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| TOWNSHIP OF MORRIS<br><br>Plaintiff,<br><br>vs.<br><br>BOROUGH OF MORRIS PLAINS, 169 JOHNSON ROAD, LLC, JOHN DOE 1-10 ABC CORPS. 1-10 | ) SUPERIOR COURT OF NEW JERSEY<br>) LAW DIVISION: MORRIS COUNTY<br>)<br>) DOCKET NO. MRS-L-1589-22<br>)<br>)<br>) | *Civil Action* |

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# BRIEF ON BEHALF OF DEFENDANT/APPELLANT

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On the Brief:

John E. Horan, Esq. (040212001)

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## CASES CITED

## PRELIMINARY STATEMENT

This matter is a straightforward contract dispute the Borough of Morris Plains ("Borough") and the Township of Morris ("Township") regarding which public entity is entitled to sewer connection fees for properties located in the Township of Parsippany.

The contractual relationship between the Borough and the Township as it pertains to this appeal began in or around 1971. At that time the Borough had upgraded its sewer system to allow for increased sewage from Parsippany that would flow through the Borough and eventually be treated in the Township at the Township's sewerage treatment plant. Subsequently, properties in the Township of Parsippany began to connect into the Borough's sewer system.

Since 1971 there have been various agreements between the Borough and Township regarding the sewage system and entitlement to connection fees for properties outside of the Borough. The most recent agreement between the parties was entered into between the Borough and the Township in 1999 and each party believes that agreement entitles it to the connection fees for the properties located outside the Borough, in Township of Parsippany.

## PROCEDURAL HISTORY

1. On or about September 19, 2022, the Township filed a Complaint for, among other things, breach of contract as a result of sewer connection fees. Da16.
2. On or about October 21, 2022, the Borough filed an Answer. Da158.
3. The parties engaged in discovery through October 4, 2023.
4. On October 6, 2023, the Township filed a Motion for Summary Judgment. Da1.
5. On October 24, 2023, the Borough filed a Cross-Motion for Summary Judgment. Da146.
6. Oral argument on the Motions was heard by the Honorable Noah Franzblau, J.S.C, on December 8, 2023. Da170.
7. On December 8, 2023, the Court granted the Township's Motion for Summary Judgment and denied the Borough's Cross-Motion for Summary Judgment. Da166.
8. On January 17, 2024, the Borough filed the subject Notice of Appeal. Da168.

## STATEMENT OF FACTS

On or about December 3, 1971, the Borough of Morris Plains ("Borough") and Township of Morris ("Township") entered into an agreement ("1971 Agreement") in which sewerage from the Borough would flow from the Borough to the Township and the Township would provide metered bulk sewerage treatment at its treatment facilities. Da25. The Agreement required the Borough to "construct and commence operations of a system of mains for the collection of sewerage within the Borough". Da26. Thereafter, on or about July 6, 1973, the parties entered into a new agreement ("1973 Agreement") to take effect immediately. Da44. The 1973 Agreement provided that the Township would receive a connection fee for houses within the Borough for connections into the sanitary sewer system. Da45.

On our about December 31, 1981, in response to recent development at Block 200 Lot 1 in the Township of Parsippany, an agreement was entered between the Borough and Township regarding sewerage treatment. Da47. Thereafter, on or about November 14, 1983, the Township, the Borough and Township of Parsippany entered into an agreement ("1983 Agreement") concerning seven (7) residential units located along Johnson Road in the Township of Parsippany. Da88.

Subsequently, on or about October 5, 1984, another agreement ("1984 Agreement") was entered into between the Township and Borough regarding connection fees along Johnson Road in the Township of Parsippany for residential units. Da94. The 1984 Agreement provided that the connection fee for any new connections along Johnson Road in the Township of Parsippany would be paid to the Township. Da96.

Thereafter on December 3, 1999, the Borough and the Township entered into another agreement for "Bulk Sewer Treatment Services" ("1999 Agreement"). Da103. The 1999 Agreement was entered into presumably because the 1973 Agreement was good for a period of twenty-five (25) years and expired on December 31, 1998. Da27. The 1999 Agreement provides specifically that connection fees shall be paid to the Borough. Da115. In that regard Section 6.1 of the 1999 Agreement provides "Section 6.1 Connection Fees – The Borough shall have the right to impose and receive connection fees as permitted by law to any user of said services in the Borough and may retain all said amount received without claim from the Township." Da115.

Several years later, in response to an emergent situation that was unforeseen involving sewerage issues, the Township and the Township of Parsippany were involved in litigation against each other. As a result of

the litigation, the Township of Parsippany and the Township entered into a settlement agreement in 2017 ("2017 Settlement Agreement"). Da120. The settlement agreement provided that connection fees from the Township of Parsippany would be paid to the Township. The Borough was not a party to the litigation between the Township and the Township of Parsippany, and did not participate in the negotiations surrounding the 2017 Settlement Agreement. Moreover, the Borough never acquiesced to the 2017 Settlement Agreement and was never provided with a copy of the it.

In 2021 there was an application for eight-seven (87) residential units on Johnson Road in the Township of Parsippany to connect into the sanitary sewer system in the Borough. Da130. In accordance with Section 6.1 the 1999 Agreement, the Borough collected the connection fees. Da115. Thereafter, the Township claimed it was entitled to the connection fee, which was objected to by the Borough. Da134. The within action that commenced on or about September 13, 2022. Da16.

# LEGAL ARGUMENT

## POINT I

## THE BOROUGH IS ENTITLED TO ALL CONNECTION FEES FOR PROPERTIES OUTSIDE ITS BOUNDARIES (Da170)

### A. The Parties are Governed by the 1999 Agreement

It is well settled that in order for a valid contract there must be four (4) elements that are shown to exist between the parties. There must be an offer, the offer must be accepted, there must be consideration, and performance by the parties to the contract. Johnson & Johnson v. Charmley Drug Co, 11 N.J. 526, 539 (1953); County of Morris v. Fauver 153 N.J. 409 (1993). A breach of contract occurs when one party fails to adhere to its obligations under the contract, and the other party has both lived up to its obligations under the contract, and has been damaged by the breach. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007).

In situations such as the present matter wherein the issue involves contract interpretation, the plain language of the contract shall govern if there exists no ambiguity. Township of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011). Clear and unambiguous language should control. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 202 (1999). Most importantly, interpretation of a contract is a question of law that should be decided by the

court. Hess Corp. v. ENI Petroleum US, LLC., 435 N.J. Super. 39, 59 (App. Div. 2014). The court may not rewrite a contract or grant a better deal than for which the parties expressly bargained. Solondz v. Kornmehl, 3147 N.J. Super. 16, 21 (App. Div. 1993).

In the present matter the controlling contract is clear, and therefore, should be enforced upon the plain language of the contract. Application of the clear language of the contract demonstrates that there was no breach by the Borough and the Borough is entitled to the subject connection fees.

The first agreement between the Borough and the Township that provided for connection fees is an agreement executed on July 6, 1973 (the "1973 Agreement"). The 1973 Agreement addresses that connection fees will be paid to the township. Specifically, the 1973 Agreement provides:

> The Borough is hereby given permission to connect the existing sanitary sewer system, houses in the Borough of Morris Plains, and its agrees to pay the Township a fee of twenty-five dollar for each connection fee so made, prior to October 31, 1973, which fee will cover the period from the date of connection to January 1, 1974. Da46.

The 1973 Agreement was a result of an emergent matter at the time. The parties still were bound by the 1971 Agreement which was to remain in effect until December 31, 1998. Da27. Ultimately, both the 1971 and 1973 Agreements

became null and void with the execution of the 1999 Agreement, which is the most recent contract between the Borough and Township.

In 1984 the Borough and Township entered into another agreement as a result of the construction of dwellings along Johnson Road in the Township of Parsippany. Da94. The 1984 Agreement provides in pertinent part:

> That there shall be imposed a sewer connection fee of $1,200.00 each for any new connection for single family residences along Johnson Road in the Township of Parsippany Troy-Hills, which sewer connection fee shall be paid to the Township of Morris. Da96.

It is important to note that the 1984 Agreement does not currently govern or bind the Borough and the Township. As noted earlier, the 1971 Agreement was set to expire on December 31, 1998, and was replaced by the 1999 Agreement, which remains in effect today. Accordingly, the 1971, 1973 and 1984 Agreements are not presently relevant to this matter. It is well settled that a subsequent contract supersedes a prior inconsistent contract to the extent of the inconsistencies. Rosenberg v. D. Kaltman & Co., 28 N.J. Super, 459 (Ch. Div. 1953).

There was a 2017 Agreement that was executed between the Township of Parsippany and the Township of Morris that the Township relied upon during the Motion for Summary Judgment with the lower court. Da120. That 2017 Agreement arose from litigation between the Township of Parsippany and the

Township of Morris in which the Borough was neither a named party, nor an interested party, and was part of a settlement agreement between those public entities. The Borough was not involved in the negotiations surrounding the 2017 Agreement and did not consent to it. Accordingly, the 2017 Agreement has no binding effect upon the Borough, and no bearing upon the relationship between the Borough and the Township as to connection fees.

It is without question, it is the 1999 Agreement that governs the Borough and Township and determines who is entitled to the connection fees for the property at 169 Johnson Road in the Township of Parsippany.

**B. The 1999 Agreement Provides the Borough is Entitled to the Connection Fees**

On December 3, 1999, the Borough and Township entered into the 1999 Agreement. Da103. There are only a few provisions in the contract that discuss fees. The clear language of the 1999 Agreement establishes that the Borough is entitled to the connection fees. The plain language of a contract controls if it is unambiguous and there is no ambiguity. Bergen, supra. at 202. Courts are to enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract." Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001). "Contracts are to be read as a whole in a

fair and common sense manner." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014)

In the present matter the first relevant section of the 1999 Agreement is Section 6.1. That is the only section in the entire agreement that contains the term "Connection Fees." Section 6.1 specifically provides:

> Section 6.1 Connection Fees – The Borough shall have the right to impose and receive connection fees as permitted by law to any user of said services in the Borough and may retain all said amount received without claim from the Township. Da115.

The above language unambiguously provides that the Borough is entitled to connection fees of any user of services in the Borough. The Township takes the position that the Borough retains connection fees for any user located in the Borough, but connection fees outside of the Borough go to the Township. However, the plain language of the contract in Section 6.1 states its any user of the services in the Borough. The service "in the Borough" referenced in Section 6.1 is the use of the Borough's sewer lines to transport the sewerage to the Township where it will ultimately be treated by the Township's treatment facility.

Here, the Township of Parsippany is using the Borough's sewer line to transport sewage to the Township of Morris where it will be treated at the Township's treatment facility. Therefore, the Borough is entitled to those

connection fees as the Township of Parsippany is connecting into a sewer line that was constructed, owned and maintained by the Borough.

The Township argued that "in the Borough" in Section 6.1 referred to only users who were located in the Borough. That position violates the clear language of the 1999 Agreement. If the intent was that the Borough received connection fees for only users "in the Borough" it would state "any users in the Borough of said services" or some similar language, as opposed to what it actually says which "any users of said services in the Borough." Additionally, contracts must be read with common sense. Obviously, the Borough is entitled to any connection fees for connection in the Borough because it's the Borough's sewer pipe. There would be no need to put that into the 1999 Agreement under section 6.1 and dedicate an entire section to it.

The second provision in the 1999 Agreement, which was discussed by the lower court is Section 6.5. Pursuant to section 6.5:

> Out of town buildings – The parties acknowledge that some users are located outside of the Borough for which the sewerage is transmitted through mains and lines through the Borough to the Township Treatment Plant. The Township agrees that it will bill said commercial users directly and further acknowledges that the Borough may reserve the right to impose an additional fee upon such user, for the use of the Borough pipes and other property by said user, which fee shall be billed to the user by the Borough.

The fees that are set forth in Section 6.5, however, are not connection fees but are the fees that are associated with the sewerage treatment services provided by the Township at its treatment facility.

The fees referenced in Section 6.5 are the fees set forth in Section 4.1 of the 1999 Agreement, specifically the service charge and that annual rate for the bulk sewerage treatment. These fees are broken down in Section 4.1 based upon the residential and commercial use. The 1999 Agreement also establishes that the rates charged to Borough residents shall be the same as the rates charged to Township residents, and that the Township will notify the Borough of any rate increases.

It is important to note that Section 4.3 of the 1999 Agreement in reference to the fees set forth in Section 4.1 provides that "The Township will bill Borough no later than December 1 for the coming year. Payment will be made in four (4) equal installments due on January 1, April 1, July 1 and October 1." It logically follows then that the language in Section 6.5 that the "Township agrees that it will bill said commercial users directly" when referring to out of town buildings is seeking to remove the Borough as the middle man for charges related to sewerage treatment at the Township's treatment facilities that are set forth in Section 4.1 for properties outside of the Borough, for properties within the Borough, Section 4.3 governs how the fees will be collected.

It also logically follows that if the Township were permitted to bill out of town buildings directly for connection fee, Section 6.1 of the 1999 Agreement would specifically provide for it. Indeed, the only section in the 1999 Agreement that addresses connection fees specifically is Section 6.1, which again, provides that the Borough may impose and receive connection fees from any user of the Borough's services. No where is Section 6.1, or anywhere else in the 1999 Agreement, does it specifically indicate that the Township may ever collect connection fees.

Based upon the above, it is unambiguous that the Borough may collect a connection fee for the use of its sewer line pursuant to Section 6.1. The Township, on the other hand, may collect its fee for the treatment facility that are set forth in Section 4.1 directly from users outside the Borough pursuant to Section 6.5 without the Borough having to be responsible for collection as the Borough is for users within the Borough pursuant to Section 4.3

C. The Trial Court Improperly Interpreted The 1999 Agreement

The Trial Court held that the 1999 Agreement entitled the Township to the collection fees. Specifically the court held:

> First, the court finds the terms of the 1999 Agreement clear and unambiguous. The court finds that the plain language of the 1999 Agreement, Section 6.5 entitles Plaintiff (Township) to all connection fees for users outside of the Borough for which sewerage is transmitted through mains and lines through the

> Borough to the Township Treatment Plant. That the term "connection fee" is not used explicitly within Section 6.5 is of no moment, as this court's interpretation of Section 6.5 is read together with Section 6.1 to provide it with further meaning. Da178.

The trial court also concluded that the connection fee in Section 6.1 are for services "in the Borough" are the only connection fees the Borough is entitled to and Section 6.5 permits to Township to collect all other connection fees outside the Borough.

Again, the lack of explicit use of the term "connection fee' in Section 6.5 is significant. If the Township was entitled to connection fees outside of the Borough it should state that in Section 6.1, which again is the only section in the entire 1999 Agreement that explicitly states the term "connection fees." Instead, the trial court relied upon Section 6.5 that allows the Township to "bill" out of town users directly. As noted earlier, it is clear that language governs fees for services rendered by the Township for the actual treatment of the sewage at the Township's treatment plant. Otherwise if it was connection fee it would have appeared in Section 6.1.

The trial court also made no reference to the fees set forth in Section 4.1. Those fees clearly establish the fee for the sewer treatment plant services and Section 4.3 places an obligation upon the Borough to collect the fees in Section

4.1 from users within the Borough. Section 6.5 eliminates the Borough from having to collect the Section 4.1 fees from users outside the Borough.

Lastly, the trial court held that the past practices between the Borough and the Township established that the Township is entitled to the connection fees because all of the earlier agreements state that the Township receives connection fees for all properties outside of the Borough. However, while it is true the agreements provide the Township with the connection fees the fact that the 1999 Agreement in Section 6.1 makes no mention of the Township receiving connection fees, indicates that this was an agreed upon arrangement in which the Borough would receive connection fees from "any users." Moreover, these earlier agreements were all superseded by the 1999 Agreement. Consequently, the trial court erred in holding that the earlier agreements established a past practice that the Township was entitled to connection fees.

## CONCLUSION

For all of the above stated reasons, the trial court's granting of the Township's Motion for Summary Judgment must be reversed.

Respectfully submitted,

By: _____
John E. Horan

Dated: 4/30/24

# Superior Court of New Jersey
## Appellate Division

Docket No. A-001464-23

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| TOWNSHIP OF MORRIS,<br><br>*Plaintiff-Respondent,*<br><br>v.<br><br>BOROUGH OF MORRIS PLAINS, 169 JOHNSON ROAD, LLC, JOHN DOE 1-10, ABC CORPS. 1-10,<br><br>*Defendants-Appellants*. | CIVIL ACTION<br><br>On Appeal From:<br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION, MORRIS COUNTY<br><br>Docket No. MRS-L-1589-22<br><br>Sat Below:<br>Hon. Noah Franzblau, J.S.C.<br><br>Date of Submission: July 1, 2024 |

**BRIEF ON BEHALF OF**
**PLAINTIFF-RESPONDENT TOWNSHIP OF MORRIS**

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## PRELIMINARY STATEMENT

This appeal arises out of Orders entered by the Superior Court of New Jersey granting Plaintiff-Respondent Township of Morris' (the "Township") Motion for Summary Judgment and denying Defendant-Appellant Borough of Morris Plains' ("Appellant" or "Borough") Cross-Motion for Summary Judgment. Therein, the trial court correctly determined the Township was entitled to all connection fees concerning properties located on Johnson Road in the Township of Parsippany-Troy Hills pursuant to contracts entered into by and between the Parties as well as the Parties' course of performance and dealing.

While affording Appellant all reasonable inferences, the trial court was correct in determining the contract clearly and unambiguously entitles the Township to all connection fees for the Subject Property. The trial court was also correct in finding the Parties' course of performance and course of dealing confirmed the Township is entitled to connection fees.

Finally, the trial court correctly determined the Borough breached the Parties' agreement by improperly billing and collecting connection fees due and owing the Township.

Accordingly, in affording Plaintiffs all reasonable inferences from the factual record, there is no genuine issue of material fact as to the Township's

entitlement to the connection fees at issue. All competent record evidence unequivocally established the contract's plain language requires payment of the subject connection fees to the Township.

As such, Summary Judgment was properly granted as to the Township and Appellant has failed to establish the trial court erred in any respect. Therefore, and for the reasons established herein, it is respectfully submitted the Appellate Division should affirm the trial court's decision in its entirety.

## PROCEDURAL HISTORY

On September 13, 2022, the Township filed a Complaint in the Superior Court of New Jersey, Morris Vicinage, bearing Docket No. MRS-L-1589-22. [Da16-Da24]. On October 20, 2022, 169 Johnson Road, LLC filed its Answer. On October 21, 2022, Appellant filed its Answer with Jury Demand. [Da158-165].

On October 6, 2023, the Township filed a Motion for Summary Judgment (the "Motion"). [Da1-Da145]. On October 24, 2023, Appellant filed a Cross-Motion for Summary Judgment (the "Cross-Motion"). [Da146-Da157]. On December 4, 2023, the trial court heard Oral Argument on the Motion and Cross-Motion. On December 8, 2023, the Court entered: (i) an Order and Statement of Reasons granting the Township's Motion [Da166-167; Da170-180]; and (ii) an Order and Statement of Reasons denying Appellant's Cross-Motion [Da168-Da180].

Thereafter, on January 17, 2024, Appellant initiated the instant appeal of the trial court's rulings by filing a Notice of Appeal in the Superior Court of New Jersey, Appellate Division. [Da181-Da184].

## COUNTER-STATEMENT OF FACTS

On or about December 3, 1971, the Township and Appellant entered into "An Agreement for a Bulk Sewage Treatment Service" (the "1971 Agreement"). [Da25-Da43]. Pursuant to the 1971 Agreement, "Township agrees to supply metered bulk sewage treatment service for [Appellant]" and "[Appellant] agrees to construct and commence operations of a system of mains for the collection of sewage within the [Appellant]" beginning on January 1, 1974. [Da26-Da27]. The 1971 Agreement specifically provided:

> No industrial or commercial connection shall be made to Borough's system unless Township has been supplied with a complete analysis of the sewage proposed to be delivered and has given its prior written approval, which will not be unreasonably withheld, so that Township can be assured that said sewage will conform with applicable standards and will not overburden the facilities. Township may require pre-treatment before sewage is introduced into the collection system. [Da28].

On or about July 6, 1973, the Township and Appellant entered into a subsequent "Agreement" (the "July 1973 Agreement") permitting Appellant to connect into the Township's system earlier than contemplated by the 1971 Agreement. [Da44-Da46]. More specifically, the July 1973 Agreement explicitly provided a connection fee was due and owing to the Township:

> The Borough is hereby given permission to connect to the existing sanitary sewerage system, houses in the Borough of Morris Plains, and it agrees to pay to the

> Township a fee of twenty-five dollars for each connection so made, prior to October 31, 1973, which said fee will cover the period from the date of connection to January 1, 1974. Any connection made between November 1, 1973 and January 1, 1974, will be charged a fee of $15.00 per connection. Thereafter, that is to say, after January 1, 1974, then the terms of payment as set forth in the previous contract dated December 1971, will apply. [Da45].

On November 1, 1973, an Agreement concerning use of the Borough's sanitary sewerage system to carry waste from an office building located on Route 10 and Johnson Road in the Township of Parsippany-Troy Hills ("Parsippany") was entered into by and between the Borough, Parsippany, and the property owner (the "November 1973 Agreement"). [Da48]. The November 1973 Agreement explicitly provided it was subject to and contingent upon the approval of the Township. [Da48]. However, despite the Township never approving the November 1973 Agreement, the parties thereto nevertheless operated under its terms and sewage from the property was transmitted to and treated by Morris. [Da48]. Upon learning of the foregoing, the Township objected to the November 1973 Agreement. [Da57].

Thereafter, on September 15, 1981, two agreements were entered into by and between the Township, the Borough, Parsippany Associates ("Assignee"), and Trustees of the General Electric Pension Trust ("Trustee") regarding property located at Block 200, Lot 1.01 in Parsippany. [Da47-Da71].

The first agreement, entitled "Agreement by and between Township of Morris, Borough of Morris Plains, Trustees of General Electric Pension Trust, and Parsippany Associates" (the "First 1981 Agreement"), required payment to the Township of "sewer service charges as set forth in and required by the ordinances of the Township." [Da49]. The second agreement, entitled "Agreement by and between Township of Morris, Borough of Morris Plains, Trustees of General Electric Pension Trust, and Parsippany Associates" (the "Second 1981 Agreement"), required payment of "a sanitary sewer fee to Morris for the office building complex." [Da61]. Further, the Second 1981 Agreement superseded the November 1973 Agreement in its entirety. [Da65].

On or about December 31, 1981, an "Agreement by and between Township of Morris, Borough of Morris Plains, and the Travelers Insurance Company" (the "1981 Johnson Road Agreement") was entered into regarding property located at Block 200, Lot 1 in Parsippany. [Da72-Da87]. Pursuant to the 1981 Johnson Road Agreement, the property owner agreed to pay a sanitary sewer service fee directly to the Township in connection with the office building complex located on Johnson Road. [Da78].

Subsequently, on or about November 14, 1983, an "Agreement" was entered into by and between the Borough and Parsippany (the "1983 Johnson Road Agreement"). [Da88-Da93]. Pursuant to the

1983 Johnson Road Agreement, seven (7) residential units located on Johnson Road in Parsippany were permitted to connect into the Borough's sewage system which is ultimately treated by the Township. [Da88, Da91].

On October 5, 1984, the Township and the Borough executed an Agreement concerning properties located on Johnson Road in Parsippany (the "1984 Johnson Road Agreement"). [Da94-Da101]. Pursuant to the 1984 Johnson Road Agreement, the Borough explicitly agreed to remit to the Township the sewer connection fee for five (5) of the residential units provided for in the earlier 1983 Johnson Road Agreement which did not include the Township. Paragraph 2 of the 1984 Johnson Road agreement provides:

> the Borough, upon signing this agreement, shall pay the sum of $3,000.00 to the Township of Morris, which represents the sewer connection fees for five residential lots along Johnson Road previously connected in the Borough of Morris Plains Sanitary Sewer System. [Da96].

Further, in the 1984 Johnson Road Agreement, the Borough explicitly agreed any new connection along Johnson Road required a connection fee to be paid to the Township, not the Borough. [Da96]. Explicitly, Paragraph 3 of the 1984 Johnson Road Agreement provides in relevant part:

> . . . there shall be imposed **a sewer connection fee . . . for any new connection . . . along Johnson Road in the Township of Parsippany Troy Hills, which sewer connection fee shall be paid to the Township of Morris** in accordance with the Agreement between the

> Township of Parsippany Troy Hills and the Borough of Morris Plains . . .. [Da96].

Similarly, on March 23, 1988, the Township of Morris Committee gave its approval for the owner of Johnson Plaza Association of Parsippany-Troy Hills to connect to the Township's treatment plant, via the Borough. [Da102]. At this time, it was the Township who was entitled to and received the connection fee, not Appellant. [Da102].

On or about December 3, 1999, "An Agreement for Bulk Sewer Treatment Services Between the Township of Morris and the Borough of Morris Plains" (the "1999 Agreement") was entered into. [Da103-Da119]. Under the 1999 Agreement, the Township agreed to continue supplying bulk sewage treatment services for Appellant. [Da104]. Further, the 1999 Agreement makes clear and unambiguous the Township is entitled to all connection fees for properties treated by the Township's plants and not located within Appellant's boundaries. Specifically, section 6.5 of the 1999 Agreement provides in relevant part:

> Out of town buildings – The parties acknowledge that some users are located outside of the Borough for which sewerage is transmitted through mains and lines through the Borough to the Township Treatment Plant. The Township agrees that it will bill said commercial users directly and further acknowledges that the Borough may reserve the right to impose an additional fee upon such user, for the use of the Borough pipes and

> other property by said user, which fee shall be billed to the user by the Borough.
>
> [Da115-Da116].

Further, on June 7, 2017, a "Settlement Agreement and Release" (the "2017 Agreement") was entered into by and between the Township and Parsippany. [Da120-Da129]. Therein, the parties agreed for out-of-town properties whose sewage is treated at the Township's treatment plants, albeit with the effluent flowing through the Borough, the connection fee is due and owing to the Township. [Da123-Da124].

Thereafter, in 2021, Bowman Consulting Group, LTD ("Bowman"), on behalf of Developer, applied for authorization to connect into the existing sanitary sewer system in anticipation of the construction of an 87-unit residential development at 169 Johnson Road, Block 200, Lot 8 (the "Subject Property"). [Da130-Da133]. Bowman requested the Township endorse a Treatment Works Authorization Endorsement ("TWA"), as the sewage flow from the Subject Property will ultimately be conveyed, through the Borough, to the Butterworth Treatment Plan owned and operated by the Township. [Da130-Da133].

As such, Developer was required to pay a connection fee to the Township in accordance with the Township's Municipal Code. Specifically, the Township's Municipal Code § 410-3(B) mandates a

$6,000.00 connection fee per unit. As the Developer proposes a project of 87 residential units, [Da131], the Township is due a connection fee of $522,000 (the "Connection Fee").

The previous owner of the Subject Property submitted a connection fee to the Township of $17,250.00 for 3,750 GPD flow. As such, Developer is entitled to a reduction on the flow previously paid (3,750 GPD), which amounts to $54,000.

The TWA Application indicated that eighteen (18) of the proposed units will be affordable in accordance with the applicable Council on Affordable Housing Standards. [Da131]. As such, those eighteen (18) units are entitled to a fifty percent (50%) reduction on the connection fee, or a $3,000 connection fee per unit. Similarly, the Developer is entitled to COAH credit to the connection fee of $54,000. Thus, the total Connection Fee has been reduced by $108,000. Given the foregoing, the Connection Fee in full of $414,000 is due and owing to the Township

On or about February 6, 2022, in pursuit thereof, on February 6, 2022, the Township sent a formal demand ("Demand Letter") to Bowman requesting payment of the Connection Fee pursuant to the Township Code and the 1999 Agreement. [Da134-Da135]. On March 11, 2022, the Borough responded to the Demand Letter and contested the Township's claim to the connection fee.

[Da136-Da137]. Therein, in reliance on an unrelated provision in the 1999 Agreement, the Borough claimed its entitlement to the Connection Fee. [Da136]. However, there is no basis in law or fact for the Borough's claim to the Connection Fee due for the Subject Property.

On or about June 24, 2022, an Escrow Agreement was entered into by and between the Township, the Borough, Developer, and Horan & Aronowitz, LLP ("Escrow Agent") (the "Escrow Agreement"). [Da138-Da142]. On August 16, 2022, and pursuant to § 2 of the Escrow Agreement, the Township formally demanded that each of the Borough and Developer provide written instructions to the Escrow Agent for the immediate release of the escrowed funds to the Township. [Da143-Da145]. After the Borough failed to respond to the August 16, 2022, Demand Letter, the Township commenced the instant action by filing a Complaint in the Superior Court of New Jersey, Morris Vicinage. [Da16-Da24].

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW.

The standard of review for a summary judgment motion is, "de novo, employing the same standard used by the trial court." Tarabokia v. Structure Tone, 429 N.J. Super. 103, 106 (App.Div.2012) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998), certif. denied, 154 N.J. 608 (1998)). Under this standard, a party against whom a claim is made may move for summary judgment in its favor before the case is tried. R. 4:46-1.

Pursuant to R. 4:46, a party is entitled to summary judgment where "there is no genuine issue as to any material fact . . . and . . . the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2. The movant bears the "burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact" regarding the claims asserted. Judson v. Peoples Bank and Trust, 17 N.J. 67, 74 (1954) (citation omitted).

The Supreme Court has cautioned, "a court should deny a summary judgment motion **only** where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)) (emphasis added). "That means a non-moving party cannot defeat

a motion for summary judgment merely by pointing to any fact in dispute." Ibid.

Moreover, "when the evidence is so one-sided that one party must prevail as a matter of law the trial court should not hesitate to grant summary judgment." Id. at 540 (quotations omitted).

Additionally, summary judgment is mandated after:

> adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.
>
> [Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986) (internal quotations omitted).

The standard for such a determination is "whether the competent materials presented . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 529 (1995) (quoting R. 4:46-2). Immaterial or frivolous evidence is insufficient to defeat a motion for summary judgment. Ibid. Moreover, an issue that has only "a single, unavoidable resolution" is not "genuine" under R. 4:46-2. Id. at 540.

## II. THE TRIAL COURT'S ORDER PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE TOWNSHIP AND SHOULD BE AFFIRMED IN ITS ENTIRETY.

### A. The Trial Court Correctly Determined Appellant Breached the Parties' Agreements by Improperly Accepting Connection Fees Due and Owing the Township.

The trial court correctly determined the 1999 Agreement clear and unambiguous insofar as the 1999 Agreement entitles the Township to connection fees related to the Subject Property. Specifically, as explicitly held by the trial court, "**the plain language of the 1999 Agreement . . . entitles [the Township] to all connection fees for users 'outside the Borough** for which sewage is transmitted through mains and lines through the Borough to the Township Treatment Plant.'" [Da178] (emphasis added).

As properly decided by the trial court, and undisputed by the parties, the 1999 Agreement controls this transaction. Section 6.5 of the 1999 Agreement provides in pertinent part:

> Out of town buildings – The parties acknowledge that some users are located outside of the Borough for which sewerage is transmitted through mains and lines through the Borough to the Township Treatment Plant. The **Township agrees that it will bill said commercial users** directly and further acknowledges that the Borough may reserve the right to impose an additional fee upon such user, for the use of the Borough pipes and other property by said user, which fee shall be billed to

> the user by the Borough. [Da115-Da116 (emphasis added).]

As determined by the trial court, the 1999 Agreement clearly and unambiguously provides the Township is entitled to **all** connection fees for properties treated by the Township and not located within the Borough.

Further, despite Appellant's unsupported argument, the trial court properly recognized, "[t]hat the term 'connection fee' is not used explicitly within Section 6.5 is of no moment, as [the trial court'] interpretation of Section 6.5 is read together with Section 6.1 to provide it with further meaning." [Da178].

On appeal, Appellant merely reiterates the same argument properly rejected by the trial court below. Specifically, Appellant claims entitlement to the connection fees pursuant to section 6.1 of the 1999 Agreement. In pertinent part, section 6.1 provides, "[t]he Borough shall have the right to impose and receive connection fees as permitted by law to any user of said services **in the Borough**." [Da115]. As correctly determined by the trial court, a plain reading of the contract clearly demonstrates the flaw in this argument. Namely, the Subject Property is **not located in the Borough**.

Despite Appellant's protestations, it is clear section 6.1 of the 1999 Agreement does not provide Appellant with a legally cognizable basis for its requested relief. Where, as here, the Subject Property is not located in the

Borough but the effluent merely flows therethrough to be treated at the Township's sewerage treatment plants, what the Borough is entitled to is the "wheeling" fee. Given the Subject Property is **not** located in the Borough, the Borough's reliance on Section 6.1 of the 1999 Agreement is misplaced and does not provide for payment of the Connection Fee to Appellant as claimed by Appellant. As such, the trial court correctly construed the 1999 Agreement to provide payment of the connection fees to the Township.

Further, the trial court correctly determined the 1984 Johnson Road Agreement entitles the Township to all connection fees. [Da179-Da180]. Per the 1984 Johnson Road Agreement, **Appellant explicitly agreed any new connection along Johnson Road required a connection fee to be paid to the Township**, not **Borough**. This is because the connection fee's primary purpose is for expansions of the service base to pay a proportionate share of the investment made to construct and maintain the treatment facility. Explicitly, Paragraph 3 of the 1984 Johnson Road Agreement provides in relevant part:

> . . . there shall be imposed **a sewer connection fee . . . for any new connection . . . along Johnson Road in the Township of Parsippany Troy Hills, which sewer connection fee shall be paid to the Township of Morris** in accordance with the Agreement between the Township of Parsippany Troy Hills and the Borough of Morris Plains . . .. [Da96].

As concluded by the trial court, the Subject Property, being one located in Parsippany, is precisely the sort contemplated by this contract. Given the 1984 Johnson Road Agreement's explicit language, the trial court properly determined the Connection Fee is properly due and owing to the Township as done by the Parties in previous instances.

Appellant's argument that the 1999 Agreement superseded the 1984 Johnson Road Agreement is equally unavailing. As noted by the trial court,

> [t]here is nothing in the 1999 Agreement indicating it supersedes the Second 1984 Agreement with respect to Johnson Road residential development in Parsippany or otherwise or othat the Borough would not be entitled to sewer connection fees for residences constructed along Johnson Road in Parsippany. [Da180].

Consistent with the trial court's analysis, "[t]he terms of the second contract must be **so inconsistent** with those of the former contract that **they cannot stand together**." Rosenberg v. D. Kaltman & Co., 28 N.J. Super. 459, 464 (Ch. Div. 1953) (emphasis added). In particular, the 1999 Agreement **is not inconsistent** with the 1984 Johnson Road Agreement. As Appellant concedes in its papers, the only explicit reference to connection fees in the 1999 Agreement is found in Section 6.1.

However, such provision is applicable only to properties located in the Borough, unlike the Subject Property at issue here. As previously stated, the 1984 Johnson Road Agreement **explicitly** provided any new connection

along Johnson Road required a connection fee to be paid to the Township, not Appellant. [Da96]. While the 1999 Agreement concerns properties located in the Borough, the 1984 Johnson Road Agreement concerns those properties which are located on Johnson Road in Parsippany, as is the Subject Property. Given the lack of overlap between these two contracts, there is no inconsistency, and the 1999 Agreement does not supersede the 1984 Johnson Road Agreement.

Given the foregoing, the trial court correctly determined the contracts by and between the Parties unequivocally establish the Township is entitled to all connection fees for properties on Johnson Road in Parsippany.

### B. The Trial Court Correctly Determined the Parties' Course of Dealing and Course of Performance Establish the Township's Right to the Connection Fee.

As properly concluded by the trial court, while the contract is clear and unambiguous, the course of performance and course of dealing further establishes the Township's entitlement to the connection fees. As noted by the trial court, the interpretation of a contract is ordinarily a legal question for the court and may be decided on summary judgment unless "there is uncertainty, ambiguity or the need for parol evidence in aid of interpretation." Great Atl. & Pac. Tea Co. v. Checchio, 335 N.J. Super. 495, 502 (App. Div. 2000).

"The interpretation of the terms of a contract are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting

testimony." Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 92 (App. Div. 2001). Cases involving contract interpretations are particularly suited to disposition by summary judgment. Spaulding Composites Co. v. Liberty Mutual Ins. Co., 346 N.J. Super. 167, 173 (App. Div. 2001), rev'd on other grounds sub nom., Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 176 N.J. 25 (2003), cert. denied, 540 U.S. 1142 (2004).

New Jersey law is well-settled, when the terms of a contract are clear, "it is the function of a court to enforce it as written and not to make a better contract for either of the parties." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). Absent ambiguity, the intention of the parties is to be ascertained by the language of the contract. Dontzin v. Myer, 301 NJ. Super. 501, 507 (App. Div. 1997). "If the language is plain and capable of legal construction, the language alone must determine the agreement's force and effect." CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 120 (App. Div. 2009) (quoting FDIC v. Prince George Corp., 58 F.3d 1041, 1046 (4th Cir. 1995)).

Notably, the trial court properly determined the "Court's interpretation of the 1999 Agreement is consistent with the parties' course of dealings in which [the Township] consistently collected connection fees for properties lying outside the Borough for which sewage was transmitted through mains and lines

through the Borough to the Township Treatment Plant." [Da179]. As summarized by the trial court, "[i]n each of the Second 1981 Agreement, 1981 Johnson Road Agreement and the 1984 Johnson Road Agreement, among others, connection fees from properties lying in Parsippany were paid to [the Township]." [Da179].

Specifically, the 1984 Johnson Road Agreement **explicitly provided any new connection along Johnson Road required a connection fee to be paid to the Township**, not the Borough. [Da96]. This contract, among the earlier ones entered by the Parties, served to formalize the Parties' practice, understanding, and agreement the Township was to receive the connection fees for such properties in the hope of avoiding similar disputes in the future.

As held by the trial court, "[t]here is **no indication** within the 1999 Agreement the parties intended to modify their prior course of dealing. As such, the plain language of Sections 6.1 and 6.5 of the 1999 Agreement is interpreted in a manner consistent with the parties' prior course of dealing in which the Township is entitled to connection fees for properties outside of the Borough." [Da179 (emphasis added)].

## II. APPELLANT'S FAILURE TO BRIEF CERTAIN FINDINGS BY THE TRIAL COURT CONSTITUTES WAIVE OF SAME AND RENDERS THE APPEAL MOOT.

Appellant's failure to brief certain issues on appeal constitutes Appellant's waiver of same and the trial court's findings should be upheld. Despite seemingly appealing the entirety of the trial court's December 8, 2023, Orders, Appellant has failed to brief certain issues and findings of the trial court. In accordance with applicable New Jersey law, Appellant has waived all such issues which Appellant has failed to brief.

New Jersey law is well-settled, "[a]n issue not briefed on appeal is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (citations omitted); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024) ("It is, of course, clear that an issue not briefed is deemed waived."); State v. Amboy Nat. Bank, 447 N.J. Super. 142, 148 n.1 (App. Div.), certif. denied 288 N.J. 249 (2016) (issue addressed for first time in reply brief deemed waived); 539 Absecon Boulevard, L.L.C. v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 272 n.10 (App. Div. 2009) (noting claims not briefed are deemed abandoned).

Here, the trial court granted summary judgment as to the Township's claims for unjust enrichment and conversion. [Da178]. Specifically, the trial court expressly declared:

> As [the Township's] claims against Defendants for unjust enrichment and conversion also relate to [the Township's] claim of entitlement to the connection fees from Bowman/LLC, and that [Appellant's] collection and retention of those connection fees would violate the 1999 Agreement, **this Court also grants summary judgment to [the Township] on those claims**.
>
> [Da178 (emphasis added).]

As such, Appellant has waived the following issues as a matter of law: (i) the trial court's determination the Township was entitled to summary judgment as a matter of law for unjust enrichment; and (ii) the trial court's determination the Township was entitled to summary judgment as a matter of law for conversion. Given Appellant's failure to brief and subsequent waiver of the trial court's findings, Appellant's appeal cannot succeed and is moot on its face. Therefore, the Appeal must be denied and the trial court's decision fully remain intact.

## CONCLUSION

Based upon the foregoing, Respondent respectfully submits the Superior Court's decision must be upheld in its entirety.

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| TOWNSHIP OF MORRIS<br><br>Plaintiff,<br><br>vs.<br><br>BOROUGH OF MORRIS PLAINS, 169 JOHNSON ROAD, LLC, JOHN DOE 1-10 ABC CORPS. 1-10 | ) SUPERIOR COURT OF NEW JERSEY<br>) LAW DIVISION: MORRIS COUNTY<br>)<br>) DOCKET NO. MRS-L-1589-22<br>)<br>)<br>)<br>) *Civil Action* |

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# REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT

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On the Brief:

John E. Horan, Esq. (040212001)

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## POINT HEADINGS

# TABLE OF JUDGMENT, ORDERS AND RULINGS

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## CASES CITED

## PROCEDURAL HISTORY

1. On or about September 19, 2022, the Township filed a Complaint for, among other things, breach of contract as a result of sewer connection fees. Da16.
2. On or about October 21, 2022, the Borough filed an Answer. Da158.
3. The parties engaged in discovery through October 4, 2023.
4. On October 6, 2023, the Township filed a Motion for Summary Judgment. Da1.
5. On October 24, 2023, the Borough filed a Cross-Motion for Summary Judgment. Da146.
6. Oral argument on the Motions was heard by the Honorable Noah Franzblau, J.S.C, on December 8, 2023. Da170.
7. On December 8, 2023, the Court granted the Township's Motion for Summary Judgment and denied the Borough's Cross-Motion for Summary Judgment. Da166.
8. On January 17, 2024, the Borough filed the subject Notice of Appeal. Da168.

# LEGAL ARGUMENT

## POINT I

## THE BOROUGH IS ENTITLED TO THE CONNECTION FEES AND DID NOT BREACH ITS CONTRACT WITH THE TOWNSHIP

The crux of the dispute between the parties is whether the Borough is entitled to the sewer connection fees along Johnson Road pursuant to Section 6.1 of the 1999 Agreement, or whether the Township is entitled to the connection fees under Section 6.5 of the Agreement.

The Township's position is that Section 6.5 establishes the Township's entitlement to the connection fees. Section 6.5 provides in pertinent part that:

> Out of town buildings – The parties acknowledge that some users are located outside of the Borough for which the sewerage is transmitted through mains and lines through the Borough to the Township Treatment Plant. The Township agrees that it will bill said commercial users directly and further acknowledges that the Borough may reserve the right to impose an additional fee upon such user, for the use of the Borough pipes and other property by said user, which fee shall be billed to the user by the Borough.

The Township's position fails because nowhere in Section 6.5 does the term "connection fee" appear. Rather, Section 6.5 provides that the Township will "bill said commercial users directly." This is a very important distinction because the fees that are discussed in Section 6.5 are the fees set forth in Section

4.1, specifically the fees associated with the sewerage treatment services provided by the Township at its treatment facility.

There is, however, only one section in the 1999 Agreement wherein the term "connection fee" appears which is Section 6.1 entitled "connection fee." Section 6.1 provides:

> The Borough shall have the right to impose and receive connection fees as permitted by law to any user of said services in the Borough and may retain all said amount received without claim from the Township.

The above language establishes that the Borough is entitled to connection fees for the use of the Borough's services in the Borough. Courts are to enforce contracts "based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract." Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001). "Contracts are to be read as a whole in a fair and common sense manner." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014). The plain language of the contract shall govern if there exists no ambiguity. Township of White v. Castle Ridge Dev. Corp., 419 N.J. Super. 68, 74-75 (App. Div. 2011). The court may not rewrite a contract or grant a better deal than for which the parties expressly bargained. Solondz v. Kornmehl, 3147 N.J. Super. 16, 21 (App. Div. 1993).

The "services" referred to in Section 6.1 are clearly the use of the Borough's sewer lines. Equally important, Section 6.1 provides the Borough is entitled to connection fees of "any user." Section 6.1 does not provide that the Borough is only entitled to connection fees for connections in the Borough, and it also does not state that all other connection fees that are not "in the borough" belong to the Township. Similarly, if the intent was for Section 6.5 to provide for the Township to receive out of town connection fees language to that effect should appear in Section 6.1, which again is the only section in the 1999 Agreement that provides for or specifically mentions connection fees. The reason, however, for why the language the Township relies upon in Section 6.5 does not appear in Section 6.1 is because the language is Section 6.5 is referencing the fees set forth in Section 4.1.

The Township and the Trial Court also relied upon the 1984 Agreement between the parties as entitling the Township to the connection fees. Although the 1984 Agreement does provide the Township with the right to collect the connection fees along Johnson Road, that agreement arose from development and construction that occurred during that time. It overlooks that the parties were also parties to the 1971 and 1973 Agreements, which under the terms of those agreements were set to expire in 1998. Accordingly, the 1999 Agreement was, at the time, the newly constructed agreement between the Borough and the

Township and a renewal of the 1971 and 1973 Agreements. As such, the parties bound by the 1999 Agreement which superseded all prior agreements between the parties.

Lastly, the Township and the Trial Court rely upon the prior course of dealings between the parties in which the Township received the connection fees along Johnson Road. However, that course of dealings arose from the 1984 Agreement, which again was superseded by the 1999 Agreement. More importantly, is the fact that the Township has not received any connection fees from Johnson Road since 1999. Accordingly, reliance upon the parties past course of dealings is misplaced.

## CONCLUSION

For all of the above stated reasons stated above the trial court's granting of Township's Motion for Summary Judgment must be reversed.

Respectfully submitted,

John E. Horan