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December 12, 2016

Via Hand Delivery
Clerk
Monmouth County Superior Court
Courthouse
P.O. Box 1266
71 Monument Park
Freehold, NJ 07728-1266

Re: Highview Homes, LLC v. Township of Hazlet, et al
Docket No. L-4224-15

Dear Sir/Madam:

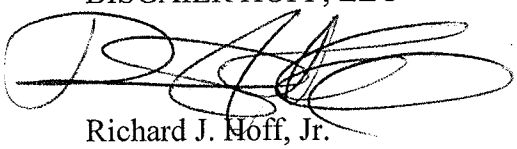
Our firm represents Plaintiff, Highview Homes, LLC ("Highview") in the above-referenced matter. Enclosed for filing are an original and one (1) copy of the following documents:

1. Letter Brief in Reply to the Township of Hazlet's Opposition to Highview's Motion for Partial Summary Judgment.

This motion is currently returnable Friday, December 16, 2016. Kindly file the original and return the stamped "filed" copy to our office in the enclosed self-addressed stamped envelope provided. Also, please bill our Superior Court account number 142320 any fees associated with this request.

Thank you for your assistance.

Very truly yours,
BISGAIER HOFF, LLC



Richard J. Hoff, Jr.

Enclosure
cc: Hon. Jamie S. Perri, J.S.C. (w/encl. via hand delivery)
James Gorman, Esq. (w/encl. via e-mail and overnight)
Gregory Vella, Esq. (w/encl. via e-mail and overnight)
Highview Homes, LLC (w/encl. via e-mail)

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Re: Highview Homes, LLC v. Township of Hazlet, et al
Docket No. L-4224-15

Dear Judge Perri:

Our office represents Plaintiff, Highview Homes, LLC ("Highview"), which has filed a Motion for Partial Summary Judgment in the above-captioned matter. Please accept this letter in lieu of a more formal brief in reply to the December 7, 2016 Opposition Brief filed on behalf of the Township of Hazlet ("Hazlet"). Highview's Motion is currently returnable for December 16, 2016.

Introduction

Consistent with Hazlet's modus operandi when it comes to affordable housing, Hazlet purports to have satisfied the entirety of its Mount Laurel obligation on the basis of (predominantly age restricted) units that existed prior to both the Council on Affordable Housing's ("COAH") promulgation of municipal obligations and this Court's 2008 determination that Hazlet had failed to achieve constitutional compliance with its Mount Laurel obligation. In other words, the very claims that Hazlet makes today relative to its Mount Laurel compliance were rejected by this Court in 2008. As such, the proper focus of this Court is to determine whether Hazlet's actions, since 2008, have brought the Hazlet into affordable housing compliance. It is clear, based upon undisputed facts, that Hazlet has continued in its ongoing failures under the Mount Laurel Doctrine.

In its latest attempt to avoid such a finding of continuing non-compliance, Hazlet argues, incredibly, that not only has it complied with its Mount Laurel obligations, but it has established an entitlement to 638 total credits. Such a claim is so fanciful that it hardly warrants a response. Nevertheless, so as to leave no doubt that Highview's Motion for Partial Summary Judgment should be granted, Highview offers the brief points of reply below.

Factual and Procedural Background

Highview relies on the factual and procedural background set forth in its November 18, 2016 moving Brief.

Legal Argument

In an effort to tailor this reply as narrowly as possible, Highview responds to the specific legal points raised by Hazlet. However, before immersing into the details of "Prior cycle credits" and RDP analysis, an overarching point should be noted. Specifically, COAH assigned Hazlet a Prior Round affordable housing obligation of 407 new units. Under no circumstances has Hazlet provided for the entirety of that need even when providing Hazlet a one-for-one credit for its 100% age restricted Bethany Towers project. While for the reasons set forth below (even when allowing Hazlet to utilize COAH's RDP adjustment process), Hazlet still falls well short of meeting its generously adjusted affordable housing obligation, it remains revealing that under no iteration can Hazlet even approach its 407 new unit obligation, which only addresses the period 1987-1999.

A. Even Assuming that Hazlet is Entitled to a Vacant Land Adjustment, Hazlet Is Not Entitled to Utilize Pre-Existing, Prior Cycle Credit to Address Its Forward Looking Realistic Development Potential

In its Brief, Hazlet offers a cocktail of Prior Cycle credits and Realistic Development Potential (RDP) in an attempt to conjure the conclusion that despite doing virtually nothing in response to its Prior Round Obligation of 407 units, Hazlet is nonetheless compliant with the entirety of that Mount Laurel obligation. Hazlet's attempt to conflate and confuse distinct crediting mechanisms under COAH's regulations does not alter the ultimate conclusion. Hazlet has failed to establish compliance with its Prior Round obligation of 407 units, whether or not Hazlet is ultimately entitled to a vacant land adjustment.[1]

Highview would acknowledge, for purposes of this Brief, that Hazlet is entitled to Prior Cycle credits for the entirety of the 140 age restricted units within Bethany Towers. The effect of characterizing Bethany Towers as Prior Cycle credits means that Hazlet is entitled to take credit for all 140, despite the fact that COAH regulations would otherwise cap age restricted units at 25% of a municipality's obligation. See N.J.A.C. 5:93-3.1. However, where Hazlet has erred, is in its assumption that it can apply those Prior Cycle credits after performing its vacant land adjustment. Such an approach is incorrect.

While COAH regulations allow Prior Cycle credits to be credited on a one-for-one basis, that one-for-one basis is against a municipality's entire affordable housing obligation, not one

[1] While Highview accepts, for purposes of this Motion, that the Township is entitled to their claimed vacant land adjustment that results in an RDP of 61 units, that is an analysis that should ultimately be reviewed by the Court's Special Master and approved by this Court. As Hazlet has excluded from that analysis sites that have the potential for redevelopment, like the very property that is the subject of this lawsuit, Highview does not believe that Hazlet's claimed RDP of 61 units is appropriate.

that may be adjusted based on a lack of vacant land. As COAH's definitions make clear, "Prior cycle credits may be requested for eligible units, except for rehabilitated units, constructed between April 1, 1980 and December 15, 1986 in petitioning to address the 1987-1999 obligation." See N.J.A.C. 5:93-1.3, "Prior Cycle Credits," emphasis added. In other words, Prior Cycle credits "come off the top" of a municipality's obligation. In the case of Hazlet, it means that the 140 age restricted units within Bethany Towers can be applied on a one-for-one basis against the entirety of its Prior Round Obligation (including rehabilitation) of 434 units. The end result is that Hazlet has an outstanding obligation of 294 units that is must address after credit for Bethany Towers (434 – 140 = 294).

To allow for Prior Cycle credits to apply against a RDP creates the absurd result being advocated by Hazlet here. Specifically, a municipality that claims a lack of vacant land to meet its affordable housing obligation moving forward, calculates an RDP that then gets satisfied by units that already exist. Such a result is not only at odds with COAH's definition of "Prior Cycle credits," but COAH's regulations that relate to the calculation and implementation of a municipality's RDP. Specifically, COAH regulations provide that a "municipality may address its RDP through any activity approved by the Council pursuant to N.J.A.C. 5:93-5." See N.J.A.C. 5:93-4.2(g). That referenced section of COAH regulations, N.J.A.C. 5:93-5, provide the many number of compliance mechanisms that may be utilized by a municipality from inclusionary zoning, to accessory apartments to others. What is not contained within N.J.A.C. 5:93-5 is "Prior Cycle credits" because Prior Cycle credits, as explained above, are addressed and accounted for before any RDP analysis is undertaken.

The net result of the foregoing is that while Hazlet can claim full credit for Bethany Towers, those credits must be assessed against its Prior Round, pre-credited need of 434 units. As a result, Hazlet must still establish that it has complied with the then remaining obligation of 294 units. Of that remaining obligation, Hazlet claims entitlement to an RDP of 61 units. With respect to that RDP of 61 units, two aspects are critical (and fatal to Hazlet's new found argument). First, Bethany Towers cannot be utilized as it has already reduced Hazlet's Prior Round obligation from 434 to 294 and, second, any RDP analysis is subject to an age restricted cap. See N.J.A.C. 5:93-5.14(a). With the foregoing, correct framework, Hazlet cannot establish compliance with its self-decreed RDP of 61 units, as such a reduction still requires Hazlet to demonstrate evidence of 46 affordable units that are not age restricted. Hazlet cannot so demonstrate.

The above conclusion of not allowing Bethany Towers to be utilized against Hazlet's RDP not only comports with COAH's regulations, but the nature of COAH's adjustment processes. The concept of RDP, is forward looking. RDP is intended, as its very words suggest, to address a municipality's "development potential." Bethany Towers is existing, not a reflection of what Hazlet could do in the future. To utilize an existing development as a response to what is intended to address the remaining "development potential" in a municipality that claims a lack of vacant land is incongruous.

B. The Compliance Mechanisms Outlined in Hazlet's Opposition Brief Are Not Entitled to the Credit as Claimed by Hazlet.

Hazlet's Opposition Brief goes on to claim credit for a host of projects and/or initiatives that, for reasons previously briefed, are not entitled to credit against its affordable housing obligation. While Highview will not detail, at length, that which it has already briefed, a few words in reply are warranted as to each claim advanced by Hazlet.

1. Stone Road Has Not Been Rezoned and Cannot Be Entitled to Credit

Hazlet claims in its Brief (as it has previously) that it should be entitled to credit for a re-zoning(s) that never occurred. While such a claim is legally unsustainable, Hazlet's Brief suggests, as it has done previously, that Hazlet must await approval from the Court or Special Master prior to implementing affordable housing initiatives. Such a claim is spurious and inappropriately suggests that Hazlet's failures are attributable to parties other than itself. Hazlet does not need approval from this Court or its Special Master to rezone property in an effort to create realistic, affordable housing opportunities within its boundaries. The factual reality is that Hazlet did nothing in response to its Mount Laurel obligation and in 2008, as a result, was sued. Rather than learn from that experience and implement a constitutional affordable housing compliance plan that could have included the Stone Road site and/or others, Hazlet, again, did nothing beyond adopting draft plans that were never implemented. That failure is neither this Court's nor the Special Master's. It is Hazlet's and the consequences of that failure is the prospect of additional builder's remedy lawsuits, such as the present complaint.

2. Existing Mobile Home Parks That Are Not Subject to Affordability Controls are Not Entitled to Credit Against Hazlet's Affordable Housing Obligation

While Hazlet knows that it cannot claim credit under COAH regulations for existing mobile homes, it nonetheless asks for such credit. Hazlet should not only be denied that credit because it is against COAH's regulations (see N.J.A.C. 5:93-9.1, N.J.A.C. 5:93-3.1(e)(2)), but because Hazlet has done nothing to ensure that the mobile home parks remain in place and within the established affordability ranges. Hazlet could have performed a credits without controls survey (N.J.A.C. 5:93-3.2(b)(3)) with respect to these units or negotiated deed restrictions to ensure that such units were and would remain affordable. Yet Hazlet, as is so often the case, took no such initiative. Rather, Hazlet relies on the 2011 opinion of its own planner and failed legislation on the topic for justification that it is entitled to credit despite the fact that such a claim runs counter to COAH regulations. Hazlet's claims on this point should be rejected by this Court.

3. As Middle Road Was Constructed Prior to 1980 It Cannot be Counted Against Hazlet's Prior Round Obligation

In seeking credit for Middle Road, Hazlet's Brief asks "If Hazlet Township cannot receive credits for these units, why bother to seek an extension of the [existing] controls?" [See Hazlet Brief at p. 18.] The answer to that question is easy. It behooves Hazlet to secure an

extension of the expiring controls within the Middle Road project because such an extension may entitle Hazlet to credit against its Third Round (1999-2025) Mount Laurel obligation. One aspect of COAH's failed Third Round regulations that did survive judicial scrutiny was the concept of providing credit against Third Round obligation for extension of controls within existing projects. See N.J.A.C. 5:97-6.14. Accordingly, while Hazlet cannot claim credit for the Middle Road project for its Prior Round obligation (because it was constructed before 1980), the Township, if it is able to secure an extension of those controls, may be entitled to take credit against whatever Third Round obligation it may be determined to have.

C. The 2016 Draft Compliance Plan is Not Relevant to the Issue of Whether Hazlet Was Compliant with Its Mount Laurel Obligation as of the Date of Highview's Complaint (November 2015)

Highview "ignores" Hazlet's draft 2016 Plan because it is irrelevant to the relief Highview seeks. For purposes of Highview's potential builder's remedy entitlements, the date upon which satisfaction with the Mount Laurel Doctrine would be measured is the date upon which a builder's remedy lawsuit was filed. Toll Bros., Inc. v. Tp. of West Windsor, 303 N.J. Super. 518 (App. Div. 1996). To hold otherwise would allow a municipality to defeat a builder's remedy by adopting a plan after the filing of a builder's remedy complaint and then use that plan as proof of a municipal compliance. Accordingly, even if the forthcoming 2016 Plan constitutes proof of compliance (which it does not, as it repeats the same shortfalls of the 2011 Plan), such a concept of "retroactive" compliance has been rejected by New Jersey courts. See Toll Bros., Inc., supra, 303 N.J. Super. 518.

In West Windsor, the Appellate Division reasoned that while municipalities should be encouraged to work toward compliance after the filing of a builder's remedy complaint, those efforts cannot defeat what would otherwise be the plaintiff's potential remedies:

> In determining whether zoning ordinances and housing plans create a realistic opportunity to satisfy defendant's fair share housing obligation, the court must assess the extent to which the municipality has created realistic housing opportunities at two different points in time. For the purpose of determining whether [plaintiff] is entitled to a site-specific builder's remedy, defendant's conduct must be assessed at the point before it began amending its ordinances in response to this litigation. For the purpose of determining whether other relief should be granted, defendant's conduct must be assessed at the close of trial, and in light of any builder's remedy awarded by the Court. Van Dalen v. Washington Tp., 205 N.J. Super. 308, 334 n. 11, 500 A.2d 776 (Law Div.1984).
>
> Id. at 531.

In light of the foregoing standards, the issue of whether the Township is in compliance with its constitutional obligations under the Mount Laurel Doctrine can be synthesized to the following, simple question: on November 10, 2015, the date Highview's Complaint was filed, did the Hazlet's zoning regulations affirmatively create a realistic opportunity for the provision of at least 407 (or 88 if the Court determines Hazlet's RDP is 61 units) units of affordable housing that are required for the Prior Round? As the answer to that question is clearly "no," then Plaintiff has made the necessary, prima facie showing of the constitutional invalidity of the Hazlet's zoning regulations. See S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 222 (1983). Accordingly, the Court should grant Highview's motion for partial summary judgment.

CONCLUSION

For the foregoing reasons and the reasons stated in Highview's moving papers, Highview respectfully requests that the Court enter an Order granting Highview's motion for partial summary judgment, as discovery has shown there is no question that the Township has failed to comply with its constitutional obligations under the Mount Laurel Doctrine.

We thank the Court for its time and consideration, and look forward to the December 16, 2016 hearing date.

Respectfully submitted

BISGAIER HOFF, LLC

Richard J. Hoff, Jr.

cc: James H. Gorman, Esquire (via e-mail and overnight delivery)
Gregory W. Vella, Esquire (via e-mail and overnight delivery)