

LEGAL ARGUMENT

Since Mount Laurel II is the foundation of plaintiff's builder's remedy suit, defendants brought a motion for summary judgment based upon five principles created by that decision. Specifically, defendants identified five responsibilities created by Mount Laurel II and explained how plaintiff violated each responsibility:

1. Plaintiff violated its threshold obligation to attempt, in good faith, to obtain relief without litigation.
2. Plaintiff violated its express additional obligation under the Mount Laurel doctrine to act in good faith.
3. Plaintiff failed to present the Borough with its "proposed project" prior to filing suit.
4. Plaintiff failed to demonstrate that it was the "catalyst for change."
5. Plaintiff failed to satisfy its burden to propose a set-aside that qualifies as "substantial" as the Supreme Court defined this term.

Plaintiff has failed to persuade that it lacks the responsibilities that defendants identified. Moreover, despite the vigor with which it has sought to obscure the facts, Plaintiff has failed to demonstrate that it did not violate these responsibilities. Therefore, this Court should grant defendants' motion for summary judgment.

POINT I

DESPITE PLAINTIFF'S INADEQUATE ATTEMPT TO OBFUSCATE THE MATERIAL FACTS, THE PRINCIPLES SET FORTH IN LIBERTY SURPLUS SUPPORT GRANTING THE BOROUGH'S MOTION FOR SUMMARY JUDGMENT

In support of its Motion for Summary Judgment, the Borough provided the Court with a straightforward analysis of the new summary judgment standard announced by the Supreme Court in Liberty Surplus Ins. Corp. v. Amoroso, 189 N.J. 436 (2007). In this case, the Supreme

Court's expressed its desire to create a more liberal summary judgment standard. To summarize, in Liberty Surplus, the Supreme Court relaxed the previous summary judgment standard in the following ways:

- (1) By expanding its holding in Judson¹ and authorizing trial courts to grant summary judgment even where a case presents a subjective question concerning the state of mind of a witness, id. at 449;
- (2) By significantly relaxing the Brill² standard and ruling that “[e]ven when **credibility may be an issue**” summary judgment may be granted, id. at 450, especially in a case where appellant's experienced lawyers “could not have conceived” that there was no malpractice claim confronting them. Id. at 445; and
- (3) By rejecting former judicial practice and granting summary judgment despite appellants' claims that discovery was not complete where, as here, the case involved cross-motions for Summary Judgment from which “one may fairly assume that the evidence was all there and the matter was ripe for adjudication.” Id. at 450.

Once this Court wades through plaintiff's clever attempt to obfuscate the material facts asserted by the Borough, the importance of the Liberty Surplus standards will become readily apparent. Indeed, Liberty Surplus authorizes summary judgment where, as here, issues such as good faith are involved and where denials of allegations of fact are based upon assertions that lack credibility.

In response to defendants' claims regarding the significance of Liberty Surplus, plaintiff argues that the opinion made no significant changes to the law. Pb at 9. A review of the opinion, however, reveals that it established exactly the principles summarized above. As such, Liberty Surplus indeed changes the law on summary judgment in a substantial way. To illustrate, plaintiff refuses to admit that it knew that once the Borough completed the preparation and adoption of its affordable housing plan, the Borough would be in a position to file its

¹ Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954).

² Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995);

affordable housing plan with COAH and thereby deprive the developer of the considerable leverage of a Mount Laurel lawsuit. See Plaintiff's response to paragraph 165 of the defendants' Statement of Material facts. This fact is important because it explains why plaintiff filed a builder's remedy suit. It did so not to compel compliance, but to prevent the Borough from completing the compliance process it started. As a sophisticated developer, Mr. Ladell would have known full well the ramifications of the Borough's completion of the preparation of an affordable housing plan and the filing of same with COAH. Under Liberty Surplus standards, this Court is free to disregard such incredible denials by Mr. Ladell.

Similarly, Braunstein claims that he is an unsophisticated developer, that he did not realize (1) that the Borough had a right to engage in an RFP process and select the redeveloper, and (2) that the Borough had the legal power to condemn his land if it pursued an RFP process. See Braunstein Certification at para. 5, 6, and 33. Braunstein claims that had he realized this, he never would have participated in the redevelopment process. Id. at para. 33. Ladell even claims that if he knew the Borough intended an RFP process, perhaps he would not have pursued the redevelopment of the subject property. Id. at para. 6. Despite all Braunstein's claims of lack of sophistication, plaintiff also represents (a) that Braunstein developed a relation with Mr. Ladell as early as August 2006, and (b) that Ladell is a "sophisticated" developer. Ladell Certification at para. 1, 9, 16. Putting aside that the RFP process was discussed as early as March of 2006, any "sophisticated" developer would know (a) that municipalities have every right to select the redeveloper; and (b) that an RFP process is a common technique used by municipalities to select the redeveloper that submits a proposal is best for the community. Any sophisticated developer would know that utilization of the RFP process does not mean that the municipality will *per se* use its powers of eminent domain. As Ladell's partner, Braunstein knew or should have known

all this. Under the Liberty Surplus standards, this Court need not presume such a patently unbelievable explanation of what Ladell and Braunstein understood about the significance of the RFP process. Rather this Court can consider the realities of what any sophisticated developer would know when deciding the Borough's summary judgment claims.

Plaintiff also argues that Liberty Surplus merely stands for the proposition that trial judges should not "ignore reality" when deciding summary judgment motions. Pb at 9. A review of defendants' brief reveals the Borough is not asking this Court to "ignore reality." To the contrary, defendants ask this Court to consider the reality that Mount Laurel II--the case that is the foundation of its suit--established five important principles, all of which plaintiff violated.

POINT II

PLAINTIFF VIOLATED ITS THRESHOLD OBLIGATION TO ADEQUATELY PURSUE GOOD FAITH PRE-SUIT NEGOTIATIONS AND PLAINTIFF FAILED TO DEMONSTRATE EITHER THAT THE OBLIGATION DOES NOT EXIST OR THAT IT SATISFIED ITS OBLIGATION.

Summary of Defendants' Argument

In its motion papers, defendants noted that Mount Laurel II clearly required developers to attempt to obtain relief "without litigation" or to be disqualified for a "false start." Mount Laurel II, 92 N.J. at 218. Defendants further noted that in Toll Bros., Inc. v. Tp. of West Windsor, 173 N.J. 502 (2002) ("Toll Brothers"), the Supreme Court's acknowledged and applied this good faith, pre-suit obligation. Since the Supreme Court acknowledged and applied this obligation in Toll--17 years after the Supreme Court created the obligation in Mount Laurel II, defendants emphasized that the Supreme Court obviously never intended the obligation it had created to be temporary. Since the Supreme Court acknowledged and applied this obligation in Toll--15 years

after the Legislature enacted the Fair Housing Act, defendants also noted that the Supreme Court clearly did not regard the FHA as having abrogated the pre-suit, good faith obligation.

Summary of Plaintiff's Argument

Plaintiff argued that pre-suit negotiations are not legally required and that the Supreme Court's contrary statements in Mount Laurel II and Toll Brothers were merely "passing references." Ibid. Plaintiff also argued that in Toll, "[t]he Court simply held that the developer in that case engaged in sufficient pre-suit negotiations, and did not reach the issue of whether pre-suit negotiations are still required." Id. at 14. In addition, Plaintiff argued that, as a matter of policy, "pre-suit negotiations [would] turn Mount Laurel jurisprudence on its head" by "transform[] the Mount Laurel doctrine into a passive obligation." Pb at 14. Finally, plaintiff argued that the Fair Housing Act impliedly eliminated the obligation. Id. at 15.³

Plaintiff argued not only that the obligation did not exist, but also that, if it did, it had satisfied the obligation. Specifically, Plaintiff argued that it "was required to do nothing more **than engage in discussions** with Roselle Park until it believed that Roselle Park had no interest in pursuing a rezoning." (emphasis added). Pb at 12. Plaintiff argued that it is the Borough's "heavy burden to establish that [plaintiff] brought [this] Mount Laurel litigation unnecessarily." Pb at 11. Under this legal theory, plaintiff claimed that the two meetings held between plaintiff's and the Borough's representatives constituted sufficient good faith negotiations. Pb at p. 12. Plaintiff also argued that any further negotiations would have been "futile." Ibid. Plaintiff also contended that its post lawsuit efforts impliedly demonstrate that its pre-suit actions were in good

³ Plaintiff also notes that the Appellate Division will soon be rendering an opinion on this very issue, and that the Court should therefore stay its decision "and permit this litigation to proceed in the meantime." Id. at 16.

faith. Id. at 13. Finally, Plaintiff argues that, at a minimum, sufficient factual issues exist to warrant a denial of the defendants' summary judgment motion. Ibid.

Summary of Roselle Park's Reply

Before detailing its reply to Plaintiff's arguments, a summary of the reply arguments would help keep the analysis that follows in focus. Accordingly, the Borough would summarize its reply arguments as follows:

- (a) While plaintiff seeks to minimize the significance of the pre-suit obligation by labeling it "a passing reference" of the Supreme Court, Plaintiff has failed to provide any language by the Supreme Court in Mount Laurel II or in any other decision to support the contention (i) that the Court distinguished between the obligation of developers to engage in good faith, pre-suit negotiations and other obligations; and (ii) that the Court regarded the good faith, pre-suit negotiation obligation as a second class right unworthy of enforcement. Unless and until the Supreme Court changes the ground rules for the remedy it created, plaintiff must comply with all of the requirements of the Mount Laurel II decision—not just the requirements it claims the Court regarded as important.
- (b) Plaintiff's policy argument that "pre-suit negotiations [would] turn Mount Laurel jurisprudence on its head" is irrelevant. Plaintiff must satisfy the requirements of the Mount Laurel doctrine as the Supreme Court designed it—not as developers believe the Court should have designed it.
- (c) Although plaintiff claims that the Supreme Court in Toll "did not reach the issue of whether pre-suit negotiations are still required" (Pb at 14); plaintiff cannot deny that, in Toll, the Supreme Court acknowledged and applied the defense. Despite the clear

opportunity in Toll to change the ground rules for builder's remedy litigation established in Mount Laurel II, the Court did not extinguish the obligation.

- (d) Although plaintiff claims that the Fair Housing Act impliedly abrogated the pre-suit, good faith obligation; this obligation is part of our common law. As such, only a plain and clear legislative pronouncement can extinguish the obligation. Plaintiff has failed to identify a plain and clear pronouncement by the Legislature to abrogate this common law responsibility. Indeed, Plaintiff altogether ignored this argument. Therefore, our laws require that the Court interpret the FHA so as to preserve the common law. In this regard, the common law responsibility can easily and rationally coexist with the rights and responsibilities created by the FHA.
- (e) Putting aside that plaintiff never discussed its desire to produce affordable housing—a fact in dispute, an analysis of facts not in dispute reveals that Braunstein, one of plaintiff's principals, brought a builder's remedy suit against a municipality that had responded favorably to its request for zoning relief and was working cooperatively with plaintiff to redevelop the site. Indeed, by the time plaintiff sued, the Borough had declared the subject property an area in need of redevelopment and had also prepared a redevelopment plan that would allow development at an extraordinary density of 43 units per acre. Suing a municipality that was working to facilitate the redevelopment of the site in a manner beneficial to the owner and one of plaintiff's principals hardly represents good faith, pre-suit negotiations.
- (f) Putting aside that plaintiff never discussed a desire to produce affordable housing prior to its suit, it was not futile for plaintiff to secure the right to develop a project with a substantial amount of affordable housing at a reasonable profit. Further, while the

Borough certainly expressed its reservations about rental housing, it never extinguished the possibility that the Borough would enter into a redeveloper's agreement with Avalon for a rental project.

- (g) Plaintiff's claim that its post lawsuit efforts demonstrate the good faith of its pre-suit actions ignores that plaintiff's satisfaction of its pre-suit obligations must be judged based upon its pre-suit activities.

An elaboration of these points follows.

A. Unless And Until Either The Supreme Court Changes The Ground Rules For The Remedy It Created Or The Legislature "Clearly And Plainly" Changes The Limitations On The Remedy The Supreme Court Deemed Appropriate, Plaintiff Must Comply With All Of The Requirements Of The Mount Laurel II Decision—Not Just The Requirements It Claims The Court Regarded As Important.

The Supreme Court never changed the ground rules for builder's remedy litigation it established in Mount Laurel II—including the pre-suit, good faith obligation. Moreover, the FHA did not "plainly" and "clearly" abrogate this common law obligation. Therefore, the obligation still exists.

1. The Supreme Court Established The Limitations On The Builder's Remedy In Mount Laurel II Including The Obligation To First Engage In Good Faith Negotiations Before Filing Suit And Plaintiff Has Failed To Demonstrate That The Supreme Court Ever Eliminated Any Of The Limitations On The Builder's Remedy, Including The Pre-suit, Good Faith Obligation.

In its effort to eliminate exclusionary zoning, the Supreme Court established a three-part test for a builder's remedy: (1) the developer must "succeed in litigation;" (2) the developer must present a "proposed project" with an affordable housing set-aside that qualified as "substantial;" and (3) the municipality must fail to prove that "the plaintiff's proposed project is clearly contrary to sound land use planning." Mount Laurel II at 279-280.

The builder's remedy represented a means for the Supreme Court to place pressure on exclusionary municipalities to comply. However, the Supreme Court also had a number of additional concerns regarding the manner in which the controversial builder's remedy would assume a prominent, yet controlled role in the implementation of the doctrine. Consequently, in addition to requiring developers to pass the three-part test, the Court, after careful consideration, placed additional limitations on the remedy—limitations designed to address each concern. Thus, it is not sufficient merely for a developer to satisfy all three elements; it must also conform to all of the limitations the Supreme Court deemed reasonable.

One of these limitations required developers, as a threshold responsibility, to attempt to negotiate in good faith with municipalities before instituting suit, and to file suit only after first making bona fide efforts to achieve an amicable accord. Mount Laurel II at 218. Considering that the history of the doctrine had been “paper, process, witnesses, trial and appeals,” it is understandable why the Supreme Court imposed the requirement for developers to first negotiate before suing. Mount Laurel II at 199. In this way, the Court could attempt to avoid “unnecessary litigation,” one of the overarching principles of the Mount Laurel doctrine. Mount Laurel II at 280-281. The only real way to "avoid unnecessary litigation" is to bring the parties together before a developer files suit and require the developer to engage in good faith negotiations over a project that includes a substantial amount of affordable housing.

Plaintiff claims that the Supreme Court merely mentioned this pre-suit, good faith obligation “in passing” as if the Court intended to distinguish between this obligation and other obligations it had imposed. However, Mount Laurel II reveals no intention (i) to create classes of obligations and (ii) to assign the good faith, pre-suit obligation with a lower status than other obligations:

Builder's remedies will be afforded to Plaintiffs in Mount Laurel litigation where appropriate, on a case-by-case basis. **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, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact.

[Mount Laurel II at 218 (emphasis added).]

Clearly, the prerequisite created in this seminal passage was not some discretionary hoop for developers to jump through in the quest for the profits associated with Mount Laurel development. Instead, this duty was specific “check and balance” to the builder’s remedy created by the Supreme Court as a mandatory prerequisite to entitlement to the very judicial relief this plaintiff seeks.

Despite the opportunity to do so in Toll, discussed below, the Supreme Court has never extinguished any of the limitations it placed on the remedy, including the good faith, pre-suit obligation. Therefore, although plaintiff’s counsel opines that “pre-suit negotiations [would] turn Mount Laurel jurisprudence on its head”, plaintiff cannot choose to follow only those requirements articulated by the Supreme Court with which it agrees. Rather, plaintiff must satisfy all of the Court’s requirements.

Indeed, the parties and trial courts are bound by all the laws the Supreme Court established, unless and until (a) the Supreme Court decides to change those laws or (b) the Legislature “plainly and clearly” abrogates the laws the Supreme Court established. Plaintiff has failed to demonstrate that the Supreme Court ever changed the ground rules for builder’s remedy litigation. Moreover, for the reasons set forth below, plaintiff has also not demonstrated that the Legislature has “plainly and clearly” abrogated the laws the Court established. Thus, the requirement still exists despite plaintiff’s efforts to wish or argue it away.

2. Plaintiff Has Not Demonstrated That the Fair Housing Act “Plainly and Clearly” Eliminated The Pre-suit, Good Faith Obligation.

The obligation for developers to act in good faith and to attempt to obtain relief without litigation, like the three elements of the builder’s remedy, is part of our common law. See Black’s Law Dictionary 7th Edition, West Group 1999, at page 270 (defining the “common law” as “the body of law derived from judicial decisions, rather than from statutes or constitutions.”) “As a creature of the common law, the [builder’s remedy **and its limitations**] exists independent of any legislative pronouncement.” In re Lead Paint Litigation, 191 N.J. 405, 444 (2007). “A statute may take away a common law right; however **there is a presumption that the Legislature had no such intention.**” De Fazio v. Haven Sav. & Loan Ass’n, 22 N.J. 511, 518-519 (1956)(citing 3 Sutherland, Statutory Construction (3d ed. 1943), s 6201)(emphasis added). Accord Velazquez v. Jiminez, 172 N.J. 240, 256 (2002). See also Wildstein v. Tru Motors, Inc., 227 N.J.Super. 331, 335 (Law Div. 1988)(“There is a presumption that a statute is consistent with the common law.”)

In view of this presumption, a “statute should be interpreted to subsume pre-existing common law remedies **only if that intention is ‘clearly and plainly expressed.’**” In re Lead Paint Litigation, supra, 191 N.J. at 444 (quoting Velazquez, supra, 172 N.J. at 257)(emphasis added); see also Warnig v. Atlantic County Special Services, 363 N.J.Super. 563, 571 (App. Div. 2003) (“**If a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed.**”)(citing Blackman v. Iles, 4 N.J. 82, 89 (1950)). “**Unless there is a clear legislative expression to the contrary, a statutory right or remedy does not preempt an existing common law right or remedy; but rather, is deemed to be additional to or cumulative of the latter.**” Terrace Condominium Ass’n v. Midlantic Nat.

Bank, 268 N.J. Super. 488, 500 (Law Div. 1993)(citing DeFazio, supra, 22 N.J. at 519; Blackman v. Iles, 4 N.J. 82, 89 (1950)).

The FHA did not “plainly and clearly” abrogate the common law. Nowhere in the FHA does the Legislature even *mention* the Supreme Court’s controls on the builder’s remedy, much less *clearly* or *plainly* abrogate them. Rather, the FHA offers an alternative administrative means for municipalities to comply without facing litigation, and specifies those circumstances when a developer must, or must not, exhaust the administrative remedies created by the FHA. See N.J.S.A. 52:27D-309 and 316.

The duty of developers to adequately pursue pre-suit, good faith negotiations can easily coexist with the right of developers to not have to exhaust the administrative remedies created by the Fair Housing Act when municipalities have properly brought themselves within COAH’s jurisdiction. In essence, our laws provide that if the municipality has adopted and filed an affordable housing plan with COAH, a developer must exhaust the administrative remedies created by the FHA. Conversely, if the municipality has not adopted and filed an affordable housing plan with COAH, the developer has no obligation to exhaust the administrative remedies created by the FHA. N.J.S.A. 52:27D-309, 316. However, just because a developer is free to file a builder’s remedy claim does not mean that the developer is free to ignore the express controls created by Mount Laurel II—the very case that created the builder’s remedy cause of action. Rather such a developer must comply with all the controls the Supreme Court imposed on the builder’s remedy, including the obligation to act in good faith and to attempt to obtain relief without litigation.

Since the Supreme Court never changed the ground rules for builder's remedy litigation it established in Mount Laurel II—including the pre-suit, good faith obligation; and since the FHA did not “plainly” and “clearly” abrogate this common law obligation; the obligation still exists.

B. Toll Eliminates Any Question As To The Continuing Vitality Of The Obligation To Engage In Pre-Suit, Good Faith Negotiations And Plaintiff's Claim That The Supreme Court Never Reached The Issue Of Whether The Obligation Still Exists Has No Merit.

Former Governor Keane signed the FHA into law in July of 1985, and the Supreme Court reviewed and affirmed the constitutionality of the FHA in February of 1986. See generally Mount Laurel III, supra, 103 N.J. 1 (1986). If, as plaintiff argues, the Legislature eliminated the duty of a developer to seek, in good faith, to “obtain relief without litigation” when it enacted the FHA in 1985, the New Jersey Supreme Court would obviously have had no reason thereafter to determine whether a developer, in fact, violated its pre-suit obligations. Yet, as recently as 2002, our Supreme Court not only expressly acknowledged the duty, but also analyzed the facts and made a determination as to whether Toll Brothers had passed the test and sufficiently negotiated in good faith with West Windsor Township before filing suit.

In Toll Brothers, the parties vigorously debated whether Toll Brothers had satisfied its duty to negotiate in good faith prior to filing suit. More specifically, West Windsor argued (a) that “good faith” is a prerequisite for the granting of a builder's remedy; and (b) that “Toll Brothers was not entitled to a builder's remedy because it failed to act in good faith”. Toll, supra, 173 N.J. at 537. Indeed, “West Windsor relied on the following language from Mount Laurel II, supra, 92 N.J. at 218 . . . ‘Builder's remedies will be afforded to plaintiffs in Mount Laurel litigation where appropriate, on a case-by-case basis. *Where the plaintiff has acted in good faith, attempted to obtain relief without litigation. . . .*” Ibid. (italics in original)(emphasis added). In response, Toll Brothers and *amici* quoted Mount Laurel II at 218 and strenuously argued that

Toll actually satisfied its threshold obligation by conducting excessive pre-suit negotiations. Id. at 537 (quoting Mount Laurel II at 218).

These arguments thus raised the question of whether Toll Brother had violated the duty established by Mount Laurel II to pursue good faith, pre-suit negotiations. These arguments also left the Supreme Court with two choices.

Option 1: If the Supreme Court believed that the FHA *had extinguished* the duty to negotiate it had established in Mount Laurel II, it should have declined to decide the issue. After all, the Supreme Court would have been issuing an advisory opinion if it regarded the FHA as having extinguished the obligation. See, e.g., Grand Union Co. v. Sills, 43 N.J. 390, 410 (1964).

Option 2: If the Supreme Court believed that the FHA *had not extinguished* the Mount Laurel II duty to negotiate, it should decide the issue.

The Supreme Court chose the latter path. More specifically, the Supreme Court analyzed the facts vis-à-vis the obligation to negotiate in good faith; found that the developer had satisfied this obligation and consequently affirmed the Appellate Division's denial of relief sought by West Windsor. Id. at 538.

There would have been no reason for the Court to determine if plaintiff violated its good faith, pre-suit obligation if the obligation no longer existed. Indeed, the Supreme Court would have been expressing an advisory opinion to do so. Therefore, plaintiff's claim that the Supreme Court never reached the issue of the continuing vitality of the obligation has no credibility. Clearly, the Court would not have issued what would clearly be an advisory opinion and determined whether Toll violated an obligation if it believed that it no longer existed.

The Supreme Court's ruling in Toll proves that the Court did not view that the FHA as abrogating the limitations on the builder's remedy it had established in Mount Laurel II. The acknowledgment and application of the good faith obligation in Toll further demonstrates that the Supreme Court regarded this obligation as having a continuing value. Finally, since the Supreme

Court decided Toll almost twenty years after Mount Laurel II, the Supreme Court obviously did not intend the pre-suit, good faith obligation to be a second class obligation unworthy of enforcement.

C. Braunstein Violated Plaintiff's Obligation To Pursue Good Faith, Pre-Suit Negotiations By Joint Venturing With AvalonBay And Suing The Municipality That Had Come To His Rescue And Was Engaged In A Redevelopment Process Gauged To Advance The Economic Interests Of Braunstein And The Redevelopment Goals Of The Community.

The undisputed facts reveal the following:

- (a) Braunstein had encountered economic woes utilizing and marketing the Romerovski site and approached the Borough for help. See Defendants Statement of Facts at 9-11, 18-24, 26-27.
- (b) The Borough agreed to work with Braunstein to advance his economic objectives and the Borough's redevelopment objectives. See Defendants Statement of Facts at 28, 32, 36-38, 42-44, 56-57.
- (c) Mr. Braunstein pledged to do "what was best for the community," to "work together" and to create a partnership. See Defendants Statement of Facts at 33.
- (d) The Borough had retained a planning firm to facilitate the redevelopment of the site. See Defendants Statement of Facts at 35.
- (e) The Borough deemed the site an area in need of redevelopment and authorized the preparation of a redevelopment plan. See Defendants Statement of Facts at 43, 57.
- (f) The Borough's professionals had completed a draft of a redevelopment plan as early as November 30, 2006. See Defendants Statement of Facts at 103.
- (g) The redevelopment plan, if adopted, would allow the site to be developed at an extraordinary density of 43 units per acre and would allow Braunstein to make a far more beneficial economic use of his land than could be achieved with the present use or under the prior zoning. See Redevelopment Plan, attached to Latini Certification, dated June 27, 2007 at Exhibit B, (revealing a plan to permit 215 units on 5 acres, which translates to a density of 43 units per acre)
- (h) The Borough was continuing to move towards the adoption of the redevelopment plan at the point plaintiff filed suit and indeed adopted the plan on March 1, 2007. See Defendants Statement of Facts at 158.

The initial relation between the Borough and Braunstein was so mutually beneficial that the Mayor made the following comment at a Planning Board meeting on August 21, 2006: “The process has been moving along nicely. This is because the property owner [Braunstein] has really cooperated **and wants community support for this.**” See Certification of Michael A. Jedziniak, Esq. at Exhibit 9 (minutes of August 21, 2006 Planning Board meeting.) Similarly, at the same meeting, Mr. Braunstein stated publicly that he “was **more than willing to work with the town to enhance the property.**” Ibid.

Instead of thanking the Borough for its assistance and allowing the Borough to adopt and implement the redevelopment plan that the planner had prepared and forwarded to the Borough on November 30, 2006, Braunstein’s company entered into a joint venture with Ladell’s in October or November 2006 and the newly formed entity filed a builder’s remedy suit a few months later. Such a lawsuit violates plaintiff’s obligation to adequately pursue good faith negotiations *prior* to filing suit. Such a developer should be dismissed for a “**false start.**” J.W. Field Co. v. Tp. of Franklin, 204 N.J.Super. 445, 461 (Law. Div. 1985).

The above argument confines itself to facts not in dispute. If you consider facts in dispute, plaintiff’s failure to satisfy its pre-suit, good faith obligation is even more apparent. In this regard, plaintiff claims that it negotiated in good faith prior to filing suit for a project with a “substantial” percentage of affordable housing. Pb at 5. In contrast, Mayor DeIorio and Charles Latini certified that Braunstein and Ladell never discussed their desire to provide affordable housing. Latini cert., dated October 1, 2007, at para. 57; DeIorio Cert., dated October 1, 2007, at para. 121.

If plaintiff failed to negotiate for a project with a substantial amount of affordable housing as plaintiff contends or if plaintiff never discussed their desire to provide affordable

housing as defendants contend, then plaintiff clearly violated the good faith, pre-suit obligation established in Mount Laurel II and applied in Toll. As a self proclaimed sophisticated developer familiar with the Rumson and Oceanport cases, plaintiff should have known better. However, plaintiff failed to heed the Supreme Court's warnings and the lessons of the Rumson and Oceanport cases. Consequently, this Court, like Judges Coogan and Quinn, should dismiss the builder's remedy complaint and authorize the Borough to pursue approval of its affordable housing plan by COAH.

D. Plaintiff's "Futility" Defense Has No Merit

In J.W. Field, Judge Serpentelli (a) indicated that a developer should be relieved of its pre-suit, good faith obligation if it proves that further negotiations would have been futile; and (b) cautioned developers about relying upon the futility defense: "Admittedly, there may be instances when good faith negotiations will be futile. The Plaintiff choosing to win the race to the courthouse by relying upon the futility defense **had better be prepared to prove it or risk having won the race only to be disqualified for a false start.**" J.W. Field, supra, 204 N.J.Super. at 461. On the basis of this language, Plaintiff asserted that at the point it filed suit, it was clear that further negotiations would have been futile. Pb at 13.

This defense, like its others, has no merit. In this regard, consider the interests of (a) 450 West Westfield Realty LLC, the entity in which Braunstein is a principal; and (b) Avalon Bay, the entity in which Ladell was a principle. These two entities created Roselle Park VP, LLC, on or about October 31, 2006 and brought the builder's remedy suit in February of 2007.

As to 450 West Westfield Realty LLC, the entity owned by Braunstein, the facts reveal that further negotiations were not futile. Indeed, the Borough had responded favorably to his efforts to redevelop his site. The Mayor had commented on how favorably the cooperative

process was going at the August 21, 2006 Planning Board meeting. The Borough had declared Braunstein's site an area in need of development and authorized the preparation of a redevelopment plan. The Borough's planner had prepared a draft redevelopment plan by November, 2006 revealing the Borough's intent to effectively rezone the property at an extraordinary 43 units per acre and the Borough was steadily moving towards the fulfillment of its redevelopment goals and affordable housing goals in a manner that would economically benefit Braunstein.

As to Avalon Bay, the entity in which Ladell was a Vice-president, the Mayor had invited plaintiff to compete for the right to redevelop the subject property and Ladell had indicated that he was a serious developer that produced a great product. Thus, while the Mayor had candidly informed first Braunstein and then Ladell that a rental project would raise the public's concerns, the Mayor kept his mind open and the planner had indicated that the site is generally suitable for the type of project Ladell had proposed.⁴ Thus, while plaintiff seeks to make much of Ladell's inability to reach the Mayor on the phone, we certainly had not reached the point of futility that the Borough would effectively rezone the site to allow it to be developed at higher densities in an economically feasible fashion with a substantial percentage of affordable units.

As to Ladell's inability to reach the Mayor on the phone, plaintiff's emphasis on this ignores that it could have done what the plaintiff in the Oceanport case did: namely, write a letter seeking to develop a project with a substantial amount of affordable housing, prepare and present a concept plan showing what it wanted. While the failure of the Oceanport plaintiff to do more than that disqualified that plaintiff from Mount Laurel relief, Roselle Park V.P. failed to

⁴The Borough has not waived any right to contest the suitability of a 300-unit rental complex on the Romerovski site. Should plaintiff's suit not be dismissed, the Borough will explore this issue in detail if ever plaintiff presents its proposed project.

even go that far.⁵ Since the Mayor had emphasized the importance of public participation so heavily, clearly the next step prior to the bus trip was a public presentation. Even though plaintiff purportedly had prepared a detailed concept plan and even expert reports, it failed to submit them to the Borough and ask the Borough Council to discuss the plan publicly.

In conclusion, the futility defense appropriately applies when a developer seeks a rezoning for a project with a substantial amount of affordable housing and the municipality flatly refuses to negotiate with the developer or include the developer's site in the municipality's affordable housing plan. Where, as here, the Borough's willingness to develop the site at higher densities and to include an affordable housing component in the project has been clear since at least November of 2006, the futility defense should not empower an impatient developer to further dictate how the Borough will use its redevelopment powers, zoning powers and/or related powers to best advance the community's interest in redevelopment and affordable housing.

E. Even Handed Justice Requires That Whether A Developer Has Satisfied Its Pre-Suit Obligations Requires An Evaluation Of Its Pre-Suit Conduct.

Plaintiff asks this Court to consider its post suit activities as evidence of its efforts to pursue good faith negotiations before it sued. However, for our laws and our institutions to maintain the public's trust, they must be even handed. In this regard, relying on the following language, developers typically argue, as plaintiff has done in this case, that the trial judge should "freeze frame the world" on the date of suit to determine the state of municipality's compliance:

⁵Moreover, although Ladell and Braunstein pestered the Mayor to schedule a bus trip, the Mayor did not these calls because he was clear that they would have to present a proposal to the public prior to the scheduling of any bus trip. If Ladell and Braunstein truly intended to involve the public in this process, they would take taken the easy steps necessary to secure an audience with the Borough or its Planning Board. They chose not to. Certification of DeIorio, October 1, 2007, at para. 141.

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 Toll 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.

[Toll Bros., Inc. v. Township of West Windsor, 303 N.J.Super. 518, 530-531 (Law Div. 1996) (emphasis added)]

See also Van Dalen v. Washington Tp., 205 N.J.Super. 308, 334 (Law Div. 1984) (“a builder's remedy arguably may be awarded where the ordinance in effect when a complaint was filed violated Mount Laurel . . .”). On the basis of these statements, developers frequently argue that it would be unfair for the courts to consider post suit municipal activity for purpose of determining whether the municipality is compliant because, to do so, would enable a municipality to remain non-compliant and only comply when sued to defeat the builder's remedy.

By the same token, it would also be unfair for our Courts to consider post-suit activities to determine whether a plaintiff satisfied its pre-suit activities. Otherwise developers would simply file suit and then seek to negotiate. Such a conduct would defeat the Supreme Court's objective: namely, to render litigation unnecessary through pre-suit negotiations.

F. Other Related Issues

Plaintiff also argues that the pre-suit good faith obligation is a not a threshold issue and that interested parties have broad standing to bring builder's remedy suits. Pb at 15-16. Defendants do not dispute that the Supreme Court established a broad standing standard. However, nothing in Mount Laurel jurisprudence or other applicable law precludes any party from bringing a summary judgment motion at any time to decide any issue in the case. If this

Court, like Judges Coogan and Quinn, rules that developers have a good faith, pre-suit obligation and that plaintiff violated this obligation, then it should, dismiss the lawsuit for “a false start” as judges Quinn and Coogan did in similar circumstances. J.W. Field, 204 N.J.Super. at 461. In this regard, the Oceanport plaintiffs also argued that Oceanport kept it waiting too long for a response and the therefore further negotiations would have been futile.

If, despite the foregoing, this Court did not wish to dismiss the suit, it could still decide plaintiff’s entitlement to a builder’s remedy. For example, the Court could and, indeed, should rule that plaintiff is not entitled to a builder’s remedy rule if it concludes that plaintiff had a good faith, pre-suit obligation and that it violated that obligation. Under such circumstances, the Court should enter a temporary immunity order as Judge Serpentelli did in the Berkeley case and review the Borough’s affordable housing plan under the protective shield of the immunity order. Through this process, the Borough could respond to any concerns the Court may have as to whether the Borough’s plan creates the requisite realistic opportunity for satisfaction of its fair share without the Mount Laurel gun to its head represented by plaintiff’s builder’s remedy claim.

The Borough is not opposed to any process that will result in approval of its affordable housing plan without the builder’s remedy gun to its head. However, Roselle Park presumed that this Court, like Judges Quinn and Coogan, would far prefer that COAH review and, if satisfied, approve the Borough’s plan. After all, as Judges Coogan and Quinn noted, COAH has the expertise to conduct this review. If, for any reason, the Court feared that Roselle Park might not complete the process of securing substantive certification from COAH, then the Court should certainly retain jurisdiction to the limited extent of resuming the litigation if the Borough does not secure substantive certification. While we do not think such steps are necessary, we are

more than happy to subject ourselves to this Court's resumption of jurisdiction if we do not achieve certification. After all, we have every intention to secure such certification.

Finally, plaintiff urges this Court to stay its decision pending the Appellate Division's ruling on the appeal by the Oceanport plaintiff to Judge Coogan's dismissal of its lawsuit on the basis of the violation of the pre-suit, good faith obligation. However, there is no telling when the Appellate Division will decide the matter and, if so, whether it will issue a published opinion. Therefore, this Court can and should decide an issue that has been fully briefed.

In any event, defendants' motion not only raises the obligation of developers to pursue good faith, pre-suit negotiations -- the sole issue on appeal in Oceanport, but also raises many other issues. For example, it raises the issue of whether plaintiff violated the obligation to act in good faith; to present a "proposed project"; to be the "catalyst for change" and to propose a project with a set-aside that qualifies as "substantial." Therefore, if this Court stays its decision over defendants' objection, defendants urge this Court to decide the many other issues pending in this case. Indeed, even if this Court finds that no pre-suit obligation exists or that plaintiff did not violate the obligation based upon the facts established thus far, it is entirely possible that the Court will find a violation of the overarching obligation of developers to act in good faith generally.

POINT III

PLAINTIFF VIOLATED ITS SEPARATE AND INDEPENDENT LEGAL OBLIGATION TO EXERCISE GOOD FAITH THROUGHOUT THE PROCESS.

Summary of Defendants' Argument

Separate and apart from the obligation to conduct pre-suit, good faith negotiations, the Supreme Court required developers, *inter alia*, to act in "good faith" throughout the process. Id.

at 218. This overarching good faith requirement arose out of the Supreme Court’s appreciation of the tremendous potential for abuse that would result if it did not place limitations on the developers seeking a builder’s remedy. Consequently, it expressly warned trial judges to “guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mount Laurel doctrine.” Id. at 281. By imposing a good faith requirement on developers, the Court sought to avoid developer abuse of the remedy replacing municipal abuse of the zoning power. Thus, it comes as no surprise that if a developer such as plaintiff holds itself out as the “champion” of the rights of “the unhoused poor” (Pb at 15), **the Supreme Court required its ambassadors to conduct themselves with the utmost integrity.**

Plaintiff hardly acted in good faith. Indeed, one of plaintiff’s principals, Braunstein (a) pledged to do “what was best for the community,” to “work together” and to create a partnership; and (b) persuaded the Borough to entrust him, only to betray that trust. Braunstein breached his duty of good faith by secretly partnering with an aggressive developer and suing Roselle Park before the Borough could complete the cooperative process that Braunstein and the municipality had embarked upon together.

In yet an additional example of bad faith, Ladell, another principal of plaintiff, openly used the Mount Laurel doctrine to hijack the redevelopment process the Borough had established to advance the public’s interests. The Borough sought to advance the public’s interests by creating a redevelopment plan that created sufficient economic incentives to interest the development community. But for Ladell’s threats to undermine that process by sending the word out to the development community that his company had contract rights to acquire the subject property, the process was working exactly as it had been envisioned: namely, in manner

that will advance the economic interests of Braunstein, the interests of the poor, and the redevelopment efforts of the community.

Summary of Plaintiff's Argument

Plaintiff presented no contrary authority or legal analysis to even attempt to refute defendants' argument that Mount Laurel II conferred a separate legal obligation on developers to act in good faith at all times before and during the litigation in addition to the obligation to pursue good faith, pre-suit negotiations. Pb at 9-26. Moreover, the closest scrutiny of plaintiff's brief reveals no effort to refute defendants' argument that plaintiff violated this obligation. Pb at 1-8.

Notwithstanding the foregoing, a review of the Braunstein certification and plaintiff's Reply to defendants' Statement of Material Facts reveals a contradictory set of facts somehow intended to convey the impression that he was fully justified in teaming up with Ladell and filing suit. In an apparent effort to insulate his incredible story from challenge, Braunstein repeatedly claims that he is "not a sophisticated developer and [does] not have experience redeveloping property." See Braunstein Certification, paragraph 6 and 21. He swears under oath that the Borough representatives never discussed an RFP process with him before the December 2006 meeting. Id at 5. He asks this Court even now to believe that the RFP process and eminent domain are inextricably intertwined and that the Borough's desire to pursue an RFP process necessarily means that the Borough intended, and intends now, "to take his property by eminent domain." Id. at 5, 32, and 39. He seeks to mask his malfeasance by accusing the Mayor of making "political" decisions. Id. at 9, 10, 12, 14 and 43. He emphasizes that he believed that the delays in the Mayor responding to his calls following the December, 2006 meeting meant

that “Roselle Park's officials did not want to work with me to redevelop the site.” Id. at 13.

A review of the Ladell certification suggests that Ladell was a sophisticated developer that was not trying to undermine the Borough’s redevelopment efforts, but was merely trying to help the Borough redevelop a site it had targeted for redevelopment. While claiming that he is a sophisticated developer and land use attorney, Ladell expressed surprise that the Borough would pursue an RFP process. In this regard, he claims that the Borough never mentioned an RFP process until the December, 2006 meeting. Ladell Certification, paragraph 28. Ladell goes on to state that “[i]f I understood that there was to be an RFP process to select the redeveloper, AvalonBay may not have partnered with Israel Braunstein.” Id. at 22.

Plaintiff denies the Mayor’s statement that “Mr. Ladell aggressively stated that the Borough should forget about attempting to elicit multiple proposals, because no redeveloper would touch this property now that his organization had tied up the site.” See Mayor’s Certification, paragraph 66. Mr. Ladell also denies he said that he would “send word out into the development community and no other developer would then be interested in responding to the Borough’s RFP”. Id. at 67. However, with a mastery of understatement, Ladell admits that he “inform[ed] Mayor Delorio that AvalonBay had a contractual relationship to develop the property and I did not foresee another developer intruding on that relationship. I also told him that an RFP process did not make any sense when the property owner had already partnered with an experienced developer and both were eager to redevelop the property.” Ladell Certification, paragraph 28.

The Borough's Reply

A. Braunstein's Betrayal Hardly Constitutes "Good Faith"

As set forth above, Braunstein reached out for the Borough's help. The Borough delivered. It took a site with zoning of little use to Braunstein and the marketplace and put into motion a process that would ultimately result in allowing the site to be developed at a dramatically high density of 43 units per acre. The prospect of a project that could be developed at such high densities generated significant interest in the marketplace, as evidenced by the interest expressed by several developers in redeveloping the property.

The process was indeed working as defendants had intended from the outset: namely, to enable Braunstein to use his land in an economically beneficial way, and to enable the Borough to consider multiple proposals—including Ladell's—so that the Borough could decide what was best for the community after the public was given the opportunity to comment on each proposal.

While the Borough moved steadily toward radically changing the permitted use of the subject property and, thereby, making the property far more attractive to the developer community than the prior zoning, Braunstein betrayed the municipality that had created such opportunities for him. He teamed up with Ladell through their respective companies and instituted suit.

None of his rationalizations justify his betrayal. The RFP process was not intended to damage Braunstein's interests. It was intended to advance the mutual interests of the Borough in controlling the redevelopment of the site and in Braunstein realizing an economic benefit. To be sure, the process did not guarantee that the redeveloper the Borough found most attractive would fetch as high a price as another. However, unless the Borough and Braunstein could agree on a redeveloper, the Borough would have no choice but to resort to condemnation. The Borough

never saw the need to pursue that avenue. DeIorio Cert., dated October 1, 2007, at para. 46. The Borough's present and even proposed redevelopment plan does not authorize condemnation.. In any event, no municipality would wish to exercise its condemnation powers if it could avoid it. Given the public furor over the use of a municipality's eminent domain powers, municipalities are increasingly reluctant to exercise these powers. Moreover, if a municipality could avoid using its bonding capacity to acquire land only to have to seek recapture from the redeveloper selected, it would do so. Certainly, it is preferable for a municipality to take itself outside the middle of the process.

B. The Supreme Court Never Intended Its Mount Laurel Doctrine To Empower Bullies Such As Ladell To Run Roughshod Over A Municipality Actively Seeking (1) To Achieve Constitutional Compliance And (2) To Foster The Redevelopment Of Land In A Manner Designed To Promote Community Input and Acceptance.

As a sophisticated developer, Ladell would have known that he should not presume that he would be selected as the redeveloper of the site. He had to have known that any municipality, including Roselle Park, would appreciate the value of competition between potential redevelopers, and that it had every right to create such competition through an RFP process. Mr. Ladell had no interest in competing, however, despite the high marks he gave to the product his company produced. That is why he filed a builder's remedy suit. That is why he brazenly informed the Mayor that he could forget about the RFP process because he would send word to the development community that he had tied up the property and thereby scare off any competitors.⁶

⁶ In addition, the Borough had already adopted resolutions to authorize the preparation of an affordable housing plan. As a sophisticated developer, Ladell would know full well that once the Borough completed the preparation of its plan, it would be in a position to file that plan with COAH thereby eliminating the leverage of a builder's remedy suit in pressuring the Borough to accede to his demands. In view of the above, it is clear that Ladell did not bring a builder's

Such brazen conduct cannot be tolerated. A municipality working to develop and implement a community vision for a site and to develop and implement an affordable housing plan in conjunction therewith should not be subjected to such strong arm tactics. This type of situation is exactly what the Supreme Court sought to guard against when its said warned trial judges to “guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mount Laurel doctrine.” Id. at 281.

Admittedly, Ladell denies that he made the threats the Mayor and Borough planner witnessed and swore to. However, Ladell did admits that he “inform[ed] Mayor Delorio that AvalonBay had a contractual relationship to develop the property and I did not foresee another developer intruding on that relationship.

In any event, if this Court cannot find that Ladell violated its obligation to act in good faith in view of the dispute over what Ladell said, surely Braunstein’s betrayal is sufficiently beyond credible to dispute to implicate the Supreme Court’s warnings about developer abuse.

POINT IV

PLAINTIFF VIOLATED ITS OBLIGATION TO FORMULATE AND PRESENT A “PROPOSED PROJECT”. PLAINTIFF HAS FAILED TO PERSUADE THAT IT DOES NOT HAVE THIS OBLIGATION OR THAT IT HAS SATISFIED THE OBLIGATION.

Summary of Defendants’ Argument

To facilitate pre-suit negotiations and the speedy administration of builder’s remedy suits, Mount Laurel II clearly envisioned that a developer would create and present a “proposed project” *before* instituting suit. Mount Laurel II at 279-80, 330. After all, a developer can hardly

remedy suit to cause the Borough to comply. Plaintiff, quite obviously, brought the builder’s remedy suit before the Borough could complete the process it started. This too is not good faith but merely a race to the Courthouse to maximize his litigation leverage.

negotiate “in good faith” *before* filing a Mount Laurel suit if it has not even developed and presented a concept plan of what it reasonably hopes to achieve. Similarly, the Supreme Court put enormous pressure on trial judges in Mount Laurel II to expedite Mount Laurel cases. See Mount Laurel II at 281. Trial judges can’t achieve a model of trial efficiency that requires copying, not explaining, if developer’s don’t identify their “proposed project” at the outset of the litigation so that the trial judge and parties can determine if the plaintiff has satisfied the “preconditions” to the award of a builder’s remedy. Mount Laurel II at 279-280,330.

Summary of Plaintiff’s Argument

Plaintiff argues “[t]here is no legal authority in support of Roselle Park’s position.” Pb 22. That is the extent of the analysis plaintiff offers to refute the Borough’s claim that developers have an obligation to formulate and present a proposed project as part of pre-suit negotiations or at the outset of litigation.

Plaintiff also claims that it satisfied any obligation to present a proposed project by presenting a proposal for 300 units with a 15 percent set-aside in conjunction with pre-suit negotiations. Plaintiff claims that it had formulated a Concept Plan for this 300 unit project and that it had also prepared professional reports concerning same. Plaintiff blames the Borough for not asking for these documents instead of accepting responsibility for its failure to present its proposed project and the details associated therewith.

The Borough’s Reply

As to plaintiff’s claim that developers have no obligation to formulate and present a “proposed project” because of the lack of authority, plaintiff simply ignores the sentence from Mount Laurel II that is the very foundation of its lawsuit. See Mount Laurel II at 279-280 (wherein the Supreme Court requires the trial judge to determine whether “the proposed project”

is clearly contrary to land use planning.) Plaintiff also ignored the Supreme Court's application of the three part builder's remedy test in the Clinton section of Mount Laurel II. In that section, the Supreme Court noted the need for the trial judge to consider the developer's proposed project to determine whether the developer had satisfied the "pre-conditions" to the award of a builder's remedy. Id at 330. Finally, plaintiff ignores that a developer cannot negotiate in good faith before filing suit if the developer has not at least figured out what it hopes to achieve; prepared a detailed concept plan illustrating same; considered the obvious site constraints that must be addressed to develop the site in conjunction with the concept plan; and presented that concept plan to the municipality. In view of the above, there is clear express and implied authority for the proposition that developers must prepare and present a proposed project in conjunction with their lawsuits early on.

As to plaintiff's claim that it already presented its proposed project, this claim does not stand scrutiny. Ladell mentioned that he would like to construct a roughly 300 unit apartment project. He did not mention a 15 percent set-aside or the desire to construct any affordable housing in the project. Latini cert., dated October 1, 2007, at para. 57; DeIorio Cert., dated October 1, 2007, at para. 121. Although, eight months into the litigation, he claims to have prepared a detailed concept plan along with professional reports. Ladell cert. at para. 38. However, he admits that he never supplied them to the Borough. Ibid. Thus, plaintiff has presented Roselle Park even less than Oceanport Holdings, LLC presented in the Oceanport matter. In this regard, Oceanport LLC prepared a concept plan. The developer wrote to the Borough of Oceanport explaining what it wanted and enclosed the Concept Plan. See Certification of Jedziniak, dated October 1, 2007, at Exhibits B and C. The developer's conduct, even with this, was found to be insufficient by the trial judge, who noted the need for more detail

and appreciation of site constraints in order to truly negotiate “in good faith.” Similarly, in the Rumson case, Judge Quinn expressed his concern with the great lack of detail of the proposals, such as they were, presented by the Rumson plaintiffs.

Ladell claims he was familiar with the Rumson and Oceanport cases. Yet, he failed to present the detailed concept plan or expert reports he claims to have had in his possession. This is curious. He blames the Borough for not asking. Yet, when defendants served a discovery demand seeking *inter alia* the details of plaintiff’s proposed project, plaintiff failed to provide the information and brought a motion for a protective order.

The process can hardly proceed with the alacrity to Supreme Court sought to achieve if developers can withhold such fundamental information either in conjunction with pre-suit negotiations or at the outset of the litigation. In view of plaintiff’s violation of its obligations to present a proposed project and its other violations, this Court should dismiss the lawsuit. It should also allow defendants to petition COAH to review and approve their affordable housing plan and allow plaintiff, if it so desires, to object to the Borough’s petition. Perhaps in its objection, plaintiff will comply with COAH regulations and detail what it hopes to achieve by its objection. See N.J.A.C. 5:95-4.1 – 4.3.

POINT V

THE SUPREME COURT REQUIRED PLAINTIFFS SEEKING BUILDER’S REMEDIES TO BE THE “CATALYST FOR CHANGE” AND PLAINTIFF HAS FAILED TO MEET ITS BURDEN.

Summary of Defendants’ Argument

The first element of the builder’s remedy test requires developers to “succeed in litigation.” Defendants pointed out that to succeed in litigation under applicable law a developer must pass a two-part test. First, it must prove that the municipality had not complied with its fair

share responsibilities at the point it instituted suit and, second, it must show that the plaintiff was the “catalyst for change” that caused the municipality to comply. Toll Brothers squarely and clearly supports this interpretation as to what a developer must do to “succeed in litigation.” In this case, the Supreme Court made clear that in order to qualify as a “successful” plaintiff as required under Mount Laurel II, it was not sufficient to demonstrate that the municipality had failed to create a realistic opportunity for its full fair share. In addition, the developer must demonstrate that it was the “**catalyst for change.**” 173 N.J. at 560 (wherein the Supreme Court stated that the “critical point” was that the plaintiff “**served as the catalyst for change and [] successfully demonstrated West Windsor’s non-compliance with its constitutional obligation.**”) (emphasis added).

Defendants pointed out that in the instant case, plaintiff did not bring a builder’s remedy lawsuit to cause the Borough to comply. Rather, plaintiff brought the lawsuit to prevent the Borough from completing the preparation of its affordable housing plan. As a sophisticated developer, plaintiff knew full well that once the Borough adopted its plan and filed it with COAH, it would lose the ability to bring a Mount Laurel lawsuit and thereby put pressure on the town to capitulate to its demands. N.J.S.A. 52:27D-309,316. Consequently, it filed a lawsuit before the Borough completed the preparation of its affordable housing plan. Such a preemptive strike hardly qualifies plaintiff as the “catalyst for change”. Rather, plaintiff’s actions expose the developer as an entity that places its desire for profit above the interest of the community in a redevelopment plan and an affordable housing plan that earns community acceptance.

Summary of Plaintiff’s Argument

First, plaintiff argues that Page 216 of Mount Laurel II states that the pre-suit, “good faith” efforts of the Borough to achieve compliance “are not enough.” Pb at 17. The bright-line

test established in Mount Laurel II merely requires an “objective inquiry” into whether the municipality was compliant on the date of suit. Ibid. Plaintiff has met its burden.

Second, argues that some of the cases cited by the Borough in support of its “catalyst” argument are factually distinguishable and therefore not relevant. Id. at 18. Moreover, plaintiff argues that the holding of the Supreme Court in Toll Brothers, 173 N.J. at 560, establishes a two part, disjunctive test. According to plaintiff, a developer has a choice as to how to qualify as a “successful plaintiff.” It can demonstrate that the municipality was noncompliant on the date of suit. **Alternatively**, according to plaintiff, even if it the municipality was compliant, the developer can demonstrate that its lawsuit was the catalyst that caused the municipality to comply. Id. at 19.

Finally, plaintiff alleges that the facts demonstrate that it was the “catalyst for change” because its proposal for a 300-unit, apartment complex created the impetus for the Borough to adopt its affordable housing plan. Ibid.

The Borough’s Reply

A. To “Succeed in Litigation,” A Developer Must Not Only Prove Noncompliance, But Also Prove That it Was the “Catalyst For Change”

Our laws make clear that in order to qualify as a successful plaintiff, it is not enough merely to show that a municipality is non-compliant at the point the developer filed suit. In addition, the developer must show that it was the “catalyst” for change. The problem with plaintiff’s argument is that it attempts to rewrite the rulings articulated by the Supreme Court in Toll Brothers. According to plaintiff, a developer can succeed in litigation if the developer either “served as the catalyst for change” **or** “successfully demonstrated West Windsor’s non-compliance with its constitutional obligation.” See Pb at 19. However, in Toll Brothers, the Supreme Court stated that the “critical point” was that the plaintiff “served as the catalyst for

change” **“and”** “successfully demonstrated West Windsor's non-compliance with its constitutional obligation.” Thus, the express, unambiguous language of the Court explodes plaintiff’s argument that plaintiffs have a choice as to how to qualify as a successful plaintiff. Clearly, developers must pass both prongs of the conjunctive test.

This two-part “success in litigation” standard makes perfect sense. The primary objective of the Supreme Court in Mount Laurel II was to promote “voluntary compliance” and the Court regarded the builder’s remedy as a remedy of last resort. See Mount Laurel II at 214 (wherein the Supreme Court identifies as its first stated purpose “to encourage voluntary compliance with the constitutional obligation.”) See also K. Hovnanian Shore Acquisition Inc v. Berkeley Township, 2003 WL 23206281, (App. Div. Jul 01, 2003) See Jedziniak Cert., dated July 27, 2007, at Exhibit 30 (wherein the Appellate Division noted that in *Toll Bros* “the [Supreme] Court emphasized that voluntary compliance is preferred, should be encouraged, and that a builder's remedy action **should be considered a remedy of last resort.**”) (emphasis added).

Where, as here, a municipality has initiated compliance and a developer intervenes before the municipality reaches the finish line so that it can dictate how the municipality will use its powers to redevelop land and achieve constitutional compliance, the plaintiff’s lawsuit did not create the required causal nexus to the municipality’s compliance. Rather, it is actually *interfering* with the municipality’s effort to comply and to use its redevelopment powers to appropriately advance the public’s best interests.

Not only did plaintiff ask this Court to rewrite the Supreme Court’s holding in Toll Brothers, but also plaintiff largely ignored contrary authority that clearly contradicts plaintiff’s claim that all it needs to do to qualify as a successful plaintiff is to prove that the municipality is noncompliant at the point it filed suit. In particular, consider In Morris Cty. Fair Hous. Council

v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984), aff'd 209 N.J. Super. 108 (App. Div. 1986). In this case, a developer named Hubschman claimed that it should be entitled to continue to litigate in the matter so it could achieve "successful plaintiff" status. Hubschman reasoned that it should have the right to achieve this status because it brought a Mount Laurel suit prior to the determination of the invalidity of the ordinance. Judge Skillman found that, by virtue of a settlement with the Public Advocate, Morris Township had achieved compliance and Hubschman was, therefore, not "in a position to succeed in his Mount Laurel action and hence could not pursue a builder's remedy." Id. at 373.

The Court explained Mount Laurel II as follows:

Although the Court stated in Mount Laurel II that 'builder's remedies must be made more readily available to achieve compliance with Mount Laurel' (id. 92 N.J. at 279), it did not say that *any developer* who has a Mount Laurel action pending when a municipality rezones in compliance with Mount Laurel II may seek a builder's remedy."

[Id. at 372-373 (emphasis added).]

Judge Skillman added that, in order to qualify as "successful," a developer must demonstrate "that its lawsuit played **a substantial part**" in bringing about the municipality's achievement of constitutional compliance. Id. at 373 n. 3 (emphasis added). The Appellate Division affirmed this decision.

In Morris County Fair Housing Council, Judge Skillman did not hold that a developer has a choice as to how to qualify as a successful plaintiff—i.e., by either (a) proving a lack realistic opportunity or (b) by demonstrating that it is the proximate cause of compliance. Rather, Judge Skillman held that a developer must do more than institute suit at a point when the municipality was noncompliant in order to qualify as a "successful plaintiff." **In addition, the developer must prove that it played a "substantial role" in causing compliance.** Even then, that act

would not guarantee a remedy, if the interests of the poor were better served by another course. Ibid.⁷

Thus, Morris County Fair Housing Council, like Toll Brothers, stand for the proposition that success in litigation is a two part standard and developers do not have a choice as to how to qualify as a “successful plaintiff.” They must pass both requirements of the two part test.

B. Plaintiff Was Not The “Catalyst For Change”

Perhaps the most strained argument in plaintiff’s entire brief is its claim that it was the catalyst for change. According to plaintiff, Mr. Ladell’s passing mention of a 300 unit rental project in a meeting he had with Braunstein and the Mayor on August 9, 2006 is the real match that lit the fire to cause the Borough to comply. However, putting to the side that Mr. Ladell did not mention the inclusion of a substantial set-aside as he claims (Defendants’ SOF 116), Mr. Ladell was insignificant at the time as far as Roselle Park knew. He was one of many potential redevelopers. (Defendants’ SOF 116). He had no contract rights as far as the Borough knew. Indeed, Mr. Ladell represents that his company did not enter into an agreement with Mr. Braunstein’s until November of 2006. Ladell cert. at para. 17.

⁷ For the convenience of the Court, footnote 3 of the Morris County Fair Housing Council opinion states:

Other interested developers such as Hubschman may of course be heard in opposition to the proposed settlement. Hubschman may seek to demonstrate at the hearing that its lawsuit played a substantial part in bringing about the rezoning of Morris Township embodied in the proposed settlement and that consequently approval of the settlement would be inconsistent with the Court's "decision to expand builder's remedies," in order to "maintain a significant level of Mount Laurel litigation," "to compensate developers who have invested substantial time and resources in pursuing such litigation" and to ensure that "lower income housing is actually built." Mount Laurel II, 92 N.J. at 279-280, 456 A.2d 390. The weight to be assigned this factor in determining whether to approve a settlement will depend upon the facts of the particular case.

[Id. at 373.]

Moreover, at this time, the relation with Braunstein was so cordial that later that month, the Mayor stated that “the process has been moving along nicely. This is because the property owner [Braunstein] has really cooperated and wants community support for this.” See Minutes of Planning Board, dated August 21, 2006, attached as Exhibit C to Jedziniak Certification dated July 27, 2007. At the same meeting, Mr. Braunstein (a) stated he “is more than willing to work with the town to enhance the property”; and (b) that “a 400-500% tax improvement is possible” for the Borough. Ibid. Therefore, certainly defendants had nothing to fear from Braunstein or Ladell when they met on August 9, 2007 as the minutes of the August 21st meeting demonstrate.

Three months later in November, 2006, a desire to achieve constitutional compliance emerged as a natural outgrowth to the redevelopment process. In this regard, the COAH regulations that existed in 2006 assign fair share obligations in the third housing cycle based upon the anticipated number of new units and new jobs that came into existence between January 1, 2004 and January 1, 2014. N.J.A.C. 5:94-1.4. For every eight new market units or 25 jobs created in this 10 year window, COAH regulations assign a responsibility to create one affordable unit. N.J.A.C. 5:94-2.4. Therefore, the discussion of a multifamily project with hundreds of units had obvious Mount Laurel implications—especially to Charles Latini, PP, the Borough’s planner in the redevelopment and COAH processes.

As a result of the above, it should come as no surprise that questions arose about Mount Laurel compliance as the Borough worked through the redevelopment process and that the planner pointed out that the Borough does have Mount Laurel responsibilities and should address them. Roselle Park, to its credit, followed the recommendation of its planner and retained the planning firm to prepare an affordable housing plan. In the Statements of Fact 90-111 of its brief, Defendants summarize the facts concerning Mount Laurel compliance from November,

2006 and through February 15, 2007 when plaintiff served its complaint and stunned the Borough. Most of those facts are uncontested. For example, plaintiff admits that, “On November 20, 2006, the Planning Board openly acknowledged that the “Fair Share housing plan is needed as soon as possible in Roselle Park.” Statement of Fact 102.⁸

A review of these facts plainly reveals that the Planning Board’s recognition of the need for Mount Laurel compliance arose in November, 2006 as a natural outgrowth of the redevelopment process.⁹ That recognition sparked the compliance process and served as the true catalyst for change. The facts further reveal that defendants committed monies; performed planning and moved towards compliance from November, 2006, through the service of the complaint on February 15, 2007. Indeed, by the time plaintiff served its complaint on February 15, 2007, the Borough had already taken the following actions:

- a. Hired HGA to develop a redevelopment strategy and conducted a series of several public outreach meetings specifically to discuss the redevelopment of the Romerovski site;
- b. Based upon the results of the public outreach meetings, (i) drafted and adopted New Directions, and (ii) declared the Romerovski site a redevelopment area;
- c. Drafted and publicly discussed the recommendations of the Redevelopment Plan, and placed the proposed redevelopment plan on file for public inspection prior to its adoption;

⁸ The correct date was actually November 22, 2006.

⁹ The Court should note that the first discussion concerning the need for a Housing Element and Fair Share Plan emerged on or around November 14, 2006, at the 2006 League of Municipalities conference. See Certification of Latini, October 1, 2007, at para. 65.; Certification of DeIorio, October 1, 2007, at para. 152 - 157. This need was then immediately conveyed by the Mayor to the Planning Board at the next Planning Board meeting on November 22, 2006 (erroneously cited by defendants as November 9th in its initial motion papers). See Certification of Jedziniak, dated July 27, 2007, at Exhibit 13.

- d. Included in the Redevelopment Plan mandatory provisions for the inclusion of affordable housing;
- e. Formally committed to complying with its Mount Laurel obligations by adopting a resolution on December 7, 2006 to authorize HGA to commence preparation of a Housing Element and Fair Share Plan; and by adopting a resolution on February 1, 2007 to complete the work on the plan;
- f. Began drafting a Housing Element and Fair Share Plan that contemplated the provision of affordable housing through the redevelopment of the Romerovski site.

The above facts reveal that the Borough and its Planning Board were the catalyst for compliance. The above facts further reveal that plaintiff has not played a substantial role in causing compliance.

Another factor is very significant. If defendants completed their efforts to adopt an affordable housing plan, they could have filed that plan with COAH. Once the Borough filed its plan, it would secure two years of automatic protection from Mount Laurel lawsuits—even if it did not seek COAH’s approval of the plan. N.J.A.C. 5:95-2.1. Specifically, a developer that filed a builder’s remedy lawsuit against such a community would be required to exhaust the administrative remedies created by the Fair Housing Act. N.J.S.A. 52:27-309, 316. If the municipality petitioned COAH for approval of its affordable housing plan and secured same, the Fair Housing Act provides that the municipality would secure 10 years of protection. N.J.A.C. 5:95-1.4.

In light of the above, a sophisticated developer such as Ron Ladell would have been well aware that the Borough’s completion of the compliance process it initiated in November 2006

would be fatal to any future attempt by the developer to use the Mount Laurel doctrine to put pressure on the Borough to capitulate to its demands. Specifically, the Fair Housing Act would insulate defendants from a Mount Laurel lawsuit if the Borough adopted and filed its plan with COAH before Plaintiff filed suit. N.J.S.A. 52:27-309. A recognition of this fact reveals why plaintiff made sure that it filed its lawsuit before the borough completed the preparation and adoption of its affordable housing plan.

In conclusion, plaintiff did not serve as the “catalyst for change”. Rather, plaintiff did nothing more than make a preemptive strike so that it could attempt to use the considerable leverage of a Mount Laurel lawsuit to bully the Borough from completing the redevelopment and affordable housing process it had initiated and from allowing its public to meaningfully participate in that process. Ladell seeks to marginalize the public, not invite its scrutiny. That is why, despite all its bravado, it has failed to make a public presentation.

POINT VI

AS A “PRECONDITION” TO DECLARING A PLAINTIFF ENTITLED TO A BUILDER’S REMEDY, THE SUPREME COURT REQUIRED PLAINTIFFS TO PROPOSE A SET-ASIDE THAT QUALIFIES AS “SUBSTANTIAL” AND PLAINTIFF MAY NOT SATISFY THE PREREQUISITE TO JUDICIAL RELIEF BY RELYING UPON A SUPERCEDED REGULATION NEVER INTENDED TO CREATE AN IRREBUTABLE PRESUMPTION.

Summary of Defendants’ Argument

The second element of the builder’s remedy requires a plaintiff to demonstrate that it has proposed a set aside that qualifies as “substantial.” Mount Laurel II at 279-80. The Court defined “substantial” as at least 20 percent, and indicated that the set-aside should be even greater as long as the remedy entitles the developer to a sufficient percentage of market units “to render the project profitable.” Mount Laurel II at 279 n.37. The Court also stated that trial

courts should determine whether the set aside is truly “substantial” on a case-by-case basis. Ibid. The Legislature incorporated the term “substantial” in the Fair Housing Act. N.J.S.A. 52:27D-304(f)

COAH’s current cycle III regulations, like Mount Laurel II itself, seek to harness the value of rezoning to ensure that low and moderate households secure their fair share of the benefit achieved in their name and to ensure that the municipality’s legitimate concerns with sound planning are taken into account. N.J.A.C. 5:94-4.4(a). Although developers often argue that COAH’s cycle II regulations apply, COAH superseded the cycle II regulations when it promulgated cycle III regulations. Moreover, in accordance with well established law holding that presumptions are rebuttable unless expressly required otherwise, COAH has made clear that it intended the presumptions set forth in its Cycle II regulations to be rebuttable. 37 N.J.R. 5766. Therefore, even if this Court ruled over defendants’ strenuous objection that cycle II regulations apply, the Court should give the Borough the opportunity to overcome the presumptions and secure a higher set-aside

Summary of Plaintiff’s Argument

Plaintiff notes that its proposal for 300 units on its site (60 units per the acre) would result in two more affordable units than contemplated in the Borough’s adopted Fair Share Plan. Id. at 21. Further, under the 24 year old Law Division opinion in Urban League v. Mahwah, profits (even windfall profits) are irrelevant. Ibid.

Finally, plaintiff asserts that this Court is bound by COAH’s Cycle II regulations which, impliedly, create an irrebuttable presumption that a 15% set aside for inclusionary rental projects is “substantial” as a matter of law. Id. at 21 – 22.

The Borough's Reply

Plaintiff seeks a builder's remedy on the basis of Mount Laurel II at 279-280. Since plaintiff relies on Mount Laurel II, it should not be heard to complain that it must satisfy the standards set forth in Mount Laurel II. Those standards render a 20 percent set-aside a "minimum" and require that the extent of the set-aside above 20 percent take into account economic realities. Id at 279 n. 37.

This makes sense because unless the affordable housing ordinance creates economically feasible zoning, the affordable housing will not be produced. Therefore, the Court should take care to ensure that the set-aside is not too high. However, the manner in which the FHA requires that COAH define low and moderate households renders 40 percent of the households in the state low or moderate. This drives up the need for affordable housing. Indeed, if 40 percent of the households qualify as low or moderate and we only allow a 20 percent set-aside, municipalities can never meet the need. Therefore, municipalities need to be concerned that they achieve the maximum practicable set-aside from each project. Where, as here, there are precious few opportunities to create affordable housing, we need to ensure that we remain faithful to the principles in Mount Laurel II and, thus, seek to maximize the production of affordable housing from each project to the extent practicable.¹⁰

Plaintiff's argument seeks to substitute administrative ease for the type of financial analysis called for by Mount Laurel II. See Mount Laurel II at 269 n.29. However, COAH itself has retreated from the 15 percent set-aside standard for rental housing and the 20 percent set-

¹⁰ COAH current policies highlight the need to secure more than a mere 20 percent set-aside from each project. In this regard, every eight market units will generate a one unit obligation under the cycle III regulations that became effective on December 20, 2004. That means that if a municipality merely secures 20 affordable units in a 100 unit project, it cannot simply satisfy 20 units of its fair share with the 20 affordable units. It must use 10 of the 20 affordable units to satisfy the 8 unit growth share obligation created by the 80 market units: $80/8=10$.

aside standard for for-sale housing set forth in its regulations for the first and second housing cycles. COAH's current regulations, like Mount Laurel II itself, call for an economic analysis to gauge a set-aside that allows for an "adequate profit." Id. See Point V.A at 99-106 (explaining the operation of the principles set forth in Mount Laurel II for gauging the set aside on the basis of an economic analysis). See also Point V(C) of Defendants Summary Judgment Brief at 108-111 (explaining the operation of COAH's current regulations and empowering municipalities to maximize the production of affordable housing on the basis of an economic analysis).

Plaintiff also asks this Court to apply cycle II regulations. However, we are in the third housing cycle. Consequently, cycle III regulations should apply. See also Point V.D.1. of Defendants Summary Judgment Brief at 111-113 (explaining why this Court should apply cycle III regulations—not cycle II regulations). Moreover, even if cycle II regulations controlled, those regulations were never intended to create the irrebuttable presumption plaintiff seeks. COAH's own words demonstrate conclusively that COAH never intended the set-asides from its Cycle II regulations to be fixed or immutable: "[t]he Council's second round rules **did not dictate minimum or maximum** affordable housing set-asides" 37 N.J.R. 5766.¹¹

¹¹ COAH also contradicts plaintiff's position concerning "substantial" set asides in the following passage:

Furthermore, the Council does not believe it is appropriate to require a site specific minimum or maximum affordable housing set-aside or density in the third round proposal. The municipality is responsible for submitting a plan that meets its overall affordable housing obligation, as set forth in N.J.A.C. 5:94-2.4. Municipalities have a myriad of options to satisfy their obligation. **The obligation may be fulfilled with a higher set-aside and density on some sites or zones and a lower set-aside and density on other sites or zones. The municipality shall have the flexibility to negotiate an appropriate set-aside and density, provided the overall plan creates a realistic opportunity pursuant to N.J.A.C. 5:94-1.4. The rule does, however, require the municipality to take into consideration the economic feasibility of its zoning.**

[36 N.J.R. 5773 (emphasis added).]

Finally, all **presumptions are rebuttable** unless expressly irrebuttable by regulation or statute. See Ran-Dav's County Kosher, Inc. v. State, 243 N.J.Super. 232, 243 (App. Div.), rev'd on other grounds, 129 N.J. 141 (1992). COAH's Cycle II regulation did not specify that the presumptions contained therein are irrebuttable. To the contrary, as noted above, COAH stated, **"The Council's second round rules did not dictate minimum or maximum affordable housing set-asides"** 37 N.J.R. 5766. Consequently, even if Cycle II regulations controlled—which is not the case for the reasons set forth above, they would not create irrebuttable presumptions.

In light of the above, clearly a developer cannot satisfy its obligation to provide a substantial set aside by relying upon older regulations and ignoring current regulations, which now more clearly embody principles set forth in Mount Laurel II upon which plaintiff relies. Plaintiff has simply failed to satisfy the applicable criteria and, therefore, this Court should declare that plaintiff is not entitled to the remedy it seeks.¹²

COAH's emphasis on "economic feasibility" is also consistent with the FHA, which provides: "In preparing the housing element, the municipality shall consider the following techniques for providing low and moderate income housing within the municipality, as well as such other techniques as may be published by the council or proposed by the municipality: (1) Rezoning for densities necessary **to assure the economic viability** of any inclusionary developments, either through mandatory set-asides or density bonuses, as may be necessary to meet all or part of the municipality's fair share. . . ." N.J.S.A. 52:27D-311a.

¹² Defendants would note that Plaintiff's reliance on the Toll Brothers and Urban League cases is ill-placed. As to the Toll Brothers case, it is true that the majority of the Supreme Court allowed a builder's remedy plaintiff to satisfy its obligation to provide a substantial set-aside merely by reserving 15 percent of the units for low and moderate housing. However, the history of the experience developers had in developing the site was so severe that it is understandable why the Court did not consider the set-aside issue more carefully. See Jedziniak cert., dated July 27, 2007, at Exhibit 29 (analysis of the facts in the Toll Brothers saga). Perhaps more importantly, the Supreme Court decided Toll when the Cycle II regulations were in effect. Those regulations established a presumptive set-aside of 15 percent. If the Supreme Court were to decide toll Toll today, it would need to take into account the current Cycle III regulations which, indeed, call for

POINT VII

THE BOROUGH'S ADOPTED HOUSING ELEMENT AND FAIR SHARE PLAN IS FUNDAMENTALLY SOUND AND MORE THAN SUFFICIENT TO BE REVIEWED BY COAH STAFF, SUBJECT TO WHATEVER REVISIONS OR ADDITIONAL INFORMATION THE AGENCY REQUESTS.

As noted above, the Borough maintains that that Plaintiff is not entitled to the relief it sought because (a) it failed to satisfy its pre-suit, good faith obligation; (b) it failed to act in good faith generally; (c) it did not act as the “catalyst for change”; (d) it did not meet its burden of demonstrating that it had proposed a set-aside that qualifies as “substantial”; and (e) for various other reasons. While any of these reasons alone would warrant dismissal, despite plaintiff’s attempts to obfuscate the salient facts, certainly their cumulative impact warrants a declaration that plaintiff is not entitled to a builder’s remedy.

Not only should this Court dismiss plaintiff’s complaint, but also it should allow the Borough to perfect its filing with COAH so that it can seek COAH’s review and approval of its affordable housing plan. In this regard, while the Borough has submitted its adopted Housing Element and Fair Share Plan to COAH, it has not been able to perfect its filing because COAH

the very type of economic analysis envisioned by the Supreme Court in Mount Laurel II. See *id* at 267 n.29.

As to the Urban League case, this is a non-binding trial court decision decided over two decades ago. Moreover, the analysis in that case not only violates the principles embodied in COAH’s Cycle III regulations, but also is inconsistent with another well respected trial court decision of that era- J.W. Field Co. v. Tp. of Franklin, 204 N.J.Super. 445, 454 (Law. Div. 1985). In J.W. Field, Judge Serpentelli emphasized “that there is [nothing] magical about the figure of 20%”. *Id.* at 467. Judge Serpentelli also stated that “[t]he goal [of the builder’s remedy] is to devise a solution which maximizes the opportunity for lower income people and minimizes the impact on the municipality.” *Id.* at 453. Thus, one specially-appointed Mount Laurel judge at the time did not view the common 20 percent set-aside as written in stone, as plaintiff advocates. Rather, the surrounding facts will help a trial judge to determine the appropriate set-aside.

does not allow municipalities to file their plans while Mount Laurel litigation is pending. N.J.A.C. 5:95-2.1. If this Court dismisses the complaint, however, the path to perfecting the filing will be clear so that COAH can review and, if satisfied, approve the Borough's plan. If this Court dismisses the complaint as defendants advocate, this Court will be in the same position as Judges Quinn and Coogan in the Rumson and Oceanport matters respectively, whereby the courts allowed the municipalities to complete their efforts to secure approval of their plans free from the overwhelming burdens of unnecessary Mount Laurel litigation.

The Borough admits that its plan is not perfect and that it still has some work to do to. However, the Borough has taken all the steps necessary to secure COAH review, which merely requires (1) submission of the Borough's adopted and endorsed Housing Element and Fair Share Plan and the associated Resolutions of the Planning Board and Borough Council by the Planning Board, and a copy of the Service List. See <http://www.state.nj.us/dca/coah/sampledocs/petitionchecklist.doc> (COAH's "Checklist for a Complete Petition for Third Round Substantive Certification"). Roselle Park's adopted and endorsed Housing Element and Fair Share Plan, the associated resolutions, and the service list were all sent to COAH. See Latini cert., dated October 1, 2007, at para. 73-74. Therefore, the Borough is poised to perfect COAH jurisdiction upon dismissal of this action.

Although plaintiff's expert attempts to criticize the Borough's plan, she cannot credibly deny that the Borough's plan is at least sufficient for purposes of authorizing the Borough to file the plan with COAH—after dismissal of plaintiffs' complaint—so that the Borough can then petition COAH for substantive certification. Once reviewed, COAH staff will likely ask for additional information, but this is standard operating procedure. Rarely, if ever, does a town submit a plan that is perfect.

The Borough has sought to provide this Court with meaningful assurances that the interest of lower income households would not be harmed by granting the dismissal sought by this motion. Therefore, as stated in its initial brief, the question in this matter is not *whether* the Borough will comply or indeed even utilize the site that plaintiff has purportedly contracted to purchase. Rather, the Borough clearly will comply. It merely wishes to control the process it initiated and select the best redeveloper with the best plan for the site.

CONCLUSION

For the foregoing reasons, the Borough urges the Court to dismiss plaintiff's complaint and allow the Borough to file its plan with COAH and petition COAH for approval of its affordable housing plan.

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By _____
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Michael A. Jedziniak

Dated: October 2, 2007