

- Brief of Township of Hillsborough in the County of Somerset
for cert of fair share housing plan.

Pg. 33

HI 000094 B

Superior Court of New Jersey
Appellate Division

Docket No. A-6668-97T3

IN THE MATTER OF THE PETITION FOR: CIVIL ACTION
SUBSTANTIVE CERTIFICATION OF :
THE HOUSING ELEMENT AND FAIR : ON APPEAL FROM AN ORDER
SHARE PLAN OF THE TOWNSHIP OF : OF THE SUPERIOR COURT
HILLSBOROUGH, SOMERSET COUNTY, : OF NEW JERSEY,
Substantive Certification No.31-99, Revoked : LAW DIVISION,
: SOMERSET COUNTY
:
: Sat Below:
:
: COUNCIL ON AFFORDABLE
: HOUSING
:
:

**BRIEF OF TOWNSHIP
OF HILLSBOROUGH IN THE
COUNTY OF SOMERSET**

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PROCEDURAL HISTORY

In 1991, the Township of Hillsborough ("Hillsborough" or "Township") developed a Planned Adult Community/Health Care Facility ("PAC/HCF") ordinance which in part was aimed at providing an opportunity to address the Township's Mt. Laurel obligations (Aa 41)¹. *is this true? how?*

Pursuant to the zoning scheme created by the PAC/HCF ordinance, PAC/HCF Joint Venture applied for General Development Plan ("GDP") approval in 1991 and was granted approval on December 19, 1991; that approval was memorialized by resolution passed January 2, 1992 (Aa 54).

Who was the original developer?
In 1995, the developer, by that date succeeded by Hillsborough Alliance for Adult Living, LP ("HAAL") sought approval of an Amended General Development Plan ("Amended GDP"). The Amended GDP reduced the scope of the project from the 1991 approval for 10,000 dwelling units to 3,000 dwelling units and eliminated one mixed use location and one golf course, where two of each had been proposed in the original GDP. The Amended GDP was approved by resolution of the Township Planning Board ("Planning Board") on December 7, 1995 (Aa 58).

In February 1995, the Township Attorney wrote a letter (Aa 62) to the Council On Affordable Housing ("COAH") forwarding the Planning Board resolution (Aa 66) adopting the Municipality's Housing Element and Fair Share Plan ("Fair Share Plan") (Aa 68) and the resolution of the Hillsborough Township Committee formally requesting Substantive Certification from COAH (Aa 67).

During the COAH process, another developer, owning property known as Gateway at

¹ Aa refers to Appellant Township of Hillsborough's Appendix.

Sunnymeade, objected to Hillsborough's Petition for Substantive Certification (Aa 94) and COAH commenced mediation. Mediation was concluded with the issuance of a January 17, 1996 mediation report (Aa 95) to which the objector filed no comments. Subsequently on March 4, 1996, COAH issued its compliance report regarding Hillsborough's Substantive Certification (Aa 105).

On the heels of the issuance of the mediation report, Hillsborough and HAAL executed a Municipal Development Agreement ("Development Agreement") (Aa 117) which, if implemented, would provide for the construction of Hillsborough's second cycle Mt. Laurel units as well as a substantial number of market units and would possibly address future fair share obligations for the Township's subsequent cycles, all subject to the terms and conditions set forth in the Development Agreement; those conditions included, for example:

- a. Planning Board approval;
- b. Other governmental approvals;
- c. Sewer availability, depending in great degree upon the approval of the New Jersey Department of Environmental Protection ("DEP"); and
- d. Designation of the property as Planning Area 2 by the Office of State Planning.²

On April 3, 1996, COAH granted Substantive Certification (Aa 145). In its Substantive Certification, COAH acknowledged the possibility that there might not be approval by DEP of sewer infrastructure for the Greenbriar Project. In that event, Hillsborough would be required to amend its Fair Share Plan and provide alternative means to address the 160 unit ~~new~~ construction component. The Substantive Certification also granted a waiver from the ~~center~~ designation

² Of the 758± acres of HAAL's property (also known as "Greenbriar"), 42 acres is located in Planning Area 2 and the remaining is located in Planning Areas 4 and 5 pursuant to the State Development and Redevelopment Plan ("SDRP").

requirements of the SDRP. The Substantive Certification concluded as follows:

Be it further resolved that any change in the facts upon 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.
(Aa 160)

On May 20, 1996, New Jersey Future, Inc. ("NJF") filed a Notice of Appeal ("NJF Appeal") (Aa 161) from COAH's grant of Substantive Certification.

Pursuant to a requirement of the Substantive Certification, on April 8, 1997, John Middleton, Hillsborough's Administrator, filed a letter with COAH advising that the Hillsborough Planning Board had passed a resolution requesting the entire Greenbriar site be included in the Somerset County-Upper Raritan Watershed Wastewater Management Plan (Aa 171). Shortly thereafter however, the Township Committee by resolution dated April 22, 1997 (Aa 172) hedged on the Township's position; its resolution reserved the right to endorse or not endorse the Planning Board's April 3, 1997 recommendation. On June 24, 1997, Hillsborough voted (Aa 173) to overrule the Planning Board's recommendation in order to permit:

- a. DEP to process the independent petition filed by U.S. Home Corporation ("USH"), HAAL's contract purchaser, for inclusion of the Greenbriar site in a wastewater management plan and
- b. The Planning Board to hear the Greenbriar applications pending before it.

The Township was deferring any action until those other activities had concluded. Township Administrator Middleton forwarded the Township resolution to COAH by letter dated June 27, 1997 (Aa 174).

In reaction to Hillsborough's actions, COAH moved to remand the NJF Appeal back to

COAH (Aa 175). The Appellate Division denied that motion (Aa 179).

In October, 1997, the Township adopted an ordinance which repealed the PAC/HCF portions of its zoning chapter (Aa 178). HAAL had attempted to enjoin the adoption of that ordinance through an emergent motion filed with COAH. The parties had briefed HAAL's motion and COAH had denied the motion.

On October 10, 1997, COAH filed a motion to supplement the record with documentation of Hillsborough's actions in April and June of 1997 with respect to sewers for the Greenbriar site and with the papers filed by various parties in connection with HAAL's emergent motion before COAH in September-October 1997. The court granted COAH's motion on November 13, 1997.

On December 4, 1997, NJF filed a motion for the court to take judicial notice and for supplementation of the record on appeal in the NJF Appeal, requesting that various municipal actions regarding sewers for the Greenbriar site and the repealer of the PAC/HCF zoning regulations in addition to other correspondence be included in the record. On January 7, 1998, the Appellate Division granted NJF's motion to supplement the record and temporarily remanded all the supplemented materials to COAH (Aa 180). The order stated in part:

Among other things COAH shall 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. COAH should also 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 issued an Order to Show Cause on February 5, 1998 (Aa 181), directing Hillsborough and the other parties to the NJF Appeal to show cause "whether the grant of Substantive Certification remains valid as a consequence of actions by Hillsborough, subsequent to the grant of Substantive Certification..."

The parties submitted briefs to COAH and COAH entertained oral argument. Then on June 3, 1998, COAH adopted a decision and passed a resolution revoking Substantive Certification No.31-99 (Aa 183).

Hillsborough appealed ("Hillsborough Appeal") the June 3, 1998 decision and resolution of revocation (Aa 13) and HAAL cross-appealed (Aa 21). HAAL then filed an amended cross-appeal (Aa 31).

Meanwhile, subsequent to its June 3rd action, COAH moved to dismiss the NJF Appeal. The Appellate Division dismissed the NJF appeal on August 8, 1998 (Aa 213).

STATEMENT OF FACTS

The June 3, 1998 decision revoking Substantive Certification outlined the positions taken by the parties in their briefs in response to COAH's February 5, 1998 Order to Show Cause (Aa 184). COAH then reached the following conclusions.

1. Hillsborough had not complied with the terms of its Substantive Certification (Aa 200);
2. Hillsborough has no intention of complying in the future with its Substantive Certification (Aa 200) because:
 - a. Hillsborough requested that COAH allow Hillsborough time to create a new Fair Share Plan;
 - b. Hillsborough's June 24, 1997 resolution regarding sewers is a retreat from the commitment it made to COAH to induce COAH's grant of Substantive Certification;
 - c. Hillsborough's October 1997 Repealer Ordinance repealing the PAC/HCF zoning affects the HAA site and is further evidence of Hillsborough's retreat from commitments made to COAH.
3. Hillsborough, by its actions, rendered its Fair Share Plan "null and void" (Aa 202).
4. Hillsborough has refused to support the development of the Greenbriar site, constituting a material act of noncompliance with its municipal Fair Share Plan.
5. COAH revokes the Substantive Certification (Aa 203).
6. COAH, as a consequence of the revocation, has no continued jurisdiction over

Hillsborough (Aa 203) because Hillsborough has no Fair Share Plan before COAH (Aa 204).

7. The Development Agreement between HAAL and the Township is the subject of a law suit filed by HAAL against Hillsborough in Superior Court³ (Aa 207).
8. Hillsborough refuses to support the extension of sewer service to the Greenbriar site (Aa 208).
9. If Hillsborough repetitions for Substantive Certification, there will be no waivers granted from any of COAH's rules or policies (Aa 209).
10. COAH need not afford Hillsborough a hearing regarding the revocation pursuant to N.J.A.C. 5:93-10.5 (Aa 202).
11. The Greenbriar site has acquired a status in COAH's eyes similar to sites certified to provide affordable housing in a COAH prior certification; and therefore any new petition "must fully account for the inclusion or noninclusion of the HAAL site as a provider of affordable housing" (Aa 209).
12. In spite of the language in the Appellate Division remand that COAH 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 has determined that issue to be moot (Aa 212).

³ HAAL filed a builder's remedy lawsuit against Hillsborough in February, 1998, presently bearing the Docket No. HNT-L-492-98 (the case was transferred to Hunterdon County from its original Somerset County venue). That action has been consolidated with three other builders' remedy cases, and a fifth case brought by Friends of Hillsborough, Inc., a citizens group against Hillsborough, the Planning Board, HAAL and USH seeking to stop the Greenbriar project. NJF has intervened in the consolidated cases.

ARGUMENT

POINT I

HILLSBOROUGH COMPLIED WITH THE
TERMS OF ITS SUBSTANTIVE
CERTIFICATION

COAH cites three reasons for its contention that Hillsborough undermined its own Substantive Certification as follows:

- A. Hillsborough's actions with regard to the inclusion of the Greenbriar site in the Somerset County/Upper Raritan Wastewater Management Plan.
- B. Hillsborough's October 28, 1997 Repealer Ordinance repealing the PAC/HCF zoning.
- C. Hillsborough's position with regard to the designation of the Greenbriar site in State Development and Redevelopment Plan Planning Area 2.

A. Sewers

The Wastewater Management Plan for Hillsborough was prepared in 1988 and endorsed by the Township in May of that year (Aa 214). That Plan did not include the Greenbriar site. While Hillsborough endorsed a proposed amendment to the Wastewater Management Plan on July 25, 1995 (Aa 215), when objections were filed with DEP shortly thereafter, the Township Committee passed another resolution on August 22, 1995 withdrawing its endorsement (Aa 216).

On September 24, 1996, the Township Committee again acted with respect to sewers, requesting DEP to defer consideration of the Hillsborough portion of the County Wastewater Management Plan and indicating "no amendment to the Hillsborough Township Wastewater

Management Plan shall be endorsed without the consent or by affirmation of the Hillsborough Township Committee" (Aa 217).

When the Planning Board recommended inclusion of the Greenbriar site in the County Wastewater Management Plan by resolution adopted on April 3, 1997, the Township Committee followed up with its own resolution dated April 22, 1997 suspending the Planning Board action (Aa 172). Then on June 24, 1997, knowing that USH had applied to DEP petitioning for sewer approval for the Greenbriar site, the Township recommended that the PAC/HCF zone not be included in Hillsborough's portion of the Wastewater Management Plan (Aa 173).

At the time that Hillsborough executed the Development Agreement with HAAL in late February of 1996 and at the time COAH granted Substantive Certification on April 3, 1996, the Township had already firmly established its position as set forth in its August 22, 1995 resolution (Aa 216) which stated in pertinent part:

It leaves the individual property owners to either continue to pursue their independently filed request for plan amendments or to allow such plan amendments to proceed to NJDEPE for review in accordance with the Somerset County/Upper Raritan Watershed Wastewater Management Plan dated November, 1994, of which the respective amendments are a part.

Shortly before that, on August 10, 1995, Van Cleef Engineering Associates, the engineering firm working on behalf of Hillsborough with respect to the Township's Wastewater Management Plan Amendments, wrote to DEP requesting that the portion of the Township's amendment involving the Greenbriar site be deleted based upon a meeting held with Township officials on August 9, 1995 (Aa 218). That letter was copied to the developer as well as others.

In short, Hillsborough had taken a position with regard to sewers prior to execution of the Development Agreement and COAH's Substantive Certification, and maintained that position

throughout. When USH independently petitioned for inclusion of the lands in the Wastewater Management Plan on June 11, 1998, the Township then passed a resolution which referenced that filing and articulated the Township's decision to allow the DEP process to go forward without being prejudged by the Township's governing body. — but DEP requires TP endorsement

The Township can hardly be accused of repudiating Substantive Certification when its position with regard to sewerage the Greenbriar site remained constant before, during and after the grant of Substantive Certification by COAH.

B. The Repealer Ordinance does not affect Greenbriar. — true!

Hillsborough adopted 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" on October 28, 1997 (Aa 178). Prior to adoption, HAAL filed an emergent application seeking an order from COAH blocking the passage of the ordinance. Hillsborough opposed that emergent application. Hillsborough's adoption of the Repealer Ordinance and its opposition to HAAL's emergent application are the linchpin for COAH's finding that Hillsborough has flipfopped on its position with respect to its Substantive Certification. That is not the case.

HAAL argued before COAH, and continues to argue, that the Repealer Ordinance does not affect its Substantive Certification. N.J.S.A. 40:55D-45.1 provides in part:

...
The planned development shall be developed in accordance with the General Development Plan approved by the planning board notwithstanding any provision of P.L. 1975, c.291 (C 40:55D-1 et seq.), or an ordinance or regulation adopted pursuant thereto after the effective date of the approval.

b. The term of the effect of the General Development Plan Approval shall be determined by the planning board using the guidelines set forth in Subsection c of this Section, except that the term of the effect of the approval shall not exceed twenty years from the date upon which the developer receives final approval of the first section of the planned development pursuant to P.L. 1975, c. 291 (C 40:55D-1 et seq.).

...
Cox, New Jersey's Zoning and Land Use Administration (Gann 1977) Section 15-2, at page 287, interprets the above cited statutory provision to mean "approval of such plans insulate the developer from certain subsequent changes in law for periods potentially much longer than would be achieved by preliminary and final site plan and subdivision approval alone. Compare N.J.S.A. 40:55D-45.1 and N.J.S.A. 40:55D-49.1".

In Hillsborough, the history of the Repealer Ordinance reflects the municipal belief that the Repealer Ordinance would not invalidate Greenbriar approvals. First, the Planning Board through a letter from the Planning Board Attorney to the Township Attorney dated June 16, 1997 (Aa 220) recommended the repeal of the PAC/HCF zone with the understanding that the Planning Board would create alternatives to address senior citizen needs to the Township. The letter from Planning Board Attorney William Sutphen, states in part:

2. The existing PAC/HCF zone would still be applicable to the Greenbriar at the Village (formerly Hillsborough Alliance for Adult Living) application which has received General Development Approval and has filed an application for preliminary major site plan approval.

The Planning Board wanted to create alternatives for senior citizen housing and believed the existing PAC/HCF ordinance was too restrictive. Prior to adoption of Ordinance No. 97-28, the Township Attorney wrote to the Township Committee, on October 24, 1997. A portion of this memorandum reads:

It is my view both from viewing the Planning Board Memorandum of June 16, 1997 to you and your own actions, that it is not your intent to take action inconsistent with the Land Use Plan Element and the Housing Plan Element of the Master Plan as it pertains to senior citizens. Rather, it is your intention to replace what you believe to be an ordinance with problems with a superior ordinance. Nevertheless, some may view the PAC/HCF repealer as being inconsistent with the Master Plan. If this be case, you may still adopt the ordinance but three affirmative votes are necessary as is the attached resolution.

(Aa 221).

What about low income?

The Township's resolution passed on the same evening as the Repealer Ordinance was adopted reinforces the notion that Hillsborough was seeking to address senior citizen housing in a more meaningful way and that the Repealer Ordinance was neither proposed as a mechanism to invalidate the Greenbriar project nor was it adopted with that goal in mind. The only appropriate inference from the activities of the Planning Board and Township Committee is that Hillsborough intended to repeal the PAC/HCF ordinance with regard to all properties in the Township, excepting the Greenbriar property, and then develop an alternative regulatory scheme for the provision of senior citizen housing. There was a valid legislative purpose, which from its inception was unrelated to Greenbriar, and in no manner should that be construed as a breach of Substantive Certification. The PAC/HCF zone is an overlay zone encompassing many residential districts throughout Hillsborough and affecting a great deal of property. Even without the PAC /HCF district, Hillsborough provides for affordable housing in all residential districts. The expressed purpose of residential districts MZ, AG, RA, RS, R, R1, CR, AH, RCA, TC, BPD includes the following:

The standards are intended to offer maximum flexibility and site design in the selection of dwelling unit types in order to offer a balanced housing pattern attractive to all income and age segments of the community as part of the Township's fair share of meeting of the regions low- and moderate-income needs, Section 77-91 (Aa 224)

Greenbriar is located in the AG District and therefore the underlining zoning after adoption

of the Repealer Ordinance still provides for and encourages low- and moderate-income needs; that is simply icing on the cake however because as previously noted, Greenbriar is still entitled to the benefits of the PAC/HCF zoning as existed prior to repeal.

Further supporting and evidencing Hillsborough's position that Greenbriar was saved from the repealer is the consent judgment which it signed with USH (Aa 225). USH had challenged the Repealer Ordinance in an action in lieu of prerogative writs. Hillsborough and USH entered a consent judgment which provides that the Repealer Ordinance does not apply to the Greenbriar project and states in part:

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.

This is OK is not it? why is David challenging this in the App? DJV

The consent judgment⁴ was signed on April 8, 1998, which was subsequent to the oral argument before COAH on whether the Substantive Certification was still valid. However, at oral argument, Hillsborough advised COAH of the impending settlement and consent judgment; that was acknowledged by a footnote in the June 3, 1998 opinion (Aa 200) but COAH chose to disregard that information.

C. SDRP

It is totally irrelevant that Hillsborough may have argued before COAH that the planning area

⁴ FOH filed a motion to intervene in U.S. Home vs. Hillsborough but the consent judgment was signed prior to the return date. FOH filed a motion for reconsideration which Judge Guterl denied. FOH has appealed the consent judgment in Docket No. A-5414-97T2. That appeal has been briefed and awaits decision.

designation should not be changed or that Hillsborough did not take steps to seek that change. The resolution of COAH granting Substantive Certification reads in pertinent part:

BE IT FURTHER RESOLVED, that COAH hereby grants a waiver of N.J.A.C. 5:93-5.4 (c) regarding center designation for the PAC/HCF site in Hillsborough for the reasons set forth above and in the attached COAH compliance report;

(Aa 159)

The "reasons set forth above" are set forth in the preamble of the resolution which describes that the "PAC/HCF is located predominantly in Planning Area 4 and partially in Planning Area 2"; cites N.J.A.C. 5:93-5.4(c) which requires when an inclusionary development is in a Planning Area 4 that the development be located in a center; cites COAH policy that the center designation may be waived "When a new site meeting a 12-year obligation is jointly proposed by the municipality and the developer and the site has water and sewer capacity and accessibility and is determined to be available, approvable, suitable and developable"; finds that the PAC/HCF site meets the criteria of the aforementioned COAH policy; advises that COAH had requested an advisory report from the Office of State Planning ("OSP") and that OSP responded that it did not formally object to the center designation waiver; and concludes that Hillsborough's waiver request meets "COAH criteria for a waiver pursuant to N.J.A.C. 5:93-15.1(b)".

The COAH compliance report further fleshes out the issue regarding center designation waiver (Aa 105). It discusses a memorandum of understanding between COAH and the State Planning Commission ("SPC") which sets forth ten basic principals and reviews each of the ten principals with regard to Hillsborough's waiver of request. The COAH staff then recommended the waiver of center designation.

The Development Agreement (Aa 117) provides that HAAL is not obligated to proceed

unless sewers are made available to the site "by reason of the site: ...(c) having been reviewed by the Office of State Planning (OSP) and the assurance given to COAH by OSP that during 1996 cross-acceptance process for the State Development Plan that the PAC site and Planning Area 4 will be recommended for inclusion in Planning Area 2..." (Aa 122) (emphasis added).

In fact, OSP wrote exactly that to COAH on January 31, 1996 (Aa 131). Herbert Simmens, Director of OSP in response to COAH's request for input regarding Hillsborough's waiver of center designation request, wrote in part:

Subject to our discussions with the Department of Environmental Protection, the Department of Transportation, Somerset County and other agencies regarding the adequacy of current or proposed infrastructure improvements, the office would recommend to the State Planning Commission that areas encompassing and immediately surrounding the PAC/HCF be given consideration by the State Planning Commission for redesignation as Planning Area 2.

(Aa 133)

COAH granted the center designation waiver. The HAAL development could proceed with that waiver and without the redesignation of the site from Planning Area 4 to Planning Area 2. NJF appealed the Substantive Certification in principal part based upon the waiver of center designation. It would appear from the arguments set forth in NJF's appellate brief that NJF would view any attempt to change the planning area designation of the site to Planning Area 2 with a jaundiced eye (Aa 229-235). NJF argued that the Greenbriar site was not suitable nor developable under COAH regulations, and by implication not suitable for Planning Area 2 designation, because the site is "not adjacent to compatible land uses"; the site is a "gateway to a much larger concentration of Planning Area 4 and 5 land to the North and West"; the site does not have access to appropriate water and sewer infrastructure and has not received consistency approvals from DEP.

Since COAH has granted the waiver as an ingredient of Substantive Certification, it can not

now contend that Hillsborough has violated the Substantive Certification by not seeking a change for the site to Planning Area 2. If the waiver is valid, a change in the Planning Area designation is unnecessary. Besides, OSP had indicated it would ^{consideration} recommend the Greenbriar site be included in Planning Area 2. It was NJF which stood in the way of such a change. Notwithstanding Hillsborough's advocacy or opposition, NJF would and will ~~continue~~ to oppose a redesignation of that portion of the Greenbriar site lying within the Planning Area 4.

Hillsborough did not undermine Substantive Certification. It has consistently maintained its position with regard to sewers. The repealer ordinance was not intended to affect nor did it affect the Greenbriar project. COAH had granted a waiver from the Planning Area center designation required by its rules and so Hillsborough's inaction with regard to changing the site's planning area designation from 4 to 2 was immaterial.

In spite of the language in COAH's June 3, 1998 decision, it was NJF's appeal which derailed the Substantive Certification and not Hillsborough's acts or omissions. It was NJF's position on appeal that rendered the present construction of low and moderate income housing unrealistic.

what is the issue?
who would be paying?
if it were
considered as?
Mayor Jim Reese
read the
net!

POINT II

HILLSBOROUGH SHOULD HAVE BEEN PROVIDED A HEARING PURSUANT TO N.J.A.C. 5:93-10.5

N.J.A.C. 5:93-10.5 provides as follows:

5:93-10.5 Revocation of Substantive Certification

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.

COAH in its decision of June 3, 1998 writes:

It is clear however, that the requirement for a hearing in Section 10.5 assumes that there are no material contested issues of fact. (Citation omitted) 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 remarkable that COAH could contend that there are no material contested issues of fact when the entire Substantive Certification was subject to an appeal which was not even initiated by the Township.

Is there sewer infrastructure available to the Greenbriar site? Is the Greenbriar site appropriately designated as a Planning Area 4? Is the Greenbriar site an appropriate site to receive a center designation? Does Hillsborough meet the standards for waiver of center designation? Does the Repealer Ordinance save from repeal the Greenbriar site?

It may be argued that all those questions are questions of law and not fact, but Hillsborough contends that they are mixed questions of law and fact. Evidence can be educed as to where sewer

the material issue is whether Hillsborough met the standards for waiver of center designation?

is this a material issue for revocation?

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Legal not pertinent to issue

COAH revocation

infrastructure presently exists in the area of the Greenbriar property; the extent to which the existing infrastructure has capacity for the Greenbriar development; the extent to which sewer infrastructure must be extended for the ultimate development contemplated by the Substantive Certification and Development Agreement; the environmental constraints, if any, to extending the sewers; the uses and developability of the adjacent and proximate properties to the site; the documentation of the Township and Township Planning Board leading to the adoption of the Repealer Ordinance as they may effect the question of whether Greenbriar's GDP and Amended GDP Approval were saved from repeal. Of course the most critical fact is whether or not there is a realistic present opportunity for the development of the Greenbriar site within the twelve year cycle for which Hillsborough had been granted Substantive Certification. That specific issue of whether there is a realistic opportunity for construction of low- or moderate-income housing has been found to be an issue of fact in Quad Enterprises vs. Paramus Borough, 250 N.J. Super. 256, 263 (App. Div. 1991). In that case the court criticized COAH for not transferring a contested case to the Office of Administrative Law saying "COAH did not say how it arrived at that decision, and the justification for it does not appear elsewhere in the record before us." Likewise in this case, COAH makes the conclusionary statement that there are no contested material issues of fact but does not indicate how it arrived at that decision and there is no justification elsewhere in the record supporting that conclusion.

The New Jersey Administrative Procedure Act N.J.S.A. 52:14B-1 et seq., requires agencies to afford parties an opportunity for an hearing in contested cases. N.J.S.A. 52:14B-9. That section requires reasonable notice to the parties; opportunity to respond, appear and present evidence and argument; and findings of fact based exclusively on the evidence and matters officially noticed.

COAH in its decision cites Contini vs. Bd. Of Educ. of Newark, 286 N.J. Super. 106 (App.

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Div. 1995) cert. den. 145 N.J. 372 for the proposition that no hearing is required where there are no material contested issues of fact. In that case the Commissioner of Education had referred to the Office of Administrative Law a petition seeking removal of the Newark Board of Education and creation of a state-operated district. The Administrative Law judge considered a motion for summary judgment wherein "extensive documentary material was submitted in support of and in opposition to the motion, and oral argument was conducted." 145 N.J. at p.12. The ALJ concluded there were no material issues of fact after reviewing photographs and a videotape which clearly depicted the state of deterioration in the Newark school system. The Newark Board had argued that it was entitled to a "plenary" hearing and it was really the scope and type of the hearing at issue as opposed to the entitlement to a hearing at all. Again, as previously indicated, COAH in the Hillsborough case simply says there are no contested issues of fact without any foundation for that statement and ignores the requirement for a hearing. *What about TSC members*

N.J.A.C. 5:93-10.5 is not discretionary. It requires a hearing conducted pursuant to the Administrative Procedure Act when an action revoking Substantive Certification is contemplated by COAH. That administrative regulation works in concert with N.J.S.A. 52:14B-11 which provides in part:

No agency shall revoke or refuse to renew any license unless it has first afforded the licensee an opportunity for hearing and conformity with the provisions of this act applicable to contested cases.

A license is defined in the Act and "includes the whole or part of any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law". N.J.S.A. 52:14B-2(f).

In Hills Development vs. Bernards Tp. 229 N.J. Super. 318, 339 (App. Div. 1988), the court

found that the issues of access to appropriate streets and consistency with COAH's environmental policies constitute genuine issues of material fact. The court therefore found that the agency was obligated to afford affected parties a hearing.

In New Jersey DEP vs. Atlantic State, 241 N.J. Super. 591, 599 (App. Div. 1990), the court wrote:

Where a statute does not specifically provide that a hearing is not required when an agency decides to revoke, suspend or refuse to renew a license, then a hearing may be provided under the APA.

The Fair Housing Act is silent but N.J.A.C. 5:93-10.5 requires a hearing; clearly a hearing should have been afforded.

In Matter Of Issuance Of A Permit, 120 N.J. 164 (1990) Ciba-Geigy had been issued a permit to discharge wastewater effluent into the Atlantic Ocean. The municipalities of Lavalette and Seaside Park as well as an environmental protection group and several concerned citizens appealed the DEP permit. In that case the court discussed adjudicatory procedures to be employed by agencies when there are contested proceedings. The court found at p. 172 that fact finding "is a basic requirement imposed on agencies that act in a quasi-judicial capacity" and cited Application of Howard Savings Institution of Newark., 32 N.J. 29, 52 (1960) for the following:

It is axiomatic in this state by this time that an administrative agency acting quasi-judicially must set forth basic findings of fact, supported by the evidence in supporting the ultimate conclusions and final determination, for the salutary purpose of informing the interested parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra legal considerations.

The court at p.173, also cited New Jersey Bell Tel. Co. vs. Communications Workers of AM., 5 N.J. 354, 375 (1950), for the proposition that "This requirement is 'far from a technicality and is a matter

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of substance.” See also, Application of Holy Name Hosp., 301 N.J. Super. 282, 291-292 (App. Div. 1997).

Where the resolution of a contested legal issue properly before the court necessarily turns on factual issues within the special province of an administrative agency, the court should refer the factual issues to that agency.

Boss. v. Rockland Elec. Co., 95 N.J. 33, 42 (1983); see also Alexander’s v. Paramus Borough, 125 N.J. 100, 116 (1991). The deference to administrative fact-finding requires the appropriate process for fact-finding be implemented.

This case must be remanded to COAH consistent with the requirement to afford the parties a hearing prior to the revocation of Substantive Certification.

POINT III

COAH SHOULD HAVE RETAINED JURISDICTION

COAH did not believe it had the statutory authority to continue its jurisdiction over Hillsborough. COAH revoked certification because it believed that Hillsborough had obstructed the construction of an inclusionary development, a belief Appellant contends was in error, as argued in Point I. The reality is that Hillsborough did not precipitate the problems with the Substantive Certification. If in fact the Fair Share Plan which received Substantive Certification was proving incapable of providing a realistic present opportunity for the construction of low- and moderate-income housing, then COAH could have and COAH should have required amendments to the Fair Share Plan. Indeed that is exactly what the Substantive Certification contemplated where it reads:

Whereas, in the event that the PAC/HCF site is not approved for inclusion in the 208 Plan Amendment, Hillsborough shall be required to amend its Housing Element and Fair Share Plan to address the 160 units in another manner.

(Aa 156)

Elsewhere the resolution provides that Hillsborough is to report back to COAH within six months regarding the status of the 208 Plan Amendment. Similarly, the Development Agreement anticipated the possibility that DEP sewer approval or required approval of other agencies would not ultimately be forthcoming and set forth contingencies if those approvals could not be obtained.

An amended Fair Share Plan might address Hillsborough's calculated need in many fashions. For example, the Fair Share Plan, which was forwarded to COAH in February of 1995 as part of the petition for Substantive Certification, noted the realistic possibility of credits without control and reserved the right to amend the Fair Share Plan to include those additional credits (Aa 91). These

credits without control were pursued through the process before COAH leading up to Substantive Certification (See Aa 238, paragraph 4; Aa 243; Aa 245; Aa 246; Aa 95). The last of those documents is the COAH Mediation Report wherein it was written "Hillsborough has withdrawn its request for credits without control in its current Fair Share Plan by letter dated January 11, 1996 (Attachment B)" (Aa 101). In fact, the referenced Attachment B is a letter from Hillsborough Borough Attorney Edward Halpern, which belies the statement in the Mediation Report; Mr. Halpern writes and informs COAH that Hillsborough would not be pursuing credits without control "at this time" but "should the present Fair Share Plan have to be modified or should it become necessary to submit a different Fair Share Plan, the Township reserves the right to utilize credits without control" (Aa 130).

Credits without control are critical because if a municipality demonstrates its entitlement to credits without control, it reduces the number of units of new construction which must be provided for in that municipality's Fair Share Plan. Since Hillsborough's Fair Share Plan included the Greenbriar project and consequently provided for the full number of calculated need units through that development, Hillsborough, did not feel the urgency of reviewing its entitlement to credits without control. When the landscape changed and Greenbriar became problematic, COAH should have permitted Hillsborough time to resurrect credits without control as part of an amended Fair Share Plan.

The Fair Housing Act provides, "notwithstanding any other law to the contrary, a municipality shall be entitled to ..." credits without control in accordance with the four statutory proofs required.. N.J.S.A. 52:27D-307c(1). (emphasis added)

Another mechanism Hillsborough could utilize in an amended plan is permitted by N.J.S.A.

52:27D-312. It allows a municipality to transfer up to 50% of its Fair Share by way of a Regional Contribution Agreement to a receiving municipality. That is simply another example of a possible component that Hillsborough might have employed had it been allowed to amend its Fair Share Plan. COAH should have determined that the plan for which Substantive Certification was granted was not likely to produce low- and moderate-income housing in a timely manner and should have given Hillsborough a specific timeframe to file an amended Fair Share Plan.

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The procedural regulations governing COAH provide for such amendments to the terms of Substantive Certification at Subchapter 13 of N.J.A.C. 5:91. By analogy, if the original petition for Substantive Certification had been denied, the municipality would have been given sixty days to refile its petition. N.J.A.C. 5:91-5.5.

COAH in refusing to maintain jurisdiction cites N.J.S.A. 52:27D-309. That section, at least on its face, is inapposite. N.J.S.A. 52:27D-309b states:

A municipality which does not notify the Council of its participation within four months may do so at any time thereafter. In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirements pursuant to Section 16 of this Act, unless a municipality also files its Fair Share Plan and Housing Element with the Council prior to the institution of litigation.

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The four month trigger in this cited section refers to a time four months after the effective date of the Fair Housing Act N.J.S.A. 52:27D-309a. The statutory scheme of Section 9 deals with the Fair Housing Act's first cycle and is not relevant to the second cycle in which Hillsborough finds itself.

As COAH wrote in another portion of its decision, "The Fair Housing Act is silent as to what the consequences of municipal non-compliance with a certified Fair Share Plan will be." (Aa 201). COAH could have and should have utilized sections of its regulations permitting it the opportunity

to retain jurisdiction since Hillsborough has continually shown a spirit of compliance with the Mount Laurel mandate and the Fair Housing Act.

Hillsborough is not a municipality that has resisted the Mount Laurel mandates. It has complied with its first round share and therefore COAH, in the second round was amenable to granting a substantial compliance reduction. The Township created a Fair Share Plan for its second cycle. When it became apparent that its Fair Share Plan was floundering and prior to any builder's remedy case being filed, the municipality began to prepare an alternate Fair Share Plan. There is absolutely no evidence to date that Hillsborough has not acted in good faith in this regard. See Van Dalen v. Washington Township, 120 N.J. 234 (1990). COAH should have retained jurisdiction.

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POINT IV

COAH MAY NOT PREDETERMINE WHETHER IT WILL GRANT WAIVERS UPON RE-PETITION

The June 3, 1998 decision on appeal attempts to give Hillsborough guidance with respect to any new Fair Share Plan. In part COAH wrote:

The criteria found in the Council's rules for the formulation of 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.

(Aa 209)

In the very next paragraph, COAH then finds that the HAAL site must be included in any new Fair Share Plan. The only way that the HAAL site could be included is with the waivers previously granted as part of the Substantive Certification. There were two waivers, one dealing with the phasing of the inclusionary development and the other, of course, regarding the SDRP center designation waiver. In short, the requirement to include the HAAL site cannot be reconciled with the predetermination to reject waiver applications. *why?*

Notwithstanding the particulars regarding the Greenbriar site, it is inappropriate for COAH to make a predetermination that it will not grant waivers; it can be nothing but mere speculation as to what set of circumstances will be presented by any new Fair Share Plan or what waivers, however minimal, may be required to make the new plan a workable document. See State v. Marshall, 148 N.J. 89, 278 (1997); 100 East Credit Corp. v. Eric Schuster, 212 N.J. Super. 350, 358 (App. Div. 1986); R. 1:12-1. *- Sure I can!*

COAH's statement that it would not consider waivers is similar to a situation where

municipality adopts a zoning ordinance prohibiting variances from certain specified standards. Such a provision was ruled invalid in Smith v. Paquin, 77 N.J. Super. 138, 143 (App. Div. 1962), cited in a footnote in AMG Associates v. Township of Springfield, 65 N.J. 101, 114 (1974). The enabling legislation for zoning grants variance capability from the strict application of zoning regulations upon demonstrating affirmative and negative criteria; the COAH rules provide for a waiver from the strict application of its rules upon demonstrating the three proofs required by N.J.A.C. 5:91-15.1(b). A municipality cannot bar in advance the right to seek a variance and COAH cannot bar in advance the right to seek a waiver.

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COAH's rules provide for waiver if COAH is able to make certain determinations which are specifically enunciated in the rule on a case by case basis. N.J.A.C 5:93-15.1(b). COAH must wait for a specific application for a waiver, consider the application for waiver on its merits applying the standards in the rule, and then make a determination. It was inappropriate to state in its June 3, 1998 decision that no waivers would be granted.

POINT V

**A RE-PETITION FOR SUBSTANTIVE
CERTIFICATION NEED NOT INCLUDE
HAAL'S PROPERTY**

COAH equates the Greenbriar site to sites certified to provide affordable housing during a prior certification period pursuant to N.J.A.C. 5:93-5.13. That rule simply does not apply since Greenbriar site was not an inclusionary development included in the 1987-1993 housing obligation.

COAH also acknowledges that the Greenbriar property was the subject of Superior Court litigation "and it is not at all clear whether the HAAL site can be developed as envisioned in the [developer's] agreement." COAH writes:

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).

(Aa 210)

COAH's pronouncement does not comport with the directive of Mount Laurel which required a determination that there be "a likelihood - to the extent economic conditions allow - that the lower income housing will actually be constructed." So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 222 (1983). If on one hand COAH is revoking certification because it alleges the municipality's obstructionist tactics have rendered the likelihood of construction of Mount Laurel units remote, then it should not be ordering the inclusion of that site in a new Fair Share Plan yet to be submitted because it will be found to have ordered a plan without a present realistic opportunity for the construction of low- and moderate-income housing.

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CONCLUSION

For the reasons set forth herein, the COAH decision of June 3, 1998 should be reversed; and the matter should be remanded to COAH nunc pro tunc to exercise jurisdiction over an amended Fair Share Plan to be filed by the Township of Hillsborough⁵.

Respectfully submitted,

By James A. Farber
James A. Farber
Attorney for Respondent
Township of Hillsborough

Dated: December 17, 1998

⁵ Hillsborough did in fact file a new petition for Substantive Certification in September, 1998 and it was returned by COAH on the basis that COAH did not have jurisdiction..

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