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ATTORNEYS FOR INTERVENOR-DEFENDANT

MANALAPAN 37 LLC

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
DOCKET NO.: MON-L-2518-15

IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP OF
MANALAPAN, COUNTY OF MONMOUTH,

Plaintiff/Petitioner

:
:
:
:

Civil Action

(Mount Laurel Action)

CERTIFICATION OF SERVICE

JEFFREY KANTOWITZ, of full age, certifies:

1. I am an attorney at law of the State of New Jersey and am of counsel to the Law Office of Abe Rappaport, attorneys for proposed Intervenor-defendant and/or interested party Manalapan 37 LLC. I have personal knowledge of the facts set forth in this certification.

2. On December 30, 2015, I caused to be served the following papers on the following persons in the manner set forth, and on the persons on the attached service list via electronic mail:


1. Cover Letter to Clerk;
2. Notice of Motion to Deny Manalapan Request to extend Immunity;
3. Letter in lieu of brief;
4. Proposed form of Order;
5. Certification of service.

Clerk, Civil Law Division BY HAND
Superior Court of New Jersey
Monmouth County - Law Division
71 Monument Park
Room 101 West
Freehold, New Jersey 07728

Andrew Bayer, Esq. ^{HAND JK} BY ~~PRIORITY MAIL~~ and ELECTRONIC MAIL
Gluck Walrath LLP
428 Riverview Plaza
Trenton, NJ 08611
Attorneys for Plaintiff/Petitioner
Township of Manalapan

Hon. Jamie S. Perri, J.S.C. BY HAND
Superior Court of New Jersey
Monmouth County Courthouse
71 Monument Park
Freehold, NJ 07728

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.



Jeffrey Kantowitz
Attorney ID# 017141982

Dated: December 30, 2015

SERVICE LIST: IMO APPLICATION OF TOWNSHIP OF MANALAPAN, ET AL., DOCKET

NO. MON-L-2518-15

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MEMBERS NJ AND NY BARS

December 30, 2015

Hon. Jamie S. Perri, J.S.C.
Superior Court of New Jersey
Monmouth County Courthouse
71 Monument Park
Freehold, NJ 07728

**RE: In the Matter of the Application of the Township of
Manalapan, County of Monmouth
Docket No. MON-L-2518-15
(Motion of proposed intervenor defendant Manalapan 37
LLC to deny Manalapan's request to extend immunity)**

Dear Judge Perri:

We represent Manalapan 37 LLC, a proposed intervenor-defendant in the captioned matter. We submit this letter in lieu of brief in support of Manalapan 37's motion to deny Manalapan's request for an extension of immunity. Manalapan 37's motion to intervene and file an Answer, filed on or about November 23, 2015, and made returnable on December 18, 2015, has not yet been decided by the Court. Nonetheless, in anticipation of a favorable decision; to notify Manalapan timely of Manalapan 37's opposition to Manalapan's request to extend immunity; and to obviate a motion on short notice to deny Manalapan's request

(after the Court were to rule favorably on Manalapan 37's motion to intervene), we are filing this motion. Should the Court grant Manalapan 37's motion to intervene and file an Answer in this action, it can surely rule nunc pro tunc to allow this motion to be heard and adjudicated.

In the alternative, for purposes of this motion, the Court can and should consider Manalapan 37 an interested party and accept and adjudicate this motion.

This Court's December 2, 2015 Omnibus Order #4 in IMO Declaratory Judgment Actions filed in the County of Monmouth, etc., par. 3, directed that motions to deny municipal requests to extend immunity be filed by parties or interested parties within 15 days of a municipality's notice of its request. Manalapan included in a December 14 cover letter to the Court (and sent to the parties) - and which letter was later re-submitted and re-sent on December 22 because of a missing page 2, a request for an extension of immunity. Its letter included a notice dated December 11, 2015. We have never received a filed copy of the notice.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Manalapan filed its complaint in early July 2015, and its motion for immunity was granted by order on August 19, 2015. Manalapan was granted immunity until December 8.

Thereafter, on October 30, Manalapan submitted a draft plan

as directed by this Court's Omnibus Order #2. Following a November 4 case conference, the Court entered Omnibus Order #4 of December 2, 2015. That Order directed Manalapan to submit by December 14 an updated draft plan to address the obligation determined preliminarily by the Court's methodology master Richard Reading. Mr. Reading set Manalapan's obligation at 649 units.

LEGAL ARGUMENT

MANALAPAN'S REQUEST TO EXTEND IMMUNITY SHOULD BE DENIED BECAUSE IT HAS FAILED TO CARRY ITS BURDEN AND DEMONSTRATE ITS GOOD FAITH EFFORTS TO ADDRESS ITS AFFORDABLE HOUSING OBLIGATION.

Manalapan's request for an extension should be denied because it has failed to carry its burden to demonstrate that it is pursuing in good faith the process set by this Court and the direction of the Supreme Court in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 24-28, 35-36 (2015) (Mount Laurel IV). Mount Laurel IV and this Court's order and rulings on immunity make clear, through repeated references and discussion, that immunity was to be temporary and for a brief, finite period, to allow a town to achieve compliance voluntarily. The justification was that a town would be pursuing with vigor and good faith compliance with its affordable housing obligations. Under Omnibus Order #4, the town bears the burden of proof to justify continued immunity.

Here, Manalapan's effort is lacking, and it has failed

utterly to carry its burden. Currently, a town was directed to address its compliance, even in draft plans, through mechanisms (or methods) determined to be legal and valid via precedent, and through appropriate and sufficient documentation to support those mechanisms. Manalapan has failed to do so. Except for a repeatedly stated vague remark about its plans for several potential inclusionary developments, and vague but undocumented references to meetings with intervenors and interested parties - a statement belied by its refusal to consent to the intervention of Manalapan 37, its December 14 submission is little more than a re-hash of its October 30 submission, despite knowing that its efforts and request for continued immunity would be scrutinized. The submission is ill-documented and lacking. To be sure, the town should not be enabled to rectify its failures by submitting the required documentation or a revised draft summary plan and matrix as part of its response to this motion. Such conduct is an affront to the Court's process and orders.

A. Prior Round Obligation and Third Round Substantive Certification

Manalapan's submission omits critical facts and fails to note that it has still failed to satisfy and bring to fruition all of the methods it proposed to address its second round obligation of 706 units.

Third Round Certification

At page 2 of its December 14 letter (a copy of which was only furnished on December 22), Manalapan's counsel writes: "Here, there has not been a finding by the Court that the housing plan submitted by Manalapan that was the basis for COAH's award of substantive certification is deficient."

At page 2 of the single-spaced December 10, 2015 narrative that accompanied its "Summary of Plan for Total Fair Share Obligation" sheet, Manalapan, in the section titled "Township Affordable Housing History," writes that "COAH granted substantive certification to the Township's third round amended housing element and fair share plan on July 15, 2010."

Yet, the narrative omits that an appeal of that decision to grant substantive certification was dismissed without prejudice by the Appellate Division in February 2014. Second, it omits that Manalapan failed to adopt ordinances to implement its fair share plan within 45 days as required under the Fair Housing Act, N.J.S.A. 52:27D-314 ("[o]nce substantive certification is granted, a municipality shall have 45 days in which to adopt its fair share housing ordinance approved by the council [COAH]."), and N.J.A.C. 5:91-6.5(d) (implementing ordinances shall be adopted within 45 days of substantive certification, otherwise certification will be "void and of no force and effect"). Thus, with its certification void and of no force and effect, Manalapan omits that on August 27, 2010 a lawsuit was filed

against Manalapan - now without substantive certification - for exclusionary zoning and a builder's remedy, in a suit titled Triplet Square LLC v. Township of Manalapan, et al., Docket No. MON-L-4351-10. The suit has been stayed and is pending in the Superior Court.

Third, Manalapan's narrative omits that COAH's decision denying a motion to void the substantive certification for failure to adopt ordinances timely, as required by section 314 of the Fair Housing Act and N.J.A.C. 5:91-6.5(d), was appealed, and that appeal, too, was dismissed without prejudice by the Appellate Division in February 2014.

Prior Round Obligation

With respect to its prior obligation, Manalapan's submission is vague with respect to the Lewis Street project, a 10 unit project. Two (2) of the 2 units were to be applied to satisfy its second round (1987-1999) obligation. The narrative indicates that the site was purchased by Manalapan following COAH mediation. We estimate, then, that the purchase occurred about 5 years ago. (Manalapan does not document the date of purchase.) Eight of the 10 units were to be applied to the third round obligation. The narrative writes that Lewis Street is a "residential subdivision consisting of two lots planned for the development of two affordable units. Final approval was granted by the Township in 1992." Yet, there is no affirmative statement

that these two units have ever been built. Rather, the "100% Affordable Housing Project" sheet describing the Lewis Street project recites that the "Township, in conjunction with an affordable housing developer, will permit the construction of 10 affordable for-sale townhouse units on the site." Further, that sheet indicates "Rezoning Needed: Yes." In other words, the Lewis Street site, which is relied on to address Manalapan's second round obligation and third round obligation, still needs to be re-zoned, and then needs to be applied for and approved, and then needs to be built. Yet, there is no documentation of any of these steps. As well, is any funding needed? No information is provided.

B. Prospective Obligation

Manalapan's matrix and summary narrative discuss a variety of mechanisms, but they are short on necessary information to carry Manalapan's burden and justify an extension of immunity.

First, as noted above, five years after the Township's apparent purchase of the Lewis Street property, there remain significant questions and an absence of answers about the Lewis Street project. Is it realistic or viable? The "100% Affordable Housing Project" sheet admits that the site needs rezoning and that no units have been built. ("Two of the units will provide credit to the Township prior round obligation. The remaining eight units will provide credit toward the township Third round

obligation.") Too, no affordable housing developer has been identified. No mention is made of any efforts to locate a developer these past five years. Further, crucially, no mention is made of whether money is needed to help fund the project, and whether there is a firm source or commitment for it.

Second, with respect to RCAs, Manalapan fails to document whether all the committed money has been transferred to the receiving municipality and whether the units to be funded with its money have been built and are occupied.

Third, with respect to Millhurst Road project, which is to address 120 of the 649 units calculated by Mr. Reading, or almost 20% of the obligation, the "100% Affordable Housing Project" sheet for that project - which is dated October 6, 2015 - states that the site was acquired back in 2006 - almost a decade ago - by Manalapan. Yet, Manalapan states that no units have been built. Further, the sheet is silent as to what steps in the development process have or have not occurred. Has an application for development been prepared, let alone filed? Will the Township be the developer and if so, does it have any experience? Will an affordable housing developer be sought? If so, what efforts have been undertaken these past nine (9) years to find a developer? Will further funding be needed, and if so, where is a firm commitment for it?

Fourth, with respect to its several listed inclusionary

developments, the Township, in almost a self-congratulatory tone, proclaims it has met with intervenors and other interested parties. Yet, it could not see its way clear to consent to Manalapan 37's motion to intervene. Is this the conduct of a voluntarily cooperating town?

As for those meetings, the Township's report of them is vague and couched in obfuscatory, tentative, opaque language. For each of the six inclusionary sites listed, the narrative states: "The Township is in the preliminary stages of engaging the developer to finalize a development concept and may amend this project description to reflect the ongoing discussions." There is absolutely no way to determine if any of those sites will realistically become a part of Manalapan's plan, or if the meetings were merely perfunctory so that Manalapan could report - exactly as it has - it met with interested developers.

Two other aspects of its submission demonstrate that it failed to carry its burden. First, it appears that its claimed bonus credits exceed its allowable limits.

Second, and more importantly, nowhere has Manalapan justified a complete failure to address the so-called gap period of 1999-2015, and to assign it an obligation of 0. See Summary of Plan. Manalapan offers no support whatsoever for such a posture. To be sure, in promulgating in 1994 second round prospective need, COAH calculated a prospective need obligation

for 1993-1999. Also, Mount Laurel jurisprudence has always imposed the affordable housing obligation on the municipality. COAH's providing a quantification of the obligation was only that: a means or function, not the essence of the obligation itself. The absence of a quantification of the obligation - even for sixteen years - does not, and cannot, equate with the elimination of the obligation for that period. (By analogy, the builder's remedy is a means to address the constitutional obligation, and not of constitutional moment itself.)

To be sure, the municipal power to zone, Mount Laurel I and Mount Laurel II instruct, derives from the State. It must be exercised in pursuit of the general welfare. When during these sixteen years it was exercised to permit all types of development - e.g., commercial, retail, market rate residential, industrial - except for low and moderate income residential housing, its abuse in this manner cannot be excused by eliminating the obligation during the period of the zoning power's abuse.

Moreover, N.J.S.A. 52:27D-313's provision of a declaratory judgment action in the Superior Court as an alternative for towns to achieve satisfaction of their affordable housing obligations (parallel to the COAH administrative process) demonstrates that the legislature saw the COAH function of quantifying obligations as only a means to implement the

obligation, not part of the obligation itself. To be sure, during the gap period, any town could have pursued relief under section 313 and relied on credible planning testimony to quantify its obligation. Surely, no court would have denied a town's request for relief if a town justifiably quantified and supported a third round obligation simply because COAH had not issued valid third round numbers.

CONCLUSION

Manalapan 37's motion to deny Manalapan's request for an extension of immunity should be granted. Manalapan's draft plan and matrix are plainly lacking. Its absence of detail and documentation are fatal. Its failure and lengthy delay in connection with several proposed mechanisms are fatal. As well, it has failed to justify assertions and claims with respect to its obligations.

Respectfully,


Jeffrey Kantowitz

Cc: Manalapan 37 LLC
Andrew Bayer, Esq.
Service List

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December 30, 2015

BY HAND

Clerk, Civil Law Division
Superior Court of New Jersey
Monmouth County - Law Division
71 Monument Park
Room 101 West
Freehold, New Jersey 07728

**RE: In the Matter of the Application of the Township of
Manalapan, County of Monmouth
Docket No. MON-L-2518-15
(Motion to deny Request of Manalapan Township to extend
Immunity)**

Dear Sir/Madam:

We represent Manalapan 37 LLC, a proposed intervenor-defendant and/or interested party in the captioned matter. We enclose for filing an original and one (1) copy of:

1. Notice of Motion for Order Denying Request of Manalapan to Extend Immunity;
2. Letter in lieu of brief;
3. Proposed form of Order Denying Request;
4. Certification of service.

Please charge any fees associated with this motion to this firm's Superior Court account, #140498.

Please stamp these papers "filed" and return a filed copy in the enclosed, self-addressed, stamped envelope.

By copy of this letter, we are forwarding copies of these

papers to persons/entities set forth in the Certification of Service, and forwarding a courtesy copy to the Hon. Jamie S. Perri, J.S.C., the judge assigned to and managing this Mount Laurel Declaratory Judgment action.

We appreciate your time and efforts. If you have any questions, please contact me.

Very truly yours,



Jeffrey Kantowitz

Enclosures

Cc: Hon. Jamie S. Perri, J.S.C. BY HAND (w. enc.)
Andrew Bayer, Esq. BY USPS PRIORITY MAIL and Email (w. enc.)
Service List (w. enc.)

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MANALAPAN 37 LLC

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
DOCKET NO.: MON-L-2518-15

IN THE MATTER OF THE
APPLICATION OF THE TOWNSHIP OF
MANALAPAN, COUNTY OF MONMOUTH,

Plaintiff/Petitioner

:
:
:
:
:

Civil Action

(Mount Laurel Action)

**NOTICE OF MOTION TO DENY
MANALAPAN TOWNSHIP REQUEST
TO EXTEND IMMUNITY OF
PROPOSED INTERVENOR
DEFENDANT MANALAPAN 37 LLC**

TO: Clerk - Civil Division
Superior Court of New Jersey
Monmouth County Courthouse
71 Monument Park
Freehold, NJ 07728

Andrew Bayer, Esq.
Gluck Walrath LLP
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Attorneys for Plaintiff/Petitioner
Township of Manalapan

Attached Service List

SIRS/MADAM:

PLEASE TAKE NOTICE THAT on Friday, January 22, 2015, at 9:00 AM, or as soon thereafter as counsel may be heard, the undersigned, counsel for proposed intervenor-defendant and/or interested party Manalapan 37 LLC, will move before the Honorable Jamie S. Perri, J.S.C., or her designee, at the Monmouth County Courthouse, 71 Monument Park, Freehold, New Jersey 07728, for an Order granting intervenor defendant and/or interested party Manalapan 37 LLC's motion to deny Manalapan Township's request for an extension of immunity.

PLEASE TAKE FURTHER NOTICE that in support of this motion, Manalapan 37 LLC shall rely on this notice of motion, a letter in lieu of brief, and its proposed form of Order.

PLEASE TAKE FURTHER NOTICE oral argument under R. 1:6-2 is requested if opposition is filed to this motion, or if requested by the Court.

PLEASE TAKE FURTHER NOTICE that in accord with R. 1:6-2, a proposed form of order is attached.

Respectfully,
ABE RAPPAPORT, Attorney at Law
Attorneys for Manalapan 37 LLC

By: Jeffrey Kantowitz
Jeffrey Kantowitz

Dated: December 30, 2015

SERVICE LIST: IMO APPLICATION OF TOWNSHIP OF MANALAPAN, ET AL., DOCKET
NO. MON-L-2518-15

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Village at Manalapan Properties

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MANALAPAN 37 LLC

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
DOCKET NO.: MON-L-2518-15

IN THE MATTER OF THE :
APPLICATION OF THE TOWNSHIP OF :
MANALAPAN, COUNTY OF MONMOUTH, : Civil Action
Plaintiff/Petitioner :
 : (Mount Laurel Action)
 :

**ORDER GRANTING MOTION TO
DENY MANALAPAN TOWNSHIP
REQUEST FOR EXTENDED
IMMUNITY**

THIS MATTER HAVING BEEN opened to the Court by way of
motion of Abe Rappaport, Attorney at Law, attorneys for proposed
intervenor-defendant and/or interested party Manalapan 37 LLC
(Jeffrey Kantowitz, Esq., appearing), on notice to the
parties/entities listed on the notice of motion and attached
Service List, for an order granting the motion of Manalapan 37
LLC to deny the request of Manalapan Township to extend its
immunity from exclusionary zoning litigation in this matter, and

the Court having reviewed papers submitted in connection with this motion, having heard the arguments of counsel, and for the reasons set forth by the Court on the record on _____, 2016, and for good cause shown,

IT IS ON THIS _____ day of January, 2016 ORDERED as follows:

1. The application of Manalapan 37 LLC to deny Manalapan Township's request to extend immunity from exclusionary zoning litigation is granted.

2. The protections of immunity granted by this Court's earlier orders are terminated.

3. A copy of this Order shall be served on all counsel/interested parties in this action within _____ days of the entry of this Order.

Hon. Jamie S. Perri, J.S.C.

_____ Opposed

_____ Unopposed