

Letter Brief of

- Respondent Township of Hillsborough in opposition to the Motion for Dismissal of this Appeal by Respondent COAH

Pg. 42

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June 15, 1998

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

Re: I/M/O the Petition for Substantive Certification of the  
Housing Element and Fair Share Plan of the Township of  
Hillsborough, Somerset County  
Docket No. A5349-95T3

Dear Mr. Cox:

Please accept this letter brief in lieu of a more formal brief  
on behalf of Respondent Township of Hillsborough in opposition to  
the Motion for Dismissal of this appeal by Respondent New Jersey  
Council on Affordable Housing ("COAH").

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PROCEDURAL HISTORY

New Jersey Future, Inc. ("NJF") filed this appeal from COAH's April 3, 1996 grant of Substantive Certification to the Housing Element and Fair Share Plan of the Township of Hillsborough ("Hillsborough" or "Township"). After submission of briefs and after motions were granted supplementing the record, the Appellate Division temporarily remanded the matter back to COAH on January 7, 1998 "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." The Appellate Division also directed COAH to determine whether actions by Hillsborough which were documented in the supplemental filings with the court or any other new issues affected the Substantive Certification. COAH was also ordered 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)."

COAH then issued an Order to Show Cause on February 5, 1998 (Ra32, Ra33) directing Hillsborough and other parties to show cause whether the Substantive Certification continued as valid due to Hillsborough's activities since the April 3, 1996 Substantive Certification. The parties filed briefs and presented oral argument on April 1, 1998. On June 3, 1998, COAH passed a

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resolution and decision revoking the Substantive Certification (Ra1<sup>1</sup>, Ra2). COAH's decision also voided the waiver of center designation of the Township's PAC/HCF site (Ra26). On June 4, 1998, Respondent COAH filed this motion to dismiss the appeal as moot.

#### STATEMENT OF FACTS

Respondent Township of Hillsborough ("Hillsborough" or "Township") adopts as its counterstatement of facts the counterstatement of facts set forth in the brief of Respondent Hillsborough on the substantive merits of the appeal as supplemented by the grant of COAH's motion to supplement the record on November 12, 1997 and NJF's motion to supplement the record granted on January 7, 1998.

#### ARGUMENT

#### THE APPELLATE DIVISION SHOULD DECIDE THE ISSUES RAISED BY THE APPEAL.

Although COAH has revoked Substantive Certification, it's decision rendered on June 3, 1998 hardly concludes the issues raised on appeal. COAH notes that the mediated agreement between Hillsborough and the Hillsborough Alliance for Adult Living, LP ("HAAL"), which materially gave rise to COAH's certification decision, is at issue in a suit filed by HAAL against Hillsborough in the Superior Court..." (Ra25). Additionally, Friends of

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<sup>1</sup> Ra refers to Respondent COAH's Appendix filed with it's Motion to Dismiss the Appeal as Moot.

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Hillsborough ("FOH"), a local citizens group, has filed an appeal, Docket No. A-005414-97T2 appealing from a consent judgment entered between Hillsborough and US Home Corporation ("US Home") (HRa1)<sup>2</sup>. US Home is the contract purchaser of the property owned by HAAL which received the Substantive Certification at issue here. The consent judgment appealed from (HRa3) ordered that the ordinance adopted by Hillsborough repealing it's PAC/HCF overlay zone would not apply to the HAAL/US Home project ("Greenbriar Project") for which the Hillsborough Planning Board had granted general development plan approval and amended general development plan approval. The Order reads:

Further ordered, that the repealer ordinance shall not be deemed or construed to prevent Plaintiff from filing with the Planning Board, or divest the Planning Board of jurisdiction to consider and act upon, further applications for development approvals for the project pursuant to the GDP and the amended GDP for as long as they remain in force. (HRa4).

Additionally FOH has filed in the Superior Court Law Division, Docket No.SOM-L-913-98, a Complaint in Lieu of Prerogative Writs against the Township, the Township Planning Board, US Home and HAAL (HRa6). Another lawsuit recently filed seeks a builder's remedy (HRa16) as does the HAAL lawsuit referenced in the COAH decision. At issue in much of the litigation is whether the Greenbriar Project site is approvable, available, developable and suitable as

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<sup>2</sup> HRa refers to Respondent Hillsborough's Appendix attached to this brief.

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those terms are defined in N.J.A.C. 5:93-1.3. Included within the ambit of that ultimate determination is the applicability of the State Development and Redevelopment Plan ("SDRP"). In short, all the litigation will ultimately lead back to a need for determination of whether COAH's center designation waiver was permissible and whether the Greenbriar Project site has access to appropriate sewer infrastructure.

COAH's decision then goes on to add fuel to the fire by setting forth guidelines for any new Fair Share Plan submitted by Hillsborough to COAH. Pursuant to COAH's guidelines, any such plan must be capable of being implemented immediately (Ra26). "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." (Ra26). "[T]here will be no waivers granted from any of the Council's rules or policies." (emphasis in original) (Ra26). "[A]ny 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 intention is directed to 5:13(c)." (Ra27). Since COAH is requiring that any new Fair Share Plan still include the HAAL site, the issues as to the SDRP, center designation and sewer availability must of necessity rise again. The issues raised on appeal are therefore far from moot. The Appellate Division should decide the issues raised by the appeal. The issues that were raised on appeal

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are not hypothetical. The Greenbriar Project is in limbo until the issues are resolved. See, Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch.Div. 1976).

CONCLUSION

For the foregoing reasons, the appeal in the above matter should not be dismissed as moot.

Respectfully submitted,

DeCotiis, FitzPatrick & Gluck  
Attorneys for Township of  
Hillsborough

By:

  
James A. Farber

JAF/kg

cc: Edward Lloyd, Esq.  
Ronald L. Shimanowitz, Esq.  
Stephen Eisdorfer, Esq.  
Peter A. Buchsbaum, Esq.  
David Trombadore, Esq.

**NOTICE OF APPEAL  
SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION**

TITLE OF ACTION AS CAPTIONED BELOW:

U.S. HOME CORPORATION, a  
Delaware corporation authorized to do  
business in New Jersey,

Plaintiffs,

vs.

TOWNSHIP COMMITTEE OF THE  
TOWNSHIP OF HILLSBOROUGH in the  
County of Somerset,

Defendant.

ATTORNEY OF RECORD:

David W. Trombadore, Esq.  
Raymond R. & David W. Trombadore  
33 East High Street  
Somerville, NJ 08876  
Attorney for Appellant,  
Friends of Hillsborough, Inc.

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION; SOMERSET COUNTY  
DOCKET NO. SOM- L-1996-97 P.W.

SAT BELOW:

HON. ROBERT E. GUTERL

NOTICE IS HEREBY GIVEN THAT Friends of Hillsborough, Inc. APPEALS TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FROM THE ORDER ENTERED IN THIS ACTION ON APRIL 8, 1998 IN FAVOR OF PLAINTIFF ENTERING JUDGMENT, DISMISSING COMPLAINT AND RENDERING MOOT APPELLANT'S THEN-PENDING MOTION TO INTERVENE.

IF APPEAL IS FROM LESS THAN THE WHOLE, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED:

ARE ALL ISSUES AS TO ALL PARTIES DISPOSED OF IN THE ACTION BEING APPEALED?      YES

IF NOT, IS THERE A CERTIFICATION OF FINAL JUDGMENT ENTERED PURSUANT TO R. 4:42-2?

PRIORITY UNDER r. 1:2-5?

APPLICABLE SECTION UNDER THE RULE:

1. NOTICE OF APPEAL HAS BEEN SERVED ON:

	<u>DATE OF SERVICE</u>	<u>TYPE OF SERVICE</u>
Clerk of the Superior Court, Appellate Division Hughes Justice Complex 25 W. Market Street Trenton, NJ 08625	5/22/98	Messenger
Trial Judge - Hon. Robert E. Guterl Somerset County Court House P.O. Box 3000 Somerville, NJ 08876	5/22/98	Messenger



John R. Halleran, Esq.  
Giordano, Halleran & Ciesla  
P.O. Box 190  
Middletown, NJ 07748  
Attorney for Plaintiff, U.S. Home Corporation

5/22/98

Fed. Ex.

James Farber, Esq.  
DeCotiis, Fitzpatrick & Gluck  
500 Frank W. Burr Blvd.  
Teaneck, NJ 07666  
Attorney for Defendant, Township Committee of the  
Township of Hillsborough

5/22/98

Fed. Ex.

2. PRESCRIBED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON:

The order was decided on the papers; therefore, no transcript was made.

3. I HEREBY CERTIFY THAT:

There is no verbatim record.

Dated: May 22, 1998



DAVID W. TROMBADORE  
Attorney for Appellant

RECEIVED  
SUPERIOR COURT OF N.J.  
DEPUTY CLERK

98 APR -9 PM 12: 22

**GIORDANO, HALLERAN & CIESLA, P.C.**  
Mail to: P.O. Box 190, Middletown, N.J. 07748  
Deliver to: 125 Half Mile Road, Lincroft, N.J. 07738  
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**Attorneys for: Plaintiff**

**U.S. HOME CORPORATION, a**  
**Delaware corporation authorized**  
**to do business in New Jersey,**

**SUPERIOR COURT OF NEW JERSEY**  
**LAW DIVISION**  
**SOMERSET COUNTY**

**Plaintiff,**

**vs.**

**DOCKET NO. SOM-L-1996-97 P.W.**

**TOWNSHIP COMMITTEE OF THE TOWN-**  
**SHIP OF HILLSBOROUGH in the**  
**County of Somerset,**

**CONSENT JUDGMENT**

**Defendant.**

**THIS MATTER** having come before the Court by John R. Halleran, Esq. of Giordano, Halleran & Ciesla, a Professional Corporation, as attorneys for Plaintiff U.S. HOME CORPORATION ("Plaintiff"), in the presence of James A. Farber, Esq. of DeCotiis, Fitzpatrick & Gluck, as attorneys for Defendant TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HILLSBOROUGH ("Defendant"), and it appearing that Plaintiff has brought this action challenging the validity of Ordinance No. 97-28 entitled: "An Ordinance Repealing Chapter 77 (Development Regulations) Section 91.1 (PAC Planned Adult Community) of the Municipal Code of the Township of Hillsborough, County of Somerset, State of New Jersey" (the

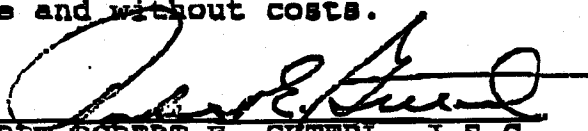
"Repealer Ordinance"), and it further appearing that counsel for Defendant has consented to the entry of this Order, and good cause having been shown,

IT IS ON this 8<sup>th</sup> day of April, 1998;

**ORDERED**, that the Repealer Ordinance shall not apply to, or have any effect upon, Plaintiff's proposed Planned Adult Community/Health Care Facilities planned development (the "Project") intended to be developed pursuant to §77-91.1 of the Development Regulations on Lots 1, 6, 10A, 13, 27, 28, 34, 44 and 44A in Block 11, and Lots 26, 27, 28, 29A, 33, 44, 45 and 47 in Block 12, as shown on the Official Tax Map of the Township of Hillsborough ("Township"), for which the Township Planning Board ("Planning Board") granted approval of the General Development Plan for the Project on December 19, 1991, which approval was memorialized by resolution dated January 2, 1992, (the "GDP") an and amended general development plan for the Project on December 7, 1995 (the "Amended GDP"); and it is

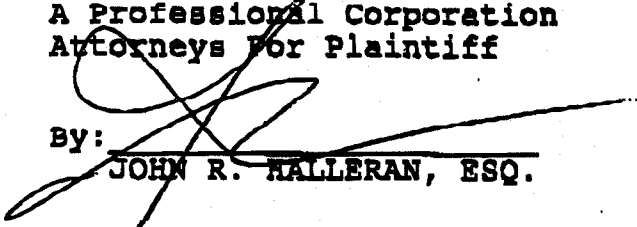
**FURTHER ORDERED**, that the Repealer Ordinance shall not be deemed or construed to prevent Plaintiff from filing with the Planning Board, or divest the Planning Board of jurisdiction to consider and act upon, further applications for development approvals for the Project pursuant to the GDP and the Amended GDP for as long as they remain in force; and it is

FURTHER ORDERED, that the Complaint be, and the same is hereby, dismissed with prejudice and without costs.

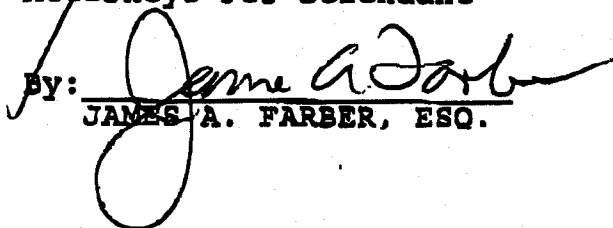
  
HONORABLE ROBERT E. GUTERL, J.S.C.

THE UNDERSIGNED HEREBY CONSENT TO THE FORM AND ENTRY OF THE FOREGOING JUDGMENT:

GIORDANO, HALLERAN & CIESLA,  
A Professional Corporation  
Attorneys For Plaintiff

By:   
JOHN R. HALLERAN, ESQ.

DECOTIIS, FITZPATRICK & GLUCK  
Attorneys For Defendant

By:   
JAMES A. FARBER, ESQ.

SUPERIOR COURT OF NEW JERSEY  
SOMERSET COUNTY  
MAY 22 8:15 AM

RAYMOND R. & DAVID W. TROMBADORE  
A Professional Corporation  
33 East High Street  
Somerville, NJ 08876  
908-722-7555  
Attorneys for Plaintiff

FRIENDS OF HILLSBOROUGH, INC., a :  
Corporation of the State of New Jersey, :  
Plaintiffs, :

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
SOMERSET COUNTY  
DOCKET NO. *Sum-L-913-98*

vs.

Civil Action

TOWNSHIP COMMITTEE of the :  
TOWNSHIP OF HILLSBOROUGH, :  
PLANNING BOARD of the TOWNSHIP :  
OF HILLSBOROUGH, U.S. HOME :  
CORPORATION and HILLSBOROUGH :  
ALLIANCE FOR ADULT LIVING, L.L.P., :  
Defendants. :

COMPLAINT IN LIEU OF  
PREROGATIVE WRITS

Friends of Hillsborough, Inc., a corporation of the State of New Jersey, having its registered office at 33 East High Street, Somerville, New Jersey, (hereinafter referred to as "Friends") by way of complaint against the defendants say:

**FACTS COMMON TO ALL COUNTS**

1. Friends is a not for profit corporation authorized to do business in the State of New Jersey.

*ab*

2. Friends was organized in 1996 to promote planning, conservation, and development policies that will create a sustainable future for the Township of Hillsborough.

3. Friends has approximately 200 members, most of whom reside in Hillsborough.

4. From its inception, Friends has been a vocal and public opponent of a proposed development for a 3,000 unit residential planned adult community in Hillsborough which has come to be known as the Greenbriar project. Many of Friends' members live in the immediate vicinity of the proposed project.

5. The Greenbriar project is proposed on a 760-acre site in the northwestern portion of the Township.

6. The Greenbriar site is located in the Township's agricultural (AG) zone. The AG zone has a minimum lot size of three acres for single family homes and two acres for clustered single family homes. Approximately 95% of the site is designated Rural Planning Area (Plan Area 4) under the State Development and Redevelopment Plan. The Greenbriar project would result in an overall average density in excess of 4 units per acre, with much greater densities in particular portions of the project.

7. On information and belief, the owner of the Greenbriar property is the Hillsborough Alliance for Adult Living, L.L.P. ("HAAL").

8. On information and belief, the contract purchaser and proposed developer of the site is U.S. Home Corporation. ("U.S. Home").

9. The proponents of the project, HAAL and U.S. Home, and their predecessors in interest have sought approvals for the project pursuant to Hillsborough's Ordinance Sec 77-91:1 et seq. commonly known as the Planned Adult Community ordinance (the "Ordinance").

10. The Ordinance requires, among other things, approval by the Township Planning Board of a general development plan ("GDP"). Ordinance Sec. 77-91.1B(1).

11. An applicant for GDP approval must demonstrate the availability of public sewers. Ordinance Sec. 77-91.1C(#)(d).

12. The Hillsborough Planning Board (the "Planning Board") approved a GDP proposing in excess of 10,000 units for the Greenbriar site by resolution dated January 2, 1992.

13. The Planning Board approved an amended GDP proposing in excess of 3,000 units for the Greenbriar site by resolution dated December 5, 1995 (this and the foregoing GDP approval collectively the "GDP approvals").

14. The applicants for the GDP approvals never made the required showing of the availability of public sewers for the Greenbriar site.

15. The Greenbriar site is not now and never has been included in any existing sewer service area.

16. The Greenbriar site requires extension of wastewater sewer facilities.

17. Neither the New Jersey Department of Environmental Protection nor any other governmental agency has approved inclusion of the Greenbriar site in any sewer service area.

18. In or around August 1994, the Hillsborough Township Committee ("Township Committee") applied to the New Jersey Department of Environmental Protection to include the Greenbriar site in the existing wastewater service area for Hillsborough Township.

19. In or around August 1995, the Township Committee withdrew its support for inclusion of the Greenbriar site in the existing wastewater service area.

as

20. In or around June 1997, the Township Committee refused to endorse the inclusion of the site in the Somerset County area-wide wastewater management plan now pending before NJDEP.

21. On July 30, 1997, HAAL and U.S. Home filed a complaint in lieu of prerogative writs in this Court challenging the Township Committee's failure to include the Greenbriar site in the proposed area-wide wastewater sewer plan (the "First Suit").

22. On August 26, 1997 Friends moved to intervene in the First Suit as of right, asserting both a substantial interest in the subject matter of the lawsuit and the inability of the Township Committee appropriately to represent Friends' interests.

23. On September 15, 1997 the Court granted Friends' motion to intervene.

24. On October 28, 1997, the Township Committee repealed the Ordinance without any language excluding the above GDP approvals from the effect of the repeal.

25. Prior to the repeal of the Ordinance, the Township Committee publicly debated whether to include language in the ordinance of repeal exempting the GDP approvals from the effect of the repeal. The ordinance originally was drafted to include such language; however, Friends objected to the inclusion of such language which was ultimately omitted.

26. On December 5, 1997, U.S. Home filed a complaint in lieu of prerogative writs against the Township Committee challenging the repeal of the Ordinance (the "Second Suit").

27. Neither U.S. Home nor the Township Committee informed Friends of the filing or pendency of the Second Suit.

28. U.S. Home did not inform the Court that Friends was a party to be joined in the Second Suit.



29. On January 13, 1998, and on the motion of U.S. Home, the Court dismissed the First Suit.

30. On February 8, 1998, HAAL filed a complaint in lieu of prerogative writs challenging the repeal of the Ordinance (the "Third Suit").

31. HAAL did not inform Friends of the filing of the Third Suit.

32. HAAL did not inform the Court that Friends was a party to be joined in the Third Suit.

33. Friends learned of the filing of the Third Suit from Bill Bowman, a reporter for the Courier News.

34. Friends moved to intervene as of right in the Third Suit on March 13, 1998 and promptly after learning of the lawsuit.

35. The Court granted Friends' motion to intervene in the Third Suit on April 17, 1997.

36. Friends did not learn of the filing of the Second Suit until March 31, 1998, when Mr. Bowman called Friends' counsel to inform him of the filing.

37. Friends confirmed the filing of the Second Suit on April 1, 1998.

38. Friends filed a motion to intervene in the Second Suit on April 2, 1998.

39. Friends wrote the Court on April 6, 1998 to request the Court not entertain any disposition of the matter until deciding the pending motion to intervene.

40. The Court entered a Consent Judgment in the Second Suit on April 8, 1998, without hearing or deciding the pending motion to intervene.

41. The Consent Judgment memorializes a settlement between the Township Committee and U.S. Home excepting the GDP approvals from the effect of the repeal of the Ordinance.

42. Friends filed an omnibus motion to hear the motion to intervene and to reconsider the entry of the Consent Judgment on April 15, 1998.

43. The Court denied the motion to reconsider by order dated May 13, 1998; the Court found the motion to intervene moot.

### **FIRST COUNT**

#### **(Violation of the Municipal Land Use Law and Denial of Due Process)**

44. Friends incorporates the above statements as if set forth herein.

45. The GDP approvals were granted contrary to the provisions of the Municipal Land Use Law ("MLUL") mandating that all ordinances for planned development shall require planning boards to find adequate provision of public services prior to approval of any planned development. N.J.S.A. 40:55D-45(b).

46. The GDP approvals were granted contrary to the express requirements of the Ordinance requiring a finding of the availability of public sewers.

47. The GDP approvals are invalid as contrary to the requirements of the MLUL and the Ordinance, as well as the due process requirements of the New Jersey Constitution and the United States Constitution.

48. The Consent Judgment purports to grant vested rights in an invalid enactment.

49. The Consent Judgment is contrary to law, illegal and unenforceable.

50. Further, the Consent Judgment is contrary to the interests of Hillsborough Township and its residents.

WHEREFORE, plaintiff demands judgment against defendant:s:

A. Declaring the Consent Judgment void, illegal, unconstitutional and of no force and effect;

all

B. Restraining U.S. Home from acting upon any of the terms of the Consent Judgment;

C. Ordering the Township Committee and the Planning Board to follow the requirements of the Municipal Land Use Law and the New Jersey Constitution and the United States Constitution in entertaining any application for the development of the Greenbriar site;

D. Awarding plaintiff costs and attorneys fees;

E. Granting such other relief as the Court may deem appropriate.

**SECOND COUNT**

**(Violation of the Open Public Meetings Act, Violation of the Municipal Land Use Law and Denial of Due Process)**

51. Friends incorporates the above statements as if set forth herein.

52. The Township Committee has not held any noticed public hearing in connection with its decision to enter the Consent Judgment.

53. The Township Committee has held no public vote to adopt, confirm or otherwise ratify the terms of the Consent Judgment.

54. The failure of the Township Committee to conduct a public hearing or take a public vote regarding the terms of the Consent Judgment violates the Public Meetings Act, N.J.S.A. 10:4-6 et seq., the Municipal Land Use Law, N.J.S.A. 40:55D-10, and the due process requirements of the New Jersey Constitution and the United States Constitution.

WHEREFORE, plaintiff demands judgment against defendants:

A. Declaring the Consent Judgment void, illegal, unconstitutional and of no force and effect;

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B. Restraining the Township Committee, the Planning Board or U.S. Home from acting upon any of the terms of the Consent Judgment;

C. Ordering the Township Committee, the Planning Board and U.S. Home to follow the requirements of the Municipal Land Use Law, the Open Public Meetings Act, the New Jersey Constitution and the United States Constitution in entertaining any action concerning the development of the Greenbriar site;

D. Awarding plaintiff costs and attorneys fees;

E. Granting such other relief as the Court may deem appropriate.

### **THIRD COUNT**

#### **(Declaratory Judgment)**

55. Plaintiff repeats the above statements as if set forth herein.

56. U.S. Home and HAAL continue jointly to submit proposals for development of the Greenbriar site to the Planning Board.

57. On or about April 30, 1998, U.S. Home and HAAL submitted to the Planning Board a concept proposal for the development of approximately 1750 units on the Greenbriar site.

58. The concept plan reduces the number of residential units by more than 15% and therefore requires Planning Board approval pursuant to N.J.S.A. 40:55D-45.6.

59. The Planning Board presently has no jurisdiction to hear any application for development of the Greenbriar site submitted by or on behalf of HAAL. HAAL has not been exempted from the effects of the repeal of the Ordinance. Therefore, HAAL must seek a density variance for the Greenbriar project, whether at 3,000 or 1,750 units, pursuant to N.J.S.A. 40:55D-70(d)(5). The Planning Board has no jurisdiction

to grant such a variance. N.J.S.A. 40:55D-60. Therefore, any such application must go to the Hillsborough Board of Adjustment.

60. Further, the Planning Board has no jurisdiction to entertain any application for the development of the Greenbriar site due to the invalidity of the GDP approvals.

61. Despite its obvious lack of jurisdiction, the Planning Board continues to entertain applications on behalf of HAAL and US Home for development of the Greenbriar site as a planned adult community pursuant to the GDP approvals.

WHEREFORE, plaintiff demands judgment against defendant:s:

A. Declaring the GDP approvals void, illegal, unconstitutional and of no force and effect;


B. Restraining the Planning Board, U.S. Home or HAAL from taking any action in reliance upon any or the terms of the GDP approvals;

C. Ordering the Township Committee and the Planning Board to follow the requirements of the Municipal Land Use Law and the New Jersey Constitution and the United States Constitution in entertaining any application for the development of the Greenbriar site;

D. Awarding plaintiff costs and attorneys fees;

E. Granting such other relief as the Court may deem appropriate.

RAYMOND R. & DAVID W. TROMBADORE  
A Professional Corporation  
Attorneys for Plaintiff

By:   
DAVID W. TROMBADORE  
A Member of the Firm

Dated: May 22, 1998

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**CERTIFICATION**

I certify that there is no other action pending in any court or in any arbitration proceeding concerning the subject matter of this suit, nor is any such action or arbitration contemplated except for Hillsborough Alliance for Adult Living, L.L.P. v. Township of Hillsborough, Superior Court of New Jersey, Law Division, Somerset County. Docket No. SOM-L-247-98 and In the Matter of the Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, et al., Superior Court of New Jersey, Appellate Division, Docket No. A-005349-95T3.

I further certify that I know of no other party who should be joined in the within action.

RAYMOND R. & DAVID W. TROMBADORE  
A Professional Corporation  
Attorneys for Plaintiff

By:   
DAVID W. TROMBADORE  
A Member of the Firm

Dated: May 22, 1998

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HUTT & BERKOW, P.C.  
459 Amboy Avenue  
P.O. Box 648  
Woodbridge, NJ 07095  
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Attorneys for Plaintiffs

	) SUPERIOR COURT OF NEW JERSEY
PEC BUILDERS, INC., a New Jersey Corporation and SKP LAND, INC., a New Jersey Corporation	) LAW DIVISION
	) SOMERSET COUNTY
Plaintiffs,	) DOCKET NO. <i>Som-L-993-98</i>
	) CIVIL ACTION
vs.	) COMPLAINT IN LIEU OF
TOWNSHIP OF HILLSBOROUGH, a Municipal Corporation of the State of New Jersey, located in Somerset County, New Jersey, the TOWNSHIP COUNCIL of the Township of Hillsborough and the PLANNING BOARD of the Township of Hillsborough	) PREROGATIVE WRIT
	) (Pursuant to <u>Mt. Laurel II</u> )
Defendants	)

Plaintiff, PEC Builders, Inc., a New Jersey Corporation, with a registered office at 812 Central Avenue, Westfield, NJ 07090 and Plaintiff SKP Land, Inc., a

New Jersey Corporation with a registered office at 90 Woodbridge Center Drive, Sixth Floor, Woodbridge, New Jersey 07095 (hereinafter referred to collectively as "Developer"), by way of Complaint against Defendants, say:

### FIRST COUNT

1. Plaintiffs PEC Builders, Inc. and SKP Land, Inc. are the owners of real property located in the Township of Hillsborough (hereinafter referred to as "Township" or "Hillsborough"), in the County of Somerset, State of New Jersey. The 240.2 acre real property (hereinafter collectively referred to as "the site" or "the property") consists of 117.55 acres, identified as Block 141, Lots 7.01, 30 and 31.02 ("PEC Builders, Inc. Property") and 122.7 acres identified as Block 140, Lot 1 and Block 141, Lot 2.01 ("SKP Land, Inc. Property") on the official tax map of the Township. The PEC Builders, Inc. Property and the SKP Land, Inc. Property are contiguous. Plaintiffs are substantial experienced financially sound Builder/Developer and as such has the immediate ability to acquire other suitable sites for development within the Township.

2. The site has frontage on U.S. Route 206 and Falcon Road.

3. The site is currently zoned as Rural/Agricultural (two acre minimum lot size) and Residential (one acre minimum lot size)

4. The site is essentially undeveloped farmland or woodlands.



5. The site is located in an area under the jurisdiction of the Township of Hillsborough. The site can be sewerred by lines existing at or near the site. The Township of Hillsborough has adequate sewer line and treatment capacity for the development of the site for Mt. Laurel purposes.

6. There is an existing water line at or near the site with sufficient capacity to service the site. The Township has adequate water capacity for the development of the site for Mt. Laurel purposes.

7. There are no environmental restraints that would prevent the development of the site for affordable housing purposes.

8. The site is buildable, suitable, available, developable and approvable for affordable housing purposes. The site is located in Planning Area 2 of the SDRP.

9. Defendant, the Township of Hillsborough, is a municipal corporation organized and existing under the laws of New Jersey.

10. Defendant, Township Council of the Township of Hillsborough (hereinafter referred to as "Township Council") is the duly constituted governing body of the Township of Hillsborough, and enacted all the ordinances hereinbelow complained of, including the land use and development regulations (hereinafter referred to as "zoning ordinances"), and the ordinances creating the Township of Hillsborough Planning Board (hereinafter referred to as "Planning

Board”).

11. Defendant, Planning Board, was created pursuant to municipal land use law (N.J.S.A. 40:55D-1 et seq.) and had adopted a master plan and recommended zoning ordinances and other ordinances regulating the nature, extent and cost of development of the land within Hillsborough.

12. Hillsborough is a developing municipality which anticipates continuing future commercial industrial and/or residential growth.

13. Plaintiff's property is physically well suited for a properly designated single family and/or multi-family residential development which includes an appropriate set-aside of affordable housing.

14. The Township of Hillsborough has heretofore submitted a Housing Element and Fair Share Plan to the Council on Affordable Housing (hereinafter referred to as "COAH"). Plaintiff, PEC Builders, Inc. was an objector to the Township's Housing Element and Fair Share Plan pursuant to the COAH mediation process. COAH had granted Substantive Certification to Township. However, pursuant to challenges to the grant of Substantive Certification COAH on June 3, 1998 revoked the grant of Substantive Certification for failure of Township to support and implement the Housing Element and Fair Share Plan. Township has taken no action to obtain Substantive Certification or a Judgement of Repeal. Township has not petitioned for Substantive Certification and has not

filed a new Housing Element and Fair Share Plan.

15. Since there is no exhaustion of administrative remedy requirements pursuant to Section 16 of the Fair Housing Act, N.J.S.A. 52:27d-301 et seq., or pursuant to COAH regulation promulgated thereunder, and the Township has not yet filed its final adopted fair share plan and housing element with the Council on Affordable Housing, Plaintiff rightfully seeks relief from the court, which has primary jurisdiction in this matter.

16. As the Township has not filed a finally adopted housing element and Fair Share plan with the Council on Affordable housing prior to the institution of the within litigation, the Township has forfeited the exhaustion of administrative remedy protection provided by the Fair Housing Act.

17. The zone in which the site is located forbids the construction of multifamily housing. The zone does not provide for a realistic opportunity for the construction of low and moderate income housing.

18. Township has failed to voluntarily comply through the administrative-process created by the Fair Housing Act. Defendants still have not adopted a housing element in accordance with N.J.S.A. 52:27d-310 or a Fair Share Plan approved by the Council on Affordable Housing.

19. The Defendant, Township, a municipal corporation of the State of New Jersey, has excised the authority delegated to it pursuant to the enabling

legislation, N.J.S.A. 40:55D-62, (hereinafter referred to as "Municipal Land Use Law"), and has adopted zoning and land use regulations regulating the nature, extent and cost of development of land within the Township.

20. The zoning ordinance of the Township contains several residential and non-residential zones. The zones which permit residential uses generally inhibit the development of affordable housing.

21. The Township zoning ordinance restricts the development of housing which would be affordable to low and moderate income households.

22. In addition, the Township's zoning ordinance fails to provide for sufficient density bonuses or other affirmative measures which would encourage development of a significant amount of low and moderate income housing.

23. The provisions of the multi-family zones of the Township's zoning ordinance are inadequate to provide a realistic opportunity for the construction of the Township's Fair Share of Affordable Housing because, inter alia, there are insufficient lands so zoned, and insufficient densities permitted.

24. There are numerous additional standards pertaining to residential development which are excessive and cost-generating.

25. The land use regulations adopted by Hillsborough are not reasonably necessary for protection of vital public interest or the public health or safety.

Rather, the land use regulations are harsh and oppressive and produce artificial

constraints which have the effect of arising unit rent costs and units sales costs of potential residential dwellings beyond the reach of the low and moderate income population of the Township and of the region.

26. The Township has, through its system of land use regulations, (A) violated its presumptive constitutional obligation to plan for and provide a realistic opportunity for an appropriate variety and choice of housing within its municipal boundaries, including affordable housing for low and moderate income persons; (b) failed to promote the general welfare of all categories of people within the municipality and the region: (C) failed to provide its fair share of the present and prospective regional needs of low and moderate income housing; and (D) failed to provide for housing needs of the indigenous poor.

27. The development regulations, as aforesaid are intended to have, and have had the effect of, precluding the actual construction of, or the realistic opportunity for the construction of, Hillsborough's Fair Share of low and moderate income housing units.

28. The zoning ordinance and development regulations of the Township of Hillsborough are presumptively and facially invalid, ultra vires, and contrary to the substantive due process and equal protection guarantees inherent in Article I, Section 1 of the New Jersey Constitution, and are contrary to N.J.S.A. 40:55D-2, due to the failure of the Township to provide, through its regulations, for a

balanced community and promote the general welfare.

29. As a direct, proximate and intended result of the polices effectuated through the Township's zoning ordinance and other development regulations, Hillsborough has affirmatively excluded most low and moderate income families and larger families from renting and/or owning residential units within the Township.

30. Plaintiff stands ready, willing and able to present an economically feasible residential development plan under the principles of Mt. Laurel which includes a substantial percentage of the total units being available to, and being affordable by, low and moderate income persons, pursuant to principles of sound land use and environmental planning.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

A. Declaring the entire ordinance of the Township of Hillsborough null and void and of no effect, generally, and as to Plaintiff's land specifically;

B. Enjoining the Township of Hillsborough to cease and desist in enforcing its entire zoning ordinance;

C. Appointing a special master to negotiate, mediate, and assist in developing constitutional zoning and land use regulations in the Township generally, and Plaintiff's property specifically with particular emphasis on meeting

the housing needs of low to moderate income persons;

D. Directing the Township of Hillsborough to revise its zoning and land use regulations within a time certain to meet its fair share obligation, which revisions shall contain affirmative devices designed to encourage construction of low and moderate income housing, which are designed to effectuate that purpose;

E. Formulating a "Builder's Remedy", which shall direct the Township of Hillsborough to rezone Plaintiff's property to permit up to two thousand four hundred (2,400) units or such average gross density, consistent with principles of sound land use and environmental planning, and sufficient to provide a reasonable economic return to the Plaintiff, while assuring the construction of an appropriate percentage of low and moderate income housing;

F In the alternative, if it is determined that the Mt. Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Township generally, and on Plaintiff's property specifically.

G. Ordering Defendants to pay Plaintiff's costs and reasonable attorney's fees, in light of its known failure to comply with the mandate of Mt. Laurel II and Hills, and its failure to rezone;

H. For such other relief as the Court shall deem just and proper under the circumstances.

### **SECOND COUNT**

1. Plaintiff repeats the allegations of the First Count as if set forth herein.
2. A municipal obligation to provide a realistic opportunity for housing its fair share of the region's present and prospective low and moderate income persons, exists and extends to every municipality.
3. In addition, Hillsborough, like every other municipality in the State, has an obligation to provide adequate housing for its indigenous need.
4. The Council on Affordable Housing has assigned Hillsborough a fair share obligation of 167 units.
5. The Township has failed to adopt and implement any compliance strategy that would create a realistic opportunity for the satisfaction of its fair share of lower income housing. The zoning and developmental regulations of Hillsborough are, therefore, clearly violative of the mandate of Mt. Laurel II, the Hills decision and the Fair Housing Act, and are contrary to the substantive due process and equal protection guarantees inherent in Article I, Section 1 of the New Jersey Constitution, and are contrary to N.J.S.A. 40:55D-2, due to the failure of the Township to provide, through its regulations, for a balanced community and



to promote the general welfare.

6. As the direct, proximate and intended result of the policies effectuated through the Township's zoning ordinance and other development regulations, Hillsborough has affirmatively excluded most low and moderate income families and larger families from renting and/or owning residential units within the Township.

7. Plaintiff stands ready, willing, and able to present an economically feasible residential development plan under the principles of Mt. Laurel II, which includes a substantial percentage of the total units being available to, and being affordable by, low and moderate income persons, pursuant to principles of sound land use and environmental planning.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

A. Declaring the entire ordinance of the Township of Hillsborough null and void and of no effect, generally, and as to Plaintiff's land specifically;

B. Enjoining the Township of Hillsborough to cease and desist in enforcing its entire zoning ordinance;

C. Appointing a special master to negotiate, mediate, and assist in developing constitutional zoning and land use regulations in the Township generally, and Plaintiff's property specifically with particular emphasis on meeting

the housing needs of low to moderate income persons;

D. Directing the Township of Hillsborough to revise its zoning and land use regulations within a time certain to meet its fair share obligation, which revisions shall contain affirmative devices designed to encourage construction of low and moderate income housing, which are designed to effectuate that purpose;

E. Formulating a "Builder's Remedy", which shall direct the Township of Hillsborough to rezone Plaintiff's property to permit up to two thousand four hundred (2,400) units or such average gross density, consistent with principles of sound land use and environmental planning, and sufficient to provide a reasonable economic return to the Plaintiff, while assuring the construction of an appropriate percentage of low and moderate income housing;

F. In the alternative, if it is determined that the Mt. Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Township generally, and on Plaintiff's property specifically.

G. Ordering Defendants to pay Plaintiff's costs and reasonable attorney's fees, in light of its known failure to comply with the mandate of Mt. Laurel II and Hills, and its failure to rezone;

H. For such other relief as the Court shall deem just and proper under the circumstances.

### THIRD COUNT

1. Plaintiff repeats the allegations of the First and Second Counts as if set forth herein.
2. Defendant Planning Board,, as part of the master plan, adopted a housing element which purports to address defendant's obligation for its fair share of the region's low and moderate income housing needs and Defendant Planning Board has recommended to the Township Council the present land development regulations ("Zoning Ordinance).
3. Said Housing Element and Zoning Ordinance is inadequate to satisfy the Township's fair share since same fails to provide for a realistic opportunity to develop low and moderate income housing.
4. As the direct, proximate and intended result of the policies effectuated through the Township Zoning Ordinance, Housing Element and other development regulations, Hillsborough has affirmatively excluded most low and moderate income families and larger families from renting and/or owning residential units within the Township.
5. Plaintiff stands ready, willing and able to present an economically feasible residential development plan under the principles of Mt. Laurel II., which

includes a substantial percentage of the total units being available to and being affordable by, low and moderate income persons,, pursuant to principles of sound land use and environmental planning.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

A. Declaring the entire ordinance of the Township of Hillsborough null and void and of no effect, generally, and as to Plaintiff's land specifically;

B. Enjoining the Township of Hillsborough to cease and desist in enforcing its entire zoning ordinance;

C Appointing a special master to negotiate, mediate, and assist in developing constitutional zoning and land use regulations in the Township generally, and Plaintiff's property specifically with particular emphasis on meeting the housing needs of low to moderate income persons;

D. Directing the Township of Hillsborough to revise its zoning and land use regulations within a time certain to meet its fair share obligation, which revisions shall contain affirmative devices designed to encourage construction of low and moderate income housing, which are designed to effectuate that purpose;

E. Formulating a "Builder's Remedy", which shall direct the Township of Hillsborough to rezone Plaintiff's property to permit up to two thousand four

hundred (2,400) units or such average gross density, consistent with principles of sound land use and environmental planning, and sufficient to provide a reasonable economic return to the Plaintiff, while assuring the construction of an appropriate percentage of low and moderate income housing;

F. In the alternative, if it is determined that the Mt. Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Township generally, and on Plaintiff's property specifically.

G. Ordering Defendants to pay Plaintiff's costs and reasonable attorney's fees, in light of its known failure to comply with the mandate of Mt. Laurel II and Hills, and its failure to rezone;

H. For such other relief as the Court shall deem just and proper under the circumstances.

#### **FOURTH COUNT**

1. Plaintiff repeats the allegations of the First, Second and Third Counts as if set forth herein.

2. The Plaintiffs lands were proposed to be developed as a Planned Adult Community/Health Care Facilities planned development (the "Project") pursuant to §77.91.1 of the Hillsborough Township Code (the "PAC/HCF

Ordinance") as it existed prior to October 28, 1997.

3. Notwithstanding the above, on October 28, 1997, defendant unilaterally adopted on final reading Ordinance No. 97-28 ("Repealer Ordinance") which purported to repeal Section 91.1 (PAC Planned Adult Community) of the Municipal Code of the Township of Hillsborough.

4. No exception was made for Plaintiffs' Property.

5. On October 28, 1997, Defendant adopted a Resolution purporting to justify the adoption of the Repealer Ordinance.

6. In accordance with the Municipal Land Use Law, specifically N.J.S.A. 40:55D-62a, no zoning ordinance may be adopted which contravenes the housing, as well as the land use element of the Municipal Master Plan, unless a Resolution explaining this discrepancy has been adopted.

7. The adoption of such an inconsistent Ordinance in the absence of an explanatory Resolution renders Ordinance 97-28 null, void and of no effect.

8. The housing and health care facilities proposed by Plaintiffs would have served the needs of persons with handicaps as defined in the Federal Fair Housing Amendments Act ("FHAA"), 42 U.S.C. §3601 et seq. and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, and the New Jersey Law Against Discrimination ("NJLAD"), specifically N.J.S.A. 10:5-12.5.

9. Ordinance 97-28, by interfering with the construction of such

housing, violates Plaintiffs' rights, and the rights of persons with disabilities who would purchase housing from Plaintiff or reside within the development planned by Plaintiffs.

10. Defendant's actions interfering with the provision of sewer service to Plaintiffs' PAC/HCF site have likewise violated the FHAA, the ADA, and the NJLAD.

WHEREFORE, Plaintiffs demand judgment against Defendants for an Order;

- A. reversing and setting aside the Resolution;
- B. declaring the Repealer Ordinance to be null and void and of no force and effect;
- C. permanently restraining and enjoining defendant from taking any further action the intent of which is to prevent the processing of development approvals.
- D. awarding Plaintiff damages and punitive damages;
- E. directing Defendants to pay attorneys' fees pursuant to 42 U.S.C. §3613 or otherwise and costs of suit; and
- F. for such other and further relief as the Court may deem necessary and just.

**FIFTH COUNT**

1. Plaintiff repeats the allegations of the First, Second, Third and Fourth Counts as if set forth herein.

2. The present zoning of Plaintiffs' site (i.e. Rural/Agricultural-2 acre minimum lot size and Rural- one acre minimum lot size) is inconsistent with the surrounding zoning pattern and constitutes illegal zoning.

3. The present zoning is arbitrary, capricious and unreasonable.

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

A. Declaring the present zoning null and void.

B. Requiring Defendants re-zone the site to allow development consistent with the surrounding zone pattern.

C. For such other and further relief as the Court may deem necessary and just.

HUTT & BERKOW, P.C.  
ATTORNEYS FOR PLAINTIFFS

DATED: June 5, 1998

BY:   
\_\_\_\_\_  
RONALD J. SHIMANOWITZ, ESQ.



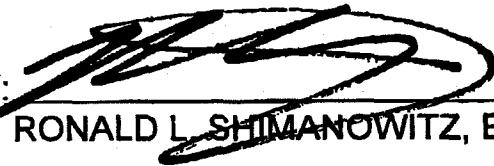
**RESERVATION OF FEDERAL RIGHTS**

Plaintiff hereby reserves any rights or claims it has to relief under the Fifth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983 and §1988, and hereby gives notice that it further reserves the right to pursue such federal rights or claims in a separate proceeding in federal court or in the courts of the State of New Jersey.

HUTT & BERKOW, P.C.  
ATTORNEYS FOR PLAINTIFFS

DATED: June 5, 1998

BY:

  
\_\_\_\_\_  
RONALD L. SHIMANOWITZ, ESQ.

**CERTIFICATION**

Pursuant to R. 4:5-1, the undersigned hereby certifies that:

1. The matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding except as follows:

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, Substantive Certification No. 31-99, Superior Court of New Jersey Appellate Division, Docket No. A-5349-95-T1;

B. U.S. Home Corp. v. Township Committee of Township of Hillsborough Docket No. SOM-L-1996-97; and,

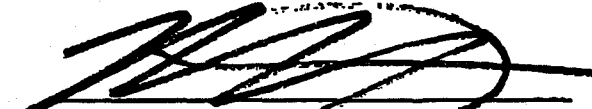
C. Hillsborough Alliance of Adult Living, L.L.P. vs. Township of Hillsborough, Docket No. SOM-L-247-98.

2. No other action or arbitration proceeding is presently contemplated; and

3. There are no other parties present known who must be joined in this action.

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

DATED: **June 5, 1998**



RONALD L. SHIMANOWITZ

KYLEPHILLERCOMPLAIN.WPD