

Hillsborough Litigation

10/22/99

- Cross Reply Brief of Respondent / Cross ~~Application~~
Appellant Hillsborough Alliance for Adult Living, L.L.P.

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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

ON APPEAL FROM
A DECISION ON REMAND OF
Council on Affordable Housing

Docket No. COAH 97-9015

Sat Below:

COUNCIL ON AFFORDABLE HOUSING

**CROSS REPLY BRIEF OF RESPONDENT/CROSS APPELLANT
HILLSBOROUGH ALLIANCE FOR ADULT LIVING, L.L.P.**

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PRELIMINARY REPLY STATEMENT

Hillsborough Alliance for Adult Living ("HAAL") is the owner of the property (the "PAC/HCF Site") that is the subject matter of this appeal, and that was chosen to be the sole inclusionary site in the fair share plan of the Township of Hillsborough (the "Township" or "Hillsborough"). After receiving substantive certification, the Township began repudiating its certification. As a result of the Township's actions and the failure by the Council on Affordable Housing (the "Council" or "COAH") to enforce its regulations and mandate compliance with the certification, New Jersey Future, Inc. ("NJF") appealed COAH's grant of substantive certification in the May 1996. Wong

On January 7, 1998, while on appeal, the Township's continued repudiation ultimately caused the Appellate Division to grant a motion to remand the matter to COAH to determine certain issues. On June 3, 1998, on remand, COAH revoked the substantive certification and, despite the Appellate Division order requiring it to determine the applicability of certain regulations to this matter, COAH deemed that issue moot. The Township appealed and HAAL cross-appealed COAH's decision on remand.

There is no legal basis for the direct insubordination by the Council on Affordable Housing (the "Council" or "COAH") in its refusal to address issues as directed by the Appellate Division. Without any further delay, this Court should now address and

determine whether N.J.A.C. 5:93-4(c) or (d) is applicable.

Furthermore, COAH erred in not enforcing the terms of the substantive certification it granted to the Township by failing to require Hillsborough to comply with the terms of its substantive certification to (1) facilitate sewerage availability; (2) order Hillsborough to reinstate the PAC/HCF zone; and (3) seek Planning Area 2 status designation for the entire PAC/HCF Site. This Court should now require COAH to affirmatively enforce its regulations and order the Township's compliance therewith.

REPLY STATEMENT OF FACTS

On February 27, 1995, the Township petitioned for substantive certification of its housing element and fair share plan, in which it proposed to address its entire inclusionary component in HAAL's PAC/HCF Site.¹ (Aa62-93; HAALa19-60).²

The Township's petition indicated that

. . . the subject land area is within "Planning Area 4" directly adjacent Planning Area 2". (sic) Moreover, all of the designated "Planning Area 2" is within the sewer service area.

¹The PAC/HCF Site (Planned Adult Community/Health Care Facility) received a general development approval ("GDP") in 1991, which was later extended in December 1995.

²"Aa__" refers to the Appendix submitted on behalf of Hillsborough. "HAALa__" refers to the Appendix submitted on behalf of HAAL. "Cra__" refers to the Appendix of Respondent Council on Affordable Housing. "HILLb__" refers to the Reply Brief of Appellate Township of Hillsborough in the County of Somerset. "COAHb__" refers to the Brief of Respondent Council on Affordable Housing. "NJFb__" refers to the Brief of Respondent New Jersey Future, Inc.

(Aa76).³

Hillsborough's petition for certification further stated that "the entirety" of the PAC/HCF Site 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 (NJDEP)." (Aa187). At that time, Hillsborough represented in its petition that

In support of the "Hillsborough Township Wastewater Management Plan", (sic) the Somerset County Planning Board has written a letter affirming its inclusion of the subject "PAC/HCF" tract in the County's overall "Wastewater Management Plan". (sic) Hillsborough Township submitted its "Wastewater Management Plan" to the NJDEP during September 1994; approval is expected shortly and prior to COAH's review and approval of Hillsborough's petition for "Substantive Certification". (sic) Upon final approval by the NJDEP, the sanitary sewer lines of the Hillsborough Township Municipal Utility Authority will carry the sewage from the tract for treatment at the Somerset Raritan Valley Sewerage Authority regional wastewater treatment plant in the Township of Bridgewater.

(Aa87).⁴

³Thus, despite NJF's innuendoes that the Site only possessed "nearby" sewer pipe, (NJFb4), the record clearly establishes that the sewer service exists on the Site. See Amended Certification of Robert B. Heibell (HAALa6-13). The PAC/HCF Site has infrastructure. See also fn4, infra.

⁴A portion of the PAC/HCF Site is in a sewer service area and there are substantial sewer lines and a 24" water main adjacent to the Site. See Amended Certification of Robert B. Heibell (HAALa6-13). Thus, the PAC/HCF Site is, as COAH found in the 1996 Certification, not remote from sewer and water infrastructure. (Aa157); see, also, COAH Compliance Report--Substantive

*Only
PA 2
5/10
Contradicts
fn4*

The proposed Somerset County/Upper Raritan Watershed Wastewater Management Plan, as prepared by Malcolm Pirnie, Inc., dated November 1994 ("WMP") (HAALa61-113), as submitted to DEP on behalf of Somerset County for review and approval in November 1994, had included the PAC/HCF Site and indicated that the PAC/HCF is proposed to be in the sewer service areas of the SRVSA. (HAALa61-113). Thus, the Township's cooperation on facilitating sewer service was clearly part of the certification.

Further, believing that COAH's substantive rules imposed a center designation requirement on the PAC/HCF Site, Hillsborough requested a waiver. (Aa88-89). The Township delineated ten reasons that the waiver should be granted. (Aa88-89). COAH gave careful consideration to each reason and, on May 26, 1995, COAH issued a report, in which COAH stated that it determined that Hillsborough had demonstrated that the PAC/HCF Site met all COAH's requirements for waiver of center designation under its regulations. (CRa41-51; 46).

In addition, by letter dated January 5, 1996, Shirley Bishop, the Executive Director of COAH, requested an opinion from the Office of State Planning ("OSP") as to the applicability of state planning considerations during the process of reviewing

Certification Hillsborough Township, Somerset County, dated March 4, 1996 (Aa105-116). Thus, NJF's comment that the certified plan would "inevitably collapse[]" is ridiculous and not supported by the record. (NJFb16).

Hillsborough's Fair Share Plan for certification. (Aa134-137).⁵

As further detailed in HAAL's initial brief, by letter dated January 31, 1996 (the "OSP Letter"), Herbert Simmens, the Director of the OSP, responded that his office (the administrative arm designated by statute for administering the State Planning Act), had no objection to a waiver. (Aa131-133; HAALa136-138).⁶

The OSP Letter detailed the extensive review conducted by the OSP and identified ten basis for its conclusions, which included language that tracked N.J.A.C. 5:93-4(d) and concluded that the "any center designation for the PAC/HCF would be looked at under the Planning Area 2 policies and objectives and criteria." (Aa132). The OSP Letter then concluded that "sites in Planning Area 2 are not required to be located in designated centers." (Aa132).

In February 1996, Hillsborough and HAAL signed a Municipal Development Agreement (the "Development Agreement"), which provided that the PAC/HCF Site was to produce 3,000 units of housing, 450 of which were designated to be set aside as affordable housing. (Aa121). The Development Agreement further provided that a portion

⁵In this letter, COAH identified the several reasons proposed by Hillsborough for waiver of the center designation and included ten additional comments to be considered by the OSP in making its determination. (Aa135-136).

⁶Ironically, the parties opposing the waiver of the center designation failed to mention both the existence of the OSP Letter and that the OSP had consented to the waiver of center designation for the PAC/HCF Site.

of the affordable units were to be built in connection with the pending substantive certification and that the remainder would meet Hillsborough's Mount Laurel obligations in future cycles. (Aa121).

The Development Agreement further provided that "[HAAL] agrees to cooperate with the Township of Hillsborough and provide any requested information for the designation of the Property as Planning Area 2 of by the Office of State Planning." (Aa124). The Development Agreement also required Hillsborough to seek Planning Area 2 status under the New Jersey State Development and Redevelopment Plan for the PAC/HCF Site in order to facilitate sewer service. (Aa122, 124).

The Development Agreement also anticipated Hillsborough's cooperation in obtaining sewer service consistent with the Planning Area 2 designation. Specifically, the Development Agreement recited that (1) the Site had "received General Development approval prior to the New Jersey State Development and Redevelopment Plan"; (2) the Site was "included in its entirety, in the Somerset County Waster Water Management Plan which has received preliminary comments by NJDEP and is presently being reviewed by Somerset County for resubmission to DEP by April 1996"; and (3) the Site had "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/HCF Site] in Planning Area 4 will be recommended for inclusion in Planning Area

2." (Aa122). These provisions clearly evidence Hillsborough's commitment to facilitate sewerage of the Site and, thus, mandated its cooperation and assistance in that process.

COAH granted substantive certification on April 3, 1996. (Aa145-160). The provisions and representations contained in the Development Agreement were material to COAH's certification decision. (Aa148-152, 188). Furthermore, COAH acknowledged that the development of the PAC/HCF Site was contingent upon 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 re-filed with DEP within two months of the date of substantive certification. (Aa156). COAH conditioned its grant of substantive certification on the requirement that Hillsborough report to COAH within six months on the status of the water quality management plan amendment then pending at the DEP. (Aa160). COAH thus, clearly required cooperation in order to implement the housing plan it had approved.

As detailed in HAAL's initial brief, Hillsborough repudiated the terms and conditions of its substantive certification and Development Agreement. Specifically, Hillsborough failed to seek a Planning Area 2 designation for the PAC/HCF Site, failed to approve or include the PAC/HCF Site in its water quality management plan and, thus, effectively precluded it from obtaining the

necessary sewerage--failed to facilitate sewerage to the Site and, finally, adopted a repealer ordinance, which purported to change the zoning of the PAC/HCF Site.

Finally, at various points throughout the opposition to the ordering COAH to enforce its regulations, inferences are made to other, possibly superior sites.⁷ No other site is before this Court.

LEGAL ARGUMENT

POINT I

PURSUANT TO THE APPELLATE DIVISION'S ORDER ON REMAND, COAH SHOULD HAVE DETERMINED WHETHER N.J.A.C. 5:93-5.4(c) OR N.J.A.C. 5:93-5.4(d) GOVERNS THIS MATTER

While HAAL agrees with Hillsborough that it is inappropriate and improper for COAH to make a predetermination as to whether it will grant waivers on future petitions from Hillsborough, (Aa209), and that no waiver of center designation is necessary for the PAC/HCF Site, pursuant to the Appellate Division's Order on remand, HAAL contends that COAH should have determined whether N.J.A.C. 5:93-4(c) or N.J.A.C. 5:93-5.4(d) applies.⁸

In its Order on remand, the Appellate Division directed COAH

⁷Moreover, this contention is not surprising. David Kinsey is the planner for P.E.C. Builders, Inc. and SKP Land, which are corporations owned by developer Anatol Hiller, who had been an objector to the Township's fair share plan and participated in the appeal. Mr. Kinsey is also a consultant to NJF, which praises in its opposition brief the very site that Mr. Kinsey represents as a planner. (NJFb17; 51).

⁸NJF also concurs in this contention. (NJFb5).

to "address the issue of whether the proposed development is governed by N.J.A.C. 5:93-5.4(d) or N.J.A.C. 5:93-4(c)." (Aa180). While COAH specifically acknowledged this directive (Aa211), it nonetheless refused to reach a conclusion as to this question, declared that "this question is moot" and, thus, did not even discuss the applicability of these sections.⁹ (Aa211-212). This was in error. COAH should have considered the applicability of the above-referenced sections and should have determined that N.J.A.C. 5:93-5.4(d) controls in the present case.

N.J.A.C. 5:93-5.4(d) specifically applies to "municipalities that are divided by more than one planning area." Hillsborough, clearly, is such a municipality. State Plan maps show this to be the case. (See HAALa6-13). In fact, Hillsborough is a community that includes a multiplicity of planning areas.

HAAL's engineer examined maps to determine the proportion of land in Planning Areas 2, 4 and 5 and found that, in fact, 8.7% of the PAC/HCF Site is in Planning Area 2 and that less than 1% of the Site is in Planning Area 5. (HAALa6).

Accordingly, to the extent the planning areas are important, the relevant facts reveal that the PAC/HCF Site is substantially adjacent to Planning Area 2, that almost 10% of the Site is located within that Planning Area, and that the Site was identified as a

⁹Thus, NJF's contentions that COAH somehow accepted its contentions that waiver of center designation was improper under its regulations, (NJFb61), is blatantly false.

Center in the SDRP itself.

Thus, there can be no question that N.J.A.C. 5:93-5.4(d), which deals with municipalities divided by more than one planning area, is the appropriate section to govern this case. The simple fact is that not only is Hillsborough divided by more than one planning area but, also, the PAC/HCF Site at issue is itself divided by more than one planning area. (HAALa6-13). Therefore, the waiver of center designation by COAH was superfluous, since center designation was never required for the Site.

POINT II

COAH SHOULD HAVE ENFORCED THE TERMS AND CONDITIONS OF THE SUBSTANTIVE CERTIFICATION

The opposition received to HAAL's contention that COAH should have enforced the terms and conditions of the substantive certification is of no merit. Clearly, COAH was empowered and obligated to (1) require Hillsborough officials to endorse all applications for water and sewer service; (2) order Hillsborough to reinstate the PAC/HCF zone; and (3) order Hillsborough to petition the State Planning Commission to change the planning area designation of the PAC/HCF Site from Planning Area 4 to Planning Area 2 and, thus, erred by failing to doing so.¹⁰

COAH was established under the Fair Housing Act of 1985, P.L. 1985, c.222, N.J.S.A. 52:27D-301 et seq. (the "Act"), and is

¹⁰HAAL maintains that pursuant to N.J.A.C. 5:93-5.4(d), center designation was never required for the PAC/HCF Site.

charged with the administration of housing obligations in accordance with sound regional planning considerations in the State. As NJF points out, the Act endowed COAH with wide-ranging powers, (NJFb27), including enforcement. Pursuant to the Act, COAH established regulations, which set forth criteria to be used by municipalities in addressing their constitutional obligation to provide a fair share of affordable housing for moderate and low income households. N.J.A.C. 5:93-1.1(b). These regulations set forth the parameters and mandate the actions of municipalities under the control of COAH.

Consequently, COAH has not only the authority but also the duty to enforce its substantive certifications. In fact, COAH has acknowledged its power to enter orders requiring Hillsborough to take various actions to which it had committed when it was granted substantive certification. (COAHb45). However, COAH has failed to fulfil its responsibilities or enforce its own regulations. Instead, COAH suggests that it should simply await an order from the Court, with which it promises to comply. (COAHb50)

This lackadaisical attitude should not be permitted. To allow this action to go unchecked by not enforcing its own substantive certification, COAH is allowing the entire substantive certification process to be rendered meaningless. Rather, COAH has decided to sit by, idly; claiming that its actions would be "futile." (COAHb42-46). However, by not enforcing a substantive

certification, COAH is permitting a certification to be subverted, and a development site to be removed from a plan, as a result of unilateral municipal action. In effect, COAH has abandoned its own regulations in favor of a builder's remedy in the court, which will undisputably constitute a lengthy and complex proceeding. Surely this cannot be the end result of an administrative process designed to assume the Court's role in protecting the constitutional right to affordable housing.

COAH asserts that its decision to revoke rather than enforce the substantive certification was based on its view that Hillsborough's failure to cooperate as promised in the Development Agreement and its petition for substantive certification, "render[] futile any Council order to enforce that Certification." (COAHb43-44). This can be no more than a self-fulfilling prophecy and should be discouraged.

COAH further asserts that its certification decision was based upon assurances that the PAC/HCF Site could be developed within the six-year period. (COAHb44). NJF correctly asserts that "COAH has been slow to recognize its own responsibility for the mess that has been made of this case." (NJFb4). Had COAH enforced the terms of its certification when it first learned of the Township's repudiation of its terms, it could have prevented not only the appeals to the Appellate Division, but the builder's remedies in the Law Division as well--and saved several years. COAH still has

the power and the ability to force Hillsborough to comply.

As to N.J.A.C. 5:93-4.3(c)2 provides that

Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.

(Emphasis added). Thus, COAH is mandated to require Hillsborough officials to endorse all applications for water and sewer service upon which a COAH substantive certification of a Housing Element and Fair Share Plan is dependent. Furthermore, N.J.A.C. 5:93-5.1(b)9, references "necessary applications for amendments to, or consistency determinations regarding, applicable areawide water quality management plans (including wastewater management plans)." Finally, N.J.A.C. 5:93-5.3(b), requires that sites such as the PAC/HCF Site be included in an amendment application filed prior to the grant of final substantive certification.

It is clear that, to date, Hillsborough has not complied with these regulations. Instead, Hillsborough has repudiated a commitment that it made when seeking COAH's certification to obtain water and sewer approvals for the PAC/HCF Site. Hillsborough does not have the right to unilaterally take this action, which is inconsistent with its own certification. Such action is illegal under N.J.A.C. 5:93-4.3(c)2 and it severely prejudices the vested rights of HAAL, with whom Hillsborough signed the Development Agreement.

The opposition further evidences a misunderstanding of the well-settled case law, which provides that, with regard to sewer service, "[m]unicipalities have an affirmative obligation to facilitate provision of the infrastructure necessary to make development realistically likely." Toll Bros. v. Tp. of West Windsor, 303 N.J. Super. 518, 543 (Law Div. 1996). See also So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 297-99 (1983); Dynasty Bldg. v. Upper Saddle River, 267 N.J. Super. 611, 616 (App. Div. 1993), certif. den., 135 N.J. 467, appeal dismissed, 135 N.J. 468 (1994).

By COAH's apparent default with regard to its obligation to superintend the municipal provision of affordable housing, HAAL--a developer that has voluntarily worked with Hillsborough and has relied on the status of its project as a COAH substantively certified site--suddenly risks being denied the opportunity to provide affordable housing to a community, and being remanded to Superior Court, while Hillsborough--a municipality that has contumaciously repudiated the substantive certification--enjoyed the shelter and protections of COAH while it maintained the mere shadow of a substantive certification. This result is unjust and contrary to Supreme Court precedent.

In Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1, 57-58 (1986), the Supreme Court stated that it presumed that COAH would not permit a municipality to invoke the substantive

certification process, utilize and gain the protection of COAH while its application is pending, then, years later, walk away from COAH by its own volition and, in effect, determine that it no longer desires to subject itself to the restraints of COAH. "We believe the Legislature never intended such a result and presume the Council will not permit it." Id. at 58. Rather, the Supreme Court recognizing that COAH had the power to require municipalities to "pursue substantive certification expeditiously and to conform its ordinances to the determination implicit in the Council's action on substantive certification," determined that COAH should use it to enforce and mandate a municipality's compliance with its regulations. Id. at 58; see also 103 N.J. at 35-36.¹¹

¹¹Indeed, the Hills Court explicitly stated that the replacement of litigation and remedies pursuant to Mt. Laurel II by the administrative procedures of COAH "was one of the primary purposes of the [Fair Housing] Act." 103 N.J. at 35-36, citing §3 of the Fair Housing Act.

Thus, NJF's repeated insinuations that the PAC/HCF Site did not present a "realistic" opportunity for development based on the extended delay thus far is improper. (NJFb18). In Hills, the Court determined that the method municipalities should utilize is the COAH process and not, as NJF suggests, the builders' remedy. Moreover, the delay of which NJF complains in proceeding forward with the development of the Site is largely--if not entirely--attributable to the objectors, not HAAL, and COAH's repeated failure in October 1997 and June 1998 to enforce the certification.

The Township's continued failure to facilitate and cooperate as agreed attributed to much of the delay. Furthermore, an objector forced the certification into mediation. Finally, after the certification was granted, NJF--which blames HAAL for the delay--filed an appeal, several entities intervened or otherwise joined the action, requests were made to supplement the record, the appeal was remanded to COAH due to Hillsborough's actions (or

Thirteen years have passed since the Hills decision. COAH has continued to exist and, now, municipalities look to COAH for the substantive certification process and invoke its protections in doing so, cloaking themselves in the COAH shield to builders' remedies. COAH recognizes its enforcement powers must be utilized in order to maintain its duty to oversee and administrate the municipal development of New Jersey. Builders should not be continuously seeking relief in the judicial system, which is already overcrowded with other matters. COAH must utilize its enforcement powers to prevent such occurrences.

COAH, admittedly, has in fact exercised this power with respect to other municipalities, e.g., Howell and Denville. (COAH45-46). There is no meritorious basis for the distinction and COAH has not articulated any.

The Township argues that COAH cannot be "unleashed" until all of the issues raised by NJF in its appeal have been addressed. (HILLb13). Clearly, with the wide-ranging powers with which COAH has been entrusted and its duty to administer the housing

inactions) and most recently, after the certification was revoked, Hillsborough appealed that decision. The litigation surrounding the certification process cannot be attributable to HAAL nor can HAAL be blamed for any delay caused by the litigation process. To assert otherwise is absurd.

Moreover, NJF arrogantly claims that its "opposition to the plan was also a 'fact' that merited reevaluation," (NJFb28), somehow inferring that its opinion alone should disqualify the PAC/HCF Site.

obligations in accordance with sound regional planning considerations in the State, COAH would be in a better position to enforce its regulations and address NJF's issues. Under Hills, this approach would be favored over having the many separate actions--as are present in this matter. These powers are not outside the parameters expressed in Hills, but clearly are those specifically contemplated by it.

Moreover, the Court's decision in Toll Bros. is directly on point. All that HAAL is seeking is for COAH to enforce its regulations, under which it has the power to fully resolve these issues. The Township asserts that COAH does not have the power over it. (HILLb13). Other municipalities will begin similar approaches with COAH in the future if Hillsborough is successful in its repudiation. The Court needs to terminate this now and order COAH to take action.

It now is painstakingly clear that Hillsborough is opposing the extension of sewer service onto the PAC/HCF Site. COAH should not permit this willful disregard of its regulations to set the stage for future municipalities to follow suit.

Therefore, the proper action for COAH to have taken was to exercise its authority to order Hillsborough to seek the necessary water and sewer approvals pursuant to the Development Agreement it executed with HAAL.

Likewise COAH erred by not ordering Hillsborough to reinstate

the PAC/HCF zone. In yet another attempt to subvert the certification, Hillsborough attempted to change the zoning of the property in question by repealing its PAC zoning. A municipality cannot change the terms of an existing certification by changing the zoning of the underlying property. Hillsborough's actions afforded COAH the power to compel Hillsborough to conform to the certification by pursuing the re-designation pursuant to the certification. COAH, again, relies on its "futile" argument, which, for the reasons above, should be disregarded.

Furthermore, the Supreme Court in Hills, recognized the power of COAH to force a municipality to conform its ordinances to the certification. 103 N.J. at 57-58. In Hills, as noted above--but repeatedly misunderstood by the opposition--the Court concluded that the Legislature did not intend to afford a municipality protection from the courts through the jurisdiction by COAH and then, after invoking COAH's coverage, simply choose not to comply with COAH's requirements of substantive certification. However, this is precisely what Hillsborough is attempting to accomplish and it should, accordingly, be disallowed.

The thrust of NJF's opposition is the "timing and sequence." (NJFb23). This comment is intellectually dishonest. It is remarkable that NJF, who initiated the first appeal, is now complaining of the delays caused by the furtherance of the resulting litigation. Moreover, the resulting delay due to the

litigation further supports HAAL's contentions that COAH should be compelled to enforce compliance with its policies and regulations. The most expeditious way to proceed now is for COAH to enforce. In order to comply with the Mt. Laurel mandate to expedite the process, enforcement is the only solution.

The opposition has provided no meritorious basis for such actions by COAH. Instead, this action is directly contrary to and inconsistent with Hillsborough's pledge to support HAAL in its re-designation from Planning Area 4 to Planning Area 2 and, thus, directly subverted its certification, which COAH expressly recognized and relied upon in granting the certification.

Moreover, despite NJF's contentions that HAAL has not "changed its position in reliance on the substantive certification, as had the non-profit sponsor in Denville," (NJFb59), the principal of HAAL has in fact submitted a certification indicating HAAL's actual reliance on the substantive certification and HAAL's subsequent-- and reasonable--incurrence of expenses totally approximately two million dollars.¹² (HAALa6-13).

Therefore, COAH should have ordered Hillsborough to reinstate the PAC/HCF zone and, thus, erred in doing so. Likewise, COAH should have ordered Hillsborough to petition the State Planning

¹²What is not part of the record is NJF's grudging remark that HAAL "hoped it would sweeten the prospects" of its development and that any money expended represents "high stakes speculative development." (NJFb59). In light of the approval of waiver by the Office of State Planning, HAAL's actions were very well calculated.

Commission to change the planning area designation of the PAC/HCF Site from Planning Area 4 to Planning Area 2. The opposition has provided no support for this inaction and, thus, COAH erred by failing to do so.

CONCLUSION

For the foregoing reasons and the reasons set forth in the initial papers, Respondent/Cross Appellant Hillsborough Alliance for Adult Living, L.L.P. respectfully requests that COAH's decision on remand, revoking the substantive certification granted to Hillsborough be affirmed and that any re-petition for substantive certification by Hillsborough include the PAC/HCF Site. In addition, Hillsborough Alliance for Adult Living, L.L.P. respectfully requests that this Court (1) order COAH to reinstate the PAC/HCF zone; (2) mandate COAH to require Hillsborough officials to endorse all applications for water and sewer service; and (3) order COAH to order Hillsborough to petition the State Planning Commission to change the planning area designation of the PAC/HCF Site from rural Planning Area 4 to Planning Area 2; and (4) declare that center designation was never required for the Site.

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Dated: October 22, 1999