Hillsborough Litigation
U.S. Home Corp. Vs. Hillsborough and Friends of Hillsborough, Inc.

9/29/97

Letter brief in response to papers submitted by the Friends of Hillsborough, Inc.

5 pgs.

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GREENBAUM, ROWE, SMITH,
RAVIN, DAVIS & HIMMEL LLP

COUNSELLORS AT LAW

METRO CORPORATE CAMPUS ONE
P.O. BOX 5600
WOODBRIDGE, NEW JERSEY 07095-0988
(732) 549-5600
TELECOPIER (732) 549-1881
ABA NET 2529

DELIVERY ADDRESS:
99 WOOD AVE. SOUTH
ISELIN, NEW JERSEY 08830-2712

6 BECKER FARM RD.
ROSELAND, NEW JERSEY 07068-1735
(973) 535-1600
TELECOPIER (973) 535-1696

REPLY TO Woodbridge

VIA HAND DELIVERY
September 29, 1997

The Honorable Robert Guterl, J.S.C.
Somerset County Courthouse
North Bridge and Main Streets
P.O. Box 3000
Somerville, NJ 08876-1262

RE: U.S. Home Corp., et al.v. Township Committee of the Township of Hillsborough and Friends of Hillsborough, Inc.
Docket No. SOM-L-1239-97 PW

Dear Judge Guterl:

This firm is serving as co-counsel with Giordano, Halleran & Ciesla, P.C. with respect to the above referenced matter. Please accept this letter in lieu of a more formal brief in response to papers submitted to you by the Friends of Hillsborough, Inc. It is the position of U. S. Home Corp. and the Hillsborough Alliance for Adult Living, L.L.P. that no Order to Show Cause should be entered in this matter.

A. THE RELIEF SOUGHT IS PROCEDURALLY DEFECTIVE.

1. The Council on Affordable Housing ("COAH") has not been joined in this matter.

Intervenor is seeking to thwart a COAH hearing now scheduled for October 1, 1997. Yet COAH is not a party to this action. Nor has any effort been made to join COAH in this action. Therefore, the

very entity against whom relief is sought is not in this case and therefore no relief is appropriate.

2. There is no basis for the relief sought.

Intervenor suggests that counsel for the plaintiff should be somehow enjoined from even presenting a case to COAH. No authority whatsoever is recited for this remarkable proposition. To assert, in effect, that it could be contempt of court merely to argue in a duly convened hearing before a state administrative body is to assert so novel and remarkable a proposition that this Court should discount it entirely.

In sum, the relief requested lacks any legal foundation, both because the proper party has not been joined and because there is no basis in law whatsoever for enjoining the conduct of an administrative hearing or preventing an attorney from appearing before a duly constituted administrative body.

B. THERE IS NO EMERGENCY WHICH REQUIRES EXTRAORDINARY RELIEF.

COAH has not yet acted. If it fails to grant the relief in question, then Intervenor's prayer for immediate relief will have been rendered moot. Thus, there is no basis for this Court's intervening with the processes of an administrative body at this time.

Moreover, even if COAH acts, Intervenor has an adequate remedy by way of appeal. Either it, or New Jersey Future, with whom it is clearly cooperating, could seek temporary emergency relief from the Appellate Division in the event that COAH acts and does not stay its action. See R. 2:9-5. Thus, there is absolutely no need for this Court to take the extraordinary step of enjoining counsel from appearing before an agency, or enjoining the holding of the hearing by an agency, since there is an adequate remedy available to Intervenor should the agency act.

C. COAH CLEARLY HAS JURISDICTION OVER THIS MATTER.

Intervenor's claim that Alexander's v. Paramus Boro., 125 N.J. 100 (1991), somehow bars COAH action is absurd. As the very quote on page 2 of Intervenor's letter brief indicates, the Fair Housing Act authorizes COAH to promulgate regulations regarding compliance with Mt. Laurel. Alexander, supra, 125 N.J. at 112. Such authority includes the right to determine whether a housing plan is realistic. Id.

Moreover, COAH clearly has jurisdiction to issue orders addressed to sewerage, where such sewerage is essential for the construction of low or moderate income housing. Hills Corp. v. Twnsp. of Bernards, 103 N.J. 1, 61-62 (1986). In Hills, the Supreme Court held that COAH had the power to bar all sewerage connections needed to protect the vital resource of sewer capacity. In addition, Tocco v. Council on Aff. Housing, 242 N.J.Super. 218 (App. Div. 1990), certif. den. 122 N.J. 403 (1990), cert. den. 499 U.S. 37 (1991), the Appellate Division upheld a ban on connections to sewerage needed to protect capacity for low or moderate income housing a COAH ban.

The relief sought here is far less drastic. Plaintiffs are only requesting that COAH require that communities with substantive certification facilitate developments they have certified by signing applications for sewerage capacity. Certainly that is a logical and even necessary concomitant of COAH's powers, as set forth in Hills, to ensure compliance with Mt. Laurel's constitutional mandate of a realistic opportunity for affordable housing. Thus, Alexander's, supra, restrictions on COAH's ability to determine such matters as compliance with the Open Public Meeting Act or contract zoning, are utterly irrelevant to this matter. What is relevant is COAH's clear jurisdiction to protect sewerage capacity to the extent necessary to prevent interference with the provision of a realistic opportunity for affordable housing construction, as mandated by both the Fair Housing Act and the Mt. Laurel case.

D. COAH REGULATIONS CLEARLY APPLY TO THIS CASE.

Contrary to the argument in B, p.3 of Intervenor's letter brief, the relevant COAH regulation N.J.A.C. 5:93-4.3(c)2 clearly requires, in very explicit language, that applications with respect to sewerage be executed. There is no ambiguity in the language of the regulation.

Moreover, the claim that the regulation is invalid is not supported by any authority cited by Intervenor. Moreover, such a claim flies in the face of the Hills and Tocco cases described above, as well as the clear intent of both the Fair Housing Act and Mt. Laurel decision to achieve a realistic opportunity for affordable housing. See also Samaritan Associates v. Englishtown, 294 N.J. Super. 437 (Law Div. 1996) holding that not only may a town which hosts 97 affordable housing project be required to cooperate as to sewers, but neighboring towns may also, under certain circumstances, be forced to accept sewerage where necessary for the construction of

affordable housing within another municipality. Cox, *Zoning and Land Use Administration* at 152 (1997 Ed.).

E. THE REST OF INTERVENORS' ARGUMENTS ARE WITHOUT MERIT.

In its part C, Intervenor engages in inappropriate ad hominem argument. Suffice it to say that the Alexander's case, for the reasons stated above, is not controlling. Intervenor itself has failed to cite the controlling authorities, namely Hills and Tocco. Moreover, it has utterly failed to deal with the presumption of validity that is accorded to administrative actions and indeed with the doctrine that an administrative agency's interpretation of its own statutory mandate is given deference by the Court unless it is clearly contrary to the statute's intent. See Emmer v. Merin, 233 N.J.Super. 568 (App. Div.), certif. den., 118 N.J. 181 (1989); Golden Nugget Atlantic City Corp. v. Atlantic City Elec. Co., 229 N.J.Super. 118 (App. Div. 1988). It would seem unlawyerly for a party to take a single case out of context, and criticize the other party for not citing it while the complaining attorney has ignored the real key cases.

Finally, in this regard, Intervenor does not even begin to provide authority for the extraordinary relief it requests, or to explain to the Court why such relief as it may need cannot be had by way of appeal from any decision by COAH. Thus, part D of Intervenor's brief, where the injunction against HAAL (not COAH) is requested has no citations whatsoever.

CONCLUSION

For the reasons above stated, this Court should not execute the Order to Show Cause which has been presented to it.

Respectfully submitted,

PETER A. BUCHSBAUM

PAB/pas

cc: Raymond Trombadore, Esq.
James A. Farber, Esq.
William P. Malloy, Esq., Deputy Attorney General
Gregory J. Bonin, Township Clerk
William Sutphen, Esq.
Edward Halpern, Esq.
New Jersey Future c/o Edward Lloyd, Esq.
Frank Yurasko, Esq.
Ronald L. Shimanowitz, Esq.
Anatole Hiller