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April 11, 2016

VIA LAWYERS SERVICE
Motion Clerk, Superior Court of New Jersey
Law Division
Monmouth County Court House
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728

Re: Highview Homes, LLC v. Township of Hazlet, et al.
Docket No. MON-L-4224-15
Motion Returnable April 15, 2016

Dear Sir or Madam:

I am enclosing an original and one copy of the following on behalf of the defendant, Township of Hazlet:

- Reply Brief of Defendant Township of Hazlet in Support of its Motion for Summary Judgment and in Opposition to Plaintiff's Cross Motion for Summary Judgment;
- Defendant's Response to Plaintiff's Counter-Statement of Material Facts;
- Certification of Service.

This motion is returnable on April 15, 2016 before the Honorable Jamie S. Perri, J.S.C.

Please charge all fees to my Superior Court Account No. 141377.

Very truly yours,

JAMES H. GORMAN
Attorney for Defendant,
Township of Hazlet

JHG/jo
Enclosures
cc: Honorable Jamie S. Perri, J.S.C., *via Lawyers Service*
Richard J. Hoff, Jr., Esq., *via Lawyers Service*
Gregory W. Vella, Esq., *via Email and Regular Mail*
Client, *via Email*

HIGHVIEW HOMES, LLC, Plaintiff, v. TOWNSHIP OF HAZLET and PLANNING BOARD OF THE TOWNSHIP OF HAZLET, Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO: MON-L-4224-15 CIVIL ACTION

REPLY BRIEF OF DEFENDANT TOWNSHIP OF HAZLET IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

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Township of Hazlet

PRELIMINARY STATEMENT

Plaintiff had no basis to file this complaint. It did not act in good faith, as required in Mount Laurel II. The complaint should be dismissed.

It sought rezoning for its self-described "luxury" rental apartment development, with no affordable units. Only when pressed by Hazlet Township, did the plaintiff propose any affordable units at all, and then its last minute proposal was for a deficient 10% set-aside, where COAH rules require a minimum of 15%.

In argues unpersuasively that the good faith requirement had gone by the wayside, relying only on a few unpublished trial court hearing transcripts. Those transcripts are in conflict with published, controlling opinions issued after Mount Laurel II.

Further, Hazlet Township is entitled to the benefit of the immunity orders entered by this court in the Elegant Properties matter. Plaintiff misreads the unambiguous directives of Mount Laurel IV in a meritless argument that the Township's immunity somehow vanished.

Pursuant to those immunity orders, the complaint should be dismissed.

LEGAL ARGUMENT

POINT I

PURSUANT TO R. 4:46-2(B), ALL MATERIAL FACTS IN THE TOWNSHIP'S STATEMENT OF MATERIAL FACTS ARE DEEMED ADMITTED

The plaintiff's Counter-statement of Material Facts does not admit or dispute the facts set forth in the Township's Statement of Material Facts. Those facts are admitted pursuant to R. 4:46-2(b):

> Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact.

Those admitted facts prove that plaintiff did not act in good faith. Those admitted facts support the Township's motion for summary judgment.

POINT II

PLAINTIFF HAD AN OBLIGATION TO ACT IN GOOD FAITH UNDER MOUNT LAUREL II, AND PLAINTIFF HAS FAILED TO SATISFY THAT BURDEN

For a developer to be awarded a builder's remedy, the Supreme Court in Mount Laurel II, 92 N.J. 158, 218 (1983) imposed an obligation upon that developer to first act in good faith in its negotiations with the municipality:

> Where the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in Mount Laurel-type litigation, ordinarily a builder's remedy will be granted . . ..

That good faith requirement imposed by the Supreme Court thirty-three years ago is still the law. Both the Supreme Court and the Appellate Division have recognized the continued viability of the good faith defense in **controlling**, **published** decisions.

There is no published trial court or appellate decision to the contrary. Further, there is no unpublished decision of the Appellate Division to the contrary.

Turning first to the published, controlling authority after Mount Laurel II, the Supreme Court in Toll Brothers v. Township of West Windsor, 173 N.J. 502, 537-538 (2002), did not disturb the good faith defense it previously set forth in Mount Laurel II. Citing the unpublished appellate

decision below, the Supreme Court spelled out the affordable housing proposals that Toll Brothers had made to the town, which provided "100 affordable units" or credits. Id. at 538. On those facts, the Supreme Court affirmed the appellate decision which "failed to find evidence that Toll Brothers had acted in bad faith." Id.

The good faith efforts of Toll Brothers to provide affordable housing contrast dramatically with the many proposals made by the plaintiff and other developers for commercial or multi-family use, none of which proposed any affordable units until right before filing suit. Even then the plaintiff's proposal was not a bona fide affordable housing plan as it proposed a deficient 10% set aside.

Just as the Supreme Court recognized the continued viability of the good faith defense, so too has the Appellate Division. Notably, in Oceanport Holding, LLC v. Borough of Oceanport, 396 N.J. Super. 622, 624 (App. Div. 2007), Judge Skillman's opinion considered:

> whether a Mount Laurel action brought by a developer is subject to dismissal if the defendant municipality can establish that the developer did not attempt in good faith to obtain relief without litigation.

Judge Skillman interpreted the good faith requirement of Mount Laurel II:

> Consequently, it should be construed to mean that such threats may result in the denial of a builder's remedy, not the dismissal of the action.

Id. at 632.

Judge Skillman in Oceanport concluded:

> For these reasons, we conclude that the determination whether a developer has "attempted to obtain relief without litigation" is relevant only to its entitlement to a builder's remedy, which is a determination that should be made only after the developer has succeeded in establishing that the municipality's zoning does not comply with its Mount Laurel obligations.

Id. at 633, 634.

Oceanport Holding upholds the good faith requirement, and merely says that the issue must wait until the compliance issue is decided.

Here, the compliance issue has already been decided against the Township in the Elegant Properties case, pursuant to the court's order of July 28, 2008. (Gorman Cert. Ex. A). The court has already ruled that Hazlet is not in compliance. There is no purpose to litigate that issue again in the instant matter.

Whether the prior court order of non-compliance in Elegant Properties was properly entered or not is academic. That prerequisite set forth in Oceanport Holding has been satisfied.

This court can now look at this developer's bad faith. There is no procedural bar to the dismissal of plaintiff's builder remedy action.

As additional, consistent authority, the Appellate Division in Joseph Kushner Hebrew Acad. v. Twp. of Livingston the Township, 2013 N.J. Super. Unpub. LEXIS 2170, 2013 WL 4607526, A-5797-10T1, decided Aug. 30, 2013, p. 26 (provided with defendant's original brief), notes that a developer must act in good faith before filing suit:

> Defendants assert that Hillside's builder remedy claim is barred by the failure to present a bona fide affordable housing proposal prior to filing suit.
>
> Defendants are correct that the Court stated that a precondition to the award of a builder's remedy is a determination that the "the plaintiff has acted in good faith [and] attempted to obtain relief without litigation[.]" Mount Laurel II, supra, 92 N.J. at 218.

Hillside escaped a dismissal because "a developer prior to Hillside made a bona fide affordable housing proposal for this site before litigation was instituted." Id. at 26. The Appellate Division also noted that "Hillside's plan involved construction of four three-story buildings containing eighty multi-family dwelling units sixteen of which [20%] would be affordable . . .. Id. at 13.

The plaintiff here is not in the same fortunate position as Hillside was. Hillside and its predecessors acted in good faith in stark contrast to the lack of good faith negotiations from Highview and its predecessors.

The Township relies on published, controlling upper court decisions, and one consistent unpublished appellate decision. In contrast, plaintiff relies only on unpublished, non-binding, imprecise, bench rulings from the trial court.

Plaintiff relies most heavily on Judge Skillman's trial court decision in East/West Venture v. Borough of Fort Lee, decided in 1989. (Kinback Cert. Ex. J). Without any support, without any real analysis, Judge Skillman dismissed that town's good faith argument. It must be noted that after two decades in the Appellate Division Judge Skillman thinking had obviously changed, as he had the opportunity to invalidate, or at least speak to, the good faith requirement in Oceanport Holding, but did not do so.

Also of note, despite the importance that plaintiff places on this unreported decision, there are no published, or even unpublished, appellate decisions which cite to it for authority.

The next unreported decision cited by plaintiff, the only one actually reduced to writing by the trial court,

Community Developers v. Borough of Emerson (Kinback Cert. Ex. K) by Judge Harris in 2001 supports the Township's position, not the plaintiff's. Judge Harris denied a builder's remedy based on the developer's failure to act in good faith. Judge Harris stated, citing facts very similar to the one now before this court:

> Community Developers' last-minute conversion to the cause of affordable housing is simply too fortuitous to warrant a finding of its good faith. Community Developers is further disqualified from a builder's remedy because to grant it this extraordinary relief would render the judiciary the enforcer of a builder's threat.

Id. at 14.

The trial court motion transcript in Traditional Developers v. Farmingdale, decided in 2003 by Judge Reisner (Kinback Cert. Ex.L), is not relied upon by the plaintiff in its argument. The good faith issue is discussed during colloquy, but is not discussed in the decision.

In KJ&J Associates v. Township of Eagleswood, Judge Serpentelli in 2003 (Kinback Cert. Ex. M) merely quotes Judge Skillman's trial court opinion in East/West without any further analysis.

Judge O'Hagan's oral ruling in American Properties v. Matawan in 2005 (Kinback Cert. Ex. N), basically relies on East/West, without much further analysis.

Plaintiff's last unpublished trial court decision supports the Township's position. KTK Trust v. Rumson decided by Judge Quinn on July 14, 2004 (Kinback Cert. Ex. O) came to a conclusion consistent with Mount Laurel II:

> [A]ny plaintiff who seeks a Builder's Remedy has a legal requirement and obligation to engage in good faith pre-suit negotiations with the municipality prior to filing a law suit in which a builder's remedy is sought.

Id. at 10.

None of these unreported trial court rulings, whether for or against the Township's position, should be given any weight by this court. As the court is well aware, R. 1:36-3, "Unpublished Opinions", states:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine, or any other similar principle of law, no unpublished opinion shall be cited by any court.

(Emphasis added.)

There are obvious reasons why unpublished decisions are given no precedential weight and cannot be cited in an

opinion. Published decisions are written for a general audience requiring a court to accurately lay out all the relevant facts and procedural background. A published opinion must lay out the controlling law and set forth the courts holding in significant detail. Considerably less time and effort goes into an unpublished opinion. The problems of unpublished decisions are further magnified when those decisions are not even in writing, but decided orally from the bench.

It would be one thing if plaintiff was relying on instructive, unpublished Appellate Division decisions as secondary authority. But that, simply, is not the case here.

Plaintiff seems to argue that mere trial court motion transcripts can somehow trump the Supreme Court and the Appellate Division. That would eviscerate R. 1:36-3.

The use of unpublished trial court decisions, from a private library compiled by the insular Mount Laurel development bar, gives those attorneys an unfair advantage and unequal access. You can just see East/West's attorney in 1989 running to his fax machine to share his victory with the developer bar. Such use of selective unpublished, non-precedential, trial court transcripts is a disservice

to the court, and opposing counsel. It distorts our judicial process.

Plaintiff fails to cite any controlling authority to support its position. Indeed, even the unpublished trial court transcripts offer little support.

Thus, the good faith requirement remains. This plaintiff failed to satisfy its obligation to negotiate in good faith when it proposed "luxury apartments" without any affordable units. Its failure continued when, after being pressed by the Township for a complaint plan, it offered a non-compliant plan with only a deficient 10% affordable set-aside. It never proposed a bona fide, compliant affordable housing plan before filing suit.

The good faith requirement prohibits such gamesmanship. The plaintiff has not acted in good faith. Its claim for a builder's remedy should be dismissed with prejudice.

The plaintiff cannot demand exclusionary luxury housing, and then stomp its feet when the Township does not run with open arms to conspire with the plaintiff, particularly when the Township still sought a compliance order from the court in the Elegant Properties matter.

Plaintiff's misconduct cannot be rewarded. The Township will satisfy its obligation in Elegant Properties without the use of this site.

POINT III

HAZLET TOWNSHIP COULD NOT HAVE FILED A DECLARATORY JUDGMENT ACTION UNDER MOUNT LAUREL IV

The Supreme Court clearly set forth the parameters for the declaratory judgment process it created in Mount Laurel IV, formally known as In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015).

The Supreme Court identified two classes of municipalities which would be subject to its declaratory judgment rules. The Supreme Court stated:

> During the first thirty days following the effective date of our implementing order, the only actions that will be entertained by the courts will be declaratory judgment actions filed by any town that either (1) had achieved substantive certification from COAH under prior iterations of Third Round Rules before they were invalidated, or (2) had "participating" status before *COAH*.

Id. at 5.

The Supreme Court established "procedures for the two classes of municipalities left stranded by COAH's failure to adopt valid Third Round Rules." Id. at 24.

Hazlet Township does not fall within either of those two classes.

The Supreme Court did not forget about towns, like Hazlet Township, that did not fall into one of those two classes:

> For completeness, we note that approximately 200 towns never subjected themselves to COAH's jurisdiction, choosing instead to remain open to civil actions in the courts. Those towns will continue to be subject to exclusionary zoning actions, as they have been since inception of *Mount Laurel* obligations.

Id. at 23.

If some of those other 200 towns somehow made their way into the declaratory judgment process, so be it. Hazlet Township followed the dictates of the Supreme Court.

Plaintiff's assertion that Hazlet Township had to file a declaratory judgment action is without merit. Hazlet Township was under the court's jurisdiction and remains so.

POINT IV

HAZLET TOWNSHIP IS ENTITLED TO THE BENEFIT OF THE PRIOR IMMUNITY ORDERS ENTERED BY THIS COURT

The court has issued numerous orders in the pending Elegant Properties litigation. Some of them went against Hazlet Township; some went in its favor. Some Hazlet Township agrees with; some not.

Perhaps Elegant Properties will resolve to the satisfaction of all parties. If not, all parties retain their appellate rights.

The Appellate Division on its remand in Elegant Properties (Kinback Cert. Ex. G) has made clear that the trial court proceedings must be completed in their entirety before the matter is ripe for appellate review. Citing Mount Laurel II:

> 'The judiciary should manage Mount Laurel litigation to dispose of a case in all of its aspects with one trial and one appeal, unless substantial considerations indicate some other course. This means that in most cases after a determination of invalidity, and prior to final judgment and possible appeal, the municipality will be required to rezone, preserving its contention that the trial court's adjudication was incorrect. If an appeal is taken, all facets of the litigation will be considered by the appellate court including both the correctness of the lower court's determination of invalidity, the scope of remedies imposed on the municipality, and

> the validity of the ordinance adopted after the judgment of invalidity.'
>
> That procedure was not followed in this case, and instead, the litigation was fractionated in a fashion that precludes proper appellate consideration.

Id. at 12-13 of decision.

Plaintiff spends much of its brief attacking Hazlet Township's position in a case that is not yet fully adjudicated, a case that Highview is not a party to. Plaintiff collaterally, and without standing, attacks Hazlet Township in the other incomplete matter.

Neither Hazlet Township or Elegant Properties are going back to rehash the prior trial court rulings. Highview Homes certainly has no right to do so.

The Appellate Division has made it clear that it does not want that case back until it is over. Consideration of plaintiff's arguments would require this court to go back over each decision previously made by at least three other judges who have presided over Elegant Properties. That role is reserved to the Appellate Division.

While that other matter is pending, both Hazlet Township and Elegant Properties are entitled to the protection of the orders entered by the court. Judge Lawson issued an immunity order on July 28, 2008 (Gorman

Cert. Ex. A). Judge Quinn granted the Township immunity in his builder's remedy order of November 17, 2009. (Gorman Supp. Cert. Ex. A).

Have there been gaps and delays in the Elegant Properties case? Surely.

But most of those delays are not the fault of Hazlet Township. Hazlet Township does not believe that this is the proper forum to adjudicate or consider those delays. However, to avoid being painted by Highview as a villain here, a brief explanation is provided.

Hazlet Township submitted compliance plans in 2009 and 2011. Gorman Cert. ¶ 5. There have been no comments by the special masters. Gorman Cert. ¶ 6 & 7.

It is not Hazlet's fault that the November 17, 2009 builder's remedy order (Gorman Supp. Cert. Ex. A), prepared by Elegant Properties' attorney, incorrectly certified it as a final order, leading to an appeal by the Township.

It is not Hazlet's fault that Ms. McKenzie, the prior special master immediately resigned in August 2011 when the Township discovered that she was serving as a special master sitting side-by-side with Elegant Properties' then attorney, who was serving as a court appointed special hearing officer, as arms of the court in other matters. Gorman Cert. ¶ 6.

It is not Hazlet's fault that the current special master was not appointed until October 17, 2012, well over a year after his predecessor resigned. Gorman Cert. ¶ 7.

It is not Hazlet's fault that there have been understandable delays in the Elegant Properties case as the court and the parties were waiting for the disposition of court challenges in other highly visible cases.

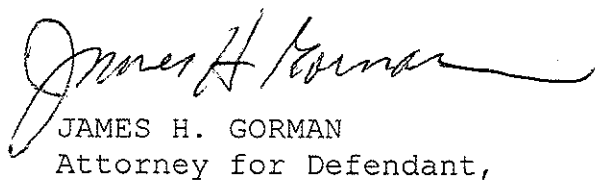
Plaintiff offers no legal authority to support its argument that Hazlet's immunity vanished, except its frivolous argument that Hazlet Township was governed by Mount Laurel IV.

The immunity orders remain in full force and effect. Hazlet Township is entitled to the protections they afford. The plaintiff's complain should be dismissed.

CONCLUSION

For the foregoing reasons, Hazlet Township respectfully requests that its motion for summary judgment be granted, and the complaint be dismissed.

Respectfully submitted,



JAMES H. GORMAN
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Township of Hazlet

Dated: April 11, 2016

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HIGHVIEW HOMES, LLC, Plaintiff, v. TOWNSHIP OF HAZLET and PLANNING BOARD OF THE TOWNSHIP OF HAZLET, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MONMOUTH COUNTY DOCKET NO. MON-L-4224-15 CIVIL ACTION DEFENDANT'S RESPONSE TO PLAINTIFF'S COUNTER-STATEMENT OF MATERIAL FACTS

Defendant, Township of Hazlet, submits this response to plaintiff's Counter-Statement of Material Facts:

1. Disputed. No facts are asserted. No citation to the motion record is set forth.

2. Disputed. No facts are asserted. No citation to the motion record is set forth.

3. Disputed. No facts are asserted. No citation to the motion record is set forth.

4. Disputed. No facts are asserted. No citation to the motion record is set forth.

5. Disputed. No facts are asserted. No citation to the motion record is set forth.

6. Disputed. No facts are asserted. No citation to the motion record is set forth.

7. Admitted.

8. Disputed. The order speaks for itself. The Township of Hazlet is not a party to that litigation.

9. Disputed. February 19, 2016, a Compliance Plan prepared by Heyer, Gruel & Associates was submitted to Philip Caton, P.P., Special Master in a case entitled Elegant Properties, LLC v. Township of Hazlet, Docket No. MON-L-1559-08. Gorman Supp. Cert. para. 3.

10. Admitted, but not material.

11. Admitted, but not material.

12. Admitted, but not material.

13. Admitted, but not material.

14. Admitted, but not material.

15. Admitted, but not material.

16. Disputed. No facts are set forth. No citation to the motion record is set forth.

17. Admitted, but not material.

18. Disputed. No facts are set forth. No citation to the motion record is set forth.

19. Disputed. No facts are set forth. No citation to the motion record is set forth.

20. Disputed. No facts are set forth. No citation to the motion record is set forth.

21. Disputed. No facts are set forth. No citation to the motion record is set forth.

22. Disputed. No facts are set forth. No citation to the motion record is set forth.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

27. The July 28, 2008 order is admitted. The November 17, 2009 order is admitted. The September 9, 2010 decision of the Appellate Division is admitted. All other alleged facts are disputed.

28. Disputed. No facts are set forth. No citation to the motion record is set forth.

29. Disputed. No facts are set forth. No citation to the motion record is set forth.

30. Admitted.

31. Disputed. No facts are set forth. No citation to the motion record is cited. Furthermore, the legal analysis contained in this paragraph is not supported by the Supreme Court's decision in Mount Laurel IV.

32. Disputed. No facts are set forth. No citation to the motion record is set forth.

33. Admitted, but immaterial.

34. Disputed, and immaterial.

35. Disputed, and immaterial.

36. Admitted.

37. Admitted.

38. Admitted.

39. Disputed. Plaintiff proposed only self-described "luxury" apartments, up through August 12, 2015 when plaintiff's planner first proposed a deficient 10% affordable set-aside, where COAH rules required a minimum of 15%. Pino Cert. paras. 10, 11, 12.

40. Admitted.

41. Admitted.

42. Admitted.

43. Admitted.

44. Admitted. Said report "calls for a comprehensive luxury rental apartment community" without any low and moderate income units proposed, as set forth at the bottom of page 2. Report attached as Ex. G to Pino Cert. and Ex. 1 to Cofone Cert.

45. Admitted.

46. Disputed. No affordable units were proposed until Ms. Cofone's email of August 12, 2015 and only was a deficient 10% set-aside proposed. Pino Cert. para. 13. Prior to that email, no affordable units were proposed. Pino Cert. paras. 7, 8, 9, 10, and 11. The statement that the plaintiff" modified its proposed developments [sic] to . . . increase the

affordable set-aside" is only true in the mathematical sense that any number above zero would be an "increase".

47. Admitted.

48. Disputed. This so-called statement contains no specific facts, and merely the general conclusion of the affiant.

49. Disputed. This so-called statement contains no specific facts, and merely the general conclusion of the affiant.

50. Disputed. This so-called statement contains no specific facts, and merely the general conclusion of the affiant. Furthermore, the Township's planner was scheduled to meet with the Township Committee on November 16, 2015 to discuss plaintiff's deficient "luxury" plan. Pino Cert. para. 29 and 30.

Dated: April 11, 2016

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HIGHVIEW HOMES, LLC, Plaintiff, v. TOWNSHIP OF HAZLET and PLANNING BOARD OF THE TOWNSHIP OF HAZLET, Defendants.	:	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION DOCKET NO. MON-L-4224-15 CIVIL ACTION CERTIFICATION OF SERVICE

I hereby certify that the enclosed reply brief and supporting papers were served within the time prescribed by the Rules of the Court upon the Clerk of the Superior Court, Monmouth County Courthouse, 71 Monument Park, Freehold, NJ 07728 and upon:

Honorable Jamie S. Perri, J.S.C.
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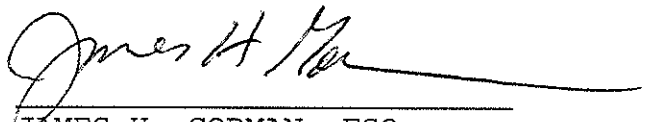

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Dated: April 11, 2016