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LANDMARK DUMONT, LLC, Plaintiff, vs. BOROUGH OF DUMONT, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY; THE MAYOR AND COUNCIL OF THE BOROUGH OF DUMONT; AND THE PLANNING BOARD OF THE BOROUGH OF DUMONT, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY Docket No.: BER-L-1297-14 CIVIL ACTION **NOTICE OF MOTION TO DISMISS COMPLAINT WITHOUT PREJUDICE FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

TO: Clerk of Superior Court
Superior Court of New Jersey
Law Division-Bergen County
10 Main Street
Hackensack, New Jersey 07601

Antimo A. Del Vecchio, Esq.
BEATTIE PADOVANO, LLC
50 Chestnut Ridge Road
P.O. Box 244
Montvale, New Jersey 07645
Attorney for Plaintiff

ON NOTICE TO: Mark D. Madaio, Esq.
27 Legion Drive
Bergenfield, New Jersey 07621
Attorney for Co-Defendant, Planning Board of Dumont

Honorable William C. Meehan, J.S.C.
10 Main Street-Court 301
Hackensack, New Jersey 07601

PLEASE TAKE NOTICE that on Friday, June 6, 2014 at 9am or as soon thereafter as counsel may be heard, the undersigned counsel for Defendants, Borough of Dumont, Borough Council for the

Borough of Dumont, and the Mayor of Dumont, will apply to the Judge of the Superior Court sitting in Hackensack and assigned to hear such Motions at 10 Main Street, Hackensack, New Jersey, for an Order dismissing the complaint without prejudice as against the Defendants, for failure of the Plaintiff to exhaust its administrative remedies; and

PLEASE TAKE FURTHER NOTICE THAT, Defendant will rely upon a brief and certifications, annexed hereto, in support of this Motion. Movant consents to disposition on the papers in the absence of opposition hereto.

GREGG F. PASTER & ASSOCIATES
Attorneys for Defendants, Borough of Dumont, et al.

Dated: May 13, 2014

By: GREGG F. PASTER, ESQ.

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT WITHOUT PREJUDICE FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

On the Brief:
Alfred A. Egenhofer, Esq.

Of Counsel and on the Brief:
Gregg F. Paster, Esq.

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PRELIMINARY STATEMENT

The Borough of Dumont has been mischaracterized by the Plaintiff to this action as having spent the last thirty years in violation of their constitutional obligation to provide affordable housing for their fair share of the region's low and moderate income households. In fact, the Borough has been fully compliant with both the first and second round rules of the Council on Affordable Housing ("COAH"), and they filed their housing element and fair share plan ("HE&FSP") with COAH in December 2013, simultaneously petitioning COAH for substantive certification of their Plan. COAH's Third Round Rules have been the subject of numerous lawsuits, appeals, orders, motions and corrections, frequently leaving municipalities in New Jersey uncertain of their calculated affordable housing obligation, and even now, following the release of proposed new third round rules as ordered by the courts, that calculated obligation has potentially changed once again. In spite of that, the Borough of Dumont has made a sincere, good faith effort to accommodate the needs of its fair share of the region's low and moderate income households and has fulfilled its constitutional obligation.

The action initiated by Landmark Dumont, LLC, makes several faulty claims related to Dumont's satisfaction of its constitutional obligation, but more importantly, it has prematurely filed a builder's remedy action after Dumont has filed its HE&FSP with COAH and petitioned for substantive certification on December 19, 2013. New Jersey's Appellate Division has oft considered the jurisdiction of exclusionary zoning actions and has consistently interpreted the Fair Housing Act to require the exhaustion of a plaintiff's administrative remedies prior to engaging in legal action in the courts. In fact, the courts have ruled that one of the very goals of the

Fair Housing Act was to reduce the role of the courts in exclusionary housing actions. In keeping with the language of the act and the rationale of the New Jersey Appellate Division, the instant action must be dismissed without prejudice and remanded to COAH for further proceedings, for the plaintiff's failure to exhaust their administrative remedies.

STATEMENT OF FACTS

1. The Borough of Dumont ("Borough" or "Dumont") is a municipal corporation and political subdivision of the State of New Jersey, organized and existing under the laws of the State of New Jersey.

2. The Plaintiff is, based upon the allegations in the Complaint, a New Jersey limited liability company, organized under the laws of the State of New Jersey, and the contract purchaser of property owned by the Estate of Marylou D'Angelo situate in the Borough.

3. The Borough is approximately 2 square miles in area and had a population of slightly less than 17,500 according to the 2010 US Census, making it the 12th most densely populated municipality in Bergen County and 41st most densely populated municipality in New Jersey.

4. Although it has never had a certified affordable housing plan as defined in the Fair Housing Act, 52:27D-301 et seq., the Borough has, by virtue of its planning and zoning actions, provided a substantial number of affordable housing units, and is in compliance with its first and second round obligations, which have not been disturbed by any Court action, under the rules promulgated by the New Jersey Council on Affordable Housing(COAH).

5. The Dumont Planning Board adopted, and the Mayor and Council endorsed and ratified, a Housing Element and Fair Share Plan, consistent with the Borough's master plan, on December 17, 2013. This plan was submitted to COAH in the form of a petition for substantive certification on December 19, 2013.

6. The Plaintiff filed its complaint in the instant case on or about February 4, 2014.

7. Notwithstanding the form or contents of the petition for substantive certification of the Dumont plan, its filing triggers a requirement that an allegedly aggrieved party seek its remedies from COAH prior to seeking relief in Court, as required by statute, administrative regulation, and case law.

8. This motion seeks to have the lawsuit dismissed without prejudice pending exhaustion of the administrative remedies available to the Plaintiff from COAH, given its function and expertise, and the preference of the courts that such issues be addressed in that forum prior to judicial intervention.

PROCEDURAL HISTORY

On December 19, 2013, the Borough filed a petition for substantive certification of its Housing Element and Fair Share plan with COAH. On February 4, 2014, Plaintiff filed a four count complaint against the Borough of Dumont, the Mayor and Council of the Borough of Dumont, and the Planning Board of the Borough of Dumont alleging violation of the New Jersey Constitution and the Fair Housing Act. On March 24, Defendants filed a motion to stay the proceeding to allow COAH to release an amended set of regulations. That motion was argued on April 23, 2014, and the Court reserved decision. On May 14, 2014 Defendants filed their Answer to the complaint.

Defendants now file this Motion to Dismiss Landmark's complaint without prejudice, for failing to exhaust their available administrative remedies.

LEGAL ARGUMENT

THIS BUILDER'S REMEDY ACTION IS IMPROPERLY BEFORE THE COURT BECAUSE THE BOROUGH OF DUMONT HAD SUBMITTED ITS HOUSING ELEMENT AND FAIR SHARE PLAN TO THE COUNCIL ON AFFORDABLE HOUSING AND PETITIONED FOR SUBSTANTIVE CERTIFICATION PRIOR TO THE INITIATION OF THIS ACTION

The Builder's Remedy was legitimatized in 1983 after the second of two exclusionary zoning lawsuits decided by New Jersey's Supreme Court. They are known informally as Mount Laurel I and Mount Laurel II (S. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151 (1975) and S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158 (1983), respectively) and. The Fair Housing Act ("FHA") codified in N.J.S.A. 52:27D-301 et seq. was adopted by the legislature in the 1985, in the aftermath that followed Mount Laurel II. "The FHA codified the core constitutional holding undergirding the Mount Laurel obligation… and included particularized means by which municipalities could satisfy their obligation, mirroring the judicially crafted remedy. Furthermore, the FHA created the Council on Affordable Housing ("COAH"), N.J.S.A. 52:27D-305, and provided it with rulemaking and adjudicatory powers to execute the provision of affordable housing." In re Adoption of N.J.A.C 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578, 584-585 (2013).

COAH is responsible for establishing "…criteria and guidelines so that municipalities could determine their fair share of their region's need for affordable housing." Wayne Property Holdings, LLC, v. Township of Wayne, 427 N.J. Super. 133, 137 (App. Div. 2012). "The FHA allows a municipality to submit its housing element and fair share plan to COAH, 'based on the council's criteria and guidelines.' N.J.S.A. 52:27D-309" Id. Once a Township invokes COAH's juridiction by filing its housing element and fair share plan seeking substantive

certification, those who would seek to "challenge [that] Township's ordinance on Mount Laurel grounds must first seek to exhaust their administrative remedies before trial court proceedings can go forward." Id. at 142.

A series of New Jersey opinions have consistently confirmed the FHA's strong preference for administrative relief. In Sod Farm Associates, Et. Al. v. Township of Springfield, 366 N.J. Super. 116 (2004), an appeal was filed by COAH itself, on the grounds that once the Township of Springfield submitted their petition for substantive certification prior to the commencement of the developer's legal action, the issue of their Mount Laurel obligation was under their (COAH's) exclusive primary jurisdiction. Id. at 118. The Sod Farm Court concurred, holding that once a Township submitted itself to COAH's jurisdiction, developers had to exhaust their available administrative remedies before they were entitled to bring the case to court. Id. at 124. Their reasoning was heavily informed by the language of NJSA 52:27D-309(b):

> A municipality which does not notify the council of its participation within four months [of the effective date of the FHA] may do so at any time thereafter. In ***any exclusionary zoning litigation*** instituted against such a municipality, however, there shall be ***no exhaustion of administrative remedy*** requirements pursuant to section 16 of this act ***unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation.*** (Emphassis added in Sod Farm opinion.)

On the basis of that rule, the court determined that the developer's action should have been dismissed, in deference to the long-standing exhaustion of remedies rule.

Later in 2004, in Elon Associates, LLC, v. Township of Howell, 370 N.J. Super. 475 (2004), a developer sued the Township of Howell that had previously submitted their HE&FSP to COAH, received their substantive certification, and had that certification revoked. The Elon Associates court echoed the Sod Farms opinion, while citing to different portions of the FHA: "[T]he State's preference for the resolution of existing and future disputes involving exlusionary zoning is the mediation and review process set forth in this act and not litigation." N.J.S.A. 52:27D-303. "To this end, the FHA confers 'primary jurisdiction' upon COAH 'for the administration of [affordable] housing obligations in accordance with sound regional planning considerations.'" Elon Associates, 370 N.J. Super. at 480-81 (2004)(quoting N.J.S.A. 52:27D-304(a)).

"The obligation to exhaust COAH's administrative procedures to secure compliance with municipal affordable housing obligations is particularly strong in a case where a municipality has invoked those procedures before Mount Laurel litigation is instituted." Id. at 481. Making reference to N.J.S.A. 52:27D-316(b) and N.J.S.A. 52:27D-309(b), the Elon Associates court concluded that "[u]nder these provisions, a municipality that adopts a resolution of participation and fair share plan and housing element before Mount Laurel litigation is instituted may require exhaustion of COAH's adminstrative procedures before it can be compelled to defend the action." Id. They further quoted the New Jersey Supreme Court in Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 49 (1986): "The legislative history of the FHA makes it clear that it had two primary purposes: first to bring an administrative agency into the field of lower income housing to satisfy the Mount Laurel obligation; second to get the courts out of that field." The

Elon Associates court thought it was also clear that "the FHA was designed to afford municipalities an opportunity to avoid exposure to Mount Laurel litigation by filing a compliance plan and petitioning for substantive certification before such litigation is initiated." Id. On the basis of Sod Farms and Elon Associates, any municipality that filed its housing element and fair share plan with COAH in advance of any exclusionary housing litigation is protected from a Builder's Remedy action until said builder had exhausted its administrative remedies. In the instant matter, it is not disputed that the Borough of Dumont has submitted itself to COAH's jurisdiction and has submitted a petition for substantive certification of its HE&FSP. It is also not disputed that the petition was submitted prior to the instant litigation being instituted. Therefore, it is axiomatic that the requested relief should be granted.

In 2012, New Jersey's Appellate Division maintained and reinforced that position, notwithstanding the invalidation of the 'growth share' model of third round compliance regulations, in Wayne Property Holdings, LLC, v. Township of Wayne, 427 N.J. Super. 133 (2012). In Wayne Property, a contract purchaser of about 25 acres of land in the Township of Wayne claimed that the Township's zoning ordinance failed to create a realistic opportunity for the development of "102 units of unmet need" of affordable housing. Among other relief, they sought a builder's remedy. Both the Township and COAH filed a motion to dismiss without prejudice. They both argued that the developers were "required to exhaust administrative remedies on the third-round petition before proceeding with their complaints." Id. at 141. The court agreed.

> "As we have explained, the Township petitioned COAH for substantive certification of its housing element and

> fair share plan for the third round of the COAH process. Because the Township has invoked the Council's jurisdiction by filing its housing element and fair share plan and seeking substantive certification, those challenging the Township's ordinance on Mount Laurel grounds must first exhaust their administrative remedies before the trial court proceedings can go forward." Id. at 142.

The Wayne Property court referred back to Elon Associates in recalling that "the FHA expresses a strong preference for resolving affordable housing disputes before COAH rather than in the courts. That same principle applies here." Id. at 144. The view of the New Jersey courts has been consistent for the last 10 years. COAH is the proper venue for resolving affordable housing complaints, as long as the municipality has taken the appropriate measures to qualify for COAH jurisdiction.

In the instant case, it is abundantly clear, simply from reading the Plaintiff's complaint that the requested relief is required in this situation. The Borough of Dumont adopted their housing element and fair share plan December 17, 2013. It was filed with COAH seeking substantive certification on December 19, 2013. The instant action was initiated on February 4, 2014. As the borough availed itself of COAH's assessment of the housing element and fair share plan prior to the commencement of this action, Plaintiff should have exhausted its adminstrative remedies before bringing their action to the courts. Particularly given the facts set forth in the complaint, that the COAH third round 'growth share' model was invalidated by court order, and that there is now a new, proposed third round set of regulations and municipal obligations, it is clear that COAH has a more reasonable opportunity to address the Plaintiff's issues in a coherent and effective manner than the

Court, and is the judicially preferred venue to address such issues.

CONCLUSION

For the foregoing reasons, the Borough of Dumont respectfully requests that the Court dismiss the instant action for failure to exhaust their available administrative remedies prior to initiating this builder's remedy action.

Respectfully submitted,

GREGG F. PASTER & ASSOCIATES
Attorneys for Borough of Dumont and Dumont Mayor and Council

BY: Gregg F. Paster, Esq.

Dated: May 14, 2014