IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF WAYNE, Plaintiff/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket No. A-000199-23 CIVIL ACTION On Appeal from Final Orders Dated August 8, 2023 and December 19, 2023 Superior Court of New Jersey Law Division, Civil Part Passaic County Docket No. PAS-L-2396-15 Sat Below: Hon. Thomas F. Brogan, P.J.S.C., Retired Hon. Darren J. Del Sardo, P.J.S.C.

AMENDED BRIEF OF APPELLANT TOWNSHIP OF WAYNE

CLEARY GIACOBBE ALFIERI
JACOBS LLC
169 Ramapo Valley Road, UL-105
Oakland, New Jersey 07436
Telephone: (973) 845-6700
Attorneys for Township of Wayne

Of Counsel and On the Brief:
Mary Anne Groh, Esq. (030531993)
mgroh@cgajlaw.com

TABLE OF CONTENTS OF BRIEF

Table of Judgments, Orders and Rulings Being Appealed **Page**

Table of Authorities

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The base of the controversy on appeal is whether the approval by the Planning Board of the Township of Wayne ("Board" or "Planning Board") of an application by AvalonBay Communities, Inc. ("AvalonBay") for an inclusionary residential development project with a condition requiring elevators in all of the multi-story buildings with housing violated a Settlement Agreement dated January 8, 2021 between AvalonBay, the Board and the Township of Wayne ("Township") in this Mount Laurel compliance action. AvalonBay argued below that it was entitled to approval of its application without an elevator in the fifth building, despite its representations to the Board prior to the close of the Board hearings that it would include elevators in all buildings and the Board's willingness to approve a development application on such grounds.

As discussed hereafter, the trial court improperly granted prerogative writ ("PW") relief in this action on AvalonBay's motion to enforce the Settlement Agreement and improperly set aside a Resolution adopted by the Board on AvalonBay's development application. To support its decision, the Court held that the Board and Township had acted in bad faith. To reach that holding, the Court ignored the motion record before it, which was woefully deficient in that there were no transcripts of the proceedings before the Board, and chose to consider the history of the litigation dating back to 2015, when at most the

parties' actions after the Settlement Agreement was executed in January 2021 were in issue. Indeed, AvalonBay had argued that the Board and the Township breached the Settlement Agreement, so clearly the operative facts related to the parties' actions after the Agreement was executed.

The Township and its Planning Board complied with all of their obligations under the Settlement Agreement. They timely rezoned the subject property and approximately 9 months later, AvalonBay made its application to the Planning Board for development approvals. As presented, the project was to contain five (5) buildings; AvalonBay proposed to include elevators in only two (2) of the buildings. For various health, safety and welfare reasons, both the Township and the Board wanted elevators in all five (5) buildings. During the hearings, AvalonBay initially agreed to amend its application to include elevators in four (4) of the five (5) and before the hearings closed agreed to include elevators in all buildings on condition that additional units be approved.

The hearings before the Board concluded in June 2022 with the Board's belief that the project would contain an elevator in Building E and the unit count would be increased by ten units. The presentation of the proposed form of resolution to the Board was delayed while the resolution, Amended Settlement Agreement and amended zoning ordinance were being drafted to effectuate the additional ten units. In October 2022, AvalonBay advised that it was reneging

on the foregoing agreement and insisted the Board approve the project without an elevator in all buildings. Given the sudden turn of events and with the composition of the Planning Board at risk of change upon reorganization in January, a Resolution without an elevator in Building E was presented to the Board at its December 12, 2022 meeting, which was approved while noting on the record its intention to adopt a supplemental written resolution to require an elevator in Building E the following month. It adopted that Resolution on January 23, 2023.

On May 11, 2023, AvalonBay filed a PW action to set aside the January 23rd Resolution. In addition, on the day before it filed its PW action, AvalonBay filed a Notice of Motion in Aid of Litigant's Rights in this action claiming breach of the Settlement Agreement and seeking to set aside the same resolution, plus monetary relief based on alleged breaches of the Settlement Agreement.

The trial court erroneously granted PW relief to AvalonBay without a proper record and erroneously determined that the imposition of penalties and award of attorneys' fees and costs were warranted despite no finding of breach of the terms of the Settlement Agreement, which is a necessary predicate to the imposition of a penalty or award of fees by the terms of the Settlement Agreement, and is contrary to the American Rule as applied in PW actions.

PROCEDURAL HISTORY

On May 10, 2023, Intervenor AvalonBay filed a Notice of Motion in Aid of Litigant's Rights in this action seeking an order "(i) "invalidating and nullifying [Board] Resolution PB-2023-05" [conditioning the grant of the AvalonBay project upon inclusion of an elevator in Building E], (ii) compelling the Township of Wayne to pay Per Diem Penalties in accordance with the settlement agreement between the parties; and (iii) imposing other obligations and penalties on the Township of Wayne and the Board of the Township of Wayne, as deemed necessary by the Court to deter such conduct in the future." (Pa35) The day after it filed its Notice of Motion, it completed its motion papers by filing a Certification of Counsel to support the relief requested. (Pa37) On the same day it cured its deficient motion in this action, AvalonBay filed a PW Complaint against the Board, which was docketed under No. PAS-L-661-23. (Pa128) The Board and Township opposed AvalonBay's motion with Certifications (Pa138-352 and Pa353); and AvalonBay filed a Reply Certification. (Pa358) There were no other submissions on that motion.

The trial court (Hon. Thomas F. Brogan, P.J.Cv., now retired) heard oral argument on June 20, 2023 and reserved decision. (See 1T30 and 72-21.)[1] The matter next came before the trial court on July 18, 2023. At that time, the trial court announced its ruling granting AvalonBay's motion and specifically setting aside the January 23rd Resolution, adjudging legal fees were due and owing and (2T5-23) and permitting additional submissions as to AvalonBay's request for delay penalties. (2T13-2) In his ruling the Judge explained his rationale:

> I quite frankly find this is a tactic in a long line of tactics that Wayne has utilized to delay meeting its constitutional obligation of affordable housing. I incorporate by reference Ms. Cofone's October 19th 2020 missive that was - oh, I don't know. I've – you read it. It must have taken you – it was 12 pages. But it lists chapter and verse of all the delay tactics and the failures to mediate not just with Avalon, but with failure to approve other intervener's applications that they contend that we were settled with. And we said well do we have anything in writing. And these things lingered on and lingered on. And quite frankly I did at that time revoke the immunity. That was back on November 10th of 2020.

---

[1] There are 3 transcripts in the record on appeal that are referred to herein as follows:
1T - Transcript of oral argument of motion on June 20, 2023;
2T - Transcript of court proceeding on of July 18, 2023; and
3T - Transcript of oral argument on motion on December 8, 2023.

As to transcript of proceedings on June 20, 2023, the transcript includes a case management conference as to other Mt. Laurel matters; oral argument on a second motion brought by AvalonBay, which sought to disqualify WPB counsel, which was denied and is not the subject of appeal; and the motion in aid of litigant's rights that begins at page 30.

(2T4-22:5-11) On August 8, 2023, the court entered an Order granting certain relief based on its rulings on July 18, 2023. (Pa1) Said Order contains a provision certifying the Order as being "final' pursuant to R. 4:42-2. Pa4 ¶ 12. The amount of attorneys' fees and costs and delay penalties were to be determined by subsequent application. On August 18, 2023, AvalonBay filed a Certification of Counsel wherein it sought an award of fees in the amount of $30,614.53. (See Pa367, ¶10). The Board and the Township opposed the application relying in part on a Certification of Township Professional Planner Christopher Kok. (Pa378) In addition, the Board submitted one exhibit as part of its legal brief. (Pa395)[2] In an effort to correct deficiencies noted in opposition, AvalonBay filed a supplemental Certification of Counsel. (Pa385)

The hearing on AvalonBay's application for a determination of the amount of attorney's fees and delay penalties came before the trial court with the Honorable Darren J. Del Sardo, P.J.Cv. presiding[3] on December 8, 2023. At the conclusion of oral argument, the court reserved decision. In an Order dated

[2] Although the Exhibit not presented to the Trial Court by way of Certification, it is included herein; the exhibit is a 'screen shot' from a New Jersey Courts web page showing New Jersey licensed attorneys, and was then, and is presently submitted with request that the Court take judicial notice of the content in as much as it constitutes the Court's own records.

[3] Judge Brogan retired in September 2023.

December 19, 2023, the court awarded attorney's fees in the amount of $28,909.52, and awarded Delay Penalties in the amount of $112,000. (Pa21)

The Township filed a Notice of Appeal from the Order dated August 8, 2023 on September 21, 2023 (Pa396) and an Amended Notice to appeal the Order dated December 8, 2023 on January 8, 2023. (Pa400)

STATEMENT OF FACTS

The Township and the Board had filed this action in 2015 in compliance with the New Jersey Supreme Court's decision in In The Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council On Affordable Housing, 221 N.J. 1 (2015), which has become known as Mount Laurel IV. Pursuant to the process created under Mount Laurel IV, the Township and the Planning Board obligated themselves to develop, adopt, endorse and ultimately enact, a constitutionally compliant affordable housing plan in the form of a Housing Element and Fair Share Plan ("HEFSP" or "Affordable Housing Plan"), in accordance with N.J.S.A. 55D-28 and under the auspices of the Court.

AvalonBay, who was the contract purchaser of certain real property identified as Block 3103, Lot 16 (approximately 12 acres) and 19 (approximately 5 acres), and Block 3101, Lots 12 and 13 (approximately 9 acres) on the Township's Tax Map (the "Property") (Pa42), had filed a Motion to Intervene in this action; that application was granted by the Court by Order dated

November 9, 2015 (Pa42) and AvalonBay "advised that it desire[d] the Property and the development of the Property to be included in the said Township's HEFSP—in other words, AvalonBay wanted to develop the Property as a Mt. Laurel a/k/a 'affordable housing" "Inclusionary Development". (Pa42-43)

What followed were various negotiations and mediations between the Township and the Board on one side and AvalonBay on the other side (see Pa46) In 2020 during COVID-19 shutdowns and disruptions, the parties reached an impasse and AvalonBay, unhappy that it was not being offered all that it wanted, filed a motion to the trial court claiming the Township and the Board were not negotiating in good faith. By Order dated November 10, 2020, the trial court revoked the Township's Mr. Laurel temporary immunity (Pa6) and then denied the Township's request for stay pending appeal (Pa46), which effectively 'forced' a settlement on AvalonBay's terms.

Upon the trial court's granting of the motion, AvalonBay filed a "Builder's Remedy" action under AvalonBay Communities, Inc. v. Township of Wayne and the Board of the Township of Wayne, Docket No. PAS-2323-20. (Pa45) The Township and the Board filed denial answers to the Builder's Remedy action (Pa46) and filed a motion to the trial court in this action seeking reconsideration of the Court's November 10, 2020 revocation order. That motion for reconsideration remained pending during further negotiations

between the parties, which negotiations ultimately led to a Settlement Agreement dated January 8, 2021 to resolve AvalonBay's claims including its request for a builder's remedy. (Pa41)

Under the terms of that Settlement Agreement, AvalonBay was permitted to develop the site as a non-age restricted, rental Inclusionary Development of up to 473 non-age restricted residential units, to include 71 'affordable' units, (i.e., a 15% set aside) to be located on 1445 and 1455 Valley Road (Block 3103, Lots 16 and 19) (the "Residential Project") and 1460 Valley Road (Block 3101, Lots 12 and 13) would remain as commercial (the "Commercial Project"),a separate non-residential commercial. The Settlement Agreement included a concept plan (Pa72) depicting low-rise townhomes on Lot 19 and midrise apartment-style buildings on Lot 16.

As recited in the Settlement Agreement, *inter alia*, "[t]he purpose and intent of this Agreement is to . . . resolve Avalon's intervention in the DJ Action and to settle the Builder's Remedy Action and/or claims therefor" (Pa47), and to "control the development of the Property as set [in the agreement]" (Pa48).

The Settlement Agreement provided that the development project would be "generally consistent with the Concept Plan," (Pa72), subject to modifications and clarifications otherwise contained in the Agreement, and called for the rezoning Lots 16 and 19 in accordance with a "Rezoning

Ordinance" (Pa75). The agreement acknowledged that the Concept Plan was not "fully engineered". (Pa48)

The Settlement Agreement contains certain specific obligations of the Township and of the Board. It requires the Township to adopt the Rezoning Ordinance within 60 days of the Settlement Agreement but subject to the Court's approval of the agreement at a fairness hearing. (Pa51) The Rezoning Ordinance was timely adopted on March 3, 2021. (Pa124a and Pa98)[4]

The Settlement Agreement contains many provisions, most not relevant to the within appeal. Relevant to the within appeal are the following:

> 6. c. Obligation To Cooperate. The Township and the Board acknowledge that in order for Developer to construct its Inclusionary Development, Developer will be required to obtain any and all necessary and applicable agreements, approvals, and permits from all relevant public entities and utilities; such as, by way of example only, the Township, the Planning Board, the County of Passaic, the Passaic County Planning Board, the New Jersey Department of Environmental Protection, the New Jersey Department of Transportation, and the like, including the Township's ordinance requirements as to site plan and subdivision approval (the "Required Approvals"). The Township and the Board agree to cooperate with Developer in

[4] It should be noted that the adoption process requires a three (3) step process: ordinance introduction (a.k.a. 'First Reading") and then a separate adoption (a.k.a. 'Second reading') both at duly noticed public hearing, see N.J.S.A. 40:49-2, as well as a referral to the Planning Board for consideration at a separate noticed public hearing, taking place between the First and Second Readings, see N.J.S.A. 40:55D-37, and thus the process, even if expedited, requires close to 60 days.

> processing all applications with outside agencies which the Parties acknowledge will benefit the Project. The Township and the Board agree to use all commercially reasonable efforts to assist Developer in its undertakings to obtain the Required Approvals, provided that the taxes are current and Developer is in compliance with this Agreement. Developer and the Township further agree that certain underground utility easements maybe required across the Property or across Township property to facilitate the efficient develop out of the Inclusionary Development. The Developer and the Township agree to execute any such reasonable easements in a manner which minimizes the impact upon the development potential of the Property.

(Pa52 emphasis added) A section of the Settlement Agreement created specific timetables and the process for the review and presentation of AvalonBay's land use application including the following pertinent provisions.[5]

> ¶ 8. Site Plan Application and Review Process.
>
> ***
>
> g. Following the conclusion of the public hearing, the Board shall promptly deliberate on the SPA and vote. Following the vote of the Board, the Board shall memorialize its decision regarding the SPA in a written resolution, which shall be adopted by the Board within the earlier of 30 days or the second meeting following the approval meeting.
>
> ***

[5] The Municipal Land Use Act ('MLUL'), N.J.S.A. 40:55D-1 et seq., governs land use applications and requires such land use applications to be presented to and considered by a municipal land use board (Planning Board or Board of Adjustment).

> i. The Parties acknowledge that the Developer will incur substantial costs if the deadlines set forth herein are not achieved by the dates provided. As a result of the foregoing, if any deadline or timeframe set forth herein that is the responsibility of the Township or the Board is not achieved in accordance with the timeline set forth above, inclusive of the 15-day extension period with respect to the adoption of the Ordinance, there shall be a penalty in the amount of five hundred ($500) per day ("Per Diem Penalty"), excepting acts of god or inclement weather cancellations or the like provided that the Township or the Board takes the required action no later than the next regular or special scheduled meeting. The Developer shall receive a credit ("Credit") for each day that the action, decision, meeting, or similar item is not acted upon by the Township or Board, as the case may be, or does not take place by the appropriate deadline. By way of example, if the Township is responsible for adopting the Ordinance by January 30, 2021 and adopts the Ordinance on February 15, 2021 and in violation of this agreement, the Developer will be entitled to a Credit totaling 15 multiplied by the Per Diem Penalty. The Developer shall be entitled to apply the Credit towards any fee that is due and payable to the Township in the ordinary course of development the Property, such as, but not limited to, application fees, building or construction permits, or connection fees for sanitary sewer or potable water. This Paragraph does not limit the Developer's remedies, in law or equity, to redress non-compliance by the Township or the Board and does not limit the Township or the Board's defenses thereto.

(Pa554-58 emphasis added)

> 10. Mutual Cooperation on All Governmental Approvals. The Township and the Board, including all of its officials, employees, agents, committees, departments, shall fully cooperate and assist with

> Avalon's efforts, to the extent permitted under any applicable state or federal law, rule or regulations, to secure necessary municipal, county and state permits, approvals, licenses, waivers, exceptions, easements, variations and variances for the development, including the SPA, Treatment Works Approval applications/permits, soil conservation district approvals, NJDEP Freshwater Wetlands and Flood Hazard Area approvals/permits, construction/building permits, and all other necessary or useful governmental approvals ("Government Approvals"). While the Parties recognize that it shall remain the responsibility of the Developer, and not of the Board or the Township, to secure Government Approvals, the Township and the Board shall cooperate with the Developer as set forth herein. . . . The Township and the Board shall expedite the review and approval of all necessary governmental approvals, within its jurisdiction, including scheduling special meetings as may be required to meet the schedules as set forth in other provisions of this Agreement.

(Id. emphasis added)

On or about December 21, 2021 - almost a year after the Settlement Agreement was executed - AvalonBay filed an application with the Board seeking preliminary and final major site plan approval under N.J.S.A. 40:55D-46, bulk variance relief under N.J.S.A. 40:55D-70c and design waiver relief under N.J.S.A. 40:55D-51 (the "Application"). (Pa106) The Application was diligently processed and the public hearing process before the Board commenced in April 2022. (Pa268) The Application was presented over the

course of four (4) public hearings on April 25, 2022, May 9, 2022, May 23, 2022 and June 13, 2022. (Pa106)

As originally presented, AvalonBay proposed to include elevators in only Buildings A (clubhouse building) and B (320 unit midrise building). By the time of the last hearing, AvalonBay presented a development plan calling for Lot 19 to be developed with 55 townhouse units (all of which would be 'market rate units and no 'affordable' units) in eleven buildings (together with various associated infrastructure) and for Lot 16 to be developed as 418 multi-family apartment units in five (5) buildings, together with various associated amenities and infrastructure, which would include 71 'affordable' units. The buildings were described by AvalonBay in its revised application as follows:

A. Building A: To be a two-story clubhouse building; the building is to contain no residential units but will contain one (1) an ambulance stretcher access elevator.

B. Building B:

   a. To be a 320-unit multi-story, multifamily residential mid-rise building with an internal parking garage containing 423 parking stalls,

   b. The total unit count will include 46 'affordable' units.

   c. The building will contain four (4) ambulance stretcher accessible passenger elevators.

C. Building C:

   a. To be a 35-unit multi-story, multifamily residential building.

   b. The total unit count will include 9 'affordable' units.

c. The building will contain one (1) ambulance stretcher accessible passenger elevator.

D. Building D:

a. 34-unit multi-story, multifamily residential building.

b. The total unit count will include nine (9) 'affordable' units.

c. The building will contain one (1) ambulance stretcher accessible passenger elevator.

E. Building E:

a. To be a 29-unit multifamily residential building.

b. The total unit count will include eight (8) 'affordable' units.

c. The building is proposed by AvalonBay to contain no ambulance stretcher accessible passenger elevator.

During the Board's public hearings, but prior to the final AvalonBay hearing of June 13, 2022, the Township, speaking through its mayor who is also a Member of the Board, voiced concern that all of the multi-story residential buildings should have an ambulance stretcher compliant passenger elevator. As a result, the Mayor proposed that AvalonBay include such an elevator in Building E, and in exchange the municipality would agree to increase Building E's unit count (and hence, the Project's over all unit count) by 10 additional units. (Pa268, 2nd ¶)

In furtherance to same, there were various discussions between and among the attorneys for AvalonBay, the Township, and the Board as to the details of such arrangement, including that same would require an amendment to the

Settlement Agreement and that the Project approval Resolution and the amendment to the Settlement Agreement should be presented to the Board simultaneously. (Pa268-Pa269)

The day before the June 13, 2022 Board hearing, an agreement was reached and was confirmed by email of AvalonBay's attorney Orth, addressed to the attorneys for the Board and the Township, which, in relevant part, reads:

> To follow up, AvalonBay accepts the proposal discussed on Friday. To sum up, AvalonBay will agree to install an elevator in Building E if (i) the Planning Board and the governing body approve one additional story with no more than 10 total units only 1 of which is affordable and (ii) contingent upon the Planning Board approving the AvalonBay project on Monday, 6/13 (see below). As a result, the total number of units at the AvalonBay project will equal 483 including 72 affordable units.
>
> In terms of procedure, AvalonBay will bring its affirmative presentation to a close on Monday, 6/13 and seek a vote at that meeting. AvalonBay will be seeking approval for the project as presented with no elevator in Building E. All parties (Avalon, Wayne, and the Planning Board), will have to amend the settlement agreement and the zoning ordinance for the property to permit the additional units in Building E. In terms of timing, we propose the following schedule: (i) June 15th – Council resolution authorizing amendment to settlement agreement and introducing (via title only), an amended zoning ordinance; (ii) planning board consistency review on June 27th; (iii) ordinance adoption on July 20th, 2022.
>
> Once the ordinance is adopted and appeal periods pass, AvalonBay will file an application seeking amended

> site plan approval for the additional story and units, with an elevator in Building E.

(Pa148)

On June 13, 2022 a final hearing took place before the Board during which AvalonBay concluded its presentation and the Board voted to approve the Project consistent with AvalonBay's email on the prior day.[6]

On June 14, 2022, the day after the Board voted to approve the Project, AvalonBay, through its attorney, sent an email addressed to the Township and Board's attorneys which read:

> [P]lease advise the Mayor that [AvalonBay attorney Orth's] email [of June 12, 2022] represents AvalonBay Bay's willingness to amend the settlement in accordance with the terms therein. I think the Mayor said he has a Council meeting Wednesday evening. Please let me know how that goes so we can get back to work[.]

Immediately after the June 13th Board hearing, the Board's attorney, the Township's attorney, and the Township's planners began the process of drafting the necessary amendments to the zoning code, the amendments needed for the Settlement Agreement and the Board's project approval resolution. To that end,

[6] Further details as to what took place during the Board Hearing are not included because AvalonBay did not present any transcript of that hearing to the Trial Court.

Board's counsel sent an email to AvalonBay's counsel on June 15, 2022 requesting information from AvalonBay for that purpose (Pa151) followed up by a 'reminder' emails, on June 20th (Pa153), to which AvalonBay's counsel responded that he "was away last week and had to deal with an OTSC the minute [he] got back—so digging out of a hole still. "I'll put all the docs together as soon as possible." (Pa156) Board counsel sent a follow-up reminder on July 8, 2022 (Pa157), and was advised that AvalonBay counsel was instead "taking a stab at drafting [the] resolution" (Pa161). Board counsel responded saying "I always appreciate the help but in the meantime if you could send me that list of exhibits so I could cross check against what I already have, that would be helpful as well. (Pa166) Board counsel again sent a reminder email on August 4, 2022, following up on a phone call reminder. (Pa167)

By August 7, 2022, and as shown in Board counsel's email to AvalonBay's attorney, the combination of the Township's and Board's planners and attorneys had drafted a revised rezoning ordinance (Pa182), drafted an amendment to the Settlement Agreement (Pa173), had discussed and received the endorsement of the Court's Mt. Laurel Special Master and had also obtained approval from intervenor, Fair Share Housing Center ("FSHC"). In relevant part, the email reads:

> Re: Plan Board Reso. Please be sure to send me your draft AvalonBay Reso asap, so I can review your's.

> Re: The extra 10 units for Bldg E. We've drafted a proposed Amendment to Settlement Agreement which is attached for your review. We'd like to get this in front of the Planning Board at the same time as the AvalonBay Reso, then send it over to the Council. The Agreement is 'short and sweet' and contains the proposed revised zoning ordinance. . . . For the [amendment] to work, we need [Mt. Laurel Court Master] Christine Cofone and FSHC to weigh-in. We spoke to Christine Cofone about it; she's on board, and in fact she agrees (strongly) that all of the building should have elevators, that the +10 makes sense and the 1 unit setaside also makes sense, even though it amount to a 10% set aside. So, she endorses it. Since she is on board, we thought it wise to ask Christine to speak to FSHC. She spoke to [FSHC's] Adam Gordon, he is ok with it, although initially wanted a 15% setaside, rounding up, that would mean 2 of the 10 would be AH units.

(Pa172) In a response email, which specifically included Court Master Cofone on the distribution list, AvalonBay responded:

> Thank you, [Board counsel]. I have the draft resolution which will be going out later today or tomorrow for your review. [To Court Master] Christine, AvalonBay will do the elevator in the final MF family building with the additional units. But that requires another story to be added, which requires an amended settlement agreement and then an amended ordinance to avoid a D variance. So it's a bit of a process we have to go through to get there.

(Pa187)

On August 29, 2022 AvalonBay counsel sent to the Board's counsel AvalonBay's version of proposed form of Resolution. (Pa190-191) On

September 6, 2022, the Board's counsel responded and provided redlined comments and modifications to the draft. (Pa209 & 211) In that same email, Board counsel again reminded AvalonBay's counsel to respond to the proposed Amendment to Settlement Agreement and proposed amendments to the Rezoning Ordinance that were sent to AvalonBay's counsel on August 24, 2022 and reiterated the Board's desire to move both the Resolution and the Amendment to Settlement Agreement to the Board at its next meeting of September 12, 2022. (Pa209) Having no response, the Board's counsel sent a follow-up email of September 8, 2022, which prompted a conference call between counsel. (Pa237) Thereafter, AvalonBay sent Board counsel a further revised/redlined draft resolution by way of email of October 7, 2022 (Pa238-239); that draft contained significant changes.

From the foregoing history, it is clear that the Board wanted to resolve both the resolution and the Settlement Agreement amendment as soon as possible, and long before the Board counsel's scheduled an out-of-the country trip from October 20 through November 3, 2022, because the Board did not want the resolution and/or the settlement agreement amendment to linger past October. (Pa269) In addition, AvalonBay's attorney Orth was scheduled to be married in mid-November. (Pa139)

By the date of Board counsel's scheduled departure date of October 20, 2022, the Resolution had not been resolved and AvalonBay had yet to provide any comments to the proposed Amendment to the Settlement Agreement. By email dated November 2, 2022, while the Board's Counsel was still away, AvalonBay's counsel sent an email demanding the Board 'move the resolution' at is public hearing of November 14, 2022. (Pa263) By letter dated November 21, 2022, AvalonBay issued a 'Notice of Default" to the Board demanding the Board move the resolution at its meeting of November 28, 2022. (Pa264)

Board counsel responded by way of letter dated November 23, 2022, which, *inter alia*, rejected the Notice of Default as inapt, set forth a detailed case history, recited that counsel had agreed that the Resolution and the Amendment to the Settlement Agreement would be presented to the Board simultaneously, and advised that the Board had yet to receive any comments to the proposed Amendment to Settlement Agreement that was sent to AvalonBay on August 7, 2022. (Pa267)

Further discussion did not resolve the issues, as AvalonBay did not provide comments or consent to the proposed Amendment to Settlement Agreement. Instead, AvalonBay insisted that the Resolution be presented without reference to the proposed Amendment and/or inclusion of provision for an elevator in Building E. (Pa272) The form of resolution that was presented

to the Board on December 12th was not finalized until December 11, 2022 and was not unreasonably delayed. (Pa312 & Pa313) Aside from the Building E elevator matter, there were various provisions and language items of the draft resolution that needed to be addressed by the Board and AvalonBay counsel from the time the hearings ended and the Resolution was presented to the Board. (Pa272 to Pa312)

As reflected in the Board's Meeting Minutes[7] (Pa356), the Board accepted the proposed form of Resolution, but only with imposition of a condition that Building E contain an elevator, and, with advice of counsel, directed that a written supplemental resolution be drafted for presentation to the Board embodying that condition. A supplemental form of resolution, PB-2023-003 was duly drafted, presented to the Board, accepted and adopted by the Board at its January 23, 2023 meeting. (Pa123)

[7] AvalonBay did not submit any transcript of the December 12th Board hearing, or of any of the Board Hearings to the trial court in connection with its request for PW relief.

LEGAL ARGUMENT

POINT I

THERE WAS NO RECORD BEFORE THE TRIAL COURT THAT SUPPORTED OR JUSTIFIED THE TRIAL COURT'S FINDING OF BAD FAITH BY THE BOARD OR THE TOWNSHIP. [2T4-17:5-11]

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) *quoting* Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). See also, State v. Camey, 239 N.J. 282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record' ").

On July 18, 2023, the Court announced its ruling granting AvalonBay's Motion in Aid of Litigant's Rights and its decision to set aside the January 23rd

Resolution and to award AvalonBay "reasonable attorney's fees." (2T5-23) On August 8, 2023, the trial court entered an Order implementing its decision. (Pa1) Therein, the trial court did not articulate findings of fact and/or conclusions of law. Instead the court incorporated its rulings on the record and a report by the Planner/Special Master dated October 19, 2020, which the trial court relied on in reaching its decision on the motion. (Pa9) However, that Report could not logically be the basis for the relief entered, since any relief required a finding of a default of a provision in the Settlement Agreement that did not even exist at the time the Planner/Special Master's Report was authored.

The oral ruling by the Judge confirms such inappropriate reliance.

> I am going to grant the application. I'm going to enforce the first resolution that the Wayne Planning Board passed. And then 42 days later or whatever it was they decided – that was only a conditional approval. And they went back and they unpassed (sic) it. I quite frankly find this is a tactic in a long line of tactics that Wayne has utilized to delay meeting its constitutional obligation of affordable housing. I incorporate by reference Ms. Cofone's October 19th 2020 missive that was - oh, I don't know. I've – you read it. It must have taken you – it was 12 pages. But it lists chapter and verse of all the delay tactics and the failures to mediate not just with Avalon, but with failure to approve other intervener's applications that they contend that we were settled with. And we said well do we have anything in writing. And these things lingered on and lingered on. And quite frankly I did at that time revoke the immunity. That was back on November 10th of 2020.

(2T4-17:5-11)

In its Order, the Court provided in relevant part as follows:

1. Avalon's Motion be and is hereby granted, subject to the Court's future determination of the Per Diem Penalty, as set forth herein. The Court's oral decision on the Motion be and is hereby incorporated into the record.

2. The supplemental resolution memorialized by the Board on January 23, 2023, notated as Resolution PB-2023-05 (the "Supplemental Resolution"), be and is hereby invalidated, and set aside and said resolution is of no force and effect.

3. The original resolution memorialized by the Board on December 12, 2022, referred to as Resolution PB-2022-025, be and is hereby affirmed and remains in full force and effect.

4. **The Court finds that the Board's adoption of the Supplemental Resolution constitutes bad faith conduct.**

5. The Court hereby awards AvalonBay reasonable counsel fees and costs incurred in connection with the Motion. Within ten (10) days of entry of this Order, AvalonBay shall submit a Certification of Services detailing its fees and costs incurred in connection with the Motion.

***

8. Within ten (10) days of entry of this Order, AvalonBay is permitted to submit an application for award of a Per Diem Penalty it also sought in connection with the Motion. Avalon's submission shall detail the basis for the claimed Per Diem Penalty, and a calculation of the amount claimed to be due and owing.

(Pa1-2 (emphasis added))

There is no finding in the Order or in the transcript of the Court's ruling that the Board or the Township breached the Settlement Agreement or defaulted on any terms therein. Moreover, the trial court did not enforce any provision of the Settlement Agreement when it set aside the Supplemental Resolution. Instead, the trial court looked beyond the express terms of the Settlement Agreement and considered the past history to find that "the Board's adoption of the Supplemental Resolution constitutes bad faith conduct." The Court's granting PW relief is not supported by the record, nor is its finding of bad faith. And, in any event, a finding of bad faith is not a basis for an award of attorneys' fees or delay penalties and, accordingly, the August 8th Order must be set aside.

A. The Trial Court Improperly Set Aside The Supplemental Resolution.

The trial court's finding that the Board approved the AvalonBay application in December 2022 and then "unapproved" the application in January 2023 is not supported by the evidence in the record before the trial court. Indeed, it is clear from the language of the Board's minutes that the Board did not "approve" and then "unapprove" the AvalonBay project or otherwise 'change its mind' about the AvalonBay application in January. Rather, in December, the Board approved the application and at the same time imposed a condition upon that approval.

For reasons of health, safety and welfare, the Board wanted an elevator in all of the multi-story buildings and saw no legitimate reason why Buildings A through D should have elevators and Building E should have none. In addition, when the public hearings were concluded, the Board had the expectation that an elevator would be included in Building E based on AvalonBay's representations. (Pa148)

When the Board adopted the proposed form of resolution on December 12, 2022, it was subject to the addition of a condition that Building E contain an elevator. The Board further directed that the condition be memorialized in a separate supplemental written resolution. The Board's Minutes clearly show the Board's actions:

> **AVALONBAY COMMUNITIES INC** - 1445 and 1455 Valley Road; Block 3103, Lots 16 & 19; MLR3D-4 (Mount Laurel Round 3 District 4) District; Application PB-2021-037. Memorialization if Resolution PB-2022-025 granting a Preliminary and Final Site Plan Approval to construct 473 residential dwellings across two properties.
>
> **Board Comments:**
> Mayor Vergano noted that the agreed upon elevator for building "E" and the additional 10 units in that building were missing from the resolution. He stated that these conditions were very important to the Board and he suggested amending the resolution to include said requirements.
>
> Mr. Cavaliere suggested that the Board vote on the resolution in its current form but add the caveat to have a supplemental resolution which would include these requirements presented at a future meeting.

Within their area of jurisdiction, planning boards act in a "quasi-judicial capacity", Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 225

(App. Div. 2009). When reviewing the actions taken by a land use board, the Courts are to give substantial deference to findings of fact of the Board, Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 362 (2011), but review *de novo* those "interpretations of the law and the legal consequences that flow from established facts . . . ." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). The Courts have also long recognized that "because of their peculiar knowledge of local conditions," municipal land use boards "must be allowed wide latitude in their delegated discretion." Jock v. Zoning Bd. of Adjustment, Twp. of Wall, 184 N.J. 562, 597 (2005); accord Booth v. Bd. of Adjustment of Rockaway Twp., 50 N.J. 302, 306 (1967). Land use board decisions "enjoy a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) *citing* Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002)). Consequently, "courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58-59 (1999).

The party challenging the action of a zoning board carries the burden of demonstrating that the board acted arbitrarily, capriciously, or unreasonably. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment, 233 N.J. 546, 558 (2018)

quoting Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015); Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013) *citing* Smart SMR of N.Y., Inc. v. Bd. of Adjustment, 152 N.J. 309, 327 (1998)). "A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record, or if it usurps power reserved to the municipal governing body or another duly authorized municipal official." Ten Stary, supra, 216 N.J. at 33. "Even when doubt is entertained as to the wisdom of the [board's] action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of [.]" Kramer, supra, 45 N.J. at 296-97 (1965).

Moreover, it has long been recognized that a land use board, such as a planning board, in granting a land use application, certainly one that involves a variance, may impose conditions to safeguard the public interest, so long as the conditions are reasonable and advance the purposes of zoning. See generally, Berninger v. Board of Adjustment, 254 N.J. Super. 401 (App. Div. 1991); aff'd. o.b., 127 N.J. 226 (1992) ; Aldrich v. Schwartz, 258 N.J. Super. 300, 311 (App. Div. 1991); Urban v. Planning Board, 124 N.J. 651, 661 (1991). Further, a board is "required to lay down adequate protective conditions and safeguards where it appears proper to grant a variance and at the same time further one of the zoning objectives." Alperin v. Mayor and Township Com. of Middletown Township, 91

N.J. Super. 190, 196 (Ch. Div. 1966) *citing* Kramer v. Board of Adjust., Sea Girt, 45 N.J. 268 (1965). Obviously, there are, however, limits on what conditions a board may properly apply. See Orloski v. Planning Board, 226 N.J. Super. 666 (Law Div. 1988). Based on the foregoing legal authorities, a court can only set aside a condition in a land use approval if it is unreasonable, arbitrary or capricious. The trial court made no finding that the condition was unreasonable, arbitrary, capricious, or contrary to the Mt. Laurel doctrine, because it was not. After all, why shouldn't persons who qualify for affordable housing be entitled to an elevator.

Here, the trial court gave no deference to the Board's findings of fact and, instead, rejected out-of-hand the Board's finding as to the importance of the Building E elevator. Additionally, the Court did not review transcripts of the proceedings before the Board and, thus, was without a proper basis for its decision, which is decidedly disfavored by the Courts. See Mulligan v. Panther Valley Property Owners Ass'n, 337 N.J. Super. 293 (App. Div 2001). While a Mt. Laurel judge may have authority to determine if a planning board arbitrarily denied a developer's application, it is the responsibility of a planning board, not the court, to evaluate the appropriateness of a site plan application and may impose conditions on Mt. Laurel developments to promote the health, safety and welfare as the board deems appropriate. Morris County Fair Housing Council

v. Boonton Twp., 220 N.J. Super. 388 (Law Div. 1987), aff'd as modified, 230 N.J. Super. 345 (App. Div. 1989). Even where a Mt. Laurel judge evaluates whether a resolution by a planning board was contrary to the intent of a settlement agreement, it must do so based on the terms of the settlement agreement and the full record of proceedings before the planning board, including the transcripts. Id. at 403-404. There were no transcripts in the motion record.

In sum, the trial court's decision to set aside the Supplemental Resolution is not supported by adequate, substantial, credible evidence and should be reversed.

B. The Finding Of Bad Faith Was Not Supported By The Record Of Conduct After The Settlement Agreement Was Executed.

Bad faith is often referred to as the doing of an act for a dishonest purpose. The term also "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." Borough of Essex Fells v. Kessler Institute for Rehab., 289 N.J. Super. 329, 338 (1995), *citing* Lustrelon Inc. v. Prutscher, 178 N.J. Super. 128, 144 (App. Div. 1981). The party making a claim that the government has conducted itself in bad faith or in a fraudulent manner has the burden of proof. Texas East, Trans. Corp. v. Wildlife Preserves, Inc., 48 N.J. 261 (1966); State v. Totowa Lum. & Supp. Co., 96 N.J. Super. 115 (App. Div. 1967). Furthermore, evidence showing that the government acted in

bad faith must be clear and convincing. Klump v. Cybulski, 274 Wis. 604, 81 N.W.2d 42, 47 (1957). A party who acts in good faith on an honest but mistaken belief that his/her actions were justified has not breached the covenant of good faith and fair dealing. Silvestri v. Optus Software, Inc., 175 N.J. 113 (2003).

A review of the correspondence between AvalonBay and the Board's counsel between June and December does not demonstrate - and certainly not by adequate, substantial, credible, and clear and convincing evidence - that the Board or the Township acted in "bad faith".

To the contrary, the Board deemed elevators in the multi-story building as important to the health, safety and welfare of the community and of the future residents of the AvalonBay Project, which are the charge and jurisdiction of the Board. Indeed, the stated legislative purpose of the MLUL is, in part, "[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare." N.J.S.A. 40:55D-2.

During the public hearings, the Board and AvalonBay discussed inclusion of ambulance stretcher compliant passenger elevators in buildings "C", "D" and "E" and the Board received testimony and commentary from various Township personnel recommending and otherwise requesting that such elevators be

included in building "C", "D" and "E" for the benefit, health, safety and welfare of the residents and of the first responders; the Board shared such concerns.

When the public hearings ended, the Board believed that the Project was to have elevators in all the multi-story buildings, including Building E as expressed by AvalonBay's counsel in an email on June 12, 2022:

> To follow up, AvalonBay accepts the proposal discussed on Friday. To sum up, AvalonBay will agree to install an elevator in Building E if (i) the Planning Board and the governing body approve one additional story with no more than 10 total units only 1 of which is affordable and (ii) contingent upon the Planning Board approving the AvalonBay project on Monday, 6/13 (see below). As a result, the total number of units at the AvalonBay project will equal 483 including 72 affordable units.

(Pa148) Immediately following the June 13 Board hearing, the Board's attorney, the Township's attorney, and the Township's planners began the process of drafting the needed amendments to the zoning code, the amendments needed for the Settlement Agreement, and the Board's project approval resolution. Just two (2) days after the Board's June 13th hearing, the Board's attorney contacted AvalonBay's attorneys saying "On the above, I'll be sitting down to draft the resolution shortly. To that end, I would invite you to send me your list of submissions (Application, plans (including latest revision date),

approvals and other documents and your list of hearing exhibits (Date, exhibit number, brief description), so that nothing is left out." (Pa150)

A coordinated effort was required to accomplish what was intended, as admitted by AvalonBay counsel in his August 9, 2022, email to the Court Master:

> AvalonBay will do the elevator in the final MF family building with the additional units. But that requires another story to be added, which requires an amended settlement agreement and then an amended ordinance to avoid a D variance. So it's a bit of a process we have to go through to get there.

(Pa187 (Emphasis supplied).

By August 7, 2022, and as shown in Board counsel's email to AvalonBay's counsel (Pa172), the combination of the Township's and Board's planners and attorneys had drafted a revised rezoning ordinance (Pa182), drafted an amendment to the Settlement Agreement (Pa173), had discussed and received the endorsement of the Court's Planner/Special Master (Pa172), and had also obtained approval from FSHC. (Id.) As of August 7th, AvalonBay had still not submitted its promised proposed form of resolution as of August 7th.

What followed over the course of the next three plus months were a series of largely uninterrupted[8] phone and email primarily from the Board's attorney to the AvalonBay's attorneys attempting to finalize the Amendment to the Settlement Agreement and the Resolution of Approval.

The facts reflected in the incomplete record before the trial court do not support any finding that the Township acted in bad faith. Similarly, the record does not support a finding that the Board acted in bad faith especially since it was acting on a belief that its action in adopting the January 23rd Resolution was justified. See Silvestri.

The factual history in the record showed the Board's good faith efforts to effectuate the AvalonBay's agreement for the Building E elevator. The trial court completely disregarded and discounted that it was AvalonBay - not the Township or the Board - that 'went back on its word'.

[8] There was a hiatus beginning late October because the Board's counsel had a long planned trip abroad from October 20 through November 3, 2022 and because one of AvalonBay's attorneys was married in early November2022.

POINT II

THERE WAS NO RULING BY THE TRIAL COURT THAT THE BOARD OR THE TOWNSHIP DEFAULTED ON AN OBLIGATION SET FORTH IN THE SETTLEMENT AGREEMENT, NOR ANY FACTUAL BASIS FOR ANY SUCH RULING. [1T60-1 to 62-2]

The Settlement Agreement may only be enforced based on its terms; the court may not rewrite a better contract for the parties than the parties made for themselves. Pennbar Corp. v. Insurance Co. of No. America, 976 F.2d 145 (3d Cir. 1992); In re Community Medical Ctr., 623 F.2d 864, 866 (3d Cir.1980); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 46 (1960).The Settlement Agreement contemplated that the AvalonBay project be presented to the Planning Board for review. The Settlement Agreement did not, and could not, consistent with law, require the Planning Board to approve the development application as it was presented to the Planning Board. That process requires presentation at a public hearing convened for that purpose. See generally, N.J.S.A. 40:55D-12 and N.J.S.A. 10:4-6. AvalonBay does not and cannot argue that there was an obligation to approve any specific application. AvalonBay instead argues that the Township Defendants breached a duty to cooperate with AvalonBay in obtaining the "Required Approvals" and "Government Approvals".

A duty "to cooperate" is not a duty "to approve" as that certainly would have been against public policy to mandate approval by the Planning Board. AvalonBay argues in this motion that the elevator is not required under the Uniform Construction Code and, thus, it may not be a condition of the development approval. However, the Uniform Construction Code sets forth the minimum standards for construction; development approvals may require compliance with higher standards. See Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F.Supp.2d 648, 653 (D.N.J. 2006).

There is nothing - and as a matter of public policy, can be nothing - in the Settlement Agreement that mandated the Planning Board approve the AvalonBay project as requested. In fact, to further underscore that concept, the Settlement Agreement itself acknowledged that the project plan attached to the Agreement was not "fully engineered" and that the project was subject to Planning Board review:

> The Parties recognize that the Concept Plan is not fully engineered at present and will only be fully engineered and submitted as part of the site plan application (SPA) process, which will likely result in variations from the Concept Plan prior to the SPA (as hereinafter defined).

(Pa48)

There is also nothing in the Settlement Agreement that requires the Planning Board to compromise the safety and welfare of its first responders or

of the future residents and guests of Building "E". Moreover, by providing elevators in the other multistory buildings (i.e., Buildings B through D) and none for Building E, the project would effectively be giving disparate treatment to the affordable housing residents of Building E and would be violative of public policy.

The Planning Board's decision to require the installation of an elevator in Building "E" to make it in parity with the other buildings and to address the concerns of the Township's first responders is not inconsistent with the duty to cooperate and certainly is not a default of the Settlement Agreement. By making that condition, the Planning Board set a standard designed to promote the public health, safety and general welfare, which is consistent with the foremost purpose of the Municipal Land Use Law "[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare." See N.J.S.A. 40:55D-2a.

It is not for the courts to substitute its conception of what the public welfare requires in place of the conception of the local land use body. Pascack Assoc'n, Ltd. v. Mayor & Council of the Twp. of Washington, 74 N.J. 470, 485 (1977). A municipality may condition a land development approval upon the developer's installation of improvements a local governing body may find

necessary for the protection of the public interest. Divan Builders v. Wayne Tp. Planning Bd., 66 N.J. 582,595 (1975). Moreover, "[t]he protection of apartment dwellers has long been recognized as consistent with the public health, safety and welfare." State v. C. I. B. Int'l., 83 N.J. 262, 272 (1980).

In accordance with its obligations under the Municipal Land Use Law, the Planning Board included terms and conditions in the approval of Avalon's development application that promote the safety, health and welfare of the future inhabitants of the development, their visitors and the first responders who may be called to provide life-saving measures.

Neither the Township nor the Planning Board defaulted on any obligation in the Settlement Agreement based on the Planning Board's condition requiring the installation of an elevator in Building "E".

POINT III

THE TRIAL COURT ERRED IN GRANTING AVALONBAY ATTORNEY'S FEES AND DELAY PENALTIES. [1T62-3 to 63-23; 3T-17 to 33:14; 3T40-22 to 41-14]

The trial court's granting of attorney's fees and delay penalties was premised upon the granting of AvalonBay's motion to enforce the Settlement Agreement, and thus a reversal of that motion naturally vitiates an award of

attorneys' fees and delay penalties since such must be predicated on a determination of default of the Settlement Agreement.

AvalonBay sought relief under R. 1:10 when it moved the court for an order enforcing litigant's rights and, more particularly, to enforce the terms of the Settlement Agreement. The Court granted the motion and awarded fees in an amount to be determined upon submission of a Certification of Services. However, the authority to grant fees under R. 1:10 is limited to motions based on violation of an Order or Judgment, not a settlement agreement. Haynoski v. Haynoski, 264 N.J. Super. 408, 414 (App. Div. 1993). As such, the Court's award of fees can only be supported by R. 4:42-9 or some other basis.

While attorney's fees may be allowed in a judgment pursuant to R. 4:42-9 where the parties have agreed thereto in advance in an agreement, such a provision will be strictly construed in light of the general policy disfavoring attorney's fee awards. See McGuire v. City of Jersey City, 125 N.J. 310, 317 (1991); Verna v. Links at Valleybrook, 371 N.J. Super. 77, 100-101 (App. Div. 2004); Englewood v. Exxon Mobil Corp., 406 N.J. Super. 110, 123 (App. Div.), certif. den., 199 N.J. 515 (2009). A proportionality review under Rendine v. Pantzner, 141 N.J. 2922 (1995) is particularly relevant in contract-fee cases. Litton Industries v. IMO Industries, 200 N.J. 372, 286-280 (2009).

Any award of attorneys' fees based on a contractual provision is limited to those fees reasonable in the circumstances and does not automatically encompass the full fee charged. North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-574 (1999). Hence, the amount of fees actually charged is the starting point. In any case, an application for fees must be supported by an appropriate certification of services. After all, a conforming affidavit is a prerequisite to an allowance of fees. Glen v. June, 344 N.J. Super. 372, 381-382 (App. Div. 2001); Scullion v. State Farm Ins. Co., 345 N.J. Super. 431, 439 (App. Div. 2001) (holding certified copy of bill is required in an application for fees).

R. 4:42-9 (b) stipulates that all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by R.P.C. 1.5(a). Furthermore, the affidavit shall also include the following:

> a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider the rendition of paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorneys' services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client[.]

R. 4:42-9 (b).

Paragraph (d) of the Rule mandates that an allowance of fees must be included in the judgment or order stating the determination that an award of fees is appropriate. R. 4:42-9 (d).

R.P.C. 1.5(a) provides as follows:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

In its moving application, AvalonBay requested an award of $30,614.52 in fees and costs, which AvalonBay's counsel admitted were "substantial" and claimed were "reasonable." (Pa365) Counsel argued that there were "numerous breaches of the Settlement Agreement", but Avalon's motion was based on two (2) alleged breaches – (1) the Planning Board allegedly violated the Settlement Agreement by not adopting a Resolution by the second meeting in October after Avalon's counsel had agreed to the form of Resolution and (2) by adopting a Supplemental Resolution in January 2023. Also, to support the application for fees, AvalonBay claimed that the Supplemental Resolution caused rejection of Avalon's compliance plans and delayed construction; but that was not the case. It was Avalon's failure to address the various conditions of the approvals other than an elevator in Building E that were the cause of any delay in construction. (Pa378)

In any event, AvalonBay's counsel had not even actually charged AvalonBay for the fees that it sought to recover; instead, AvalonBay's counsel prepared invoices specifically for their fee application. (Pa365 at ¶8) Such is not consistent with R. 4:42-9 and does not create a level of trustworthiness as with invoices actually billed to a client. Indeed, AvalonBay admitted as much in the reply papers when it conceded that its application included $1,705.00 for service unrelated to the motion after the Township pointed that out.

The trial court disregarded the infirmities in AvalonBay's motion. After recognizing a need to determine both the hourly rate and the amount of hours spent were reasonable, the trial court made no determination that the amount of time spent - 72 hours by six (6) different attorneys - on a motion to enforce a settlement agreement was reasonable, because it was not, especially when AvalonBay claimed it was clear cut that the Township and Board breached the express terms of the Settlement Agreement. The court proceeded to grant the full amount of fees sought by AvalonBay after its admitted overstepping and found that the fees were reasonable based on the representations of AvalonBay's counsel.

Since the Court did not find that the Settlement Agreement was breached and the PW relief was not based on the terms of the Settlement Agreement, there was no basis for entry of an award of fees. Moreover, the applicant did not sustain its burden under R. 4:42-9 and, thus, the award should be reversed.

Similarly, there was no basis for an award of delay penalties, since neither the Township nor the Planning Board failed to take any action required by the Settlement Agreement and the provision regarding the imposition of penalties only applies to a failure to take timely action required under the Settlement Agreement. The very fact that AvalonBay did not seek the penalty while the parties were working out the details of the Resolution despite the passage of

more than thirty (30) days after the vote, shows that the Board's conduct did not violate the Settlement Agreement.

Notwithstanding, the trial court assessed penalties from October 24, 2022 until December 12, 2022 when the Resolution was adopted finding that the Resolution should have been adopted on October 24, 2022 (Pa31), but AvalonBay only asked for the Resolution to be adopted at its November 28, 2022 meeting (Pa264).

Without any failure to act by the Township or Board, the penalty clause was not triggered. The trial court, nonetheless, assessed a penalty because it felt there were "significant delays Avalon faced throughout the entirety of the project." (Pa32) Clearly any delay prior to the Board vote was not relevant to the motion before the court. The court also erroneously determined the January 23rd Resolution "unlawfully, severely delayed AvalonBay's ability to continue with the project." (Pa33) That finding was not supported by any evidence in the record. In actuality, AvalonBay was not in compliance with the December 12, 2022 Resolution irrespective of the Elevator in Building E. (Pa378)

In reaching its holding on delay penalties, the court rewrote the parties' Settlement Agreement. However, a court must enforce settlement agreements as written and cannot rewrite an agreement to include a penalty against the Township for its adoption of the Supplemental Resolution. See Pennbar Corp.,

supra; In re Community Medical Ctr., supra; and Kampf, supra. Furthermore, while liquidated damage clauses may be enforceable, penalty clauses are unlawful and should not be enforced. Wasserman's Inc. v. Middletown, 137 N.J. 238, 248-249 (1994).

AvalonBay even recognized that the penalty did not accrue while the parties were negotiating the terms of approvals for the development and form of Resolution and, such was seemingly a justification for tolling any delay penalties, but it arbitrarily lifted the tolling in October. If AvalonBay believed the penalty began in October, it should have provided notice in October, but it did not. Avalon's claims of wrongful delay in the adoption of the Resolution are barred by the doctrine of laches since Avalon's delay in making a claim to a credit a month and a half later and lack of any effort between November 21, 2022 and its motion to request a credit for a sum certain are unexplainable, unexcusable and unreasonable to the detriment of the Township Defendants and taxpayers. See Mancini v. Township of Teaneck, 179 N.J. 425, 435-436 (2004); Knorr v. Smeal, 178 N.J. 169, 181 (2003); Borough of Princeton v. Mercer Cty, 169 N.J. 135, 157 (2001); Lavin v. Board of Educ. of City of Hackensack, 90 N.J. 145 (1982). In Lavin, the Supreme Court noted the following:

> Pomeroy defines laches as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing

> prejudice to an adverse party, operates as a bar in a court of equity."
>
> ***
>
> "Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if, plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; or that plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim."

Lavin, 90 N.J. at 151-152 (citations omitted).

In addition, it is significant that AvalonBay originally asked the trial court in its motion to order payment of delay penalties to AvalonBay, as opposed to a credit as the Settlement Agreement provides if the Township or Board failed to timely act. Such shows that AvalonBay was not trying to enforce the terms of the Settlement Agreement as it claimed.

Finally, there was and could not be any argument that the Township, which is an entity distinct from the Planning Board, defaulted on any obligation under the Agreement. As such, there was no basis for an award of attorneys' fees and costs or delay penalties against the Township.

CONCLUSION

For the foregoing reasons, the Orders dated August 8, 2023 and December 19, 2023 should be reversed.

Respectfully submitted,

Mary Anne Groh
Mary Anne Groh
ATTORNEY ID NO. 030531193

Dated: April 4, 2024

4868-7378-0402, v. 2

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF WAYNE and **THE PLANNING BOARD OF THE TOWNSHIP OF WAYNE**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000199-23 Civil Action ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION – PASSAIC COUNTY DOCKET NO. PAS-L-2396-15 Orders dated August 8, 2023 and December 19, 2023 Sat Below: Hon. Thomas F. Brogan, P.J.S.C. (Ret.) Hon. Darren J. Del Sardo, P.J.S.C. **DATE SUBMITTED: MAY 13, 2024**

MERITS BRIEF AND APPENDIX OF RESPONDENT/INTERVENOR, AVALONBAY COMMUNITIES, INC. IN OPPOSITION TO APPELLANT/PLAINTIFF, THE TOWNSHIP OF WAYNE'S APPEAL

INGLESINO TAYLOR
600 Parsippany Road, Suite 204
Parsippany, New Jersey 07054
(973) 947-7111
Attorneys for Respondent/Intervenor, AvalonBay Communities, Inc.

Of Counsel and On the Brief:
John P. Inglesino, Esq. (0077511991)
Derek W. Orth, Esq. (001152013)

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF ORDERS BEING APPEALLED

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Treatises

PRELIMINARY STATEMENT

The primary issues raised before this Appellate Court are simply summarized as follows: (i) whether a planning board can, after approving an application and memorializing its decision in a written resolution, later *sua sponte* re-open the very same closed proceedings, without notice to the applicant or the public, and impose new conditions of approval on the application; and (ii) whether a court should enforce contractually negotiated, and court-approved penalties, such as attorney's fees and per diem fees, when the planning board breaches its obligations under a Mt. Laurel settlement agreement by engaging in the foregoing misconduct. The Trial Court rightfully answered both of these inquiries in the affirmative, its findings are entitled to deference by the Appellate Division, and its rulings should be affirmed on appeal.

Appellants/Plaintiffs, Planning Board of the Township of Wayne (individually "Board") and Township of Wayne (individually "Township") (collectively "Township Defendants") share historic company with perhaps only three other municipalities—out of hundreds—to have their temporary immunity from exclusionary zoning/builder's remedy litigation revoked. The Township Defendants' duplicative appeals not only seek an unfair result, but also legal acquiescence for their *ultra vires*, unconstitutional, and bad faith conduct. Defendant/Respondent, AvalonBay Communities, Inc. ("Avalon") simply seeks to

hold the Township Defendants accountable to the terms of the settlement agreement they entered with Avalon and unambiguous black letter law, neither of which permit the Township Defendants to engage in the conduct at issue here.

Avalon is the owner of certain property with an established right to construct a 473-unit inclusionary development in the Township. On November 10, 2020, due to the Township Defendants' well-documented bad faith conduct, violation of prior Court orders, and ongoing intransigence, the Trial Court entered an Order invalidating the Township Defendants' immunity from builder's remedy actions. This action yielded near immediate results as, on January 8, 2021, Avalon and the Township Defendants entered into a settlement agreement—which was later approved by the Trial Court—containing clear timelines, obligations, and remedies, which the Township Defendants are essentially now asking this Court to remake. The settlement agreement mandates that the Township Defendants cooperate and use commercially reasonable efforts to assist Avalon, to not impose unnecessary cost-generative development standards and features, and, as it specifically concerns the Board, to expedite its review of Avalon's site plan application and to issue a written resolution memorializing its decision on the application within 30 days or by the second meeting following the Board's decision.

Avalon's application was approved by the Board on June 13, 2022 and, at that time, there was no condition of approval requiring an elevator in Building "E." The

Board, after a six-month period during which it refused to memorialize the resolution of approval, finally did so on December 12, 2022. This resolution specifically indicated that an elevator in Building "E" was neither required nor a condition of approval.

On January 23, 2023, the Board then, *sua sponte* and without notice to Avalon, the public, and long after the hearing record was closed and Avalon's application was approved, adopted a supplemental resolution which mandated the installation of an elevator in Building "E". This not only constitutes the precise unnecessary cost-generative development standards and features prohibited under the settlement agreement, but also a lack of cooperation, substantial delay, bad faith misconduct, and clear violation of the Municipal Land Use Law.

Two different Trial Court judges separately determined that this *ultra vires* and bad faith conduct by the Township Defendants constituted a clear breach of their contractual and constitutional Mt. Laurel settlement agreements with Avalon, and fashioned a reasonable remedy that reflects both the Municipal Land Use Law and the specific penalties the Township Defendants agreed to in the settlement agreement with Avalon.

We respectfully submit that the Trial Court's orders of August 8, 2023 and December 19, 2023 must be affirmed in their entirety; otherwise recalcitrant municipalities will continue to skirt their constitutional Mt. Laurel obligations.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Since late 2015, Avalon has participated in the Mt. Laurel declaratory judgment action filed by the Township Defendants under Docket Number PAS-2396-15 (the "DJ Action") as a Defendant-Intervenor. Pa042. Although Avalon initially had a different property under contract, in early 2019, Avalon entered into a purchase and sale agreement with Valley National Bank to acquire its headquarters at 1445, 1455, and 1455 Valley Road, and proposed to construct an inclusionary community on said lands in order to assist the Township Defendants in meeting their Third Round constitutional Mt. Laurel obligations. Pa012. The subject property, in relevant part, is more particularly referred to on Wayne's official Tax Map as Block 3103, Lots 16 and 19 (the "Property").

Over the next year and a half, Avalon engaged in a long running effort to negotiate a resolution with the Township Defendants regarding the proposed multifamily rezoning of the subject Property. A detailed summary of these failed efforts, and the Township Defendants intransigent approach to their constitutional Mt. Laurel obligations, are set forth in the October 19, 2020 report prepared by Christine Cofone, PP/AICP, the Court-appointed Special Adjudicator, which was

[1] The Procedural History and Statement of Facts have been combined for the Court's convenience and to avoid repetition. Additionally, for the convenience of the Court, pursuant to R. 2:8-1(a), Avalon summarizes pleadings and other undisputed papers or records which do not accompany the brief.

annexed to the Trial Court's November 10, 2020 Order revoking the Township Defendants' temporary immunity, as well as the August 8, 2023 Order enforcing litigant's rights in favor of Avalon. Pa009-Pa020. This includes the following pertinent facts, which are not challenged by the Township Defendants *vis-a-vis* this appeal, and are thus undisputed facts underlying this Appeal:

1. In April 2019, the Township Defendants' initial refusal to participate in mediation sessions overseen by the Special Adjudicator. Pa012.
2. On May 24, 2019, the Township Defendants' insistence, "without any basis in fact or personal knowledge", that the subject Property was not ripe to be considered for inclusion in the Township's Third Round Housing Plan. Pa012-Pa013.
3. On May 24, 2019, the Township Defendants' insistence that Avalon provide a copy of its purchase and sale agreement with Valley National Bank as an "initial starting point" for them to even consider Avalon's proposal, and the Special Adjudicator's disagreement with this position. Pa013.
4. On June 26, 2019, Avalon's filing of its first motion to revoke the Township Defendants' temporary immunity. Pa014.

5. In response to Avalon's first motion to revoke immunity, the Township Defendants' issuance of subpoenas to Avalon and Valley National Bank seeking copies of the purchase and sale agreement. Id.
6. On August 7, 2019, The Trial Court's entry of an Order that conditioned further extensions of temporary immunity on the Township Defendants making progress towards their Third-Round obligation and participating in good faith mediations with Avalon, amongst other things. Id.
7. On October 3, 2019, the Trial Court's extension of temporary immunity provided that the Township Defendants make progress towards resolving their Third Round obligation. Id.
8. In November 2019, Avalon's submission of concept plans and design standards for the subject Property and the Township Defendants' unilateral cancellation of mediation sessions with Avalon. Pa014-Pa015.
9. On January 16, 2020, The Trial Court's extension of the Township Defendants' temporary immunity through January 2020, but finding in the same Order as follows: *While the immunity continues this Court finds, for now, Wayne is not acting in bad faith. It is certainly questionable whether it is acting in good faith. This Court strongly cautions Wayne that in the future it will not proceed in the same fashion as it has to date. Deadlines*

will be enforced and a determination of bad faith can be and probably will be revisited in the future. Pa015; Ra001 (italics added).

10. On January 31, 2020, the Trial Court's entry of another Case Management Order wherein the Trial Court directed the Township Defendants and Avalon to engage in prompt ongoing mediation, with the goal of reaching a final settlement agreement before April 21, 2020. Pa015-Pa016. Avalon also coordinated with the Township on offers to arrange site visits at its communities in Boonton and Teaneck. Pa016.

11. In March 2020, the Township Defendants' unilateral cancellation of mediation sessions. Id.

12. At an April 2020 case management conference, Avalon and the Township Defendants' report that a conceptual settlement had been achieved, subject to standard municipal approval process. Id. These representations ultimately did not prove true. Id.

13. In May 2020, Avalon's submission of revised concept plans and bulk standards to the Township Defendants. Pa016-Pa017.

14. On May 15, 2020, the Township Defendants' rejection of Avalon's revised proposal and concomitant demand for "engineered site plans[,]" which the Special Adjudicator found to be "particularly ridiculous because detailed

engineering efforts are not undertaken by a developer when zoning is not yet in place due to the significant costs associated with the same." Pa017.

15. On June 9, 2020, the Trial Court's entry of a Case Management Order setting forth the Township Defendants' ongoing refusal to comply with Court directives and failure to "make demonstrable progress with any other project proposed for inclusion in its Housing Plan." Pa018; Pa360.

16. On or about June 24, 2020, Avalon's filing of its second motion to revoke the Township Defendants' immunity from builder's remedy actions. Pa018.

17. On August 5, 2020, Avalon's filing of its builder's remedy action against the Township Defendants in the case entitled AvalonBay Communities, Inc. v. Township of Wayne and the Planning Board of the Township of Wayne, Docket No. PAS-2323-20 (the "Builder's Remedy Action"). Pa045.

18. On or about September 23, 2020, the Township Defendants' notification to the Special Adjudicator that it would not settle with Avalon. Pa019.

19. On or about October 19, 2020, the Special Adjudicator's issuance of her report, containing the foregoing findings and recitations of fact. Pa009-Pa020.

20. On November 10, 2020, following oral argument, the Trial Court's entry of an Order revoking the Township Defendants' temporary immunity from builder's remedy actions, finding that:

    a. After the passage of more than five years and concerted procrastination and delay, the Township has not acted, with good faith effort and reasonable speed, to voluntarily achieve constitutional compliance with its Third Round affordable housing obligation;

    b. The Township had not acted in good faith, and has, to the contrary, acted in bad faith in its prosecution of this matter;

    c. The Township has acted to avoid compliance with its obligation to create a realistic opportunity for the creation of its fair share of the regional need for low- and moderate-income housing, and is this constitutionally non-compliant with its Third Round affordable housing obligation;

    d. Builder's remedy/exclusionary zoning action be and are hereby authorized against the Township Defendants. Pa005-Pa008.

Notably, the Special Adjudicator's Report, which was not challenged by the Township on this appeal, was incorporated by reference into the Trial Court

November 10, 2020 Order, and then re-incorporated into the Trial Court's August 8, 2023 Order. Pa005; Pa001.

On January 8, 2021, as a direct result of the Court's revocation of the Township Defendants' immunity and the institution of the Builder's Remedy Action, Avalon entered into a settlement agreement with the Township Defendants, which was signed by both the Township and the Board (the "Settlement Agreement"). Pa041; Pa066. Pursuant to the Settlement Agreement, the Property was to be developed as a Mt. Laurel inclusionary development consisting of a residential community that will permit, in relevant part, a total of 473 residential units upon Lots 16 and 19, with the residential community having a 15% 'set aside' for very-low, low-, and moderate-income housing yielding 71 affordable units based on the development of 473 residential units in total. Pa043.

Pursuant to Section 6(c) of the Settlement Agreement, the:

> Township and the Board acknowledge that in order for [Avalon] to construct its Inclusionary Development, [Avalon] will be required to obtain any and all necessary and applicable agreements, approvals, and permits from all relevant public entities and utilities; such as, by way of example only, the Township, the Planning Board, the County of Passaic, the Passaic County Planning Board, the New Jersey Department of Environmental Protection, the New Jersey Department of Transportation, and the like, including the Township's ordinance requirements as to site plan and subdivision approval (the "Required Approvals"). **The Township and the Board agree to cooperate** with [Avalon] in processing the applications with outside agencies which the Parties acknowledge will

> benefit the Project. **The Township and the Board agree to use all commercially reasonable efforts** to assist [Avalon] in its undertakings to obtain the Required Approvals, provided that the taxes are current and [Avalon] is in compliance with this Agreement.
>
> [Pa052-Pa053 (emphasis added)].

Pursuant to Section 6(d) of the Settlement Agreement, the "Township and the Board recognize that the Required Approvals and this Agreement all contemplate the development of an "Inclusionary Development" within the meaning of the Mount Laurel doctrine. Therefore, in accordance with N.J.A.C. 5:93-10, the Township and Planning Board **will not impose development standards and/or requirements that constitute unnecessary 'cost generative features.'**" Pa053 (emphasis added).

Pursuant to Section 8(g) of the Settlement Agreement, "the Board shall promptly deliberate on the SPA and vote. Following the vote of the Board, the Board shall **memorialize its decision** regarding the SPA in ***a* written resolution, which shall be adopted by the Board within the earlier of 30 days or the second meeting following the approval meeting.**" Pa056 (emphasis added). The Settlement Agreement specifically noted that the:

> Parties acknowledge that [Avalon] will incur substantial costs if the deadlines set forth herein are not achieved by the dates provided. As a result of the foregoing, **if any deadline or timeframe set forth herein** that is the responsibility of the Township or the Board is not achieved in accordance with the timeline set forth above .

> . . **there shall be a penalty in the amount of five hundred ($500) per day ("Per Diem Penalty")** . . . [Avalon] shall receive a credit ("Credit") for each day that the action, decision, meeting or similar item is not acted upon by the Township or Board, as the case may be, or does not take place by the appropriate deadline . . . [Avalon] shall be entitled to apply the Credit towards any fee that is due and payable to the Township in the ordinary course of the development [sic] the Property . . . This Paragraph **does not** limit [Avalon's] remedies, in law or equity, to redress non-compliance by the Township or the Board.
>
> [Pa057-Pa058 (emphasis added).]

Paragraph 10 of the Settlement Agreement further provides that the:

> Township and the Board . . . shall **fully cooperate and assist** with Avalon's efforts . . . to secure necessary municipal, county and state permits, approvals, licenses, waivers, exceptions, easements, variations and variances for the development, including the SPA, Treatment Works Approval applications/permits, construction/building permits, and all other necessary or useful governmental approvals ("Governmental Approvals") . . . **the Township and Board shall cooperate with [Avalon]** as set forth herein . . . The Township and Board shall **expedite review and approval** of all necessary governmental approvals, within its jurisdiction.
>
> [Pa058 (emphasis added).]

In similar fashion, Paragraph 18 of the Settlement Agreement mandates that the "Township and the Board shall work diligently, in good faith, and shall undertake all **commercially reasonable efforts**, including **expediting reviews of Avalon's submissions** and scheduling of special meetings, as necessary to effectuate the terms of this Agreement." Pa062 (emphasis added).

As to enforcement, the Settlement Agreement specifically states that this "Agreement may be enforced through a **motion to enforce litigant's rights** . . . filed in Superior Court, Passaic County. In the event that any Party defaults under this Agreement, then the defaulting Part[ies] shall reimburse the non-defaulting Part[ies] for **all legal and professional fees and expenses** incurred in connection with enforcement of this Agreement." Pa062-Pa063 (emphasis added).

The Settlement Agreement was approved by way of Court Order and Judgment in the DJ Action on March 23, 2021 by Judge Brogan. Pa109; Pa390. The Property was rezoned to the Mt. Laurel Round 3, District 4 by way of a March 3, 2021 Ordinance that took effect on March 23, 2021. Pa109.

Thereafter, in December 2021, Avalon filed a Site Plan Application ("SPA") with the Board seeking preliminary and final major site plan approval along with incidental bulk variance relief. Pa025. Avalon's SPA proposed the construction of a 473-unit inclusionary multifamily residential community, including 71 affordable units, along with a clubhouse, associated amenities, and related sited improvements. Pa110. The Board held public meetings on Avalon's SPA on April 25, 2022; May 9, 2022; May 23, 2022; and June 13, 2022. Pa106.

The Board voted and approved Avalon's SPA on June 13, 2022. Pa025; Pa106. Following approval, counsel for the Board and Avalon worked jointly on the form of resolution the final version of which was circulated on October 7, 2022.

Pa238-Pa262. Avalon specifically requested that the Board consider the resolution at the Board's next meeting. Pa263. The Board did not respond, and the resolution was not considered at all in October or November. Pa265.

As the Board had failed to consider the resolution in a timely manner, Avalon was left with no choice but to serve a Notice of Default under the Settlement Agreement on November 21, 2022. Pa264. As noted in Avalon's November 21, 2022 Notice of Default, the final resolution was prepared on October 7, 2022, but the Board failed to consider same at two meetings—the October 24, 2022 meeting and the November 14, 2022 Meeting. Pa266.

Thus, the Per Diem Penalty was accruing on a daily basis and the Notice of Default specifically advised that if the Board again failed to consider the resolution on November 28, 2022, that Avalon will avail itself of its remedies. Pa266. In response, the Board's attorney indicated that the Board was intentionally holding up the resolution in the hopes of amending the Settlement Agreement despite the fact that the Settlement Agreement does not allow the Board to refuse memorialization of a resolution, but actually requires the contrary—that same be expedited. Pa267.

On December 12, 2022, approximately six months later, the Board memorialized the June 13, 2022 approval of Avalon's Site Plan Application by way of written Resolution No. PB-2022-025 (the "Original Resolution"). Pa025; Pa106. As expressly noted in the Original Resolution, Avalon agreed to provide elevators

in Buildings A-D—but expressly refused to include an elevator in Building "E", and the Board accepted that such a condition was outside of its jurisdiction to impose. Pa110-111. The Original Resolution specifically states in its findings of fact that:

> [d]uring the course of the public hearings, the Board and [Avalon] had discussions about the inclusion of ambulance stretcher compliance elevators in buildings "C", "D", and "E" . . . However, according to the testimony presented by [Avalon's] professionals, the question of presence or absence of such elevators in such buildings is **controlled exclusively by the UCC, which Code does not require such elevators for those particular buildings**. Nonetheless, as a consequence of various discussions between the Board and [Avalon], [Avalon] agreed to amend the Application so as to include such elevators in buildings "C" and "D". **[Avalon] declined to include such elevator in building "E."**
>
> [Pa114 (emphasis added)].

Accordingly, the elevator in Building "E" was not listed as a condition of approval in the Original Resolution. Thus, the Original Resolution confirmed that Avalon's SPA was approved on June 13, 2022 and that Avalon "shall install an elevator in Buildings C and D" only. Pa119.

On January 23, 2023, the Board, *sua sponte*, without notice to the public or even Avalon, adopted the Supplemental Resolution PB-2023-05 on January 23, 2023 (the "Stealth Resolution") which imposed an additional condition to the approval of Avalon's SPA—namely, the requirement that Avalon include an elevator in Building "E." This new requirement was expressly excluded from the Original

Resolution. Pa002; Pa025; Pa123. So brazen was the Stealth Resolution that it freely recognized that, despite approving Avalon's SPA on June 13, 2022, "the Board discussed and ultimately resolved and decided to proceed upon the proposed form of reservation while at the same time **adding certain conditions and requirements to be memorialized in [the Stealth Resolution]** . . . the Board has adopted the within [Stealth Resolution] for that purpose." Pa123 (emphasis added).

Still, the Stealth Resolution recognized that, while Avalon "[a]greed to amend the Application so as to include such elevators in building 'C' and 'D[,]' **[Avalon] declined to include such elevator in building 'E.'**" Pa124 (emphasis added). In a complete reversal of the Original Resolution, which did not condition approval on an elevator in Building "E", the Stealth Resolution now required that, "[a]s a condition of approval, and for the reasons set forth herein . . . Building 'E' shall include not less than one (1) passenger elevators." Pa125.

On January 28, 2023, Avalon's counsel, who learned of the Board's action by way of a newspaper article forwarded to them by their client, promptly advised that Avalon would move to enforce the Settlement Agreement. Pa339.

On May 10, 2023, Avalon filed a Motion to Enforce Litigant's Rights against the Township Defendants on account of adoption of the Stealth Resolution, which was a blatant breach of the parties' Settlement Agreement. Pa035.

On June 20, 2023, the parties conducted oral argument before Judge Brogan. 1T. At that time, it was specifically noted that the Stealth Resolution was entered post-close of testimony; post-close of the vote to approve Avalon's SPA; post adoption of the December 12, 2022 Original Resolution; and without notice to Avalon. 1T30:20-24. At that time, it was further noted that "none of the subject buildings are required to be equipped with an elevator under the UCC . . . . And further, that the board lacked legal authority to require Avalon to exceed UCC requirements. This testimony wasn't controverted as the area in this—as the law in this area is very clear." 1T35:8-14. Not only was the Stealth Resolution entered some seven months after the June 12, 2022 approval, but Avalon "didn't hear from the board attorney. [Avalon] [wasn't] notice[d] by the board prior to them taking this action in January of 2023. [Avalon] found it out because a local newspaper had published an article regarding the adoption of this [Stealth Resolution]." 1T36:17-37:3. Further, it was specifically argued that "[t]here is no authority for the board to reopen the public hearing process without notice to the applicant and to impose additional conditions on the application, which has been decided and voted on." 1T38:24-39:3.

Perplexingly, the Board's counsel even argued that "what happened was the board made a decision **that it would adopt the resolution that was drafted** . . . but wanted a condition for an elevator in building E." 1T47:18-25 (emphasis added).

That means the Township Defendants knew, at all times, that there was no condition for approval requiring an elevator in Building "E." At that time, the Court noted that "[t]here are resolutions when the [B]oard starts to consider them where not everyone is unanimous. Some say I don't like this, some say—at the end of the day they take a vote. The majority rules. This is what happened, this was passed. The way it happened to me is, is **quite frankly almost deceitful in that well let's just give them this version now; we can always go back and change it**." 1T50:21-51:4 (emphasis added).

Even when the Special Adjudicator was asked if she had ever even heard of such a thing occurring, the Special Adjudicator responded:

> Not in my capacity as special master. Not in my capacity, you know, as an expert witness who regularly provides testimony…on over a thousand occasions before, before planning and zoning boards . . . And I can't think of a scenario where I participated in something like this before where there was a resolution adopted . . . [a]nd then another action, another resolution subsequent to that.
>
> [1T64:10-20.]

The Special Adjudicator further explained that:

> [i]t seems **unusual to me that the board can go back and add conditions of approval to the resolution that was not agreed to at the hearing**. But I think something else that troubles me here is the addition of ten units, **I don't believe the [B]oard maintained jurisdiction of the application**. This is a planning board application and I don't know that the addition of the ten units would be permissible under the current zoning . . . the planning

> board would have lacked jurisdiction . . . if the town believes that elevator buildings are preferred, I'm not sure that requiring that through a second adopted resolution that [Avalon] didn't have the benefit of commenting on when they clearly had the benefit of commenting on the first time is the most appropriate way to accomplish that.
>
> [1T65:5-24 (emphasis added).]

In fact, it was noted that the "[B]oard as a matter of law has absolutely no authority to grant more units. Mr. Cavaliere knows that. It would have required a use variance." 1T70:3-6. Stated succinctly:

> [w]hat is relevant is the fact that there was a resolution of approval adopted that specifically indicated there was no elevator for building E. That resolution was adopted and the case was closed. There was no more pending application. It was over. There is no authority, no right whatsoever for the board after an application has concluded, after a [vote] has been taken on the final resolution, after the resolution has been published, to then go out and say we changed our minds . . . [if] the board wanted to condition its approval, it should have done so when it adopted the resolution. It didn't. It tried to do so under the cover of darkness, insidiously, inappropriately and illegally. The application was finished. There was no application when the board took the res—adopted the section resolution. It was concluded.
>
> [1T70:9-71:2.]

Although Judge Brogan indicated that he would reserve on his decision, he noted that "Wayne has been habitually delaying this. They really have. I've already decided they've acted in bad faith . . . at different times . . . I am still very much shocked that they would pass the—they would agree to an agreement in July, wait

five months before they memorized it in a resolution that was really a resolution . . . And then they again in January 23rd with no notice they adopted the supplemental resolution which added a term unilaterally . . . it smack of, you know, deceit when you say but we reserve the right to amend it at a later point." 1T66:25-67:25.

On July 18, 2023, Judge Brogan read his decision into the record relative to Avalon's Motion to Enforce. 2T. At that time, Judge Brogan held that "I'm going to enforce the first [December 12, 2022] resolution that the Wayne Planning Board passed. And then 42 days later or whatever it is was they decided to—that was only a conditional approval. And they went back and they unpassed the [December 12, 2022 resolution]. I quite frankly find this is a tactic in a long line of tactics that Wayne has utilized to delay meeting its constitutional obligation of affordable housing." 2T4:17-25. Judge Brogan further reasoned that the Township Defendants are "still not acting in good faith certainly with this latest episode with the—after approving the Avalon on Valley Road there, the extension, and then unapproving quite frankly. So I am going to grant—I find that they acted in bad faith. **It was just another tactic to delay the city or the Township of Wayne [from] meeting its constitutional obligation, which they seem to have a real problem conceptually having to deal with.**" 2T5:14-24 (emphasis added).

On August 8, 2023, Judge Brogan entered an order granting Avalon's Motion to Enforce against the Township Defendants. Pa001. This Order, which was the form

of Order submitted by legal counsel for the Township: (i) invalidated the Stealth Resolution; (ii) affirmed the validity of the Original Resolution; (iii) found that the Board's adoption of the Stealth Resolution constituted bad faith conduct; (iv) awarded Avalon counsel fees and costs incurred in connection with its Motion to Enforce, subject to the submission of a certification of services; and (v) permitted Avalon to submit an application for the Per Diem Penalty, along with a calculation of the amount sought. Pa002-Pa003.

In accordance with the Trial Court's August 8, 2023 Order, Avalon subsequently filed a certification in support of its attorney fee award and an application for the Per Diem Penalty, which both the Township and the Board opposed. Pa023. In response to Township Defendants' opposition, Avalon submitted an amended brief and certification, slightly reducing the amount of attorneys' fees that was previously submitted, and the Board subsequently filed an unauthorized sur-reply. Id.

On December 8, 2023, as Judge Brogan had retired, the Honorable Darren J. Del Sardo, Esq., P.J.Cv. held oral argument to fix the amount of attorneys' fees and consider the Per Diem Penalty to which Avalon was entitled in connection with its Motion to Enforce. 3T. On December 19, 2023, Judge Del Sardo entered an Order with an accompanying statement of reasons awarding Avalon $28,909.52 in counsel

fees and a contractual Per Diem penalty in the amount of $112,500.00, to be applied as a credit towards any future fees. Pa021-Pa022.

As set forth in the Trial Court's December 19, 2023 Statement of Reasons, the Trial Court made the following findings of fact:

> The Court notes that Ms. Cofone, Special Master to the matter, has indicated to the Court on various occasions that Inglesino Taylor has been representing Avalon Bay fairly and adequately throughout the entirety of this litigation. The Court is satisfied that the attorneys' fees submitted in the supplemental certification provided by Inglesino Taylor are fair and accurate. The Court finds that the hour rates are reasonable and appropriate. The $550.00 fee is not excessive, especially in this case type.
>
> [Pa030.]

In response to the Board's argument that it should not be held to the attorney fee award clause which it had, in fact, stipulated to in the Agreement, the Trial Court aptly held that:

> The Board argued that the American system does not traditionally allow for an award of attorney fees, but the Court rejects that argument. The Agreement between the parties states, in pertinent part, "the defaulting Parties shall reimburse the non-defaulting Parties for all legal and professional fees and expenses incurred in connection with the enforcement of this agreement." The language included in the Settlement Agreement is clear, the parties entered into the agreement with competent and knowledgeable counsel and the Court in the August 8th Order already addressed such an argument and thereafter awarded reasonable attorney fees.
>
> [Id.].

With regard to the Per Diem Penalty, the Trial Court also awarded Avalon the Per Diem Penalty for two periods of delays, including: (i) the 49-day time period between when the Board was required to memorialize the Original Resolution and refused to do so; and (ii) the 176-day time period running from January 23, 2023—the date that the Board adopted the Stealth Resolution—and July 18, 2023—the date that the Trial Court orally invalidated the Stealth Resolution. Notably, the Trial Court specifically rejected the Township Defendants' arguments that the Per Diem Penalty clause was against public policy, finding that:

> The parties entered into this agreement with the representation of competent and knowledgeable counsel. The Court is not inclined to invalidate a Settlement Agreement that has been entered into, where both parties are represented by counsel, especially counsel who has been involved in the matter since its inception . . . . The Per Diem Penalty is an amount all parties agreed upon and not intended to represent actual damages.
>
> [Pa032.].

Furthermore, the Trial Court, serving as the trier of fact, also specifically found as follows:

- The Supplemental Resolution essentially voided the initial resolution the Board enacted. Pa033.
- The Board's actions, memorializing a resolution unlawfully, severely delayed Avalon Bay's ability to continue with the project. Id.

- The Board, by enacting the Supplemental Resolution, rendered the initial Resolution unworkable and essentially void. Pa034.
- The Supplemental Resolution was an act by the Board, either intentionally or unintentionally, to further delay the overall project. Pa033.
- It was the Board's bad faith that caused the delay, and it should not escape the penalty provision incorporated in the agreement for such tactics. Id.

Both the Township and Board have filed separate appeals concerning the August 8, 2023 and December 19, 2023 Orders asserting identical and thus duplicative arguments. The Township is proceeding under the instant appellate docket, while the Board is proceeding under appellate docket A-220-23.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

The Trial Court's August 8, 2023 and December 19, 2023 Orders are entitled to significant deference.

A Trial Court's determination in non-jury cases is "subject to limited and well-established scope of review." Siedman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011). Accordingly, our "appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings were 'so manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (internal citations omitted). Relatedly, the

Appellate Division generally reviews an award of counsel fees under an abuse of discretion standard. Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 155 (App. Div. 2016). Thus, "[w]here such fees are authorized[,] the decision to award or deny attorneys' fees rests within the sound discretion of the trial court." Desai v. Bd. of Adjustment of Town of Phillipsburg, 360 N.J. Super. 586, 598 (App. Div. 2003).

Here, the Trial Court's August 8, 2023 and December 19, 2023 Orders were not only well-reasoned but amply supported by the motion record and largely based upon undisputed facts. It is undisputed that Avalon's SPA was approved by the Board on June 13, 2022. It is undisputed that the Board's June 13, 2022 approval was not conditioned on Avalon including an elevator in Building "E." It is undisputed that the December 12, 2022 Original Resolution, which memorialized the Board's June 13, 2022 approval, expressly found that there was no basis to condition the approval on the inclusion of an elevator in Building "E," but also that Avalon had expressly refused same.

Critically, it is undisputed that the Board's January 23, 2023 Stealth Resolution took place without public notice, without notice to Avalon, and imposed a new condition of approval that was not imposed at the June 13, 2022 meeting approving Avalon's SPA or in the December 12, 2022 Original Resolution. These

are the only relevant facts at issue in this appeal, which are neither disputed nor controverted by anything in the motion record.

Therefore, for these reasons, it is respectfully submitted that the August 8, 2023 and December 19, 2023 Order must be affirmed and the appeal dismissed.

II. THE MOTION RECORD AMPLY SUPPORTS THE TRIAL COURT'S FINDINGS OF THE TOWNSHIP DEFENDANTS' BAD FAITH AND MISCONDUCT.

The Township Defendants misstate the issues. The issue is simply that, on June 13, 2022, Avalon's SPA was approved, and that approval was not conditioned on Avalon placing an elevator in Building "E." The record was closed as of June 13, 2022, and as the SPA was approved at that time, there was no longer any application pending before the Board. The June 13, 2022 approval was then memorialized by way of the December 12, 2022 Original Resolution, which further confirmed that approval was not conditioned on Avalon placing an elevator in Building "E." The bad faith misconduct occurred when the Board adopted a blatantly *ultra vires* January 23, 2023 Stealth Resolution without any notice whatsoever, which effectively reversed the June 13, 2022 approval and December 12, 2022 Original Resolution—after the record was closed and after approval was already obtained and published—by now conditioning the June 13, 2022 approval on Avalon placing an elevator in Building "E." That is the hallmark of "bad faith." Accordingly, the Township Defendants' citation of emails amongst counsel and the meeting minutes,

which only further evince the Township Defendants' bad faith, are nothing more than red herrings.

It is long established that "the adoption of the memorializing resolution is not the 'decision' but merely a memorialization of that decision . . . Indeed, it is the vote on the motion to approve or deny which establishes the rights of an applicant. A contradictory vote on the memorializing resolution could not reverse that decision." Fieramosca v. Twp. of Barnegat, 335 N.J. Super. 526, 533–34 (Law. Div. 2000) (internal citations omitted).

Thus, after the Board approved Avalon's SPA on June 13, 2022, it could not then impose additional conditions to that approval. See e.g. Builders League of S. Jersey, Inc. v. Burlington Cnty. Planning Bd., 353 N.J. Super. 4, 24 (App. Div. 2002) ("approval gives the developer certain vested rights for a given period of time, as discussed in Point III. It would be manifestly unfair for the municipality to impose additional conditions during the period in which the developer's rights are protected. Indeed, one could readily imagine circumstances where the additional conditions are so oppressive as to effectively nullify the preliminary approval and prevent the developer from going forward, perhaps after considerable effort and resources have been expended.").

Equally axiomatic, the Township Defendants were obligated to notify Avalon that it was effectively re-opening the application and would be imposing a significant

and new condition. See William M. Cox & Stuart R. Koenig, New Jersey Zoning & Land Use Administration §18-1.2 (2024) (citing Edison Bd. v. Zoning Bd., 464 N.J. Super. 298, 307-310 (App. Div. 2020)) ("As long as a memorializing resolution is adopted at a regularly scheduled meeting, and **there is no modification or elimination of a significant condition or conditions therein**, it would appear that notice with regard to the adoption of such a resolution is not necessary either under the MLUL or OPMA." (emphasis added)). Without proper notice, the Board is without jurisdiction to act. Northgate Condo v. Planning Bd., 214 N.J. 120, 138 (2013). Additionally:

> [w]hile remarks made by individual Board members during the course of hearings may be useful in interpreting ambiguous language in a resolution, they are not a substitute for the formality mandated by N.J.S.A. 40:55D–10(g). Such remarks at best reflect the beliefs of the speaker and cannot be assumed to represent the findings of an entire Board. Moreover, because such remarks represent informal verbalizations of the speaker's transitory thoughts, they cannot be equated to deliberative findings of fact. It is the resolution, and not board members' deliberations, that provides the statutorily required findings of fact and conclusions.
>
> [New York SMSA v. Bd. of Adjustment of Twp. of Weehawken, 370 N.J. Super. 319, 333–34 (App. Div. 2004).]

Here, there is no dispute that at the June 13, 2022, the Board approved Avalon's SPA and did so without placing any condition for the inclusion of an elevator in Building "E." This is confirmed by the December 12, 2022 Original

Resolution. As set forth in the Original Resolution's Findings of Fact, Avalon was to include elevators in Buildings A through D. Pa110. The Original Resolution notably does not include any such requirement with respect to Building E. Pa110-111. Moreover, the Findings of Fact expressly state that:

> according to the testimony presented by [Avalon's] professionals, the question of presence or absence of such elevators in buildings is controlled exclusively by the UCC, which Code does not require such elevators in those particular buildings. Nonetheless, as a consequence of various discussions between the Board and [Avalon], [Avalon] agreed to amend the Application so as to include such elevators in buildings 'C' and 'D.' **[Avalon] declined to include such elevator in building 'E.'**
>
> [Pa114 (emphasis added).]

Thus, in conformity with this finding and in approving Avalon's SPA, the December 12, 2022 Original Resolution specifically noted that the only conditions with respect to elevators was that "Applicant shall install an elevator in Buildings C and D"—not Building "E." Pa119.

There is no question as to what conditions were or were not imposed at the June 13, 2022 meeting—these are set forth in the December 12, 2022 Original Resolution. The Original Resolution specifically notes that Avalon did not agree to install an elevator in Building "E," nor did the Original Resolution condition approval on the installation of such an elevator. Indeed, this fact is also reflected in the Stealth Resolution, which noted that Avalon "agreed to amend the Application

so as to include such elevators in building 'C' and 'D'. The Applicant declined to include such elevator in building 'E.'" Pa124. Thus, there is no dispute as to any factual findings.

Accordingly, there is a clear and unrefuted record establishing that Avalon's SPA was approved without an elevator in Building "E." There is no need for transcripts because we have the Original Resolution, which is the Board's formal decision on Avalon's SPA. The Board simply implemented the Stealth Resolution, without any prior notice to Avalon, effectively undoing the December 12, 2022 Original Resolution and then imposed a condition that was neither agreed to nor part of any approval. The Township Defendants' assertion that the Trial Court entered its August 8, 2023 Order without any specific findings of fact or conclusions of law, and relied exclusively on the Special Master's October 19, 2020 report, are demonstrably false and without merit. To the contrary, Judge Brogan specifically stated he was granting Avalon's motion because the Board had already granted approval that was memorialized in the Original Resolution on December 12, 2022 and "then 42 days later or whatever it was they decided—that was only conditional approval. And they went back and they unpassed [the December 12, 2022 resolution]." 2T4:17-25. The bad faith misconduct is evident in both the outcome and the process followed by the Board.

The Trial Court's purposeful incorporation of the Special Adjudicator's October 19, 2020 report in the August 8, 2023 Order was to reference the long-documented bad faith conduct on the part of the Township Defendants, all of which the Trial Court had dealt with for years. In fact, when Judge Brogan rendered his decision, he noted that the Township Defendants are "still not acting in good faith certainly with this latest episode with the—after approving the Avalon on Valley Road there, the extension, and then unapproving quite frankly. So I am going to grant—I find that they acted in bad faith. It was just another tactic to delay the city or the Township of Wayne [from] meeting its constitutional obligation, which they seem to have a real problem conceptually having to deal with." 2T5:14-24.

The Township Defendants also appear to entirely ignore what took place during oral argument wherein the Board's Counsel even admitted that "what happened was the **[B]oard made a decision that it would adopt the resolution that was drafted** . . . but wanted a condition for an elevator in building E." 1T47:18-25 (emphasis added). In other words, the Board intentionally approved the Original Resolution confirming that there was to be no elevator in Building "E," but still "wanted a condition for an elevator in Building "E." At that time, Judge Brogan noted that "this was passed. The way it happened to me is, is quite frankly almost deceitful in that well let's just give them this version now; we can always go back and change it." 1T50:21-51:4. Even the Special Master noted that she is unaware of

this ever occurring with any other municipality, during the thousands of times that she has appeared before a board in either her capacity as Special Master or an expert planner. 1T64:10-20; 1T65:5-24. At oral argument, the Court noted that "Wayne has been habitually delaying this. They really have. I've already decided they've acted in bad faith . . . at different times . . . I am still very much shocked that they would pass the—they would agree to an agreement in July, wait five months before they memorized [sic] it in a resolution that was really a resolution . . . And then they again in January 23rd with no notice they adopted the supplemental resolution which added a term unilaterally . . . it smack of, you know, deceit when you say but we reserve the right to amend it at a later point." 1T66:25-67:25.

The Township Defendants attempt to point to the December 12, 2022 Meeting Minutes—apparently for the proposition that stating their intent to violate the Settlement Agreement and the MLUL somehow cures the breach. For a myriad of reasons, this is incorrect. As a preliminary matter, the December 12, 2022 meeting was to simply memorialize the approval on June 13, 2022, not to create additional conditions. Further, the Minutes indicate that "Mr. Cavaliere suggested that the Board vote on the resolution in its **current form but add** the caveat to have a supplemental resolution which would **include** these requirements presented at a future [unidentified] meeting." Pa357 (emphasis added). This is not helpful to the Township Defendants, as this confirms that the Board approved the "current form"

of the Resolution and then was going to "add" additional conditions at an unspecified meeting. This is the precise situation that the Trial Court referenced when it stated that the Board's actions were the equivalent of "well let's just give them this version now; we can always go back and change it." 1T50:21-51:4.

Thus, all parties acknowledge that Avalon's SPA was approved with no elevator in Building "E" on June 13, 2022, and the Board could not then include an additional condition thereafter.

In the Township's Merits Brief, the Township argues that "in December, the Board approved the application and at the same time imposed a condition upon that approval." See Township's Brief ("Twp. Br.") at p. 26. This is not what happened and it is also contrary to black letter Municipal Land Use Law. As noted previously, the SPA was approved on June 13, 2022, while the December Original Resolution only memorialized the approval voted on by the Board on June 13, 2022. It is not a vehicle for imposing new conditions. Fieramosca, 335 N.J. Super. at 533–34. Moreover, the Original Resolution clearly did not impose any condition requiring an elevator in Building "E," as that condition did not appear until the January 2023 Stealth Resolution which was memorialized without a hearing and without any notice whatsoever. In addition to being a meritless argument, same constitutes an admission of the precise bad faith conduct cited by Judge Brogan.

The Township nevertheless maintains that Judge Brogan "made no finding that the condition was unreasonable, arbitrary, capricious, or contrary to the Mt. Laurel doctrine." See Twp. Br. at p. 30. Yet, the entire foundation of the Trial Court's decision was predicated on this bad faith conduct, including in particular the adoption of the Stealth Resolution, without notice. There were no "finding of facts" for which deference could be provided. The issue is the imposition of new conditions, without notice, after the fact and after approval was already granted.

The Township then claims that the Trial Court did not consider the correspondence between Avalon and the Boad's counsel when it rendered its bad faith finding. Id. at p. 32. First, this irrelevant correspondence was submitted to the Trial Court by the Board, but the Trial Court determined it had no bearing on its decision, as should the Appellate Court. The Township Defendants' dissatisfaction with this ruling does not mean that it was not considered nor does it present an appealable issue—it simply means that it was rejected. Instead, the Appellate Division must simply consider what was contained in the Original Resolution versus the new condition of approval that was memorialized in the Stealth Resolution.

The Township Defendants' conclusory insistence that Avalon, *vis-a-vis* emails between counsel, could somehow amend the previously Court-approved Settlement Agreement does not, and cannot, relieve the Township Defendants from not only their contractual duty, but their duties under the MLUL, to adopt the

resolution that memorialized the June 13, 2022 approval. The Township Defendants simply continue to misstate the actual issue in a concerted effort to mislead the Court.

Still, the Township claims that the "Board believed that the Project was to have elevators in all the multi-story buildings, including Building E." Id. at p. 33. However, we know this is false because every single resolution, including the Stealth Resolution, clearly states that Avalon never agreed to install an elevator in Building "E." The Township attempts to cite to e-mails with Avalon's counsel discussing a potential amendment, but even in that exchange, it is expressly stated that "[i]n terms of procedure, Avalon will bring its affirmative presentation to close on Monday, 6/13 and seek a vote at that meeting. **Avalon will be seeking approval for the project as presented with no elevator in Building E**." Pa148 (emphasis added). This is the be-all and end-all of this issue.

The Township then closes its argument by stating that the "factual history in the record showed the Board's good faith efforts to effectuate the AvalonBay's [sic] agreement for the Building E elevator. The trial court completely disregarded and discounted that it was AvalonBay—not the Township or Board—that 'went back on its word.'" See Twp. Br. at p. 35. Respectfully, that is not what was before the Board nor is it relevant to the issues. What was before the Board was approval of Avalon's SPA without an elevator in Building E, which was approved on June 13, 2022. The issue was, and has always been, that the Stealth Resolution, adopted without notice

to Avalon or the public, imposed an additional condition that was previously rejected by all parties, including the Board.

Therefore, Judge Brogan's August 8, 2023 Order is amply supported by the record and the Stealth Resolution, which was entered without notice, is the foundation of Judge Brogan's decision, and but one example of the Township Defendants' bad faith since the inception of this litigation in 2015. For these reasons, it is respectfully submitted that the Trial Court's Orders must be affirmed.

III. THE RECORD CLEARLY REFLECTS THAT THE TOWNSHIP DEFENDANTS BREACHED THE SETTLEMENT AGREEMENT.

The Settlement Agreement was entered into by both the Township and the Board, making them equally responsible for abiding by its terms. Moreover, the Settlement Agreement—which was Court Approved—contains clear and express terms relative to the Township Defendants' obligations with respect to timing, expediting approval and review, cooperation, and prohibiting the Township Defendants from requiring Avalon to include unnecessary and cost-generative features, such as an elevator in Building "E" that is not required by the UCC.

New Jersey Courts have long favored settlement agreements and do not hesitate to enforce same as any other contract. Pascarella v. Bruck, 190 N.J. Super. 118, 134-135 (App. Div. 1983). Where the terms and conditions of a settlement agreement are clear and unambiguous—as is the case here—they will be enforced. Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191-192 (App. Div. 2022).

Furthermore, the "square corners" doctrine compels the government to "turn square corners" in dealing with the public and to "observe certain standards and norms . . . that are beyond reproach." CBS Outdoor, Inc. v. Borough of Lebanon Plan Bd./Bd. of Adjustment, 414 N.J. Super. 563, 585 (App. Div. 2010). Moreover, the "square corners" doctrine has been applied to all levels of municipal government, including planning boards. In CBS Outdoors, *supra*, this Appellate Court held that a municipality's undiscovered failure to file a development regulation with the County Planning Board, which permitted the installation of billboards, precluded the defendant planning board from later defending the denial of the billboard application on the grounds that the permitting ordinance was, in fact, a nullity. Id. at 587. In pertinent part, the Appellate Division noted that:

> We will not tolerate the Board's purposive action of advocating the nullity of its own ordinance, particularly when it seeks to take advantage of the municipality's gaffe . . . The manifest injustice of subscribing to the Board's advocacy should be apparent, and we decline to become an instrument of mischief by deeming all of the previous proceedings mere exercises in futility.
>
> [Id.]

Additionally, our courts have long held that vigilant enforcement of Mount Laurel commitments are imperative. Toll Bros. v. Twp. of W. Windsor, 173 N.J. 502, 567 (2002) ("[E]xperience demonstrates that absent adequate enforcement, the Mount Laurel doctrine can deliver little more than a vague and hollow promise that

a reasonable opportunity for the development of affordable housing will be provided."). Further, the Appellate Division has stated that:

> This court's power to grant such relief is clear. In Mount Laurel II, the Court held that the trial courts have the **broadest possible remedial power to enforce municipality's Mount Laurel obligations**. Indeed the courts have broad power to order municipal land use agencies to discharge their statutory responsibilities in a timely and proper manner **even outside the framework of Mount Laurel litigation**.
>
> [Morris County Fair Hous. Council v. Boonton Twp., 220 N.J. Super. 388 (Law Div. 1987), aff'd as modified, 230 N.J. Super. 345 (App. Div. 1989) (internal citations omitted) (emphasis added).]

As noted in Morris County, the Trial Court has ample precedent to remedy a municipality's breach of its Mount Laurel obligations by tailoring its relief to the specific nature of the municipality's breach. Id. In Morris County, the court found that the planning board engaged in a series of actions to delay construction of the inclusionary development in question, thereby violating the expedited disposition requirements of the parties' Settlement Agreement. Id. Accordingly, the Appellate Division directed the planning board to undertake several affirmative actions, including the invalidation of official Board actions—which in this case is the Stealth Resolution—such that the Settlement Agreement remained intact. Id.

There are a litany of examples showing how the Township Defendants have breached the Settlement Agreement and failed to "turn square corners" with Avalon, all of which was argued before the Trial Court. 1T34:2-56:24.

Section 6(c) of the Settlement Agreement further provides that the "Township and the Board agree to use all commercially reasonable efforts to assist [Avalon] in its undertakings to obtain the Required Approvals." Pa052-Pa053. Concomitant with that obligation, the Township Defendants agreed in Section 6(d) of the Settlement Agreement that "the Township and Planning Board will **not impose** development standards and/or requirements that constitute unnecessary '**cost generative features**.'" Pa053 (emphasis added).

The Township Defendants breached these contractual obligations by imposing these very "cost generative features" by issuing the Stealth Resolution that added a brand-new condition to the previous approvals. Moreover, this was an "unnecessary" and "cost generative feature" that was neither required for approval nor required by the UCC. The December 2022 Original Resolution specifically noted that there is no actual requirement for an elevator in Building "E," as it acknowledged in its Findings of Fact that: "[d]uring the course of the public hearings, the Board and [Avalon] had discussions about the inclusion of ambulance stretcher compliance elevators in buildings 'C', 'D', and 'E . . . However, according to the testimony presented by [Avalon's] professionals, the question of presence or

absence of such elevators in such buildings is **controlled exclusively by the UCC, which Code does not require such elevators for those particular buildings**." Pa114 (emphasis added). Therefore, it has already been admitted that there is no requirement for an elevator in Building "E" and thus the inclusion of same would constitute nothing more than the exact "cost generative feature" and "development standards and/or requirements" expressly prohibited by the Settlement Agreement, thereby constituting breach.

The Township Defendants further breached the Settlement Agreement as Section 8(g) states that "the Board shall promptly deliberate on the SPA and vote. Following the vote of the Board, the Board shall **memorialize its decision** regarding the SPA in a **written resolution, which shall be adopted by the Board within the earlier of 30 days or the second meeting following the approval meeting**." Pa056 (emphasis added). Paragraph 10 of the Settlement Agreement provides that the "Township and the Board . . . shall fully cooperate and assist with Avalon's efforts . . . to secure necessary municipal, county and state permits, approvals . . . including the SPA . . . [and] the Township and Board shall cooperate with [Avalon] . . . The Township and Board shall **expedite review and approval** of all necessary governmental approvals, within its jurisdiction." Pa058 (emphasis added). Section 18 of the Settlement Agreement provides that the "Township and the Board shall work diligently, in good faith, and shall undertake all commercially reasonable

efforts, including expediting reviews of Avalon's submissions and scheduling of special meetings, as necessary to effectuate the terms of this Agreement." Pa062.

Here, the Township Defendants have clearly breached Sections 8(g), 10, and 18 of the Settlement Agreement. The breach first occurred by the substantial delay in issuing the December 12, 2022 Resolution. The Board had approved Avalon's application on June 13, 2022. Yet, despite being obligated to "expedite review and approval" and to issue a resolution "within the earlier of 30 days or the second meeting" by exercising "commercially reasonable efforts," the resolution memorializing the June 13, 2022 approval was not issued until nearly six months later on December 12, 2022—and only after Avalon was forced to issue a Notice of Default. The Township Defendants' wild insistence that Avalon amended the Settlement Agreement, without any formal action by the public entities party to the Settlement Agreement, does not, and cannot, obviate the Township Defendants' obligations under the Settlement Agreement, including to pass the resolution of approval within the timeframes set forth therein.

To compound matters, the Township Defendants then issued the Stealth Resolution in January 2023 that effectively added conditions to the June 13, 2022 approval and essentially reversed the Original Resolution. This is specifically noted in Judge Brogan's decision wherein he held that "I'm going to enforce the first [December 12, 2022] resolution that the Wayne Planning Board passed. And then

42 days later or whatever it is was they decided to—that was only a conditional approval. And they went back and they unpassed the [December 12, 2022 resolution]. I quite frankly find this is a tactic in a long line of tactics that Wayne has utilized to delay meeting its constitutional obligation of affordable housing." 2T4:17-25. Therefore, there is ample record support for finding that the Township Defendants not only breached the Settlement Agreement, but did so on multiple occasions and in various ways.

Thus, the actual issues to be considered on appeal relate to the improper and illegal Stealth Resolution and the Township Defendants' substantial and bad faith delay in carrying out their contractual obligations under the Settlement Agreement. The issue is not Avalon seeking a "rubber stamp" of the approval, but rather, the Township Defendants deviating from their contractual obligations by imposing unnecessary, cost-generative conditions against Avalon and failing to promptly act—all of which constitute a failure to cooperate and use commercially reasonable efforts.

The Township proffers that the "Settlement Agreement did not, and could not, consistent with law, require the Planning Board to approve the development application as it was presented to the Planning Board." See Twp. Br. at p. 36. This is simply a statement in a vacuum with no meaning, as the Board *did* approve

Avalon's SPA as "it was presented to the Planning Board" without an elevator in Building "E", with a list of actual conditions of approval that Avalon had agreed to.

This entire dispute is simply because the Township Defendants reversed course. As the Township even admits in its own brief, this was not just because of the Board, but because "both the Township and the Board wanted elevators." Id. at 2 (emphasis added). In fact, the Township was so heavily involved that it freely acknowledges that the "Township, speaking through its Mayor . . . voiced concern that all of the multi-story residential buildings should have an . . . elevator." Id. at p. 15. Thus, both the Township and Board were responsible under the Agreement and for insisting on a condition for an elevator in Building "E" *after* Avalon's SPA was already approved.

The Township's assertion that it cannot compromise the safety and welfare of the community, while being permitted to impose conditions greater than those required by the UCC not only misstates the issue on appeal—which, instead, relates to the imposition of additional conditions that were not included in the June 13, 2022 approval and the Township Defendants' significant delays—but also reflects a fundamental misunderstanding of law.

The Township Defendants *cannot* impose conditions greater than those required by the UCC. In fact, the Board recognized this, as indicated above, when they relied on Avalon's expert in this regard. Pa114. In so doing, the Board

acknowledged and admitted that it cannot impose conditions greater than those required under the UCC.

Moreover, the UCC is intended to "encourage innovation and economy in construction and to provide requirements for construction" and "[t]o eliminate restrictive, obsolete, conflicting and unnecessary construction regulations that tend to unnecessarily increase costs." N.J.S.A. 52:27D-120(a); (d). Thus, the UCC exists to "lower the costs of housing and other construction without any detriment to the public health, safety and welfare." N.J.S.A. 52:27D-122(b). The UCC regulates the "structure, design, construction, maintenance and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, maintenance, removal, or demolition of all buildings or structures already erected." N.J.S.A. 52:27D-123.1. The UCC regulations indicate that they "shall apply to all buildings and structures and their appurtenant construction." N.J.A.C. 5:23-2.2(a). Furthermore, "[w]here provisions herein specify requirements for structural, fire and sanitary safety, no provision of any municipal zoning or other municipal code shall conflict, govern, or have effect." N.J.A.C. 5:23-2.2(e).

The Original Resolution's findings adopted the unrefuted testimony of Avalon's expert stating that the UCC does not require elevators in Building "E" and that the Board cannot impose restrictions on Avalon greater than those required by the UCC. Pa124. This, however, is a red herring, as what must be considered are the

conditions that were in place at the time Avalon's SPA was approved on June 13, 2022, where there was no condition requiring an elevator in Building "E" at that time. There is no, and cannot be any, dispute in this regard.

Lastly, the Township cites to the Federal Court decision in Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F. Supp. 2d 648, 653 (D.N.J. 2006) for the proposition that development approvals may require compliance with higher standards. See Twp. Brief, at p. 37. Yet, the Cherry Hill decision does not say that at all. It actually states that "[t]he New Jersey legislature enacted the [UCC] in part to create adequate minimum standards for new construction and to implement **uniform**, streamlined construction regulations . . . If the application conforms with the [UCC] and any other applicable laws or ordinances, the municipal construction **official must approve the application** and issue the permit." Id. (emphasis added).

However, again, the issue of whether elevators can be required in Building E is not relevant to this Appeal. The only issue is whether a planning board can, on one hand, approve a site plan application and adopt a memorializing resolution, and then, approximately one month later, without notice to the applicant or a public hearing, re-open the matter *sua sponte* and adopt a new resolution with divergent conditions of approval. Clearly, they cannot, and for all of these reasons, the Trial Court's decisions should be affirmed.

IV. THE TRIAL COURT'S IMPOSITION OF COUNSEL FEES AND DELAY PENALTIES IS SUPPORTED BY LAW AND THE PARTIES' SETTLEMENT AGREEMENT.

A trial court's discretionary determination for an award of counsel fees will only be disturbed "on the 'rarest of occasions,' and then only because of clear abuse of discretion." Barr v. Barr, 418 N.J. Super. 18, 45 (App. Div. 2011) (internal citations omitted). Relatedly, as noted in Section III of this brief, the Trial Court has the "broadest possible remedial power to enforce a municipality's Mount Laurel obligations." Morris County, 220 N.J. Super. at 388. Included within this "broadest possible remedial power" is the imposition of counsel fees and penalties for delay.

Moreover, both the imposition of penalties for delay and counsel fees are expressly provided for by the Settlement Agreement. It is well established that "a prevailing party can recover those fees if they are expressly provided for by statute, court rule, or contract." Packard–Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 440 (2001). Soo too are contractual per diem delay penalties, particularly when important public policy considerations exist—such as the need for affordable housing in the context of Mt. Laurel litigation. See e.g. Holtham v. Lucas, 460 N.J. Super. 308, 319 (App. Div. 2019) (affirming an award of per diem penalties where implicated by policy goals).

Here, the Settlement Agreement expressly states that "the defaulting Part[ies] shall reimburse the non-defaulting Part[ies] for **all legal and professional fees and**

expenses incurred in connection with enforcement of this Agreement." Pa062-Pa063 (emphasis added). Likewise, the Settlement Agreement provides for a $500.00 per diem penalty on account of the Township Defendants failure to act in accordance with the timelines set forth therein. Pa057-Pa058.

Thus, the award of both the counsel fees and per diem are entirely appropriate. Avalon was successful in bringing its enforcement action and the award of counsel fees was expressly contemplated by the Settlement Agreement. Similarly, the Township Defendants have created significant delays causing Avalon to incur significant, but avoidable costs. This is the precise event that would trigger both the award of counsel fees and the per diem penalty. Moreover, it should be noted that although Avalon could have arguably sought per diem fees from 30 days after the SPA was approved in June 13, 2022, Avalon only sought same from the time when the form of resolution was finalized on October 7, 2022.

Furthermore, "[a]n allowance for counsel fees is permitted following the filing of a motion in aid of litigant's rights, R. 1:10-3." Satz v. Satz, 476 N.J. Super. 536, 554 (App. Div. 2023), cert. denied, 256 N.J. 352 (2024). Again, the Settlement Agreement specifically states that the Avalon can move to enforce the settlement agreement "through a motion to enforce litigant's rights . . . filed in Superior Court, Passaic County." Pa062-Pa063. That is precisely what Avalon did. Moreover, the Settlement Agreement was approved by the Court via a March 31, 2021 Court Order

and Judgment. Pa109; Pa390. Thus, the enforcement of the Settlement Agreement is also an enforcement of a Court Order and Judgment.

The Township then claims that, as to the fee application, the invoices were not actually charged. That is categorically false. As noted by counsel to Judge Del Sardo during oral argument, "these are the time entries that were billed to the client [Avalon]." 3T33:22. Indeed, as set forth in the Trial Court's December 19, 2023 Statement of Reasons, the Trial Court made the following findings of fact:

> The Court notes that Ms. Cofone, Special Master to the matter, has indicated to the Court on various occasions that Inglesino Taylor has been representing Avalon Bay fairly and adequately throughout the entirety of this litigation. The Court is satisfied that the attorneys' fees submitted in the supplemental certification provided by Inglesino Taylor are fair and accurate. The Court finds that the hour rates are reasonable and appropriate. The $550.00 fee is not excessive, especially in this case type.
>
> [Pa030.]

In response to the Board's argument that it should not be held to the attorney fee award clause stipulated to in the Agreement, the Trial Court aptly held that:

> The Board argued that the American system does not traditionally allow for an award of attorney fees, but the Court rejects that argument. The Agreement between the parties states, in pertinent part, "the defaulting Parties shall reimburse the non-defaulting Parties for all legal and professional fees and expenses incurred in connection with the enforcement of this agreement." The language included in the Settlement Agreement is clear, the parties entered into the agreement with competent and knowledgeable counsel and the Court in the August 8th

> Order already addressed such an argument and thereafter awarded reasonable attorney fees.
>
> [Id.]

With regard to the Per Diem Penalty, the Trial Court also awarded Avalon the Per Diem Penalty for two periods of delays, including: (i) the 49-day time period between when the Board was required to memorialize the Original Resolution and refused to do so; and (ii) the 176-day time period running from January 23, 2023—the date that the Board adopted the Stealth Resolution—and July 18, 2023—the date that the Trial Court verbally invalidated the Stealth Resolution. Notably, the Trial Court specifically rejected the Township Defendants' arguments that the Per Diem Penalty clause was against public policy, finding that:

> The parties entered into this agreement with the representation of competent and knowledgeable counsel. The Court is not inclined to invalidate a Settlement Agreement that has been entered into, where both parties are represented by counsel, especially counsel who has been involved in the matter since its inception . . . . The Per Diem Penalty is an amount all parties agreed upon and not intended to represent actual damages.
>
> [Pa032.]

Furthermore, the Trial Court, serving as the trier of fact, also found:

- The Supplemental Resolution essentially voided the initial resolution the Board enacted. Pa033.
- The Board's actions, memorializing a resolution unlawfully, severely delayed Avalon Bay's ability to continue with the project. Id.

- The Board, by enacting the Supplemental Resolution, rendered the initial Resolution unworkable and essentially void. Pa034.
- The Supplemental Resolution was an act by the Board, either intentionally or unintentionally, to further delay the overall project. Pa033.
- It was the Board's bad faith that caused the delay, and it should not escape the penalty provision incorporated in the agreement for such tactics. Id.

As a result thereof, the Trial Court awarded Avalon $28,909.52 in counsel fees and a contractual Per Diem penalty in the amount of $112,500.00, which sum is to be applied as a credit towards any fees incurred in the development of Avalon's project. Pa021-Pa022. The Trial Court's factual findings on this issue are entitled to deference from the Appellate Court, and should be upheld in all respects, as they are based on the ample record below and the long history of malfeasance by the Township Defendants. For these reasons, it is respectfully submitted that the Court's Orders be affirmed in their entirety.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Trial Court's Orders dated August 8, 2023 and December 19, 2023 must be affirmed in their entirety.

INGLESINO TAYLOR

By: */s/ Derek W. Orth*
DEREK W. ORTH, ESQ.

Date: May 13, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Appellate Docket No. A-000199-23

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF WAYNE, a Municipal Corporation of the State of New Jersey,

Plaintiff/Petitioner Appellant

Submission Date: March 28, 2024

CIVIL ACTION
On Appeal from
Superior Court Law Division,
Civil Part, Passaic County

Final Orders Dated August 8, 2023, and December 19, 2023

Sat Below: Hon. Thomas F. Brogan, P.J.S.C., Retired & Hon. Darren J. Del Sardo, P.J.S.C.

Trial Court Docket
No. PAS-L-2396-15

BRIEF for CO-PETITIONER/RESPONDENT WAYNE PLANNING BOARD

Dated: April 29, 2024

Of counsel and on the brief:
MATTHEW J. CAVALIERE, ESQ – 029151982
CAVALIERE & CAVALIERE, P.A.
1700 Route 23 N, Suite 210
Wayne, New Jersey 07470
P 973-305-1800
E MJC@CavaliereLaw.us
Attorneys for CoPlaintiff/Petitioner, Wayne Township Planning Board

TABLE OF CONTENTS

Table of Judgments, Orders and Rulings Being Appealed Page

Table of Authority

Table of Cases

Cases

Table of Statutes

Statutes

Table of Other Authority

None.

Reference Key

"Pbx" - plaintiff's brief, page x.

"Pax" - plaintiff's appendix, page x.

"1Tx-y" – transcript of June 20, 2023, page x, line y.

"2Tx-y" – transcript of July 18, 2023, page x, line y.

"3Tx-y" – transcript of December 8, 2023, page x, line y.

CoPlaintiff/Petitioner Township of Wayne – "Township" or "Twp"

CoPlaintiff/Petitioner Planning Board of the Township of Wayne – "Planning Board" or "Board"

Intervenor AvalonBay Communities, Inc. - "Avalon" or "AvalonBay"

Valley National Bank – 'VNB'

PRELIMINARY STATEMENT

The essence of this controversy is in two parts:

a. Whether AvalonBay sufficiently demonstrated below that the Wayne Planning Board's approval of the AvalonBay Mt Laurel inclusionary project was arbitrary, unreasonable and capricious by reason that the Board conditioned its approval upon the inclusion of a passenger elevator in the Building "E"—the fifth of five multistory residential buildings—rather than in only four of the project's buildings as demanded by AvalonBay; and

b. Whether AvalonBay sufficiently demonstrated below that the Board's Building E elevator condition constituted "bad faith" despite AvalonBay's representations that it would include a Building E elevator, and, if so, whether the Board's condition then violated the parties' January 8, 2021, Mt. Laurel Settlement Agreement.

The AvalonBay project ("Project") site is the former headquarters of the Valley National Bank; AvalonBay contracted to purchase the site, which consisted of three separate but adjoining lots, and develop it as a Mt. Laurel inclusionary project. This occurred as Wayne Township and its Planning Board were preparing the Township's Third Round Mt. Laurel Plan and, in accordance

with procedure created by the Supreme Court, had filed its declaratory judgment action for that purpose. AvalonBay sought and received intervenor status and lobbied heavily for inclusion of that property in the plan under terms most favorable to it.

During that process, the parties reached an impasse, and the trial court revoked the Township's immunity forcing the Township and the Board to accept AvalonBay's terms by way of a settlement agreement dated January 8, 2021 (Pa041). As required in the Settlement Agreement, the Township and its Planning Board timely rezoned the property and approximately 9 months later, AvalonBay made application to the Planning Board for development approvals. As presented, the project was to contain five buildings; AvalonBay proposed to include elevators in only two (2) of the buildings. For various health, safety and welfare reasons, both the Township and the Board wanted elevators in all five buildings. AvalonBay agreed to include elevators in four of the five buildings, but not the fifth (to wit, Building E). The Township and Board offered to modify the Settlement Agreement and the property's zoning to increase the maximum permitted units in the Project by ten units in exchange for inclusion of a Building E elevator. AvalonBay agreed but then reneged.

When the hearings concluded in June 2022, the Board had the belief that the Project would contain an elevator in Building E and that the unit count would be increased by ten. The proposed form of approval resolution was delayed while the resolution, Amended Settlement Agreement and amended zoning were being drafted. AvalonBay 'foot-dragged' and then reneged. AvalonBay insisted the Board approve the Project without the Building E elevator. As a result, a proposed form of Project approval resolution, without a Building E elevator, was presented to the Board at its December 12, 2022, public hearing. Despite its insistence that the Board move the resolution at its December 12, 2022, hearing, AvalonBay chose not to be present. At that hearing, the Board voted to approve the Project, and the proposed form of resolution, Pa106, but only with the addition of a condition that Building E, like the other buildings, include an elevator. The Board stated it would memorialize the condition in a separate, supplemental written resolution the following month, which it did, Pa123.

AvalonBay filed Motion in Aid of Litigant's Rights under the DJ action claiming breach of the Settlement Agreement (Pa035) and filed a separate prerogative writ action (Pa128) which it later withdrew. The trial court erroneously granted AvalonBay's in Aid motion as well as awarding attorney's fees and 'Delay Penalties'. Comes now the appeal.

PROCEDURAL HISTORY

Trial Court

On May 10, 2023, Intervenor AvalonBay filed a Motion in Aid of Litigant's Rights under Docket No. PAS-L.2396-15 seeking an order "(i) "invalidating and nullifying [Board] Resolution PB-2023-05" [conditioning the grant of the AvalonBay project upon inclusion of an elevator in Building E], (ii) compelling the Township of Wayne to pay Per Diem Penalties in accordance with the settlement agreement between the parties; and (iii) imposing other obligations and penalties on the Township of Wayne and the Planning Board of the Township of Wayne, as deemed necessary by the Court to deter such conduct in the future." Pa035.

In support of its motion, AvalonBay submitted a certification of its counsel, Attorney Orth, (Pa037) dated May 11, 2023, containing nine exhibits (numbered A through I), Pa040 through Pa137, together with a legal brief.

On May 11, 2023, AvalonBay filed a Prerogative Writ Complaint against the Board under Docket No. PAS-L-002396-15, Pa128.

In opposition, the Board submitted a certification of its counsel, Attorney Cavaliere, (Pa138) dated May 18, 2023, containing approximately 70 exhibits, Pa141 through Pa352, together with a legal brief.

In opposition, the Township submitted a certification of its counsel, Attorney Groh, (Pa353), dated May 18, 2023, containing three (3) exhibits, Pa355 through Pa357 (some of which are omitted from the Appendix as being duplicative), together with a legal brief.

In further support of its motion, AvalonBay submitted a certification of its counsel, Attorney Orth, (Pa358) dated May 22, 2023, containing one (1) additional exhibit.

The motion came before the trial court (Hon. Thomas F. Brogan, P.J.Cv., now retired) for oral argument on June 20, 2023, see 1T1-1 et seq.[1] At the June 20, 2023, hearing, the Court scheduled a follow-up hearing date of July 18, 2023. 1T72-21.

The matter came before the Trial Court on July 18, 2023, see 2Tx-y, for hearing. At that time, the Court announced its ruling granting AvalonBay's Motion in Aid of Litigant's Rights, granting 'reasonable attorney's fees" (2T5-

[1] 1. At the same June 20, 2023 hearing date, 1T1 et sq., the Trial Court also conducted a case management conference as to other Wayne Township Mt. Laurel matters (including a second and unrelated AvalonBay potential project on site known as 1655 Valley Road) as well as entertained oral argument on a second motion brought by AvalonBay which sought to disqualify Board counsel; that motion was denied by order dated June 21, 2023 and is not the subject of appeal. Thus, the transcript contains matters that do not pertain to the within appeal. Argument as to the Motion in Aid begins at 1T30.

23), permitting additional submissions as to as to the amount of its attorney's fees and additional submissions as to AvalonBay's request for 'Delay Penalties" (sometimes referred to as "per diem penalty") 2T13-2 et seq.

The Trial Court entered its Order as to same dated August 8, 2023, Pa001. That Order contains a provision certifying the motion in aid matter as being "final' pursuant to R. 4:42-2. Pa004 ¶ 12. The Board filed the within appeal and the Township filed a separate appeal under Dkt. A-000199-23.

In support of its application for attorneys' fees and Delay Penalty, AvalonBay submitted a certification of its counsel, Attorney Inglesino, (Pa365) dated August 18, 2023, containing one exhibit (Pa368) consisting of billing time entries totaling $30,614.53 (see Pa367, ¶ 10) together with a legal brief.

In opposition, the Board and the Township each submitted legal briefs along with a jointly offered Certification of Township Professional Planner Christopher Kok, (Pa378) dated August 28, 2023, which contained one exhibit, Pa380.

In addition, the Board submitted one exhibit as part of its legal brief, Pa395.[2]

[2] Although not presented to the Trial Court by way of Certification, it is included herein; the exhibit is a 'screen shot' from a New Jersey Courts web page showing

In further support of its motion, AvalonBay submitted a certification of its counsel, Attorney Inglesino, (Pa385) dated August 30, 2023, containing one additional exhibit.

The application for attorney's fees and Delay Penalty came before the trial Court for oral argument, the Hon. Darren J. Del Sardo, P.J.Cv. presiding[3] for oral argument on December 8, 2023. By way of Order dated December 19, 2023, Pa21, the Court awarded attorney's fees in the amount of $28,909.52 and awarded Delay Penalties of $112,000.

Appellate Division

The Board filed its Notice of Appeal on September 21, 2022, Pa396, and filed its Amended Notice of Appeal on March 18, 2024, Pa407.

The Township filed its Notice of Appeal on September 21, 2022, Pa396, and filed its Amended Notice of Appeal on January 8, 2023, Pa400.

New Jersey licensed attorneys, and was then, and is presently submitted with request that the Court take judicial notice of the content in as much as it constitutes the Court's own records.

[3] Judge Brogan retired in September 2023.

STATEMENT OF FACTS

Effective January 8, 2021, the Township of Wayne, Township of Wayne Planning Board and AvalonBay Communities, Inc. entered into a certain "Settlement Agreement". Pa041.

At that time, AvalonBay was the contract purchaser of certain real property identified as Block 3103, Lot 16 (approximately 12 acres) and 19 (approximately 5 acres), and Block 3101, Lots 12 and 13 (approximately 9 acres) on the Township's Tax Map (the "Property"), Pa042a, which realty was owned by Valley National Bank and used for its corporate headquarters, see Pa139a and Pa144a. Although comprising four (4) separate tax lots, two of the lots were contiguous thus forming three (3) land tracts that were separated by two roadways, see Pa074a, and comprised somewhere between 26 and 27 acres in total, see Pa049a. Thus, lots 12 and 13 (also known as 1460 Valley Road) lie to the east of Valley Road and Lots 16 (also known as 1445 Valley Road) and 19 (also known as 1455 Valley Road) lie to the west of Valley Road. Lot 19 lies to the south of Barbour Pond Road and Lot 16 (the largest of the lots) lies to the north of Barbour Pond Road. The Settlement Agreement contains a map showing the lot configuration, Pa074a.

Historically, the Property had been utilized for office buildings, and it was then situated in the Township's Office and Research (OR) or Office Building-Limited (OB-L) zone districts; both were non-residential zones, Pa049a.

As recited in that Settlement Agreement, the Township and the Board had filed an action entitled *In the Matter of the Application of the Township of Wayne,* Docket No. PAS-L-2396-15 (the "DJ Action") in conformance with the New Jersey Supreme Court's decision which has become known as Mt. Laurel IV, to wit, *In The Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council On Affordable Housing*, 221 *N.J.* 1 (2015). Under the process created under Mt. Laurel IV, the Township and the Board obligated themselves to develop, adopt, endorse and ultimately enact, a constitutionally compliant affordable housing plan in the form of a Housing Element and Fair Share Plan ("HEFSP" or "Affordable Housing Plan"), in accordance with N.J.S 55D-28 and under the auspices of the Court (as opposed to under the auspices of COAH).

AvalonBay filed a Motion to Intervene in the DJ Action (the "Avalon Intervention") seeking to promote its own interests; that application was granted by the Court by Order dated November 9, 2015, Pa042. AvalonBay advised that it desire[d] the Property and the development of the Property to be included in the said Township's HEFSP—in other words, AvalonBay wanted to develop the

Property as a Mt. Laurel a/k/a "affordable housing" "Inclusionary Development". See Pa042-3.

What followed were various negotiations and mediations between the Township and the Board on one side and AvalonBay on the other side, see Pa046.

During that process, the parties reached an impasse and AvalonBay, unhappy that it was not being offered all that it wanted, filed a motion to the trial court claiming the Township and the Board were being unreasonable and not negotiating in good faith.

The trial court, by motion and not by hearing, granted the motion and revoked the Township's Mr. Laurel temporary immunity, Court order dated November 10, 2020, Pa006. The court denied the request for stay pending appeal, see Pa046a, and effectively 'forced' the Township and the Board to accept a settlement under AvalonBay's terms.

Upon the Trial Court's granting of the motion, AvalonBay filed a "Builder's Remedy" action under *AvalonBay Communities, Inc. v. Township of Wayne and the Planning Board of the Township of Wayne*, Docket No. PAS-2323-20, see Pa045a. The Township and the Board filed denial answers to the Builder's Remedy action, see Pa046, and filed motion to the trial court seeking

reconsideration of the Court's November 10, 2020 revocation order. That motion for reconsideration remained pending during further negotiations between the parties, see Pa046a, which negotiations ultimately led to the January 8, 2021, Settlement Agreement, Pa041.

Under the terms of that Settlement Agreement, AvalonBay was permitted to develop the site as a non-age restricted, rental Inclusionary Development of up to 473 non-age restricted residential units, to include 71 'affordable' units, (i.e., a 15% set aside) to be located on 1445 and 1455 Valley Road (Block 3103, Lots 16 and 19) (the "Residential Project") and 1460 Valley Road (Block 3101, Lots 12 and 13) would remain as commercial (the "Commercial Project"), a separate non-residential commercial. The Settlement Agreement included a concept plan, Pa072, depicting low-rise townhomes on Lot 19 and midrise apartment-style buildings on Lot 16.

Ultimately, AvalonBay presented a development plan calling for Lot 19 to be developed with 55 townhouse units (all of which would be 'market rate units and no 'affordable' units) in eleven (11) buildings (together with various associated infrastructure) and for Lot 16 to be developed as 418 multi-family apartment units in five (5) buildings, together with various associated amenities

and infrastructure. 71 of those units would be 'affordable' units. The buildings are:

A. Building A: To be a two-story clubhouse building; the building is to contain no residential units but will contain one (1) ambulance stretcher-accessible elevator.

B. Building B:

   a. To be a 320-unit multi-story, multifamily residential mid-rise building with an internal parking garage containing 423 parking stalls,

   b. The total unit count will include 46 'affordable' units.

   c. The building will contain four (4) ambulance stretcher-accessible passenger elevators.

C. Building C:

   a. To be a 35-unit multi-story, multifamily residential building.

   b. The total unit count will include 9 'affordable' units.

   c. The building will contain one (1) ambulance stretcher-accessible passenger elevator.

D. Building D:

   a. 34-unit multi-story, multifamily residential building.

   b. The total unit count will include nine (9) 'affordable' units.

   c. The building will contain one (1) ambulance stretcher-accessible passenger elevator.

E. Building E:

   a. To be a 29-unit multifamily residential building.

   b. The total unit count will include eight (8) 'affordable' units.

   c. The building is proposed by AvalonBay to contain no ambulance-stretcher accessible passenger elevator.

As recited in the Settlement Agreement, inter alia, "[t]he purpose and intent of this Agreement is to . . . resolve Avalon's intervention in the DJ Action and to settle the Builder's Remedy Action and/or claims therefor", Pa047a, and to "control the development of the Property as set [forth in the agreement]", Pa048.

Under New Jersey Mt. Laurel Law, such Settlement Agreements are subject to, and must be approved by the Court after conducting a "Fairness Hearing", which is required to be publicly noticed. *Morris Cty. Fair Hous. Council v. Boonton Twp.,* 197 *N.J. Super*. 359, 367-69 (Law Div. 1984) aff'd o.b., 209 N.J. Super. 108 (App. Div. 1986); *East/West Venture v. Borough of Fort Lee,* 286 *N.J. Super*. 311, 328-29 (App. Div. 1996). See also Pa062. The Court conducted a Fairness Hearing on March 23, 2021, approved the AvalonBay Settlement Agreement[4] and entered a written order on May 13, 2021, Pa390.

The Settlement Agreement provided that the development project would be "generally consistent with the Concept Plan," Pa048a, (which plan is attached

[4] At the same Fairness Hearing, the Court also considered and approved several other Settlement Agreements for other properties/projects not relevant or at issue in the within appeal.

to the Settlement Agreement as Exhibit B, Pa072,) (subject to modifications and clarifications otherwise contained in the agreement) and called for the rezoning Lots 16 and 19 in accordance with a "Rezoning Ordinance" attached to the Settlement Agreement as Exhibit C, Pa075. The agreement acknowledged that the plan was a Concept Plan was not "fully engineered", Pa048.

The Settlement Agreement contains various specific obligations of the Township and of the Board. One obligation required the Township to adopt the Rezoning Ordinance within 60 days of the Settlement Agreement (but subject to the Court's approval of the agreement at a fairness hearing), Pa051. The Rezoning Ordinance was timely adopted on March 3, 2021, see Pa124a and Pa098a.[5]

The Settlement Agreement contains many provisions, most not relevant to the within appeal. In particular amd relevant to the within appeal are

¶ 6 (Pa052):

[5] It should be noted that the adoption process requires a three (3) step process: ordinance introduction (aka 'First Reading") and then a separate adoption (aka 'Second reading') both at duly noticed public hearings, see N.J.S. 40:49-2, as well as requiring the referral to the Planning Board for consideration at a separate noticed public hearing to take place between the First and Second Readings, see N.J.S 40:55D-37, and thus the process, even if expedited, requires close to 60 days.

c. Obligation to Cooperate. The Township and the Board acknowledge that in order for Developer to construct its Inclusionary Development, Developer will be required to obtain any and all necessary and applicable agreements, approvals, and permits from all relevant public entities and utilities; such as, by way of example only, the Township, the Planning Board, the County of Passaic, the Passaic County Planning Board, the New Jersey Department of Environmental Protection, the New Jersey Department of Transportation, and the like, including the Township's ordinance requirements as to site plan and subdivision approval (the "Required Approvals"). The Township and the Board agree to cooperate with Developer in processing all applications with outside agencies which the Parties acknowledge will benefit the Project. The Township and the Board agree to use all commercially reasonable efforts to assist Developer in its undertakings to obtain the Required Approvals, provided that the taxes are current, and Developer is in compliance with this Agreement. Developer and the Township further agree that certain underground utility easements maybe required across the Property or across Township property to facilitate the efficient development of the Inclusionary Development. The Developer and the Township agree to execute any such reasonable easements in a manner which minimizes the impact upon the development potential of the Property. [Emphasis added].

¶ 8 (Pa054 to 058): Site Plan Application and Review Process. This section of the Settlement Agreement created specific timetables and process for the review and presentation of AvalonBay's Municipal Land Use Act ('MLUL'), *N.J.S.A.* 40:55D-1 et seq., required land use application.[6] This section included several sub-paragraph:

> g. Following the conclusion of the public hearing, the Board shall promptly deliberate on the SPA and vote. Following the vote of the Board, the Board shall memorialize its decision regarding the SPA in a written resolution, which shall be adopted by the Board within the earlier of 30 days or the second meeting following the approval meeting. [Emphasis added].
>
> i. The Parties acknowledge that the Developer will incur substantial costs if the deadlines set forth herein are not achieved by the dates provided. As a result of the foregoing, if any deadline or timeframe set forth herein that is the responsibility of the Township or the Board is not achieved in accordance with the timeline set forth above, inclusive of the 15-day extension period with respect to the adoption of the Ordinance, there shall be a penalty in the amount of five hundred ($500) per day ("Per Diem Penalty"), excepting acts of god or inclement weather cancellations or the like provided that the Township or the Board takes the required action no later than the next regular or special scheduled meeting. The Developer shall receive a credit ("Credit") for each day that the action, decision, meeting, or similar item is not acted upon by the Township or Board, as the case may be, or does not take place by the appropriate deadline. By way of example, if

[6] The Municipal Land Use Act ('MLUL'), *N.J.S.A.* 40:55D-1 et seq., governs land use applications and requires such land use applications to be presented to and considered by a municipal land use board (Planning Board or Board of Adjustment).

> the Township is responsible for adopting the Ordinance by January 30, 2021, and adopts the Ordinance on February 15, 2021 and in violation of this agreement, the Developer will be entitled to a Credit totaling 15 multiplied by the Per Diem Penalty. The Developer shall be entitled to apply the Credit towards any fee that is due and payable to the Township in the ordinary course of development the Property, such as, but not limited to, application fees, building or construction permits, or connection fees for sanitary sewer or potable water. This Paragraph does not limit the Developer's remedies, in law or equity, to redress non-compliance by the Township or the Board and does not limit the Township or the Board's defenses thereto. [Emphasis added].

¶ 10 (Pa054 to 058):

Mutual Cooperation on All Governmental Approvals. The Township and the Board, including all of its officials, employees, agents, committees, departments, shall fully cooperate and assist with Avalon's efforts, to the extent permitted under any applicable state or federal law, rule or regulations, to secure necessary municipal, county and state permits, approvals, licenses, waivers, exceptions, easements, variations and variances for the development, including the SPA, Treatment Works Approval applications/permits, soil conservation district approvals, NJDEP Freshwater Wetlands and Flood Hazard Area approvals/permits, construction/building permits, and all other necessary or useful governmental approvals ("Government Approvals"). While the Parties recognize that it shall remain the responsibility of the Developer, and not of the Board or the Township, to secure

> Government Approvals, the Township and the Board shall cooperate with the Developer as set forth herein. . . . The Township and the Board shall expedite the review and approval of all necessary governmental approvals, within its jurisdiction, including scheduling special meetings as may be required to meet the schedules as set forth in other provisions of this Agreement. [Emphasis added].

On or about December 21, 2021, Pa173, almost a year after the January 8, 2021 Settlement Agreement, Pa041, AvalonBay filed an application with the Board seeking preliminary and final major site plan approval under *N.J.S.A.* 40:55D-46, bulk variance relief under *N.J.S.A.* 40:55D-70c and design waiver relief under *N.J.S.A.* 40:55D-51, (the "Application"), Pa106. The application was diligently processed by the Board and the public hearing process commenced in April 2022, Pa268. The application was presented over the course of four (4) public hearings, April 25, 2022, May 9, 2022, May 23, 2022, and June 13, 2022, Pa106.

As originally presented, AvalonBay proposed to include elevators in only Buildings A (clubhouse building) and B (320-unit midrise building).

As recited in the Board's Resolution PB-2022-025, dated December 12, 2022, ¶21 at Pa114 (And similarly in the Board's Resolution PB-2023-003, dated January 23, 2023, ¶6):

> During the course of the public hearings, the Board and the Applicant had discussions about the inclusion of ambulance stretcher compliant passenger elevators in buildings "C", "D" and "E". In that regard, the Board received testimony and commentary from various Township personnel recommending and otherwise requesting that such elevators be included in building "C", "D" and "E" for the benefit, health, safety and welfare of the residents and of the first responders; the Board shared such concerns. However, according to testimony presented by the Applicant's professionals, the question of presence or absence of such elevators in such buildings is controlled exclusively by the UCC. which Code does not require such elevators for those particular buildings. Nonetheless, as a consequence of various discussions between the Board and the Applicant, the Applicant agreed to amend the Application so as to include such elevators in building "C" and "D". The Applicant declined to include such elevator in building "E". [Emphasis added]

During the Board's public hearings, but prior to the final AvalonBay hearing of June 13, 2022, the Township, speaking through its mayor, who is also

a Member of the Planning Board, voiced concern that all of the multistory residential buildings should have an ambulance stretcher compliant passenger elevator. For reasons not explained, AvalonBay declined. As a result, the Mayor, as an accommodation to the impasse, proposed that AvalonBay include such elevator in Building E and in exchange the municipality would agree to increase Building E's unit count (and hence, the Project's over all unit count) by 10 additional units. See, Pa268, 2nd ¶.

In furtherance to same, there were various discussions between and among the attorneys for AvalonBay and the attorneys for the Township and the Board as to the details of such arrangement. The parties recognized that same would require an amendment to the January 8, 2021, Settlement Agreement and modification of the Property's zoning. It was the intention of the Township and Board that the Project approval Resolution and the Amendment to the Settlement Agreement be presented to the Borad simultaneously. See Pa268 & 9.

The day before the June 13, 2022, Board hearing, agreement was reached and was confirmed by email of AvalonBay's attorney Orth, addressed to the attorneys for the Board and the Township, Pa148, which, in relevant part, reads:

> To follow up, Avalon accepts the proposal discussed on Friday. To sum up, Avalon will agree to install an elevator in Building E if (i) the Planning Board and the governing body approve one additional

> story with no more than 10 total units only 1 of which is affordable and (ii) contingent upon the Planning Board approving the AvalonBay project on Monday, 6/13 (see below). As a result, the total number of units at the AvalonBay project will equal 483 including 72 affordable units.
>
> In terms of procedure, Avalon will bring its affirmative presentation to a close on Monday, 6/13 and seek a vote at that meeting. Avalon will be seeking approval for the project as presented with no elevator in Building E. All parties (Avalon, Wayne, and the Planning Board), will have to amend the settlement agreement and the zoning ordinance for the property to permit the additional units in Building E. In terms of timing, we propose the following schedule: (i) June 15th – Council resolution authorizing amendment to settlement agreement and introducing (via title only), an amended zoning ordinance; (ii) planning board consistency review on June 27th; (iii) ordinance adoption on July 20th, 2022.
>
> Once the ordinance is adopted and appeal periods pass, Avalon will file an application seeking amended site plan approval for the additional story and units, with an elevator in Building E.

The June 13, 2022, Board hearing took place, AvalonBay concluded its presentation and the Board voted to approve the Project.[7]

On June 14, 2022, the day after the Board voted to approve the Project, AvalonBay, through its attorney, sent an email addressed to the Township and Board's attorneys which read:

[7] Further details as to what took place during the Board Hearing are not included because AvalonBay chose not to present any transcript of that hearing to the trial court.

> [P]lease advise the Mayor that [AvalonBay attorney Orth's] email [of June 12, 2022] represents Avalon Bay's willingness to amend the settlement in accordance with the terms therein. I think the Mayor said he has a Council meeting Wednesday evening. Please let me know how that goes so we can get back to work. . . .

Immediately after the June 13 Board hearing, the Board's attorney, the Township's attorney and the Township's planners began the process of reviewing the Settlement Agreement and the zoning code and then drafting the needed amendments and drafting the Board's Project approval resolution. To that end on June 15, 2022, Pa151, the Board's counsel—just two days after the final Planning Board hearing—sent email to AvalonBay's counsel, requesting information from AvalonBay for that purpose, Pa151, followed up by a 'reminder' emails, on June 20th, Pa153. AvalonBay's counsel responded that he "was away last week and had to deal with an OTSC the minute [he] got back—so digging out of a hole still. "I'll put all the docs together as soon as possible." Pa156a. Board counsel sent a follow-up reminder on July 8, 2022, Pa-157a, and was advised that AvalonBay counsel was instead "taking a stab at drafting [the] resolution", Pa161. Board counsel responded saying "I aways appreciate the help but in the meantime if you could send me that list of exhibits so I could (sic) cross check against what I already have, that would be helpful as well,

Pa166. Board counsel again sent a reminder email on August 4, 2022, following -up on a phone call reminder, Pa167.

By August 7, 2022, and as shown in Board counsel's email to AvalonBay's attorney, Pa172, the combination of the Township's and Borad's planners and attorneys had drafted a revised rezoning ordinance, Pa182, drafted an amendment to the Settlement Agreement, Pa173, had discussed and received the endorsement of the Court's Mt. Laurel Special Master and had also obtained approval from State Wide intervenor, Fair Share Housing Center ('FSHC') In relevant part, the email reads:

> Re: Plan Board Reso. Please be sure to send me your draft AvalonBay Reso asap, so I can review your's.
> Re: The extra 10 units for Bldg E. We've drafted a proposed Amendment to Settlement Agreement which is attached for your review. We'd like to get this in front of the Planning Board at the same time as the AvalonBay Reso, then send it over to the Council. The Agreement is 'short and sweet' and contains the proposed revised zoning ordinance. . . . For the [amendment] to work, we need [Mt. Laurel Court Master] Christine Cofone and FSHC to weigh-in. We spoke to Christine Cofone about it; she's on board, and in fact she agrees (strongly) that all of the building should have elevators, that the +10 makes sense and the 1 unit setaside also makes sense, even though it amount to a 10% set aside. So, she endorses it. Since she is on board, we thought it wise to ask Christine to speak to FSHC. She spoke to [FSHC's] Adam Gordon, he is ok with it, although initially wanted a 15% setaside, rounding up, that would mean 2 of the 10 would be AH units.

In a response email, Pa187, which specifically included Court Master Cofone on the distribution list, AvalonBay responded:

> Thank you, [Board counsel]. I have the draft resolution which will be going out later today or tomorrow for your review. [To Court Master] Christine, Avalon will do the elevator in the final MF family building with the additional units. But that requires another story to be added, which requires an amended settlement agreement and then an amended ordinance to avoid a D variance. So it's a bit of a process we have to go through to get there.

By way of email of August 29, 2022, Pa190, AvalonBay counsel sent Board's counsel AvalonBay's version of proposed form of Resolution, Pa191. By way of email dated September 6, 2022, Pa209, Board's counsel responded and provided redlined comments and modifications to the draft, Pa211. In that same email, Board counsel again reminded AvalonBay counsel to respond to the proposed Amendment to Settlement Agreement and proposed amendments to the Rezoning Ordinance that were sent to AvalonBay counsel on August 24, 2022 and advising desire to move both the Resolution and the Amendment to Settlement Agreement to the Board at its next meeting of September 12, 2022, Pa209. Having no response, Board counsel sent follow-up email of September 8, 2022, which prompted a conference call between counsel, see Pa237.

Thereafter, AvalonBay sent Board counsel a further revised/redlined draft resolution, Pa239, by way of email of October 7, 2022, Pa.238; that draft contained significant changes.

As long ago as the summer of 2022, Board counsel advised AvalonBay's attorneys that he and the Board wanted to resolve both the resolution and the settlement agreement amendment as soon as possible, and long before counsel's scheduled out-of-the country trip from October 20 through November 3, 2022, Pa269, scheduled trip because they did not want the resolution and/or the settlement agreement amendment to linger past October. In addition, AvalonBay's attorney Orth was scheduled to be married in mid-November, Pa139.

By the date of Board counsel's scheduled departure date of October 20, the Resolution had not been resolved and AvalonBay had yet to provide any comments to the proposed Amendment to the Settlement Agreement.[8]

By email dated November 2, while Board Counsel was still away, AvalonBay counsel sent email demanding the Bord 'move the resolution' at is public hearing of November 14, 2022, Pa263. By letter dated November

[8] Ultimately, AvalonBay never provided any comments to the proposed Amendment to Settlement Agreement and/or proposed amended zoning ordinance.

21,2022, AvalonBay issued its 'Notice of Default" to the Board demanding the Bord move the resolution at its meeting of November 28, 2022, Pa264.

Board counsel responded by way of letter dated November 23, 2022, Pa267, which, inter alia, rejected the Notice of Default as premature, set forth a detailed case history, recited that counsel had all agreed that the Resolution and the Amendment to the Settlement Agreement would be presented to the Board simultaneously, and advised that the Board had yet to receive any comments to the proposed Amendment to Settlement Agreement that was sent to AvalonBay on August 7, 2022 (Pa172).

Further discussion did not resolve the issues, AvalonBay did not provide comments or consent to the proposed Amendment to Settlement Agreement, insisted that the Board move a form of resolution in December, AvalonBay objected to holding off on the Resolution until the proposed Amendment was resolved and insisted that the Resolution be presented without reference to the proposed Amendment and/or inclusion of provision for an elevator in Building E. See Board counsel email dated December 9, 2022, Pa272. Even aside from the Building E elevator matter, there were various provisions and language items of the draft resolution that were, and that needed to be addressed by the Board and AvalonBay counsel, and various changes were made to the proposed form

of Resolution. See emails of December 9, Pa272 to Pa312. The final form of resolution was not finalized until December 11, 2022—the day before the public hearing, see Pa312 and Pa313.

The proposed form of Resolution was presented to the Board for its consideration at its sole public hearing of December, to wit, December 12, 2022. As reflected in the Board's Meeting Minutes[9], Pa356, and in the written Resolution itself, Pa106, the Board accepted the proposed form of Resolution, but only with imposition of condition that Building E contain an elevator, and, with advice of counsel, directed that a written supplemental resolution be drafted for presentation to the Board embodying that condition. A supplemental form of resolution, PB-2023-003 was duly drafted, presented to the Board and accepted and adopted by the Board at its January 23, 2023, meeting, Pa123.

On May 10, 2023, AvalonBay filed Motion in Aid of Litigant's Rights under Docket No. PAS-L.2396-15 seeking an order "(i) "invalidating and nullifying [Board] Resolution PB-2023-05" [conditioning the grant of the AvalonBay project upon inclusion of an elevator in Building E], (ii) compelling the Township of Wayne to pay Per Diem Penalties in accordance with the

[9] AvalonBay did not submit any transcript of the December 12, Board hearing, or of any of the Board Hearings.

settlement agreement between the parties; and (iii) imposing other obligations and penalties on the Township of Wayne and the Planning Board of the Township of Wayne, as deemed necessary by the Court to deter such conduct in the future." Pa035.

On May 11, 2023, AvalonBay filed a Prerogative Writ Complaint against the Board under Docket No. PAS-L-002396-15, Pa128.

The Motion in Aid of Litigant's Rights was decided by the Trial court, and following same, AvalonBay submitted Certification of Counsel in support of application for attorney's fees, Pa365 and Supplemental Certification of Counsel, Pa385, together with law memo.

The Township and the Board submitted Certification of the Township Planner, Pa378 and additional exhibit (as part of Counsel's Brief), Pa395 and legal memo.

The Court awarded attorney's fees in the amount of $28,909.52, and Delay Penalties of $112,000, Pa021.

LEGAL ARGUMENT

POINT I
THERE IS NO RECORD BEFORE THE TRIAL COURT THAT SUPPORTED OR JUSTIFIED THE TRIAL COURT'S FINDINGS OF MISCONDUCT OR BAD FAITH BY THE BOARD AND/OR THE TOWNSHIP. (2T4-15 to 2T6-1)

AvalonBay's motion came before the trial court for oral argument on June 20, 2023, see 1T1-1 et seq. At the June 20, 2023, hearing, the Court reserved decision in order to review the moving and opposition papers more closely and thus scheduled a follow-up hearing date of July 18, 2023. 1T72-21.

On July 18, 2023, see 2Tx-y, the Court announced its ruling granting AvalonBay's Motion in Aid of Litigant's Rights, granting AvalonBay "reasonable attorney's fees" (2T5-23) and permitting additional submissions as to AvalonBay's request for 'Delay Penalties" (sometimes referred to as "per diem penalty") 2T13-2 et seq.

The trial court entered its written Order as to same dated August 8, 2023, Pa001. The Trial court did not articulate specific findings of fact and/or conclusions of law, did not issue a written opinion, statement of reasons or any

post-appeal amplification statement, but merely directed that to the Order would be appended Court Master Cofone's Report to the Court of October 19, 2020, Pa009. It would thus appear that the trial court decided the 2023 Motion in Aid based on what had occurred in 2020 or upon a Court Master's report dated October 19, 2020. That report could not logically or properly form the basis for the relief granted in 2023, since the 2023 'In Aid' relief required a finding of a breach of a Settlement Agreement that did not exist in 2020 when the Planner/Special Master's Report was authored.

The trial court's findings and conclusions are found in the transcript of its decision. The trial court's decision is contained in the following passage from the transcript:

> I am going to grant the application. I'm going to enforce the first resolution that the Wayne Planning Board passed. And then 42 days later or whatever it was they decided – that was only conditional approval. And they went back and they unpassed (sic) it. I quite frankly find this is a tactic in a long line of tactics that Wayne has utilized to delay meeting its constitutional obligation of affordable housing. I incorporate by reference Ms. Cofone's October 19th 2020 missive that was - oh, I don't know. I've – you read it. It must have taken you – it was 12 pages. But it lists chapter and verse of all the delay tactics and the failures to mediate not just with Avalon, but with failure to approve other intervener's applications that they contend that we were settled with. And we said well do we have anything in

> writing. And these things lingered on and lingered on. And quite frankly I did at that time revoke the immunity. That was back on November 10th of 2020.

(2T4-17:5-11.)

In its Order, the trial court provided in relevant part as follows:

> 1. Avalon's Motion be and is hereby granted, subject to the Court's future determination of the Per Diem Penalty, as set forth herein. The Court's oral decision on the Motion be and is hereby incorporated into the record.
>
> 2. The supplemental resolution memorialized by the Board on January 23, 2023, notated as Resolution PB-2023-05 (the "Supplemental Resolution"), be and is hereby invalidated, and set aside and said resolution is of no force and effect.
>
> 3. The original resolution memorialized by the Board on December 12, 2022, referred to as Resolution PB-2022-025, be and is hereby affirmed and remains in full force and effect.
>
> 4. The Court finds that the Board's adoption of the Supplemental Resolution constitutes bad faith conduct. (Emphasis added)
>
> 5. The Court hereby awards AvalonBay reasonable counsel fees and costs incurred in connection with the Motion. Within ten (10) days of entry of this Order, AvalonBay shall submit a Certification of Services detailing its fees and costs incurred in connection with the Motion.
>
> ***
>
> 8. Within ten (10) days of entry of this Order, AvalonBay is permitted to submit an application for award of a Per Diem Penalty it also sought in connection with the Motion. Avalon's submission shall detail the basis for the claimed Per Diem Penalty, and a calculation of the amount

claimed to be due and owing.

(Pa1-2)

From the record below, it appears that the trial court made two (2) findings of fact:

a. the Board had approved the AvalonBay application in December 2022 (Resolution PB-2022-025, Pa106) and then "unapproved" the application in January 2023 (Resolution PB-2023-003, Pa123) (2T4-15 to 2T6-1); and

b. in its "unapproval" of the AvalonBay project in January 2023 (Board Resolution PB-2023-003, Pa123) the Board and the Township acted in bad faith. (2T4-15 to 2T6-1).

From the record below, it appears that the trial court adopted two (2) conclusions of law:

a. the Board and the Township breached the January 8, 2021, Settlement Agreement

b. AvalonBay was entitled to damages by way of attorney's fees and 'Delay Penalties'

———————————

"The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." (Emphasis supplied). *Gnall v. Gnall*, 222 N.J. 414, 428 (2015) (quoting *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1998)).

See *State v. Camey*, 239 N.J. 282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); *Motorworld, Inc. v. Benkendorf*, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); *Thieme v. Aucoin-Thieme*, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); *State v. K.W.*, 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record").

A. "Approved and then "unapproved" – Board Misconduct

The Trial court's finding that Board approved the AvalonBay application in December 2022 and then "unapproved" the application in January 2023 is not

supported by the credible evidence in the record before the trial court and the Trial Court's finding was in error.

Initially, Counsel notes that AvalonBay chose not to provide the trial court with any transcripts of the proceedings before the Board—it did not even provide meeting minutes. The Board's minutes of its December 12, 2022, meeting, Pa356, were provided by the opposition to AvalonBay's Motion. Those minutes show that the Board did not "approve" and then "unapprove" the AvalonBay project or otherwise 'change its mind' about the AvalonBay application in January. Rather, in December the Board approved the application and at the same time imposed a condition upon that approval.

It has long been recognized that a land use board, such as a planning board, in granting a land use application, certainly one that involves a variance, may impose conditions to safeguard the public interest, so long as the conditions are reasonable and advance the purposes of zoning. See generally, *Berninger v. Board of Adjustment*, 254 N.J. Super. 401 (App. Div. 1991); aff'd. o.b. *Berninger v. Board of Adjustment of Borough of Midland Park*, 127 N.J. 226 (1992); *Aldrich v. Schwartz*, 258 N.J. Super. 300, 311 (App. Div. 1991); *Urban v. Planning Board*, 124 N.J. 651, 661, (1991). Further, a board is "required to lay down adequate protective conditions and safeguards where it appears proper to

grant a variance and at the same time further one of the zoning objectives." *Alperin v. Mayor and Township Com. of Middletown Township*, 91 N.J. Super., 190, 196, (Ch. Div. 1966), citing*, Kramer v. Board of Adjust., Sea Girt*, 45 N.J. 268 (1965). Obviously, there are, however, limits on what conditions a board may property apply, see, generally, *Orloski v. Planning Board*, 226 N.J. Super. 666, (Law Div. 1988). The AvalonBay Motion in Aid did not seek to have the Building E elevator condition set aside as unreasonable and the trial court did not analyze the question in those terms.

Thus, presented to the Board at its December Meeting was a form of Resolution that did not provide for a Building E elevator. The absence of the elevator was at the insistence of AvalonBay.

Simply put, for reasons of health, safety and welfare, the Board wanted an elevator in all of the multi-story buildings and saw no legitimate reason why Buildings A through D should have elevators and Building E should have none. In addition, when the public hearings were concluded, the Board had the expectation that an elevator would be included in Building E, See Pa148, and Statement of Facts.

The meeting minutes, Pa356, show that the Board was willing to, and in fact did approve the application, in the form of the Resolution presented but if

and only if a condition was added requiring an elevator in Building E. Mindful that AvalonBay had insisted the Board 'move a resolution' at the Board's December meeting, the Board, with advice of counsel, accepted the proposed form of resolution subject to adding condition that Building E contain an elevator and that in order to move the matter at that meeting, the Board further directed that the condition be memorialized in a separate supplemental written resolution, which at the January meeting took the form of Resolution PB-2023-003, Pa106.

The meeting minutes were uncontroverted before the trial court and show conclusively that the Board did not, as was found by the trial court, approve the project in December and then "unapprove" it or otherwise change its mind in January.

Thus, the trial court's finding is not supported by adequate, substantial, credible evidence; rather the opposite is the case.

B. "Bad Faith"

Bad Faith is often referred to as the doing of an act for a dishonest purpose. The term also "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." *Borough of Essex Fells v.*

Kessler Institute for Rehab., 289 N.J. Super. 329, 338 (1995), citing *Lustrelon Inc. v. Prutscher* 178 N.J. Super. 128, 144 (App.Div.1981). The party making the claim that the government has conducted itself in bad faith or in a fraudulent manner has the burden of proof. *Texas East, Trans. Corp. v. Wildlife Preserves, Inc.,* 48 N.J. 261 (1966); *Essex County v. Hindenlang,* 35 N.J. Super. 479 (App.Div.1955); *State v. Totowa Lum. & Sup. Co.,* 96 N.J. Super. 115 (App.Div.1967). Furthermore, evidence showing that the government acted in bad faith must be clear and convincing. *Klump v. Cybulski* 274 Wis. 604, 81 N.W.2d 42, 47 (1957)

A careful review of the various correspondence between AvalonBay and the Board's counsel between June and December does not demonstrate, certainly not by adequate, substantial, credible evidence and certainly by clear and convincing evidence, that the Board or the Township acted in "bad faith".

To the contrary, the Board deemed elevators in the multi-story building as important to the health, safety and welfare of the community and of the future residents of the AvalonBay Project. Such inquiries are the charge and the jurisdiction of the Board.

The stated legislative purpose of the MLUL is, in part, "[t]o encourage municipal action to guide the appropriate use or development of all lands in this

State, in a manner which will promote the public health, safety, morals, and general welfare." *N.J.S.A.* 40:55D-2.

As recited in the Board's Resolution PB-2022-025, ¶21 at Pa114 (And similarly in the Board's Resolution PB-2023-003, dated January 23, 2023, ¶6).

During the public hearings, the Board and AvalonBay discussed inclusion of ambulance stretcher compliant passenger elevators in buildings "C", "D" and "E" and the Board received testimony and commentary from various Township personnel recommending and otherwise requesting that such elevators be included in building "C", "D" and "E" for the benefit, health, safety and welfare of the residents and of the first responders; the Board shared such concerns.

When the public hearings ended, the Board believed that the Project was to have elevators in all the multi-story buildings, including Building E. See AvalonBay Email of June 12, 2022, Pa148:

> To follow up, Avalon accepts the proposal discussed on Friday. To sum up, Avalon will agree to install an elevator in Building E if (i) the Planning Board and the governing body approve one additional story with no more than 10 total units only 1 of which is affordable and (ii) contingent upon the Planning Board approving the AvalonBay project on Monday, 6/13 (see below). As a result, the total number of units at the AvalonBay project will equal 483 including 72 affordable units.

Immediately following the June 13 Board hearing, the Board's attorney, the Township's attorney and the Township's planners began the process of drafting the needed amendments to the zoning code, the amendments needed for the Settlement Agreement and the Board's project approval resolution. Just two days after the Board's June 13th hearing, Board attorney contacted AvalonBay's attorneys saying "On the above, I'll be sitting down to draft the resolution shortly. To that end, I would invite you to send me your list of submissions (Application, plans (including latest revision date), approvals and other documents and your list of hearing exhibits (Date, exhibit number, brief description), so that nothing is left out." Pa150.

There was a lot involved in accomplishing what was intended, as admitted by AvalonBay counsel in his August 9, 2022, email to the Court Master: ". . . Avalon will do the elevator in the final MF family building with the additional units. But that requires another story to be added, which requires an amended settlement agreement and then an amended ordinance to avoid a D variance. So it's a bit of a process we have to go through to get there." Pa187. (Emphasis supplied).

By August 7, 2022, and as shown in Board counsel's email to AvalonBay's attorney, Pa172, the combination of the Township's and Board's

planners and attorneys had drafted a revised rezoning ordinance, Pa182, drafted an amendment to the Settlement Agreement, Pa173, had discussed and received the endorsement of the Court's Mt. Laurel Special Master, Pa172, and had also obtained approval from State Wide intervenor, Fair Share Housing Center ('FSHC'), Id.. Notably, when looking at the question of bad faith, by the August 7th date, AvalonBay had still not submitted its promised proposed form of resolution.

What followed over the course of the next three plus months were a series of largely uninterrupted[10] phone and email primarily from the Board's attorney to the AvalonBay's attorneys attempting to finalize the Amendment to the Settlement Agreement and the Resolution of approval, see Statement of Facts, Pb24 to 27.

The Board's Minutes read:

> **AVALONBAY COMMUNITIES INC** - 1445 and 1455 Valley Road; Block 3103, Lots 16 & 19; MLR3D-4 (Mount Laurel Round 3 District 4) District; Application PB-2021-037. Memorialization if Resolution PB-2022-025 granting a Preliminary and Final Site Plan Approval to construct 473 residential dwellings across two properties.

[10] There was a brief hiatus beginning late October because Board's counsel had a long-planned and announced trip abroad from October 20 through November 3, 2022 and because one of AvalonBay's attorneys was married in early November, 2022.

Board Comments:
Mayor Vergano noted that the agreed upon elevator for building "E" and the additional 10 units in that building were missing from the resolution. He stated that these conditions were very important to the Board and he suggested amending the resolution to include said requirements.

Mr. Cavaliere suggested that the Board vote on the resolution in its current form but add the caveat to have a supplemental resolution which would include these requirements presented at a future meeting.

The Board agreed to same.

No further comments.

Mr. Okun: Motion to approve with the aforementioned caveat
Mr. Edge: Second

ROLL CALL: Councilman De Stefano, Mr. Edge, Mr. Falcone, Mr. Marini, Mr. Natoli, Mr. Okun, Mr. Stomber, Mayor Vergano, Mr. Ranalletti,
APPROVED

Pa357

Within their area of jurisdiction, planning boards act in a "quasi-judicial capacity", *Randolph v. City of Brigantine Planning Bd.*, 405 N.J. Super. 215, 225, (App. Div. 2009). When reviewing the actions taken by a land use board, the Courts are to give substantial deference to findings of fact of the Board, *Pomerantz Paper Corp. v. New Community Corp.*, 207 N.J. 344, 362, (2011), but review de novo those "interpretations of the law and the legal consequences that flow from established facts . . . ." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, (1995).

Here, the trial court gave no difference to the Board's findings of fact and instead rejected out-of-hand the Board's finding as to the importance of the Building E elevator; it disregarded the factual history of the Board's good faith efforts to effectuate the AvalonBay's agreement for the Building E elevator and completely disregarded and discounted that it was AvalonBay, and not the Township or the Board, that 'went back on its word'.

It cannot be seriously questioned that equipping multistory apartments buildings with ambulance stretcher accessible elevators is not a legitimate area of concern for a planning board. It also cannot be seriously doubted that having such elevator would benefit the public health safety and welfare.

The Courts have long recognized that "because of their peculiar knowledge of local conditions," municipal land use boards "must be allowed wide latitude in their delegated discretion." *Jock v. Zoning Bd. of Adjustment, Twp. of Wall*, 184 N.J. 562, 597, (2005); accord *Booth v. Bd. of Adjustment of Rockaway Twp.*, 50 N.J. 302, 306, (1967). Thus, on the face of it, and even ignoring that AvalonBay had agreed to the elevator and then reneged, the inclusion of such elevator is a legitimate exercise of a planning board jurisdiction.

Moreover, a party who acts in good faith on an honest, but mistaken, belief that his/her actions were justified has not breached the covenant of good faith and fair dealing. *Silvestri v. Optus Software, Inc.,* 175 N.J. 113 (2003).

Therefore, it is respectfully submitted that not only does the record before the trial court fail to show "bad faith" by the Board and/or by the Township, the record demonstrates the Board made a 'good faith' and a diligent attempt to complete the Project approval process and that AvalonBay was the mischievous actor.

POINT II
THERE IS NO RECORD BEFORE THE TRIAL COURT THAT SUPPORTED OR JUSTIFIED THE TRIAL COURT'S CONCLUSION THAT THE BOARD AND/OR THE TOWNSHIP BREACHED THE PARTIES' SETTLEMENT AGREEMENT (Pa-001 & 2T4-17)

The Settlement Agreement contemplated, and New Jersey law requires, that for the AvalonBay Project to proceed, it was required to be presented for hearing before the Wayne Planning Board. A land use board may then either deny the application or approve the application (with or without condition(s)). See generally, New Jersey MLUL, *N.J.S.A.* 40:55D-1 et seq. The Settlement

Agreement did not and cannot be read to require the Planning Board to approve or 'rubber stamp'[11] the AvalonBay's development application. Planning boards are not rubber stamps. See *Popular Refreshments, Inc. v. Fuller's Milk Bar & Recreation Ctr., Inc*., 85 *N.J.Super*. 528, 537, (App.Div.1964), *certif. denied*, 44 *N.J*. 409 (1965) ("If planning boards had no alternative but to rubber-stamp their approval on every [application] which conformed with the zoning ordinance, there would be little or no reason for their existence"). The New Jersey land use approval process requires presentation of the development application to a land use board, requires it to be presented at a public hearing convened for that purpose, and requires the board to hear and decide the application. See generally, MLUL, *N.J.S.A.* 40:55D-12 & 25 and N.J. Open Public Meetings Act, *N.J.S.A*. 10:4-6.

Avalon argues that the Board's Building "E" elevator condition is a breach of the Settlement Agreement. The argument is specious. AvalonBay argues that the elevator condition constitutes a failure 'to cooperate' with AvalonBay in its process to obtain "Required Approvals" and "Government Approvals"—the approval complained of being the unconditional approval of the Board. At best,

[11] 'Rubber Stamping': a mostly powerless yet officially recognized body or person that approves or endorses programs and policies initiated usually by a single specified source, Merriam-Webster Online Dictionary.

the argument is a logical fallacy and is premised upon circular reasoning: in essence, Avalon is arguing that the Board breached the Settlement Agreement because the Board did 'cooperate' by giving AvalonBay everything it wanted. The trial court agreed with AvalonBay but did not share its reasoning or address the facts of the matter, but instead merely harkened back to several years before when the trial court had disagreed with the Township's negotiating position.

The Settlement Agreement's duty "to cooperate" cannot be read to be a duty "to approve", but this is how the trial court read the Agreement.

AvalonBay argues that the Board's elevator condition was unreasonable because such elevator is not required under the Uniform Construction Code and, therefore, it argues, may not be a valid condition of the development approval and therefore constitutes a breach of a duty to cooperate. However, the Uniform Construction Code sets forth only the minimum standards for construction; development approvals may require compliance with higher standards. See *Cherry Hill Towers, L.L.C. v. Township of Cherry Hill*, 407 F.Supp.2d 648, 653 (D.N.J. 2006).

There is nothing—and as a matter of public policy there can be nothing—in the Settlement Agreement that mandated the Planning Board act as a mere

rubber stamp and approve the AvalonBay project as presented. In fact, to further underscore that concept, the Settlement Agreement itself acknowledged that the project plan attached to the Agreement was not "fully engineered" and that the project was subject to Planning Board review. Said the Agreement:

> The Parties recognize that the Concept Plan is not fully engineered at present and will only be fully engineered and submitted as part of the site plan application (SPA) process, which will likely result in variations from the Concept Plan prior to the SPA (as hereinafter defined). Pa048

The Agreement further provides that the "cooperation" would be limited to "the extent permitted under any applicable state or federal law, rule or regulations" Agreement, ¶ 10 (Pa058).

There is nothing, and should be nothing, in the Settlement Agreement that requires the Planning Board to compromise its view of the safety and welfare of the community, of its first responders or of the future residents and guests of Building "E". Moreover, by providing elevators in the other multistory buildings (i.e., Buildings B through D) and none for Building E, the project would effectively be giving disparate treatment to the affordable housing residents of Building E.

The Planning Board's approval condition to require an elevator in Building "E" and make Building "E" in parity with the other buildings is not inconsistent with a 'duty to cooperate' and certainly is not a breach of the Agreement. The Planning Board's elevator condition was imposed to promote the public health, safety and general welfare, which is entirely consistent with the foremost purpose of the Municipal Land Use Law "[t]o encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare." See *N.J.S.A.* 40:55D-2a.

In accordance with its obligations under the Municipal Land Use Law, the Planning Board, exorcising its charge and jurisdiction, voted to include terms and conditions in the approval of AvalonBay's development application that, in its view, promoted the safety, health and welfare of the future inhabitants of the development, their visitors and the first responders who may be called to provide life-saving measures.

It has long been held that it is not for the court to substitute its conception of what the public welfare requires in place of the conception of the local land use body. *Pascack Assoc'n, Ltd. v. Mayor & Council of the Twp. of Washington*,

74 N.J. 470, 485 (1977). A municipality may condition a land development approval upon the developer's installation of improvements [that] a local governing body may find necessary for the protection of the public interest. *Divan Builders v. Wayne Tp. Planning Bd*., 66 N.J. 582,595 (1975). Moreover, "[t]he protection of apartment dwellers has long been recognized as consistent with the public health, safety and welfare." *State v. C. I. B. Int'l*., 83 N.J. 262, 272 (1980).

It should also be noted that it was the Board, and not the Township, which imposed the elevator condition and thus the Township could not have breached the Settlement Agreement thereby. The trial court made no distinction between the two and offered no explanation.

It is difficult to imagine that a court could logically or properly decide whether a land use board's condition of approval was unjustified without examining the entire record before the board. Here, the trial court permitted AvalonBay to proceed upon the Motion in Aid, and the Court ultimately decided the Motion in Aid, without benefit of any of the record before the Board—a strongly disfavored practice. See *Mulligan v. Panther Valley Property Owners Ass'n,* 337 N.J. Super 293 (App. Div 2001).

Land use board decisions "enjoy a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." *Price v. Himeji, LLC*, 214 N.J. 263, 284, (2013) (citing *Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment*, 172 N.J. 75, 81 (2002)). Consequently, "courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law." *Lang v. Zoning Bd. of Adjustment*, 160 N.J. 41, 58-59, (1999).

The party challenging the action of a zoning board carries the burden of demonstrating that the board acted arbitrarily, capriciously, or unreasonably. *Dunbar Homes, Inc. v. Zoning Bd. of Adjustment*, 233 N.J. 546, 558, (2018) (quoting *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 551, (2015)); *Ten Stary Dom P'ship v. Mauro*, 216 N.J. 16, 33, (2013) (citing *Smart SMR of N.Y., Inc. v. Bd. of Adjustment*, 152 N.J. 309, 327, (1998)). "A board acts arbitrarily, capriciously, or unreasonably if its findings of fact in support of a grant or denial of a variance are not supported by the record, or if it usurps power reserved to the municipal governing body or another duly authorized municipal official." *Ten Stary Dom P'ship*, 216 N.J. 16, 33 (2013). "Even when doubt is entertained as to the wisdom of the [board's] action, or as to some part of it, there can be no

judicial declaration of invalidity in the absence of clear abuse of discretion . . . ." *Kramer v. Bd. of Adjustment*, 45 N.J. 268, 296-97, (1965).

The trial court's inferential conclusion that the Board's elevator condition was arbitrary, unreasonable and capricious is simply not supported by the record before the court.

POINT III

THE TRIAL COURT ERRED IN GRANTING AVALONBAY ATTORNEY'S FEES AND/OR A DELAY PENALTIES (Pa021, 1T62-3 to 63-23; 3T-17 to 33:14; 3T40-22 to 41-14)

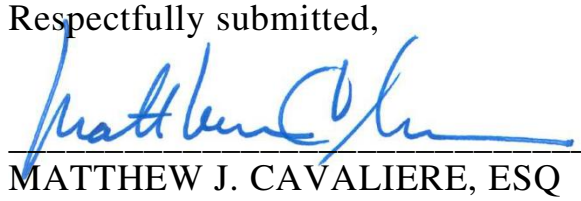
The trial court's granting of attorney's fees and Delay Penalties was premised upon the granting AvalonBay's Motion in Aid, and thus a reversal of that motion will reverse the grant of the attorney's fees and Delay Penalties.

Regarding the independent merits of reversal of the attorney fees and Delay Penalties, the Board respectfully incorporates by reference the legal arguments for same presented by the Township.

CONCLUSION

For the reasons presented above, the Board respectfully requests that the trial court's Orders of August 8, 2023, Pa001 and December 19, 2023, Pa021, be reversed and vacated, the Board's Resolution PB-2023-003 dated January 23, 2023, be affirmed and reinstated ordered enter directing AvalonBay to refund all moneys paid to it under the trial court's aforesaid Orders.

Respectfully submitted,



MATTHEW J. CAVALIERE, ESQ
(029151982)

CAVALIERE & CAVALIERE, P.A.
1700 Route 23 N, Suite 210
Wayne, New Jersey 07470
P 973-305-1800
E MJC@CavaliereLaw.us

Attorneys for CoPlaintiff/Petitioner, Wayne Township Planning Board

Dated: April 29, 2024

Note: This is the same brief filed by the Wayne Planning Board as Appellant, in Dkt. A-000220-23. In Dkt A-000199-23, Wayne Planning Bord is a Respondent. The Appendix filed by both Wayne Township and Wayne Planning Board in their respective Appeals are the same Appendix.

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF WAYNE, Plaintiff/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket No. A-000199-23 CIVIL ACTION On Appeal from Final Orders Dated August 8, 2023 and December 19, 2023 Superior Court of New Jersey Law Division, Civil Part Passaic County Docket No. PAS-L-2396-15 Sat Below: Hon. Thomas F. Brogan, P.J.S.C., Retired Hon. Darren J. Del Sardo, P.J.S.C.

REPLY BRIEF AND APPENDIX OF APPELLANT TOWNSHIP OF WAYNE IN FURTHER SUPPORT OF APPEAL

CLEARY GIACOBBE ALFIERI
JACOBS LLC
169 Ramapo Valley Road, UL-105
Oakland, New Jersey 07436
Telephone: (973) 845-6700
Attorneys for Township of Wayne

Of Counsel and On the Brief:
Mary Anne Groh, Esq. (030531993)
mgroh@cgajlaw.com

TABLE OF CONTENTS OF BRIEF

Table of Judgments, Orders and Rulings Being Appealed **Page**

Table of Authorities

Cases

Statutes

Other Authorities

TABLE OF CONTENTS OF REPLY APPENDIX

PRELIMINARY STATEMENT

In its opposition, AvalonBay Communities, Inc. ("AvalonBay") has not refuted the arguments by the Township of Wayne ("Township") that the orders awarding attorneys' fees and *per diem* penalties must be reversed. More particularly, AvalonBay does not and cannot point to any finding of default of the terms of the Settlement Agreement, a necessary predicate to any such award. In addition, AvalonBay has not demonstrated that the trial court's finding of bad faith was supported by the record – let alone the required substantial clear and convincing evidence, or that bad faith is a trigger for an award or penalty under the terms of the Settlement Agreement.

Even assuming *arguendo* that there was a basis for an award of attorneys' fees, the trial court's award is contrary to law. More particularly, there was no finding by the trial court that the hours spent on the motion were reasonable, a prerequisite to an award of legal fees. Moreover, the trial court's ruling that a rate of $550 per hour was reasonable is not supported by the record. In addition, the imposition of delay penalties was not supported by the record or law. Finally, AvalonBay has not refuted that the trial court erroneously granted prerogative writ relief to AvalonBay without a proper record.

As discussed hereafter, the orders dated August 8, 2023 and December 19, 2023 must be reversed.

PROCEDURAL HISTORY

The Township incorporates the Procedural History contained in its Amended Brief in Support of the Appeal (hereinafter "Appellate Brief") and adds that immunity that was revoked by Order dated November 5, 2020 (Pa5) was restored by the Court *nunc pro tunc* by Order dated February 5, 2021 (Pra1).

STATEMENT OF FACTS

The Township incorporates the Statement of Facts in its Appellate Brief.

LEGAL ARGUMENT

POINT I

AVALONBAY HAS NOT IDENTIFIED ANY FINDING BY THE TRIAL COURT THAT THE TOWNSHIP DEFAULTED ON AN OBLIGATION IN THE SETTLEMENT AGREEMENT.

The parties agree that findings of fact are binding on appeal when supported by and consistent with adequate, substantial, credible evidence. (See Pb23 and Db24) However, there is substantial disagreement as to whether the trial court made findings of fact and/or conclusions of law that support an award of attorneys' fees or assessment of a *per diem* penalty.

In the Order dated August 8, 2023 wherein the trial court granted AvalonBay's motion for an award of attorney's fees, the trial court did not articulate findings of fact and/or conclusions of law in support of that decision. (Pa1) Instead, the court incorporated in that Order its rulings on the record on

July 18, 2023 and a report by the Special Master dated October 19, 2020, which the trial court relied on in reaching its decision on the motion. (Pa9) As noted in the Appellate Brief, that report could not logically have been the basis for the relief entered, since any relief on August 8, 2023 required a finding of a default of a provision in the Settlement Agreement dated January 9, 2021 that did not even exist at the time the Special Master's Report was authored. AvalonBay has not and cannot refute that obvious fact. The only act after the Settlement Agreement was executed with which the trial court took issue was the adoption of a Supplemental Resolution on January 23, 2023 by the Planning Board ("Board"); however, that act did not constitute a default of an obligation in the Settlement Agreement. The only provision in the Settlement Agreement that is arguably applicable pertains to the time for adoption of a resolution on a site plan application; but the adoption of the Supplemental Resolution is not contrary to that provision or any other provision in the Settlement Agreement.

The Settlement Agreement may only be enforced based on its terms; the court may not rewrite a better contract for the parties than the parties made for themselves. Pennbar Corp. v. Insurance Co. of No. America, 976 F.2d 145 (3d Cir. 1992); In re Community Medical Ctr., 623 F.2d 864, 866 (3d Cir.1980); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 46 (1960).

In its motion before the trial court, AvalonBay argued that by not adopting a Resolution by the second meeting in October and by adopting a Supplemental Resolution in January 2023, the Board breached a duty to cooperate with AvalonBay in obtaining the "Required Approvals" and "Government Approvals" under the terms of the Settlement Agreement. The Court made no finding of fact that the Board or the Township breached those provisions in the Settlement Agreement. As to the Township, by the time the Application was before the Board, the Township had taken all action required by the Township under the terms of the Settlement Agreement. Even if the Township representatives, including its first responders advocated for the inclusion of an elevator in Building E during the Board hearings, the Township did not default on any obligation under the Settlement Agreement based on that advocacy. Indeed, AvalonBay made no argument to the trial court on its motion to enforce the Settlement Agreement that the Township – as opposed to the Board – defaulted on its obligations under the Settlement Agreement, because there was no default by the Township. As such, there was absolutely no basis whatsoever for a ruling by the trial court against the Township in either Order.

In apparent recognition that there were no findings of a breach or default under the government approvals provisions, AvalonBay argues for the first time in opposition to this appeal that the condition for inclusion of an elevator in

Building E violated a provision in the Settlement Agreement prohibiting cost-generative features because its professional opined during the Board hearing that the elevator was not required by the Uniform Construction Code ("UCC").[1] (Db39) AvalonBay made no such argument to the trial court and such was not a stated basis for the trial court's award of fees or penalties. As such, AvalonBay cannot argue to this Court that there was a breach of that provision to justify the trial court's awards, which were not based on that provision or any alleged default of that provision. See State v. Robinson, 200 N.J. 1, 18-19 (2015).

Because there was no finding of default of the Settlement Agreement in the record, there was no predicate for an award of fees or assessment of *per diem* penalties and, accordingly, the orders must be reversed.

POINT II

THE FINDING OF BAD FAITH WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND, IN ANY EVENT, BAD FAITH DOES NOT TRIGGER AN AWARD OF FEES OR IMPOSITION OF PER *DIEM* PENALTIES.

Bad faith "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." Lustrelon Inc. v. Prutscher, 178 N.J.Super. 128, 144 (App.Div.1981). Evidence showing that a government

[1] Contrary to the argument of AvalonBay, the Board did not make a finding that there was no requirement for an elevator; it merely recognized that there was testimony by AvalonBay's professional that such was not required by the UCC.

acted in bad faith must be clear and convincing. Klump v. Cybulski, 274 Wis. 604, 81 N.W.2d 42, 47 (1957). A party who acts in good faith on an honest - but mistaken - belief that his/her actions were justified has not breached the covenant of good faith and fair dealing. Silvestri v. Optus Software, Inc., 175 N.J. 113 (2003).

The record does not support a finding by clear and convincing evidence that either the Board or the Township acted in "bad faith". Rather, the record included evidence that when the public hearings ended, the Board believed that the Project was to have elevators in all the multi-story buildings, including Building E consistent with an email from AvalonBay's counsel on June 12, 2022 stating "AvalonBay will agree to install an elevator in Building E if (i) the Board and the governing body approve one additional story with no more than 10 total units only 1 of which is affordable and (ii) contingent upon the Board approving the AvalonBay project on Monday, 6/13[.]" (Pa148) Furthermore, as reflected in the record, the attorneys for AvalonBay and the Board worked to accomplish that result until AvalonBay reversed course. (Pa150, Pa172, Pa173, Pa182, Pa187) AvalonBay argues to this court that the trial court considered those dealings but determined they had not bearing. (Db34) Of course there is no citation to the record for that point because there is none to show the trial court considered those dealings. (See 2T)

When the Board adopted the proposed form of resolution on December 12, 2022, it was subject to the addition of a condition that Building E contain an elevator and the Board further directed that the condition be memorialized in a separate supplemental written resolution. (Pas355) The trial court seemingly did not consider the minutes of that meeting, as there is no reference to them in the court's order or oral decision and we know that the Court did not consider any transcripts because none were in the record. It appears that the trial court only considered the language of the December 12, 2022 Resolution that was prepared by AvalonBay. However, the totality of the record does not support a finding that the Board acted in bad faith, especially since it was acting on a belief that its action in adopting the January 23rd Resolution was justified; and, in no case is there any basis for a finding that the Township, which is a distinct legal entity from the Board, acted in bad faith. In sum, the trial court's finding that the Township and the Board acted in bad faith is not supported by the record and, in any event, did not trigger an award of fees or penalties under the Settlement Agreement. As such, the Orders must be reversed.

POINT III

THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES AND DELAY PENALTIES WERE NOT SUPPORTED BY THE RECORD AND WERE CONTRARY TO LAW.

A. The Award Of Attorneys' Fees Should Be Reversed.

The award of attorneys' fees should be reversed because there was no predicate default of the Settlement Agreement and, thus, the fees were not "authorized". See Desai v. Board of Adj. of Town of Phillipsburg, 360 N.J. Super. 586, 598 (App. Div. 2003). The trial court recognized the need for default for an award of fees incurred to enforce the Settlement Agreement, but erred in awarding fees without finding a default under the Settlement Agreement, which is clear by the fact that the trial court did not direct the Township or Board to take any action pursuant to the Settlement Agreement to cure any default and the reversal of the Supplemental Resolution was not done to enforce any provision of the Settlement Agreement. Because there was no default by the Township or the Board of obligations under the Settlement Agreement, there was no basis for an award of fees.

In addition, the award should be reversed because AvalonBay did not sustain its burden under R. 4:42-9 and the record did not include certified copies of bills as required. See Scullion v. State Farm Ins. Co., 345 N.J. Super. 431, 439 (App. Div. 2001) (holding certified copy of bill is required in an application for fees). In addition, there was no finding that the fees were consistent with R. 4:42-9 and R.P.C. 1.5 and were "reasonable." Any award of attorneys' fees based on a contractual provision is limited to those fees reasonable in the

circumstances and does not automatically encompass the full fee charged. North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-574 (1999).

AvalonBay argues that the trial court found that its fees were "fair and accurate" and that its rates were "reasonable." (Db22) However, there was nothing in the record to establish a rate of $300 for an unlicensed attorney was reasonable given "the experience, reputation, and ability of the lawyer or lawyers performing the services" (R.P.C. 1.5(a)(7)), or that billing 72 hours by six (6) different attorneys on a motion to enforce a settlement agreement was reasonable, because it was not. Based on the foregoing, even if an award of fees had been triggered by a default of the Settlement Agreement, which there was not, the trial court's award of fees is not in accordance with R. 4:42-9 and R.P.C. 1.5 and must be set aside.

B. The Imposition Of Penalties Should Also Be Reversed.

There was also no basis for an award of delay penalties since neither the Township nor the Board failed to take any action required by the Settlement Agreement and the provision regarding the imposition of penalties only applies to a failure to take timely action required under the Settlement Agreement. AvalonBay asserts in opposition to this appeal that the Board was required to memorialize the Resolution on October 24, 2022 (Db23), but can point to nothing in the Settlement Agreement to support that position. Indeed, nowhere

in the Settlement Agreement does it say that the Resolution must be adopted at the next meeting after AvalonBay unilaterally decided to reneg on its agreement to install in elevator in Building E and "requested" that the Board adopt its proposed version of the Resolution. (Db14).

Moreover, while liquidated damage clauses may be enforceable, penalty clauses – such as the one here - are unlawful and should not be enforced. Wasserman's Inc. v. Middletown, 137 N.J. 238, 248-249 (1994). The trial court should not have enforced the penalty clause. Even if enforcement was justified, the trial court did not enforce the clause as written. Instead, in reaching its holding on delay penalties, the trial court rewrote the parties' Settlement Agreement contrary to well-established law. See Pennbar Corp., supra; In re Community Medical Ctr., supra; and Kampf, supra.

Without any failure to act by the Township or Board, the penalty clause was not triggered. The trial court assessed a penalty because it felt there were "significant delays Avalon faced throughout the entirety of the project" (Pa32) again improperly referring to conduct prior to 2020 and summarily determined without any evidence in the record that the January 23, 2023 Resolution "unlawfully, severely delayed AvalonBay's ability to continue with the project" (Pa33). Yet, as AvalonBay asserts in this appeal, it had established rights upon the vote by the Board on June 13, 2022 and the Resolution did not change those

rights. (Db27) In any event, there was no evidence in the record to support a conclusion that AvalonBay's ability to proceed with the project was delayed. Rather, the record included evidence that it was AvalonBay's failure to address the various conditions of the approvals *other than an elevator in Building E* that were the cause of any delay in construction. (Pa378) The trial court apparently overlooked that evidence, as it was not referenced anywhere in its rulings.

The very fact that AvalonBay did not seek the penalty while the parties were working out the details of the Resolution despite the passage of more than thirty (30) days after the vote, shows that the Board's conduct did not violate the Settlement Agreement. In recognition of this obvious incongruity, AvalonBay argues now in opposition that it could have sought a penalty from thirty (30) days after the vote, but it did not; and, in fact, AvalonBay only asked for the Resolution to be adopted at its November 28, 2022 meeting and declared invocation of the penalty clause if no action was taken at that meeting. (Pa264). Notwithstanding, the trial court assessed penalties from October 24, 2022 until December 12, 2022 when the Resolution was adopted, finding that the Resolution should have been adopted on October 24, 2022 (Pa31), which was contrary to AvalonBay's own demand.

Moreover, if AvalonBay believed the penalty began in October, it should have provided notice of intent to seek a penalty in October, but it did not. AvalonBay's

claims of wrongful delay in the adoption of the Resolution are barred by the doctrine of laches since AvalonBay's delay in making a claim to a credit a month and a half later and lack of any effort between November 21, 2022 and when it filed its motion are unexplainable, unexcusable and unreasonable to the detriment of the Township Defendants and taxpayers. See Mancini v. Township of Teaneck, 179 N.J. 425, 435-436 (2004); Knorr v. Smeal, 178 N.J. 169, 181 (2003); Borough of Princeton v. Mercer Cty, 169 N.J. 135, 157 (2001); Lavin v. Board of Educ. of City of Hackensack, 90 N.J. 145 (1982). In Lavin, the Supreme Court adopted a definition of laches as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party" that operates as a bar. Lavin, 90 N.J. at 151 (citations omitted). Furthermore,

> "Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if, plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; … or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim."

Id. at 151-152 (citations omitted). The trial court seemingly failed to consider the laches arguments as there is no mention whatsoever of laches in its rulings. The imposition of delay penalties is contrary to law and not supported by the record.

POINT IV

THE TRIAL COURT IMPROPERLY SET ASIDE THE SUPPLEMENTAL RESOLUTION BASED ON AN INCOMPLETE RECORD.

Contrary to black letter law, the trial court did not give substantial deference to the Board's decisions and did not allow "wide latitude in their delegated discretion." See Jock v. Zoning Bd. of Adjustment, Twp. of Wall, 184 N.J. 562, 597 (2005). The trial court also overlooked settled law that a Board, in granting a land use application, may impose conditions to safeguard the public interest, so long as the conditions are reasonable and advance the purposes of zoning. See generally, Berninger v. Board of Adjustment, 254 N.J. Super. 401 (App. Div. 1991); aff'd o.b., 127 N.J. 226 (1992). Based on the foregoing legal authorities, a trial court can only set aside a condition in a land use approval if it is unreasonable, arbitrary or capricious. The trial court made no finding that the condition requiring an elevator in Building E was unreasonable, arbitrary, capricious, or contrary to the Mt. Laurel doctrine, because it was not.

AvalonBay argues that the elevator is not required under the UCC and, thus, it may not be a condition of the development approval. However, as acknowledged by AvalonBay in this appeal, the UCC sets forth the minimum standards for construction (Db45); development approvals may require

compliance with higher standards. See Cherry Hill Towers, L.L.C. v. Township of Cherry Hill, 407 F.Supp.2d 648, 653 (D.N.J. 2006).

There is nothing - and as a matter of public policy, can be nothing - in the Settlement Agreement that mandated that the Board approve AvalonBay's site plan application. There is also nothing in the Settlement Agreement that required the Board to compromise the safety and welfare of its first responders or of the future residents and guests of Building E. The Board's decision to require the installation of an elevator in Building E to make it in parity with the other buildings was not unreasonable, arbitrary or capricious, nor against the law. By including that condition, the Board set a standard designed to promote the public health, safety and general welfare, which is consistent with the foremost purpose of the Municipal Land Use Law ("MLUL"). See N.J.S.A. 40:55D-2a.

In any event, it is not for the courts to substitute its conception of what the public welfare requires in place of the conception of the local land use body. Pascack Assoc'n, Ltd. v. Mayor & Council of the Twp. of Washington, 74 N.J. 470, 485 (1977). A municipality may condition a land development approval upon the developer's installation of improvements necessary for the protection of the public interest. Divan Builders v. Wayne Tp. Planning Bd., 66 N.J. 582,595 (1975). Moreover, "[t]he protection of apartment dwellers has long

been recognized as consistent with the public health, safety and welfare." State v. C. I. B. Int'l., 83 N.J. 262, 272 (1980).

Furthermore, where a Mt. Laurel judge evaluates whether a resolution by a Board was contrary to the intent of a settlement agreement, it must do so based on the terms of the settlement agreement and the full record of proceedings before the Board, including the transcripts. Morris County Fair Housing Council v. Boonton Twp., 220 N.J. Super. 388, 403-404 (Law Div. 1987), aff'd as modified, 230 N.J. Super. 345 (App. Div. 1989) (holding it is the responsibility of a Board, not a Mt. Laurel judge, to evaluate the appropriateness of a site plan application and a Mt. Laurel judge must give substantial deference to conditions on Mt. Laurel developments imposed by a Board to promote the health, safety and welfare, as here). There were no transcripts in the record and, for that additional reason, the ruling to set aside the Supplemental Resolution must be reversed with an order of remand for a hearing with consideration of a proper record including transcripts.

CONCLUSION

For the foregoing reasons, the Orders dated August 8, 2023 and December 19, 2023 should be reversed.

Respectfully submitted,

Dated: May 27, 2024

Mary Anne Groh

Order Filed
February 5, 2021

CLEARY GIACOBBE ALFIERI JACOBS, LLC
169 Ramapo Valley Road, Upper Level
Oakland, New Jersey 07436
Telephone: (973) 845-6700
Brian M. Chewcaskie, Esq. (#021201984)
Attorneys for Co-Petitioner Township of Wayne

IMO the Application of the Township of Wayne and the Planning Board of the Township of Wayne,	SUPERIOR COURT OF NEW JERSEY PASSAIC COUNTY LAW DIVISION, CIVIL PART DOCKET NO.: PAS-L-2396-15 **ORDER SETTING ASIDE ORDER DATED NOVEMBER 10, 2020 *NUNC PRO TUNC***

This matter having been opened to the Court, by Cleary Giacobbe Alfieri Jacobs, LLC, attorneys for co-petitioner Township of Wayne ("the Township") (Brian M. Chewcaskie, Esq. and Mary Anne Groh, Esq. appearing), on notice to Cavaliere & Cavaliere, Esqs., P.C., attorneys for co-petitioner Planning Board of the Township of Wayne (Matthew Cavaliere, Esq. appearing); Bisgaier Hoff, LLC, attorneys for Intervenors Wayne Bridge Plaza, LLC and Wayne Property Holdings, LLC (Richard J. Hoff, Jr., Esq. appearing on behalf of Wayne Bridge Plaza, LLC); Fox Rothschild, LLP, attorneys for Intervenor/Defendant K. Hovnanian North Jersey Acquisitions, LLC; Inglesino Webster Wyciskala Taylor, LLC, attorneys for Intervenor/Defendant AvalonBay Communities, Inc. ("AvalonBay") (Derek W. Orth, Esq., appearing); Fair Share Housing Center ("FSHC") (Adam Gordon, Esq. and Bassam F. Gergi, Esq. appearing) and the Court-Appointed Special Master Christine A. Nazzaro-Cofone, P.P., A.I.C.P. (Ms. Cofone appearing); and the Court having reviewed and considered the moving papers and the opposition by FSHC;

and having heard and considered the arguments of counsel and the Special Master, and for good cause shown;

It is on this 5 day of Feb 2021,

ORDERED and adjudged as follows:

1. Based *inter alia* upon new information presented to the Court regarding efforts by the Township to comply with its Mt. Laurel constitutional obligations, the Court grants the Township's motion for reconsideration and finds that the Township of Wayne is not determined to be constitutionally non-compliant.

2. The Order dated November 10, 2020 is set aside *nunc pro tunc*.

3. Temporary immunity from builder's remedy suits is hereby restored *nunc pro tunc* as of November 10, 2020 and will continue on condition that the Township complies with the terms of this Order. This provision shall not affect the claims and defenses in the builder's remedy suit instituted by AvalonBay on August 5, 2020.

4. Notwithstanding the provisions appearing in the Settlement Agreements with Wayne Bridge Plaza, LLC and Wayne PSC, LLC, which call for the introduction, consistency review and second reading ("Passage") of the zoning ordinances intended to implement and effectuate those Settlement Agreements to occur after the Court conducts a Fairness Hearing thereon, the Township and the Planning Board, by stated consent, shall introduce the zoning ordinances prior to the Fairness Hearing; if the second reading(s) shall occur prior to the Fairness Hearing, such Passage shall remain subject to the Fairness Hearing.

5. The Court will conduct a Fairness Hearing as to the settlements with Wayne Bridge Plaza, LLC; AvalonBay Communities, Inc.; and Wayne PSC, LLC on March 23, 2021 at 10:00 a.m., the particulars for which will be addressed by a separate Order.

6. The Township will continue to work expeditiously to reach a memorandum of understanding ("MOU") within thirty (30) days for the property commonly referred to as the Toys R Us property and a fully-executed agreement within sixty (60) days after execution of the MOU. The Township will advise the Special Master if it experiences difficulties in reaching these goals to allow the Special Master to intercede if need be. Any failure by the developer of the Toys R Us property to act on a timely basis will not be held against the Township.

7. To assist the Township to continue its progress toward compliance, on or before February 10, 2021, FSHC shall provide to the Special Master and counsel for the Township a written response to the Township Planner's Memorandum served on January 13, 2021 and any supplemental documents provided by the Township for Lincoln Crossing and Nellis Commons as contemplated by the Memorandum. Thereafter, FSHC and the Township will work together to finalize the housing credits analysis.

/S/ Thomas F. Brogan
Thomas F. Brogan, P.J.Cv.

x Opposed
_ Unopposed

The form of the Order has been settled by the consent of all parties to the action that appeared in connection with the motion and the Special Master.

For the reasons set fort on the record 1/22/21