Hillsborough Litigation 6/4/98

Letter Brief in support of Respondent COATH's motion to dismiss appeal as moot.

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June 4, 1998

Emille R. Cox, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Trenton, New Jersey 08625

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,
DOCKET NO. A-5349-95T3

Dear Mr. Cox:

Please accept this letter brief in lieu of a more formal brief in support of respondent, the New Jersey Council on Affordable Housing's ("the Council" or "COAH") Motion for Dismissal of this appeal as moot.

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APPENDIX

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This is an appeal by New Jersey Future, Inc. ("NJF") to the April 3, 1996 grant of substantive certification by the New Jersey Council on Affordable Housing ("the Council" or "COAH")to the housing element and fair share plan of the Township of Hillsborough ("Hillsborough") in Somerset County. The appeal focuses on the Council's waiver of the center designation requirements of N.J.A.C. 5:93-5.4(c) for a Planned Adult Community/Health Care Facility ("PAC/HCF") site owned by the Hillsborough Alliance for Adult Living, L.P. ("HAAL"), which Hillsborough chose to be the sole inclusionary site in its fair share plan and for which it requested the Council's certification for zoning for 3,000 units of housing, with a 15 percent set-aside for affordable housing that would satisfy Hillsborough's Mount Laurel obligation for the 1987-1999 certification period and into the future.

After all parties filed their briefs on the merits with this Court, the case was remended to the Council by order dated January 7, 1998. The remand was in response to two orders allowing supplementation of the record with material documenting actions by

Hillsborough subsequent to the Council's certification decision. When filing its brief in the Appellate Division, the Council had moved to have material documenting Hillsborough's actions added to the appellate record. That motion, M-001289-97, was granted on November 12, 1997. Based on this new material, the Council argued in Point II of its appellate brief that the case should be remanded to the Council because the material demonstrated that Hillsborough had "stopped supporting the PAC/HCF site as a site for affordable housing" and the remand was necessary so that the Council "may take appropriate action with regard to Hillsborough's fair share plan."

NJF subsequently made a motion for the Appellate Division to take judicial notice of, or to supplement the record with, additional material that further documented Hillsborough's actions subsequent to substantive certification. That motion was granted on January 7, 1998 in conjunction with the remand order.

In its January 7 order, this Court temporarily remanded the appeal to COAH for the purpose of allowing the Council "to consider all of the materials we have allowed to be added to the record before us...along with such other facts as COAH deems relevant." Further, this Court directed COAH to "consider whether, in view of recent actions by Hillsborough Township, the grant of substantive certification remains valid and whether any new issues requiring COAH resolution have been presented." Finally, COAH was directed to "address the issue of whether the proposed development is governed by N.J.A.C. 5:93-5.4(d) or N.J.A.C. 5:93-5.4(c)." This court retained jurisdiction of the matter.

Upon receipt of the remand order, the Council issued an Order to Show Cause on February 5, 1998 (Ra32, Ra33), directing Hillsborough and all parties to the litigation to show cause before the Council "whether the grant of substantive certification by the Council dated April 3, 1996 to the housing element and fair share plan of Hillsborough remains valid as a consequence of actions by Hillsborough subsequent to the grant of substantive certification with regard to the Planned Adult Community ("PAC") site, as those actions have been documented in the briefs and appendixes, as supplemented, filed in [the appellate division litigation]." Further, the Order to Show Cause stated that Hillsborough and all parties to the litigation could file written submissions with COAH and could address all substantive issues raised by the January 7, 1998 remand "including what COAH's proper disposition of this matter should be." Also, Hillsborough and the parties could "present their positions as to the procedures to be employed by the Council to effectively and expeditiously respond to the January 7, 1998 Order." Ra32, Ra33.

The return date of the Order to Show Cause was ultimately set for the Council's meeting of April 1, 1998. Briefs were filed in response to the Order to Show Cause by Hillsborough , NJF, HAAL, P.E.C. Builders, Inc. and SKP land, Inc. ("Hiller") and the Friends of Hillsborough ("FOH"). FOH was not a party to this appellate litigation, but moved before the Council to intervene in the matter as a party. On April 1, 1998 the Council heard that motion and granted FOH the right to participate in the matter, but not as a

party (Ra34 to Ra36).

On April 1, 1998 the matter was argued before the Council. Hillsborough, and all parties and participants, were then allowed to submit further written submissions on or before April 15, 1998. NJF, HAAL and FOH did subsequently submit further briefing. Hillsborough and Hiller did not. Also, at the April 1, 1998 meeting, a COAH task force was appointed to consider the matter and to recommend a course of action to the Council. At its meeting of June 3, 1998 the Council voted to revoke its grant of substantive certification to Hillsborough's housing element and fair share plan (Ra1).

The Council's revocation of substantive certification was based upon a decision that was also adopted by vote of the Council on June 3, 1998 (Ra2 to Ra33). The decision concluded that Hillsborough's actions subsequent to certification had rendered the Council's certification "null and void" and that the Council's revocation of that certification was, therefore, a "mere formality." Ra19, Ra20. Further, the waiver of center designation to the PAC/HCF site that was the focus of NJP's appeal was also voided by the Council's revocation decision (Ra26 to Ra28).

Because the Council has revoked the substantive certification decision from which NJF appealed, this case is now moot. Therefore, the appeal must be dismissed.

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED AS MOOT BECAUSE ON JUNE 3, 1998 THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING, IN RESPONSE TO A REMAND

BY THIS COURT, REVOKED ITS APRIL 3, 1996 GRANT OF SUBSTANTIVE CERTIFICATION TO THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, THE COUNCIL ACTION FROM WHICH THIS APPEAL WAS TAKEN.

Appellant NJF appealed the Council's April 3, 1996 grant of substantive certification to Hillsborough and in that appeal challenged, primarily, the Council's grant of a waiver from the Council's requirement at N.J.A.C. 5:93-5.4(c) that inclusionary sites for affordable housing must be in centers when the site is located in a rural Planning Are 4, as defined in the State Development and Redevelopment Plan ("SDRP"). On June 3, 1998 the Council revoked Hillsborough's grant of substantive certification and the waiver of N.J.A.C. 5:93-5.4(c) upon which the certification was based. Therefore, NJF's appeal is moot. as such, the appeal should be dismissed by this court.

Questions that have become moot or academic prior to judicial scrutiny generally* have been held to be an improper subject for judicial review. Oxfeld v. NJ State Bd. of Ed., 68 N.J. 301, 303-304 (1975); In re Geraghty, 68 N.J. 209, 212-213 (1975); Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). There are two basic reasons which lie at the heart of the

*The New Jersey Constitution, unlike the federal Constitution does not restrict judicial power to review matters to "cases and controversies." See U.S. Const. Art. III, §2, cl.1 and N.J. Const. (1947), art. VI, §1, ¶1. Nevertheless, our courts have long practiced a policy of judicial restraint, declining to render advisory opinions and declining to exercise jurisdiction in the abstract. See DeVesa v. Dorsey, 134 N.J. 421, 428 (1993).

"mootness doctrine." First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment could not provide effective relief or the parties do not have concrete adversity of interest. Additionally, it is a fundamental premise of our legal system that "a contest engendered by genuinely conflicting interests of the parties is best suited to development of all relevant material before the court." Anderson v. Sills, supra at 437. Therefore, where there is a change in the posture of a matter so that a question is created concerning the immediacy of a controversy, our courts will generally stay their hand and dismiss the matter as moot. Id. A matter is considered technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation. DeVesa v. Dorsey, 134 N.J. 421, 428 (1993).

The courts of this state, therefore, have consistently expressed a refusal to render decisions in the abstract and have emphasized that litigation should proceed only in circumstances when an actual controversy exists which casts the parties to a particular action in adversarial positions. Id. and Crescent Park Tenants' Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971).*

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*However, the courts will occasionally rule on such matters when they are of substantial importance and capable of repetition, yet evade review. Matter of J.I.S. Indus. Service Co. Landfill, 110 N.J. 101, 104 (1988); Matter of Conroy, 98 N.J. 321, 342 (1985). For example, in Matter of Conroy the Supreme Court determined that the issue of when withdrawal of life support is appropriate was of such great public magnitude and capable of repetition and evasion of review so as to justify the assumption of jurisdiction by the

Here, an appeal was taken to challenge the Council's grant of a waiver of one of its rules that was essential to the Council's grant of substantive certification to Hillsborough. The certification decision has now been revoked by the Council and the granted waiver has been withdrawn. In fact, the Council in its decision on the matter has stated that it will not grant any waivers to Hillsborough in the future if the municipality again petitions for substantive certification. Ra26 to Ra28. Therefore, this appeal is moot. Because the mootness obviates the need for judicial review, the appeal should be dismissed.

CONCLUSION

For the foregoing reasons, respondent New Jersey Council on Affordable Housing requests that this appeal be dismissed as moot.

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

Respectfully submitted,

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court. In contrast, however, this matter, involving a challenge to the Council's waiver of one of its rules, presents no such situation. This case is fact-specific to Hillsborough.

RESOLUTION REVOKING SUBSTANTIVE CERTIFICATION NO. 31-99

WHEREAS, Hillsborough Township, Somerset County, received substantive certification No. 31-99 of its housing element and fair share plan from the New Jersey Council on Affordable Housing on April 3, 1996; and

WHEREAS, for the reasons set out in the attached decision, the Council has determined that Hillsborough Township has materially violated the terms of its substantive certification and has thus rendered its fair share plan null and void; and

WHEREAS, on June 3, 1998 the New Jersey Council on Affordable Housing voted to revoke Hillsborough's fair share plan for the reasons set out in the attached opinion.

NOW THEREFORE BE IT RESOLVED that the New Jersey Council on Affordable Housing hereby revokes substantive certification No. 31-99 granted to Hillsborough Township, Somerset County.

I hereby certify that this resolution with its attached decision was duly adopted by the Council on Affordable Housing on June 3, 1998

Renee Reiss, Secretary
Council on Affordable Housing

IN THE MATTER OF THE PETITION FOR CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY	)	NEW JERSEY COUNCIL ON AFFORDABLE HOUSING DECISION ON REMAND

This case has been remanded to the New Jersey Council on Affordable Housing ("the Council" or "COAH") by order of the Superior Court, Appellate Division, dated January 7, 1998. The case is an appeal by New Jersey Future, Inc. ("NJF") to the April 3, 1996 grant of substantive certification by the Council to the housing element and fair share plan of the Township of Hillsborough ("Hillsborough") in Somerset County. The appeal focuses particularly on the Council's waiver of the center designation requirements of N.J.A.C. 5:93-5.4(c) for a Planned Adult Community/Health Care Facility ("PAC/HCF") site owned by the Hillsborough Alliance for Adult Living, L.P. ("HAAL"), which Hillsborough chose to be the sole inclusionary site in its fair share plan and for which it requested the Council's certification for zoning for 3,000 units of housing, with a 15 percent set-aside for affordable housing that would satisfy Hillsborough's Mount Laurel obligation for the 1987-1999 certification period and into the future.

When filing its brief in the Appellate Division, the Council moved to have material documenting Hillsborough's actions subsequent to substantive certification added to the appellate record. That motion, M-001289-97, was granted on November 12, 1997. Based on this new material, the Council argued in Point II

of its appellate brief that the case should be remanded to the Council because the material demonstrated that Hillsborough had "stopped supporting the PAC/HCF site as a site for affordable housing" and the remand was necessary so that the Council "may take appropriate action with regard to Hillsborough's fair share plan."

NJF subsequently made a motion for the Appellate Division to take judicial notice of, or to supplement the record with, additional material that further documented Hillsborough's actions subsequent to substantive certification. That motion was granted on January 7, 1998. In its order, the Appellate Division also temporarily remanded the appeal to COAH for the purpose of allowing the Council "to consider all of the materials we have allowed to be added to the record before us...along with such other facts as COAH deems relevant." Further, the Appellate Division directed COAH to "consider whether, in view of recent actions by Hillsborough Township, the grant of substantive certification remains valid and whether any new issues requiring COAH resolution have been presented." Finally, the Appellate Division directed COAH to "address the issue of whether the proposed development is governed by N.J.A.C. 5:93-5.4(d) or N.J.A.C. 5:93-5.4(c)." Finally, the Appellate Division retained jurisdiction of the matter. A list of the documents added to the record and which COAH was directed to consider is attached as Exhibit A.

Upon receipt of the Appellate Division order, the Council issued an Order to Show Cause on February 5, 1998, Exhibit B, directing Hillsborough and all parties to the appellate litigation

to show cause before the Council at its regularly scheduled meeting of March 4, 1998 "whether the grant of substantive certification by the Council dated April 3, 1996 to the housing element and fair share plan of Hillsborough remains valid as a consequence of actions by Hillsborough subsequent to the grant of substantive certification with regard to the Planned Adult Community ("PAC") site, as those actions have been documented in the briefs and appendixes, as supplemented, filed in [the appellate division litigation]." Further, the Order to Show Cause stated that Hillsborough and all parties to the litigation could file written submissions with COAH and could address all substantive issues raised by the January 7, 1998 remand "including what COAH's proper disposition of this matter should be." Also, Hillsborough and the parties could "present their positions as to the procedures to be employed by the Council to effectively and expeditiously respond to the January 7, 1998 Order."

At the request of Hillsborough, the return date of the Order to Show Cause was rescheduled to the Council's meeting of April 1, 1998 and the original briefing schedule was also amended at the request of the parties. Briefs were filed in response to the Order to Show Cause by Hillsborough , NJF, HAAL, P.E.C. Builders, Inc. and SKP land, Inc. ("Hiller") and the Friends of Hillsborough ("FOH"). FOH was not a party to the appellate litigation, but moved before the Council to intervene in the matter as a party. On April 1, 1998 the Council heard that motion and

granted FOH the right to participate in the matter, but not as a party.

On April 1, 1998 the matter was argued before the Council. Hillsborough, and all parties and participants, were then allowed to submit further written submissions on or before April 15, 1998. NJF, HAAL and FOH did subsequently submit further briefing. Hillsborough and Hiller did not. Also, at the April 1, 1998 meeting, a COAH task force was appointed to consider the matter and to recommend a course of action to the Council. At its meeting of June 3, 1998 the Council adopted the following as its decision in this matter.

The only inclusionary site in Hillsborough's fair share plan to which the Council granted certification on April 3, 1996 is the PAC/HCF site, which was to produce 3,000 units of housing, 15 percent of which were to be affordable housing, and 160 of which were to be built within the six-year period of Hillsborough's certification. The site was the subject of a February 27, 1996 "Municipal Development Agreement" signed by Hillsborough and HAAL. The detailed history of Hillsborough's efforts to receive substantive certification from COAH for its fair share plan is set out at length at the Procedural History and Counterstatement of Facts submitted by the Council to the Appellate Division in its October 10, 1997 brief on the merits in this matter. This Procedural History and Counterstatement of Facts, which is found between pages 2 and 27 of the Council's brief, is incorporated by reference into this decision.

Important to the history of this matter is the fact that Hillsborough and HAAL had signed the February 27, 1996 "Municipal Development Agreement." This agreement was material to COAH's certification decision. The Municipal Development Agreement evidenced mutual cooperation between Hillsborough and the developer of the PAC/HCF site with regard to development of the site, including an implied pledge of Hillsborough's active support for the extension of sewer service to the PAC/HCF site as well as Hillsborough's support for a change of designation for the majority of the PAC/HCF site from rural Planning Area 4 to the more easily developed Planning Area 2 in the next cross-acceptance period for the State Development and Redevelopment Plan (SDRP). Therefore, the Municipal Development Agreement provided to the Council a large measure of certainty that the PAC/HCF site would be developed to produce 160 units of affordable housing during Hillsborough's six year certification period. As a consequence, Hillsborough received 24 rental bonus credits pursuant to N.J.A.C. 5:93-5.15(d) because the Council determined that there was the required "firm commitment for the construction" of the 40 rental units included in its plan. This "firm commitment" was established by the Municipal Development Agreement. That Agreement was attached to and made a part of COAH's substantive certification resolution.

The materials which have been added to the appellate record, and which COAH has been ordered to consider with regard to its grant of substantive certification, document Hillsborough's lack of compliance with the requirements of its fair share plan.

Among the most important documents are two letters to COAH dated June 7, 1997 and April 8, 1997 in which representatives of Hillsborough informed the Council that Hillsborough was not taking the necessary affirmative steps to include the PAC/HCF site in the Somerset County/Upper Raritan Watershed Wastewater Management Plan. Inclusion in this plan was necessary for the provision of sewer service to the PAC/HCF site. Further substantiating Hillsborough's actions are copies of two resolutions of the Hillsborough Township Planning Board dated April 3, 1997 and Hillsborough Township Committee Resolutions dated April 23, 1997 and June 25, 1997. These resolutions document Hillsborough's retreat from its support of the extension of sewer service to the PAC/HCF site. Also added to the record is a copy of the Hillsborough Township Committee Resolution dated October 29, 1997, which repealed Chapter 77, section 91.1 (the PAC/HCF ordinance) of the township's municipal code. This resolution removed the underlying zoning for the HAAL site, making the General Development Plan that had been approved for the site by the planning board in 1992 difficult, if not impossible, to realize. These were among the materials and actions which the parties were asked to address in their briefs submitted in response to the Appellate Division's remand order and the Council's Order to Show Cause. These responses will now be reviewed.

In response to COAH's Order to Show Cause, Hillsborough submitted a brief in which it stated that its October 29, 1997 repeal of the PAC/HCF ordinance did not affect COAH's grant of substantive certification, nor the Municipal Development Agreement

that Hillsborough had executed with HAAL on February 7, 1996. Hillsborough took the position that the PAC/HCF ordinance was repealed so that a better, alternative approach could be used by Hillsborough to provide senior citizen housing in the municipality. Further, the repealer did not affect the HAAL site, stated Hillsborough, because HAAL had received the General Development Plan approval pursuant to the PAC/HCF zoning. Therefore, by excepting the HAAL property from the zoning repeal and by developing an alternative scheme for the provision of senior citizen housing in Hillsborough, Hillsborough claimed that it continued to provide for affordable housing consistent with its grant of substantive certification.

Also, Hillsborough claimed that it had not changed its position with regard to the provision of sewer service to the PAC/HCS site after substantive certification. Hillsborough noted that in 1995 the township committee did not believe it was appropriate to sponsor a wastewater management plan involving individual property owners "where objections have been filed" and that this continued to be the municipality's position in 1997 with regard to the provision of sewer service to the HAAL site. Hillsborough noted that HAAL had filed for an amendment to the wastewater management plan and that the township's position communicated to COAH in April and June of 1997 that it was going to allow the DEP process to "go forward without being prejudged by the Township Committee" was identical to its position articulated in 1995. Therefore, Hillsborough stated that "there should have been

no surprise to the developer or COAH" when these letters were written based upon Hillsborough's prior activities in 1995.

Hillsborough urged COAH to "hold this matter in abeyance" until the Hillsborough Township Planning Board reviewed a plan that will soon be submitted by the developer of the HAAL site that will present the development plans for the full site. Further, Hillsborough asked that the matter be held in abeyance until the DEP ruled on the developer's application for inclusion in the county wastewater management plan. Hillsborough cited its record of 100 percent compliance with its first round affordable housing obligation allowing it a 20 percent reduction on its new construction component, see N.J.A.C. 5:93-2.6, and its prompt filing for certification with regard to its second round obligation as reasons why it should "not be penalized because it now may be having second thoughts of how exactly affordable housing may be provided in the second round." Hillsborough stated that these "second thoughts" were prompted by the law suits filed concerning development of the PAC/HCF site, including NJF's appeal: suits which helped "crystallize certain issues" for the township committee and galvanized local political pressure against the PAC/HCF development. Hillsborough viewed that pressure as "part of a political process" which is "healthy." It estimated that it will have the information it needs to begin planning for its alternative plan in September 1998 and requested the time to create the alternative plan. Alternatively, Hillsborough requested that "If COAH cannot see its way to stop the clock on its Order to Show

Cause, it minimally retain jurisdiction to permit Hillsborough to file an amended application for Substantive Certification." In so doing, Hillsborough requested COAH's help in avoiding a builder's remedy law suit, which HAAL had filed in Superior Court, "until COAH and Hillsborough have had the opportunity [to] consider opportunities for providing Hillsborough's fair share housing which are acceptable to COAH and the Township."

Finally, with regard to the Appellate Division's question as to whether N.J.A.C. 5:93-5.4(c) or (d) applies to the PAC/HCF project, Hillsborough took the position that both rules apply to the PAC/HCF project and that COAH had erroneously granted Hillsborough's requested waiver from the center designation requirements of N.J.A.C. 5:93-5.4(c). Hillsborough further criticized COAH's waiver decision by stating that there were "no findings of COAH, that granting the waiver will even address, no less meet the salient goals of the regulation". [N.J.A.C. 5:93-5.4(c)]." Hillsborough concluded by suggesting that "COAH and Hillsborough must together develop the findings of fact and conclusions to support the waiver or alternatively Hillsborough can seek the Center designation." Either alternative, stated Hillsborough, "would require COAH to reserve decision on its Order to Show Cause to allow time for other governmental processes to proceed. Hillsborough needs and requests additional time."

HAAL's position with regard to the Order to Show Cause was that COAH's regulations give it the authority as well as the obligation to enforce its grant of substantive certification and

cited N.J.A.C. 5:93-4.3(c)2, as well as N.J.A.C. 5:93-5.1(d)9 and N.J.A.C. 5:93-5.3(b), to support this assertion. HAAL claimed that a reading of these regulations makes it clear that "COAH is mandated" to require Hillsborough officials to endorse all applications for water and sewer service upon which the development of the PAC/HCF site and Hillsborough's substantive certification is dependent. Because to date this has not occurred, HAAL took the position that the proper response is for COAH to exercise its authority and 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." HAAL reviewed Hillsborough's history with regard to the PAC/HCF site and concluded that Hillsborough refused to abide by the terms and conditions of its substantive certification and that COAH "has no choice" but to take the necessary action to ensure the integrity of the certification process by enforcing substantive certification and ordering Hillsborough to seek the necessary water and sewer approvals for the HAAL's site." To do otherwise, HAAL asserts, would compromise COAH's authority over municipalities and render the COAH process meaningless.

Similarly, Hillsborough's repeal of the PAC/HCF ordinance was viewed by HAAL as "illegal" and "yet another example of the desperate attempts on the part of Hillsborough Township to subvert its own substantive certification." HAAL considered the recision to be similar to COAH's Howell case, in which COAH issued an

opinion ordering Howell Township to comply with the terms of an agreement negotiated in a COAH mediation between the municipality and a developer. HAAL stated that in the Howell case COAH acted to restrain a municipality from violating provisions made in a signed, negotiated agreement and urged COAH to do the same with regard to Hillsborough's agreement with HAAL concerning the PAC/HCF site. Finally, HAAL argued that its site is governed by N.J.A.C. 5:93-5.4(d) and that by requiring a waiver of its rules with regard to center designation, COAH applied a more stringent requirement to the PAC/HCF site than was dictated by N.J.A.C. 5:93-5.4(d). HAAL stated that N.J.A.C. 5:93-5.4(d) applied to municipalities divided by more than one planning area and was therefore appropriate to govern here, not only because Hillsborough is divided by more than one planning area, but because the HAAL site is divided by more than one planning area. Therefore, because N.J.A.C. 5:93-5.4(d), applies center designation was never required for the site, urged HAAL.

NJF began its brief by stating that "...Hillsborough Township...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 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."

To that end, NJF urged the Council to rescind Hillsborough's substantive certification and order Hillsborough to submit an amended petition for substantive certification. NJF did not want the Council to order Hillsborough to resuscitate its repudiated plan and also argued that the Council should rescind its waiver of the center designation requirement of N.J.A.C. 5:93-5.4(c). To support its position that COAH may revoke Hillsborough's substantive certification, NJF cited N.J.A.C. 5:93-10.5 which states:

> A Council determination after a hearing conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 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.

However, NJF, after reviewing the facts by which it concluded that Hillsborough had repudiated its fair share plan, took the position that the Council did not need to provide a further hearing on revocation, because the facts material to this case are undisputed. Therefore, NJF stated that based upon undisputed facts, the Council could rescind Hillsborough's substantive certification.

NJF further cited N.J.A.C. 5:91-13.1 to -13.6 as support for its view that the Council could allow Hillsborough to amend its certified plan after revocation. NJF insisted, however, that any new plan offered by Hillsborough must be produced within a strictly limited period of time (NJF suggested 60 days) and that Hillsborough must be required to propose a plan capable of being

implemented immediately. As an example, NJF stated that "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." Also, NJF stated that any new plan "must be implemented without the Council's typical willingness to be flexible in order to encourage municipal compliance." And it was NJP's position that the Council should not grant any further waivers requested by Hillsborough with regard to any new plan. In addition, NJP urged the Council to rescind its waiver of center designation in this matter.

NJF cited the Council's recent decision concerning Tewksbury Township, which required an application for center designation by Tewksbury, as a model to be followed in the future with regard to Hillsborough. NJF also cited Alexander's Department Stores, et al. v. Borough of Paramus et al., 101 N.J. 100 (1991) and argued that based upon the Paramus decision the Council lacked "general jurisdiction" over land use issues "even those essential to the implementation to the substantively certified plan." From this, NJF concluded that the Council could not order Hillsborough to approve amendments to its wastewater management plan, as HAAL had requested, or order Hillsborough to comply with the terms of its certified plan. Nor, argued NJF, should the Council order Hillsborough to live up to the mediated agreement attached to its certified plan or take any action that is consistent with the certified plan. NJF claimed that the only proper venue for such

decisions was the Superior Court and referred to the fact that HAAL had instituted suit against Hillsborough. NJF claimed that this suit provided the proper forum for resolving all issues "regarding Hillsborough's authority to adopt its own ordinances." To force Hillsborough to "comply" with its former plan, urged NJF, "would be tantamount to forcing the town to participate in the COAH process against its will, in direct contradiction of the express provisions of the Fair Housing Act that make participation voluntary."

With regard to whether N.J.A.C. 5:93-5.4(d) or N.J.A.C. 93-5.4(c) govern the PAC/HCF site, NJF took the position that both regulations should be read together and that both apply to the PAC/HCF site. The NJF brief then concluded with the following:

> Hillsborough Township is a large and prosperous place, located in a beautiful part of the State were 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.

Briefs were also received from Hiller, a land owner and builder in Hillsborough, and FOH, a citizens group that was granted leave to participate by COAH in this matter. Hiller, which did not file a brief in the Appellate Division, took the position that COAH should order Hillsborough to amend its plan on an accelerated

schedule and to include his site, which is in Planning Area 2, in its plan to provide affordable housing in an inclusionary development. FOH took the position that there are many options available to Hillsborough in Planning Area 2 for the creation of inclusionary developments or other types of affordable housing. FOH found the PAC/HCF site unsuitable for the development Hillsborough proposed in its fair share plan and asked that Hillsborough be given an opportunity to submit a new plan to the Council.

After oral argument on April 1, 1998, the parties were allowed to submit further documentation and argumentation by April 15, 1998. HAAL, NJF and FOH made further submissions; Hillsborough and Hiller did not take advantage of this opportunity.

HAAL reiterated its arguments as to the merits of its site, stating that the PAC/HCF site is in, or adjacent to, Planning Area 2 and "is serviced by water and sewer." HAAL emphasized that the site has been planned to provide affordable housing in a large inclusionary development "for over seven years with over $1 million expended by the developer," and that reconsideration of the site at this point was "inappropriate". HAAL repeated its argument that COAH precedent favored enforcement of the Municipal Developer Agreement signed by Hillsborough and HAAL on February 27, 1996 and again cited the Council's Howell decision as precedent. HAAL also argued that recent case law, particularly New Jersey Builders Association v. Department of Environmental Protection, 306 N.J. Super. 93 (App. Div. 1997) supports HAAL's position that the State

Plan is not a zoning ordinance but rather a planning document with "no binding effect on COAH." Further, an unreported case of the Highlands at Morris Inc. v. Rockaway Valley's Regional Sewerage Authority and the Township of Rockaway, Docket No. A-1869-96T2 was cited as supporting the extension of the wastewater management plan to cover the PAC/HCF project. HAAL argued that COAH should either enforce its certification or award a builder's remedy to HAAL. Further, HAAL argued against COAH awarding a builder's remedy to Hiller, which HAAL denominated a "reverse" builder's remedy.

In its supplemental letter brief NJF focused on refuting statements made by the attorney for HAAL at oral argument that the HAAL site was appropriate for affordable housing because the sewer service line "runs close by" and that the redesignation of the PAC/HCF site to Planning Area 2 would not be harmful to the State Plan because of the location and characteristics of the site. NJF supported its refutation with an analysis of the facts surrounding Hillsborough's failure to support the extension of sewer service to the PAC/HCF site and an analysis of the location of the PAC/HCF site relative to other planning areas. Ultimately, NJF concluded that to allow the PAC/HCF site's planning area designation to be changed from Planning Area 4 to Planning Area 2 would result in sprawl.

After consideration of the relevant documents that the Appellate Division has allowed into the record in its two motion

decisions, as well as the submissions of the parties in response to the Council's Order to Show Cause and the oral arguments presented before the Council, it is the Council's inescapable conclusion that Hillsborough has not complied with the terms of its substantive certification. Moreover, it is also clear that Hillsborough has no intention of complying in the future with the terms of its substantive certification, because it has requested COAH to allow it the time to formulate a new fair share plan. Hillsborough's recent actions, most particularly Hillsborough's June 24, 1997 resolution to not support the inclusion of the PAC/HCF tract in the Somerset County/Upper Raritan Wastewater Management Plan and Hillsborough's October 28, 1997 ordinance repealing in its entirety the PAC/HCF zoning that affects the HAAL site, clearly represent Hillsborough's retreat from the commitments it made in order to receive COAH's certification of its fair share plan.* All briefs submitted in response to the Council's Order to Show Cause acknowledged that Hillsborough has not complied with the terms of the Council's grant of substantive certification, including the

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*At oral argument Hillsborough reiterated its position that its repeal of the PAC/HCF ordinance did not affect the development of the HAAL site. It noted that it was about to settle a suit brought by U.S. Homes, the developer of the HAAL site, with a consent agreement "...that the repeal ordinance does not affect the Greenbriar Project...", which is the name given to U.S. Homes' proposed development of the HAAL site. Transcript at 28, 29. U.S. Homes is not a party to this matter. Hillsborough has not presented this consent order to the Council. It is clear, however, that the repeal of the PAC/HCF ordinance was contrary to Hillsborough's grant of substantive certification and that the repeal will make any development of the HAAL property for affordable housing under the plan approval more difficult, if not impossible.

attempt by Hillsborough in its brief to claim that the substantive certification remains valid. In fact, all of the submitted briefs were chiefly concerned, not with the issue of whether Hillsborough has complied with the terms of substantive certification, but with the issue of what COAH should do to respond to Hillsborough's non-compliance.

Hillsborough requested that it be allowed to submit a new plan to the Council in the future for certification, but only after it had been given time to review and monitor the actions of various state agencies that will contribute to Hillsborough's understanding of what its next fair share plan should be. NJF suggested that the Council allow Hillsborough a short period of time to submit a new plan that complies in all respects with the Council's rules and the SDRP. HAAL, on the other hand, requested that the Council enforce its grant of certification by ordering Hillsborough to comply with the certified plan. According to HAAL, Hillsborough should be ordered to support the extension of sewer to the PAC/HCF site before DEP and also to petition the State Planning Commission during cross acceptance to change the planning area designation of the PAC/HCF site from rural Planning Area 4 to Planning Area 2.

It is, therefore, clear that Hillsborough has violated the terms of its substantive certification. It is also clear that Hillsborough has no intention of complying with the terms of its certification. Therefore, the Council must determine what the effect of these actions are. The Fair Housing Act is silent as to what the consequences of municipal noncompliance with a certified

fair share plan will be. However, the Council's April 3, 1996 resolution granting substantive certification to Hillsborough stated that "any change in the facts on which this certification is based or any deviation from the terms and conditions of this certification which affects the ability of the municipality to provide for the realistic opportunity of its fair share of low and moderate income housing and which the municipality fails to remedy may render this certification null and void." Further, N.J.A.C. 5:93-10.5 states that the Council may revoke substantive certification after a hearing conducted pursuant to the Administrative Procedure Act, if the Council determines "that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development...". It is clear however, that the requirement for a hearing in §10.5 assumes that there are material contested issues of fact. See, Contini v. Board of Education of Newark, 286 N.J. Super 106, 114 to 121 (App. Div. 1995), cert. denied 145 N.J. 372 (1996). Here, there are clearly no contested issues of fact. Therefore, the Council may render a conclusion with regard to the revocation of Hillsborough's substantive certification without a further hearing.

It is the Council's determination that Hillsborough Township, by failing to support the extension of sewer service to the PAC/HCF site and by revoking the underlying zoning on the HAAL site, has rendered Hillsborough's fair share plan "null and void" as of the date of these actions. The development of the PAC/HCF

site provided, except for the rehabilitation of seven units, all of the affordable housing in Hillsborough's plan. Therefore, the refusal of the municipality to support the development of the site, as it committed to do to receive certification, constitutes a material act of non-compliance with the municipal fair share plan. As such, the Council hereby revokes its certification of Hillsborough's fair share plan. However, the Council considers its revocation to be merely a formality, because Hillsborough's failure to support its plan was so total and so far beyond any municipal action contemplated by N.J.A.C. 5:93-10.5. In the Council's view the plan was a nullity as of Hillsborough's June 24, 1997 resolution to not support the extension of sewer to the PAC/HCF site and its October 29, 1997 resolution repealing the PAC/HCF ordinance.

Both Hillsborough and NJF have asked this Council to allow Hillsborough to remain within the Council's jurisdiction while Hillsborough takes steps to create a new fair share plan. This retention of jurisdiction, it is thought, would protect Hillsborough from the builder's remedy law suit filed by HAAL. However, the Council does not believe it has the statutory authority for the requested continued jurisdiction over Hillsborough. The Fair Housing Act gives the Council jurisdiction over municipal fair share plans when a municipality files a fair share plan with the Council. N.J.S.A. 52:27D-309. The Council is also given the responsibility, once it grants certification, to defend its grant of certification if a builder's remedy suit is

filed in the courts. N.J.S.A. 52:27D-317. However, there is nothing in the Fair Housing Act which gives the Council jurisdiction over a municipality that has repudiated its certified plan. The Council, for example, could not effectively defend its certification decision in the courts if the municipality sued was not complying with the terms of its certification. Hillsborough therefore, by its own decision to repudiate its certified fair share plan, has eliminated the ability of the Council to assert jurisdiction over its Mount Laurel compliance efforts. The Council cannot now offer the protection of its jurisdiction to Hillsborough, because Hillsborough has no plan before the Council for which it either has certification or is seeking certification. Until Hillsborough presents another fair share plan to the Council and petitions for certification of that plan, COAH cannot pursuant to its understanding of the Fair Housing Act again assume jurisdiction over Hillsborough's Mount Laurel compliance efforts. Further, if Hillsborough files another fair share plan with COAH, that plan must comply with the requirements imposed by this decision.

HAAL has requested that COAH order Hillsborough to comply with its certification and order Hillsborough to take all the actions it agreed to take to achieve certification for its fair share plan. HAAL cites two COAH cases, one involving Denville Township in Morris County and the other Howell Township in Monmouth County, as precedent for this request. The Council is very familiar with both the Denville and Howell decisions, as well as

the important public policy questions rendered in both matters. Denville involved a municipal repudiation of a low-income family rental project included in its fair share plan to be built by a nonprofit developer and for which over $8 million in public funds had been pledged from both federal and state governmental sources. Denville's actions threatened the receipt of substantial federal funds. Further, Denville had a long and tortuous history in the courts before being transferred to COAH, was a party to Hills Dev. Co. v. Bernards Tp., 103 N.J. 1 (1989) and was specifically subject to the holdings of that case.

In Howell the Council ordered Howell Township to comply with the terms of a mediated agreement and to zone a particular site in the municipality as it had agreed to do in the mediated agreement as a 60-day condition of certification. If Howell did not do so, COAH would not grand final certification. Howell was based on an interpretation of the Council's rules regarding previously certified sites. The site in question was not only subject to a mediated agreement, but had previously been included in Howell's first round certified plan as an inclusionary development providing affordable housing. As a previously certified site, the site was governed by N.J.A.C. 5:93-5.13 and had to be included in Howell's plan. The mediated agreement reduced the density on the site and provided for an exclusively market rate development, with the payment of development fees. The agreement was signed by both the developer of the site and the municipality. The mediated agreement allowed the municipality to proceed with

its fair share plan without the site being included in the plan. Therefore, COAH believed that the municipality could not act in a fashion contrary to its mediated agreement and receive certification from the Council, even though the mediated site did not provide affordable housing and Howell had a certifiable fair share plan that otherwise met its Mount Laurel responsibility.*

Here, there are no public funds committed to the development of the PAC/HCF site and the PAC/HCF site is not a previously certified site that was included in Hillsborough's first round certification. Therefore, the policies at issue in Denville and Howell are not present. Rather, in this case it was Hillsborough's strong advocacy for a fair share plan which included the PAC/HCF site, as exemplified by Hillsborough's willingness to sign the Municipal Development Agreement with HAAL, which convinced COAH that the PAC/HCF site provided a realistic opportunity for affordable housing within the six year period of certification, even though the proposed development required a waiver of COAH's center designation rule. At the time of certification sewer service was not available to the site and was essential to the development of the site. Hillsborough's promised cooperation with the developer in extending sewer to the site was assumed in the

*Howell Township has not as of the date of this decision complied with the Council's order and has challenged that order in the Appellate Division. Also, the validity of the mediated agreement is at issue in a prerogative writ suit instituted by the developer.

Municipal Development Agreement. Further, the Municipal Development Agreement also provided COAH with assurance that the planned rental units would be built such that COAH awarded rental bonus credits pursuant to N.J.A.C. 5:93-5.15(d), which requires "a firm commitment for the construction" of the units. Finally, and most importantly, the agreement supported Hillsborough's requested waiver of the center designation requirements of §5.4(c) for the PAC/HCF site and was, therefore, a contributing factor to the Office of the State Plan's lack of opposition to the requested waiver and COAH's granting of the waiver.

The Council's certification decision was, therefore, based upon the joint assurances by Hillsborough and HAAL that the PAC/HCF site could be developed within the six year certification period to provide Hillsborough's requisite affordable housing. In fact, the Municipal Development Agreement provided alternative methods by which the affordable housing could be produced by HAAL if, through no fault of the signatories to the agreement, the site could not produce the required units of housing in the required six year period of certification. At the present time, however, the status of the mediated agreement, which materially gave rise to COAH's certification decision, is at issue in a suit filed by HAAL against Hillsborough in the Superior Court and Hillsborough's prior aggressive advocacy for its plan has vanished. Therefore, it now seems futile for the Council to order Hillsborough to comply with the terms of its certified fair share plan, which was so dependant

upon the mutual cooperation of the signatories to the agreement, when the mediated agreement is now the subject of litigation between the parties.

Moreover, that mutual cooperation, as has previously been stated, convinced the Council to waive without opposition from the Office of State Planning the important public policies contained in the Council's regulations concerning compliance with the State Plan and its center policy, so that the development of the PAC/HCF site could expeditiously go forward, as Hillsborough had urged that it should. At present, Hillsborough argues that the PAC/HCF site's planning area designation should not be changed from a rural designation. It had previously agreed to seek a change for the site to the more easily developed Planning Area 2. At present, Hillsborough refuses to support the extension of sewer service to the PAC/HCF site, as it also had previously agreed to do. And at present, Hillsborough even argues before COAH that the Council should never have granted Hillsborough's requested waiver of center designation, which it had previously strongly and successfully urged the Council to grant. Therefore, faced with this municipal change of heart and the attendant law suits it has generated, and mindful of the strong public policy inherent in COAH's regulations that require adherence to the policies of the SDRP, the Council will not now order Hillsborough to comply with the terms of its prior certified plan. Rather, the Council will revoke that certification.

Because Hillsborough has indicated that it wishes to develop a new fair share plan to meet it Mount Laurel obligations, the Council will provide the following guidance to Hillsborough with regard to any new fair share plan for which it seeks COAH certification. Any plan proposed by Hillsborough must be 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. The developer of any inclusionary project must be ready, willing and able to proceed promptly and any proposed subsidies must be realistically available without undue delay. The criteria found in the Council's rules for the formulation of a municipal fair share plan will be strictly applied to Hillsborough and there will be no waivers granted from any of the Council's rules or policies.

A particularly difficult issue for the Council with regard to any new plan submitted is the role of the PAC/HCF site in the new plan. The Council's rules at N.J.A.C. 5:93-5.13 by analogy provide guidance as to what the Council believes is an appropriate acknowledgment of HAAL's role to date in the COAH process. Hillsborough and HAAL signed an agreement in mediation for the development of affordable housing on HAAL's site in conjunction with Hillsborough's attempt to formulate a fair share plan for its 1987 - 1999 fair share obligation. Consequently, the HAAL site is similar to sites certified to provide affordable housing in COAH's prior certification period, the status of which are addressed in

N.J.A.C. 5:93-5.13, which states that sites zoned for inclusionary development in addressing the 1987-1993 housing obligation "shall retain such zoning in the petition addressing a 1987 to 1999 fair share obligation" if the site "was subject to an agreement pursuant to the Council's mediation process." The zoning on the site, however, may be changed with the developer's consent. N.J.A.C. 5:93-5.13(c).

In this matter, HAAL has received General Development Plan approval pursuant to the Municipal Land Use Law, (MLUL), N.J.S.A. 40:55D-1 et seq., and the site was subject to an agreement pursuant to the Council's mediation process. However, the issues regarding the development of the site pursuant to the mediated agreement are currently the subject of Superior Court litigation and it is not at all clear whether the HAAL site can be developed as envisioned in the agreement. Therefore, the development of the HAAL site, and its realistic inclusion in any future fair share plan submitted by Hillsborough, may be affected by that litigation, as well as the numerous approvals necessary for its development. For these reasons, any petition for a fair share plan submitted by Hillsborough must fully account for the inclusion or non-inclusion of the HAAL site as a provider of affordable housing. If the municipality proposes to eliminate the site, its attention is directed to 5:13(c). Any court orders issued with regard to the development of the site by the Superior Court, will of course be honored by COAH. However, it is COAH's strong

preference that the municipality and HAAL resolve their differences with regard to the development of the site consistent with COAH's rules and the policies of the SDRP. Therefore, any Hillsborough fair share plan presented to COAH for its certification must include a new, signed agreement between HAAL and Hillsborough for development of the HAAL site. If the site is to include affordable housing, all COAH rules with regard to the SDRP must be followed.

There are sound policy reasons why the Council will not permit Hillsborough to ignore the HAAL site in a future fair share plan. Consistent with the Fair Housing Act and the MLUL, both Hillsborough and HAAL entered into a mediated agreement as part of COAH's process and Hillsborough sought and received certification based upon this agreement. It would be a waste of this Council's time and effort in administering the Hillsborough plan, conducting the required mediation, granting certification, and defending that certification in the appellate courts, for the Council to not require Hillsborough to include a new agreement for development of the HAAL site in any future fair share plan filed with the Council.* Anything less would compromise the COAH process and allow any municipality in the future to repudiate mediated agreements, as Hillsborough has done here. Such municipal behavior cannot be tolerated in the future by the Council, nor will it be.

The Appellate Division has asked the Council to discuss

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*In making this requirement, the Council understands that litigation concerning development of the site is ongoing and may affect this requirement. COAH will follow any court orders concerning the development of this site.

whether N.J.A.C. 5:93-5.4(c) or (d) is applicable to PAC/HCF site. Given the fact that COAH's grant of certification to the Hillsborough fair share plan has been rendered null and void by Hillsborough's actions and has therefore been formally revoked by the Council, this question is moot. Therefore, the Council does not believe it needs to address the issue at this time.

Renee Reiss,
Council Secretary

Dated: June 3, 1998

DOCUMENT LIST

1. Letter dated April 8, 1997, from John D. Middleton, Hillsborough Township Administrator, to COAH.

2. Letter dated June 27, 1997 from John D. Middleton, Hillsborough Township Administrator, to COAH.

3. Hillsborough Township Committee resolution dated July 26, 1995 endorsing the proposed amendment to the existing Wastewater Management Plan (WMP).

4. Hillsborough Township Committee resolution dated August 23, 1995 withdrawing the Committee's July 26, 1995 endorsement.

5. Hillsborough Township Committee resolution dated September 25, 1996 requesting deferral of NJDEP's consideration of the Hillsborough portion of the County WMP.

6. Hillsborough Township Committee resolution dated April 23, 1997 suspending the Planning Board's April 3, 1997 action.

7. Hillsborough Township Committee resolution dated June 25, 1997 recommending exclusion of the Adult Community site from the County WMP.

8. Hillsborough Township Committee resolution dated October 29, 1997 repealing Chapter 77, Section 91.1 (the PAC/HCF ordinance) of the Township's municipal code.

9. Notice of Motion for Emergent Relief filed by HAAL on September 19, 1997 with attached certification of Peter A. Buchsbaum, Esq. and letter brief.

10. Letter brief dated September 25, 1997 filed by James A. Farber, Esq., for Hillsborough in opposition to emergent motion.

11. Letter brief filed on September 25, 1997 by Edward Lloyd, Esq. for New Jersey Future, Inc. in opposition to emergent motion.

12. PEC Builders Incorporated's letter brief filed with COAH dated September 25, 1997 in opposition to HAAL's motion.

13. HAAL's reply brief dated September 29, 1997.

14. Two Resolutions of the Hillsborough Township Board, dated April 3, 1997, amending the WMP, and limiting the proposed amendments, and a recommendation from the Planning Board's Land Use Sub-Committee dated April 4, 1997.

Exhibit A.

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

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

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

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

SHIRLEY BISHOP,
Executive Director
Council on Affordable Housing

DATED February 5, 1998

RESOLUTION MEMORIZING DECISION OF COUNCIL ON AFFORDABLE HOUSING

WHEREAS, on March 18, 1998 the Friends of Hillsborough, Inc. ("Friends") filed a Notice of Motion for Leave to Intervene with the New Jersey Council on Affordable Housing ("COAH") returnable on April 1, 1998, seeking to intervene as a party in the Appellate Division's remand of In the Matter of the Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, Appellate Division, Docket No. A-5349-95T1 ("Hillsborough case"); and;

WHEREAS, Friends, which states that it represents several hundred Hillsborough residents, argued in a letter brief accompanying its motion that it should be allowed to intervene because it complied with the terms of R. 4:33-1, as explicated by Chesterbrooke Limited Partnership v. Planning Board of Township of Chester, 237 N.J. Super. 118 (1989); and

WHEREAS, in further support of its intervention, Friends also argued that it had an interest relating to the PAC/HCF site, which is the property that is the subject matter of the Hillsborough case, claimed that disposition of the remand could impair Friends' ability to protect its interest, claimed that its interest was different from the interests of all other parties in the case, and stated that its application for intervention was timely; and

WHEREAS, Friends' motion was opposed by the Hillsborough Alliance for Adult Living, L.L.P. ("HAAL"), the owner of the PAC/HCF site, which argued that the motion was not timely because the Hillsborough case is two years old and was only temporarily

remended to COAH, that Friends interest was adequately protected by other parities to the case and that intervention would be unfair to HAAL at this late stage in the proceedings; and

WHEREAS, a brief in support of Friends' intervention was filed by New Jersey Future, Inc. ("NJF"), which suggested that if COAH did not wish to grant to Friends the status of a party to the Hillsborough case, Friends should be allowed to participate in the remand; and

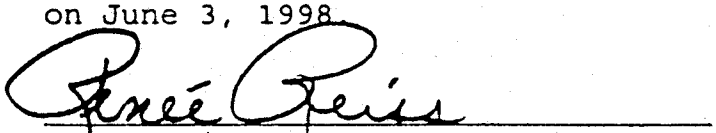
WHEREAS, oral argument on Friends' motion to intervene was heard by COAH at its regular scheduled meeting of April 1, 1998; and

WHEREAS, at its April 1, 1998 meeting the Council decided by a roll call vote that it did not wish to grant Friends' motion to intervene as a party, because of the fact that the case was before COAH on a temporary remand from the Appellate Division, but rather decided by a second roll call vote to allow Friends to participate in the remand before COAH.

NOW THEREFORE BE IT RESOLVED that the New Jersey Council on Affordable Housing hereby memorializes its decisions of April 1, 1998 granting the Friends of Hillsborough, Inc., the right to participate in the remand before COAH of In the Matter of the Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, Docket No. A-5349-95T1 and denying Friends' motion to intervene as

a party.

I hereby certify that this resolution was duly adopted by the Council on Affordable Housing on June 3, 1998.



Renee Reiss, Secretary
Council on Affordable Housing