JAMES H. GORMAN
ATTORNEY AT LAW
1129 BROAD STREET
SHREWSBURY, NJ 07702

TEL: (732) 542-4200
FAX: (732) 542-2202
JGORMAN@GORMAN-LAW.COM

January 3, 2017

VIA LAWYERS SERVICE

Honorable Jamie S. Perri, J.S.C.
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: January 20, 2017

Dear Judge Perri:

Please accept this letter brief on behalf of the defendant, Township of Hazlet (also referred to as the "Township" or "Hazlet"), in support of its motion to compel the production of documents from the plaintiff, Highview Homes, LLC ("Highview").

PRELIMINARY STATEMENT

Highview has withheld numerous documents from Hazlet Township. Highview has asserted privileges for 44 documents. (See plaintiff's privilege log, Ex. A to Gorman Cert.)

Hazlet Township seeks the production of just eight of those 44 documents. Hazlet Township is not seeking the other 36 documents for which there appears to be a legitimate claim of privilege. But there appears to be no legitimate basis for Highview to withhold the eight documents sought by the Township in this motion.

STATEMENT OF FACTS

Pursuant to the case management order dated August 2, 2016, Hazlet Township served interrogatories upon the plaintiff Highview Homes, LLC on August 4, 2016. Gorman Cert. ¶2. The plaintiff responded on September 15, 2016 and redacted or withheld documents subject to a privilege log. Gorman Cert. ¶2, Ex. A.

The documents sought by Hazlet Township are identified on Highview's privilege log as:

Bates Start and End	Date	Prepared By	Received By	Privilege
HH000168 - HH000193	4/23/2015	Highview Homes, LLC	Diocese of Trenton (Real Estate Contract)	Redacted proprietary/confidential information
HH000198 - HH000199	7/14/2015	John Abene	Jeffrey Gale, Esq., Gail Gordon, David Roskos, Esq.	attorney client privilege, attorney work product
HH001003 - HH001005	9/18/2015	Jeffrey Gale, Esq.//John Abene	John Abene, Christine Cofone//Gail Gordon, Jim Smith, Jeffrey Gale, Esq., Christine Cofone	redacted attorney client privilege, attorney work product

Bates Start and End	Date	Prepared By	Received By	Privilege
HH001010 - HH001012	8/7/2015	Stephen A. Urban, Esq.	Jim Smith, John Abene, Danielle Kinback, Esq., Gail Gordon	attorney client privilege, attorney work product
HH001035	7/24/2015	John Abene	Jeffrey Gale, Esq., Victor Herlinsky, Esq., Steve Bradach (Highview), Mike Abene, Gail Gordon	attorney client privilege, attorney work product
HH001106 - HH001107	4/29/2015	John Abene	Ryan P. Kennedy, Esq., Gail Gordon	attorney client privilege, attorney work product
HH001108 - HH001109	5/20/2015	John Abene	Jeffrey Gale, Esq., David M. Roskos, Esq., Gail Gordon, Mike Abene	attorney client privilege, attorney work product
HH001113 - HH001115	5/20/2015	David M. Roskos, Esq.	John Abene, Jeffrey Gale, Esq., Gail Gordon, Mike Abene, Neil Pirozzi	attorney client privilege, attorney work product

The Township seeks an unredacted copy of the April 23, 2015 contract between Highview and Holy Family, the first document in the above list.[1] Highview provided only a redacted copy of its contract with Holy Family for the purchase of the subject property, Block 68.13, Lot 26 and Block 69.01, Lot 8 located on Route 36. Gorman Cert. ¶3, Ex. B.

Highview has blacked out all references to the details of the proposed development. For example, Highview has redacted the entire section entitled "Proposed Development" on page 4. Those redactions cover up the number of units proposed by Highview.

The redactions also cover up whether any affordable units, if any, were proposed. In an un-redacted portion of

[1] The Church of the Holy Family is a corporation with the Bishop of the Trenton Diocese as its president and the local pastor as its secretary.

the contract, it appears that none were proposed. Section 7.1.11 entitled, "Non-Market Rate Housing, makes it clear that Highview never intended to build any affordable housing since it "may terminate this Agreement" if the Property does become subject to any law relating to non-market rate housing..."

Hazlet Township seeks an unredacted copy of the contract so that the proposed number of units and the proposed number of affordable units, if any, are disclosed. Those numbers are relevant to whether the site is approvable, available, developable and suitable under COAH rules. Certainly, the parties to the contract have detailed knowledge as to what fits on the property.

Those numbers are also relevant to whether Highview acted in good faith in its dealings with the Township after the contract was signed.

The Township intends to later file a motion for summary judgement on the issue of Highview's lack of good faith. All those facts need not be detailed in this discovery motion. But some basic facts are needed to put this motion in context, to show why the contractual provisions may well shed light on Highview's lack of good faith.

John Abene, a principal of Highview, was deposed on October 21, 2016 and October 31, 2016. [Abridged transcripts are provided with the Gorman Certification as Exhibits C and D, with the October 21, 2016 transcript referred to herein as 1T, and the October 31, 2016 transcript as 2T.]

Mr. Abene produced his email of May 17, 2015, which shows that the Township wanted a 15% set aside from Highview from the beginning of discussions (Gorman Cert. ¶4 Ex. E, Dep. Ex. D-69). When asked, "But, your interpretation sitting here today of D-69 is that the town wanted 15 percent?", he answered, "That's what my email says. I didn't interpret it." 1T95:21-24.

Mr. Abene was asked, "Do you understand that the presumptive COAH set aside on rental is 15 percent?", and he answered, "Yes". 1T94:6-8.

Even though Mr. Abene acknowledged that the Township wanted a 15% set aside, and that COAH rules presumed a 15% set aside, Highview proposed no set aside whatsoever in its proposal to Hazlet prepared by Christine Cofone, P.P., dated July 2015.

That proposal was for 180 "luxury rental apartments". Gorman Cert. ¶5, Ex. F, Dep. Ex. D-29.

John Abene, admitted that Highview's proposal did not contain any affordable units. When he was asked, "Does D-29 [the Cofone proposal] refer to affordable units?", he candidly admitted, "No". 2T18:4-5.

Highview has admitted that the first time it offered any affordable units was in an email from Christine Cofone, dated August 12, 2015, which stated, "Just wanted to let you know the unit count is down to 156 and we are able to do a 10% Mount Laurel set aside". Gorman Cert. ¶6, Ex. G, Dep. Ex. D-30. When Mr. Abene was asked, "Do you have any documents that reflect that you offered Mount Laurel units on this property prior to D-30?", he candidly admitted, "No." 2T21:16-19.

Even though Highview knew the Township wanted a 15% set aside, and even though COAH rules presumed a 15% set aside, Highview never offered a 15% rental set aside prior to filing suit. Mr. Abene admitted that when asked whether "the last plan that [he] handed into the town was P-29 [sic D-29], the report from Cofone as modified by her email of D-30"; he answered, "That's correct I don't recall handing in any additional plans after that date." 2T47:25 - 48:5.

Highview's litigation concept plan submitted to Your Honor on August 31, 2016, has now jumped from 156 units to 262 units, now finally with a 15% set aside. Gorman Cert. ¶7, Ex. H.

Hazlet seeks an unredacted copy of the contract to find out the number of units, and the number of affordable units, if any, initially proposed by Highview. Highview's claim that the number of units is somehow confidential or proprietary is without merit, as set forth in Point I below.

As set forth in Points II and III below, the Township also seeks unredacted copies of seven emails received by Ms. Gail Gordon, a self-described public affairs consultant, related to the development of this property. These emails are listed in the chart above. One of those emails was produced with redactions; the other six were not produced at all. Gorman Cert.¶8. These emails were sent to Ms. Gordon well prior to this lawsuit being filed. These documents are not protected by an attorney-client privilege or by a work product privilege, as claimed by Highview.

Highview admitted, in response to Hazlet's Request for Admissions, that "Plaintiff retained Gail Gordon as a

public affairs consultant". Gorman Cert.¶9, Request and Response 16(a), Collectively Ex. J. Further when asked to admit that "Plaintiff retained Gail Gordon as an attorney", Highview responded, "Denied. Highview admits that Gail Gordon is an attorney, but denies that Highview retained Gail Gordon to provide legal services." Gorman Cert.¶9, Request and Response 16 (c), Ex. J.

Ms. Gordon's communications as a public affairs consultant are not protected under the attorney-client privilege. Nor do they fall under the attorney-work product exemption. There is no "public affairs consultant" privilege. Hazlet Township seeks unredacted copies of these seven emails sent to Ms. Gordon prior to litigation.

LEGAL ARGUMENT

POINT I

THE REAL ESTATE CONTRACT IS NOT PROPRIETY OR CONFIDENTIAL

Highview has provided a redacted copy of its contract with Holy Family. Plaintiff claims the redactions are "proprietary/confidential information."

A privilege for confidential information is not found in our court rules or in our statutes. It is a judicial concept, a weaker version of the trade secret privilege.

Trade secrets are protected under N.J.S.A. 2A:84-26 and N.J.R.E. 514. In Hammock v. Hoffman-LaRoche, 142 N.J. 356, 383-384 (1995), the Supreme Court defined a trade secret as:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

In Hammock, the plaintiff filed a products liability suit, alleging that her unborn baby suffered severe birth defects after the plaintiff took Accutane, a prescription

drug made by Hoffman-LaRoche. Id. at 361. Hoffman-LaRoche resisted producing documents, "contending that many of the documents sought contained trade secrets and confidential and proprietary information, or were protected by the physician-patient privilege." Id. Disclosure to the plaintiff was required "under a protective order sealing the documents." Id.

In Hammock, there was no question that the plaintiff was entitled "to examine the documents." Id. at 385. When plaintiff's suit was dismissed, a public interest group, Public Citizens Group, Inc., sought to unseal the documents. The Supreme Court remanded the matter to the trial level, with strong language noting that the public, not just a party, has rights to review the documents.

The Supreme Court ruled:

- "Confidential information and proprietary information are not entitled to the same level of protection from disclosure as trade secret information." Id. at 383. (citation omitted).

- "Documents that are proprietary must be found compelling in their secrecy interests to overcome the presumption of public access." Id. at 384.

- "The standard we have adopted recognizes a very strong presumption in favor of public access." Id. at 386.

- And, like for other claims of non-disclosure, "the trial court must examine *each*

> document individually and make factual findings with regard to why the presumption of public access has been overcome." Id. at 382.

Hammock tells us that it is Highview's obligation to seek a protective order under R.4:10-3(g), requiring "for good cause shown" that "a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way." Id. at 369.

Relying upon Hammock, the Appellate Division in a recent case, Capital Health v. Horizon Healthcare, 446 N.J. Super. 96 (App. Div. 2016), considered whether some hospitals, relegated to a second tier under Horizon's new OMNIA health plan, had a right to unredacted copies of an internal Horizon report and other documents between Horizon and other hospitals. The court conducted an *in camera* review, and found that "the report contains highly confidential, 'competitively sensitive,' and proprietary information that could give St. Peter's and Capital [two of the plaintiff hospitals] a competitive edge in negotiating rates with Horizon." Id. at 119.

It makes perfect sense that such "highly confidential" "competitively sensitive" needs some protection. But that is a far different situation than Highview's redaction of

the number of proposed units. There is no claim of injury to Highview from competitors if the numbers in the contract are disclosed. The only anticipated damage to Highview from disclosure is that Hazlet will likely have more facts to support its bad faith argument.

Hazlet is entitled to know the scope of Highview's proposed development. The number of units proposed and the number of affordable units, if any, are relevant to this matter.

In a builder's remedy case, the court and Hazlet should certainly know what Highview and Holy Family agreed to as the proposed development. Suppose that the contract calls for far fewer units than Highview's 262 unit plan submitted to the court. Suppose that Highview did not propose any affordable units in its contract. Those numbers are crucial to this case.

The parties themselves did not attempt to keep these numbers confidential from others. There is no language in the contract requiring confidentiality on either party. There is no restriction prohibiting either party from recording the contract with the County Clerk. The last page of the contract shows the real estate broker as a

signatory. There is no obligation on the broker to keep the contract confidential.

Highview's claim of privilege as to the number of units it proposed is without merit. Highview seems intent on withholding that information because it will likely support Hazlet's bad faith defense.

POINT II

GAIL GORDON WAS NOT ACTING AS AN ATTORNEY, AND EMAILS SHE RECEIVED ARE OUTSIDE THE ATTORNEY CLIENT PRIVILEGE

Hazlet seeks the seven emails listed in the Statement of Facts sent to Ms. Gordon, all of which are claimed by Highview to fall within the attorney-client privilege. However, the facts show that Gail Gordon was acting as a public affairs consultant, not as an attorney. Her communications fall far outside the attorney-client privilege.

The recent phenomena of attorneys practicing as public affairs consultants, usually referred to as a lobbyist or a government affairs agent consultant, has resulted in a joint ethics opinion issued on December 10, 2015, entitled "Advisory Committee on Professional Ethics, Committee on the Unauthorized Practice of Law, Opinion 730, Advisory

Committee on Professional Ethics, Opinion 52, the Committee on the Unauthorized Practice of Law." That ethics opinion is attached to the Gorman Cert.¶10, as Ex. K.

That opinion concludes at page 9:

> In this Joint Opinion, the Advisory Committee on Professional Ethics and Committee on the Unauthorized Practice of Law find that lawyers may provide lobbying and government services in a non-legal setting but they cannot hold themselves out as lawyers, may not provide legal services, and must take measures to assure that their customers are aware that there is no lawyer-client relationship and the company does not afford the protections of a law firm.

That means, "In the law firm setting, the client is accorded all the protections that accompany the lawyer-client relationship. Those protections include the lawyer-client privilege . . .." Ethics Opinion p. 5.

However, since Gail Gordon was providing her services from her own consulting firm and not in a law firm setting, her communications are not privileged. The opinion unequivocally states, "The non-legal companies offering these services (through lawyers and non-lawyers) should be able to effectively communicate to their customers that they do not provide legal services or offer the protections of a lawyer-client relationship." Ethics Opinion p. 5.

Ms. Gordon supplied consulting services as a non-legal public affairs consultant. Her communications are not protected by the lawyer-client privilege.

Her communications fall outside the attorney-client privilege as discussed in Hedden v. Kean University, 434 N.J. Super. 1, 10 (App. Div. 2013)(citations omitted):

> It is well-settled under New Jersey law that communications between lawyers and clients "in the course of that relationship and in professional confidence" are privileged and therefore protected from disclosure. N.J.S.A. 2A:84A-20(a); N.J.R.E. 504(1). Specifically, the attorney-client privilege generally applies to communications (1) in which legal advice is sought, (2) from an attorney acting in his capacity as a legal advisor, (3) and the communication is made in confidence, (4) by the client.

Any attorney-client privilege that might have arguably attached to the seven requested emails was waived when the emails were sent to by Gail Gordon, a mere consultant with no claim to the privilege. As to waiver, N.J.S.A. 2A:84A-29 (N.J.R.E. 37) provides:

> A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

The voluntary disclosure of these seven emails to Gail Gordon waives the attorney-client privilege.

Highview's claim of attorney-client privilege for the seven emails sent to Gail Gordon is without merit.

POINT III

THE EMAILS SENT TO GAIL GORDON ARE NOT EXEMPT FROM DISCLOSURE UNDER THE WORK-PRODUCT DOCTRINE

As to these same seven emails, Highview also asserts an attorney work-product privilege. The work product privilege protects an attorney's trial preparation materials, and is found at R. 4:10-2(c):

> (c) Trial Preparation; Materials. ....[A] party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial. . . by or for another party or by or for that other only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The work product privilege is best described by the Appellate Division in Miller v. J.B. Hunt Transport, 339 N.J. Super. 144, 149 - 150 (App. Div. 2001):

> [A] statement or other document will be considered to have been prepared in anticipation of litigation if the "dominant purpose" in preparing the document was concern about potential litigation and the anticipation of litigation was "objectively reasonable."

In Miller, a statement concerning an accident taken from a truck driver by the attorney for the trucking company was found to be privileged work-product because "there no indication that . . .[the trucking company's] litigation attorney had any purpose for taking a recorded statement from [the driver] other than protecting the interests of [the company and the driver] in such anticipated litigation." Id. at 150.

"The fundamental test of applicability of the work-product privilege is whether the materials sought to be discovered were prepared in anticipation of litigation rather than in the ordinary course of business . . .. The rule protects from disclosure, an attorney's mental impressions, conclusions, opinions, or legal theories." Pressler & Verniero, Current N.J. Court Rules (2017 Ed.) R. 4:10-2, Comment 4.1. See also Rivard v. American Home Products, 391 N.J. Super 129, 155 (App. Div. 2007).

A party seeking to shield relevant work-product evidence from discovery has the burden of demonstrating that the privilege applies to that particular evidence.

Alden Leeds Inc. v QBE Specialty Insurance Co., 2015 N.J. Super. LEXIS 1793, Docket No. A-2034-14T1 (App. Div. 2015) (Gorman Cert.¶11, Ex.L), citing Payton v. N. J. Turnpike Auth., 148 N.J. 524, 539 (1997), and Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 551 (App. Div. 2003).

To determine whether a privilege applies, a trial court must conduct an "*in camera*" review, and then "make specific determinations regarding [the requesting party's] access to them, including an expression of reasons for the court's rulings." Payton v. N.J. Turnpike Auth., 148 N.J. 524, 550 (1997), citing the underlying appellate decision at 292 N.J. Super. 36, 52-53 (App. Div. 1996).

Payton dealt primarily with the attorney-client privilege, but the same in camera procedure is required when the work product privilege is claimed. Seacoast Builders Corp. v. Rutgers, supra at 542.

Work product is not entitled to the same level of protection as are attorney-client documents. "[P]rotection of the attorney-client privilege is more important than the protection of work product." Seacoast Builders, Id. at 554.

The Township respectfully requests an *in camera* inspection of the seven emails sent to Ms. Gordon to

determine if preparation for litigation was their "dominant purpose." From the limited information produced in the privilege log, they appear rather to be emails sent in the ordinary course of business in the spring and summer of 2015, well before the complaint was filed on November 11, 2015. They would appear to be emails related to the presentation of Highview's luxury rental development to the Township, not anticipated litigation.

Conversely, even if the emails do refer tangentially to the possibility of litigation, those references would bolster Hazlet's faith argument. If Highview was indeed proposing affordable units, it has an obligation to tell the Township and not hide in wait. Highview was not proposing any affordable units until Christine Cofone's email of August 12, 2015, and even then, Highview did not propose the presumptive 15% set aside.

Under R. 4:10-2(c), if the court finds that the documents fall within the work-product privilege, the documents bolster the bad faith defense and should be produced as the Township "has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

CONCLUSION

For the foregoing reasons, the Township of Hazlet respectfully requests that the court order Highview Homes to produce unredacted copies of the contract and of the seven emails sent to Highview Homes' public affairs consultant.

Respectfully submitted,

JAMES H. GORMAN
Attorney for Defendant,
Township of Hazlet

JHG/jo
cc: Motions Clerk, Superior Court of NJ, *via Lawyers Service*
Richard J. Hoff, Jr., Esq., *via Email & Lawyers Service*
Gregory W. Vella, Esq., *via Email & Regular Mail*
Client, *via email*