26 Proposed Family Rental Affordable Apartments	<u>40</u>
27 Total Affordable Units	136
28 Proposed Rental Bonus Credits***	<u>24</u>
29 Total Affordable Units and Credits (line 27 + line 28)	160
30 Set-Aside of Low and Moderate Income Units (line 27/line 21)	17.0%

- Notes:
- * Some of the units may be converted to "comprehensive personal care homes"
 - ** For purposes of low and moderate income housing set-aside calculation, "housing" excludes health care facilities.
 - *** The Township is eligible for only 24 additional rental bonus credits.

Prepared by Kinsey & Hand

Appendix H: Site Suitability Analysis, Gateway Tract, Hillsborough, New Jersey

The Gateway at Sunnymeade tract is a 240.2 acre parcel of five lots (Block 140, Lot 1; Block 141, Lots 2.01, 7.01, 30, and 31.02) in central-eastern Hillsborough, fronting on U.S. Route 206 on the west, Falcon Road on the south, and Sunnymeade Road on the east. A tributary of Royce Brook is the northern edge of the tract. The essentially undeveloped tract is mostly fields, woods, flood plains, and wetlands, with some stables, farm buildings, and a dirt training horse track. Most of the tract is currently zoned Rural/Agricultural (two acre minimum lot size), while less than one-quarter of the tract is currently zoned Residential (one acre minimum lot size).

An analysis of this tract under the thirteen criteria mandated by COAH, using the COAH definitions of "available, suitable, developable and approvable," for evaluating sites for new construction of affordable housing, follows:

- a. Water - The site has direct access to water infrastructure, as water lines of Elizabethtown Water Company exist along Route 206 to the west and in Sunnymeade Road to the east.
- b. Sewer - The tract has direct access to sewer infrastructure and is entirely within the NJDEP-approved sewer service area. Existing sewer lines practically ring the tract.
- c. Compatible Land Uses - The tract is adjacent to compatible existing land uses, which are mostly farm fields, woods, single family detached houses, a swimming club, and a strip commercial center and professional offices across Route 206.
- d. Streets - The tract has frontage on U.S. Route 206 northbound, a major arterial. NJDOT has proposed widening the Hillsborough portion of Route 206 to four lanes. NJDOT has also proposed improving the existing intersection of Valley Road and Route 206, at the western edge of the tract, by creating a new jughandle intersection that would provide direct, signalized access to the tract. In addition, the tract has direct access on its southern edge to Falcon Road, a collector road. In short, the tract has access to appropriate streets.
- e. Historic Sites - The tract has no historic resources listed on the State or National Registers of Historic Places.
- f. Restricted Agricultural Lands - The tract has no deed restricted agricultural lands. Furthermore, the tract lies outside the Agriculture Priority Area identified by the Somerset County Planning Board.
- g. Wetlands - The tract has some wetlands and transition areas which have been delineated and verified by NJDEP by a Letter of Interpretation issued in 1991. The tract is sufficiently large to avoid development of wetlands, other than minor disturbances authorized by NJDEP wetlands general permits.
- h. Flood Hazard Area - The tract has some flood hazard areas, associated with Royce's Brook on the east and an unnamed tributary of Royce's Brook on the north and west. The tract is sufficiently large for development to avoid flood hazard areas, other than minor crossings as may be authorized by NJDEP stream encroachment general permits.

- i. Steep Slopes - The tract has no significant steep slopes.
- j. Reserved Recreation, Conservation, and Open Space - This tract of privately-owned land does not include land publicly reserved for recreation, conservation, and open space.
- k. Clear Title - The tract has clear title.
- l. Applicable Permits and Approvals - The tract has no extraordinary site conditions that would suggest that any necessary State and County permits and approvals would not be granted.
- m. State Development and Redevelopment Plan Conformance -The tract conforms with the State Plan, as the tract is entirely in the Suburban Planning Area (PA 4) where COAH rules do not require inclusionary development to be in "Centers" designated formally by the State Planning Commission.

In brief, the Gateway at Sunnymeade tract is "available, suitable, developable and approvable" under all applicable COAH criteria and conforms with the *State Development and Redevelopment Plan*.

**Appendix I: Plans for Gateway at Sunnymeade Project, Hillsborough, New Jersey,
August 1997**

- Sheet 1: Land Use Plan
- Sheet 2: Critical Areas Map
- Sheet 3: Existing Utilities Plan