Hillsborough Litigation 9/21/99

Brief of Respondent New Jersey Future, Inc.

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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 CIVIL ACTION

BRIEF OF RESPONDENT NEW JERSEY FUTURE, INC.

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PRELIMINARY STATMENT

This is a Mount Laurel case, on appeal from a decision of the Council on Affordable Housing. The Mount Laurel II precedents require that Hillsborough's fair share housing plan be realistic, and that it be expeditiously realized. From the Council's very first decision in this case, granting Substantive Certification to Hillsborough Township in 1996, COAH has failed to properly heed the requirements of the Mount Laurel doctrine. As a result, it became necessary in 1998 to abandon a flawed plan that was never realistic and could not have been implemented expeditiously, even with better cooperation from the municipality. However, COAH also chose to compound its earlier Mt. Laurel failings by not only abandoning the plan (a decision that respondents fully support), but inexplicably refusing jurisdiction, leaving a gaping hole in jurisdiction through which builder's remedy suits have rushed in, further delaying the decidedly un-expeditious process of making affordable housing in Hillsborough a reality.

COAH's ill-conceived decision to refuse jurisdiction is, unfortunately, for all practical purposes irreversible at this juncture. Re-instatement of jurisdiction would almost certainly be the subject of an appeal, and cause further delay in the already woefully protracted process of securing affordable housing in Hillsborough.

However, in affirming COAH's decision to abandon the

plan -- which we strongly urge the Court to do -- it is essential that this Court also respond to COAH's wrongheaded withdrawal of jurisdiction by restating the Mt. Laurel standard of "realistic opportunity, expeditiously realized" -- the standard that COAH completely lost sight of in this case and must apply more effectively in cases to come.

Thus, while New Jersey Future agrees with COAH's recognition of the failure of the Hillsborough plan, abandonment of a plan is not the same as "revocation," the term that COAH uses. As Hillsborough points out, it is not uncommon for COAH to allow (sometime even to order) a municipality to abandon one plan and submit an amended plan in order to keep it both "realistic" and "expeditious" as the process of implementation evolves. Rather than using that common and simple procedure here, as both respondent New Jersey Future and Hillsborough urged COAH to do in 1998, the Council -- by abruptly withdrawing jurisdiction -- seems more concerned with penalizing Hillsborough for wasting the Council's time than with promoting the expeditious construction of affordable housing.

Leaving aside that blame-shifting of this sort is an inappropriate criterion for a jurisdictional determination, there is more than enough fault to go around in the telling of this sorry history. Certainly, the position that the Township now takes before this Court -- i.e., that it never intended to take the post-certification actions

realistically necessary to develop the compliance site -- is disingenuous at best and should not be accepted by this Court. Protecting the integrity of its own administrative processes in the face of this sort of municipal intransigence is generally a legitimate concern of COAH. But protective measures are not appropriate where, as here, they operate to the detriment of the overriding constitutional mandate to ensure availability of affordable housing; and surely not where, as here, COAH is at least an equal partner with Hillsborough in promoting an original plan that was doomed to failure from the start.

Hillsborough is, moreover, correct in stating that its refusal to endorse a wastewater management plan, crucial to development of the compliance site, has been firm and consistent both before and after the certification was granted. COAH apparently chose not to believe the obvious. Hillsborough is also correct in arguing that once it received a waiver of the COAH regulation requiring a state plan "center" designation for the compliance site (a designation that in all likelihood could not have been obtained under State Plan rules), it could rely on the waiver and had no obligation to initiate other approaches to solving the state plan "problem."

Thus, despite COAH's vigorous condemnation of Hillsborough, what it really complains about is that Hillsborough did not act voluntarily to save COAH from the

consequences of its own ill-advised decision to approve a plan that should have been summarily rejected when it was first presented. Approved sewer service (as opposed to a "nearby" sewer pipe) was not available in 1995 and 1996, nor is it available now, nor is it likely to be available anytime soon, unless the State Plan is unexpectedly modified. State Plan consistency was not demonstrable then, nor is it now.

COAH has been slow to recognize its own responsibility for the mess that has been made of this case. Indirectly, however, it conceded the correctness of New Jersey Future's original criticisms when, in the June 1998 opinion, it ordered Hillsborough to scrupulously follow the State Plan, without relying on waivers, should the Township choose to submit another fair share proposal. It should have been unnecessary for New Jersey Future to have brought suit to wring this concession from COAH. The HAAL site was so obviously unworkable that COAH itself, the agency charged to develop expertise in these matters, should have recognized that it did not present the speedy and realistic opportunity for lower income housing that is COAH's constitutional obligation to insure.

Thus, while it seems almost self-evident under the circumstances that COAH acted properly in June, 1998, to abandon Hillsborough's substantive certification, the more significant question is what should have been done thereafter.

New Jersey Future submits that there is no basis in law or equity that can sustain COAH's punitive decision to relinquish jurisdiction, thus condemning the status of affordable housing in Hillsborough to a complex builder's remedy lawsuit in Superior Court that may take years to conclude. After the delay between 1995 and 1998 for which COAH bears part of the responsibility, the responsible course of action would be to simply give the Township sixty days to amend its plan. While New Jersey Future recognizes that it is realistically too late now for COAH to reverse course, we urgently request the Court to consider this issue and make clear to COAH that its decision to withdraw jurisdiction was inappropriate and should not be repeated.

Leaving aside, then, the issue of how COAH should have proceeded following the revocation of certification, it is clear that the revocation itself was well within COAH's administrative authority. There is substantial evidence in the record to support a finding that the criteria for revocation in both applicable law and the substantive certification itself were met. A hearing on the matter would plainly have been superfluous and unnecessary, since there are no contested issues of material fact underlying the revocation decision; and, to the extent there were any issues at all, they were fully aired prior to the revocation.

Finally, we concur in HAAL's request that this court address the question submitted to COAH on remand that COAH

declined to answer, concerning interpretation of the regulations in connection with the State Plan. We submit that the mandate of those regulations -- requiring COAH both to encourage development away from Planning Areas 4 and 5 and to require any development in Planning Areas 4 and 5 to be limited to designated "centers" -- is plain on its face. COAH was right to lay the 1996 certified plan permanently to rest; but wrong in shirking its continuing jurisdiction to ensure realistic and expeditiously realized affordable housing.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

The underlying facts as to why new affordable housing has not yet been constructed in Hillsborough since the grant of substantive certification in 1996 are examined in detail in New Jersey Future's March 21, 1997 brief submitted to this Court in support of its challenge to the 1996 Hillsborough certification. See NJFa1 (Table of Contents of March 21 brief).[1] Appellant Hillsborough and Respondent COAH have submitted a comprehensive Procedural History and Statement of Facts in this docket that New Jersey Future generally accepts subject to the overstatements noted below and additional facts noted in this brief.

Contrary to HAAL's and COAH's repeated mantra that "Hillsborough defaulted in its commitment to seek Planning Area 2 status for the PAC/HCF site" [HAALb1] and that the

[1] We will submit the full brief if the Court so requests.

"Development Agreement also required Hillsborough to seek Planning Area 2 status under the New Jersey State Development and Redevelopment Plan . . . " [HAALb4-5][2], Hillsborough made no commitment in the Development Agreement to seek Planning Area 2 status for the Planned Adult Community/Health Care Facility ("PAC/HCF" or "Adult Community") site. In the Development Agreement there is but an "acknowledgement" that

> forty-two (42) acres [of a total 756 acres3] of the developer"s tract is located in Planning Area 2 with the remaining acreage presently located in Planning Area 4. The parties acknowledge 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 this 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 in Planning Area 4 will be recommended for inclusion in Planning Area 2 . . . .

Municipal Development Agreement Aa122 (emphasis added).

It is clear from the foregoing that Hillsborough acknowledged in the agreement that a large portion of the Adult Community site was included in Planning Area 4. The

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[2] See also HAALb10; HAALb17; HAALb39; COAHb36-37; COAHb39-40; COAHb45.

[3] See HAALa10 (Letter from developer's engineering consultant dated April 1997). Interestingly, the developer claims in this later document that there are 65.8 acres are in Planning Area 2.

only "obligation" referred to in this provision is that the "obligation" of the developer was premised on sewers being made available to the site. Further, this provision states that COAH's substantive certification is premised upon the fact that sewers will be made available to the site because Office of State Planning (OSP) "gave assurances" to COAH that it would recommend the change to Planning Area 2 for the site.[4] Nowhere does Hillsborough, the municipal party to this agreement, commit to seek Planning Area 2 status for the site. Had that been intended, certainly the two sophisticated and well-represented parties to the contract

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[4] The Municipal Development Agreement greatly overstates the "assurances" that OSP purportedly gave to COAH regarding the Adult Community site. OSP's "assurances" were that "[s]ubject 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 site be given consideration by the State Planning Commission for redesignation as Planning Area 2." HAALa138(emphasis added). Thus, the "assurance" that OSP (not Hillsborough) gave to COAH was that subject to an open-ended number of conditions (consultation with two State agencies, the county, and others) the OSP would recommend that the State Planning Commission consider (not approve) the redesignation. Of course, any consideration by the State Planning Commission (the ultimate decision-maker) is subject to public comment that would affect the ultimate decision. The Court may take note of the fact that there has been broad public opposition to the development of the Adult Community site. See e.g. NJDEP Public Notice, 29 N.J.R. 4340-41 (October 6, 1997). In any event, whatever the tepid assurances that were given regarding the Planning Area designation were not given by Hillsborough (the signatory party to the agreement) but rather by an agency that had no decision-making authority in the matter.

could have crafted a clear, straight-forward provision requiring the commitment that the developer (the other party to the contract) now seeks to read into the agreement. The commitment is not there, and no matter how often in its brief the developer criticizes Hillsborough for defaulting on that commitment, those criticisms do not create the obligation on the part of Hillsborough.

The only other provision of the Municipal Development Agreement that creates an obligation regarding the redesignation of Planning Area 4 imposes that obligation upon the developer, not on Hillsborough. Paragraph 13 of the Agreement reads as follows: "[d]eveloper agrees to cooperate with the Township of Hillsborough and provide any requested information for the designation of the Property as Planning Area 2 by the Office of State Planning." Aa124 (emphasis added). Hillsborough makes no commitment in this provision.[5]

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[5] A fair implication of the phrase "cooperate with the Township of Hillsborough" is that there was an expectation that Hillsborough might seek a redesignation. This implication, however, does not fairly rise to a commitment by Hillsborough to seek redesignation, and since COAH waived the center designation requirement, and Hillsborough had not committed to seek redesignation in the Development Agreement, Hillsborough did not default on any promise made in the Agreement. It may fairly be asked whether Hillsborough was trying to have it both ways in this vaguely drafted language, but even if that is so, what is of issue here is that COAH was lamentably lax in failing to impose the "realistic opportunity" standard on the parties to the agreement.

ARGUMENT

Point I

COAH SHOULD NOT HAVE RELINQUISHED JURISDICTION AND SHOULD HAVE PERMITTED HILLSBOROUGH TO REMEDY THE DEFECTS IN ITS CERTIFIED PLAN.

A. **The "Realistic Opportunity" Standard Is Constitutionally Mandated and Has Been Implemented by the Legislature and COAH's Own Regulations**

Each of New Jersey's three constitutional branches of government has affirmed that a municipality must create a "realistic opportunity" for the construction of its fair share of low/moderate income housing.

The obligation was first stated by the Supreme Court in the two Mount Laurel decisions. See Mount Laurel II, 92 N.J. 158, 221-222 (1983); Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 67 N.J. 151, 174, appeal dismissed, cert. denied, 423 U.S. 808 (1975)(Mount Laurel I). Creating a "realistic opportunity" is "the core of the Mount Laurel doctrine." Mount Laurel II, 92 N.J. at 205. The responsibility for determining whether a municipality's housing element can be considered a "realistic opportunity" for provision of affordable housing is shared by the Council on Affordable Housing (COAH) and the courts. See generally Alexander's Dept. Stores of New Jersey, Inc., v. Paramus, 125 N.J. 100 (1991). It is the responsibility of COAH and, in turn, the courts, to determine whether the fair share plan in fact provides the requisite "realistic opportunity."

In the two Mount Laurel decisions, the Court firmly established the underlying constitutional basis for the "realistic opportunity" mandate, but it also emphasized the legislative preeminence in the area of housing policy, so long as the Legislature acts in accordance with the terms of the Constitution. Mount Laurel II, 92 N.J. at 213-14. The Legislature's response to the Court's request for action was the enactment of the Fair Housing Act in 1985, N.J.S.A. 52:27D-301 et seq., which represented a "comprehensive planning and implementation response to [the] constitutional obligation" recognized in Mount Laurel I and II." N.J.S.A. 52:27D-302(c). The Fair Housing Act is the Legislature's express acknowledgement of the constitutional obligation of every municipality to provide a realistic opportunity for a fair share of regional affordable housing needs. See N.J.S.A. 52:27D-302(a); In re Township of Warren, 132 N.J. 1, 12 (1993).

The statutory scheme which the Fair Housing Act created "comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court." N.J.S.A. 52:27D-303. The Act "represents a substantial effort by the other branches of government to vindicate the Mount Laurel constitutional obligation."

Hills Development Co. v. Bernards Twp., 103 N.J. 1, 21 (1986). "The clear and recurring theme of the Act is the recognition and implementation of the requirement that municipalities must provide through their zoning ordinance a realistic opportunity to satisfy their fair share. . .." In re Township of Warren, 132 N.J. at 12. This is codified in no less than nine sections of the Fair Housing Act. See N.J.S.A. 52:27D-302(a),(h), 311(a), 312(b),(c), 314(b), 317(a),(b), 328. In In re Township of Warren, the Supreme Court reiterated the "paramount importance" of Mount Laurel compliance efforts and also its belief that if the Fair Housing Act worked in accordance with the expressed Legislative intent, "it [would] assure a realistic opportunity for lower income housing in all those parts of the state where sensible planning calls for such housing." In re Township of Warren, 132 N.J. at 27, citing Hills Development Co. v. Bernards Twp., 103 N.J. 1, 21 (1986).

COAH is an agency within the Executive Branch that was created by the Legislature to carry out the constitutional mandate and its statutory codification. N.J.S.A. 52:27D-305; see also Calton Homes, Inc. v. Council on Affordable Hous., 244 N.J. Super. 438 (App. Div.), cert. denied, 127 N.J. 326 (1991) (summarizing the COAH process). The Fair Housing Act endowed COAH with wide-ranging powers to establish statewide housing regions, estimate the need for low- and moderate-income housing, adopt criteria and guidelines for municipal

fair-share determinations and adjustments, and perform related tasks. N.J.S.A. 52:27D-302(a)-(c), 307. See generally Id. at §§ 305-329.

COAH, in executing the legislative intent, has expressly adopted the "realistic opportunity" standard as the basis for implementing the Fair Housing Act and the constitutional Mount Laurel obligation. COAH's administrative regulations define a "fair share plan" as a "plan ... by which a municipality proposed to satisfy its obligation to create a realistic opportunity to meet its fair share of low and moderate income housing needs...." N.J.A.C. 5:93-1.3. (emphasis added). Numerous other COAH regulations expressly impose the realistic opportunity standard as a condition of compliance. N.J.A.C. 5:93-3.1(b), 3.5(a), 4.1(a), 5.4(c), 5.14(a), 8.10(c), 14.1, Appendix E at 93-106, and Appendix F at 93-119.

In a Memorandum of Understanding with the State Planning Commission, COAH has confirmed its constitutional obligation that every municipality provide a realistic opportunity for a fair share of affordable housing, as well as its responsibility for administration of the obligation. Memorandum of Understanding, N.J.A.C. § 5:93, App. F.

Thus, all three branches of government are in complete agreement that the applicable standard for evaluating Hillsborough Township's Housing Element and Affordable Housing Plan is whether it provides a "realistic

opportunity" for the construction of the township's fair share of the regional need for low and moderate income housing. It is not remarkable that the three branches agree, for the standard is at its base a constitutional one.

The underlying constitutional basis for the "realistic opportunity" standard cannot be ignored. Our Supreme Court has repeatedly stated (and acted on) its "preference" for legislative action to implement the constitutional mandate. Hills Development. Co., 103 N.J. at 25; Mount Laurel II, 92 N.J. 158, 213-214. At the same time, however, neither the Supreme Court nor this Court has hesitated to invalidate COAH regulations on the basis that they violate both statutory requirements and the constitutional norms that the Fair Housing Act adopts and codifies. See In re Township of Warren, 132 N.J. at 28 (invalidating a COAH regulation which "does not comport with the Fair Housing Act's central purpose of providing affordable housing on a regional basis consistent with both sound planning concepts and the Mount Laurel doctrine."). In Calton Homes, this Court held that COAH's actions were inconsistent with the policies established by the Legislature. Calton Homes, Inc., 244 N.J. Super. at 450-453 (holding that COAH's 1000-unit cap was arbitrary and unreasonable because it undermined the intent of the Fair Housing Act, and may have overburdened other municipalities which have met their fair share requirements).

B. An Opportunity Is Not "Realistic" Unless It Will Result In The Creation Of Low And Moderate Income Housing As Expeditiously As Possible, Considering All The Available Alternatives

It is virtually axiomatic that a Mount Laurel remedy is not "realistic" unless it is also expeditious. The very first sentence of the Mount Laurel II opinion includes a time reference: "This is the return, eight years later, of [Mount Laurel I]." 92 N.J. at 198. Chief Justice Wilentz then immediately noted that the Mount Laurel case had been in the courts for ten years without producing housing, and he continued:

> To the best of our ability, we shall not allow it to continue. . . . The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals. . . . The length and complexity of trials is often outrageous. Id. at 199-200.

We can be confident that the Chief Justice did not add mention of "a strong COAH hand" only because COAH did not exist at that time.

The running theme of Mount Laurel II that the housing opportunity is realistic only if it is realized expeditiously is also expressed prominently in the Court's prohibition of interlocutory appeals and limitation on stays of orders when a final appeal is taken. Id. at 285. See also Id. at 248, where the Court's dramatic shift from numberless to formulaic fair share, which the Chief Justice explains is

necessary because the fair share issue "takes the most time [and] is capable of monopolizing counsel's time for years." This attention to effective time management in order to get to the actual construction of housing (appeals, especially interlocutory appeals delay compliance) is in sharp contrast to the disregard of timeliness by COAH in the Hillsborough case. In the initial substantive certification, it relied on an inclusionary zoning site that could not be developed without putting compliance on hold for years while separate (essentially interlocutory) proceedings occurred before the Department of Environmental Protection about a dubious amendment to the wastewater management plan. And then, when the substantively certified plan inevitably collapsed, COAH virtually guaranteed that there would be parallel tracks of litigation running simultaneously, each diverting the parties' attention from the other, by failing to retain jurisdiction so that a speedy solution, with one appeal, could have been fashioned.

Thus, one important branch of the timeliness requirement therefore is that the courts (and now COAH) manage the administration of Mount Laurel disputes so as to reach joinder and then decision as quickly as possible. An equally important consideration is that when the decision is made, the approved plan must be one that can be implemented expeditiously. Again, Mount Laurel II makes the point crystal clear. Speaking of defendant Mount Laurel Township's

purported compliance plan, the Chief Justice noted that "[d]efendant's planner estimated that only 30 units could be built in this zone, and conceded that under no circumstances would anything be built for five to six years since there would be no sewer or water access available until then. Lower income housing on this tract is a phantom." Id. at 298 (emphasis added). Here, the parallel to the Hillsborough case is virtually exact.

We recognize, of course, that there may be situations in which delay is inevitable. "Realistic" opportunity is a relative term. If there is only one potentially developable compliance site in a municipality, or only one developer willing to come forward with a development proposal, and that site has infrastructure or other problems, a court or COAH may nevertheless conclude that inclusion of the site presents the best opportunity that is realistically available, so long as there is some good reason to believe that, with patience, the problems can be overcome. But that was not the situation COAH faced in Hillsborough. An objector offered a site with virtually no infrastructure or State Plan problems in 1995, a site that could have satisfied all of Hillsborough's fair share obligation with no more delay than any land development project requires under the Municipal Land Use Law. As we now know from the builder's remedy litigation, at least two other sites were also waiting in the wings, also with few if any site

problems; Hillsborough, prodded by COAH, might have identified these sites with very little effort. Under these undisputed factual circumstances, there is absolutely no justification for Hillsborough to have chosen, and COAH to have accepted, a flawed site that was incapable of seeing prompt development.

We do not doubt that COAH appreciates the facial constitutional significance of the "realistic opportunity" and "expeditious resolution" mandates of Mount Laurel II. See, for instance, N.J.A.C. 5:93-5.3 (requiring that inclusionary sites be "available, suitable, developable and approvable"). What led COAH astray in Hillsborough, is pervasive Council policy of encouraging voluntary municipal participation in the COAH process by giving the municipality what it wants as often as possible. See N.J.A.C. 5:91-3.6(a) ("Municipal/developer incentives") which in effect rewards municipalities that come forward with their own plan with immunity from site specific developer relief. The practical consequence of this is that, as in Hillsborough, objectors with superior sites are given short shrift. See also N.J.A.C. 5:91-5.4, 6.2(f), each of which cites to the "benefits" granted to a municipality by § 3.6(a).

Specifically, in this case COAH agreed to the waiver of the center designation requirement for the HAAL site, a crucial error, on the basis of an "informal policy" that permits "a joint request by a municipality and a developer"

under certain conditions in Planning Areas 4 and 5. See Aa127. For reasons not spread upon this record, Hillsborough (at least in 1995) wanted the HAAL site, warts and all, and COAH, anxious to preserve the principle of voluntary compliance, looked the other way.

COAH's dilemma is a difficult one. Administering a regime of voluntary compliance with a politically "hot" issue like affordable housing requires great effort, and so all else equal (where sites are roughly comparable, for instance, or perhaps where they are close enough to comparable as to raise a doubt), deference to a municipality's wishes may be a legitimate policy. But all else was not equal in Hillsborough, and it is time for COAH to face up to its dilemma and opt for genuinely realistic and expeditious solutions, even if that costs some nominal compliance. As Hillsborough's situation reveals, compliance based on wishful thinking is neither realistic nor expeditious -- it is the kind of "papered over" phantom against which Chief Justice Wilentz spoke so strongly.

C. No Deference Is Owed To Administrative Agency When Court Is Reviewing Constitutional Or Legal Determinations Of The Agency

It is incomplete to state, as Appellant HAAL does, that the standard of review in this case is whether the agency action was "arbitrary and capricious." HAALb12. The facts are not seriously in dispute in this case. At issue is the proper meaning of the Mount Laurel Doctrine and the legal

rules that implement it. When agencies make decisions based on constitutional considerations such decisions are not given any deference. See Abbott v. Burke, 100 N.J. 269, 298-99 (1985)("[A]lthough an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review."), citing Hunterdon Cent. High Sch. Bd. of Educ. v. Hunterdon Cent. High Sch. Teacher's Ass'n, 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981). (although the Public Employment Relation Commission did not exceed its authority to resolve issue on constitutional grounds, the court emphasized that the agency's decision carried no presumptive value). Similarly, the construction of a statute is uniquely a judicial function, and an appellate court is not bound by an administrative agency's conclusions of law. Greenwood v. State Police Training Center, 127 N.J. 500, 513 (1992)(agencies have no superior ability to resolve purely legal questions; court gave no deference to Commission's misreading of the meaning of "good cause.").[6]

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[6] See also Carpet Remnant Warehouse, Inc. v. Dep't of Labor, 125 N.J. 567, 590 (1991) (no deference owed to agency's decision where it applied too restrictive an interpretation of statute.); Brambila v. Bd. of Review, 124 N.J. 425, 437 (1991) (court not legally bound by the agency's conclusions of law interpreting unemployment compensation statute; "[A]n appellate tribunal is . . . in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Securities Co., Inc. v. Bureau of Securities, 64 N.J. 85, 93 (1973) (agency order

however, lack such authority. Notwithstanding COAH's protestations to the contrary in its June, 1998 opinion, COAH had both jurisdiction and discretion to give Hillsborough the opportunity to amend its plan. It simply chose not to.

In the June, 1998 opinion, COAH observed that its jurisdiction begins when a municipality files a fair share plan with the Council, and continues while a grant of substantive certification remains in effect. This jurisdiction includes an obligation for COAH to defend its grants of substantive certification in the event that a builder's remedy suit is filed in the courts. According to COAH, however, it cannot exercise jurisdiction over a municipality that has no plan before the Council for which it either has certification or is seeking certification. COAHb21. COAH therefore reasoned that it could not again assume jurisdiction over Hillsborough's *Mount Laurel* compliance efforts until the township presented another fair share plan to the Council for certification.

COAH's rationale is superficially plausible but wrong. It fails to take into account the realities of the certification process. As COAH would have it, all that Hillsborough needed to do to regain the protection of the Fair Housing Act against builder's remedy lawsuits was to file a new fair share plan promptly. Hillsborough in fact did so, in September, 1998. By then, however, four builder's

remedy lawsuits had been filed against it. Since COAH had relinquished jurisdiction, it declined to accept Hillsborough's proffered plan. Therein lies the flaw in COAH's reasoning. Unless there is no developer interest in the municipality whose certification is revoked (an unlikely scenario), the outcome at best depends on an unseemly race, in which the winner is the one who gets to the courthouse before the other gets to COAH, or vice versa.

COAH's authority and jurisdiction to implement and enforce the constitutional mandate to provide affordable housing are simply not so limited as COAH claims. The Fair Housing Act endowed COAH with wide-ranging powers to establish statewide housing regions, estimate the need for low- and moderate-income housing, adopt criteria and guidelines for municipal fair-share determinations and adjustments, and perform related tasks. N.J.S.A. 52:27D-302(a)-(c), 307. See generally Id. at §§ 305-329. Indeed, COAH agrees that it 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." COAHb32-33. COAH cites 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); and Van Dalen v. Washington Township, 120 N.J. 234, 245 (1990) to support these broad powers. Id. Inexplicably, however, this broad power and discretion seemed to evaporate when both

Hillsborough and New Jersey Future requested that COAH make a discretionary determination to see the certification process through to the end rather than let it degenerate into litigious chaos.

Particularly read in light of these strong legal and practical reasons to construe COAH's powers broadly, it is clear that COAH's own regulations offer what would have been a simple solution. Those regulations provide that "[a]mendments may be required by the council as a result of facts that were not apparent at the time of substantive certification." N.J.A.C. § 5:91-13.1(a).[9] The facts that became apparent after the issuance of substantive certification clearly demonstrated that Hillsborough's plan should have been amended. It eventually became obvious to those who had not seen it initially, for instance, that the county's wastewater management plan was not going to be changed promptly to include the HAAL site. New Jersey Future's credible opposition to the plan was also a "fact" that merited reevaluation, as was the growing political opposition within Hillsborough that plainly made it more difficult for the township to carry out the plan.[10]

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[9] Note that this "change of fact" criterion parallels the "change of fact" language in the revocation provision of the substantive certification itself, upon which COAH relied to declare the Hillsborough plan "null and void."

[10] For example, the New Jersey Department of Environmental Protection noted that "[c]onsiderable public opposition has been voiced regarding a proposed project" when it issued its

Moreover, § 13.1(a) permits the council to "require" amendments, demonstrating that the Council may act on its own initiative, without waiting for the municipality to petition for an amendment pursuant to § 13.1(b). Indeed, even the revocation provision in COAH's own resolution granting substantive certification to Hillsborough specifically incorporated language permitting Hillsborough to "cure" problems that arose later. See Aa160.

As to COAH's expressed concern that the Fair Housing Act only gives it jurisdiction over municipalities that have plans certified or pending, the simple answer is that so long as COAH is inviting amendment of the certified plan, that plan remains before the Council and the Council retains jurisdiction. See N.J.A.C. 5:91-10.3 which permits COAH "at any time" to "take all action that expedites the Council's administrative process and/or the production of low and moderate income housing." There is an almost metaphysical logic in COAH's presumed rejoinder to Future's argument.[11] In COAH's view, the Fair Housing Act, N.J.S.A. 52:27D-317, requires it to "defend" a certified plan should it be challenged in court, but if the plan is "null and void"

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public notice for comment on the County Wastewater Management Plan that did not include the HAAL site. See NJDEP Public Notice, 29 N.J.R. 4340-41 (October 6, 1997).

[11] We say "presumed," because the June 1998 opinion never specifically addresses the applicability of § 10.3 or § 13.1.

because of the municipality's repudiation, it no longer exists and therefore there is nothing for COAH to "defend." Therefore, in such case, it has no jurisdiction for any purpose. See COAH Revocation Opinion, Aa204.

Such rigid formalism should have no place in COAH's administration of the constitutional *Mount Laurel* obligation. Hillsborough's repudiation of its certified plan, which there certainly was, came about over time, not at a date than can be fixed in the way COAH attempts to do. COAH stated in its revocation decision that Hillsborough's certified plan "was a nullity as of Hillsborough's June 24, 1997 resolution not to support the extension of sewer" to the HAAL site, and goes on to state that "there is nothing in the Fair Housing Act which gives the Council jurisdiction over a municipality that has repudiated its certified plan." Aa203-204. If that logic were to be applied rigorously, however, COAH should have concluded that the plan was dead as of June 24, 1997; which in turn would have required it to stop defending the plan against New Jersey Future's lawsuit at that date.[12] Instead, of course, COAH proceeded to file

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[12] COAH's position in its revocation decision that Hillsborough's certified plan was a "nullity" as of June 24, 1997 is also inconsistent with the position it took before this Court in seeking a remand of the New Jersey Future appeal in July, 1997. In its letter brief in support of its motion to remand in July, 1997 COAH stated that "Hillsborough's June 27 [1997] decision requires the Council to reassume jurisdiction over the Hillsborough fair share plan so that the Council may determine if the plan continues

its brief in New Jersey Future's appeal defending its 1996 decision granting certification to Hillsborough on October 10, 1997 -- *after*, according to COAH, Hillsborough's plan became a "nullity" in June, 1997. See Table of Contents of COAH's Brief, NJFa6. Were COAH correct that it lost jurisdiction in June, 1997, that loss should have deprived it of jurisdiction to accept briefs and hear oral argument on remand in April 1998. Obviously, following this rigorous logic would have made no sense; but it equally makes no sense for COAH to relinquish jurisdiction just at the crucial point where a strongly worded mandate to Hillsborough might have produced a truly workable plan for affordable housing.

Thus, this Court should make clear to COAH that it was not bound in law to relinquish jurisdiction. Rather, its decision to either retain or relinquish jurisdiction under the (hopefully rare) circumstances of the Hillsborough case is one that should be made by the exercise of informed discretion in the light of the policies to be served by prompt compliance with the Constitution. Reading between the lines, COAH's frustration with Hillsborough is both obvious and understandable. COAH is a small agency, and Hillsborough consumed a lot of staff time in review, mediation, and deliberation, much of which was wasted when Hillsborough

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to provide a realistic opportunity for affordable housing." NJFa10.

began to vacillate. Just as COAH has adopted policies deferring to municipal choices as a way to encourage participation in its voluntary processes [see N.J.A.C. 5:91-3.6(a)], so its refusal to retain jurisdiction, with the predictable consequence of exposing Hillsborough to builder's remedy litigation, can be seen as a "punishment" for its blameworthy conduct.

In the end, however, the issue is not whether COAH was inconvenienced or offended, but whether the public interest in enforcement of the constitution would be better served by giving Hillsborough another chance or not. In this regard, it bears remembering that the township has been a willing, voluntary participant in the Council's process, in contrast to the many New Jersey municipalities that have done nothing at all. In fact, in its second round of fair share calculations, the Council gave Hillsborough the reduction provided for in N.J.A.C. 5:93-3.6 for having substantially complied with the terms of prior substantive certification. Furthermore, Hillsborough's reasons for abandoning its certified plan are not entirely without merit considering that the township now recognizes the adverse planning consequences of its prior plan.

We come then, to the most troubling question, which is whether now COAH should be required to reassume jurisdiction in this case. While we are confident that COAH could have retained jurisdiction in 1998, and that in the exercise even

of agency discretion it should have retained jurisdiction of the Hillsborough matter, time has again moved on, and the parallel Superior Court litigation is well underway. New Jersey Future reluctantly concludes that the dispute should remain solely in Superior Court, but we urge this Court nonetheless to provide guidance to COAH about its jurisdictional authority so that this situation does not occur in the future.

Our conclusion is driven by the same consideration that led us to argue in 1998 that COAH should retain jurisdiction: namely, the *Mount Laurel II* mandate for speedy disposition of the issues. While we cannot predict the future course of this litigation, it seems close to inevitable that a decision by this Court remanding to COAH for further proceedings would lead to more appeals, more motion practice before COAH, and possibly yet again appeals to this court or the Supreme Court. In *Mount Laurel II*, the Court virtually prohibited interlocutory appeals, instructing that the judicial proceeding should be brought to substantive completion and then all appealable issues pursued at one time, in order to shorten the time to ultimate compliance with the Constitution. Southern Burlington County NAACP v. Town of Mt. Laurel, 92 N.J. 158, 218 (1983). The situation here is analogous: there is a clear path to reaching a substantive result in the Superior Court litigation, and it is far from likely that a remand to

COAH would shorten that time. On the contrary, it could well take longer.

Point II

COAH'S DECISION TO REVOKE HILLSBOROUGH'S CERTIFICATION WAS WITHIN ITS AUTHORITY AND BASED UPON SUBSTANTIAL CREDIBLE EVIDENCE

At issue in this appeal is COAH's decision to revoke the substantive certification granted to Hillsborough in 1996. Aa183. As COAH noted in its June 3, 1998 opinion accompanying the rescission of Substantive Certification, the Fair Housing Act is silent as to the consequences of municipal non-compliance with a certified plan. Aa201-202. COAH's regulations, however, do set forth the circumstances under which substantive certification may be revoked. N.J.A.C. 5:93-10.5 provides as follows:

> 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 . . . may result in Council action revoking substantive certification.

Thus, COAH's regulation plainly establishes municipal delay as a ground for revoking substantive certification. That ground is clearly present here.

In its decision revoking Hillsborough's certification, COAH cites the above regulation, but seems to base its revocation upon the Substantive Certification itself (Aa160). The Certification states:

> 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.

COAH Decision on Remand, p.19. Aa203 (emphasis added).

Thus, COAH's Resolution Granting Substantive Certification to Hillsborough establishes two criteria that may render the certification null and void: either a change in facts upon which the certification was based or a deviation from the terms and conditions of the substantive certification "which the municipality fails to remedy."

The standard of review on the narrow issue of COAH's decision -- pursuant to its regulations -- to revoke certification is whether the agency's action was arbitrary or capricious or a violation of the controlling law. See Van Dalen v. Washington Tp., 120 N.J. 234, 244-45 (1990); Williams v. Dep't of Human Services, 116 N.J. 102, 107 (1989); Public Service Electric and Gas Co. v. New Jersey Dep't of Envtl. Protection, 101 N.J. 95, 103 (1985). Thus, the standard here requires a broader application than in Point I above, where the question of COAH retaining jurisdiction was strictly an issue of the controlling (constitutional) law.

While COAH's opinion is not altogether precise in sorting out the basis for its action -- and we would caution against permitting reliance on "contract" language such as the Certification rather than formal rulemaking -- the fact remains that both the regulatory criterion and the Certification criteria for revocation were plainly met. Moreover, since rejecting

Hillsborough's non-compliant plan was ultimately a constitutional requirement under the "realistic opportunity" standard, it would serve no purpose to construe COAH's revocation authority narrowly. We would, in this regard, not think it remiss for this Court to strongly suggest to COAH that it clarify the standards for revocation and base them explicitly on the constitutional standard by way of an amendment to the regulations.

Point III

IT WAS NOT NECESSARY TO CONDUCT A HEARING PRIOR TO REVOCATION OF HILLSBOROUGH'S CERTIFICATION BECAUSE THERE WERE NO MATERIAL ISSUES of fact IN DISPUTE

In light of the undisputed basis on which COAH revoked substantive certification, New Jersey Future urges this court to also uphold the COAH's determination that a further pre-revocation hearing was not required. COAH's decision was akin to, and as appropriate as, a grant of summary judgment by a court that has correctly determined that there are no contested issues of material fact requiring a trial.

As noted in Point I, COAH acted on the basis of the conditions placed in the grant of substantive certification, as well as on N.J.A.C. 5:93-10.5, which provides as follows:

> 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. [emphasis added]

New Jersey Future does not lightly reach the conclusion that a hearing was not required in this case, nor should this Court. So long as the applicable legal rules are respected, administrative agencies are accorded great deference by the courts when making discretionary decisions; and for this reason, it is vital that the agency action be taken only with a sound grasp of the facts and in the light of reasoned arguments presented to it by the parties in interest. Thus, a hearing on the merits prior to decision normally is required, and this court should reaffirm the general rule in its disposition of this case.[13]

Notwithstanding the general rule, however, this case presents an exceptional situation in which a further hearing is not required, for three reasons: First, as COAH found, there is no dispute as to the material facts. Second, there was ample opportunity for COAH to ascertain the views of the parties as to both fact and law issues prior to June 3, 1998. And third, in the light of the first two reasons, the *Mount Laurel* Doctrine requires that disputes of this sort be handled as expeditiously as possible, which in this case means without unnecessarily duplicative proceedings.

A. *There Are No Material Issues of Fact In Dispute*

[13] Thus, for instance, we would not argue that the failure to include a hearing requirement in the language of the substantive certification excuses a hearing on that basis alone.

As we have demonstrated in Point I, the material facts demonstrating Hillsborough's failure to comply with the requirements of its fair share plan are not in dispute, nor were they at the time of COAH's June, 1998 decision.[14] Thus, were this case to be remanded for a hearing, there is no new evidence that could be presented that could conceivably change a fair-minded decision-maker's view of the controversy. There are disputes over how to characterize those facts, and what legal significance they have, but those questions can be resolved as a matter of law by COAH based upon the undisputed facts (and, in any event, have been fully aired before COAH in the past).

We recognize that N.J.A.C. 5:93-10.5, which authorizes COAH to revoke substantive certification, incorporates the Administrative Procedure Act ("APA") requirements for a hearing (N.J.S.A. 52:14B-9). However, those hearing requirements presume that there are material contested issues of fact. Continti v. Board of Education of Newark, 286 N.J. Super 106, 115-116 (App. Div. 1995), cert. den. 145 N.J 372 (1996). Moreover, it is a general principle of administrative law that "an evidentiary hearing

[14] It is beyond dispute that Hillsborough has effectively repudiated substantive certification by failing to support the extension of sewer service to the Adult Community site and by failing to include that site in the SC/URW WMP. Moreover, the New Jersey Department of Environmental Protection is not even considering the SC/URW WMP for the Adult Community site at this time.

is mandated only when the proposed administrative action is based on disputed adjudicatory facts." In re Farmers Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super 607, 618 (App. Div. 1992); Spalt v. N.J. Dep't of Environmental Protection, 237 N.J. Super 206 (App. Div. 1989), cert. denied, 122 N.J. 140; Bally Mfg. Corp. v. N.J. Casino Control Commission, 85 N.J. 325, 334 (1981). In addition, the authorization provided to agencies by the APA at N.J.S.A. 52:14F-7 "to determine whether a case is contested" is incorporated into the hearing requirements of the Fair Housing Act at N.J.S.A 52:27D-315(c). Contini at 118, citing In re Township of Warren, 247 N.J. Super 146, 159 (App. Div. 1991), rev'd on other grounds, 132 N.J. 1 (1995).

The APA at N.J.S.A. 52:14B-2(b) defines a "contested case" in part as a proceeding "in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or statute to be determined by an agency ... after opportunity for an agency hearing ...." However, the APA "does not create a substantive right to an administrative hearing; it merely provides for procedure to be followed in the event an administrative hearing is otherwise required by statutory law or constitutional mandate." Toys "R" Us v. Township of Mount Olive, 300 N.J. Super 585, 590 (App. Div. 1997). "Even when constitutionally

protected interests are at stake, due process does not require an evidentiary hearing unless there are contested material issues of fact." Contini, supra at 121. Thus, "[i]t is the presence of disputed adjudicative facts, not the vital interests at stake, that requires the protection of formal trial procedure." High Horizons Dev. Co. v. State of N.J, Dep't of Transp., 120 N.J. 40, 53 (1990), citing 2 K. Davis, *Administrative Law Treatise*, § 12:2 at 409 (2d ed. 1979). Accordingly, due process never requires a trial on non-factual issues; nor is trial procedure required on issues of law, policy, or discretion. 2 K. Davis, supra, § 12:2 at 409-10. What is needed on such issues is argument, written or oral, not evidence and not trial procedure. Id. § 12:1 at 406.

For these reasons, "[t]he statutory right to a hearing is subject to the summary decision procedures of the APA." Contini, supra at 119. These procedures, promulgated at N.J.A.C. 1:1-12.5, are essentially the same as the requirements for summary judgment in R.4:46-2, allowing for summary decision in contested cases if there is no genuine issue as to any material fact. See In the Matter of Robros Recycling Corp., 226 N.J. Super. 343 (App. Div. 1988), cert. den. 113 N.J. 638 (1988) (contested cases can be summarily disposed of without an administrative hearing if it is determined that the undisputed material facts indicate that the moving party should prevail as a matter of law);

Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 621 (1973)(agency can summarily dispose of a matter without affording a party a hearing despite statutory language which mandates "an opportunity for a hearing").

It is up to the agency to decide whether a case is contested, so as to trigger the hearing requirement. In re Uniform Administrative Procedure Rules, 90 N.J. 84, 104 (1982).[15] Courts have repeatedly held that "COAH has the authority to make the decision whether there are contested material issues of fact requiring an evidentiary hearing, and, thus, whether the case is 'contested'" Quad Enterprises v. Borough of Paramus and New Jersey Council on Affordable Housing, 250 N.J. Super 256, 263 (App. Div. 1991), citing In re Township of Warren, 132 N.J. at 159-160, and Hills Development Co. v. Township of Bernards, 229 N.J. Super 318,

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[15] Quad Enterprises v. Borough of Paramus, 250 N.J. Super 256 (App. Div. 1990) is not to the contrary. Appellants' suggestion (Ab18) that Quad Enterprises sets forth a blanket rule that "realistic opportunity" is always an issue of fact is simply wrong. In that case, the court was confronted with a set of circumstances in which determining the existence of a realistic opportunity was profoundly dependent on unresolved questions of fact. The Town of Paramus had attempted to meet its Mt. Laurel obligation merely by rezoning a portion of a country club. The court observed, in finding a fact hearing to be necessary, that "the redesign and development of the perimeter of these private clubs for 700 units of affordable housing and dedication of the rest as open space intuitively seem to be unlikely," and that the parties to the litigation "have vigorously argued both sides of the issue" during the mediation process. Here, by contrast, the facts constituting Hillsborough's delay - and its effect on the realistic and expeditious availability of affordable housing - are not in dispute.

340-341 (App. Div. 1988).

COAH therefore had the express authority to determine whether there are contested material issues of fact that would require a hearing; and it acted within that authority in determining that it was an undisputed fact that Hillsborough had not complied with the terms of substantive certification. Since a Court should not substitute its judgment for that of COAH unless that agency has acted in an arbitrary or capricious manner, Van Dalen v. Washington Township, 120 N.J. 234, 244 (1990), COAH's decision should be upheld.

B. There Was an Adequate Opportunity to Present Issues

To the extent there ever may have been issues in this case that would have benefited from a hearing - which we do not believe to be the case - the parties have had more than enough opportunity to air those issues in earlier extensive proceedings before COAH. Pursuant to this Court's order on remand, COAH issued an Order to Show Cause and invited the parties to submit briefs and present oral argument concerning Hillsborough's plan. COAH gave Hillsborough ample opportunity to plead its case through briefing and oral argument in response to its Order to Show Cause. COAH then gave Hillsborough the opportunity to submit further briefing subsequent to oral argument but it chose not to do so. Aa187

Upon consideration of the briefs and arguments, as well as pertinent documents that this Court allowed into the record in its two motion decisions, COAH reached the "inescapable conclusion that Hillsborough has not complied with the terms of its substantive certification" Aa200. COAH further concluded, "[h]ere, there are clearly no contested issues of fact." Id. It stated that its decision to revoke substantive certification was simply 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. 5:13-10.5." Aa203. Finally, COAH noted that "[a]ll briefs submitted in response to the Council's Order to Show Cause acknowledged that Hillsborough has not complied with the Council's grant of substantive certification." Aa200.

The only fair conclusion is that between the remand order in January and COAH's decision in June, ample opportunity was presented the parties to discover material disputes of fact that COAH was justified in not asking for additional evidence before it acted in June. Hillsborough cannot now request a further hearing after it failed to fully avail itself of the opportunities to present its case before COAH.

Due process does not require COAH to do more than it has already done. Due process principles do not demand "a hearing when it appears conclusively from the applicants "pleadings" that the application cannot succeed."

Weinberger, supra at 621. As long as parties have been given "adequate notice, a chance to know opposing evidence, and to present evidence and argument in response, due process would be fundamentally satisfied." High Horizons Dev. Co., supra at 53, citing Board of Education v. Cooperman, 105 N.J. 587 (1987). COAH provided Hillsborough with each of those opportunities in satisfaction of due process requirements. COAH even gave Hillsborough the opportunity to present its position as to how COAH should proceed in response to this Court's order on remand. Aa186. Finally, COAH set forth its findings of fact in a detailed decision which thoroughly explained its basis for revoking substantive certification.

C. Mt. Laurel cases Must Be Handled Expeditiously.

COAH's authority to revoke substantive certification should be liberally construed to enable it to accomplish the legislative goals of the Fair Housing Act, which "provided the Council with broad powers" to achieve the goals of Mt. Laurel. Id. at 245. "The Council may use its powers to grant or deny substantive certification in a 'multitude of ways' in order to achieve statewide compliance with the Mount Laurel obligation." Id.

COAH's "broad powers" clearly extend not only to granting and denying substantive certification but to revoking it as well - and, where necessary, doing so without unnecessary protracted hearing procedures. This Court should therefore construe COAH's authority liberally in

light of the overarching purpose of COAH's powers, which is to ensure expeditious availability of affordable housing.

Point IV

THE COURT SHOULD ADDRESS THE REMAND QUESTION AND CONSTRUE N.J.A.C. 5:93-5.4(C) AND (D) TO EFFECTUATE THE POLICIES OF THE STATE PLAN

When this court remanded New Jersey Future's original appeal to COAH on January 7, 1998, it specifically instructed the Council to consider the applicability of N.J.A.C. 5:93-5.4(c) and 5.4(d) to the Hillsborough certification. This question is central to the underlying issues at the heart of this case. The basis for New Jersey Future's objection to the prior certification of Hillsborough's fair share plan was its failure to respect the centers policies of the State Plan. Sections 5.4(c) and (d) embody COAH's formal regulatory embrace of the SDRP "centers" policy. This Court's mandate to carefully evaluate the relevance of these provisions thus implicitly directed COAH to reconsider the theory on which it granted substantive certification to Hillsborough.

Despite the language of the remand and the significance of the question, however, COAH did not address §§ 5.4(c) and (d) in its June 3, 1998 opinion. Appellant HAAL asks this Court to address §§ 5.4 (c) and (d) without the benefit of COAH's advice. We concur in HAAL's request. The question will surely arise again, and, as we have argued in Point I above, sound judicial administration of these *Mount Laurel*

cases requires that the constitutional standard of expeditious resolution be kept in mind. Moreover, if Hillsborough is not remanded to COAH, the parallel builder's remedy litigation will continue in Superior Court, and *Mount Laurel* trial judges have been admonished by the Supreme Court to follow the structure of COAH's rules where it is appropriate to do so, even though they are not binding on the courts. Thus, §§ 5.4(c) and (d) remain important issues.

N.J.A.C. 5.4(c) requires that compliance sites in Planning Areas 4 and 5 be located in a "center" formally designated by the State Planning Commission. HAAL concedes that its site, the only compliance site in the original plan, is primarily located in Planning Areas 4 and 5, and that it has not been designated a center by the State Planning Commission. HAAL's argument, in its briefing to this Court then and now, is that § 5.4(*c*) is inapplicable to this case, because § 5.4(*d*) governs instead. Subsection d) provides that when a municipality lies in more than one planning area, it "*must* encourage" and "*may* require" use of sites in Planning Areas 1, 2 and 3 before sites in Planning Areas 4 and 5 (emphasis added). Out of the word shift from "must" to "may," HAAL spins the argument that subsection (d) somehow renders subsection (c) a nullity, such that COAH regulations impose no limits at all on use of Planning Areas 4 and 5. This argument is entirely unsupportable.

In order to properly understand §§ 5.4(c) and (d), it

is helpful to first consider §§(a) and (b). Section 5.4(a), which deals with Planning Areas 1 and 2, the ones most appropriate for intensive development under the State Plan, provides that COAH shall "encourage" new inclusionary development within centers, but that municipalities "may" locate such development in environs. Section 5.4(b), regulating the Fringe Planning Area (Planning Area 3), also "encourages" location in Centers but, reflecting the somewhat more sensitive nature of this Planning Area, permits inclusionary developments outside a center (i.e., in the environs) only if "infrastructure is available or can be easily extended from Planning Area 2." Section 5.4(b) has no direct application to this case because there is no land in issue that lies in Planning Area 3. Section 5.4(a) is directly applicable, however, for two reasons: because a small part of the HAAL site is located in Planning Area 2, and more importantly, because Hillsborough had other potential compliance sites available (including the three other builder's remedy plaintiffs now before the trial court) whose sites lie *completely* within Planning Area 2. Sections 5.4 (a) and (b) are also of considerable indirect importance to the much larger part of the HAAL site that lies in Planning Areas 4 and 5, because of the contrasting way centers are handled in §§ 5.4(c) and (d).

Section 5.4(c) reads as follows:

In Planning Areas 4 or 5, as designated in the SDRP

> [State Plan], the Council shall require inclusionary development to be located in centers. Where the Council determines that a municipality has not created a realistic opportunity within the development boundaries of a center to accommodate that portion of the municipal inclusionary component that the municipality proposes to address within the municipality, the Council shall require the municipality to identify an expanded center(s) or a new center(s) and submit the expanded or new center(s) to the State Planning Commission for designation. N.J.A.C. 95:93-5.4(c)(emphasis added).

The requirement of location in a center is unequivocal in this section. The inclusionary new development *must* be in an existing center, or -- following an affirmative determination by COAH that the municipality has not created a realistic opportunity for affordable housing in the existing center -- in an expanded center or a newly designated center. The final part of § 5.4 (d) deals with municipalities containing more than one planning area. It provides, in the parts relevant to Hillsborough, that the Council "shall encourage and may require" the use of sites in Planning Areas 1 and 2 prior to approving inclusionary sites in Planning Areas 3, 4, and 5 that lack sufficient infrastructure, (§(d)(1)), and further that "[t]he Council shall encourage and may require the use of sites to which existing infrastructure can easily be extended prior to approving inclusionary sites that require the creation of new infrastructure in an area not presently served by infrastructure." (§(d)(3)). In the instant case, the record is barren of any suggestion that COAH "encouraged," let

alone "required," use of land in Hillsborough's Planning Area 2 or that it "encouraged," let alone "required," use of a site that had existing infrastructure capacity.

Against this background, in which the entire concern of §5.4 can be seen to respect the State Plan by carefully prioritizing compliance solutions in a sequence from most desirable to least desirable, there simply is no inconsistency between §§(c) and (d); neither the Council nor the Court need choose between them, as HAAL seems to think. Logically, however, they need to be read in reverse order. First, § 5.4(d) *requires* that use of Planning Area 1, 2 and 3 sites be "encouraged." Once this threshold step has been satisfied, §(d) then *permits* (but does not require) consideration of compliance sites found in Planning Areas 4 and 5, site which are, by definition, more sensitive in planning terms and therefore less appropriate in the first instance than PA 1/2/3 sites. Moreover, if the municipality is permitted to advance a PA 4/5 proposal (presumably because efforts to "encourage" compliance in PA 1/2/3 have failed), then § 5.4(c) *requires* that the compliance site be located in a center. Thus, the two provisions mesh smoothly around the requirement that Council-certified compliance plans carefully respect the policies of the SDRP.

In order to implement §§ 5.4(c) and (d), they must therefore be applied in the logical sequence we have suggested. First, the municipality *must* encourage the use of

compliance sites in Planning Areas 1, 2 or 3. The record demonstrates that Hillsborough utterly fails this test. COAH's compliance report and resolution granting substantive certification make plain that the township gave *no* substantive reason why the PA 2 site offered by the objector, Anatole Hiller, in 1995 was unsuitable. Indeed, the record is barren of any evidence that Hillsborough gave *any* consideration to compliance sites in the part of Hillsborough located in Planning Area 2, nor did COAH require that it do so. As we noted in our Preliminary Statement, supra, COAH's apparent reason for doing so is its policy of deferring to municipal site preferences as much as possible, a policy that can be defended up to a point, but not when that point transcends both the constitutional "realistic opportunity" standard and the plain language of the Council's own Regulations. As a matter of law, we submit, Hillsborough failed to "encourage" plan-sensitive compliance as required by § 5.4(d), and in this failure it also lost the opportunity to approve a "realistic" and "expeditious" fair share plan.

The only way Hillsborough can avoid the plain meaning of the text of § 5.4(d) is if "encourage" includes the discretion to do nothing at all. Apart from the obvious proposition that regulatory words should not be given meaningless or vacuous constructions, courts have specifically recognized that the word "encourage" connotes

an obligation to "promote or advance" some goal or purpose. See State v. Blount, 60 N.J. 23, 27 (1972)(citing dictionary meaning). In Lusardi v. Curtis Point Property Owners Association, 86 N.J. 217 (1981), for instance, the Supreme Court had before it a case in which a municipality sought to use its zoning powers, delegated through the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. to restrict beachfront access in a way that was inconsistent with the state's CAFRA regulations, see N.J.A.C. 7:7E-1.1 et seq., but the Coastal Areas Facilities Review Act, N.J.S.A. 13:19-1 et seq., had not clearly preempted inconsistent local action. Noting, however, that the MLUL includes a statutory mandate that the delegated powers be used "to encourage the most appropriate use of land," N.J.S.A. 40:55d-62(a), the Supreme Court held that in order to "encourage" the most appropriate use of land, the municipality must use its delegated powers consistent with pertinent state policies. Having failed to do so in Lusardi, municipal decisions that were otherwise presumptively valid were set aside.[16] Here, it is COAH, a statewide agency with power to regulate municipal fair share plans, that has mandated "encouragement" of a statewide policy, embodied in the state plan. Hillsborough failed to do so and its proposal should not have been approved.

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[16] See also In the Matter of Egg Harbor Associates (Bayshore Center), 94 N.J. 358, 371 (1983)(citing Lusardi with approval on this point).

Because, in our view, compliance with the "encourage" provision of § 5.4(d) is a threshold requirement that must be satisfied before § 5.4(c) can be invoked, and the unambiguous record demonstrates that Hillsborough did not "encourage" compliance in Planning Area 2, the Council should not have permitted Hillsborough to even propose a Planning Area 4 site. This conclusion is dispositive. But even if, for sake of argument, we assume that Hillsborough was able to demonstrate that Planning Areas 1-3 sites were unsuitable or that the owners could not be encouraged to develop them, this only means that Hillsborough is entitled under the regulations to propose a Planning Area 4 or 5 site. Having done so, it must then comply with the requirements of § 5.4(c); there can be no inference that having passed through the § 5.4(d) screen, the municipality's choice of a Planning Area 4 site *must* be approved by COAH. Section 5.4(c) clearly requires that any such site must be located in a designated center. It is conceded that this unambiguous requirement was not met by Hillsborough.

Thus, in answer to this court's long-pending question, New Jersey Future proposes that the answer is, both sections (c) and (d) of N.J.A.C. 5:93-5.4 apply, because that is the only way that the obvious purpose of § 5.4, to implement the State Development and Redevelopment Plan, can be achieved.

Point V

COAH SHOULD NOT ATTEMPT TO ENFORCE THE NOW-REPUDIATED FAIR SHARE PLAN BASED ON THE HAAL SITE

Appellant HAAL, attempting to preserve the advantage it claims that it obtained by being the sole compliance site in the Fair Share plan substantively certified in 1996, now suggests to the Court that the "solution" is that COAH should *order* Hillsborough to follow through on that now-repudiated (and fatally flawed) proposal. In light of the fact that HAAL also argues vigorously in the same brief that Hillsborough has repudiated the very plan it now seeks to enforce, this is an astonishing position to take. HAAL is also wrong.

An order now purporting to "force" Hillsborough to "comply" with its former plan would be tantamount to forcing the town to participate in the COAH process against it will, in direct contradiction of the express provisions of the Fair Housing Act that make participation strictly voluntary. The Act simply contains nothing granting COAH the authority to "force" the towhship to do anything. The plain language of the statute limits the Council's power to granting or withholding certification (and imposing conditions); and then outlines a cooperative scheme under which municipalities, the Council and other interested parties can *voluntarily* work together develop a certifiable plan.[17] The whole scheme of

[17] The municipality initiates this process by voluntarily applying to the Council for certification.

the Act characterizes the Council as a resource to facilitate a municipality's *Mount Laurel* compliance, not as a procedure whereby the Council can interpose its will and direct municipal choice.[18]

The New Jersey Supreme Court, interpreting the language of the Fair Housing Act in Hills Development Co. v. Bernards Township, 103 N.J. 1, 57-58 (1983), underscored the voluntary character of a municipality's participation in the COAH process in observing that a municipality may withdraw from the Council's jurisdiction at any time. A municipality may use the energies of the Council to determine its Fair Share obligation; and it may use the procedures and guidelines of the Council to craft a suitable plan. But, in the end, the municipality may withdraw from the Council's jurisdiction,

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Public comment is invited. If there are objections to substantive certification, the matter goes to mediation. Only if mediation is unsuccessful, is it transferred to an Administrative Law Judge to be heard as a contested matter.

[18] This tension between enforcement and the voluntary participation provision of the Fair Housing Act is one reason why we are uncertain whether COAH does indeed have the authority to enforce its substantive certifications. The issue need not be raised here if, as we urge, the Court concludes that it is inappropriate in any event to enforce the Hillsborough plan at this point. Thus, we assume the existence of some kind of enforcement power for the sake of argument. We note that it would be difficult for the Council to assert a broad power of enforcement in the absence of specific regulations putting municipalities and other interested parties on notice as to the scope of such an enforcement power, particularly in light of the current regulation which, fairly read, announces that the *only* enforcement power claimed by COAH is the power to rescind a substantive certification. Cf. Holmdel, 121 N.J. at 579-80 (COAH required to adopt detailed regulatory scheme as

even when substantive certification is imminent. IbId.

The cooperative scheme of the Act provides a strong incentive for a municipality to use the Council's expertise. The municipality retains ultimate control over its plan, all the while receiving valuable guidance from the Council about what constitutes an adequate plan. Indeed, it was this cooperative interpretation of the Act that led the Hills Court to articulate the indirect nature of the Council's power over municipalities. Hills, 103 N.J. at 56. Thus, it would be not only illogical to give the Council both indirect power (granting or denying certification) and direct power (forcing compliance) over a municipality, but also counterproductive, as it would reduce the incentive for COAH and municipalities to work cooperatively. A power to impose sanctions upon a municipality would be inconsistent with both the statutory scheme and sound policy.

While the Hills Court did recognize one narrow exception under which the Council might have power to order compliance with substantive certification rather than revocation, that narrow exception is not applicable to Hillsborough. Dealing with the "special class" of cases that had been pending in the Superior Court prior to the adoption of the Fair Housing Act, and which were subject to being transferred to COAH, the Supreme Court found that it would violate the legislative intent behind the Act, and frustrate public policy, if those

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predicate to validity of recognizing housing impact fees).

cases were allowed to transfer from the courts to the Council and then, the municipalities were simply allowed to walk away without complying with either the courts or the Council." IbId. Thus, specifically in connection with this narrow class of cases, the Court held that Council "*may* have the power, once its jurisdiction is invoked, to require the municipality to pursue substantive certification expeditiously and to conform its ordinances to the determination implicit in the Council's action on substantive certification." Id. at 57 (emphasis added).

Obviously, the Court's narrow exception in Hills is literally inapposite, since we are now more than a decade past the transition problem that the Justices were addressing. Hillsborough is not a case seeking transfer from the Superior Court to a newly-created administrative agency. Nor would it be appropriate to extrapolate from the equitable underpinnings of the narrow exception recognized in Hills, which is that cases whose fair share plans have developed to the point where housing is ready to be produced should not be subjected to unnecessary time and expense by relitigating them before COAH. Hillsborough simply is not in the "special class." Here, however, even if this Court were to order COAH to "enforce" the original substantive certification, the State Plan issues projected by New Jersey Future would still have to be decided, by the courts if not by COAH, and in the as-yet unexplored forum of the Department of Environmental

Protection, where HAAL will have to seek wastewater amendments that are flatly inconsistent with the State Plan.

Since the present case is dissimilar in all respects to that "special class" of cases in *Hills*, it would not "constitute a gross perversion of the purpose of the Act," IbId., nor would it represent "an imposition on both the courts and the Council," IbId., for Hillsborough to seek a different way of meeting its constitutional obligation.

Nor does the unpublished Denville case cited by HAAL (which it also pressed unsuccessfully before COAH in September, 1997 and again in April 1998) confer the broad enforcement powers on COAH that HAAL mysteriously divines. In the Matter of the Township of Denville, A-4152-93T3, decided April 21, 1995 (per curiam) (unreported). Unreported cases carry no precedential weight in New Jersey. The Denville case is also sharply limited by its facts. The Appellate Division in Denville emphasized the "peculiar and unique" circumstances involved, circumstances that are not at all present in the Hillsborough case. In Denville, which involved a municipality that had bitterly fought its *Mount Laurel* obligation for years, first in the courts and then before COAH, the certified plan reluctantly agreed to by the township had been substantially carried into effect. Denville had purchased a tract of land, as it had promised to do, and the non-profit sponsor to whom the tract was to be re-deeded by the town had expended substantial money in expectation

that the town would honor its promise. When Denville refused to transfer title, COAH ordered it to do so and the Appellate Division understandably supported the Council's decision, saying that "under the peculiar and unique circumstances here the order to transfer the property which does no more than fulfill the purpose of the acquisition the Township has already made and accomplish what it has already agreed to" was not unreasonable. Slip op. at 3 (Appendix A to HAAL's brief).

The Appellate Division in Denville did not explain the legal basis for COAH's power to enforce. Against the factual backdrop just recited, however, the "peculiar and unique" circumstances that justified an outside-the-regulations enforcement order in Denville must be understood (at least in the absence of a fuller analysis by the court) as resting on a quasi-judicial inherent agency authority to prevent seriously inequitable conduct incident to its proceedings. The most that can be said of it is that, like the transferred cases in Hills, it represents a "narrow exception," a "peculiar and unique" one, based in equitable principles.

The Hillsborough situation is completely unlike that described in Denville. While New Jersey Future is hardly romantic about Hillsborough's reasons for seeking substantive certification, first in 1986 and then again in 1995, the municipality has nonetheless been a willing, voluntary participant in the Council's process. Indeed, in

its second round fair share calculation, the Council gave Hillsborough the reduction provided for in N.J.A.C. 5:93-3.6 for having substantially complied with the terms of its "first round" substantive certification. Nor can it be said that HAAL has changed its position *in reliance on the substantive certification,* as had the non-profit sponsor in Denville. It is undisputed that HAAL received a General Development Plan approval for the site in question at least four years before the substantive certification granted by COAH, and it had continuously asserted its rights under that GDP, independent of the COAH certification. From HAAL's perspective, the substantive certification is window dressing that it hoped would sweeten the prospects of its underlying development plan, but any money it has expended has been in furtherance of that high stakes speculative development and not (in contrast to the small Denville non-profit group) in the cause of affordable housing for its own sake. Nor is Hillsborough's reason for abandoning the certified plan meritless, as was the case with the spurious reason reported in the Denville opinion. Here, albeit belatedly and only under the spur of concerted pressure by local residents and New Jersey Future's lawsuit, Hillsborough is at last paying attention to the adverse planning consequences of its prior plan, as urged by New Jersey Future. In the absence of countervailing equitable considerations (which, as we have just shown, are totally

lacking in the Hillsborough case), it would be totally inconsistent with sound public policy and COAH's stated policy of complying with the State Plan, to force the township now to execute a plan that it has wisely repudiated and that is incompatible with sound land use planning.

Point VI

COAH'S JUNE 3, 1998, DECISION DID NOT REQUIRE HILLSBOROUGH TO INCLUDE THE HAAL SITE IN ANY RESUBMITTED FAIR SHARE PLAN

Hillsborough argues, correctly, that should it be given the opportunity to present a new fair share plan. COAH's June, 1998 opinion does not require it to afford development rights to HAAL, but only to "fully account" for, i.e., explain, whatever inclusion or exclusion of HAAL is proposed. (We note that HAAL raised this issue in prior proceedings, but does not do so before this court.) The HAAL site does not enjoy "carry forward" rights under N.J.A.C. 5:93-5.13(b) because it was not included in Hillsborough's first round plan. By June, 1998, COAH was fully aware of the infrastructure and state plan problems on the site, and a fair reading of the whole opinion demonstrates that the Council anticipated that Hillsborough would exclude most or all of the site because of those problems.

Point VII

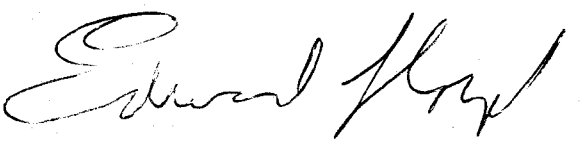
COAH WAS CORRECT IN DECLINING TO RECONSIDER GRANTING A WAIVER OF CENTER DESIGNATION IN ANY RESUBMITTED FAIR SHARE PLAN, AND IT DID NOT PRECLUDE CONSIDERATION OF ANY APPROPRIATE WAIVERS NOT PREVIOUSLY SOUGHT

That COAH anticipated exclusion of the HAAL site is reinforced by its statement that it would not grant any waivers if a further petition for substantive certification was presented. In effect, COAH was announcing that it accepted New Jersey Future's contention on appeal that a waiver of center designation was not proper under its regulations or the applicable case law. This important issue was fully briefed by the parties in earlier stages of the litigation and COAH was simply informing the parties in the interest of efficient administration of the case. Should this possible future case again be appealed, of course, any aggrieved party could then challenge the refusal to grant a waiver, with the advantage compared to now of presenting a specific factual record to aid the court. In addition, we do not understand COAH to be saying that it would not consider a request for a routine waiver of some other aspect of its regulations, one that did not suffer the defects of the center designation waiver.

CONCLUSION

For the foregoing reasons, New Jersey Future respectfully requests that this Court uphold COAH's decision to revoke Hillsborough's substantive certification; and, in so doing, to determine (i) that COAH's refusal of jurisdiction was not appropriate; and (ii) that both N.J.A.C. 5:93-5.4(c) and(d) apply to the HAAL site.

Respectfully submitted,



Edward Lloyd, Esq.
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New Jersey Future

September 21, 1999

Appendix

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5349-95-T1

IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, DOCKET NO. A-5349-95-T1

CIVIL ACTION

BRIEF OF APPELLANT NEW JERSEY FUTURE, INC.

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March 21, 1997

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5349-95TI

IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY

Civil Action

BRIEF OF RESPONDENT
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July 21, 1997

Emille R. Cox, Clerk
Superior Court of New Jersey
Appellate Division
R. J. Hughes Justice Complex
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Trenton, New Jersey 08625

Re: IN THE MATER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY
DOCKET NO. A-5349-95-T1

Civil Action: Motion for Remand

Letter Brief of Respondent, New Jersey Council on Affordable Housing in Support of Motion for Remand

Dear Mr. Cox:

Please accept this letter brief pursuant to R. 2:6-2 (b) on behalf of respondent New Jersey Council on Affordable Housing.

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ARGUMENT:

THE COURT SHOULD ENTER AN ORDER REMANDING THIS MATTER TO THE JURISDICTION OF THE COUNCIL ON AFFORDABLE HOUSING SO THAT IT MAY DETERMINE WHETHER THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH CONTINUE TO PROVIDE A REALISTIC OPPORTUNITY FOR

PROCEDURAL HISTORY AND STATEMENT OF FACTS*

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), appellant New Jersey Future, an environmental advocacy group, has challenged the decision of the New Jersey Council on Affordable Housing ("Council" or "COAH") dated April 3, 1996 granting substantive certification (Aa**11 to Aa26; Aa40 to Aa76) pursuant to the standards of the Fair Housing Act, N.J.S.A. 52:27D-301 to 321, to the housing element and fair share plan of the Township of Hillsborough ("Township" or "Hillsborough"). The Council's grant of substantive certification is based upon the Council's determination that the Hillsborough housing element and fair share plan provide a realistic opportunity for affordable housing within a six-year period of substantive certification. N.J.S.A. 52:27D-314.

Appellant's challenge to the Council's substantive

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*These sections are here combined for the sake of clarity and to avoid repetition.

**Aa ___ refers to the appendix filed by appellant New Jersey future with its brief in this matter.

HRa ___ refers to the appendix filed by respondent Township of Hillsborough with its brief in this matter.

certification decision centers on a Planned Adult Community/Health Care Facility ("PAC/HCF") site, an approximately 740 acre parcel of land (Aa107) upon which 3,000 units of primarily age restricted housing is planned to be built, of which 15 percent or 450 units are planned to be affordable units. Of the 450 affordable units, 96 age restricted units and 40 family rental units must be built pursuant to the requirements of the substantive certification within the current six year period of substantive certification (Aa21, Aa22; Aa44 to Aa 47). However, the PAC/HCF site cannot be developed and the affordable units produced within the six years of the Council's certification without sewer services being brought to the site (Aa22). The recent June 27, 1997 decision by the Hillsborough Township Committee to not actively support the inclusion of the PAC/HCF site in the Somerset County wastewater management plan amendment (also known as a "208 plan" or "water quality management plan") and to overrule a Hillsborough Township Planning Board endorsement of the site's inclusion in the plan, brings into question whether sewer service will be expeditiously extended to the PAC/HCF site so that the affordable housing may be built.

Hillsborough's June 27 decision requires the Council to reassume jurisdiction over the Hillsborough fair share plan so that the Council may determine if the plan continues to provide a realistic opportunity for affordable housing. The Council will also upon remand determine what further action must be taken with regard to the plan if it concludes that the plan no longer provides

the requisite realistic opportunity. Therefore, the Council files this motion for remand.

Hillsborough petitioned for substantive certification of its housing element and fair share plan on February 27, 1995 (Aa77 to Aa125). The PAC/HCF site was included in the plan as the primary proposed site for affordable housing (Aa 106 to Aa 108, Aa 116 to Aa 120). 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 (Aa119). Further, 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). Id. Hillsborough stated that it expected an expedited approval by the DEP because "...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. Id.

Because there was an objector to the Hillsborough petition for substantive certification, the Council conducted a mediation pursuant to N.J.S.A. 52:27D-315. A mediation report was issued on January 17, 1996 (Aa271 to Aa279). The mediation report stated that because the objection was filed, Hillsborough withdrew its request to the DEP for the water quality management plan amendment involving the PAC/HCF site and quoted Hillsborough's

reasons for the withdrawal: "...it was not 'appropriate to sponsor a Wastewater Management Plan amendment involving individual property owners where objections have been filed...'". Aa272. The mediation report also states that mediation had involved the fact that the PAC/HCF site was located predominantly in Planning Area 4, as designated in the State Development and Redevelopment Plan (SDRP), and that the objector claimed that for an inclusionary development to be built on the PAC/HCF site, the site needed designation as a "center" consistent with the policies of the SDRP. The report noted that Hillsborough had requested a waiver of the requirement that the site receive center designation and that the site met COAH's policies regarding the granting of a waiver from center designation (Aa276 to Aa278). The mediation report concluded that no substantial amendments were needed to the Hillsborough housing element and that there were no outstanding contested issues of fact requiring a referral to the Office of Administrative Law for resolution (Aa 279).

On February 27, 1996 Hillsborough and the developer of the PAC/HCF site, Hillsborough Alliance for Adult Living, L.P. ("the developer") signed an agreement with regard to the development of the PAC/HCF site (Aa40 to Aa49). The agreement set forth that the developer could build a maximum of 3,000 single family residential units on the PAC/HCF site, 15 percent of which would be set aside for affordable housing, and that 136 of the affordable units were to be built in the six year period of substantive certification (Aa44). 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 this site..."(Aa45). The agreement listed the following three reasons why the parties agreed that sewer 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 Wastewater Management Plan, "which has received preliminary comments by DEP and is presently being reviewed by Somerset County for resubmission to DEP by April 1996"; and (c) there were assurances by the Office of State Planning (OSP), which had reviewed the site, that the PAC/HCF site would be recommended for inclusion in Planning Area 2 during the OSP's next cross acceptance cycle(Aa45).

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 (Aa46). 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 136 required units of affordable housing (Aa46, Aa47).

On March 4, 1996 a COAH compliance report recommending substantive certification to Hillsborough's housing element and fair share plan was issued (Aa27 to Aa57). Attached to the compliance report was the signed, mediated agreement between Hillsborough and the developer (Aa40 to Aa50). The March 4 compliance report gave extensive attention to the issue of whether the PAC/HCF site required designation as a center and concluded that COAH could waive center designation (Aa32 to Aa35). Material to COAH's decision with regard to the waiver of center designation was the fact that it determined that the PAC/HCF site "has water and sewer," in that the PAC/HCF tract was included in the Somerset County Wastewater Management Plan "which is under review by the New Jersey Department of Environmental Protection (DEP)." Aa33.

The March 4 compliance report was issued for a 14 day comment period. On March 15, 1996, appellant New Jersey Future wrote a letter of objection to the recommendation that substantive certification be granted by COAH to the Hillsborough fair share plan (Aa70 to Aa76). Rather, appellant requested COAH "to defer its decision on this plan" until (a) the State Planning Commission ("SPC") approved a planning area map amendment incorporating the PAC/HCF site into Planning Area 2, (b) the DEP amended its waste water management plan to include the PAC/HCF tract and (c) the SPC provided center designation for the PAC/HCF tract (Aa 72, Aa73).

COAH issued substantive certification to Hillsborough's

housing element and fair share plan on April 3, 1996 (Aa19 to Aa26; Aa40 to Aa76). An executive summary accompanying the proposed substantive certification resolution (Aa15 to Aa17) stated that development of the PAC/HCF site "is contingent on the site being included in a 208 plan amendment." The summary updated the Council as to the status of efforts to bring sewer 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 currently working with an advisory committee to prepare a final document which would then be submitted within two months to the applicable municipalities and the Somerset County Board of Chosen Freeholders for review (Aa16). With regard to appellant's request to defer substantive certification, the summary 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).

In its April 13, 1996 resolution granting substantive certification to Hillsborough's housing element and fair share plan, the Council acknowledged that the development of the PAC/HCF project was contingent on the site 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 (Aa22). The resolution

required that "in the event of 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 matter;"...(Aa22). COAH conditioned its grant of substantive certification on the fact that Hillsborough Township 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 (Aa26). 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 (Aa25; Aa29 to Aa56).

On May 20, 1996 appellant filed a Notice of Appeal from Council's grant of substantive certification to Hillsborough's housing element and fair share plan (Aa1 to Aa10). In its brief on the merits filed on March 21, 1997, appellant claimed that at the time its brief was filed "there is no pending request at DEP for a wastewater management plan amendment" including the PAC/HCF site (Ab11 to Ab13 at Ab13). Hillsborough responded in its brief that "The status of the County Plan Amendment as it relates to the PAC/HCF site is the same at this writing as it was when substantive certification was granted." HRb46. However, in a footnote to this statement Hillsborough stated "...the Township Committee by resolution of 4/22/97...has declared that it will provide its opinion regarding inclusion of the site in the County Plan by June

10, 1997." HRb46.*

On April 8, 1997 John D. Middleton, Hillsborough Township Administrator, filed a letter with COAH in compliance with the six month reporting requirement included by COAH as a condition of substantive certification. See, Certification of Shirley M. Bishop, P.P., at Exhibit A. 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. Bishop Certification at Exhibit A.

However, on June 27, 1997 Middleton filed another letter with the Council. See, Bishop Certification at Exhibit B. In that letter, Middleton stated that at its meeting of April 22, 1997 the Hillsborough Township Committee by resolution "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

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*The Council has not filed a brief in this matter. Rather, on July 2, 1997 it made a motion for a thirty day extension of time in which it was stated that either a merits brief or this Motion for Remand would be filed by August 3, 1997.

plan and "at their meeting on June 24, 1997, they voted to overrule the Hillsborough Township Planning Board's [April 3, 1996] recommendation". 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." Bishop Certification at Exhibit B.

These letters were presented to the members of the Council at the July 9, 1997 monthly COAH meeting in executive session for their information and to determine whether the Council at this point desired to continue to defend its grant of substantive certification to Hillsborough. The Council determined that rather than file a brief in this matter this Motion for Remand should be filed so that jurisdiction over Hillsborough's fair share plan could be returned to the Council. Bishop Certification at ¶4. Once jurisdiction is returned, the Council may then consider the effects on Hillsborough's certified fair share plan of Hillsborough's recent decision to not actively support the inclusion of the PAC/HCF site in the Somerset County water quality management plan amendment and to overrule the planning board's support of the inclusion of the PAC/HCF site in the county plan.

ARGUMENT

THE COURT SHOULD ENTER AN ORDER REMANDING THIS MATTER TO THE JURISDICTION OF THE COUNCIL ON AFFORDABLE HOUSING SO THAT IT MAY DETERMINE WHETHER THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH CONTINUE TO PROVIDE A REALISTIC OPPORTUNITY FOR AFFORDABLE HOUSING PURSUANT TO N.J.S.A. 52:27D-314 AND SO THAT THE COUNCIL MAY TAKE WHAT ACTION IT DEEMS NECESSARY WITH REGARD TO THE HILLSBOROUGH PLAN.

The New Jersey Council on Affordable Housing 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 (1986); 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 over stressed 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.

In this matter, the Council's grant of substantive certification to Hillsborough's housing element and fair share plan represents the Council's judgment that the element and plan comport with the standards of the Fair Housing Act, provide a realistic opportunity for affordable housing and comport with the Council's regulations. N.J.S.A. 52:27D-314; N.J.A.C. 5:93-1 et seq. The Council's substantive certification decision was based upon the assumption that Hillsborough would continue to support the provision of sewer service to the PAC/HCF site (Aa22; Aa26), just as it had at the time of the filing of its petition (Aa119) and throughout the COAH mediation (Aa45 to Aa47) and certification (Aa 15 to Aa17) process. For that reason, Hillsborough was to report to the Council every six months as to the status of DEP's actions with regard to the water management quality management plan amendment containing the PAC/HCF site (Aa26). Further, the Council's resolution granting certification acknowledged that development of the affordable housing on the PAC/HCF site was conditioned on the approval of a water quality management plan amendment containing the PAC/HCF site. If the 208 plan amendment was not approved, Hillsborough would have to amend its element and plan to address its affordable housing obligation in another manner (Aa22).

The June 24, 1997 decision of the Hillsborough Township Committee to not request Somerset County to include the PAC/HCF site in its wastewater management plan and the Committee's decision to overrule the Hillsborough Township Planning Board's April 3,

1997 decision to recommend that the PAC/HCF site be included in the Somerset County plan materially undermine the assumptions and predicates upon which COAH granted substantive certification to Hillsborough's plan. Moreover, these decisions require the Council to reexamine its determination that Hillsborough's plan provides the realistic opportunity for affordable housing required by N.J.S.A. 52:27D-314.

Therefore, the Council by this Motion for Remand requests this Court to relinquish jurisdiction over this mater and return this case to the jurisdiction of the Council so that COAH may initiate procedures before it---through, for example, an Order to Show Cause issued to Hillsborough---to determine whether the Hillsborough plan continues to meet the standards for certification set out in the Fair Housing Act and COAH's rules. The Council may then take other appropriate actions it deems necessary relative to Hillsborough's fair share plan to assure that Hillsborough continues to meet its Mount Laurel responsibilities.

It is well settled that this Court has the discretion to remand an administrative action such this for further agency proceedings, when such a remand would be in the interest of justice. Texter v. Human Services Dep't., 88 N.J. 376 (1982); Wilson v. Mountainside, 42 N.J. 426 (1984). See also R. 2:9-1(a). This requested remand is clearly in the interest of justice in that the "complexity and sensitivity of the subject of affordable housing" is at issue, as are the "specific methods" of Hillsborough's "method of compliance with Mount Laurel". Holmdel

Builders Ass'n., supra, 121 N.J. 576, 577. Therefore, the Council requests this Court to allow it to reassume jurisdiction over this matter and to transfer the matter back to the Council.

CONCLUSION

For all of the above stated reasons, this Court should grant this Motion for Remand and return jurisdiction over this matter to the New Jersey Council on Affordable Housing.

Respectfully submitted,

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By: _____
William P. Malloy
Deputy Attorney General

c: Edward Lloyd, Esq.
Frank Yurasko, Esq.
Ronald Shimanowitz, Esq.
Stephen Eisdorfer, Esq.
Peter Buchsbaum, Esq.
Edward Halpern, Esq.

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
R. J. Hughes Justice Complex
CN 112 - 25 Market Street
Trenton, New Jersey 08625

By: William P. Malloy
Deputy Attorney General
(609) 292-9302

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5439-95TI

IN THE MATTER OF THE PETITION FOR SUBSTANTIVE CERTIFICATION OF THE HOUSING ELEMENT AND FAIR SHARE PLAN OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY	) CERTIFICATION IN SUPPORT OF A NOTICE OF MOTION FOR) REMAND)

Shirley M. Bishop, P.P., by way of certification states:

1. I am the Executive Director of the New Jersey Council on Affordable Housing.

2. In my capacity as Executive Director I received a letter dated April 8, 1997 from John D. Middleton, Township Administrator, Township of Hillsborough, concerning the township's 12 month status report on the provision of sewer service to the PAC/HCF tract. A copy of this letter is attached as Exhibit A to this certification.

3. I have also received another letter from Mr. Middleton dated June 27, 1997 concerning Hillsborough's decisions with regard to the extension of sewer service to the PAC/HFC tract. This letter is attached as Exhibit B.

4. On July 9, 1997 I presented these two letters to the New Jersey Council on Affordable Housing at its regular monthly meeting in executive session. Based upon the letters, the Council

decided to seek a remand of this appeal, so that the Council may consider the effect of Hillsborough's recent decisions on the continuing viability of the fair share plan to which the Council granted substantive certification and so that the Council may take appropriate action with regard to Hillsborough's fair share plan.

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

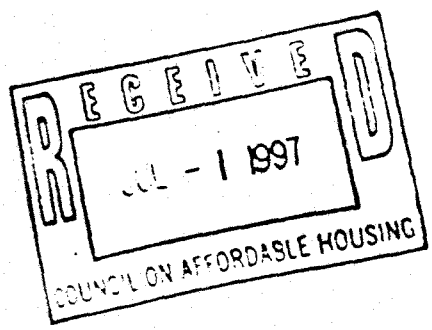
Shirley M. Bishop, P.P.,
Executive Director,
New Jersey Council on Affordable Housing

DATED: July 18, 1997

Township of Hillsborough

COUNTY OF SOMERSET
MUNICIPAL BUILDING
AMWELL ROAD
NESHANIC, NEW JERSEY 08853

(908) 369-4313



June 27, 1997

Ms. Shirley M. Bishop, P. P.
Executive Director
Council on Affordable Housing
CN 813
Trenton, N. J. 08625-0813

Dear Ms. Bishop,

As I indicated to you in my April, 8, 1997 status report, 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 (WWMP). At their meeting of April 22, 1997, the Hillsborough Township Committee reserved the right to endorse or not endorse the Planning Board's recommendation. On June 11, 1997, the developer of the Greenbriar at the Village independently petitioned NJDEP for inclusion of their lands in the WWMP.

Since the developer has requested inclusion in the WWMP and has an application for preliminary subdivision approval before the Planning Board, the Hillsborough Township Committee saw no reason to request the County to include the Mill Lane area in the WWMP; therefore, at their meeting on June 24, 1997, they voted to overrule the Planning Board's recommendation. They believe the public processes followed by NJDEP 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 NJDEP regulations, and they will.

If you need more information on this matter, please let me know.

Sincerely,

John D. Middleton
Township Administrator

Encl.
cc: Hillsborough Township Committee
Ed Halpern, Township Attorney, w/encl
Frank Yurasko, Township Litigation Attorney, w/encl
James A. Farber, Special Litigation Counsel

00 025

Exhibt A

RESOLUTION REGARDING THE STATUS OF THE PAC/HCF OVERLAY ZONE IN THE MILL LANE AREA IN THE HILLSBOROUGH TOWNSHIP WASTEWATER MANAGEMENT PLAN

WHEREAS, on April 3, 1997, the Hillsborough Township Planning Board adopted a resolution recommending changes to the Hillsborough Township portion of the Somerset County/Upper Raritan Watershed Wastewater Management Plan; and

WHEREAS, by resolution of April 22, 1997 the Hillsborough Township Committee requested that the Somerset County Planning Board defer any action on the Hillsborough Township Planning Board resolution of April 3, 1997 until such time as the Hillsborough Township Committee has a chance to review and endorse it; and

WHEREAS, as part of that resolution, the Hillsborough Township Planning Board recommended including the PAC/HCF overlay zone in the Mill Lane area in the Hillsborough Township Wastewater Management Plan, and

WHEREAS, U. S. Homes and the Hillsborough Alliance for Assisted Living have applied for preliminary approval of a major subdivision in the Mill Lane area to be known as Greenbriar at the Village; and

WHEREAS, on June 11, 1997, the developer petitioned the New Jersey Department of Environmental Protection for inclusion of their lands in the Somerset County/Upper Raritan Watershed Wastewater Management Plan; and

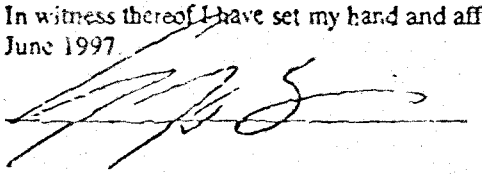
WHEREAS, both the Hillsborough Township Planning Board and the New Jersey Department of Environmental Protection have clearly defined public processes for reaching their decisions; and

WHEREAS, the Hillsborough Township Committee believes both processes should be allowed to proceed to conclusion.

NOW, THEREFORE, BE IT RESOLVED by the Township Committee of the Township of Hillsborough, County of Somerset, State of New Jersey, that the changes recommended by the Hillsborough Township Planning Board relative to the PAC/HCF zone are overruled and the PAC/HCF zone should not be included in the Hillsborough Township portion of the Somerset County/Upper Raritan Watershed Wastewater Management Plan.

I, Gregory J. Bonin, Hillsborough Township Clerk, hereby certify that the above resolution is a true and correct copy of a resolution adopted by the Township Committee of the Township of Hillsborough at a regular and duly convened meeting held on June 24, 1997.

In witness thereof I have set my hand and affixed the seal of the Township of Hillsborough this 25th day of June 1997.



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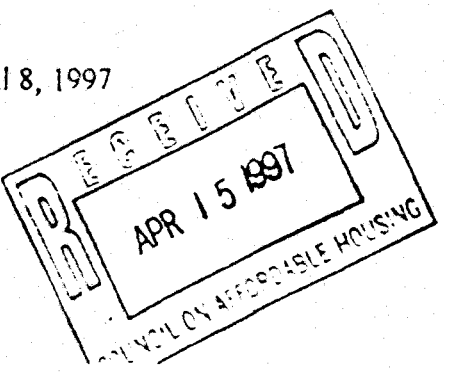
Township of Hillsborough

COUNTY OF SOMERSET
MUNICIPAL BUILDING
AMWELL ROAD
NESHANIC, NEW JERSEY 08853

TELEPHONE
(908) 369-4313

April 8, 1997



Ms. Shirley M. Bishop, P. P.
Executive Director
Council on Affordable Housing
CN 813
Trenton, N. J. 08625-0813

Re: Twelve month Status Report on Hillsborough Township's Substantive Certification

Dear Ms. Bishop,

As you are aware, satisfaction of Hillsborough Township's Fair Share Plan is dependent on DEP approval of the Somerset County/Upper Raritan Watershed Wastewater Management Plan, which includes the extension of the sewer area to the PAC/HCF tract. In November, 1996, the Township Committee requested that County and DEP review of the WWMP be deferred six months so that the Planning Board could review it and possibly modify it. That review has been completed and the Planning Board, at its April 3, 1996 meeting, passed a resolution requesting that the entire PAC/HCF tract be included in the WWMP.

In July, 1996, a developer, U. S. Homes Corporation, submitted an application for preliminary subdivision approval to the Hillsborough Township Planning Board. That application included the construction of the elements of our Fair Share Plan. In August, 1996, the application was withdrawn. In December, 1996, the application was resubmitted and is now being considered by the Planning Board.

If you need more information on this matter, please let me know.

Sincerely,

John D. Middleton

John D. Middleton
Township Administrator

cc: Hillsborough Township Committee
Ed Halpern, Township Attorney
Frank Scarantino, Township Engineer

00 027a

Exhibit B