Hillsborough Litigation 3/16/98

Letter on behalf of NJ Future, Inc. in response to COAH's order to show cause

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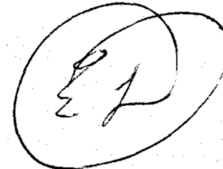

March 16, 1998

VIA HAND DELIVERY

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

RE: IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,
SUBSTANTIVE CERTIFICATION 31-99,
COAH DOCKET NO. - COAH 97-905.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO. A-005349-95T2

Dear Ms. Bishop:

This letter is being submitted on behalf of New Jersey Future, Inc. in response to the Order To Show Cause issued by the Council on Affordable Housing (hereinafter "Council" or "COAH") on February 5, 1998 seeking written submissions from all parties to the above appeal.

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PRELIMINARY STATEMENT

Many things have changed since Petitioner New Jersey Future appeared before the Council, almost exactly two years ago, to urge that the Council not approve Hillsborough Township's petition for substantive certification. We urge the Council to take notice of the significant events of the intervening months, to take guidance from those events, and to use this opportunity of hindsight to correct the errors of two years ago. If the Council does so, not only

can affordable housing soon be built in Hillsborough, in fulfillment of the Councils' statutory and constitutional mission, but the ultimate outcome of this case will provide a model for integrating housing goals into the aspirations of the State Development and Redevelopment Plan, that New Jersey become the most *livable* state in the nation, for *all* of its citizens.

In mentioning the things that have changed over the last two years, we of course have most immediate reference to the actions of Hillsborough Township, which has, by word and deed, effectively repudiated the plan for which it sought certification. Everything that the Council does from now on must be done in the light of the fact that Hillsborough has had its chance, and is no longer entitled to the luxuries of deference and delay. If Hillsborough is to have a second chance, it can only be a chance to execute a plan that is guaranteed to work, to work immediately, and to work within the mandates of the State Plan.

On a larger, and more positive scale, we also ask the Council to take note of its own subsequent decisions, specifically *Tewksbury*. Without minimizing the areas of disagreement that may still remain as to that decision or others to come in the future, the modest step taken in *Tewksbury*—requiring that it apply for a center designation—makes it impossible as a matter of public policy to adhere to the original decision in *Hillsborough*, insofar as that decision simply waived the "centers" requirement altogether. COAH, to its credit, has apparently sought to learn from the Hillsborough debacle, and it would be ironic in the extreme if only Hillsborough could

not profit from that experience.

Finally, and perhaps most importantly, we ask that the Council take careful note of Governor Whitman's stirring endorsement of the State Development and Redevelopment Plan in her Second Inaugural Address, delivered in Newark on January 20, 1998. New Jersey Future is realistic about the level of skepticism that must be overcome whenever broad-scale public planning is attempted; overcoming such skepticism is our mission. We also understand that lip service can be—and certainly has been—paid to vague and unenforceable concepts such as "good planning." In her inaugural speech, the Governor made plain that she was not a skeptic, that she intended that her Administration not act skeptically, and that she was not paying lip service to the SDRP:

> Every part of New Jersey suffers when we plan haphazardly. Sprawl eats up our open space. It creates traffic jams that boggle the mind and pollute the air. Sprawl can make one feel downright claustrophobic about our future.
>
> Fortunately, New Jersey already has a strategy to deal with these problems. It's called the State Plan—a blueprint for redeveloping cities, relieving congestion, and containing sprawl. These are all goals we want for New Jersey.
>
> So let's enable municipalities to reach these goals. Let's help them to remain places in which we want to live and can afford to live. Let's give towns a better way to plan their futures.
>
> * * *
>
> I have already directed my Cabinet to use the State Plan as a fundamental guide in making permit and funding decisions. Today I am further directing them to give priority to applications that meet the Plan's goal of developing where

infrastructure is already in place.[1]

For New Jersey Future, this case has never been about housing, but about sound planning, and the processes by which sound planning decisions are to be made. Putting aside all the technical legal manipulation of the applicable regulations, the bottom line of the prior Hillsborough certification was that it permitted a sprawl development, in total derogation of the basic policy of the State Plan. The same housing goals could have been achieved then—and still can be achieved now—without busting the state plan, by, as Governor Whitman has instructed her Cabinet, "giv[ing] priority to applications that meet the Plan's goal of developing where infrastructure is already in place." We urge the Council to take up the Governor's call. The Council can be confident now, if it was not before, that the time of the State Development and Redevelopment Plan has arrived.

With these preliminary thoughts in place, we now turn to the specifics of the remanded Hillsborough case.

THE REMAND ORDER.

The Appellate Division's remand order in this case is in two parts. First, the Council is directed to consider the status of the Hillsborough Substantive Certification in the light of the

[1] The text of the Governor's 2d Inaugural Address can be found on the Internet at http://www.state.nj.us/inaug/inaugtxt.

supplemented record. The record as supplemented since the Council's initial decision in April, 1996, now includes facts subsequently known about the Township's repudiation of the Planned Adult Community/Health Care Facility ("PAC/HCF" or "Adult Community") site as its primary compliance strategy. Second, the Council is also specifically directed to consider the applicability of N.J.A.C. 5:93-5.4(c) and 5.4(d) to the validity of the Hillsborough substantive certification. Implicit in this second part of the mandate is an invitation to the Council to reevaluate the legal basis on which the substantive certification was initially granted, quite apart from the force of subsequent events.

Since the prior substantive certification cannot withstand review on either of the two grounds to which inquiry is directed by the Appellate Division, pursuit of either inquiry would be sufficient to reach the conclusion urged by New Jersey Future, namely, that the prior substantive certification be rescinded. If the Council first considers the post-certification facts and, against New Jersey Future's urging, declines to rescind on that basis, then the Appellate Division order mandates that the Council must go further, and reconsider the legal basis for the initial certification. We consider the two inquiries in this order, on the assumption that the Council will prefer to proceed this way, but we would be equally prepared to argue the points in reverse order if the Council so wishes.

THE COUNCIL SHOULD RESCIND HILLSBOROUGH'S SUBSTANTIVE CERTIFICATION

One of the remedies specified in COAH's regulations is the revocation of substantive certification. N.J.A.C. 5:93-10.5 provides as follows:

> A Council determination after a hearing conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-l et seq., that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development may result in Council action revoking substantive certification.

The first action that the Council should take as a result of its Order to Show Cause proceeding can hardly be in doubt. Hillsborough, in its briefing and by its actions, has effectively repudiated the Housing Element and Fair Share Plan that was certified by the Council on April 3, 1996 and that plan is no longer entitled to certification.[2] The Attorney General, on behalf of the Council, has repeatedly and succinctly summarized the *facts* which demonstrate that the Hillsborough Plan, such as it was, has collapsed. These *facts*, which we will

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[2] New Jersey Future appealed the Council's original decision to grant substantive certification in April, 1996. It adheres to its argument before the Appellate Division that the original certification should not have been granted by the Council, and it would welcome the Council's acknowledgement that the original certification was wrong. Doing so, of course, would resolve the present question. For present purposes, however, it is not necessary to reach these issues. The Order to Show Cause can be resolved by focusing on whether, *at the present time*, the Substantive Certification granted to Hillsborough Township, creates a constitutionally and statutorily mandated realistic opportunity for production of low and moderate income housing in the Township. It clearly does not.

summarize below, are not in dispute. Given that the facts demonstrating that there is no longer a realistic opportunity for the Adult Community site to meet Hillsborough's fair share needs are undisputed, there would appear to be no need for a hearing pursuant to the Administrative Procedure Act. Thus, the Council should, pursuant to N.J.A.C. 5:93-10.5, rescind the substantive certification granted to Hillsborough on April 3, 1996.

Among the facts not in dispute that have occurred over the past two years and which significantly diminish the realistic opportunity that the Adult Community site will be available to meet Hillsborough's affordable housing needs, are the following: The Township has withdrawn support for inclusion of the Adult Community site in the Somerset County/Upper Raritan Watershed Wastewater Management Plan (SC/URW WMP). Hillsborough Township adopted a resolution dated June 25, 1997, deleting the Adult Community site from the SC/URW WMP. DEP is currently reviewing an amendment to the SC/URW WMP submitted by Somerset County that includes Hillsborough, but does not include the Adult Community site. See NJDEP Public Notice, 29 N.J.R. 4340 (October 6, 1997). The NJDEP Public Notice describes the status of the Adult Community site as follows:

> Hillsborough Township is presently reviewing its land use, zoning and sewerage needs relative to the Planned Adult Community/Health Care Facility Zone (PAC/HCF) [the Adult Community proposed development] . . . . The Township Committee has, by resolution dated June 25, 1997, indicated that the PAC/HCF zone should not be included in the SC/URW WMP. As such, the county has indicated in the WMP that Hillsborough is reviewing these areas with regard to providing for sanitary sewer

service and these areas will remain as areas for groundwater disposal facilities with design flows of less than 2,000 gpd until such time as the WMP is amended, if necessary to reflect Hillsborough's land use decisions.

Considerable public opposition has been voiced regarding a proposed project within the PAC/HCF Zone of Hillsborough Township. Although the developer has petitioned the Department to include the project in the SC/URW WMP, the Department is processing the WMP in its present form in deference to the need to finalize and ultimately adopt the SC/URW WMP so that components of the plan important to other municipalities not be delayed if at all possible. The SC/URW WMP will have to be amended after its initial adoption to include the affected zone which will result in a future public notice and public hearing exclusively for these issues. The Department is requesting that comments on the PAC/HCF Zone and/or project be withheld until the public comment period and public hearing for those specific issues.

[29 N.J.R. 4340-41 (October 6, 1997)]

It is clear from the foregoing that the New Jersey Department of Environmental Protection ("NJDEP") is not even considering the WMP for the Adult Community site at this time, and does not intend to until it has completed work on the county plan that does not include the site. To date NJDEP has not even issued a public notice to begin consideration of a wastewater management plan amendment that includes the Adult Community site. NJDEP's posture is explicitly the result of Hillsborough's action of withdrawing support for the Adult Community site. Thus, the absence of an approval from NJDEP for the developer to send wastes from the site to the regional sewage treatment plant prevents this site from providing a reasonable opportunity for affordable housing in the foreseeable future. The fact is that the

Adult Community project may not proceed without an approval from NJDEP of a Water Quality Management Plan that includes the Adult Community site. See Ab53-55. Without such approval, the developer has no authority to dispose of sewage from the site into the regional sewer collector network.

THE COUNCIL SHOULD ORDER HILLSBOROUGH TO SUBMIT AN AMENDED PETITION FOR SUBSTANTIVE CERTIFICATION

Subchapter 13 of the Council's procedural regulations broadly provide for amendment of substantive certifications. See N.J.A.C. 7:91-13.1-13.6. For example, N.J.A.C. 5:93-13.1(a) provides in part that "[a]mendments may be required by the Council as a result of facts that were not apparent at the time of substantive certification." At the time of the Hillsborough substantive certification in 1996, the Council apparently believed (unwisely, in New Jersey Future's view) that Hillsborough would proceed expeditiously to obtain sewer approvals. The new facts demonstrate that this confidence was unwarranted, and the Council can now, after taking the appropriate procedural steps, require that the plan be amended. A municipality seeking significant changes in its substantive certification must do so by filing a petition for such an amendment. N.J.A.C. 5:91-13.1(b). If Hillsborough refuses to do so, of course, the Council can then rescind the Certification altogether, leaving the town vulnerable to a builder's remedy lawsuit and transferring all the same issues to a trial court.

New Jersey Future reiterates its position that it does not favor any particular means of

meeting Hillsborough's fair share obligation, so long as the approach is consistent both with the SDRP and the *Mount Laurel* doctrine. We are, of course, aware that an apparently realistic site was initially proposed by an objector, located in Planning Area Two, where development at suburban densities is appropriate and were sewer service is already authorized. Casual inspection of Hillsborough's pattern of development suggests that there probably are other Planning Area Two sites that would be plausible. Nor would New Jersey Future want to be understood as insisting that Hillsborough must meet its obligation using inclusionary zoning. Indeed, strictly from a state plan perspective, compliance methods that use less land (or none at all) and use small areas of land as intensively as possible to achieve targeted policy goals, such as affordable housing, are to be preferred to lower-density, large area solutions. But all of that is, certainly in the first instance, for the township and the Council to consider.

We do urge, however, that one serious qualification must be imposed by the Council if there is to be another round of deference to municipal planning in this case. This is not Hillsborough's first try, and by its vacillation and changes of course, it has significantly delayed the realization of its 1993-99 affordable housing obligation, compared to what could have been accomplished had it gotten it right the first time. It goes without saying that the township must be given a strictly limited period (such as sixty days) within which to propose a plan amendment. But more than that, the Council must make it clear to Hillsborough that its

open-ended policy of deference to municipal choices [N.J.A.C. 5:93-5.1 (allowing municipality to develop its own plan)] cannot be applied in the face of the considerable delay that has occurred. Hillsborough must propose a plan that is capable of being implemented immediately. If the plan involves new development, the site or sites must be immediately approvable in terms of zoning and infrastructure, and they must be compatible with the SDRP so that no further planning issues arise. There must be a developer (profit or non-profit, as the case may be) ready, willing and able to proceed promptly, and any proposed subsidies (e.g. donation of municipal land) must be realistically and promptly available. These are, in effect, the criteria already in place in the Council's regulations, [N.J.A.C. 5:93-5.3 to -5.5] except that they must be implemented without the Council's typical willingness to be flexible in order to encourage municipal compliance. It goes without saying that, in this approach, the "readiness" criteria are not waivable under N.J.A.C. 5:93-15.1.

BOTH N.J.A.C. 5:93-5.4(D) AND N.J.A.C. 5:93-5.4(C) GOVERN THE ADULT COMMUNITY SITE

Under the second part of the Appellate Division's mandate, the Council must consider the applicability of N.J.A.C. 5:93-5.4(c) and 5.4(d) to the Hillsborough certification. The heart of New Jersey Future's objection to the prior certification of Hillsborough's fair share plan was its failure to respect the centers policies of the State Development and Redevelopment Plan. Sections

5.4(c) and (d) embody COAH's formal, regulatory embrace of the SDRP centers' policy. Therefore, the court's mandate to carefully evaluate the relevance of these provisions implicitly directs COAH to reconsider the theory on which it granted substantive certification to Hillsborough.

N.J.A.C. 5.4(c) requires that compliance sites in Planning Areas 4 and 5 be located in a designated center. It is undisputed that the Adult Community site is primarily located in Planning Areas 4 and 5 (90.8% and 0.5% respectively)[3], and that it has not been designated a Center by the State Planning Commission. The developer Hillsborough Alliance for Adult Living (HAAL) suggested, before the Appellate Division (HAAL brief at p. 42), that §5.4(*c*) is inapplicable to this case, because §5.4(*d*) governs. N.J.A.C. 5:93-5.4(d) provides that when a municipality lies in more than one planning area, it "*must* encourage" and "*may* require" use of sites in Planning Areas 1,2 and 3 before sites in Planning Areas 4 and 5 [emphasis added]. Out of the word shift from "must" to "may," HAAL apparently spins the argument that COAH regulations impose no limits at all on use of Planning Areas 4 and 5. This argument is unsupportable.

The first point to be noticed is that there simply is no inconsistency between §§5.4(c) and (d); neither the Council nor the Court need choose between them, as HAAL seems to think. Logically, however, they need to be read in reverse order. First, §5.4(d) *requires* that use of

[3] See page 1 of Appendix to Hillsborough Alliance for Adult Living (HAAL)

Planning Area 1,2 and 3 sites be "encouraged." Once this threshold step has been satisfied, §(d) then *permits* (but does not require) consideration of compliance sites found in Planning Areas 4 and 5, sites which are, by definition, more sensitive in planning terms and therefore less appropriate in the first instance than Planning Areas 1, 2, and 3 sites.[4] Moreover, if the municipality is permitted to advance a Planning Area 4/5 proposal (presumably because efforts to "encourage" compliance in PA 1/2/3 have failed), then §5.4(c) *requires* that the compliance site be located in a center. Thus, the two provisions mesh smoothly around the requirement that Council-certified compliance plans carefully respect the policies of the SDRP.

In order to implement §§5.4(c) and (d), they must therefore be applied in the logical sequence we have suggested. First, the municipality *must* encourage the use of compliance sites in Planning Areas 1, 2 or 3. The record demonstrates that Hillsborough utterly fails this test. COAH's compliance report and resolution granting substantive certification make plain that the township gave *no* substantive reason why the PA 2 site offered by the objector, Anatole Hiller, was unsuitable. Indeed, the record is barren of any evidence that Hillsborough gave *any* consideration to compliance sites in the part of Hillsborough located in Planning Area 2, nor did COAH require that it do so. As a matter of law, we submit, Hillsborough failed to "encourage"

Appellate Division brief dated July 3, 1997.

[4] The municipality may require use of Planning Areas 1-3 sites as an alternative to using Planning Areas 4 or 5.

plan-sensitive compliance as required by §5.4(d).

The only way Hillsborough can avoid the plain meaning of the text of §5.4(d) is if "encourage" includes the discretion to do nothing at all. Apart from the general proposition that regulatory words should not be given meaningless or vacuous constructions,[5] courts have specifically recognized that the word "encourage" connotes an obligation to "promote or advance" some goal or purpose. See *State v. Blount*, 60 N.J. 23, 27, 286 A.2d 36, 38 (1972)(citing dictionary meaning). In *Lusardi v. Curtis Point Property Owners Association*, 86 N.J. 217, 430 A.2d 881 (1981), for instance, the Supreme Court had before it a case in which a municipality sought to use its zoning powers, delegated through the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.*, to restrict beachfront access in a way that was inconsistent with the state's CAFRA regulations, see N.J.A.C. 7:7E-1.1 *et seq.*, but the Coastal Areas Facilities Review Act, N.J.S.A. 13:19-1 to -21, had not clearly preempted inconsistent local action. Noting, however, that the MLUL includes a statutory mandate that the delegated powers be used "to encourage the most appropriate use of land," N.J.S.A. 40:55d-62(a), the Supreme Court held that in order to "encourage" the most appropriate use of land, the municipality must use its delegated powers consistent with pertinent state policies. Having failed to do so in *Lusardi,* municipal decisions that

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[5] New Jersey Carpenters Apprentice Training and Education Fund v. Kennilworth, 147 N.J. 171 (1996); State v. Reynolds, 124 N.J. 559, 564 (1991).

were otherwise presumptively valid were set aside.[6] Here, it is COAH, a statewide agency with power to regulate municipal fair share plans, that has mandated "encouragement" of a statewide policy, embodied in the state plan. Hillsborough failed to do so and its proposal should not have been approved.

Because, in our view, compliance with the "encourage" provision of §5.4(d) is a threshold requirement that must be satisfied before §5.4(c) comes into play, and the unambiguous record demonstrates that Hillsborough did not "encourage" compliance in Planning Area 2, the Council should not have permitted Hillsborough to even propose a Planning Area 4 and 5 site. This conclusion is dispositive. But even if, for sake of argument, we assume that Hillsborough was able to demonstrate that Planning Areas 1-3 sites were unsuitable or that the owners could not be encouraged to develop them (on the record, this assumption is patently incorrect), this only means that Hillsborough is entitled under the regulations to propose a Planning Area 4 or 5 site. Having done so, it must then comply with the requirements of §5.4(c); there can be no inference that having passed through the §5.4(d) screen, the municipality's choice of a Planning Area 4 site *must* be approved by COAH. Section 5.4(c) clearly requires that any such site must be located

[6] *See also, In the Matter of Egg Harbor Associates (Bayshore Center)*, 94 N.J. 358, 371, 464 A.2d 1115, 1122 (1983)(reaffirming the Court's decision in Lusardi that local planning decisions must be consistent with statewide policies concerning land use and resource allocation).

in a designated center. It is conceded that this unambiguous requirement has not been met by Hillsborough.

THE COUNCIL SHOULD NOT ORDER HILLSBOROUGH TO RESUSCITATE ITS NOW-REPUDIATED PLAN

The Council should not order Hillsborough to comply with its now-repudiated plan, as has at times been suggested by the developer HAAL, the only party who stands to gain anything from reviving the former plan.[7] On the very face of it, this is not a workable approach, because Hillsborough's repudiation of the former plan has been so complete and total. It has repealed the overlay zoning that includes the inclusionary zoning for the site. It has also blocked consideration of a sewer extension to the site by NJDEP; without sewers and

[7] Under *Alexander's Department Store v. Borough of Paramus,* 125 N.J. 100 (1991), the Council lacks general jurisdiction over land use issues, even those essential to the implementation of a substantively certified plan. HAAL has now filed two actions in Superior Court raising "generally applicable" questions of law regarding Hillsborough's land use ordinances, and the effect of its claim of vested rights on Hillsborough's power to repeal the PAC/HCF overlay zoning. U.S. Home Corp, Hillsborough Alliance for Adult Living, L.L.P., et al v. Township Committee of the Township of Hillsborough, Superior Court of New Jersey, Law Division, Docket No. SOM-L-1239-97 PW filed on July 29, 1997, and Hillsborough Alliance for Adult Living, L.L.P. v. Township of Hillsborough, Superior Court of New Jersey, Law Division, Docket No. SOM-L-247-98 PW filed on February 9, 1998. Whatever the merits of those Complaints regarding Hillsborough's authority to adopt its own ordinances, the Superior Court is the proper forum under Alexander's for resolving them. Similarly, the Council does not have jurisdiction to order Hillsborough to approve amendments to its wastewater management plan. The two Complaints that HAAL has filed in Superior Court both raise this issue as well. If any relief on any of these complaints is available to HAAL, the court is the appropriate forum for that relief. It cannot be granted by the Council under the guise of "enforcement."

zoning, there is no chance that the Mount Laurel units in the proposed HAAL development can be built within a "realistic" time frame mandated by Mount Laurel II and the Fair Housing Act.

An order now forcing Hillsborough to "comply" with its former plan would be tantamount to forcing the town to participate in the COAH process against it will, in direct contradiction of the express provisions of the Fair Housing Act that make participation voluntary. The plain language of the Fair Housing Act only gives the Council the power to grant or withhold certification. The Fair Housing Act outlines a cooperative scheme under which municipalities, the Council and other interested parties develop a certifiable plan. The municipality initiates this process by voluntarily applying to the Council for certification. Public comment is invited. If there are objections to substantive certification, the matter goes to mediation. Only if mediation is unsuccessful, is it transferred to an Administrative Law Judge to be heard as a contested matter. The whole scheme of the Act characterizes the Council as a resource to facilitate a municipality's Mount Laurel compliance, not as a process for the Council to direct municipal actions.[8]

[8] This tension between enforcement and the voluntary participation provision of the Fair Housing Act is one reason why we are uncertain whether COAH does indeed have the authority to enforce its substantive certifications. The issue need not be raised here if, as we urge, the Council concludes that it is inappropriate in any event to enforce the Hillsborough plan at this point. Thus, we are willing to assume the existence of some kind of enforcement power for the

The New Jersey Supreme Court, interpreting the language of the Fair Housing Act in *Hills Development Co. v. Bernards* 103 N.J. 1, 57-58 (1991), noted that a municipality may withdraw from the Council's jurisdiction at any time. Thus, a municipality may use the energies of the Council to determine their Fair Share obligation. They may use the procedures and guidelines of the Council to craft a suitable plan. But, in the end, that municipality may withdraw from the Council, even when substantive certification is imminent. Ibid

The cooperative scheme of the Act provides a strong incentive for a municipality to use the Council's expertise. The municipality retains ultimate control over its plan and it receives valuable guidance from the Council about what constitutes an adequate plan. The incentive to use the Council is heightened by the Council's ability to certify a municipality's plan. A plan which is certified by the Council is presumed to satisfy Mount Laurel obligations. Hills, 103 N.J. at 35. A municipality with a certified plan is "relieved of the uncertainties and potential burdens of Mount Laurel litigation." Ibid. It was this cooperative interpretation of the Act that led the Hills Court to state, "[t]he basic power of the Council is

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sake of argument. We note that it would be difficult for the Council to assert a broad power of enforcement in the absence of specific regulations putting municipalities and other interested parties on notice as to the scope of such an enforcement power, particularly in light of the current regulation which, fairly read, announces that the *only* enforcement power claimed by COAH is the power to rescind a substantive certification.

to grant or withhold substantive certification." Hills, 103 N.J. at 56. Additionally, the Council may "impose conditions on its grant [of substantive certification]." Ibid. This indirect power over local legislation is the extent of the Council's power. It is illogical to give the Council both the indirect power to condition certification upon certain municipal actions and the direct power to impose those same actions. A power to impose actions upon a municipality is not aligned with the statutory scheme.

Thus, Hills strongly supports an interpretation of the Act that gives COAH the power to enforce substantive certification by rescinding certification if circumstances warrant. The Court did recognize a narrow exception under which the Council might have power to order compliance with a substantive certification rather than rescission, but that narrow exception is not applicable to Hillsborough. Dealing specifically with the "special class" of cases that had been pending in the Superior Court prior to the adoption of the Fair Housing Act, and which were subject to being transferred to COAH, the Supreme Court found that it would violate the legislative intent behind the Act, and frustrate public policy, if those cases were allowed to transfer from the courts to the Council and then the municipalities were simply allowed to walk away without complying with either the courts or the Council. Ibid. It was the considerations of this "special class"of cases which led the Court to announce a second interpretation of the Council's power. "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." Id. at 57 (emphasis added).

Obviously, the Court's narrow exception in Hills is literally inapposite, since we are now more than a decade past the transition problem that the Justices were addressing; Hillsborough is not a case seeking transfer from Superior Court to a newly-created administrative agency. But even if one were to extrapolate from the equitable underpinnings of the narrow exception recognized in Hills (which we doubt a court would do, given the tension we have already noted between voluntary compliance and mandatory enforcement), Hillsborough would not satisfy the tests articulated by the Supreme Court.

The "special class" in Hills included cases which: were in litigation for a considerable period of time; produced considerable litigation expense; involved complex proceedings; were close to an ultimate disposition; and were likely to produce lower income housing. Ibid. Of particular relevance are the final two characteristics of the Hills "special class," namely that the cases be close to an ultimate disposition and that it be likely to produce lower income housing. Id. at 58. Conversely, in the present Hillsborough case, the appeal by New Jersey Future to the Superior Court, Appellate Division, was that the Hillsborough plan was not likely to produce lower income housing. Rather, the plan is based upon one site which lacks

sewerage infrastructure, lacks NJDEP approval for infrastructure, and lacks designation as a "center" and is, therefore, inconsistent with the State Development and Redevelopment Plan. Due to the numerous obstacles to the implementation of Hillsborough's plan, it is far from an ultimate disposition which results in the construction of lower income housing. Nor has the Hillsborough case been in the courts for six to twelve years, as had many of the cases considered by the Supreme Court in Hills.

Since the present case is dissimilar in all respects to that "special class" of cases in Hills, it would not "constitute a gross perversion of the purpose of the Act," nor would it represent "an imposition on both the courts and the Council," for Hillsborough to seek a different way of meeting its constitutional obligation. *Ibid.*

Nor does the unpublished Denville case cited by HAAL in its papers filed before the Council in September confer the broad enforcement powers on COAH that HAAL suggests. In the Matter of the Township of Denville, A-4152-93T3, decided April 21, 1995 (per curiam) (unreported). Unreported cases carry no precedential weight in New Jersey. The Denville case is also limited to its facts. The Appellate Division in Denville explicitly held that "under the peculiar and unique circumstances here the order to transfer the property which does no more than fulfill the purpose of the acquisition the Township has already made and accomplish what it has already agreed to" was not unreasonable. Slip op. at 3. In that case, the Appellate

Division panel emphasized the "peculiar and unique" circumstances involved, circumstances that are not at all present in the Hillsborough case. In Denville, which the Council undoubtedly knows involved a municipality that had bitterly fought its Mount Laurel obligation for years, first in the courts and then before COAH, the certified plan had been substantially carried into effect. Denville had purchased a tract of land, as it had promised to do, and the non-profit sponsor to whom the tract was to be re-deeded by the town had expended substantial money in expectation that the town would honor its promise. When Denville refused to transfer title, COAH ordered it to do so and the Appellate Division understandably supported the Council's decision.

The Appellate Division in Denville did not explain the legal basis for COAH's power to enforce. Against this backdrop, the "peculiar and unique" circumstances that justified an outside-the regulations enforcement order in Denville must be understood (at least in the absence of a fuller analysis by the court) as resting on a quasi-judicial agency's inherent authority to prevent seriously inequitable conduct incident to its proceedings. The most that can be said of it is that, like Hills, it represents a "narrow exception," a "peculiar and unique" one, based in equity.

The Hillsborough situation is completely unlike that described in Denville. While New Jersey Future is hardly romantic about Hillsborough's reasons for seeking substantive certification, first in 1986 and then again in 1995, the municipality has nonetheless been a willing,

voluntary participant in the Council's process. Indeed, in its second round of fair share calculations, the Council gave Hillsborough the reduction provided for in N.J.A.C. 5:93-3.6 for having substantially complied with the terms of prior substantive certification. Nor can it be said that the developer waiting in the wings here (HAAL) has changed its position in reliance on the substantive certification, as had the non-profit sponsor in Denville. It is undisputed that HAAL received a General Development Plan approval for the site in question at least four years before the substantive certification granted by COAH, and it had continuously asserted its rights under that GDP, independent of the COAH certification. See the two Complaints filed by HAAL against Hillsborough in Superior Court cited supra at p. 17, n. 7. From HAAL's perspective, the substantive certification is window dressing that it hoped would sweeten the prospects of its underlying development plan, but any money it has expended has been in furtherance of that high stakes speculative development and not (in contrast to the small Denville non-profit group) in the cause of affordable housing for its own sake. Nor is Hillsborough's reason for abandoning the certified plan meritless, as was the case with the spurious reason reported in the Denville opinion. Here, albeit belatedly and only under the spur of concerted pressure by local residents, Hillsborough is at last paying attention to the adverse planning consequences of its prior plan, as urged by New Jersey Future. In the absence of countervailing equitable considerations (which, as we have just shown, are totally lacking in the Hillsborough case), it would be totally

inconsistent with sound public policy and COAH's stated policy of complying with the SDRP, to force the township now to execute a plan that it has wisely repudiated and that is incompatible with sound land use planning.[9]

Finally, and perhaps most tellingly, ordering Hillsborough to enforce its repudiated plan now would be a fruitless act on the Council's part. Unlike Denville, an order to enforce in this case will not hasten the pace of compliance at the very end of the process, because in Hillsborough the underlying issue of the relevance of the SDRP remains and must be dealt with, if not now before this Council, then later when the Appellate Division resumes jurisdiction of this case, or before NJDEP if Hillsborough were to change course again.

Thus, we submit, none of the considerations which led the Council and the Appellate Division to order enforcement in the Denville case are present here. Rather than catch Hillsborough up in yet another cycle of adversarial proceedings that can only delay the provision of affordable housing, New Jersey Future earnestly proposes that the municipality be given the opportunity to submit a new housing element and fair share plan, one that avoids the difficulties of the old plan and affords a genuinely realistic opportunity for the

[9] There is also one COAH decision, Howell Township, involving enforcement. That "decision" appears in the form of the order itself, with no supporting rationale other than its "whereas" clauses. The Howell Township order can be read as doing no more than "enforcing" the substantive certification by keeping it in effect until the Council heard further argument on the question of whether it did indeed have enforcement power.

construction of low and moderate income housing in the community, here and now.

An order now forcing Hillsborough to "comply" with its former plan would be tantamount to forcing the town to participate in the COAH process against it will, in direct contradiction of the express provisions of the Fair Housing Act that make participation voluntary.

THE COUNCIL SHOULD RESCIND ITS WAIVER OF ITS CENTER'S REQUIREMENT

In the prior substantive certification, Hillsborough "solved" the problem of the centers requirement in §5.4(c) by requesting a waiver of center designation, which the Council granted. New Jersey Future continues to believe, as it argued in its brief to the Appellate Division in this matter, that the waiver was, and is, invalid.[10] We will continue to press this point vigorously should this matter return to the courts. However, the Council's subsequent action in granting conditional substantive certification to Tewksbury Township on January 8, 1998, strongly indicates that it has re-thought the propriety of granting waivers in these situations. Thus, we suggest, it would be appropriate for the Council to rescind the waiver of §5.4(c) that it granted to Hillsborough, and require the township, at a minimum, to follow the same procedure it is now requiring of other municipalities.

In Tewksbury, the municipally-proposed compliance site lies in Planning Area 5, in the

[10] See Appellant's brief at pp. 24-45.

environs of the unincorporated village of Oldwick. Oldwick would appear to meet the State Planning Commission's criteria for designation as a center, although it has not yet been so designated. There is a significant question as to whether the proposed COAH compliance site in Tewksbury is appropriate for a center designation, and in proper recognition of that, the Council conditioned its grant of substantive certification to Tewksbury Township's plan on the making of a prompt application to the State Planning Commission for a center designation for the site in question. New Jersey Future continues to believe, as it stated in its Appellate Division Brief, that any center designation should be completed before an application for substantive certification is made. Nor is New Jersey Future prepared to state at this time that a center designation for the compliance site in Tewksbury would be appropriate under the principles of the SDRP. Given the procedure that has actually been followed, however, the pertinent point here is that the Council has at least taken a welcome first step in insisting that the center designation *process* be followed, albeit at a later stage than the Council's own regulations provide.

Most significantly for purposes of the Hillsborough case, the Council required that Tewksbury comply with the centers requirement of §5.4(c), rather than waiving it. Hillsborough, like Tewksbury, presents a substantial question as to the appropriateness of a center designation for the proposed compliance site. No less an authority than the Executive Director of the Office of State Planning, Mr. Simmens, expressed doubt to COAH that the HAAL site could meet the

criteria for designation were it to come before the Commission. See Appellant's Appendix Tab 3 at p. 62a.

If Hillsborough now proposes a compliance site outside Planning Areas 4 and 5, the centers issue will become moot, but should the township again attempt to meet its constitutional obligation in the rural and environmentally sensitive lands within its borders, we are confident that the Council will require compliance with Section 5.4(c). Having originally waived the center designation requirement for Hillsborough, the Council had no occasion then to state a process for actually complying with Section 5.4(c). New Jersey Future urges that the consequences of applying for a centers designation now be made crystal clear in relationship to the order of substantive certification, should development in Planning Areas 4 and/or 5 be pursued and thus implicating Section 5.4(c).[11]

Specifically, the Council's certification must provide for a time certain within which application to the State Planning Commission must be made, and a time certain for a resulting

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[11] New Jersey Future submits that merely requiring an application to the State Planning Commission as a condition of substantive certification does not comply with the "centers requirement" of the Council's regulations. N.J.A.C. 5:93-5.4(c). See Appellant's brief at pp. 24-32. Requiring the application, is, however, at least a first step in attempting to ensure that the State Plan is followed though it may lead to delay in the provision of affordable housing if center designation is delayed or denied by the State Planning Commission.

determination.[12] Most importantly, if the Commission denies the request for a center designation, the substantive certification must be subject to an Order to Show Cause on an expedited basis, resulting either in prompt amendment to shift compliance to an appropriate site or rescission. Obviously, this process creates additional delay in the provision of affordable housing, which is why it is required by the Council's regulations that center designation (and other necessary approvals) be completed *before* rather than after the grant of substantive certification. See N.J.A.C. 5:93-5.4(c). And for this reason, whenever there is the potential for post-certification delay, the Council must make a preliminary determination that there is a realistic likelihood that the other agency—the State Planning Commission in this case—will grant the necessary approval. We say again, because it is so vital a point, that the need for such cumbersome and time consuming processes demonstrate why the center designation should precede the grant of substantive certification, as the Council's regulations clearly provide.

We are not suggesting that the Council should take over the State Planning Commission's job of determining centers policy, but if Director Simmens' negative assessment of the HAAL

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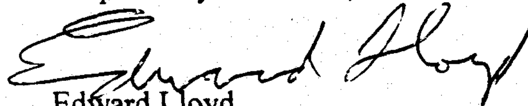
[12] Of course, the Council cannot compel another state agency to act on any given timetable. Rather, the order should provide that if the State Planning Commission has not acted by a specified date, Hillsborough must request an amendment of the certification to extend the compliance date. The Council can then grant or deny the amendment as the circumstances warrant. The important point is to prevent the municipality from applying and then letting its application lie fallow, without jeopardizing its substantive certification.

site (which is already in the record) is correct, then it may be doubted whether conditional approval of such a site would comport with the underlying *Mount Laurel* obligation to create a "realistic opportunity" for affordable housing. COAH should rescind the waiver of this center designation requirement and, because there is no realistic likelihood that the HAAL site can be designated a center, it should find the site unsuitable as presently proposed.

CONCLUSION

Hillsborough Township is a large and prosperous place, located in a beautiful part of the state where many people wish to live and work. With good will and the cooperation of its now-energized citizenry, it is blessed with a wealth of options. The SDRP, in turn, is designed to be a flexible guide to growth and change that can readily accommodate sensible and sensitive planning on Hillsborough's part. The Council and the Township are at a critical juncture, where they have the opportunity to play a leadership role in demonstrating that sound planning, social and economic diversity, and municipal advancement can, indeed must, proceed hand in hand. New Jersey Future asks only that they jointly seize the moment, which is now.

Respectfully submitted,



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