

Hillsborough Litigation

8/26/99

- Brief of Respondent Council on Affordable Housing
(by Dean Farmer) ~~4~~

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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,) REVOKED)))	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-6668-97T3 <u>Civil Action</u>
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BRIEF OF RESPONDENT
COUNCIL ON AFFORDABLE HOUSING

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PROCEDURAL HISTORY

In this Mount Laurel case, see Burlington City N.A.A.C.P. v. Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I), and Southern Burlington County N.A.A.C.P. v. Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), the Township of Hillsborough ("Hillsborough" or "Township") appeals from the June 3, 1998 decision on remand from this court (Aa*183 to Aa212 and CRA1 to CRA27) of the New Jersey Council on Affordable Housing ("COAH" or "the Council") revoking the Council's grant of substantive certification. On April 3, 1996 the Council granted substantive certification to Hillsborough's fair share plan pursuant to the standards set out in the Fair Housing Act, N.J.S.A. 52:27D-301 to -329 (Aa145 to Aa160) and thereby determined that Hillsborough's fair share plan was "consistent with the rules and criteria" adopted by the Council and would make the achievement of Hillsborough's "fair share of low and moderate income housing, realistically possible...". N.J.S.A. 52:27D-314.

The centerpiece of Hillsborough's certified fair share plan was a Planned Adult Community/Health Care Facility ("PAC/HCF") site owned by the Hillsborough Alliance for Adult Living, L.P.

*Aa refers to the appendix filed by appellant Township of Hillsborough with its brief in this matter.

Ab refers to appellant's brief.

HRa refers to the appendix filed by respondent/cross-appellant Hillsborough Alliance for Adult Living, L.L.P. ("HAAL") with its brief in this matter.

HRb refers to HAAL's brief.

CRA refers to the appendix filed with this brief.

("HAAL"), which Hillsborough chose to be the sole inclusionary site in its fair share plan. The PAC/HCF site was zoned for 3,000 units of housing, with a 15 percent set-aside for affordable housing, 196 affordable units of which would satisfy Hillsborough's Mount Laurel obligation for the 1987-1999 certification period and the remainder of which would meet Hillsborough's future affordable housing obligation (Aa85 to Aa88; Aa121; Aa109, Aa110). Hillsborough and HAAL had signed a "Municipal Development Agreement" on February 27, 1996 with regard to the development of the PAC/HCF site (Aa117 to Aa126), which was incorporated by reference into COAH's April 13, 1996 grant of substantive certification (Aa155). That agreement acknowledged that development of the site was contingent upon sewer service being made available to the site (Aa122).

On May 20, 1996 New Jersey Future, Inc. ("NJF"), an environmental and planning advocacy group, appealed the Council's grant of substantive certification to Hillsborough's fair share plan (Aa161 to Aa170). In its appeal, In the Matter of the Petition for Substantive Certification of the Housing Element and Fair Share Plan of the Township of Hillsborough, Somerset County, Appellate Division Docket No. A-5349-95T1 (hereinafter "NJF appeal"), NJF focused on the Council's grant of a waiver of its center designation requirement of N.J.A.C. 5:93-5.4(c) for the PAC/HCF site and thereby objected to the extension of sewer service to the PAC/HCF site because the site was primarily classified as Rural Planning Area 4 in the State Development and Redevelopment Plan ("SDRP") (Aa168 to Aa170). During the course of NJF's appeal,

Hillsborough, in response to growing local opposition to the development of the PAC/HCF site consistent with the Township's fair share plan, began to take actions which were inconsistent with its substantive certification. For example, Hillsborough filed a letter with the Council on June 27, 1997 (Aa174) stating that the Township had passed a resolution on June 24, 1997 indicating that it would not actively support inclusion of the PAC/HCF site in the appropriate wastewater management plan, a predicate for the extension of sewer service to the site (Aa173).

Based upon Hillsborough's growing lack of support for the affordable housing, COAH moved before this court in the NJF appeal for a remand on July 21, 1997 (Aa175 to Aa177). The motion was denied without opinion on August 27, 1997 (Aa179). Subsequently, in an emergent motion filed by HAAL before COAH on September 19, 1997 (CRa28, CRa29), Hillsborough took legal positions before the Council that were at odds with positions taken in its appellate brief filed in the NJF appeal (CRa30 to CRa38). For example, Hillsborough essentially argued before the Council that it should not have granted a waiver of the center designation requirements of N.J.A.C. 5:93-5.4(c) (CRa33 to CRa35), a statement in direct contradiction to Hillsborough's defense of its grant of substantive certification.

Consequently, when the Council filed its merits brief in the NJF appeal on October 10, 1997 it again argued (CRa39, CRa40) that the matter should be remanded to the Council because "Hillsborough's actions subsequent to certification call into

question whether the Hillsborough fair share plan continues to provide a realistic opportunity for affordable housing." The remand was necessary so that the Council "could take appropriate action with regard to its grant of certification" to Hillsborough's fair share plan (CRA40). The Council filed a motion to supplement the record on October 10, 1997 with material pertaining to the events subsequent to the Council's certification decision that prompted the Council's requested remand. That motion was granted on November 13, 1997.

NJF subsequently moved for the Appellate Division to take judicial notice of, or to supplement the record with, additional material that further documented Hillsborough's actions subsequent to substantive certification. That motion was granted on January 7, 1998 (Aa180). In the order granting the NJF supplementation motion, this court temporarily remanded the NJF appeal to the Council for the purpose of allowing the Council "to consider all of the materials we have allowed to be added to the record before us...along with such other facts as COAH deems relevant." Further, the Appellate Division directed COAH to "consider whether, in view of recent actions by Hillsborough Township, the grant of substantive certification remains valid and whether any new issues requiring COAH resolution have been presented." Also, the Appellate Division directed COAH to "address the issue of whether the proposed development is governed by N.J.A.C. 5:93-5.4(d) or N.J.A.C. 5:93-5.4(c)." The Appellate Division retained jurisdiction of the matter (Aa180).

Upon receipt of the Appellate Division order, the Council issued an Order to Show Cause on February 5, 1998 (Aa181, Aa182), directing Hillsborough and all parties to the appellate litigation to show cause before the Council "whether the grant of substantive certification by the Council dated April 3, 1996 to the housing element and fair share plan of Hillsborough remains valid as a consequence of actions by Hillsborough subsequent to the grant of substantive certification with regard to the Planned Adult Community ("PAC") site, as those actions have been documented in the briefs and appendixes, as supplemented, filed in [the appellate division litigation]." Aa181. Further, the Order to Show Cause stated that Hillsborough and all parties to the litigation could file written submissions with COAH and could address all substantive issues raised by the January 7, 1998 remand "including what COAH's proper disposition of this matter should be." Also, Hillsborough and the parties could "present their positions as to the procedures to be employed by the Council to effectively and expeditiously respond to the January 7, 1998 Order." Aa181, Aa182.

Briefs were filed in response to the Order to Show Cause by Hillsborough; NJF; HAAL; P.E.C. Builders, Inc. and SKP Land, which were corporations owned by a Hillsborough developer, Anatol Hiller, who had been an objector to Hillsborough's fair share plan ("Hiller"); and a local environmental group, the Friends of Hillsborough ("FOH"). FOH was not a party to the appellate litigation, but moved before the Council to intervene as a party to the matter. On April 1, 1998 the Council heard that motion and

granted FOH the right to participate in the matter, but not as a party (Aa 186, Aa187).

On April 1, 1998 the matter was argued before the Council. Each entity that had responded to the Order to Show Cause was then allowed to submit further written submissions on or before April 15, 1998. NJF, HAAL and FOH did submit further briefing. Hillsborough and Hiller did not (Aa187). At its meeting of June 3, 1998 the Council voted to revoke Hillsborough's substantive certification (Aa183) and issued its decision on remand with regard to the revocation (Aa184 to Aa212). COAH then moved before this court to dismiss the NJF appeal, based upon its June 3 decision to revoke Hillsborough's certification. The NJF appeal was dismissed on August 8, 1998 (Aa213).

A Notice of Appeal was filed by Hillsborough on July 14, 1998 from COAH's June 3 revocation decision (Aa13 to Aa20). A Notice of Cross Appeal from the same decision was filed by HAAL on July 16, 1998 (Aa21 to Aa30), which was amended on July 20, 1998 (Aa31 to Aa40).

COUNTERSTATEMENT OF FACTS

In its June 3, 1998 decision on remand (Aa183 to Aa212 and CRA1 to CRA 27), the Council incorporated by reference a detailed history of Hillsborough's efforts to obtain substantive certification of its fair share plan including the PAC/HCF development and of Hillsborough's efforts to obtain a waiver of the center designation requirement of N.J.A.C. 5:93-5.4(c) to facilitate the expeditious development of the PAC/HCF site. That incorporated history was initially set out at pages 2 through 27 of the Council's brief filed in the NJF appeal and was captioned "Procedural History and Counterstatement of Facts." See, Aa187; CRA1 to CRA27. Because that history is crucial to an understanding of the Council's June 3, 1998 decision to revoke Hillsborough's substantive certification, it is retold here.

Hillsborough filed its housing element and fair share plan with the Council and petitioned for substantive certification of that plan on February 27, 1995 (Aa62 to Aa93). The Township had a cumulative 12-year fair share obligation of 482 affordable housing units: 21 indigenous units and 461 inclusionary units* (Aa69, Aa70). In its fair share plan the Township requested reductions for a Regional Contribution Agreement (RCA) of 79 units, which it had entered into with the Town of Phillipsburg in compliance with its first round fair share obligation (Aa79). A

* Indigenous need" is the deficient housing currently occupied by low and moderate individuals within a municipality. The "inclusionary component" represents the municipal obligation to provide for its regional share of affordable housing. See, N.J.A.C. 5:93-1.3 and N.J.A.C. 5:93 - Appendix A.

reduction was also requested for two inclusionary developments, Crestmont Hills and Heritage Green, which were included in Hillsborough's first round plan and for which building permits had been issued at the time of the petition for 91 units of affordable family rental housing (Aa80, Aa81). Further, a 2-for-1 rental bonus credit was requested for the Crestmont Hills and Heritage Green family rental units pursuant to N.J.A.C. 5:93-5.14(d) (Aa79, Aa80). Also, a substantial compliance reduction pursuant to N.J.A.C. 5:93-3.6 was requested for a 20% reduction of Hillsborough's calculated fair share number, because Hillsborough had completed 100% of the affordable units included in its first round obligation (Aa81, Aa82). Therefore, when all credits and reductions were taken into account, Hillsborough claimed that it was responsible for addressing a fair share obligation of 181 affordable units, 160 inclusionary units and 21 indigenous units to meet its 12-year cumulative obligation (CRA41 to CRA44; but see Aa107 to Aa116).

Hillsborough proposed to address its entire inclusionary component of 160 units of affordable housing in the PAC/HCF (Aa23 to Aa76, Aa84 to Aa88). The filed petition stated that the PAC/HCF site had received a general development plan approval from the Hillsborough Township Planning Board, which was memorialized on January 29, 1992 (Aa86). The Township proposed that 101 units of age-restricted housing and 49 units of family rentals be located within the PAC/HCF (CRA43).

The filed housing element explained that the PAC/HCF development was created in response to a 1992 Hillsborough Master Plan (Aa72 to Aa74), which set forth as one of its enumerated goals "Establish the necessary framework to provide housing, health care, and specific needs for the growing number of senior citizens" (Aa73) in Hillsborough. During 1991, a general development plan was submitted to the Hillsborough Township Planning Board for approval under the Municipal Land Use Law, N.J.S.A. 40:55D-45.1 to -45.8. On January 29, 1992, the planning board adopted a resolution memorializing the approval of the General Development Plan for the PAC/HCF development (Aa75). The approval actually granted by the planning board on December 19, 1991 was for a 742 acre tract of land, 484 acres of which would be developed for residential uses, 74 acres for medical facilities, 47 acres for commercial purposes, 277 acres for recreation and open space and 60 acres for roads (Aa75). Approximately 11,000 units of housing could be built within the planned development (Aa96). The site of this acreage was on the western fringe of the already developed portions of Hillsborough to the west of Route 206 and within walking distance of the municipal complex (Aa76). The petition noted that "the entirety" of the PAC/HCF tract was included in the Somerset County amended Wastewater Management Plan "which currently is being reviewed for approval by the New Jersey Department of Environmental Protection" ("DEP")* (Aa87). Hillsborough stated

* Section 208 (33 U.S.C. §1288) of the Federal Clean Water Act, 33 U.S.C. §1251 et seq., requires States to provide areawide water quality management plans. The plans are prepared pursuant to

that in order to expedite DEP's approval of sewer service to the PAC/HCF tract "the Somerset County Planning Board agreed to permit Hillsborough Township to separate its section of the County's overall 'Wastewater Management Plan' and to submit its own 'Hillsborough Township Wastewater Management Plan'" to the DEP (Aa87).

The petition noted that the PAC/HCF site was within Planning Area 4 and directly adjacent to Planning Area 2 as defined by the New Jersey State Development and Redevelopment Plan ("SDRP") (Aa76; CRA52 to CRA66 at CRA56 to CRA59). All of the designated Planning Area 2 of the PAC/HCF site was within a sewer service area (Aa76). Further, the site was described as being "indicated" on the State Development and Redevelopment Plan as a "planned village" named "Hillsborough Village Square" (Aa76).

The petition further noted that Hillsborough had determined to accommodate the major component of its current and anticipated future fair share housing obligations for low and moderate income housing in the designated "Planned Village" named Hillsborough Village Square located on the PAC/HCF site (Aa85 to Aa87). Hillsborough recognized that N.J.A.C. 5:93-5.4 of the Council's rules required that inclusionary developments in Planning Area 4, such as the PAC/HCF site, were required to be designated as "Centers", but requested a waiver of Center designation for the

the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq. The plans are also referred to as "208 plans".

PAC/HCF site and listed ten reasons supporting the requested waiver of Center designation for the PAC/HCF site (Aa88, Aa89).

Hillsborough published notice of its Petition for Substantive Certification on March 6, 1995. The publication initiated a 45-day comment period, which ended on April 19, 1995 (CRa41). One objection to Hillsborough's housing element and fair share plan was filed by a Hillsborough developer, Gateway at Sunnymede, Inc. ("Gateway") owned by Anatol Hiller, which sought to build affordable housing on its site (Aa94). Consequently, mediation pursuant to N.J.S.A. 52:27D-315 was scheduled. Prior to the first mediation session, a COAH report was issued on May 26, 1995 reviewing the Hillsborough housing element and fair share plan, requesting additional information (CRa41 to CRa51) and recommending that the requested waiver of center designation be granted (CRa46).

Mediation concluded on November 14, 1995 (Aa96). On January 17, 1996, James Cordingly, Mediator, issued a report which described the mediation and its results (Aa95 to Aa104). Participants in the mediation were representatives of Hillsborough; Gateway, and HAAL. The Mediation Report stated that an issue in mediation had been the fact that the PAC/HCF site was located predominantly in Planning Area 4 and that the objector claimed the site needed designation as a center consistent with the policies of the SDRP. Hillsborough reiterated in mediation its request that center designation be waived pursuant to established COAH policy (Aa103). The Mediation Report also noted that Hillsborough and

HAAL had agreed during mediation to amend the 1991 general development plan approval for the site so that the developer could build a maximum of 3,000 residential units on the PAC/HCF site, including the 136 low and moderate income units. Originally, zoning on the PAC/HCF site could have yielded as many as 11,000 units of housing (Aa96). The Mediation Report concluded that no substantial amendments were needed to the Hillsborough housing element and fair share plan prior to certification by the Council and that there were no outstanding contested issues of fact requiring a referral to the Office of Administrative Law for resolution (Aa104).

Attached to the Mediation Report was a letter to Herbert Simmens, Director, Office of State Planning, dated January 5, 1996, from Shirley M. Bishop, P.P., Executive Director of the Council, requesting that OSP support the waiver of center designation for the PAC/HCF site and also requesting "OSP's written concurrence that a map change to reflect Planning Area 2 would be appropriate and endorsed by OSP during the upcoming cross-acceptance period." (Aa102; Aa134 to Aa137). On January 31, 1996, Simmens responded on behalf of the OSP to Bishop's January 5 letter (Aa131 to Aa133). Although "quite troubled by the loss of farmland which would result from the construction of the PAC/HCF," Simmens did not "formally object to COAH action to waive center designation" (Aa131). Simmens stated that subject to discussions with the DEP, the Department of Transportation, Somerset County and other agencies "regarding the adequacy of current or proposed infrastructure

improvements", the OSP "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" (Aa133). Simmens based his conclusion not to object to the waiver of center designation for the PAC/HCF project on nine separate "facts and circumstances", but emphasized that his recommendation was based upon a weighing of all nine factors and that no single factor was sufficient to be determinative (Aa131 to Aa134).

On February 27, 1996, Hillsborough and HAAL signed a "Municipal Development Agreement" with regard to the development of the PAC/HCF site (Aa117 to Aa126). A draft version of this agreement had been attached to the mediation report as Attachment F (Aa103). The agreement set forth that the developer could build a maximum of 3,000 single-family residential units on the PAC/HCF site, 15% of which would be set aside for affordable housing, and that 136 of the affordable units would be built in the six-year period of substantive certification (Aa121). The agreement contained a statement that ". . .substantive certification by COAH, and any obligation of the developer to proceed is premised upon the fact that sewers shall be made available to the site. . ." and listed the following as the reasons why the parties agreed that sewers would be provided to the site: (a) the site had received general development plan approval from Hillsborough prior to the adoption of the SDRP; (b) the site was included "in its entirety" in the Somerset County Waste Water Management Plan, "which has

received preliminary comments by NJ DEP and is presently being reviewed by Somerset County for resubmission to DEP by April 1996"; and (c) there were assurances given to COAH by the OSP, which had reviewed the PAC/HCF site, that the site would be recommended for classification as Planning Area 2 during OSP's next cycle of cross acceptance (Aa122).

Because the approval of sewer service for the project was essential for development to begin and the affordable housing to be produced, the agreement provided that if the developer were not able to build the project and produce the required affordable units within the six-year period of substantive certification, the developer should notify Hillsborough prior to December 31, 1998 "so that alternative plans . . . may be instituted either by the developer and/or the Township" to provide the required affordable housing (Aa123). Moreover, if circumstances "beyond the control of the developer" occurred which prevented the developer from building the affordable units within the six-year period of substantive certification, the developer agreed to "reserve and convey to the Township up to ten (10) acres of land with sewer availability" for the construction of the 136 required units for affordable housing (Aa123, Aa124).

On March 4, 1996, a COAH compliance report recommending substantive certification for Hillsborough's housing element and fair share plan was issued (Aa105 to Aa133). Attached to the compliance report was the signed February 27, 1996 agreement between Hillsborough and HAAL (Aa117 to Aa126). The report

analyzed the Hillsborough fair share plan and concluded that Hillsborough's 12-year calculated need of 482 affordable units could be reduced to 167 units of affordable housing, 160 new construction inclusionary units and 7 rehabilitation units after taking account of credits and reductions for Hillsborough's past affordable housing production and compliance (Aa107 to Aa108). With regard to the rehabilitation units, the report concluded that Hillsborough's plan of rehabilitating two units in 1997 and one unit each year thereafter met the Council's requirements (Aa109). With regard to the 160 inclusionary units, all of which were to be produced on the PAC/HCF site, the report concluded that 96 affordable age-restricted units and 40 affordable family rental units, which would bring 24 rental bonus credits pursuant to N.J.A.C. 5:93-5.14(d), met Hillsborough's obligation (Aa110). The rental bonus credits were available to Hillsborough pursuant to N.J.A.C. 5:93-5.14(d) because the signed Municipal Development Agreement between Hillsborough and HAAL met the rule requirement for a "firm commitment for the construction of the rental units". N.J.A.C. 5:93-5.14(d); Aa109, Aa110.

The March 4 compliance report gave extensive attention to the issue of whether the PAC/HCF site required designation as a center pursuant to N.J.A.C. 5:93-5.4(c) and concluded that COAH could waive center designation (Aa110 to Aa114). The report concluded that waiver of center designation was appropriate because the PAC/HCF site met the criteria articulated in COAH's December 7, 1994 policy directive with regard to sites with infrastructure in

Planning Areas 4 and 5, which was attached as Exhibit B to the compliance report (Aa127, Aa128). The compliance report also concluded that the PAC/HCF site was "available," "approvable," "suitable" and "developable" as those terms are defined at N.J.A.C. 5:93-1.3 (Aa111) and that the recommended waiver of center designation met COAH's three general waiver criteria found at N.J.A.C. 5:93-15.1(b) (Aa111, Aa112). The compliance report also reviewed the ten principles contained in the Memorandum of Understanding between COAH and the SPC to demonstrate how the center designation waiver gave "appropriate weight" to each of the ten principles (Aa112, Aa113). Material to this discussion was the January 31, 1996 Simmens letter stating that OSP did not object to COAH action to waive Center designation for the PAC/HCF site (Id.).

The March 4 compliance report was issued for a 14-day comment period. On March 15, 1996, NJF wrote a letter of objection to the recommendation that substantive certification should be granted to the Hillsborough fair share plan (Aa138 to Aa144). This was the first time NJF had participated in this matter.

COAH issued a substantive certification to Hillsborough's housing element and fair share plan on April 3, 1996 (Aa145 to Aa160). An executive summary of the same date accompanying the proposed substantive certification resolution (Aa149 to Aa151) stated that development of the PAC/HCF site "is contingent on the site being included in a 208 plan amendment" (Aa150). The summary updated the Council as to the status of efforts to bring sewers to the site. A preliminary plan amendment including the PAC/HCF had

been submitted to the DEP by the Somerset County Planning Board for review. The DEP responded with comments and the Somerset County Planning Board was working with an advisory committee to prepare a final document which would then be submitted within two months to the applicable municipalities and to the Somerset County Board of Chosen Freeholders for review (Aa150). With regard to NJF's request to defer substantive certification, the summary recommended that the Council not wait to grant certification and cited an OSP regulation that "No municipality, county, regional or State agency should delay any decision making process due to a pending review of their plans by the Office of State Planning for consistency with the SDRP." N.J.A.C. 17:32-7.1(c) (Aa151).

In its April 3, 1996 resolution granting substantive certification to Hillsborough's housing element and fair share plan (Aa153 to Aa160), the Council acknowledged that the development of the PAC/HCF project was contingent on the site is being included in the water quality management plan amendment and further noted that the Somerset County Planning Board anticipated that a finalized water quality management plan would be refiled with DEP within two months of the date of substantive certification (Aa156). The resolution required that "in the event 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 [of affordable housing] in another manner;"... (Aa156). COAH conditioned its grant of substantive certification with the requirement that Hillsborough report to COAH

on the status of the water quality management plan amendment then pending at the DEP in six months from the date of the grant of substantive certification (Aa160). Also, the Council granted a waiver from its center designation requirements for the PAC/HCF site in Hillsborough for the reasons set forth in the March 4, 1996 Compliance Report, which was attached and incorporated into the grant of substantive certification (Aa159; Aa105 to Aa113). Finally, the certification stated that "any changes in the facts upon which this certification is based or any deviation" from its terms and conditions affecting realistic opportunity would render the certification "null and void." Aa160.

On May 20, 1996, NJF filed a Notice of Appeal from the Council's grant of substantive certification to Hillsborough's housing element and fair share plan (Aa161 to Aa170) and filed its brief on the merits on March 21, 1997.

On April 8, 1997, John D. Middleton, Hillsborough Township Administrator, filed a letter with COAH in compliance with the six month reporting requirement set out in COAH's grant of substantive certification (Aa171). This letter was captioned "Twelve Month Status Report" and concerned the status of sewer services to the PAC/HCF tract. The letter stated that the Hillsborough Township Planning Board at its April 3, 1997 meeting passed a resolution requesting that the entire PAC/HCF tract be included in the Somerset County-Upper Raritan Watershed Wastewater Management Plan that was to be submitted to DEP (Aa171).

However, on June 27, 1997 Middleton filed another letter with the Council (Aa174). In that letter, Middleton stated that at its meeting of April 22, 1997 the Hillsborough Township Committee, by resolution (Aa172), "reserved the right to endorse or not endorse" the Planning Board's April 3, 1997 recommendation. The letter further informed COAH that on June 11, 1997 the developer of the PAC/HCF site "independently petitioned DEP for inclusion of their lands" in the wastewater management plan. Because of the developer's petition, Middleton continued, the Hillsborough Township Committee "saw no reason to request the County to include" the PAC/HCF site in the wastewater management plan and "at their meeting on June 24, 1997, they voted to overrule the Hillsborough Township Planning Board's [April 3, 1996] recommendation." Aa173. Middleton concluded that the Township Committee believed that the "public processes followed by DEP and the Hillsborough Township Planning Board should be allowed to proceed to conclusion without being prejudged. When those processes are finished, the Hillsborough Township Committee will be required to take action, under DEP regulations, and they will" (Aa174).

On September 19, 1997, HAAL filed an emergent motion with the Council, returnable at its regular monthly meeting of October 1, 1997, requesting that the Council order Hillsborough to comply with the terms of its substantive certification and require the Township "to endorse and submit" an application for the PAC/HCF site to be included in the Somerset County/Upper Raritan Watershed Wastewater Management Plan (CRa28, CRa29). Further, HAAL requested

COAH to enjoin the Township from adopting amendments to the PAC zoning that affected the HAAL site and that the Township had scheduled for public hearing on October 14, 1997 (CRa29).

In its brief filed before the Council in response to HAAL's emergent motion, Hillsborough took positions at odds with its posture before this court in the NJF appeal. Hillsborough argued that its "substantive certification should not have been granted until there was Section 208 approval" and stated, as did NJF in its appeal, that N.J.A.C. 5:93-5.3(b) so provides (CRa34). Moreover, Hillsborough characterized the HAAL site as "...located in SDRP Planning Area 4 for which a policy objective is the enhancement of agricultural viability and rural character. That policy objective is to be implemented by guiding development into 'Centers' while insuring that agricultural areas be protected from whole scale development. . ." (CRa34). These statements were in direct contradiction of positions taken in Hillsborough's brief filed in the NJF appeal.

The Council heard oral argument on HAAL's emergent motion at its meeting of October 3, 1997 and denied the motion (HRa134, HRa135). Subsequently, on October 29, 1997 the Hillsborough Township Committee adopted a resolution which repealed Chapter 77, Section 1.1 (the PAC/HCF ordinance) of the Township's municipal code (Aa178). This resolution removed the underlying zoning for the HAAL site, making the General Development Plan that had been

approved for the site by the planning board in 1992 much more difficult, if not impossible, to realize.*

When the Council filed its merits brief in the NJF appeal on October 10, 1997, it argued that the matter should be remanded because Hillsborough's actions with regard to the PAC/HCF site were inconsistent with Hillsborough's certified fair share plan and, consequently, called into question the realistic opportunity for affordable housing provided by the COAH certified plan (CRA39, CRA40). The Council filed with its brief a motion to supplement the record with materials supporting the Council's requested remand, which was granted on November 13, 1997. NJF then moved in the NJF appeal to supplement the record with additional material documenting Hillsborough's actions. This court granted that motion on January 7, 1998 and temporarily remanded the appeal to COAH to consider all of the materials added to the record and to consider whether Hillsborough's substantive certification remained "valid." Aa180. A list of the materials added to the record as a result of the Council's and NJF's motions was attached to the Council's decision on remand as Exhibit A (CRA1).

The Council issued its Order to Show Cause on February 5, 1998 (Aa181, Aa182). Oral argument on the Order to Show Cause was held before the Council on April 1, 1998. Hillsborough's position

*The developer of the PAC/HCF site challenged the repeal of the ordinance and, on April 8, 1998 a consent judgment was signed by Hillsborough and the developer, U.S. Home Corporation, agreeing that the repealer ordinance "shall not apply to, or have any effect upon" the proposed PAC/HCF development pursuant to the January 7, 1992 approved General Development Plan, as amended on December 7, 1998 (Aa225 to Aa227).

before the Council was similar to its position in this appeal. Hillsborough stated that its October 20, 1997 repeal of the PAC/HCF ordinance did not affect COAH's grant of substantive certification, nor the Municipal Development Agreement that Hillsborough had executed with HAAL on February 7, 1996, because HAAL had received the General Development Plan approval pursuant to the PAC/HCF zoning (CRA70 to CRA75). Hillsborough also claimed that it had not changed its position with regard to the provision of sewer service to the PAC/HCF site after substantive certification in that the township committee in 1995 did not believe it was appropriate to sponsor a wastewater management plan involving individual property owners "where objections have been filed" and that this continued to be the municipality's position in 1997 with regard to the provision of sewer service to the HAAL site (CRA75 to CRA77).

Hillsborough urged COAH to "hold this matter in abeyance" until the Hillsborough Township Planning Board reviewed a plan that would soon be submitted by the developer of the HAAL site and until the DEP ruled on the developer's application for inclusion in the county wastewater management plan (CRA77, CRA78). Hillsborough also stated it should "not be penalized because it now may be having second thoughts of how exactly affordable housing may be provided in the second round." CRA79. Hillsborough stated that its "second thoughts" were prompted by the lawsuits filed concerning development of the PAC/HCF site, including NJF's appeal: suits which helped "crystallize certain issues" for the township committee and galvanized local political pressure against the

PAC/HCF development. Hillsborough viewed that pressure as "part of a political process" which is "healthy." CRA80.

Hillsborough estimated that it would have the information it needed to begin planning for a new alternative fair share plan in September 1998 and requested time to create the new plan (CRA80, CRA81). Alternatively, Hillsborough requested that "If COAH cannot see its way to stop the clock on its Order to Show Cause, it minimally retain jurisdiction to permit Hillsborough to file an amended application for Substantive Certification." In so doing, Hillsborough requested COAH's help in avoiding a builder's remedy lawsuit, which HAAL had filed in Superior Court, "until COAH and Hillsborough have had the opportunity [to] consider opportunities for providing Hillsborough's fair share housing which are acceptable to COAH and the Township." CRA81.

Hillsborough again criticized COAH's waiver of center designation decision by stating that there were "no findings of COAH, that granting the waiver will even address, no less meet the salient goals of [COAH's waiver] regulation". CRA82, CRA83. Hillsborough concluded by suggesting that "COAH and Hillsborough must together develop the findings of fact and conclusions to support the waiver or alternatively Hillsborough can seek the Center designation." Either alternative, stated Hillsborough, "would require COAH to reserve decision on its Order to Show Cause to allow time for other governmental processes to proceed. Hillsborough needs and requests additional time." CRA83.

HAAL's position with regard to the Order to Show Cause was also similar to its position in its cross-appeal. HAAL stated that COAH must enforce its grant of substantive certification and require Hillsborough officials to endorse all applications for water and sewer service upon which the development of the PAC/HCF site and Hillsborough's substantive certification is dependent (CRA93 to CRA101). HAAL took the position that the proper action for COAH was to exercise its authority and order Hillsborough to seek the necessary water and sewer approvals to move the PAC/HCF site development along "pursuant to the development agreement it executed with HAAL on February 27, 1996." CRA93 to CRA98 at CRA97.

Similarly, Hillsborough's repeal of the PAC/HCF ordinance was viewed by HAAL as "illegal" and "yet another example of the desperate attempts on the part of Hillsborough Township to subvert its own substantive certification." HAAL considered the rescision to be similar to COAH's Howell decision, In the Matter of the Township of Howell, COAH Docket No. 97-908 (HRb Exhibit B), in which COAH issued an opinion ordering Howell Township to comply with the terms of an agreement negotiated in a COAH mediation between the municipality and a developer. HAAL stated that in the Howell case COAH acted to restrain a municipality from violating provisions made in a signed, negotiated agreement and urged COAH to do the same with regard to Hillsborough's agreement with HAAL concerning the PAC/HCF site. CRA98 to CRA101. Finally, HAAL argued that its site was governed by N.J.A.C. 5:93-5.4(d) and that by requiring a waiver of its rules with regard to center

designation, COAH applied a more stringent requirement to the PAC/HCF site than was dictated by N.J.A.C. 5:93-5.4(d). CRA101 to CRA112.

Other briefs were filed by NJF, Hiller and FOH, in response to its Order to Show Cause. Oral argument was held at the Council's regular meeting of April 1, 1998. At that time all parties and participants in the matter were allowed to submit further written submissions (Aa186, Aa187).

On June 3, 1998 the Council issued its decision on remand (Aa183 to Aa212 and CRA1 to CRA27). The decision was based upon the Council's consideration of all of the relevant documents that the Appellate Division had allowed into the record, as well as the written submissions and oral arguments of the parties (Aa199, Aa200). The Council held that it was its "inescapable conclusion that Hillsborough has not complied with the terms of its substantive certification." Aa200. In fact, the Council noted, Hillsborough showed that it had no intention of complying with its substantive certification because it had requested of COAH time to formulate a new fair share plan (Aa200). Further, the Council noted that all submitted briefs, including Hillsborough's, acknowledged that Hillsborough had not complied with the terms of the Council's grant of substantive certification (Aa200, Aa201) and were chiefly concerned with "what COAH should do to respond to Hillsborough's noncompliance." Aa201.

COAH decided that it had no choice but to revoke Hillsborough's substantive certification:

It is the Council's determination that Hillsborough Township, by failing to support the extension of sewer service to the PAC/HCF site and by revoking the underlying zoning on the HAAL site, has rendered Hillsborough's fair share plan "null and void" as of the date of these actions. The development of the PAC/HCF site provided, except for the rehabilitation of seven units, all of the affordable housing in Hillsborough's plan. Therefore, the refusal of the municipality to support the development of the site, as it committed to do to receive certification, constitutes a material act of non-compliance with the municipal fair share plan. As such, the Council hereby revokes its certification of Hillsborough's fair share plan. However, the Council considers its revocation to be merely a formality, because Hillsborough's failure to support its plan was so total and so far beyond any municipal action contemplated by N.J.A.C. 5:93-10.5. In the Council's view the plan was a nullity as of Hillsborough's June 24, 1997 resolution to not support the extension of sewer to the PAC/HCF site and its October 29, 1997 resolution repealing the PAC/HCF ordinance. [Aa202, Aa203].

Having so held, the Council's decision on remand went on to address the various arguments raised by the parties in response to the Council's Order to Show Cause (Aa203 to Aa212). That part of the Council's decision will be set out in the Argument section of this brief in response to the points raised on appeal. Further, the Council did not address the issue of whether N.J.A.C. 5:93-5.4(c) or (d) was applicable to the PAC/HCF site because it regarded that issue as moot, given the Council's revocation of Hillsborough's certification (Aa212).

Hillsborough filed its Notice of Appeal from the Council's revocation decision on July 14, 1998 (Aa13 to Aa20). HAAL filed its Notice of Cross-Appeal on July 16, 1998 (Aa21 to

Aa40). After the Council's revocation, jurisdiction over Hillsborough's Mount Laurel compliance efforts was in the Superior Court. A builder's remedy suit had been filed against Hillsborough in February 1998 by a developer of the PAC/HCF site. That suit has Docket No. HNT-L-492-98 and has been consolidated with three other builder's remedy suits brought by three other developers and with a suit brought against Hillsborough by FOH. The suit involving the PAC/HCF site is ongoing.

ARGUMENT

THE DECISION OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING TO REVOKE ITS PRIOR GRANT OF SUBSTANTIVE CERTIFICATION TO THE FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH WAS REASONABLE AND IS SUPPORTED BY THE FAIR HOUSING ACT, THE COUNCIL'S RULES AND THE RECORD.

The Council may issue substantive certification to a municipal fair share plan pursuant to N.J.S.A. 52:27D-314 if the Council finds that

a. The municipality's fair share plan is consistent with the rules and criteria adopted by the council and not inconsistent with the achievement of the low and moderate income housing needs of the region as adjusted pursuant to the Council's criteria and guidelines adopted pursuant to subsection c. of section 7 of this act; and

b. The combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the council. [N.J.S.A. 52:27D-314].

Although the Fair Housing Act is silent as to what the consequences of municipal noncompliance with a certified fair share plan will be, it is clear that the Council may revoke a prior grant of substantive certification if subsequent to certification a municipality fails to adhere to the fair share plan such that the plan no longer meets the Fair Housing Act standard that the plan provide a realistic possibility for the achievement of low and

moderate income housing. To that end, the Council's April 3, 1996 resolution granting substantive certification to Hillsborough stated that "any change in the facts on which this certification is based or any deviation from the terms and conditions of this certification which affects the ability of the municipality to provide for the realistic opportunity of its fair share of low and moderate income housing and which the municipality fails to remedy may render this certification null and void." Aa160.

Further, N.J.A.C. 5:93-10.5 states that the Council may revoke substantive certification if the Council determines "that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development...". Here, it is clear that Hillsborough's actions subsequent to certification both obstructed the construction of the PAC/HCF development and also delayed action on applications required for the PAC/HCF site to be developed. Moreover, Hillsborough dramatically deviated from the terms and conditions of its certified fair share plan, rendering that plan "null and void."

In its decision on remand, it was the Council's "inescapable conclusion" that Hillsborough had not complied with the terms of its substantive certification. Further, from the evidence presented, it was also clear that Hillsborough had no intention to comply in the future with the terms of its substantive certification, because it had requested COAH to allow it the time to formulate a new fair share plan. Moreover, all briefs submitted

in response to the Council's Order to Show Cause acknowledged that Hillsborough had not complied with the terms of the Council's grant of substantive certification, including Hillsborough's brief with its request to formulate a new plan. Therefore, it was clearly an "inescapable" consequence of Hillsborough's position before the Council that the Council revoke Hillsborough's substantive certification.

The Council's decision was most reasonable, especially in light of Hillsborough's June 24, 1997 resolution to not support the inclusion of the PAC/HCF tract in the Somerset County/Upper Raritan Wastewater Management Plan and Hillsborough's October 28, 1997 ordinance repealing in its entirety the PAC/HCF zoning that affected the HAAL site. The Council stated in its decision that these two actions "...clearly represent Hillsborough's retreat from the commitments it made in order to receive COAH's certification of its fair share plan." The Council therefore concluded that Hillsborough's fair share plan was "a nullity" as of the June 24 and October 29 municipal actions and that its revocation decision was "merely a formality, because Hillsborough's failure to support its plan was so total and so far beyond any municipal action contemplated by N.J.A.C. 5:93-10.5."

Hillsborough claims in Point I of its brief that its municipal actions did not violate the Council's substantive certification. The municipality argues that its failure to support the inclusion of the PAC/HCF site in the county wastewater management plan subsequent to certification was consistent with its

actions regarding sewerage of the site prior to certification. However, that is not the test of whether a municipality is meeting its Mount Laurel responsibilities with regard to its fair share plan. N.J.S.A. 52:27D-314(b) sets as a standard for certification that a municipality eliminate cost-generating features of its land use ordinances and take "affirmative measures" to make low and moderate income housing "realistically possible." Hillsborough's refusal to actively support the extension of sewer services to the PAC/HCF site, along with its failure to meet its commitment that it would seek to change the planning area designation of the PAC/HCF site from Planning Area 4 to Planning Area 2, was correctly seen by the Council as violative of the standards of N.J.S.A. 52:27D-314(b).

Similarly, Hillsborough's repeal of the PAC/HCF ordinance was correctly perceived by the Council as making the development of the PAC/HCF site for affordable housing more difficult because Hillsborough had removed the underlying zoning from the site. The fact that the PAC/HCF site was ultimately saved from the repealer ordinance once a consent judgment was signed by Hillsborough in a suit challenging the repeal (Aa225 to Aa227), does not alter the Council's conclusion. The repeal of the ordinance did obstruct the development of the PAC/HCF site, contrary to N.J.A.C. 5:93-10.5. Moreover, any changes in the PAC/HCF general development plan continue to remain subject to the new underlying zoning, which continues to render development of the site difficult for affordable housing (HRb20).

Therefore, taken together, Hillsborough's actions with regard to the PAC/HCF site clearly demonstrate a municipal pattern of failure to facilitate the creation of the site's affordable housing consistent with the commitments Hillsborough made to secure substantive certification of its fair share plan. The Council's decision to revoke Hillsborough's certification was a reasonable response to Hillsborough's actions and must be affirmed by this court.

Whenever the action of an administrative agency or official is subject to judicial review, a presumption exists that the decision is reasonable and correct and the discretion legislatively delegated to such an agency has been properly exercised. Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980); Commuter Operating Agency's Determination, 166 N.J. Super. 430, 435 (App. Div. 1979), certif. den. 81 N.J. 261 (1979). One challenging such action accordingly has the burden of demonstrating that it was arbitrary, unreasonable or capricious. Morris Cty. v. Skokowski, 86 N.J. 419, 424 (1981); N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978).

Moreover, in undertaking the review of such matters, it is also well established that deference must be given to the special competence and expertise of administrative agencies with regard to matters with which such agencies and officials are concerned. New Jersey Bell Tel. Co. v. State, Dept. of Public Utilities, Bd. of Public Utility Com'rs., 162 N.J. Super. 60, 77 (App. Div. 1978). In the area of affordable housing, the Council

has consistently been recognized by the New Jersey Supreme Court as having broad powers and wide discretion to resolve low and moderate income housing problems. Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 32 (1989); Holmdel Builders Ass'n v. Tp. of Holmdel, 121 N.J. 550, 574 (1990); Van Dalen v. Washington Township, 120 N.J. 234, 245 (1990).

In Holmdel Builders Ass'n, supra, 121 N.J. 550, for example, the Supreme Court recognized the Council's broad authority over satisfaction of the fair share need and general affordable housing policy. As the Court noted,

It cannot be overstressed that the Legislature, through the FHA, intended to leave the specific methods of compliance with Mount Laurel in the hands of COAH and the municipalities, charging COAH with the singular responsibility for implementing the statute and developing the State's regulatory policy for affordable housing. [Id. at 576].

The Court further emphasized the breadth of COAH's authority, finding that COAH's authority comports "... with the complexity and sensitivity of the subject of affordable housing." Id. at 577.

The Supreme Court's specific directive in Holmdel Builders Ass'n should be read together with the general proposition that all State agencies have such incidental powers as may be necessary to effectuate their statutory policies. A.A. Mastrangelo, Inc. v. Environmental Protec. Dept., 90 N.J. 666, 680 (1982). This authority should be liberally construed when the public welfare is involved. N.J. Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 79 (1980), cert. denied, appeal dismissed sub. nom. Wayne Haven Nursing Home v. Finley, 449 U.S. 944, 101

S.Ct. 342, 66 L.Ed.2d 208 (1980). In the Mount Laurel context, the public welfare is most clearly involved.

In Mount Laurel II, the Supreme Court restated its support for the constitutional obligation previously announced in So. Burl. City. N.A.A.C.P. v. Tp. of Mount Laurel, supra, 67 N.J. 151 (Mount Laurel I). Specifically, the Court stated that the power to zone, delegated to New Jersey municipalities by statute, is one portion of the police power, and thus must be exercised consonant with the general welfare. Mount Laurel II, supra, 92 N.J. at 208. A consideration of the general welfare includes more than the needs of a municipality's own residents -- it also includes the housing needs of those outside the municipality but within the region contributing to housing need within the municipality. Ibid. Zoning regulations that conflict with the general welfare, as thus defined, are unconstitutional. Ibid.

The Mount Laurel obligation, as announced by the Supreme Court, requires that municipalities provide, through their land use regulations, a "realistic opportunity" for the construction of their fair share of the State-wide obligation. Id. at 205. In providing that realistic opportunity a municipality must, at a minimum, remove all municipally created barriers to the construction of its fair share. Id. at 259. Thus, to the extent necessary to meet its Mount Laurel obligation, a municipality must "remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety." Ibid.

However, the removal of such barriers does not automatically signal that a municipality has provided the requisite realistic opportunity. Rather, the Mount Laurel II Court made it clear that in most case municipalities must go further, and provide inducements in the form of "affirmative measures" in order to insure the existence of a realistic opportunity. Id. at 261. Thus, a municipality could not simply zone a site to permit the construction of affordable housing as one of several permissible uses. In such a case, other permitted uses might prove to be more profitable, and thus no affordable housing would actually result. As stated by the Court, satisfaction of the obligation "cannot depend on the inclination of developers to help the poor." Ibid. For the opportunity to be realistic it must be "one that is at least sensible for someone to use." Ibid.

The Court suggested several possible forms of "affirmative measures," although the list was not meant to be exclusive, and encouraged other solutions. First and foremost, the Court stated that a municipality should aid in procuring available federal or state subsidies to aid in the construction of affordable housing. Id. at 262. Second, the Court held that municipalities should use inclusionary zoning devices, such as incentive zoning and mandatory set-asides. Id. at 265. Once a municipality had done these two things (removed excessive restrictions and instituted appropriate affirmative measures) "the Mount Laurel doctrine requires it to do no more." Id. at 259-60.

The Fair Housing Act incorporates the compliance test laid down in the Mount Laurel decisions. N.J.S.A. 52:27D-311(a) provides that, in adopting its housing element, a municipality "may provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share." Thus, the responsibility for creation of the plan, and selection of the appropriate approach, rests with the municipality. However, any plan must provide the requisite realistic opportunity.

Hillsborough chose to include the PAC/HCF property in its fair share plan as the site for an inclusionary development that would produce up to 450 units of affordable housing to meet Hillsborough's current and future affordable housing obligations. Hillsborough chose to seek the Council's certification of a fair share plan that included the PAC/HCF site. Hillsborough chose to enter into the Municipal Development Agreement for the development of the PAC/HCF tract with HAAL that the Council incorporated into its grant of substantive certification. And Hillsborough chose to seek the waiver of the center designation requirement of N.J.A.C. 5:93-5.4(c) to allow the development of the PAC/HCF site to expeditiously proceed. When after certification Hillsborough chose to have "second thoughts" about its fair share plan and the development of PAC/HCF site for affordable housing (CRA79), and chose to act on these thoughts by failing to support the extension of sewer services to the PAC/HCF site, by failing to comply with its promise to seek a change in the planning area designation of

the PAC/HCF site and by repealing the PAC/HCF zoning of the site, the Council had little choice but to revoke its substantive certification of Hillsborough's fair share plan. The Council's action was not only reasonable, it was required by Hillsborough's conduct and the requirements of the Fair Housing Act. As such, the Council's revocation decision must be affirmed.

A. THERE WERE NO MATERIAL CONTESTED FACTUAL ISSUES THAT REQUIRED A HEARING BEFORE THE OFFICE OF ADMINISTRATIVE LAW PRIOR TO COAH'S RENDERING ITS DECISION REVOKING HILLSBOROUGH'S GRANT OF SUBSTANTIVE CERTIFICATION.

In its decision the Council found that "[a]ll briefs submitted in response to the Council's Order to Show Cause acknowledged that Hillsborough has not complied with the terms of the Council's grant of substantive certification, including the attempt by Hillsborough in its brief to claim that the substantive certification remains valid." Aa200, Aa201. Because there were no material contested issues of fact, the Council held that N.J.A.C. 5:93-10.5 provided that there was no reason for a hearing.

N.J.A.C. 5:93-10.5 states:

A council determination, after a hearing conducted pursuant to the Administrative Procedure Act (APA), 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.

In Hills Development Company v. Bernards Tp., 229 N.J. Super. 318 (App. Div. 1998), a case in which objectors to a

municipal fair share plan contested COAH's certification of the plan without holding an evidentiary hearing, this court noted that the APA clearly establishes the right of an agency head to determine whether a case is "contested." N.J.S.A. 52:14F-7(a). The court concluded that the Fair Housing Act preserves COAH's authority to make such a determination, and that an unresolved issue "will receive an evidentiary hearing only if [COAH] determines that the case is contested." Hills, supra, 229 N.J. Super. at 341. See also In re Township of Warren, 247 N.J. Super. 146, 159-160 (App. Div. 1991); certif. denied in part, 127 N.J. 557 (1992), and reversed and remanded in part, 132 N.J. 1 (1993). It is clear that there were no contested issues of fact material to the Council's revocation decision. Therefore, it is clear that no hearing was required prior to COAH's revoking Hillsborough's substantive certification. See Contini v. Bd. of Educ. of Newark, 286 N.J. Super., 106, 120-121 (App. Div. 1995), certif. den., 145 N.J. 372 (1995).

However, Hillsborough at Point II of its brief claims that a hearing was necessary prior to COAH's revoking its grant of certification, even though Hillsborough argued before COAH that it should be allowed time to fashion a new fair share plan. Hillsborough lists the following as contested factual issues material to COAH's decision on remand:

Is there sewer infrastructure available to the Greenbriar PAC/HCF 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? [Ab17]

These questions which Hillsborough has conjured up to support its argument are not relevant to the questions the Council was ordered by this court to decide upon remand, which were whether Hillsborough was complying with its fair share plan and whether the Council's grant of substantive certification remained "valid" (Aa180).

Rather, the listed questions concern the viability of the fair share plan which COAH certified at Hillsborough's request and which contained the PAC/HCF site. The questions generally deal with the developability of the PAC/HCF site and the appropriateness of that site's inclusion in Hillsborough's fair share plan. As such, they are the types of questions that an appellant would raise on appeal to contest COAH's grant of certification to Hillsborough. Hillsborough's raising of these questions at this time demonstrates its continued failure to support the development of the PAC/HCF site for affordable housing, which was the reason COAH revoked Hillsborough's substantive certification.

Moreover, none of Hillsborough's listed questions were raised by Hillsborough when the municipality was supporting its fair share plan and the PAC/HCF site as a site for affordable housing. Then, Hillsborough had committed to COAH and HAAL in its Municipal Development Agreement that it would cooperate to see that sewer infrastructure be made available to the PAC/HCF site and that the Planning Area designation on the majority of the site be

changed from Planning Area 4 to the more easily sewered Planning Area 2. With this planning area change, center designation would not have been an issue with regard to the PAC/HCF site, because center designation is not required by COAH's rules for sites in Planning Area 2. See N.J.A.C. 5:93-5.4(a). Further, if Hillsborough had not repealed the PAC/HCF ordinance, there would be no question as to whether the ordinance "saves from repeal" the PAC/HCF site.

Hillsborough, therefore, in raising its listed questions, once again demonstrates its lack of support for its COAH certified fair share plan and for the development of the PAC/HCF site for affordable housing consistent with that plan. Clearly, the Council's decision to revoke Hillsborough's substantive certification was based upon the uncontested fact that Hillsborough no longer supported its fair share plan. There was, therefore, no need for a factual hearing below.

B. ONCE IT DECIDED THAT HILLSBOROUGH'S ACTIONS RENDERED ITS FAIR SHARE PLAN "NULL AND VOID", THE COUNCIL DID NOT HAVE THE STATUTORY AUTHORITY TO RETAIN JURISDICTION OVER HILLSBOROUGH'S MOUNT LAUREL COMPLIANCE EFFORTS.

Because it was so clear to all parties to the Order to Show Cause that Hillsborough had failed to comply with the terms of its substantive certification, a major concern of the briefs filed before the Council was what action the Council should take in response to Hillsborough's noncompliance with its fair share plan (Aa201). Hillsborough and NJF asked the Council in their

submissions to allow Hillsborough to remain within the Council's jurisdiction while Hillsborough took steps to create a new fair share plan (Aa189 to Aa192 and Aa194 to Aa197). Hillsborough reasserts this position in Point III of its brief. In its argument before the Council, Hillsborough argued that its requested retention of jurisdiction would protect Hillsborough from the builder's remedy lawsuit filed in February 1998. However, the Council held, correctly, that it did not have the statutory authority for the requested continued jurisdiction over Hillsborough (Aa203, Aa204).

The Fair Housing Act gives the Council jurisdiction over municipal fair share plans when a municipality files a fair share plan with the Council. N.J.S.A. 52:27D-309; Hills Dev. Co. v. Bernards Tp., supra, 103 N.J. at 33 to 36. The Council is also given the responsibility, once it grants certification, to defend its grant of certification if a builder's remedy suit is filed in the courts. N.J.S.A. 52:27D-317. However, nothing in the Fair Housing Act gives the Council jurisdiction over a municipality that has repudiated its certified plan. The Council, for example, could not effectively defend its certification decision in the courts pursuant to N.J.S.A. 52:27D-317 if the municipality sued was not complying with the terms of its certification.

Hillsborough, therefore, by its own actions in repudiating its certified fair share plan, eliminated the ability of the Council to assert jurisdiction over the municipality's Mount Laurel compliance efforts. The Council, once it decided that

Hillsborough's actions compelled revocation of Hillsborough's certified fair share plan, could not offer the protection of its jurisdiction to Hillsborough, because Hillsborough had no plan before the Council for which it either had certification or was seeking certification. Until Hillsborough presented another fair share plan to the Council and petitioned for certification of that plan, COAH could not, pursuant to its understanding of the Fair Housing Act, again assume jurisdiction over Hillsborough's Mount Laurel compliance efforts.

- C. SIMILARLY, BECAUSE THE COUNCIL'S CERTIFICATION DECISION HAD BEEN MATERIALLY BASED UPON THE MUTUAL COOPERATION OF HILLSBOROUGH AND HAAL TO DEVELOP THE PAC/HCF SITE FOR AFFORDABLE HOUSING, AS REFLECTED IN THEIR MUNICIPAL DEVELOPMENT AGREEMENT, HILLSBOROUGH'S ACTIONS REPUDIATING ITS FAIR SHARE PLAN MADE IT FUTILE FOR THE COUNCIL TO ORDER HILLSBOROUGH TO COMPLY WITH THE TERMS AND CONDITIONS OF ITS CERTIFIED FAIR SHARE PLAN.

In its brief filed in response to the Council's Order to Show Cause, and again in Point VI of its brief filed in its cross appeal, HAAL argues that COAH should have ordered Hillsborough to comply with the terms and conditions of its certification and to take all necessary steps it agreed to take to achieve certification of its fair share plan. However, the Council's decision to revoke, rather than enforce, certification was informed by the Council's knowledge of the entire history of Hillsborough's efforts to achieve certification, particularly its strong advocacy for a plan that included the PAC/HCF site, as well as the Council's view that

Hillsborough's actions subsequent to certification rendered futile any Council order to enforce that certification (Aa204 to Aa208). Central to the Council's decision on this issue was the fact that Hillsborough and HAAL had negotiated and signed a Municipal Development Agreement "which convinced COAH that the PAC/HCF site provided a realistic opportunity for affordable housing within [Hillsborough's] six year period of certification" (Aa206) and the fact that at the time of COAH's decision on remand the Municipal Development Agreement was the subject of builder's remedy litigation in the Superior Court filed against Hillsborough (Aa207).

The importance of the Municipal Development Agreement to COAH's initial certification decision cannot be overemphasized. It was Hillsborough's willingness to sign the Municipal Development Agreement with HAAL which convinced COAH that the PAC/HCF site provided a realistic opportunity for affordable housing within the six year period of certification, even though the proposed development required a waiver of COAH's center designation rule. At the time of certification, sewer service was not available to the site and was essential to the development of the site. Hillsborough's promised cooperation with the developer in extending sewers to the site was assumed in the Municipal Development Agreement. Further, the Municipal Development Agreement also provided COAH with assurance that the rental units provided in the fair share plan would be built such that COAH awarded rental bonus credits pursuant to N.J.A.C. 5:93-5.15(d), which requires "a firm

...that mutual cooperation, as has previously been stated, convinced the Council to waive without opposition from the Office of State Planning the important public policies contained in the Council's regulations concerning compliance with the State Plan and its center policy, so that the development of the PAC/HCF site could expeditiously go forward, as Hillsborough had urged that it should. At present, Hillsborough argues that the PAC/HCF site's planning area designation should not be changed from a rural designation. It had previously agreed to seek a change for the site to the more easily developed Planning Area 2. At present, Hillsborough refuses to support the extension of sewer service to the PAC/HCF site, as it also had previously agreed to do. And at present, Hillsborough even argues before COAH that the Council should never have granted Hillsborough's requested waiver of center designation, which it had previously strongly and successfully urged the Council to grant. Therefore, faced with this municipal change of heart and the attendant law suits it has generated, and mindful of the strong public policy inherent in COAH's regulations that require adherence to the policies of the SDRP, the Council will not now order Hillsborough to comply with the terms of its prior certified plan. Rather, the Council will revoke that certification. [Aa208].

HAAL argues at Point VI of its brief that the Council had the power and obligation to enforce its grant of substantive certification and to order Hillsborough to take the various actions it had committed to take with regard to the development of the PAC/HCF site when it was granted substantive certification. The Council agrees with HAAL that it does have the power to enter such orders in appropriate circumstances. As HAAL notes in its brief, the Council has in other cases ordered municipalities to comply with the terms of agreements negotiated with developers during the Council's process, see In Re Township of Howell, COAH Docket No.

97-908, attached as Exhibit B to HAAL's brief (HRb Exhibit B), and has also ordered municipalities to comply with the explicit terms of their substantive certification, see In the Matter of the Township of Denville, App. Div., decided April 21, 1995, unpublished, attached as Exhibit A to HAAL's brief (HRb Exhibit A).

The Council, however, in its decision below distinguished both of these cases from Hillsborough's case, based upon the facts and policy questions they presented (Aa204 to Aa207). Rather, the Council concluded that because Hillsborough's certification was so dependent upon Hillsborough's Municipal Development Agreement with HAAL, which Hillsborough had repudiated, revocation was the appropriate remedy with regard to Hillsborough's substantive certification. That decision was within the Council's discretion and, given the facts of the matter as articulated throughout this brief and the Council's decision, that decision was most reasonable. It should therefore be affirmed.

D. THE GUIDANCE PROVIDED TO HILLSBOROUGH CONCERNING ANY NEW FAIR SHARE PLAN FOR WHICH IT SEEKS COAH'S CERTIFICATION WAS CONSISTENT WITH THE FAIR HOUSING ACT AND WAS MOST REASONABLE GIVEN THE HISTORY OF HILLSBOROUGH'S MOUNT LAUREL COMPLIANCE EFFORTS BEFORE COAH.

The Fair Housing Act states at N.J.S.A. 52:27D-314:

In conducting its review, the council may meet with the municipality and may deny the petition or condition its certification upon changes in the element or ordinances. Any denial or conditions for approval shall be in writing and shall set forth the reasons for the denial or conditions. If, within 60 days of the council's denial or conditional approval, the municipality refiles its

petition with changes satisfactory to the council, the council shall issue a substantive certification.

Consistent with The Fair Housing Act, the Council--in revoking Hillsborough's fair share plan--provided guidance to the municipality in the last few pages of its decision with regard to any new fair share plan Hillsborough intended to file with the Council. The Council stated that:

Any plan proposed by Hillsborough must be capable of being implemented immediately. If the plan involves new development, the site or sites must be immediately approvable in terms of zoning and infrastructure and they must be compatible with the SDRP. The developer of any inclusionary project must be ready, willing and able to proceed promptly and any proposed subsidies must be realistically available without undue delay. The criteria found in the Council's rules for the formulation of a municipal fair share plan will be strictly applied to Hillsborough and there will be no waivers granted from any of the Council's rules or policies. [Aa209].

The Council further required that any new fair share plan "...fully account for the inclusion or non-inclusion of the HAAL site as a provider of affordable housing." Aa210.

These requirements were made by the Council because of Hillsborough's history with regard to its Mount Laurel compliance efforts before the Council, as that history has been recounted here. Particularly relevant to the requirements are Hillsborough's advocacy for and subsequent repudiation of (a) the PAC/HCF site for affordable housing and (b) the waiver of COAH's center designation requirement for PAC/HCF site. The Council had relied upon Hillsborough's signing the Municipal Development Agreement with

HAAL in order to grant the center designation waiver and to certify Hillsborough's plan. Because Hillsborough had repudiated this Agreement, the Council informed Hillsborough that in the future it would strictly construe its rules when certifying any future Hillsborough plan and would not grant any waivers of these rules. Further, Hillsborough would in the future have to fully account for its treatment of the PAC/HCF site in any new plan, an acknowledgment that the zoning of the site consistent with the Municipal Development Agreement was at issue in the builder's remedy litigation in the Superior Court.

The Council's requirements constitute a reasonable response to Hillsborough's actions with regard to its fair share plan and, therefore, should be affirmed by this court.

- (1) The Council's statement that it would not in the future grant any waivers to a Hillsborough fair share plan is reasonable, when understood in the context of Hillsborough's history, and the Council's opinion.

Both Hillsborough at Point IV of its brief and HAAL at Point V of its brief challenge the Council's statement that it would not in the future grant any waivers to a Hillsborough fair share plan. Both parties cite Smith v. Paquin, 77 N.J. Super 135, 143 (App. Div. 1962), to support their claims that the requirement is analogous to a municipal governing body's prohibiting by ordinance a local board of adjustment from granting particular variances. However, that analogy is not applicable here because the Council is an administrative body that in its June 3, 1998 opinion is responding to a particular set of circumstances created

by a particular municipality and is informing that municipality as to what it will be required to do if it wishes to once again seek the Council's jurisdiction over a fair share plan.

Moreover, the Council's waiver prohibition to Hillsborough must be read in the context of the entire decision, which makes clear that the waiver prohibition was particularly directed at Hillsborough's seeking a future center designation waiver. In the same paragraph that contained the waiver prohibition, the decision stated that inclusionary developments heretofore included in a Hillsborough plan "must be immediately approvable in terms of zoning and infrastructure and they must be compatible with the SDRP." Aa209. With this statement the Council was emphasizing that, given the lost time and futile efforts expended with regard to the creation of affordable housing under Hillsborough's repudiated fair share plan, the Council would not in the future certify any new Hillsborough plan as realistic unless the inclusionary developments in that plan were capable of being developed quickly and within the six year certification period. The Municipal Development Agreement had previously provided assurance to the Council that the PAC/HCF site would provide affordable housing in the six years of the Council's certification, but Hillsborough had unequivocally demonstrated that it would retreat from such written commitments. Therefore, the Council required that any future fair share plan have only inclusionary

developments with approvals and infrastructure in place so that the affordable housing would be built within six years.*

Further, the decision also makes clear that the waiver prohibition is not absolute, at least with regard to the PAC/HCF site's inclusion in a Hillsborough fair share plan. This is because the opinion acknowledges that the PAC/HCF site's development was at issue in the Superior Court builder's remedy litigation and the opinion states that the Council would comply with any court orders issued with regard to the development of the PAC/HCF site for affordable housing. Therefore, if the Superior Court, which now has jurisdiction over Hillsborough's Mount Laurel compliance efforts and over the development of the PAC/HCF site, ordered that the PAC/HCF site be developed for affordable housing in a manner that required waivers from COAH rules, COAH stated in its decision that it would honor that court order in any future fair share plan.

- (2) The Council's requirement that Hillsborough account for the

*With regard to the center designation waiver, this court's remand requested that the Council "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)" (Aa180). The Council's decision on remand did not deal with this issue, because the revocation of substantive certification rendered the issue moot (Aa211, Aa212). HAAL at Point V(B)(2) of its brief argues that COAH should have determined this issue and should have held that pursuant to N.J.A.C. 5:93-5.4(d) the PAC/HCF site did not require center designation or a waiver of center designation to be developed for affordable housing. Because the Council did not address the issue in its decision, this brief will not take a position on the matter. However, it may be noted that the Council did in fact grant the waiver of the center designation requirement of N.J.A.C. 5:93-5.4(c) for the PAC/HCF development when granting substantive certification to Hillsborough's fair share plan (Aa159).

inclusion or non-inclusion of the PAC/HCF site is also reasonable.

Hillsborough challenges at Point V of its brief the Council's requirement that "the inclusion or non-inclusion" of the PAC/HCF site must be fully accounted for in any new fair share plan submitted to COAH by Hillsborough. This requirement is based, by analogy, on N.J.A.C. 5:93-5.13, which states that sites zoned for inclusionary development in addressing the 1987-1993 housing obligation "shall retain such zoning in the petition addressing a 1987 to 1999 fair share obligation" if the site "was subject to an agreement pursuant to the Council's mediation process." The Council's decision also noted, however, that the zoning on the site could be changed with the developer's consent. N.J.A.C. 5:93-5.13(c). The Council acknowledged that the site was the subject of litigation and stated that "any court orders issued with regard to the development of the site by the Superior Court, will of course be honored by COAH." However, it was "COAH's strong preference" that the municipality and HAAL "resolve their differences" with regard to the development of the site "consistent with COAH's rules and the policies of the SDRP."

COAH made this requirement for the following reasons:

There are sound policy reasons why the Council will not permit Hillsborough to ignore the HAAL site in a future fair share plan. Consistent with the Fair Housing Act and the MLUL, both Hillsborough and HAAL entered into a mediated agreement as part of COAH's process and Hillsborough sought and received certification based upon this agreement. It would be a waste of this Council's time and effort in administering the Hillsborough plan, conducting the required mediation, granting

certification, and defending that certification in the appellate courts, for the Council to not require Hillsborough to include a new agreement for development of the HAAL site in any future fair share plan filed with the Council. [Footnote omitted] Anything less would compromise the COAH process and allow any municipality in the future to repudiate mediated agreements, as Hillsborough has done here. Such municipal behavior cannot be tolerated in the future by the Council, nor will it be. [Aa211.]

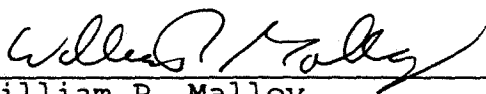
Hillsborough's argument in Point V of its brief ignores the policy reasons COAH articulated for its requirement. Rather, Hillsborough challenges the requirement because it claims it would not result in a realistic opportunity for affordable housing given the fact that COAH has determined that Hillsborough's "obstructionist tactics have rendered the likelihood of construction of the Mount Laurel units remote..." (Ab28). This presents no basis for this court to void COAH's very reasonable requirement that if Hillsborough files a new fair share plan with the Council, the PAC/HCF site's "inclusion or non-inclusion" in the plan be fully accounted for.

CONCLUSION

For all of the above-stated reasons, the June 3, 1998 decision on remand from this court of the New Jersey Council on Affordable Housing must be affirmed.

Respectfully submitted,

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