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

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

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PRELIMINARY STATEMENT

The Township of Hazlet has never used its zoning power to exclude low and moderate income households.

These excerpts from the Township's 2011 compliance plan (Hoff Cert., Ex. A, p.1) shows that **32%** of the households in the Township were lower income households:

> The Township is a substantially developed suburban residential community approximately 5.7 square miles in area (3648 acres). The population is approximately 20,334 and there are approximately 7,417 residential units.
>
> The Township has a diverse housing stock that includes single family detached dwellings, townhouses, age restricted multifamily dwellings, and mobile homes. Most of the residential units are modest single family homes on small lots in subdivisions created in the 1950's, 60's and 70's. The zoning ordinance allows development on lots as small as 5,000 square feet. The primary zoning pattern is on lots with 7,000 square feet.
>
> Mobile home units (manufactured housing) account for nearly 10% of the Township housing stock. The Township has eight mobile home parks and approximately 750 mobile home units.
>
> Hazlet Township also has affordable developments limited to age restricted low and moderate income households. Bethany Towers is a six story high-rise with 141 rental apartments, constructed in the early 1980's. Middle Road Village is a complex of two-story buildings with 212 rental units for low and moderate income households, built in the 1970's.
>
> As a result of historically utilizing the municipal zoning power over the past decades to provide for the development of a diverse housing

> stock affordable to all income levels, a substantial proportion of households in Hazlet Township are low or moderate income and occupy housing in standard condition. As of the year 2000, an estimated 32% of Township households, or 2327 households, were lower income households.

Thirty-two percent without ever considering the affordability of Hazlet's modest single family homes and townhouses.

Hazlet is not the type of municipality that Chief Justice Wilentz had in mind when he so eloquently wrote in Mount Laurel II, 92 N.J. 158, 209-210 (1983):

> The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.

Hazlet has welcomed everyone. Hazlet has always met its constitutional obligations.

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AND COUNTER STATEMENT OF FACTS

1. Denied. No facts are stated. It is legal argument.

2. Denied. No facts are stated. It is legal argument.

3. Denied. No facts are stated. It is legal argument.

4. Denied. No facts are stated. It is legal argument.

5. Denied. No facts are stated. It is legal argument.

6. Denied. No facts are stated. It is legal argument.

7. Denied. No facts are stated. It is legal argument.

8. Denied. No facts are stated. It is legal argument.

9. Admitted that the Township submitted a compliance plan in 2011. However, the Township has submitted a compliance plan to the Court in February 2016 prepared by Fred Heyer, P.P. (Gorman Cert., Ex. C, para. 6) Highview Homes, LLC ignores the 2016 compliance plan.

10. Admitted. However, the Superior Court has never reviewed the 2011 compliance plan.

11. Admitted that the 2011 claims an RDP of 61 units. The 2009 Compliance Plan claimed this same 61 until RDP.

12. Admitted. However, neither the court nor the special master have ever reviewed the vacant land adjustment or RDP.

13. Admitted.

14. Admitted.

15. Admitted.

16. Denied. No facts are stated. It is legal argument.

17. Denied. No facts are stated. It is legal argument.

18. Denied. No facts are stated. It is legal argument.

19. Denied. No facts are stated. It is legal argument.

20. a. Admitted. However, the 2011 compliance plan was never reviewed by the court or the special master.

b. Admitted. However, the 2011 compliance plan was never reviewed by the court or the special master.

c. Admitted. However, the 2011 compliance plan was never reviewed by the court or the special master.

d. Admitted that it was constructed prior to 1980. The remainder contains no facts, merely legal conclusions.

1. Admitted.

21. Denied. No facts are stated. It is legal argument.

22. Denied. No facts are stated. It is legal argument.

23. Admitted.

24. Admitted.

25. Denied. Judge Lawson's order of July 28, 2008 granted a ten year immunity from builder's remedy lawsuits. Judge O'Brien's an order of November 17, 2009 granted a ten year immunity from builder's remedy lawsuits. (Gorman Cert., para. 2 and 4, Exs. A and B).

26. Denied. No facts are stated. It is legal argument.

27. Admitted that the mobile home park units are not deed restricted. The remainder is denied.

28. Admitted.

29. Denied. No facts are stated. It is legal argument.

30. Denied. No facts are stated. It is legal argument.

31. Denied. No facts are stated. It is legal argument.

32. Denied. No facts are stated. It is legal argument.

33. Denied. No facts are stated. It is legal argument.

34. Admitted. However, Mount Laurel IV did not authorize such a filing.

COUNTER-STATEMENT OF MATERIAL FACTS

1. In the Elegant Properties matter, Hazlet Township submitted a compliance plan dated March 28, 2009 prepared by Marcia Shiffman, P.P. The plan was never reviewed by the special master. (Gorman Cert., para. 3).

2. Hazlet Township submitted a second compliance plan dated September 2011, prepared by Richard S. Cramer, P.P. (Hoff Cert., Ex. B). This second compliance plan was never reviewed by the special master (Gorman Cert., para. 5).

3. Hazlet Township submitted a third compliance plan, dated February 18, 2016 prepared by Fred Heyer, P.P. This plan has been informally reviewed by the special master. (Gorman Cert., para. 6, Ex. C).

4. The 2011 Cramer plan is based upon a Realistic Development Potential of 61 units. (Hoff Cert., Ex. B, p. 5).

5. The 2011 Cramer plan concludes that the 61 unit RDP is met by existing units at Bethany Towers, a 141 unit age restricted affordable mid-rise built in 1982. (Hoff Cert., Ex. B, p.5).

6. The 2011 Cramer plan concludes that Hazlet had a rehabilitation obligation of 27 units, which was met by 5 rehab units and 22 credits from Bethany Towers (Hoff Cert., Ex. B., p.4-5).

7. The 2011 Cramer plan concludes that Hazlet had a prior round obligation of 407 units. Sixty-one units (from the RDP calculation) are applied against the 407, leaving an unmet need of 346 units. (Hoff Cert., Ex. B, p. 5).

8. The 2011 Cramer plan concludes that Hazlet Township has 638 credits, to be applied against, and exceeding, the 346 unit unmet need. (Hoff Cert., Ex. B, p. 12).

9. Those 638 credits are derived from the following mechanisms (with references to the 2011 Cramer plan):

Remainder of Bethany Towers (p. 5)	58
Elegant Properties (p. 6)	10
Johnson Townhomes (p. 10)	4
Stone Rd. Rezoning (p. 6)	52
Credits to be derived if 842	

existing mobile homes were rezoned for townhomes (p. 6-9)	202
Expansion of mobile home parks (p. 9)	100
Middle Road Village (p. 10)	212
Total	638

10. Holy Family requested a zoning change in 2011 to permit business highway commercial use on a portion of the property. The requested zoning ordinance was adopted on March 15, 2011. (Gorman Cert., para. 8, Ex. E). In 2011, the Holy Family property was not available as a site to meet the unmet need.

11. Even without credits for mobile homes, the 2016 Heyer compliance plan concludes that the Township has satisfied its unmet need without the Holy Family site. (Gorman Cert., Ex. C, Heyer report p. 36).

LEGAL ARGUMENT

POINT I

THE 2011 COMPLIANCE PLAN SATISFIES THE TOWNSHIP'S MOUNT LAUREL OBLIGATIONS

A. THE TOWNSHIP IS ENTITLED TO A VACANT LAND ADJUSTMENT.

The Fair Housing Act, at N.J.S.A. 52:27D-307(c)(2)(f), provides that there shall be a "Municipal adjustment of the present and prospective fair share based upon available vacant and developable land . . . and adjustments shall be made whenever . . . vacant and developable land is not available in the municipality."

Pursuant to COAH regulations, at N.J.A.C. 5:93-1.3, a municipality would then have a "realistic development potential (RDP)," defined as the "municipal obligation calculated pursuant to N.J.A.C. 5:93-4.2(f)."

Hazlet's expert, Richard Cramer, P.P. calculated the RDP as 61 units, a calculation accepted by the plaintiff in its motion brief at p. 16.

There is no dispute that the Bethany Towers development built in 1982 resulted in 141 affordable rental units. Hazlet Township is entitled to utilize 61 of those credits to satisfy its RDP.

COAH regulations, makes it clear that Hazlet is entitled to a one-for-one credit for the Bethany Towers units:

> § 5:93-3.2 Credits for units constructed between April 1, 1980 and December 15, 1986
>
> (a) A housing unit created and occupied between April 1, 1980 and December 15, 1986 is eligible for a one for one credit when it has been developed specifically for households whose income does not exceed 80 percent of median income and the unit is governed by controls on affordability that are the same as those set forth in N.J.A.C. 5:92-12 and Appendix E, incorporated herein by reference.

Highview incorrectly argues that the RDP credit is limited to 25%, just 15 units, since Bethany Towers is a senior development. However, Judge Cuff writing for the Appellate Division in In re Adoption of N.J.A.C. 5:94 and 5:95, 390 N.J. Super. 1, 79-80 (App. Div. 2007), cert. denied, 192 N.J. 71 (2007) (emphasis added), made it clear that COAH's 25% limit applied only to units built after 1994:

> Moreover, since June 6, 1994, COAH has permitted municipalities to age-restrict up to twenty-five percent of new affordable housing. N.J.A.C. 5:93 -5.14.

Plaintiff cites to this same authority, but fails to inform the court that the 25% limit applied only to units built after June 6, 1994.

As further support, Hazlet Township relies upon an email dated October 31, 2016 from Maria Connolly, P.P., principal planner at COAH to Fred Heyer, the Township's planner, in which Ms. Connolly was asked:

> Are prior cycle credits (80 - 86) subject to the 25% cap [on age-restricted] or are they credited on a one for one basis?

And she responded:

> No, prior cycle credits were just credited on a one-for-one basis because there were no rules when they were created.

(Gorman Cert. Ex. G)

Plaintiff also mistakenly relies on N.J.A.C. 5:80-26.3 and 5:93-7.3 to incorrectly argue that Bethany Towers requires two and three bedroom units to quality for credits. The cited bedroom distribution rules for two and three bedroom units apply to "developments that are not age-restricted."

Thus, the Township's 61 unit RDP was fully satisfied by the Bethany Towers development. A 2001 COAH handbook makes it clear that the balance of the Township's first and second round obligation becomes an "unmet need" which "remains as a goal to be addressed." (emphasis added). (Gorman Cert., Para. 7, Ex. D).

Referring back to In re Adoption of N.J.A.C. 5:94 and 5:95, supra at 84-85, Judge Cuff explains that unmet need must be met "should additional land become available":

> Briefly, the FHA directs COAH to adopt criteria and guidelines for adjusting a municipality's fair share if a municipality lacks sufficient vacant and developable land. N.J.S.A. 52:27D-307(c)(2)(f). For many municipalities, the second round fair share obligation exceeded the municipality's capacity to meet its fair share. Under the second round rules, a municipality's fair share plan had to provide a method for satisfying its fair share, that is to say, its unmet need, should additional land become available.

Most significantly, the subject property, the Holy Family school site, was certainly not available for affordable housing when the September 2011 compliance plan was submitted to the court. That property has just been rezoned at the request of Holy Family to permit commercial use in the Business Highway zone along Route 36. (Gorman Cert., para. 8, Ex. E).

There is nothing in the record claiming that any land was available in 2011. Certainly, the Holy Family property was not available as an affordable housing site. Hence, Hazlet Township satisfied its first and second round obligations by providing 61 units from Bethany Towers to meet its RDP.

B. THE UNMET NEED IS MET

The Township's 2011 compliance plan provided mechanisms to meet the unmet need:

1. 58 credits remain from the Bethany Towers site (Block 164, Lot 2.01).

As set forth in the 2011 compliance plan, the Township COAH assigned a rehabilitation share of 27, and a prior round obligation of 407, totaling 434 credits. The Township has 5 rehabilitation credits.

The math is as follows:

Rehab share	27
Rehab credits	-5
From Bethany Towers	-22
Rehab Balance	0
RDP	61
From Bethany Towers	-61
RDP Balance	0

Prior Round	407
From Bethany Towers	-61
Unmet Need	346
Remainder Beth. Twrs.	-58
Remaining Unmet Need	288

The special masters have not commented on these credits. If there is any factual question as to the inclusion of the Bethany Towers units, the court should have the opportunity to hear factual and expert testimony on the issues.

2. 52 credits from Stone Road site (Block 65, Lot 1).

The remaining unmet need is met with various proposals. This 26 acre site produces 52 credits. It is the last remaining farm in the Township. The Township awaits the approval of the special master of this proposed rezoning. If there is any factual question as to the inclusion of this site, the court should have the opportunity to hear from the parties' planners and the special master.

3. 10 credits from Elegant Properties (Block 66, Lot 1.02).

The 2009 builder's remedy provided for 10 affordable units. Plaintiff does not dispute these credits.

4. 4 credits for Johnson Townhouses (Block 62, Lot 1).

The property obtained a use variance, and is required to produce 4 affordable units. Plaintiff does not dispute these credits.

*5. 202 credits for **NOT** rezoning the existing mobile home parks.*

The Township's position is that the existing mobile home parks could be rezoned for multi-family housing, which would result in 202 new affordable units under COAH's

rules. But in that process the existing 842 mobile homes would be lost as affordable housing opportunities, resulting in a net loss of 640 lower income units.

If the goal is affordable housing, it makes far more sense to keep the existing 842 mobile homes, rather than rezoning the sites for townhouses.

The Township recognizes that this argument is a square peg in COAH's round hold. But it makes sense. It is logical. Courts are not bound to follow counter-productive COAH rules.

The special masters have not commented on these credits. Hazlet Township should be given the opportunity to present all relevant evidence to support this position.

Others agree with this logic. As Mr. Cramer notes in his 2011 compliance plan, at pp. 8-9:

> The Township further notes that application of credit for manufactured housing, even when it is not subject to affordability controls, is compatible with the findings and recommendations of the Governor's Housing Opportunity Task Force, as outlined in its March 19, 2010 report entitled Housing Opportunity Task Force Findings & Recommendations (accessed on September 6, 2011 at: http://www.nj.gov/governor/news/reports/pdf/20100323_COAH.pdf. Specifically, the Governor's Housing Opportunity Task Force report indicated that "types of affordable housing should . . . be flexible [and] . . . should include all options to achieve a variety of housing, including, but not limited to, . . . manufactured housing" (Page 21). The Governor's Housing Opportunity Task Force report also indicated that "not all units

require deed restriction" (Page 36). It indicated that "some types of housing are inherently less expensive than traditional construction [and that it] . . . believes a municipality should be able to receive credit for an affordable unit whether or not it is deed restricted" (Page 36).

. . .

The Legislature has recognized that "Homes located in a mobile home park may be deemed qualified housing units without affordability controls" S1/A3447 passed by New Jersey Senate and Assembly on January 10, 2010. Although that bill was conditionally vetoed by the Governor on other grounds, it is clear that both the Governor and the Legislature recognize that mobile homes are intrinsically affordable.

And the Supreme Court in Mount Laurel II, supra at 269 (citations omitted) said the same:

As several commentators have noted, the problem of keeping lower income units available for lower income people over time can be a difficult one. Because a mandatory set-aside program usually requires a developer to sell or rent units at below their full value so that the units can be affordable to lower income people, the owner of the development or the initial tenant or purchaser of the unit may be induced to re-rent or re-sell the unit at its full value.

This problem, which municipalities must address in order to assure that they continue to meet their fair share obligations, can be dealt with in two ways. First, the developer can meet its mandatory quota of lower income units with lower cost housing, such as mobile homes. . . .

6. 100 credits for expansion of mobile home parks.

The same logic applies to the expansion of the Township's mobile home parks.

The only authority that Highview cites for its argument that lower cost mobile homes must also be have affordability controls is a COAH resolution approving a settlement, with no findings, no analysis, and no precedential value.

The inescapable fact is that mobile homes remain affordable without controls. They are the type of housing that municipalities and the courts should encourage, not thwart with unnecessary affordability controls. They are *de facto* affordable.

The special masters have not commented on these credits. If this issue is in doubt, the court should have the opportunity to hear from the planners and the special master.

7. 212 credits from Middle Road Village (Block 120, Lot 87).

These affordable senior rental units were built in the 1970's. The affordability controls expire in 2023. Hazlet seeks to extend those controls. Per COAH regulations, these units do not count because were built too early, before 1980. Hazlet acted voluntarily to provide affordable

housing, only to have that admirable effort negated decades later by COAH's somewhat arbitrary rule that pre-1980 units do not count.

Common sense dictates that Hazlet should be given 212 credits for seeking an extension of the soon expiring affordability controls.

If Hazlet Township cannot receive credits for these units, why bother to seek an extension of the controls? Why not just let the owner convert them to market rate units, with 212 affordable units being lost? Another example of the illogical nature of some of COAH's rules.

The special master has not commented on these credits. If there is any doubt as to the inclusion of these credits, the court should have the opportunity to hear from the special master and the parties' planners.

* * *

In sum, by these mechanisms, Hazlet has demonstrated 638 credits to be applied against an unmet need of 346 units -- a surplus of 292 credits to be applied against the third round, whenever that obligation is determined.

POINT II

THE 2016 COMPLIANCE PLAN ALSO DEMONSTRATES COMPLIANCE

Hazlet Township has submitted a 2016 compliance plan dated February 19, 2016, prepared by Fred Heyer, P.P. (Gorman Cert., para. 6, Ex. C)

Highview simply ignores this latest version of Hazlet's compliance plan. The special master, Philip Caton, P.P. has reviewed the 2016 plan, but has not issued a written report. Mr. Caton has met with the parties, offered informal comments, and generally has made efforts to mediate the dispute.

The 2016 Heyer compliance plan is similar to the 2011 Cramer compliance plan, except that Mr. Heyer has not included credits for the existing mobile home parks or for their expansion. Even after excluding credits for mobile homes, Mr. Heyer concludes that Hazlet has satisfied its first and second round obligations, and has satisfied its unmet need.

Relying on either the 2011 Cramer plan or the 2016 Heyer Plan, Hazlet Township has satisfied its constitutional obligation for the first and second rounds.

POINT III

HAZLET WAS NOT AUTHORIZED TO FILE A DECLARATORY JUDGMENT ACTION

As to the third round, the Supreme Court has not authorized Hazlet to file a declaratory judgment action.

The Supreme Court clearly set forth the parameters for the declaratory judgment process it created in Mount Laurel IV, 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.

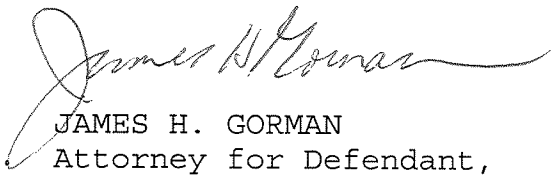
Plaintiff's continued assertion that Hazlet Township had to file a declaratory judgment action for a third round determination is without merit.

Hazlet Township was under the court's jurisdiction and remains so. The Township's third round obligation remains undetermined.

CONCLUSION

For the foregoing reasons, Hazlet Township respectfully requests that plaintiff's motion for summary judgment be denied.

Respectfully submitted,



JAMES H. GORMAN
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Township of Hazlet

Dated: December 7, 2016