

- Opinion affirming COAH's action revoking its prior grant of substantive certification to Twp's fair share plan and relinquishing subject matter jurisdiction

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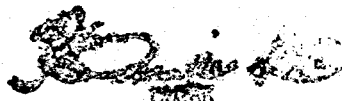
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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6668-97T1

FILING DATE
APPELLATE DIVISION

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

APR 14 2000



CLERK

Submitted: March 29, 2000 - Decided: APR 14 2000

Before Judges Stern, Kestin and Wefing.

On appeal from the New Jersey Council on
Affordable Housing.

DeCotiis, Fitzpatrick & Gluck, attorneys
for appellant Township of Hillsborough
(James A. Farber, on the brief).

Greenbaum, Rowe, Smith, Ravin, Davis & Himmel,
attorneys for respondent/cross-appellant
Hillsborough Alliance for Adult Living
(Peter A. Buchsbaum, of counsel and, with
Rachel M. Coe, on the brief).

John J. Farmer, Jr., Attorney General,
attorney for respondent Council on Affordable
Housing (Mary C. Jacobson, Assistant Attorney
General, of counsel; William P. Malloy, Deputy
Attorney General, on the brief).

Edward Lloyd and John M. Payne, Rutgers
Environmental Law Clinic, attorneys for
respondent New Jersey Future, Inc. (Mr. Lloyd
and Mr. Payne, on the brief).

PER CURIAM

The Township of Hillsborough appeals from the June 3, 1998
action of the Council on Affordable Housing (COAH) revoking the

previously granted (April 3, 1996) substantive certification of the Township's housing element and fair share plan; and relinquishing jurisdiction over the Township's Mount Laurel' obligations and its compliance with the requirements of the Fair Housing Act, N.J.S.A. 52:27D-301 to -329. COAH's reasons for this action were set out in a written decision attached to its revocation resolution.

In that decision, COAH identified the Hillsborough Alliance for Adult Living, L.L.P. (HAAL) as the owner of property "which Hillsborough chose to be the sole inclusionary site in its fair share plan" providing "3,000 units of housing, with a 15 percent set-aside for affordable housing that would satisfy Hillsborough's Mount Laurel obligation for the 1987-1999 certification period and into the future." The decision mandated that any future "petition for a fair share plan submitted by Hillsborough must fully account for the inclusion or non-inclusion of the HAAL site as a provider of affordable housing." The decision also provided with regard to future applications: "The criteria found in the Council's rules for the formulation of a municipal fair share plan will be strictly applied to Hillsborough and there will be no waivers granted from any of the Council's rules or policies."

The Township argues on appeal that the COAH decision was erroneous in all respects.

* Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II); Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I).

HAAL, as a respondent on appeal and cross-appellant, argues that COAH'S determination to revoke Hillsborough's substantive certification and relinquish jurisdiction was correct, but that COAH "may not predetermine whether it will grant waivers" on future fair share petitions and "should have enforced the terms and conditions of the substantive certification" specifically with respect to the HAAL site.

Another respondent on appeal, New Jersey Future, Inc., also argues that the decision to revoke the Township's certification was correct, but contends that COAH should not have relinquished jurisdiction and should rather "have permitted Hillsborough to remedy the defects in its certified plan." This respondent also argues that 1) we should consider issues involving the construction and application of N.J.A.C. 5:93-5.4(c) and (d), which COAH declined to address on the ground of mootness in the light of its revocation decision; 2) COAH did not mandate the inclusion of the HAAL site in any future fair share application, and should not do so when any such plan is considered; and 3) COAH was essentially correct in its determination not to entertain waiver applications that had previously been considered, but "did not preclude consideration of any appropriate waivers not previously sought."

After reviewing the record in the light of the arguments advanced by the parties, we have concluded that COAH's determination to revoke the Township's certification was neither arbitrary, nor capricious, nor unreasonable. Revocation was a

consequence well within COAH's discretion as the agency viewed the history of the Township's conduct in meeting its constitutional and statutory responsibilities regarding fair housing, a view supported by the record. Cf. Hills Development Co. v. Township of Bernards, 103 N.J. 1, 56-58 (1986). Because that determination was the discretionary action of an administrative agency within its delegated powers, purporting to effectuate its statutory and regulatory authority, and untainted by arbitrariness, caprice or unreason, we are obliged to defer to its choices. Brady v. Department of Personnel, 149 N.J. 244, 256 (1997).

We are, further, in substantial agreement with COAH's view that once certification was revoked the agency was well warranted in relinquishing jurisdiction over the Township's fair share obligations and leaving the issues to be resolved via the alternate remedy, a builder's remedy lawsuit, see Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 279-80 (1983) (Mount Laurel II), in the absence of future administrative action. We also regard as appropriate COAH's view that the issues bearing upon the construction and application of N.J.A.C. 5:93-5.4(c) and (d) were rendered moot by its revocation decision.

To the extent the COAH decision may be regarded as having predetermined any issues which may rightly come before the agency in the future, however, it was clearly beyond the agency's power or discretion to do so. Every permitted application which an agency receives is entitled to be evaluated on its merits, with due regard

given to party-specific historical factors but free of predecision. Cf. Juzek v. Hackensack Water Co., 48 N.J. 302, 314 (1966) (an administrative agency's quasi-judicial power is "conditioned upon the observance of traditional safeguards against arbitrary action and the fundamental requisites of due process of law"); In re Shelton College, 109 N.J. Super. 488, 492 (App. Div. 1970) (administrative hearings must be "fair," which includes the obligation to consider all the evidence presented); Jersey City v. Department of Civil Service, 57 N.J. Super. 13, 45 (App. Div. 1959) (the exercise of quasi-judicial powers necessitates a hearing to which the "essential concomitants of judicial action" apply). We include in this category the issues relating to the Township's entitlement to waivers in respect of future applications and the extent to which, if at all, the HAAL site should be included in any future plan COAH may be called upon to review.

We affirm COAH's action revoking its prior grant of substantive certification to Hillsborough Township's fair share plan and relinquishing subject matter jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



Clerk