

Letter brief on behalf of NJ Future, Inc. in response to the motion to dismiss filed by the AG on behalf of COAH

10 pss

HI000091B

## ***RUTGERS ENVIRONMENTAL LAW CLINIC***

---

*15 Washington Street, Room 304  
Newark, New Jersey 07102-3192  
(973) 353-5695  
(973)353-1249(Fax)  
relc@igc.apc.org (e-mail)*

*Rutgers, The State University of New Jersey  
School of Law-Newark*

June 30, 1998

Emille R. Cox, Clerk (HAND DELIVERED)  
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. A-5349-95T3

Dear Mr. Cox:

Please accept this letter brief in lieu of a more formal submission, on behalf of Appellant New Jersey Future, Inc., in response to the motion to dismiss this appeal as moot filed by the Attorney General on behalf of the Council on Affordable Housing ("Council" or "COAH"). We ask that this letter brief be substituted for our letter brief dated June 17, 1998. Our earlier position is no longer relevant in light of subsequent actions taken by Hillsborough Township, as explained herein.

Table of Contents

Procedural History and Statement of Facts ..... 2

ARGUMENT

    THE COURT SHOULD DENY COAH'S MOTION TO DISMISS AND  
    CONVENE A CASE MANAGEMENT CONFERENCE TO ADOPT A  
    BRIEFING SCHEDULE TO DISPOSE OF THIS APPEAL ..... 4

CONCLUSION ..... 9

**Procedural History and Statement of Facts**

As recited in the Movant's papers, this appeal was temporarily remanded to COAH on January 7, 1998, the Appellate Division retaining jurisdiction. After further agency proceedings, COAH issued an opinion on remand on June 3, 1998, revoking the grant of substantive certification to Hillsborough Township. In its decision, COAH instructed Hillsborough that should it present a new fair share plan,

[it] 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.

[COAH Decision, June 3, 1998 at 26, emphasis in original]

Immediately after issuing its decision on remand, COAH moved before this Court to

dismiss New Jersey Future's appeal on June 4, 1998. While the instant motion to dismiss was

Emile R. Cox

Docket No. A-5349-95T3

June 30, 1998

Page 3

pending before this Court, on June 12, 1998, Hillsborough Township petitioned the Council for reconsideration of the revocation of substantive certification, and it simultaneously asked this Court not to dismiss this appeal. In light of this fact, on June 17, 1998, in response to the Council's motion to dismiss the instant appeal, Future asked this Court to hold the Council's motion to dismiss in abeyance, pending the disposition of the Township's petition for reconsideration. On June 24, 198, without explanation, Hillsborough informed COAH that it was withdrawing its petition for reconsideration. On the same day, COAH reaffirmed its motion to dismiss in the light of Hillsborough's most recent change of course.

Because of COAH's decision on June 3, 1998 to revoke substantive certification outright, without giving Hillsborough an opportunity to amend its fair share plan, at least three builder's remedy suits have been filed in the Superior Court against the Township. Respondent Hillsborough Alliance for Adult Living filed a builder's remedy case on February 9, 1998 even before the instant appeal was considered on remand to COAH. See Hillsborough Alliance for Adult Living, L.L.P. v. Township of Hillsborough, Superior Court of New Jersey, Law Division, Docket No. SOM-L-247-98 PW. A second builder's remedy suit was filed on June 5, 1998 by PEC Builders, Inc. which was involved in the mediation before COAH in the instant case. See PEC Builders, Inc. v. Township of Hillsborough et al., Superior Court of New Jersey, Law Division, Docket No. SOM-L-993-98 PW. A third builder's remedy case was filed on June 12, 1998. See Krame Development Company v. Township of Hillsborough et al., Superior Court of

Emile R. Cox  
Docket No. A-5349-95T3  
June 30, 1998  
Page 4

New Jersey, Law Division, Docket No. SOM-L-1054-98 PW.<sup>1</sup> Hillsborough is no longer protected by the Fair Housing Act against such suits, because it does not have a petition pending before COAH. See N.J.S.A. 52:27D-319(b); Hills Dev. Co. v. Bernards Tp., 108 N.J. 1, 35-36 (1986). Therefore, these suits must be defended by Hillsborough and decided by the trial court.

### ARGUMENT

THE COURT SHOULD DENY COAH'S MOTION TO DISMISS AND CONVENE A CASE MANAGEMENT CONFERENCE TO ADOPT A BRIEFING SCHEDULE TO DISPOSE OF THIS APPEAL.

This appeal is not moot. The substantive issues that have been raised by New Jersey Future in this appeal must be resolved by either the trial court or by this court in connection with the three builder's remedy suits that are now pending in the trial court. An issue that is "capable of repetition" is not moot. DeVesa v. Dorsey, 134 N.J. 420, 428 (1993).

It is axiomatic that the courts, when deciding *Mount Laurel* cases that are not within COAH's jurisdiction, "should conform wherever possible to the decisions, criteria, and guidelines of the Council." *Hills Development Company v. Bernards Township*, 103 N.J. 1, 63 (1986).

COAH's "criteria and guidelines" embodied in its regulations, have been shown by New Jersey Future's appeal brief to embrace consistency with the SDRP. For example, COAH's regulations require that inclusionary developments in Planning Area 2 must be preferred before those in Planning Areas 4 and 5 (see N.J.A.C. 5:93-5.4(d)(1)); that PA 4 and 5 developments, when

---

<sup>1</sup> To add further complication to this matter, we have been informed by counsel that the latter two builder remedy cases, but not the first case, have been referred to Judge Mahon in Hunterdon County.

Emile R. Cox  
Docket No. A-5349-95T3  
June 30, 1998  
Page 5

approved, must be located in Centers (see N.J.A.C. 5:93-5.4(c)); that such Centers must be designated by the State Planning Commission prior to Substantive Certification (see N.J.A.C. 5:93-5.4(c)); that the availability of infrastructure must be guaranteed prior to substantive certification (see N.J.A.C. 5:93-5.3(b)) (referencing N.J.A.C. 5:93-1 which defines a “developable site” as one which has access to appropriate water and sewer infrastructure and has received water consistency approval from DEP). These requirements are rarely, if ever, waivable. See New Jersey Future’s initial appellate brief at pp. 32-45. COAH’s “decision” embodied in the June 3 Hillsborough opinion, which is quoted above, requires any new Hillsborough plan to conform to the SDRP. In doing so, it essentially adopts New Jersey Future’s interpretation of the relevant regulations, and there is every reason under *Hills*’ “wherever possible” language for the courts to do so as well.

When the builder’s remedy claims come are adjudicated, at least one of the claimants, Respondent Hillsborough Alliance for Adult Living (HAAL) in this case, will offer a PA 4 and 5 site. Moreover, at least one other builder, PEC Builders, will offer a PA 2 site. These two claimants are interested parties in the instant appeal whose adverse claims were mediated by COAH prior to substantive certification in this case, and resolved in favor of HAAL. Thus, it is perfectly clear that, unless this Court steps in now to resolve the legal issues that have been presented concerning the obligation to choose PA 2 over PA 4 sites, the parties will have to retrace the steps already taken in COAH mediation. At issue in the builder’s remedy cases is which builder (or possibly one of the other builder’s remedy claimants, whose facts align with



either HAAL or PEC Builders) prevails in its builder's remedy claim. It is equally clear that the winner will have to defend its victory in this court on exactly the same issues that are now presented. Not only are the issues "capable of repetition," but they are virtually guaranteed of repetition because of the procedural posture of the case as it has evolved.

There is an additional, powerful reason for this Court to retain jurisdiction and resolve the SDRP issues before it. In the opening passages of *Mount Laurel II*, Chief Justice Wilentz wrote forcefully about the endless delays and the procedural tangles that had frustrated compliance with the constitution. The Chief Justice made clear that a central purpose of the Court's refashioning of the procedure in *Mount Laurel* cases was to administer the cases swiftly and efficiently, so that the constitutional mandate to provide a "realistic opportunity" for lower income housing would be met promptly.

The [*Mount Laurel*] obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 199 (1983) ("*Mount Laurel II*").

The remainder of the Court's long opinion is virtually saturated with efficiency concerns, both substantive (the use of an objective fair share formula, for instance, *id.* at 248) and, most relevantly for our purposes, procedurally. Efficiency was the reason the Court reassigned all *Mount Laurel* litigation to the three special *Mount Laurel* judges, *id.* at 216, 292-93. And,



closely paralleling the issue here, efficiency was the reason that *Mount Laurel II* held there could be only a single appeal, after all compliance issues had been resolved. *id.* at 285. Overwhelmingly, the Supreme Court's concern was that these issues get through litigation and that housing get built, as quickly as possible.

New Jersey Future initiated this appeal to pursue the objectives that were defined by Chief Justice Wilentz in the Mount Laurel litigation. New Jersey Future like the Supreme Court wants housing to be built expeditiously and in the right place, i.e., consistent with the State Plan. This appeal should not be dismissed because to do so would delay the construction of housing in Hillsborough and perhaps more importantly, leave unresolved important housing and State Plan issues that will directly affect the ability to build expeditiously affordable housing in other parts of the State.

It is no doubt true that the SDRP issues could be presented to the trial court, resolved, and then brought to this Court on appeal by the losing party. If, instead, this court resolves the critical issues now, the builder's remedy litigation will be dramatically simplified, and almost certainly shortened. If these matters are resolved in this appeal, the developer or developers whose sites are disadvantaged by the Court's ruling are likely to drop out before trial, there being no incentive to stay in and appeal a decision that follows this Court's prior decision. The issues have been fully briefed over the last year (with the exception of Appellant's reply brief), by parties whose adversariness and concrete interest in the outcome cannot be doubted. Any additional briefing that might be required to deal with recent matters can be accomplished

Emile R. Cox  
Docket No. A-5349-95T3  
June 30, 1998  
Page 8

promptly. Nor is this a situation frequently encountered with mootness claims where judicial efficiency is not served by hearing the mooted issue. Anderson v. Sills, 143 N.J.Super. 432, 437 (Ch. Div. 1976). As we have demonstrated (and both HAAL and Hillsborough agree), the Court will eventually have the identical issues before it, presented by the identical parties. It actually would be *inefficient* not to hear this case now, but rather to postpone it for a year or two and then start all over again.

Appellant New Jersey Future respectfully requests that this Court deny the Council's motion to dismiss the appeal. If the Court decides to retain jurisdiction, we further suggest that the parties be called to a case management conference at which a briefing schedule and any other matters than could facilitate a prompt resolution can be worked out.

### CONCLUSION

For all of the foregoing reasons, this Court should deny the Motion to Dismiss and schedule a case management conference at which a briefing schedule and any other matters that can facilitate a prompt resolution of this matter may be addressed.

Respectfully submitted,

Edward Lloyd  
John Payne  
Counsel for Appellant

cc. William P. Malloy, Esq. D.A.G.  
Peter A. Buchsbaum, Esq,  
Ronald I. Shimanowitz, Esq.

Emile R. Cox  
Docket No. A-5349-95T3  
June 30, 1998  
Page 9

David Trombadore, Esq.  
James Farber, Esq.  
Stephen Eisdorfer, Esq.