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October 7, 2016

**VIA FEDEX**
Hon. Jamie S. Perri, J.S.C.
Superior Court of New Jersey
Law Division
Monmouth County Courthouse
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728

**Re: Highview Homes, LLC v. Township of Hazlet and Planning Board of the Township of Hazlet v. The Church of the Holy Family**
**Docket No.: MON-L-4224-15**
**Motion to Dismiss**
**Return Date: October 14, 2016**

Dear Judge Perri:

This law firm represents Third Party Defendant/Movant, The Church of the Holy Family ("Holy Family"), in the above matter. This letter brief is in reply to the opposition filed by Third Party Plaintiff Township of Hazlet ("Hazlet" or "Township").

## I. THE EXTENSION OF LAW SOUGHT BY HAZLET WOULD TURN THE MOUNT LAUREL DOCTRINE ON ITS HEAD.

Hazlet's opposition is based upon a contrived defense to a builder's remedy action that is novel, interesting and also, very wrong. It seeks to permanently bind owners, subsequent developers and properties, by extending the lack of good faith defense to the failure of owners and previous developers to negotiate zoning changes to build affordable housing. Hazlet,

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essentially argues the failure to negotiate in good faith by an owner or previous developer in connection with a particular property should provide the municipality with a binding defense against any subsequent projects on said property. See Hazlet brief, pp. 5-7. The Township's position turns the Mount Laurel doctrine on its head.

The natural result, if the Township's position were adopted, would be to permanently set aside properties as immune from future builder's remedy actions. The whole purpose of the Mount Laurel doctrine is to encourage and ensure the accessibility of affordable housing by providing a remedy for exclusionary zoning by forcing municipalities to take on their fair share of affordable housing. The "until the end of time" defense suggested by Hazlet would result in excluded areas, otherwise suitable for affordable housing development, continuing to remain unavailable under the same exclusionary zoning simply because of the alleged failure of a predecessor to negotiate in good faith before bringing an action.

The lack of a good faith defense set forth in So. Burlington Cty. NAACP v. Mt. Laurel Twp., 92 N.J. 158, 218 (1983) ("Mt. Laurel II") only protects a municipality from having to defend specific builder's remedy actions where the plaintiff failed to attempt to negotiate in good faith first. Its plain intent is to foster the provision of affordable housing through negotiation rather than litigation. The defense is against excess litigation, not a mechanism for municipalities to escape their fair share obligation. The proposed extension of the doctrine that Hazlet seeks would frustrate that intent by applying the defense to subsequent projects whose developers had, in fact, tried to negotiate in good faith.

Accordingly, not only is the extension of the Mount Laurel doctrine that Hazlet urges here not a logical extension of the doctrine nor suggested by any recent case law (Hazlet cites

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no legal authority in support of its illogical contention), it would run counter to the primary purpose of the Mount Laurel doctrine—namely that each municipality be required to provide its fair share of affordable housing.

## II. HOLY FAMILY'S STATEMENT OF MATERIAL FACTS IS MORE THAN SUFFICIENT UNDER THE RULES.

As to Hazlet's contention that Holy Family's Statement of Material Facts is deficient (Hazlet brief, pp. 1-2) , the gravamen of Holy Family's material facts are set forth in Hazlet's Third Party Complaint and in Deacon Pirozzi's Certification submitted in support of the motion, both of which are cited in paragraph 3 of the Statement of Material Facts.

## III. WHETHER HOLY FAMILY OR PREVIOUS DEVELOPERS PROPOSED AFFORDABLE HOUSING IS IRRELEVANT TO THIS MATTER.

With regard to Hazlet's contention that its allegation of bad faith specifically entitles it to discovery, we reiterate that the "bad faith" here is limited to the plaintiff in the builder's remedy action failing to engage in good faith negotiations with the municipal entity regarding zoning changes before suit is filed. See Mount Laurel II, supra. Here Hazlet contends that the action must be dismissed because Holy Family's failure to previously propose any affordable housing for the property constitutes a failure to negotiate in good faith. Putting aside for the moment that Holy Family is not the plaintiff, and that all of the previous discussions concerned different plans and projects for the property, it is no secret and it is not disputed that Holy Family has never proposed affordable housing for the property. Holy Family is not a developer. However, previous proposals for the property, and prior developers' good faith or lack thereof, in negotiating with Hazlet regarding them, are clearly irrelevant to whether the negotiations

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between the Township and Highview Homes, L.L.C. ("Highview") concerning the current project were conducted in good faith (For the record, Holy Family has never sought to exclude affordable housing on the property or anywhere else in Hazlet Township.).

## IV. HOLY FAMILY IS CLEARLY NOT INDISPENSABLE.

As to Hazlet's argument that Holy Family is indispensable, we point out, as we did in our moving papers, that there have been many upper court decisions regarding zoning matters brought by contract purchasers, as explicitly permitted by the Municipal Land Use Law, N.J.S.A. 40:44D-1, et seq., in which the courts have not deemed it necessary to join the owners as indispensable parties. Highview, in its Brief, cites additional cases. Nowhere in its papers does Hazlet cite a single case in which a court deemed an owner to be an indispensable party in a builder's remedy action or another zoning action brought by a contract purchaser. Moreover, under Hazlet's view of who is indispensable, in addition to Highview and Holy Family, other logical defendants would be any and all other developers that might consider a proposal for the property, any and all affordable housing advocacy groups in the State, and any citizen of Hazlet. Under Mount Laurel II, those entities would all have standing to bring builder's remedy actions. If Holy Family is indispensable, so are those other parties. Yet Hazlet does not seek to include them.

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## V. THE PURPOSE OF THE COMPLAINT IS TO OBTAIN IMPROPER DISCOVERY TO GAIN AN EDGE OVER HIGHVIEW.

Hazlet admits that there is no legal authority for its claim that the lack of good faith defense enunciated under Mount Laurel II should apply to an entity that is not the plaintiff in the builder's remedy suit. Nonetheless, Hazlet asks this Court to consider doing just that, but only after "all the facts are known." Hazlet brief, p. 7.

It is clear that Hazlet's only purpose here is to embark on a "fishing expedition" to discover the details of the contract between Holy Family and its contract purchaser, Highview. Knowledge of those details would give Hazlet an impermissible edge in its dispute with Highview over Hazlet's fair share of low income housing, even though those details are legally irrelevant to that determination.

Our discovery rules only permit discovery "which is relevant to the subject matter involved in the pending action... ." R. 4:10-2(a). Relevancy, under the rule, has been defined as congruent with the definition of relevancy under N.J.R.E. 401, which is evidence with a "tendency in reason to prove or disprove any fact or consequence to the determination of the action." See Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535 (1997). Discovery is also appropriate where the information sought would raise a jury question. Assoc. Home Eq. Servs. v. Troup, 343 N.J. Super. 254, 270 (App. Div. 2001). The discovery Hazlet seeks here will not result in evidence that will either tend to prove or disprove a legally sufficient claim. Hence, Hazlet seeks discovery that is not relevant and its "fishing expedition" is not permitted under R. 4:10-2(a). Hazlet's "fishing expedition" should be ended and its baseless Third Party Complaint should now be dismissed.

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Accordingly, for the reasons, stated above and set forth in Holy Family's moving papers, we respectfully request that the motion be granted.

Respectfully submitted,

David M. Roskos
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DMR:EAD/sb

cc: James H. Gorman, Esq. (w/enc. via email and regular mail)
Richard J. Hoff, Jr., Esq. (w/enc. via email and regular mail)