

Hillsborough Litigation

3/14/98

Written Submission of HAAL w/ regard to the NJ COAH's order to show cause whether the Grant of Substantive Certification of the Housing Element and Fair Share Plan of Hillsborough remains Valid.

33 pgs

HI 000083B

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REPLY TO

WOODBIDGE

VIA HAND DELIVERY

March 14, 1998

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

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

Written Submission of Hillsborough Alliance for Adult Living,
L.L.P. With Regard to the New Jersey Council on Affordable
Housing's Order to Show Cause Whether the Grant of Substantive
Certification of the Housing Element and Fair Share Plan of
the Township of Hillsborough, Somerset County Remains Valid.

Dear Ms. Bishop:

Please accept this written submission on behalf of Hillsborough Alliance for Adult Living, L.L.P. ("HAAL") with regard to the New Jersey Council on Affordable Housing's ("COAH's") Order to Show Cause whether the grant of substantive certification of the housing element and fair share plan of the Township of Hillsborough, Somerset County remains valid as a consequence of the

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actions of Hillsborough subsequent to the grant of certification. Certifications of Peter A. Buchsbaum, Robert B. Heibell, and Harry B. Smith are also being filed herewith. We would also ask that, in reviewing these papers, COAH also consider the papers previously filed by HAAL in this case. Since the arguments in those papers are similar, they have not been repeated in full here.

PRELIMINARY STATEMENT

It is HAAL's position that COAH should take all necessary steps to insure that its previous certification in this matter is enforced. To do otherwise would be to reward Hillsborough for its refusal to act in good faith to fulfill its responsibilities under the substantive certification of its housing element and fair share plan.¹

Hillsborough has an affirmative obligation under both the developer's agreement and the COAH certification to take whatever steps are necessary to secure water and sewer approvals for the PAC/HCF site. Not only has Hillsborough refused to take these steps, Hillsborough recently undertook the extraordinary action of repealing the Planned Adult Community/Health Care Facility ("PAC/HCF") zoning of the site in question without first grandfathering HAAL's site into its PAC/HCF zoning.

¹ An example of Hillsborough's failure to act in good faith is its refusal to seek Planning Area 2 status for the HAAL site, despite its previous commitment to do so. See ¶3 of Certification of Peter A. Buchsbaum.

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These outrageous actions on Hillsborough's part are nothing more than a blatant attempt to deny HAAL its vested and COAH approved right to build 3,000 housing units in the township, including 450 units of affordable housing, for no better reason than that the powers that be in Hillsborough wish to circumvent the terms of the developer's agreement entered into by the Township or the COAH substantive certification applied for by the Township.

COAH should not allow Hillsborough to repudiate its housing element and fair share plan by failing to abide by its terms and conditions over one year after COAH granted certification. To allow this to happen will send the unmistakable signal to all parties to future housing elements and fair share plans to be submitted to COAH for certification that such certifications are non binding and thus not worth the paper they are printed on. Surely this will defeat the primary purpose of the certification process, which is to ensure the provision of a realistic opportunity for the construction of affordable housing in New Jersey.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Procedural History and Statement of Facts With Regard to Zoning and Development

On January 29, 1992, upon the application of HAAL to the Planning Board of the Township of Hillsborough ("Planning Board"), the General Development Plan for HAAL's project was approved pursuant to Hillsborough's PAC/HCF Ordinance (the "Initial GDP

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Approval"). On December 7, 1995, the Planning Board approved an amended General Development Plan for the Project (the "Amended GDP Approval") upon HAAL's application. See Exhibit A.²

On February 27, 1996, HAAL entered into a Municipal Development Agreement with the Township (the "Fair Share Agreement"). See Exhibit B. By the Fair Share Agreement, HAAL agreed to set aside, as part of the housing component of the Project, up to 15% of its development for low and moderate income housing for age-restricted and non-age-restricted occupancies, on a sale or rental basis.

The Fair Share Agreement requires Hillsborough to seek Planning Area 2 status under the New Jersey State Development and Redevelopment Plan for plaintiff's lands. This status is consistent with both the development approval in the Amended GDP Approval, and with the agreed upon use of plaintiff's land for, among other things, affordable housing. The Fair Share Agreement also anticipated Hillsborough's cooperation in obtaining sewer service consistent with the Planning Area 2 designation, the Amended GDP Approval, and the affordable housing requirement.

Hillsborough had petitioned for substantive certification of its housing element and fair share plan on February 27, 1995. See Exhibit C. The PAC/HCF site was included in the plan as the primary proposed site for affordable housing. The filed petition

² All references to Exhibits are to the Exhibits to the accompanying Certification of Peter A. Buchsbaum, unless otherwise noted.

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stated that the PAC/HCF site had received a General Development Plan approval from the Hillsborough Township Planning Board. On April 3, 1996, after execution of the Developer's Agreement and grant of the amended GDP approval, COAH granted substantive certification to the Hillsborough Plan which had the HAAL lands as its only new construction site.

On October 28, 1997, Hillsborough unilaterally adopted on final reading Ordinance No. 97-28, which purported to repeal Section 91.1 (PAC/HCF) of the Municipal Code of the Township of Hillsborough. Also on October 28, 1997, Hillsborough adopted a Resolution purporting to justify the adoption of the Repealer Ordinance. See Exhibit D. No exception was made for HAAL's project, even though it has already received a General Development Plan approval and was included in COAH's substantive certification of Hillsborough's housing element and fair share plan.

**B. Procedural History and Statement of Facts With
Regard to Sewer**

The "Amendment of the Wastewater Management Plan for Hillsborough Township, Somerset County, New Jersey" was revised on October 18, 1995, and was approved by DEP on December 14, 1995, but did not include the project site. Yet, on July 12, 1994, the Hillsborough Township engineer wrote to Mr. McCracken urging that the PAC/HCF site be included in the sewer service area as a "minor change to the existing greater Water Quality Management Plan." On July 21, 1994 Mr. McCracken wrote back, acknowledging that the

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PAC/HCF Site should be included in the sewer service area. See Exhibit E. On August 1, 1994, the Mayor of Hillsborough wrote to Mr. Van Abs urging that the PAC/HCF Site be included in the sewer service area. See Exhibit F.

The Hillsborough petition for substantive certification before COAH 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"). Hillsborough stated that it expected an expedited approval by the DEP because "...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.

The proposed Somerset County/Upper Raritan Watershed Wastewater Management Plan as prepared by Malcolm Pirnie, Inc., dated November 1994 (the "County WMP"), was submitted to DEP on behalf of the County of Somerset ("Somerset County") for review and approval in November 1994, and does include the Project Site. See Exhibit G. For example, Table 1 of Exhibit G, and specifically Footnotes 16 and 20 indicate flows of population projections from the then proposed 10,604 units for the PAC/HCF. See also Exhibit H, which contains portions of Plate 3A of the Somerset County/Upper Raritan Watershed Wastewater Management Plan dated October 1994 as

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submitted to DEP, which indicate that the PAC/HCF is proposed to be in the sewer service area of the SRVSA.

In its April 3, 1996 resolution granting substantive certification to Hillsborough's housing element and fair share plan, COAH 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. 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 manner. COAH conditioned its grant of substantive certification on the fact that Hillsborough Township 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.

On April 8, 1997 John D. Middleton, Hillsborough Township Administrator, filed a letter with COAH in compliance with the six month report requirement included by COAH as a condition of Substantive Certification. See Exhibit I. This letter was captioned "Twelve Month Status Report" and concerned the status of sewer services to the PAC/HCF tract.

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At the request of the Township Committee, the Planning Board undertook a study to delineate the areas of the Township to be included in the County WMP and, at its meeting held on April 3, 1997, the Planning Board adopted three (3) resolutions whereby the HAAL site was recommended for inclusion within the County WMP. Exhibit J. This is further addressed in an April 22, 1997 letter from the Chairman of the Hillsborough Township Planning Board to the Mayor and Township Committee. Exhibit K.

On April 28, 1997, U.S. Home Corp. and HAAL petitioned the Department of Environmental Protection for inclusion of the HAAL site within the proposed Somerset County/Upper Raritan Watershed Wastewater Management Plan. See Exhibit L. On June 24, 1997, Hillsborough adopted a resolution which attempted to avoid the issue of sewer service area endorsement by pointing to other processes to be completed first. No mention was made in the resolution why Hillsborough felt it could not act when its Planning Board had. Three days later Middleton filed another letter with the Council. See Exhibit I. 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 concerning recommending HAAL's site for inclusion within the County WMP.

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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." On September 26, 1997, the Department of Environmental Protection informed counsel for U.S. Home Corp. and HAAL that it would not consider its petition to be included in the wastewater management plan at the present time, but would consider it later. See Exhibit M.

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LEGAL ARGUMENT

POINT I

THE COUNCIL ON AFFORDABLE HOUSING SHOULD ENFORCE ITS GRANT OF SUBSTANTIVE CERTIFICATION OF HILLSBOROUGH'S HOUSING ELEMENT AND FAIR SHARE PLAN.

A. COAH's Regulations Give It The Authority As Well As The Obligation To Enforce Its Substantive Certifications.

COAH'S regulations provide as follows:

Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.

N.J.A.C. 5:93-4.3(c)2 (emphasis added). By a simple reading of COAH's own regulations, it is clear that COAH is mandated to require Hillsborough Township officials to endorse all applications for water and sewer service upon which a COAH Substantive Certification of a Housing Element and Fair Share Plan is dependent. See also N.J.A.C. 5:93-5.1(b)10, referring to "necessary applications for sewer service . . ." and N.J.A.C. 5:93-5.3(b), which also requires applications for sewer service to be made.

To date, this has not occurred. What has occurred is that Hillsborough Township has backed away from a commitment it made when seeking COAH's Certification to obtain water and sewer approvals for the PAC/HCF site. Hillsborough Township does not have the right unilaterally to take this action and opt out of its

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own Certification. Such action is illegal under N.J.A.C. 5:93-4.3(c)(2), and it severely prejudices the vested rights of HAAL, with whom Hillsborough Township signed a Development Agreement.

Moreover, it is well settled that, with regard to sewer service, "[m]unicipalities have an affirmative obligation to facilitate provision of the infrastructure necessary to make development realistically likely." Toll Bros. v. Tp. of West Windsor, 303 N.J. Super. 518, 543 (Law Div. 1996). See also So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 297-99 (1983); Dynasty Bldg. v. Upper Saddle River, 267 N.J. Super. 611, 616 (App. Div. 1993), certif. denied, 135 N.J. 467, appeal dismissed, 135 N.J. 468 (1994). Hillsborough has openly flouted this requirement in the present case. To allow this action to go unchecked, by not enforcing its own Substantive Certification, COAH is allowing the entire Substantive Certification process to be rendered meaningless. By not acting on its power to enforce a Substantive Certification, COAH is apparently asserting that a Certification can be subverted, and a development site removed from a Plan, as a result of unilateral municipal action, at any time, even sixteen months after Certification was granted and a Developer's Agreement signed with the municipality and endorsed by COAH.

The end result of this assertion could be an apparent default on the part of COAH with regard to its obligation to superintend

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the municipal provision of affordable housing. Further, in the case at bar, a developer who has voluntarily worked with Hillsborough and has relied on the status of its project as a COAH substantively certified site, suddenly risks being denied the opportunity to provide affordable housing to a community due to a sudden unilateral shift in the political winds in that community. This result simply cannot be allowed, given COAH's responsibility for enforcing the constitutional obligation for provision of affordable housing. See generally, Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1 (1986).

Hillsborough Township now seems to argue that it does not favor the extension of sewer service onto the HAAL site because it will destroy the pristine character of the area surrounding the site. This line of reasoning is spurious. HAAL's site is not in the middle of virgin fields; on the contrary, it is near the heavily developed center of Hillsborough. See Exhibits O and P. Surrounding the site is a variety of barriers, including a river, railroads, and major roads. All of these factors combine to set this site off as a unique tract of land. Further, it is not distant from sewer, water and other infrastructure. In fact it is served by sewer and water lines which run right up to and alongside the site. In addition, it is not far from developed Planning Areas as designated in the State Development and Redevelopment Plan ("SDRP"). It borders an extensive growth area which, in fact,

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encompasses a significant portion of the site. Nevertheless, Hillsborough refuses to endorse an extension of sewer service to the HAAL site as it is required to do by both its substantive certification and by the developer's agreement it entered into with respect to the site.

In addition, the site is not literally surrounded by Planning Area 4, as suggested in the map excerpts provided in the appendix to New Jersey Future's appeal. The map provided by New Jersey Future gives a partial view -- the western half -- of the map incorporated in Hillsborough's Housing Element. The full version of that same map is provided in as an exhibit to the Certification of Peter A. Buchsbaum. See Exhibit O. New Jersey Future's version of the map misleads one to conclude that the site is surrounded by the "unspoiled" land of Planning Area 4. The reality of the situation, however, as borne out by the complete map, is that the site is located partially within Planning Area 2, adjacent to the more densely populated portions of the township, most of which have a Planning Area 2 designation. It is not, as New Jersey Future would have one believe, in the middle of nowhere. In fact, by location, the site is close to the Hillsborough Municipal Building and is not far from the junction of Route 206 and Amwell Road, which is the busy hub of Hillsborough. COAH and the Office of State Planning thus easily found that this site is not in a remote rural location.

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The site has discrete boundaries which combine to form a border to it as a development area. Part of the site is bounded by a railroad. Another part is bounded by the South Branch of the Raritan River. Still other areas are bounded by Amwell Road, which is a major road. There is also a greenway surrounding the outlying portions of the site. See Exhibit P. In fact, it is only to the east of the site, in the direction of existing development, that the site has no real logical boundaries. Here the site melds into the existing development pattern.

COAH has the power and the authority to require Hillsborough to seek the water and sewer approvals pursuant to its commitment when substantive certification was granted. See Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. at 57-58. See also In The Matter of the Township of Denville, A-4152-93T3, (App. Div. April 21, 1995), attached as Exhibit T.

HAAL now respectfully submits that the proper action for COAH to take at this time is for it to exercise its authority under N.J.A.C. 5:93-4.3(c)(2) to order Hillsborough to seek the necessary water and sewer approvals to move the PAC/HCF site development along pursuant to the development agreement it executed with HAAL on February 27, 1996. COAH's own February 4, 1998 Resolution Memorializing COAH Decision of October 3, 1997 states, in relevant part:

Hillsborough's grant of substantive
certification contained language requiring

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Hillsborough to continue to comply with the terms of its grant of substantive certification.

See Exhibit Q. COAH has already recognized that Hillsborough has an obligation to comply with the terms of the substantive certification. Hillsborough's actions in refusing to seek the necessary sewer approvals are clearly in contravention of the COAH substantive certification received by Hillsborough. Since COAH has recognized Hillsborough's obligations and the Township steadfastly refuses to abide by its terms and conditions, COAH has no choice but to take the necessary action to ensure the integrity of the certification process by enforcing the substantive certification by ordering Hillsborough to seek the necessary water and sewer approvals for the HAAL site.

B. Hillsborough Cannot Rezone A Property Which Is Included In A Site Which Has Been Granted Substantive Certification By COAH.

In addition to failing to obtain the necessary water and sewer approvals, which it is obligated to do under the terms of its Certification, Hillsborough is also now attempting to subvert the COAH Certification process by changing the zoning of the property in question by repealing its PAC zoning. See Exhibit A. It is unquestionable that a municipality cannot change the terms of an existing Certification by changing the zoning of the underlying property.

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In general, the Supreme Court has held that one cannot invoke the COAH process and then refuse to enforce the results if one is unhappy with them. As the Supreme Court stated:

The Council may have the power, once its jurisdiction is invoked, to require the municipality to pursue substantive certification expeditiously and to conform its ordinances to the determination implicit in the Council's action on substantive certification. While the language of the statute could support a contrary conclusion, that conclusion would allow a municipality to use all of the energies of the Council, presumably for the purpose of determining its Mount Laurel obligation through the Council rather than the courts, all the way up to the point at which substantive certification is about to be determined, and then to withdraw from the matter.

Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. at 57-58.

The Court went on to state that:

It would be beyond the understanding of any citizen if our system of government allowed a municipality, about to conform to the requirements of our Constitution after years of litigation for that purpose, to have its case transferred to an administrative agency, allegedly for the purpose of meeting that same constitutional obligation in a different, yet permissible way, and thereafter, at the last moment, several years later, simply to walk away and say, in effect, "I choose not to comply with either the courts or the administrative agency set up by the Legislature." We believe the Legislature never intended such a result and presume the Council will not permit it.

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Id. This is as true in 1998 in the present case as it was in 1986 with respect to the transfer issue the Court was dealing with in the Hills matter.

In In the Matter of the Petition of Howell Township in Monmouth County for Substantive Certification of its Housing Element and Fair Share Plan, Howell attempted to do this very same thing by rezoning a multifamily parcel for use as a single family development. The property was already subject to a COAH Substantive Certification, and COAH ordered that Howell continue to comply with the Certification, thereby frustrating Howell's attempt to circumvent the COAH Certification process through rezoning.

The situation in the present case is precisely the same, with Hillsborough seeking to accomplish through the zoning process what it has been unable to accomplish through the legal process. The property in question has already been approved as part of Hillsborough's General Development Plan, and Hillsborough is seeking to take it out of the Plan through the use of its zoning power. This violates the terms and conditions of the Substantive Certification which has been granted by COAH. As has already been mentioned, COAH acted in the Howell case to restrain a municipality from taking a property out of a General Development Plan that has already been approved through the use of zoning.

Thus, Hillsborough's action on October 28, 1997 of unilaterally adopting on final reading Ordinance No. 97-28, which

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purports to repeal Section 91.1 (PAC/HCF) of the Municipal Code of the Township of Hillsborough is illegal and is yet another example of the desperate attempts on the part of Hillsborough Township to subvert its own substantive certification. If COAH stands by and allows Hillsborough to contravene its own certification, it will irreparably harm HAAL, which stands to lose its vested rights in its project. Moreover, it will irreparably harm COAH, which will from this point forward find it increasingly difficult to assert its authority to enforce its certifications in the face of political opposition. Ultimately, COAH's inability to enforce its own certifications will render the entire certification process meaningless.

POINT II

BY REQUIRING A WAIVER OF ITS RULES WITH RESPECT TO CENTER DESIGNATION, COAH APPLIED A MORE STRINGENT REQUIREMENT TO THE HAAL SITE THAN WAS DICTATED BY ITS REGULATIONS.

Council on Affordable Housing, before certifying the Hillsborough Plan, requested an opinion from the Office of State Planning as to the applicability of state planning considerations during the process of reviewing Hillsborough's Fair Share Plan for certification. By letter dated January 31, 1996, Herbert Simmens, the Director of the Office of State Planning ("OSP"), responded that his office, which is the administrative arm designated by statute for administering the State Planning Act, had no objection

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to a waiver. In supporting his findings, Mr. Simmens asserted the following:

1. The proposed PAC/HCF is located largely in Planning Area 4 with a small portion (5 percent) located in Planning Area 2. State Plan policy 20 (p28) states 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 area of lowest numerical value." Therefore any center designation for the PAC/HCF would be looked at under the Planning Area 2 policy objectives and criteria. Under the Memorandum of Understanding between COAH and the SPC, sites in Planning Area 2 are required to be located in designated centers.
2. "Hillsborough Village Square" is 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 the Department of Environmental Protection, would not extend very far beyond existing sewer infrastructure.
5. The request to include this site as part of the Township's fair share obligation is made jointly by the developer and the municipality.
6. The representation in your letter that COAH rules regarding the timely filing of a petition for substantive certification by Hillsborough would preclude the granting of a builder's remedy or site specific relief to an objector by COAH.
7. The principle in the COAH/OSP MOU which states that "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."
8. The vigorous plan for acquisition of open space and easements by the Township, Somerset County, a neighboring

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community in Hunterdon County, and Hunterdon County. Consistent with the intent of Planning Area 4 these acquisitions will serve to create an open space green belt including much of the undeveloped lands in proximity to the PAC/HCF.

9. If a center designation petition were filed, I believe a reasonable case could be made that the project could meet many of the criteria for center designation, particularly if incorporated into a somewhat larger community development area. The PAC/HCF appears to meet many of the policy objectives of Planning Area 2. The PAC/HCF is consistent with many of the design characteristics of a planned village, including a range of housing types, sufficient density (well in excess of 3 dwelling units per net acre) and intensity of use, a pedestrian oriented commercial core and green, and adequate internal pedestrian linkages. Commercial and health care related employment is accommodated. The project is identified in local and county plans. Adequate transportation capacity would have to be demonstrated.

See Exhibit R.

Mr. Simmens also noted that the age restrictive nature of the project, even though it had diverse housing types, had not been specifically anticipated in the 1992 State Plan. He suggested that such projects be addressed in the revision to the State Plan, which is now being commenced. Id. Finally, Mr. Simmens advised COAH that he had carefully considered the individual facts relating to this particular situation and his response was based on those individual facts:

It is important to emphasize that my recommendation is based on weighing all the factors involved in this issue and that no single factor is sufficient to be determinative. For example, the fact that a development was approved prior to the adoption of the State Plan would not on its own be sufficient justification to support a waiver, nor would the fact that it was

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identified as a planned village nor that the town and the developer were jointly agreeing on the site. Therefore, my conclusion concerning this request for a center designation waiver should not be viewed as a precedent for a future waiver request by any other municipality.

Id.

Based on these detailed findings, reflecting a great deal of thought, Mr. Simmens advised COAH that the Office of State Planning had no objection to the granting of a waiver of the requirement of Center designation. He further advised that the Hillsborough Plan, with the HAAL site, could be approved by COAH, consistent with state planning principles, even if the HAAL site were not formally designated as a State Plan Center.

On April 3, 1996, the Council on Affordable Housing granted substantive certification in a Resolution. That Resolution specifically referenced Mr. Simmens' letter and also incorporated the findings of fact made in a Compliance Report written by COAH staff. Specifically, in the recitals in its Resolution, COAH found that:

WHEREAS, COAH confirms its support of the State Development and Redevelopment Plan (SDRP) and encourages center designation as set out in the Memorandum of Understanding of October 27, 1992; however, COAH policy states that COAH may waive center designation as per N.J.A.C. 5:93-5.4(c) when a new site meeting a 12-year [affordable housing] obligation was jointly proposed by the municipality and the developer and the site has water and sewer capacity and accessibility and is determined to be available, approvable, suitable and developable; . . .

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The HAAL site met these criteria. The Resolution went on to state:

WHEREAS Hillsborough's waiver request meets COAH criteria for waiver pursuant to N.J.A.C. 5:93-15.1(b) in that the waiver fosters the production of affordable housing, the waiver fosters the intent, if not the letter of COAH rules and the strict application of the rule would work unnecessary hardship as set forth in the COAH Compliance Report dated March 4, 1996; . . .

Implementing these findings, COAH, also in the recitals of its resolution granting approval to Hillsborough, not only granted substantive certification, but specifically imposed the following detailed schedule for the production of affordable housing units:

<u>Market units completed</u> <u>completed</u>	<u>Affordable units</u>
231 (30%)	32 (24%)
462 (60%)	64 (47%)
616 (80%)	96 (70%)
693 (98%)	136 (100%)
707 (100%)	

The Compliance Report, which was incorporated in, and indeed physically attached to the COAH Resolution of Substantive Certification, contains an extensive discussion of the suitability of the site under COAH regulations, as well as its eligibility for a waiver. With respect to the site's availability, developability, suitability, and approvability, the usual requirements for all new construction sites for affordable housing, the Compliance Report found as follows:

1. This is a new site meeting a 12-year obligation and is jointly proposed by Hillsborough and the developer. The PAC development received general development plan approval from the Hillsborough Township Planning Board in 1991, prior to the adoption of the SDRP in June 1992.

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The township proposed this new site in its 1995 housing element and fair share plan to address its second round affordable housing obligation. The municipality and the developer have drafted a developer's agreement for 135 (sic) affordable housing units at this site that will address the township's 12-year inclusionary obligation.

2. The site has water and sewer. Public water service will be provided by the Elizabethtown Water Company and the entire tract is within the sewer service area of the Hillsborough Township Municipal Utility Authority. The tract is included in the Somerset County Waste Water Management Plan which is under review by the New Jersey Department of Environmental Protection (DEP). Upon DEP approval, sewage from the tract will be carried to the Somerset Raritan Valley Sewerage Authority regional wastewater treatment plant in Bridgewater Township.

3. The site is available. As per the definition in N.J.A.C. 5:93-1, the owner/developer of the PAC has acquired clear title or has a contract interest for the site, free of encumbrances.

4. The site is approvable. The PAC site first received general development plan approval in 1991. On December 7, 1995, it received approval of an amended General Development Plan by the Hillsborough Township Planning Board that reduced the total number of potential units from 11,000 to 3,000.

5. The site is suitable. It is adjacent to compatible land uses such as the municipal complex, the library, police department and the YMCA. It has vehicular access via Amwell Road, River Road and Mill Lane. It has no environmental constraints which would prevent development of the site at 3,000 units.

6. The site is developable. As stated above, public water service will be provided by the Elizabethtown Water Company and the entire tract is within the sewer service area of the Hillsborough Township Municipal Utility Authority. The tract is included as an amendment which is under DEP review.

See Exhibit S. In addition, the Compliance Report made detailed findings with respect to the proposed waiver of formal designation

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of the site as a Center. The Report went into detail on three specific findings of fact with respect to the grant of a waiver:

1. The waiver fosters the production of affordable housing. The site not only provides for all of Hillsborough Township's new 12-year cumulative obligation but the developer has agreed to provide an additional 15 percent of affordable units for Hillsborough's future fair share obligations. This provision is contained in a signed agreement between Hillsborough Township and the developer which resulted from the mediation process.

2. The waiver fosters the intent, if not the letter, of COAH's rules. COAH'S rules regarding center designation in Planning Areas 4 and 5 were based upon an understanding that sites in Planning Areas 4 and 5 did not have infrastructure. After adoption of the rules, COAH learned that this was not accurate and subsequently a meeting between representatives from COAH, the Office of State Planning (OSP) and the State Planning Commission (SPC) took place in the fall of 1994. At that time it was agreed that COAH would not amend its rules with regard to Planning Areas 4 and 5 but would offer a waiver to towns that fell into two specific categories (see attached policy memo, Exhibit B). The Hillsborough site falls into category 2. The policy was articulated at COAH's December 1994 meeting and published in the COAH newsletter. The waiver request meets the criteria of COAH's articulated policy and fosters the intent and pronounced letter of COAH's rules.

3. The strict application of the rule would create an unnecessary hardship. COAH first learned of Hillsborough's PAC site in June 1991 in a letter forwarded to COAH's executive director. The township has been proceeding in good faith to ensure that the site will meet COAH's regulations and policy so it could be included in Hillsborough's 12 year plan. The Hillsborough Township governing body

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petitioned COAH for substantive certification and the petition contained the PAC site. There was a 45 day period for objectors to file with COAH and the township. One objector did so and at the end of mediation, there were no contested issues of fact. The mediation report was presented at the February 1996 COAH meeting. The many reasons to now grant substantive certification are listed in this report. To not waive N.J.A.C. 5:93-5.4(c) would clearly create an unnecessary hardship.

Id. It should be noted that these findings not only dealt with the present obligation, but also with the developer's commitment to provide 450 units over full build out as well. See Finding #1, supra. Finding #2 merely states what is the case here, namely that some tracts of land identified as rural in the State Plan do have access to water and sewer facilities, and thus could efficiently make use of same. In its third finding, COAH stated that Hillsborough's Plan, which was voluntarily submitted in the absence of litigation, was one which should be encouraged in order to foster affordable housing. COAH went on to state that there were so many reasons to grant substantive certification that to deny Hillsborough's request for same would be an interference with the production of such housing where there was a municipal blessing.

In addition to these detailed findings, the COAH report set forth ten specific principles as contained in the Memorandum of Understanding between COAH and the State Planning Commission. The report then recited how the housing plan addressed each of these. Id. Although all ten principles were addressed, the most extensive

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comments were made with respect to principles #3 and #4, set forth below, which thoroughly and in detail recited not only that the site was within two Planning Areas, but also that "a site visit and review of technical data reviewed no such [environmental] constraints," and that "infrastructure may be easily extended to the site as it is in close proximity." Id.

The compliance report's specific findings with respect to the planning and environmental character of the HAAL site and the Hillsborough Plan, and its comparison of the State Plan, included the following:

3. COAH has considered the SDRP's Resource Planning and Management Map. COAH is also aware of SDRP's concern regarding infrastructure availability and environmental sensitivity. COAH's review of the Hillsborough plan indicates that the site is within two planning areas and that there is an SDRP plan 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. COAH is sensitive to environmental constraints and in fact has rules that address this issue. A site visit and review of technical data reveal no such constraints. In addition, infrastructure may be easily extended to the site as it is in close proximity. The site is in the Somerset County Wastewater Management Plan and is awaiting DEP approval. COAH understands that Somerset County is supportive of the amendment and DEP expects to move on the plan this year.

Id. COAH also found consistency with the goals, objectives and policies of the SDRP as follows:

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4. This site is not inconsistent with the goals, objectives and policies of the SDRP. The site is within two planning areas; the site will maximize existing infrastructure in that such infrastructure may be easily extended to the site and the site has been reduced from the potential to yield 11,000 units to a more compact 3,000 units.

Id. Based on all these findings, the staff concluded:

For all the above reasons, COAH's staff recommends granting of a waiver of N.J.A.C. 5:93-5.4(c) regarding center designation. . . .

Id.

The Order on Motion from the Appellate Division in this case states that COAH should address the issue of whether N.J.A.C. 5:93-5.4(c) or N.J.A.C. 5:93-5.4(d) governs this case. A simple review of the facts reveals that N.J.A.C. 5:93-5.4(d) controls in the present case. N.J.A.C. 5:93-5.4(d) specifically applies to "municipalities that are divided by more than one planning area." Hillsborough clearly is such a municipality. Both the skewed State Plan map submitted by New Jersey Future in its appeal of the COAH substantive certification, and the actual map attached as an exhibit to the certification of Peter A. Buchsbaum show this to be the case. See Exhibits O and P. Hillsborough is in fact a community that includes a multiplicity of Planning Areas.

It should be noted that HAAL has had its engineer check the maps to determine the proportion of land in Planning Area 2, 4 and 5. In fact, some 8.7% of the HAAL site is in Planning Area 2. Moreover, less than 1% of this site is in Planning Area 5. See

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Certification of Robert B. Heibell, Exhibit A. In sum, to the extent the Planning Areas are important, the relevant facts are that the HAAL site is substantially adjacent to Planning Area 2, that almost 10% of the site is located within Planning Area 2, and that the site was identified as a Center in the SDRP itself. Id.

With respect to municipalities divided by more than one Planning Area, the unchallenged COAH regulations state as follows:

1. The Council 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.

N.J.A.C. 5:93-5.4(d). This provision clearly says only that COAH shall encourage, and only "may require," the use of sites in Planning Areas 1 and 2 in mixed communities like Hillsborough. Further, even such encouragement is only to be applied where sites in Planning Areas 3, 4, and 5 lack sufficient infrastructure. The HAAL site clearly does not lack sufficient infrastructure because it is serviced by a county road system, and existing sewer facilities and water facilities go right up to and along the site.

Further, the third subparagraph of N.J.A.C. 5:93-5.4(d) states as follows:

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.

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Id. This regulation provides a positive endorsement for the HAAL site and the Hillsborough Plan. Infrastructure does not have to be extended to the site. It already exists. Therefore, it is just the kind of site whose use COAH is supposed to encourage according to the COAH regulations which deal with State Plan issues.

In sum, N.J.A.C. 5:93-5.4(d) supports COAH's action here as not only being consistent with the State Plan principles contained in the COAH regulations, but actually encouraged by them. To the extent that COAH went an extra step and required a waiver under N.J.A.C. 5:93-15.1, it was justified in granting same, since its own regulations clearly anticipated and approved of project sites such as the HAAL site in a community like Hillsborough, which is bisected by several Planning Areas.

Thus, there can be no question that N.J.A.C. 5:93-5.4(d), which deals with municipalities divided by more than one Planning Area is the appropriate section to govern this case. The simple fact is that not only is Hillsborough divided by more than one Planning Area, the HAAL site itself is divided by more than one Planning Area! Therefore, the waiver of center designation by COAH was superfluous, since center designation was never required for this site.

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POINT III

HAAL IS ENTITLED TO A BUILDER'S REMEDY BECAUSE HILLSBOROUGH HAS NOT LIVED UP TO ITS OBLIGATIONS UNDER THE DEVELOPER'S AGREEMENT TO SEEK PLANNING AREA 2 DESIGNATION FOR THE HAAL SITE.

The Developer's Agreement between Hillsborough and HAAL, adopted pursuant to the approved General Development Plan and N.J.S.A. 40:55D-45.2(1), which authorizes such agreements, states that Hillsborough will cooperate with HAAL in obtaining Planning Area 2 (Suburban Development with sewers) designation, since the site:

Having been reviewed by the Office of State Planning (OSP) and the assurance given to COAH by OSP that during [the] 1996 cross acceptance process for the State Development Plan at the PAC site in Planning Area 4 [it] will be recommended for inclusion in Planning Area 2. This inclusion would not prohibit the approval of sewers by NJDEP but rather encourages such infrastructure.³

See Exhibit B. The Agreement is dated February 27, 1996. No appeal has been taken with respect to this Agreement, or the amended GDP approval on which it was based, even though the time period for such appeals elapsed two years ago.

It is evident that the HAAL site has vested development rights. These rights were first conferred upon HAAL by the

³ The Developer's Agreement also provides for the eventual build out of 450 low and moderate income units. See ¶5, Exhibit B, stating that 15% of the total build out, or 450 units, must be low or moderate income.

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January, 1992 Resolution of the Planning Board granting HAAL General Development Plan approval. See Exhibit A. These rights were extended for a period of an additional five years by the Resolution of the Planning Board of December, 1995, giving HAAL such rights to the year 2000. Id.

In addition, these was further confirmation of these rights with the Township governing body through the adoption of the Developer's Agreement. See Exhibit B. This Agreement spelled out HAAL's obligation to proceed with its 3,000 unit approval, in addition to its rights to 136 low and moderate income units, which would produce 160 units of credit, and eventually 450 units of affordable housing overall. Id. Thus, through no fewer than three separate municipal acts, HAAL has vested rights to proceed with its development. None of these acts state that such rights are dependent on eventually receiving COAH certification; rather, they are absolute grants of vested rights pursuant to the Municipal Land Use Law. These are grants which, in effect, date back to the period before the State Plan was adopted.

No appeal was ever taken from these grants of rights. Thus, they are not the subject of any potential challenge in any Court. The rationality of the COAH certification thus must be judged, in part, in terms of these extant vested right commitments to the HAAL site, in addition to the usual factors applicable to a COAH certification.

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In sum, notwithstanding COAH's and OSP's detailed and even painstaking findings regarding this particular site, in addition to all of the other factors enumerated above, New Jersey Future has challenged COAH's action as irrational. That challenge is the subject of the within appeal.

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CONCLUSION

For all of the aforementioned reasons, COAH should enforce its Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County.

Respectfully submitted,

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