SISTERS OF CHARITY OF SAINT ELIZABETH, Plaintiff/Respondent, vs. TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, THE BOROUGH OF FLORHAM PARK*, THE VILLA AT FLORHAM PARK, INC. and MORRIS COUNTY GOLF CLUB, INC., *Defendant/Appellant Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003175-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT, LAW DIVISION MORRIS COUNTY DOCKET NO. MRS-L-975-20 Hon. Stephan c. Hansbury, J.S.C. Sat below Date of Submission: October 16, 2024
TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, Third Party Plaintiffs, vs. THE BOROUGH OF FLORHAM PARK, Third Party Defendant	

BRIEF OF APPELLANT FLORHAM PARK PROPERTY, LLC

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PRELIMINARY STATEMENT

This case involves the transfer of an existing sewer pump, owned and operated by the plaintiff Sisters of Charity of Saint Elizabeth to the defendant Morris Township (hereinafter "defendant Township"). Multiple property owners contribute flow to the sewage system through the pump. The defendant Florham Park Property, LLC (for purposes of this appeal, defendant Florham Park Property, LLC, and predecessor in the plaintiff's Amended Complaint, are hereinafter "defendant") is one of those owners.

As a part of the transfer, plaintiff obtained rights to significantly increase their allowable sewer flow and the total capacity of the system. As part of the increase, all of the existing unused capacity and all of the approved increase in capacity is to be used solely by plaintiff. No other contributors, including the defendant, received an increase in capacity. Additionally, all established rights of defendant to the existing unused capacity have been effectively extinguished in favor of plaintiff. What makes this more egregious is that the plaintiff is legally bound to support defendant's efforts to seek any expansion of the conveyance capacity of the system. Plaintiff has systematically and intentionally breached their duty, to the detriment of the defendant. The trial court erred by entering orders granting summary judgment to plaintiff, defendant Township and defendant Florham Park Borough (hereinafter "defendant Borough"), and a

consent order, that improperly enabled and approved those breaches. This appeal seeks to reverse those orders to protect defendant's recognized rights regarding the pump and sewage system, and defendant's ability to participate in any expansion of same.

PROCEDURAL HISTORY

In the matter of Sisters of Charity of Saint Elizabeth v. Township of Morris and The Township Committee of the Township of Morris, Docket No. A-0226-20, the Appellate Court vacated a portion of the trial court's order directing the Township of Morris and Township Committee of Morris Township to assume ownership, maintenance and control of the plaintiff's pump station and force main and remanded that matter for further proceedings (FPPDa440-FPPDa465)[1] As a result, plaintiff filed an Amended Complaint on January 18, 2022, naming various defendants, including the Villa at Florham Park, Inc. (FPPDa135-FPPDa154). On March 23, 2022, the Defendant The Villa at Florham Park filed its Answer to Amended Complaint, Counterclaim, Crossclaim, Answer to Crossclaim, Demand for Statement of Damages, Demand for Allocation Pursuant to R. 4:7-5(c), Designation of Trial Counsel, Certification, and Certification Pursuant to R. 4:5.1 (FPPDa155 – FPPDa179). On September 22, 2022, the Defendant Florham Park Property, LLC filed a motion to intervene

[1] FPPDa = Defendant Florham Park Property, LLC's appendix.

(FPPDa132). The court granted Defendant Florham Park Property LLC's motion to intervene by Order dated October 28, 2022, specifically noting on the Order, "As contract purchaser of the Villa property, R. 4:33-1 applies, the court assumes this party will step into the shoes of the Villa and so no new pleading is required per R. 4:33-3." (FPPDa131). Thereafter, on May 19, 2023, defendant Florham Park Property, LLC filed a motion to substitute party pursuant to *R*. 4:34-3 (FPPDa134). On June 20, 2023, the court granted the motion and entered an order that substituted the defendant Florham Park Property, LLC for the Villa at Florham Park (FPPDa133). On May 26, 2023, plaintiff filed a motion for summary judgment (FPPDa180 – FPPDa424). The defendant Florham Park Property, LLC filed opposition to the plaintiff's motion on July 11, 2023 (FPPDa467). On July 13, 2023, the defendant Morris Township filed a motion for summary judgment (FPPDa425 – FPPDa430). The defendant Florham Park Property, LLC filed opposition to the defendant's motion on August 15, 2023. (FPPDa468). The defendant Florham Park Borough filed a motion for summary judgment on September 1, 2023 (FPPDa431 – FPPDa439). The defendant Florham Park Property, LLC filed opposition to this motion for summary judgment on October 3, 2023. (FPPda469) The trial judge heard oral argument on all of the summary judgment motions on October 13, 2023 (T).[2] Following

[2] T= transcript of October 13, 2023.

oral argument, the trial judge granted plaintiff's motion for summary judgment and as to the counterclaim filed against the plaintiff and dismissed "all claims" raised by "The Villa at Florham Park, Inc. and Florham Park Property LLC against the plaintiff with prejudice by way of order filed October 13, 2023 (FPPDa126 – FPPda127). The trial judge also granted the defendants' Township of Morris and Borough of Florham Park motions for summary judgment, dismissing defendant the defendant Florham Park Property LLC's crossclaims against each of the defendants by way of order filed October 13, 2023 (FPPDa128 – FPPDa130).

Thereafter, plaintiff and the defendants Morris Township and Township Committee of Morris Township, Florham Park Borough and Morris County Golf Club, Inc., submitted a Settlement Agreement that they negotiated and executed, along with a Consent Order to the trial judge and on May 2, 2024, the trial judge executed and entered the Consent Order Accompanying Settlement Agreement and Concluding Case (FPPDa1 - FPPDa3; FPPDa4 – FPPDa125). The defendant Florham Park Property, LLC filed a Notice of Appeal to this court on June 14, 2024 (FPPDa470 – FPPDa475) and an Amended Notice of Appeal on September 12, 2024 (FPPDa476 – FPPDa482).

STATEMENT OF FACTS

On May 1, 2020, plaintiff initially filed suit (hereinafter "Initial Suit") against the defendant Township and defendant The Township Committee of the Township of Morris (hereinafter "defendant Committee") (FPPDa196 - FPPDa214). Plaintiff sued the defendant Township and defendant Committee for the express purpose of requiring defendant Morris to accept ownership and control of the subject sewer pump and force main located on plaintiff's property The filing of this complaint was the genesis of plaintiff's breach of their agreements with the defendant. Plaintiff failed to notify or join any other parties, including defendant, despite having a contractual obligation to do so and knowing that the suit affected defendant's rights. (FPPDa440 – FPPDa465; FPPDa402 – FPPDa418, paragraph 26; FPPDa155-FPPDa179, page 23, paragraph 11).

In the Initial Suit, the lower court granted plaintiff's requested relief in summary fashion, ruling that ownership of the pump must be transferred to defendant Township (FPPDa442). In 2022, the Appellate Division reversed the trial court (FPPDa465). In its opinion, the Appellate Division recognized that the suit was improperly decided without additional necessary parties, Florham Park and the Florham Park Sewerage Authority (FPPDa464). The court held, "Morris also asserts that the court should have joined Florham Park and FPSA

as indispensable parties to this litigation. We agree with these contentions." (FPPDa448). The court also found that discovery should have been conducted, and is doing further held, "The trial court should permit the parties to engage in discovery, including depositions. Prior to doing so however, the court should allow the defendants to serve their third-party complaint upon Florham Park (the Villa) and FPSA, or file a motion to join them as indispensable parties under R.4:28-1." (FPPDa464) The court found that the litigation was a "highly contested and complex matter." (FPPDa464)

Furthermore, at all relevant times, plaintiff had actual knowledge of a 2016 Sanitary Sewer Agreement (FPPDa386 – FPPDa395) and 2016 Sanitary Sewer Easement (FPPDa396-FPPDa401) between plaintiff and defendant (hereinafter jointly referred to as the "2016 Sewer Agreements"). Because the 2016 Sewer Agreements significantly affected rights relating to the subject sewer pump and related system, plaintiff was keenly aware the defendant was also a relevant and indispensable party. The 2016 Sewer Agreements were the result of the plaintiff selling a portion of their land, which included a nursing home facility, to The Villa at Florham Park, Inc.'s predecessor, which utilized the subject sewer pump and force main. Notably, the 2016 Sewer Easement granted defendant a permanent easement across the subject property for use of the pump and main. The 2016 Sewer Easement also included a specific covenant

that the grantee shall "quietly enjoy the easement across the land, as well as the rights set forth in the "Agreement Regarding Sewer Rights" between the parties dated September 30, 2016." (FPPDa396 – FPPDa401) The easement went even further, in paragraph 3 by stating that plaintiff "will *warrant* generally the easement hereby conveyed." (FPPDa398) The easement specifically "incorporated by reference" the entire 2016 Agreement Regarding Sewer Rights." (FPPDa397)

The foregoing was bolstered in paragraph 21 of the 2016 Sewer Agreement which states, in relevant part, that plaintiff shall execute an Easement Agreement "for the use of the pump station in order to implement the terms and conditions of this Agreement." (FPPDa392) Consequently, the 2016 Sewer Agreements conferred upon defendant significant rights. One right relates to unused or reserved sewer capacity. That right reads as follows:

> "**28. The parties hereto [The Sisters and the Villa] shall have equal rights and responsibilities regarding any unused by[or] reserved sewer capacity associated with the pump station and, as indicated above, shall share in the cost of maintaining same based on percentage of sewer flow."** (FPPda394)

The second right relates to defendant's right to expand the capacity of the pump and sewer system for its use, supporting the property that was purchased from plaintiff. Specifically, the 2016 Sanitary Sewer Agreement, further states as follows:

"22. The Sisters of Charity agree that the Sisters of Charity shall not prevent TVFP [the Villa] from seeking to expand the conveyance capacity of the portion of the SC system that conveys or pumps flow from Lot 3 so as to convey additional flow from Lot 3 (an "Expansion") and the Sisters of Charity agree to reasonably assist in that regard at no cost to the Sisters of Charity, provided that the following conditions are met:" (FPPDa392)

The "conditions" immediately following are located at subparagraphs 22(a)-(d) of the 2016 Sanitary Sewer Agreement and generally include that defendant would be responsible for a) preparation of plans, b) obtaining government approvals, 3) building the improvements in a workmanlike manner, and d) paying all associated costs (FPPDa392).

Notwithstanding, plaintiff failed to join the defendant in the Initial Suit. Following the appeal of the Initial Suite, plaintiff filed an Amended Complaint that included the defendant, presumably in response to the Appellate Division's instruction that necessary parties be added (FPPDa135 – FPPDa154).

Plaintiff's failure to add defendant as a party until after the first appeal is telling of plaintiff's true intentions, namely that plaintiff intended to increase the development of their land, and sought to enrich themselves without notice to the defendant so defendant's established rights could be ignored/and or extinguished. If plaintiff's improper intent, i.e. breach its agreements with defendant) was not completely evident from its initial acts, it certainly became evident prior to the trial court's rulings that are the subject of this appeal. After joining defendant in the litigation, plaintiff continued aggressively breaching the

terms of the 2016 Sewer Agreements, including breaching their covenant of good faith and fair dealing.

Plaintiff had knowledge that it should not have attempted to modify defendant's rights without prior notice. Paragraph 27 of the 2016 Sewer Agreement is very clear as to the notice required (FPPDa393). Specifically, plaintiff was required to provide defendant with at least 30 days prior written notice of "any intention" by the plaintiff "to convey ownership of the system or the real estate upon which the system is located" to any entity (FPPDa393). Plaintiff failed to provide defendant with any notice (FPPDa177, page 23 paragraph 11), and affirmatively litigated in breach of the 2016 Sewer Agreements for years, and may have been successful in carrying out its improper effort had Defendant Morris not filed its initial appeal.

Following defendant being joined by plaintiff by the Amended Complaint, plaintiff took about every action possible during this present litigation to deny defendant its rights guaranteed by the 2016 Sewer Agreements. Specifically, plaintiff failed to "warrant generally the easement conveyed" (FPPDa398). Plaintiff aggressively sought to usurp the unused capacity, despite paragraph 28 of the 2016 Sewer Agreement granting rights in the unused capacity to defendant, despite defendant making it clear that it was seeking to increase the capacity of the system for its own use (FPPDa394). Rather than warranting

defendant's contractual and recorded property rights as it agreed to do, plaintiff filed a summary judgment motion seeking to dismiss defendant's counterclaims that sought to protect its rights (FPPDa180 - FPPDa182).

At oral argument, plaintiff's counsel spent pages and pages of the transcript complaining that defendant was somehow the offending party for appearing in the case, despite the Appellate Division's prior ruling having opined that plaintiff failed to include necessary parties and that such parties should be added (FPPDa464). Plaintiff's counsel also admitted that for at least three years it had been negotiating on behalf of plaintiff to transfer the system (without notice, or joinder of the Villa or its predecessor.) (T.7:2-6) Counsel disparaged defendant's efforts to protect its rights by stating, "Everything seemed to be cruising along …" (T:7:12); "Then at long last after years of trying to resolve this." (T.7:13-14); "the new owners … just stepped in and ground everything to a halt." (T.7:14-18); "so they managed to throw sand in the gears to this point." (T.7:23-24); "Those contractual claims (the Villa's claims) are simply not worthy of the Court's attention." (T.8:1-3); "There's no need for discovery." (T.9:19). Finally, he accused defendant of attempting to "commandeer the process" (T.10:8-9).

Plaintiff's counsel continued to argue against the application paragraph 28 of the 2016 Sewer Agreement, despite admitting it must be applied. Counsel

relayed to the court an engineering report that was provided for private mediation purposes, wherein defendant's engineer estimated that roughly 21,000 gallons of flow currently existed as "unused in reserve" (T.13.7-14). Although, confidential mediation information was improperly used in argument, it is indicative that at least one expert opined that roughly 21,000 gallons of flow were "unused in reserve." (T.11:7-14) Thus, per paragraph 28, defendant has "equal rights" to 21,000 gallons of the reserve.

Counsel further advised the trial judge that plaintiff offered 12,000 gallons of additional flow (in addition to the existing 8,100 already being held by the Villa, for a total of 21,100 gallons) to resolve the matter (T.11:15-25). The issue with making such an assertion at oral argument relating to confidential settlement negotiations is that such an offer was not a part of the record, and defendant vehemently denies such offer ever being made. However, if such an offer had been made, it could have been considered. Furthermore, plaintiff's assertions regarding settlement negotiations appear to have been offered for the purpose of affecting the trial judge's by arguing that the defendant was being unreasonable in settlement negotiations (T.11:15 to 12:6).

Plaintiff's counsel then argued that, despite the contractual language stating that the parties have "equal rights" to the extra capacity, that defendant only has a right to 8.5% of the capacity. (T.13:15-17) While this argument flies

in the face of the plaint language of the 2016 Sanitary Sewer Agreement, it is an admission by plaintiff that defendant has a right to at least 8.5% of the extra capacity. (T.13:15-17) Whether 8.5% or 50%, plaintiff admits that defendant has a contractual and property right, and that a fact dispute exists as to the extent of that right. Notwithstanding, plaintiff argued that defendant's claims were not "worthy of the court's attention" (T.8:2-4) and that there was "no need for discovery." (T.9:18).

The plaintiff also improperly characterized paragraph 22 of the 2016 Sewer Agreement. (FPPDa). Plaintiff admitted that paragraph 22 bestows a legal right upon defendant, and a legal responsibility upon plaintiff. (T.10:11-14). Plaintiff argued, however that their legal responsibilities (**to not prevent TVFP [defendant] from seeking to expand the conveyance capacity and to reasonably assist such efforts)** would not be triggered unless the conditions in subparagraphs 22(a-d) were met as conditions precedent. (T.10:11-19). In fact, plaintiff actually argued that permission of the municipalities for an expansion had to first be obtained prior to plaintiff having a duty to "not prevent" defendant from seeking expansion, or to "assist" the Villa's efforts to expand. (T.10:15-19). However, paragraph 22 does not mention any "condition precedent." (FPPDa392-393). Indeed, reading the stated conditions as being "conditions precedent" would not make sense. The conditions include a) creating an

engineered design, b) obtaining government approvals, c) completing the build-out, and d) paying for all of the costs. (FPPDa392-393). If those items were meant to be conditions precedent to plaintiff's obligation to cooperate, then the project would have to be fully built and paid-for prior to plaintiff's having to cooperate, thus rendering this paragraph meaningless. Notwithstanding, the trial judge apparently made a finding that these conditions were "conditions precedent" and that defendant's related to paragraph 22 would not be ripe until those conditions were met. Specifically, the trial judge opined that defendant's paragraph 22 claims were not ripe because defendant had not applied to the Township for approvals. (T.75:5-9 and 27:25-28:6) This ruling is both factually and legally incorrect and was a significant basis for the trial judge's dismissal of defendant's claims.

Paragraph 22 also states that plaintiff shall not prevent defendant from "***seeking*** to expand." (FPPDa392). The record clearly shows that defendant **was and is** seeking to expand. Plaintiff has, through a reading of the agreement in a manner that suits its purposes, not only breached their legal duties, but have parlayed their improper argument into a supposed right to vociferously oppose defendant, all the while arguing that no discovery is warranted.

The trial judge framed the issues prior to issuing his final opinion. In so doing, he made it clear that the court and the parties acknowledged the above

described two presently existing and enforceable rights of defendant. Regarding paragraph 22 of the 2016 Sewer Agreement (relating to seeking to expand capacity), the trial judge stated, "*He's acknowledged that Parargraph 22 is – is a right. And of course it's a right. It's right there*." (Emphasis added) (T.75:9-11) As to Paragraph 28, (relating to equal rights to the existing excess capacity) the trial judge acknowledged as follows: "*Paragraph 28 is a little trickier, but I think I have to – I do reach the same conclusion.*" (Emphasis added) (T.75:12-13)

The trial judge was also well aware that plaintiff, defendant Morris and defendant Borough were negotiating an agreement relating to the subject pump main and property, as it was discussed several times on the record. (i.e. T.) The trial judge, unfortunately incorrect in his stated belief that these same parties would not attempt to exclude defendant from any such settlement agreement. In that regard, the trial judge stated, "*This entire application, the motions are granted because they're not ripe for adjudication. This is particularly so as to Morris Township and Flohram Park because they've done nothing wrong. They've acknowledged that they're close to an agreement and there's no reason to think that it won't include (the Villa's) property. They've given me no reason to do that."* (Emphasis added) (T.74:2-9, Also see T.74:23-25). Following this statement, none of the parties disabused the trial judge of his mistaken belief.

Rather, they remained silent as to their true intent and the defendant's claims were dismissed. The trial court even envisioned that if justiciable claims became present, "a new Complaint can be filed. That's not two bites at the apple." (T.77:3-4)

Six months later, a "justiciable claim" definitely became present. The plaintiff, defendant Morris and defendant Borough negotiated and signed a "Settlement Agreement" that intentionally excluded the defendant and which gave ***all*** of the existing unused and reserved capacity to plaintiff (taking all unused and reserved capacity up to the then existing limit of 95,000 gallons per day), and necessarily enriched plaintiff by giving them an additional 28,950 gallons per day of expansion. (FPPDa1– FPPDa27 Consent Order – Settlement Agreement, page 7, paragraph 8, specifically FPPDa11). Notably, paragraph 8 of the Settlement Agreement lists the "new" capacity for defendant as 8,100 (no increase from the prior usage) and the capacity for plaintiff as 123,950 per day "**for the buildings on, and to be located on, the Sister's Property …**" (FPPDa11). Thus, the extra capacity gained by plaintiff by excluding the defendant from the negotiation and execution of the "Settlement Agreement" was not to be shared, as required by the 2016 Sewer Agreements. Plaintiff, per this Settlement Agreement, is now purportedly able to vastly expand and develop their property at great profit to themselves by converting all interest in

the unused and reserved capacity that had previously existed for itself, despite knowing that defendant had "equal rights" to it. Plaintiff has also greatly prejudiced the defendant's ability to obtain, let alone seek, the expansion that it desired to pursue. By siphoning all of the existing unused and reserved capacity, the defendant will be unable to ask defendant Township for a greater expansion to meet its request, because the existing capacity can no longer be used by the defendant. Further if plaintiff is permitted to proceed with its expansion, to the exclusion of the defendant (as they obviously intend to do), defendant will then have to request that a new pump be replaced, rather than obtaining its expansion in conjunction with the currently proposed replacement of the old pump. This will necessarily make it much more difficult for defendant to obtain municipal approval for its expansion. This prejudicial effect is obvious to any party. As stated above, plaintiff has rendered it impossible for defendant to expand by taking advantage of the approximately 20,000 gallons of excess capacity, in which defendant had a contractual and property right, because plaintiff has taken it all for itself.

To make matters worse, plaintiff, defendant Township, and defendant Borough then submitted the Settlement Agreement to the trial judge, who signed the Consent Order and presumably signed off on the Settlement Agreement. (FPPDa1-FPPDa125) Again, the defendant was not given any prior notice about

the Settlement Agreement, thus it was not provided with an opportunity to oppose and or argue against its implementation.

Consequently, this appeal is not only correct, but it is necessitated by the wrongful acts of the other parties. Had plaintiff, defendant Morris and defendant Borough simply dismissed the remaining claims and made a private agreement without the trial court's approval, the defendant, to the extent it was advised of same, could have simply commenced suit challenging that agreement in a separate action without the need for appeal. This would have been a remedy that the trial court anticipated would have still remained (T.77:3-4). However, because court orders now exist that extinguish defendant's rights, these final orders must now be appealed to undo the conversion of defendant's rights.

LEGAL ARGUMENT

I. THE COURT ERRED IN ENTERING THE CONSENT ORDER

(The ruling relating to this section is located in the appendix FPPDa1-FPPDa27)

The trial court erred as a matter of law in granting summary judgment to plaintiff and to defendant Morris and defendant Borough. The trial court and the parties acknowledged on the record that two relevant contractual rights exist in favor of the defendant. Those rights are established in paragraphs 22 and 28 of the 2016 Sewer Agreement, as further established and warranted by plaintiff in the 2016 Easement Agreement. The trial court erred in interpreting the 2016

Sewer Agreements and in failing to recognize a breach, even at the later date when the trial judge signed and entered the Consent Order approving the Settlement Agreement.

Rule 4:46-2 states that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial judge must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party[.]" Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

An appellate court uses the same standard as the trial court when reviewing a trial court's decision to grant summary judgment. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). It decides first whether there was a genuine issue of fact. If there was not, it then decides whether the lower court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

In this case, there are both genuine issues of fact, and the trial judge's ruling on the law was not correct.

Celanese v. Essex County Improvement Authority, 404 N.J.Super. 514 (App.Div.2009) explains well-established law regarding the interpretation of contracts. The court held:

> 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, 762 *A.*2d 1057 (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, 783 *A.*2d 731 (App.Div.2001).
>
> In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain. *Onderdonk v. Presbyterian Homes of N.J.,* 85 *N.J.* 171, 183–84, 425 *A.*2d 1057 (1981) *****601*** (citing *Atl. N. Airlines v. Schwimmer,* 12 *N.J.* 293, 301, 96 *A.*2d 652 (1953)); *Driscoll Constr. Co. v. State,* 371 *N.J.Super.* 304, 313, 853 *A.*2d 270 (App.Div.2004). Thus, in ruling on a summary judgment motion that involves the interpretation of a contract, a court must necessarily determine whether there is any genuine issue of material fact regarding the parties' intentions.

In Goldfarb v. Solimine, 245 N.J. 326 (2021), the court sets for the well-established elements for breach of contract:

> To prevail on a claim of breach of contract,
> [o]ur law imposes on a plaintiff the burden to prove four elements: first, that "the parties entered into a contract containing certain

> terms"; second, that "plaintiffs did what the contract required them to do"; third, that "defendants did not do what the contract required them to do," defined as a "breach of the contract"; and fourth, that "defendants' breach, or failure to do what the contract required, caused a loss to the plaintiffs."

Initially, based on the foregoing, the trial judge improperly granted the Consent Order. The Settlement Agreement was attached to the Consent Order and became a part thereof. The terms of the Settlement Agreement gave all of the unused capacity in the pump system to the plaintiff. This capacity was estimated by defendant's engineering expert to be over 20,000 gallons per day. During oral argument, both the trial judge and the parties openly acknowledged that defendant has a contractual and property right described as an "equal right" to that capacity. (FPPDa394, paragraph 28) The trial judge also acknowledged that a fact issue exists as to the meaning of that term (i.e. the extent/percentage of that ownership right). (T.75:14-22 and T.64:20 to 65:7)

It is also established that the trial judge at the time of the oral argument of the motions for summary judgment, was aware that plaintiff, defendant Morris and defendant Borough were engaged in long-standing negotiations relating to control and expansion of the pump station. In that regard, the trial judge mistakenly believed that any settlement agreement would not ignore the rights of defendant. (T.74:2-9, Also see T.74:23-25).)

Perhaps the trial judge viewed the Consent Order simply as a consent dismissal of the lawsuit, and not necessarily adopting all the terms of the Settlement Agreement. Because there is no transcript or other explanation for the trial judge's reasoning for entering the Consent Order, the defendant is not able to verify, or even oppose the trial judge's reasoning. Furthermore, the defendant was not provided with prior notice of the entry of the Consent Order, not given an opportunity to object to same, or the terms and conditions of the Settlement Agreement, except by way of this appeal. In that regard, because the Consent Order adopts the terms of the Settlement Agreement, thus rendering them "legally valid," the Consent Order must be reversed.

Furthermore, it is indisputable that the Settlement Agreement appended to the Consent Order clearly breaches the 2016 Sewer Agreements by giving all the excess reserve capacity to plaintiff. It also breaches the agreements because it is a final act, in an obvious long-term pattern of plaintiff failing to abide by its obligations set forth in paragraph 22 of the 2016 Sewer Agreement (FPPDa392-FPPDa393). That paragraph clearly requires plaintiff to cooperate with the defendant whenever the defendant seeks to expand the system for its use. The trial court erred by finding that the conditions set forth as paragraph 22 (a)-(d) placed upon such cooperation were conditions precedent. The trial judge improperly found the defendant failed satisfy these conditions (including

obtaining government approval for an expansion), prior to any duty existing for plaintiff to cooperate. This interpretation of paragraph 22 is simply not correct, otherwise it renders paragraph 22 as being meaningless. Under the trial judge's interpretation, plaintiff would have no duty to cooperate unless and until (a)-(d) were satisfied, which necessarily would include building any proposed expansion, and making all payments relating thereto. Thus, the entire project would be completed before any duty to cooperate would be triggered. This is simply not logical. It is also illogical to interpret that paragraph to allow plaintiff to oppose, prejudice and/or extinguish defendant's right to expand. The Settlement Agreement makes it inordinately more difficult, if not impossible, for defendant to obtain an expansion. By improperly converting all the unused excess capacity to plaintiff, it would necessarily permit the municipal defendants to deny any proposed future expansion based upon the terms of the Settlement Agreement. At the very least, any future expansion request made by defendant to the municipal defendants would be much more difficult. To the extent plaintiff's proposed course of action is permitted to proceed without the defendant at this time, to the extent that the defendant was able to proceed with expansion at some time in the future, then it would necessarily require tearing down any new pump system that would be installed presently, to accommodate any future expansion by defendant. This is clearly illogical and necessarily

prejudicial, as the cost to defendant at that time would be much greater than if both parties were shared in the cost of a new pump presently.

For these reasons, by signing the Consent Order, and necessarily approving the Settlement Agreement, the trial judge failed to recognize a breach of the 2016 Sewer Agreements, and necessarily misinterpreted paragraph 22(a)-(d) as being conditions precedent. By entering the Consent Order, the trial judge necessarily failed to recognize that fact issues exist, particularly as to the amount and value of the reserve capacity that was unilaterally taken by plaintiff. Finally, even if the conditions set forth at paragraph 22(a)-(d) were in actuality conditions precedent, the Settlement Agreement and Consent Order are improper for the other reasons stated herein, namely, plaintiff's failure to comply with other terms of the 2016 Sewer Agreements such as prior notice and usurping all of the excess capacity. Consequently, the Consent Order, and necessarily, the Settlement Agreement, cannot stand.

The Consent Order is also improper because it enshrines the improper acts of defendant Morris and defendant Borough. Defendant's crossclaims against each of these defendants includes a count for interference. (FPPDa173-FPPDa175 - Crossclaims, Count IV) In DiMaria Const., Inc. v. Interarch, 351 N.J.Super. 558 (App.Div.2001), this court explained the elements of tortious interference with a contract as follows:

> The tort of interference with a business relation or contract contains four elements: (1) a protected interest; (2) malice—that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages. *MacDougall v. Weichert,* 144 *N.J.* 380, 404, 677 *A.*2d 162 (1996).
>
> We first consider defendants' second argument of insufficient evidence of malice. "Malice" as used in the tortious interference cause of action is not construed as ill will toward the plaintiffs. *Printing Mart–Morristown v. Sharp Elec. Corp.,* 116 *N.J.* 739–751, 563 *A.*2d 31 (1989). Rather, malice is defined to mean that the interference was inflicted intentionally and without justification or excuse. *Ibid.*
>
> Here, accepting all of DiMaria's evidence as true, the jury could have reasonably concluded …

In the present case, a finder of fact can easily conclude that the above elements have been met. Defendants Morris and Borough have apparently been negotiating with plaintiff for some time, and engaged in litigation in an attempt to achieve an expansion by plaintiff that would knowingly breach defendant's rights. Certainly, there is little doubt following the oral argument on the summary judgment motions. The protected interests were acknowledged, and ruled upon, by the trial judge. These rights were discussed, argued, and explained in detail. This left no doubt as to the existence of defendant's contractual rights. Notwithstanding, a mere five months later, defendant Morris and defendant Borough signed the Settlement Agreement and Consent Order, which openly breaches the defendant's contractual rights. There is no possible way to read the Settlement Agreement other that it converts all exiting unused

capacity to plaintiff for plaintiff's sole use. It is reasonable to believe that defendant Morris and Defendant Borough had this knowledge when they negotiated and executed the Settlement Agreement and Consent Order. In fact, it seems very unlikely, if not impossible, that they did possess that knowledge. Further, both defendant Morris and defendant Borough were aware from oral argument that the trial judge expected that any future settlement agreement would not exclude the defendant or run contrary to the defendant's stated rights. Notwithstanding, each proceeded to cooperate with plaintiff in implementing an agreement that not only ignored the stated belief and understanding of the trial judge, but necessarily negated the defendant's stated rights. The interference obviously damaged the defendant as stated herein above. Finally, in this instance, a finder of act could also easily find in favor of the defendant as to the final element of malice. As explained in DiMaria Const., Inc. v. Interarch, *supra.* malice in this context does not include ill will or ill intent. Malice only requires a finding of that the "interference was inflicted intentionally and without justification or excuse." (See above quote) Given the facts of this case, it is difficult to envision how a jury would not find in favor of the defendant on this element. A party could not possibly have more recent and more poignant actual knowledge of the defendant's rights as was given to defendant Morris and

defendant Borough at oral argument, yet they moved forward intentionally despite this knowledge.

II. THE COURT ERRED IN DISMISSING THE VILLA'S COUNTERCLAIM AGAINST THE SISTERS

(The ruling relating to this point is located in the appendix at FPPDa126-FPPDa127 and in the transcript at T.74:2 to 75:22)

The trial judge erred in dismissing the defendant's counterclaim against plaintiff, which was clearly based on defendant's contractual rights. As argued under point 1 above, plaintiff clearly breached the 2016 Sewer Agreements, which necessarily include their covenant of good faith and fair dealing. In that regard, the trial judge's summary judgment order must be vacated. Alternatively, the court should fashion a remedy for the defendant to pursue its rights in a separate proceeding unfettered by these prior orders. The defendant must be permitted to pursue its rights and have a court resolve all fact issues, including the extent and amount of damages.

III. THE COURT ERRED IN DISMISSING THE TORTIOUS INTERFERENCE CROSSCLAIMS AGAINST MORRIS AND FLORHAM PARK

(The ruling relating to this point is located in the appendix at FPPDa129-FPPDa130 and in the transcript at T.74:2 to 75:22)

Similarly, for all the reasons argued in point I above, the trial judge erred in dismissing defendant's Crossclaims against defendant Morris and defendant Borough that are based in tortious interference. (FPPDa – FPPDa Crossclaim Count IV) As third parties, defendant Morris and defendant Borough clearly and

intentionally interfered with the defendant's known rights. If this was not already obvious by the time oral argument was conducted, it became impossible to ignore upon execution of the Settlement Agreement only months later. As such, the summary judgment orders granted to each of these defendants should likewise be vacated so that the defendant can pursue its rights in the existing litigation. Alternatively, this court should fashion a remedy for the defendant to pursue its rights in a separate proceeding unfettered by these prior orders. The defendant must be afforded the ability to pursue its rights and have a court resolve all fact issues, including the extent and amount of damages.

CONCLUSION

For the foregoing reasons, the trial judge, in granting plaintiff's and defendants' Morris and Borough motions for summary judgment, erred as a matter of law. The trial judge further erred in entering the Consent Order that approved the Settlement Agreement. Each of these orders had the effect of assisting these parties in completing a long-standing effort to take vested and legal contractual rights from the defendant. Therefore, this Court must vacate the Consent Order and necessarily the Settlement Agreement, and reinstate defendant's Counterclaim against plaintiff, and defendant's crossclaim against the defendant Morris and defendant Borough as it relates to defendant's tortious interference claim against each of these defendants. Alternatively, this court

must enter an order to enable the defendant to fully pursue its rights against the plaintiff, the defendant Morris and the defendant Borough (including the right to seek to enjoin the construction of the expansion), and to challenge the Settlement Agreement, without any negative legal effect of the three improperly entered summary judgment orders.

Respectfully submitted,

ROSELLI GRIEGEL LOZIER, PC

Dated: October 16, 2024 By: /s/***Mark Roselli***

Dated: October 16, 2024 By: /s/***Steven W. Griegel***

SISTERS OF CHARITY OF SAINT ELIZABETH, Plaintiff/Respondent, vs. TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, THE BOROUGH OF FLORHAM PARK*, THE VILLA AT FLORHAM PARK, INC., and MORRIS COUNTY GOLF CLUB, INC., *Defendants/Appellant, Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003175-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT, LAW DIVISION MORRIS COUNTY DOCKET NO. MRS-L-975-20 Hon. Stephan C. Hansbury, J.S.C. Sat below
TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, Third Party Plaintiffs, vs. THE BOROUGH OF FLORHAM PARK, Third Party Defendant.	

BRIEF OF DEFENDANT RESPONDENT TOWNSHIP OF MORRIS

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Preliminary Statement

The Township of Morris was sued by the Sisters of Charity of Saint Elizabeth initially to compel the Township of Morris to treat additional effluent to be processed through a sanitary sewer pump station owned and operated by the Sisters of Christian Charity pursuant to a 1981 agreement. (FPPDa 287) The suit also sought to compel the Township of Morris to take over the ownership and operation of the sanitary sewer pump station in order to create an expectation of a stable operating environment for the developer of an inclusionary Mt. Laurel development to be constructed on property sold to that developer by the Sisters of Christian Charity.

Prior to the initiation of litigation, the Township of Morris had agreed that it would accept and treat the additional effluent therefore leaving as the sole remaining issue the ownership and operation of the sanitary sewer pump station. The trial judge, the Honorable Michael C. Gaus entered a final order on an Order to Show Cause requiring the Township of Morris to treat the effluent and further ordering the Township to take over the maintenance and operation of the sanitary sewer pump station. (Ja11-Ja73)

The Township appealed this order and the Appellate Division reversed the ruling based in part upon the fact that other necessary parties had not been joined to the initial action.

As a result of that ruling the Sisters of Christian Charity expanded the litigation to include the Borough of Florham Park, The Villa at Florham Park[1] and the Morris County Golf Club. (FPPDa440-FPPDa465)

The Township of Morris as a part of its responding pleading to the initial action had named the Borough of Florham Park as a third-party Defendant because the inclusionary development in question and the pump station are both located in the Borough of Florham Park and would provide credits to the Borough of Florham Park toward meeting the Boroughs affordable housing obligation. Service of process was not formalized on the Borough at the time of Judge Gaus' decision and the judges ruling dealt only with Morris Township. (Ja11-Ja73)

In any event, issue was joined across the board by all parties via cross claims, counter claims, etc.

With the assistance of a settlement mediator (Special Master), Morris Township, Florham Park Borough, Morris County Golf Club, and the Sisters of Charity of St. Elizabeth reached a settlement (FPPDa1-FPPDa3;FPPDa4-FPPDa125)

The claims of Florham Park Property, LLC are grounded in a certain agreement stated "This _____ day of September, 2016" (FPPDa387-FPPDa395)

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[1] Florham Park Property, LLC in the successor in interest to the original named party, the Villa at Florham Park, Inc.

The identified parties to this agreement are the Sisters of Charity of St. Elizabeth, the Township of Morris and The Villa at Florham Park, Inc. This "Sanitary Sewer Agreement" was entered into as a result of the purchase of that portion of the property of the Sisters of Charity formerly occupied by the Villa at Florham Park, Inc. by Florham Park Property LLC. It is remarkable and must be noted that the Township of Morris did not sign the 2016 sanitary sewer agreement. (FPPDa394) and is not a party of the same.

That agreement is the sole source of all of the rights claimed by Florham Park Properties LLC[2]. As above, the rights of Florham Park Property, LLC are contractual in nature and run between the Sisters of St. Elizabeth and Florham Park Property, LLC and do not involve the Township of Morris.

PROCEDURAL HISTORY

The Township of Morris adopts the procedural history in this matter as set forth in the brief of Florham Park Property, LLC

STATEMENT OF FACTS

The Township of Morris, with the following amplification, adopts the Statement of Facts as set forth by Florham Park Property, LLC ("FPP") and emphasizes (as set forth in twelve pages of Statement of Facts) that any complaint

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[2] Those claimed rights are to a share of the Sisters portion of the pump station capacity and to expand the capacity of the pump station.

that FPP has is: one, derivative from the 2016 sewer agreement, and two, is addressed to and only to the Sisters of Charity of St. Elizabeth ("Sisters"). (Florham Park Property, LLC brief pages 5-17).

The brief of FPP is replete with references to the 2016 agreement (as to which Morris Township is not a signatory), citing various paragraphs which are claimed to confer rights upon FPP by the Sisters of Charity. Several additional pages are directed at counsel to the Sisters of Charity. The brief goes on to complain apparently that Florham Park Property, LLC was denied a seat at the settlement table, a specious claim in that any rights of Florham Park Property, LLC were never articulated, are clearly derived from the 2016 agreement and are further rights which are "justiciable" only against the Sisters of Christian Charity.

A few significant points emerged from a reading of that hearing transcript. Firstly, no where is there an acknowledgment of any pending or otherwise quantifiable demands for sewer gallonage allocation on behalf of FPP (see transcript of motion page T16 line 5 "Mr. Carroll: They haven't proposed anything to the Sisters, no such engineering plans, nothing. They haven't obtained the agreement of the Sisters. Even if they did, this bolded language which specifically says, and this is probably the most important language, that they still need the authority, the approvals of, among others, Florham Park and Morris Township which they haven't requested and certainly don't have. " (T16 L5-12) Two pages later at T17-22 through

T18-L8 the attorney for FPP acknowledged, "Mr. Kessler: As a result of that, once they were joined, the Villa had to assert claims to protect its interest because if they didn't, they could potentially be barred by the entire controversy doctrine. Some of the claims which may be being asserted at the moment at this case with regard to the Sisters and their breach of contract or as to the Township and their interference with the contractual rights of FPP, they admittedly may be premature because they have not, until they go forth with the settlement and we see how the exact rights of FPP are effected, we'll know what damages they - -they suffered."

Ultimately, the analysis was crystalized by Judge Hansbury at pages T27-28 of the transcript in exchange with counsel for FPP commencing at page T28 L1

> "The Court:...I'm still a little bit unclear. Mr. Carroll, first of all has agreed to comply with paragraph 22 so I don't know why we are litigating over that. But, setting that aside, at the time you apply, (for additional gallonage allocations) if you do, under paragraph 22, the answer might be no. Are you saying that that's objectionable?
> Mr. Kessler: No, from the governing authorities?
> The Court: Yes.
> Mr. Kessler: No, they have the right to say no. I'm - - I'm not saying they can't say no.
> The Court: So your not - -
> Mr. Kessler: I'm saying - -
> The Court: Twenty-two doesn't establish a right but a possible opportunity. Is that, at least as my language, is that what you're saying?
> Mr. Kessler: I - - I would agree that that's—"
>
> Later at page 29
> "The Court: You have the right to - - not make the expansion, but to request the expansion.

> Mr. Kessler: Correct, right. And that right will - - has to continue and can't be elimated by virtue of any agreement that the Sisters and the Township make when the pump station is transferred ownership.
> The Court: Why is that in jeopardy? I don't understand that? It's clearly in the - - in the agreement.
> Mr. Kessler I - - I - - I don't know that it is in jeopardy, Your Honor. (T29 L1-12)

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW APPLICABLE TO THIS CASE REQUIRES THAT THE DECISION OF THE COURT BELOW BE AFFIRMED

The Appellate Court review of the Trial Court action below is "de novo" (In Re Ridgefield Park Board of Eduation 244 N.J. 1, 17 (2020)).

This court must accept the findings of fact by the court below since they are supported by sufficient, credible evidence in the record. Due defference is to be given to the trial court that heard the case. State v. Mohammed 226 N.J. 71 (2016) and State v. McNeil-Thomas 238 N.J. 256 (2019) "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))

Most notably here the court found that no justiciable issue had been presented pursuant to which any measure of damages could be had. In other words, Florham Park Property, LLC, has not made a demand for any specific amount of sewer gallonage, does not have a project pending requiring additional sewer gallonage and there has been no showing that such gallonage, if requested would be denied or if denied that such denial created a claim against Morris Township.

II. SUMMARY DISPOSITION OF THE CASE WAS ENTIRELY APPROPRIATE AND PROPER

The court below found that "no rights have been violated here. Nothing has happened which takes away from FPP anything that its entitled to contractually. In other words, this entire application, the motions are granted because they are not ripe for adjudication this is particularly so as to Morris Township and Florham because they have nothing wrong. They have acknowledged that they are close to an agreement and that there is no reason to think that it won't include FPP's property they have given me no reason to do that." (T73 L24-T74 L9)

The Court went on further to find that there was no violation of the civil rights of Florham Park Property. As to claims for breach of contract that since FPP has not come forward They are seeking what amounts to an advisory opinion with any claim of a specific increase in capacity from the Sisters, that claim is similarly premature. (T74 L10-T75 L22)

Summary disposition is governed by R4:46-2, in this case subsection (c) "The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of Law." (see also Judson v. People's Bank & Trust Co. 17 N.J. 1967 (1954) and Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995)) (Failure of the nonmoving party to demonstrate the

existence of an issue, the resolution of which in favor of the non-moving party would entitle that party to judgment.)

The sum and substance of this case is that very simply, the three principal litigants have reached a resolution regarding the increase in capacity of the sewer pump station from 95,000 gallons per day to 142,550 gallons per day which said increase is for the purposes for serving an inclusionary affordable housing development in the Borough of Florham Park. In 2016 the Villa at Florham Park separated from the Sisters of Christian Charity and in furtherance of said separation the parties entered into the 2016 agreement which agreement defines all the rights responsibilities by and between those parties.

Now comes FPP as successor in interest to The Villa at Florham Park, Inc. claiming violation of two particular paragraphs in the 2016 agreement: Paragraph 22 to the effect that the sisters of charity should not prevent the Villa at Florham Park from seeking to expand the conveyance capacity of that portion of the system serving FPP. There are four lettered subparagraphs under paragraph 22 detailing the steps FPP must follow in furtherance of that expansion. None of these steps have been undertaken (FPPDa392-393)

In paragraph 28 of the 2016 agreement, it simply recites (the Sisters and FPP) shall have equal rights and responsibilities regarding any unused by (sic) sewer capacity associated with the pump station…" (FPPDa394) Again, no quantifiable

claim has been advanced by FPP against the sisters for an increase in allocation. Until such time as a claim is made, FPP cannot assert damages where no relief has been denied.

Furthermore, the Township of Morris hastens to note that FPP's attorney acknowledges that there is no duty on the part of Morris Township to grant a further increase in capacity in response to a request by FPP and that there was no jeopardy expansion plans.

III. NO PARTY TO THIS CASE HAS BREACHED THE "CONTRACT" (THE 2016 SEWER AGREEMENT)

The Appellant cites established case law regarding interpretation of contracts.

Specifically, the Appellant cites Goldfarb v. Solimine 245 N.J. 326 (2021) setting forth the Appellant's burden to prevail on a claim of breach: 1. That there is in fact a contract. 2. That the aggrieved party did what the contract required of them. 3. That the reverse party did not do what the contract required of them. 4. That that failure caused a loss to the Appellant. (Goldfarb Supra.)

This claim clearly fails as to the Township of Morris and the Borough of Florham Park in that neither of those parties were signatories to the 2016 agreement.

The Appellant takes the position that "Furthermore, it is indisputable that the settlement appended to the consent order clearly breaches the 2016 sewer agreement by giving all the excess reserve capacity to the Plaintiff." (DBFPP 21) No demand

for gallonage allocation has been articulated by FPP. FPP is not a party to the 1981 master sewer agreement between Morris Township, Florham Park, Sisters of Charity of St. Elizabeth and ultimately amended to include Morris County Golf Club. Furthermore, the assignment of any excess or reserve capacity to the sisters is not inconsistent with the 2016 agreement particularly when the party claiming to be a beneficiary of that agreement has failed to make any kind of request or demand whatsoever.

IV. THE APPELLANTS CLAIM MAY NOT BE ENTERTAINED BECAUSE IT IS NOT YET "RIPE"

In this case the Appellant is asserting unquantified claims for sewer gallonage allocation and pump station expansion to support projects not yet identified, planned, or by any means underway. For these reasons, the Appellant cannot be heard to argue that it has been damaged when no formal demand has yet to be articulated. The doctrine of ripeness is a means to determine whether or not a case is ready for judicial review. In other words, has it developed sufficiently to warrant the courts involvement. A case is generally considered ripe when it presents an actual controversy that requires resolution, as opposed to being based on hypothetical or speculative scenarios. The idea is that courts do not intervene prematurely in disputes and that the court should only hear cases that have reached a stage where the issues are concrete and have been properly articulated. (Toilet Goods Association v. Gardner 387 U.S. 158(1967))

V. DISMISSAL OF THE APPELANTS TORTIOUS INTERFERENCE CROSS CLAIMS AGAINST MORRIS TOWNSHIP AND FLORHAM PARK WAS ENTIRELY APPROPRIATE

The Appellant incorrectly claims that the Borough of Florham Park and the Township of Morris are guilty of improper acts which amount to a tortious interference with a business relation or contract. The Township of Morris finds this curious in that neither the Township nor the Borough are parties to the 2016 contract for which interference is claimed by Appellant.

Further, a review of the case cited by the Appellant (DiMaria Const. vs. Interarch 351 N.J. Super. 558 (App. Div.) 2001) speaks about four elements: 1. A protected interest; 2. Intential interference without justification; 3. A likelihood that the interference caused the loss of a perspective gains; and 4. Resulting damages. For reasons discussed above, the Appellant has suffered no ascertainable loss because it has not asked for any gallonage from the Sisters of Charity of St. Elizabeth nor has the Appellant shown the loss of a "prospective gain" and lastly it has failed to define the nature of the intentional interference.

The 2016 agreement provides, inter alia, that the Appellant has the right to ask the Township of Morris for additional sewerage allocation but counsel freely admitted before Judge Hansbury that the Township of Morris was not under any obligation to grant such additional gallonage.

Given the foregoing, there cannot be any finding that there was a tortious interference with Appellants rights by the Township of Morris or the Borough of Florham Park.

CONCLUSION

Summary Judgment was appropriately granted in this matter because there are no facts in dispute, the Trial Judge merely applied the applicable law. The Appellant has not presented a factual basis demonstrating an entitlement to relief against any party and in fact has not provided a factual basis setting forth any ascertainable loss whatsoever. The idea that the Appellate Division should "enter an order to enable the Defendant to fully pursue it's rights against the Plaintiff, the Defendant Morris and Defendant Borough" (FPPD 28) is completely lacking in merit as there has been no quantifiable claim advanced against the Sisters and there is no privity of contract whatsoever between the Appellant, FPP, and either the Borough of Florham Park or the Township of Morris.

Respectfully Submitted,

John M. Mills, III
Mills & Mills P.C.

Dated: November 21, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-003175-23

SISTERS OF CHARITY OF SAINT ELIZABETH, *Plaintiff-Respondent,* vs. TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, THE VILLA AT FLORHAM PARK, INC. and MORRIS COUNTY GOLF CLUB, INC., *Defendants-Respondents,* and THE BOROUGH OF FLORHAM PARK, *Defendant-Appellant.*	CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY Docket No. MRS-L-975-20 Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.
TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, *Third-Party Plaintiffs,* vs. THE BOROUGH OF FLORHAM PARK, *Third-Party Defendant.*	

BRIEF OF DEFENDANT-RESPONDENT MORRIS COUNTY GOLF CLUB

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PRELIMINARY STATEMENT

This case concerns the transfer of a sewer system owned and operated by the Sisters of Charity of Saint Elizabeth ("Plaintiff" or "Sisters"). Respondent Morris County Golf Club's ("MCGC") owns property in the Township of Morris ("Township" or "Defendant Township") and contributes its flow to the sewer system. Throughout the course of this protracted litigation, MCGC's allocation of sewer capacity has not changed. As such, MCGC's role in the matter has been peripheral, and its position in an otherwise adversarial litigation has remained neutral.

The instant appeal now requires MCGC to assert its stance, despite never engaging in any motion practice, and being a passive party. After years of litigation, extensive mediation and ultimately settlement negotiations (which culminated in a comprehensive settlement), it appears the instant appeal is an attempt by Appellant, Florham Park Property, LLC ("FPP" or "Appellant") to take a second bite out of the appeal and seek adjudication of its hypothetical concerns. The appeal must be dismissed.

PROCEDURAL HISTORY

MCGC adopts the procedural history in this matter as set forth in Appellant's brief and adds as follows:

On June 14, 2024, FPP filed a Notice of Appeal thereby appealing the May 2, 2024 Consent Order. (FPPDa470-FPPDa475) On September 12, 2024 FPP filed an Amended Notice of Appeal adding an appeal of the October 2023 Orders (FPPDa476-FPPDa482).

STATEMENT OF FACTS

Respondent MCGC sets forth herein, the facts relevant to *its* relationship and the nature of its impartial position in the proceedings.

Sisters and Villa at Florham Park, LLC ("Villa")[1] are the owners of property located within the Borough of Florham Park ("Borough" or "Defendant Borough"). (FFPDa5-FFPDa6). Sisters owns and operates a pump station which is situated on its property, together with a force main ("Sewer Infrastructure"). (FFPDa5-FFPDa6). MCGC's property is located in the Township. (FFPDa6). The Sewer Infrastructure is used to convey sanitary sewer flows from the Sisters, Villa/FPP and MCGC properties into the Township sewer system. (FFPDa5-FFPDa6).

A brief history of the relationship of MCGC to the parties is as follows: the Sisters, Township, Borough, and the Florham Park Sewerage Authority (the "FPSA"), entered into an agreement on July 28, 1981, to address wastewater

[1] Villa is the predecessor in interest to FPP. (FPPDa4-FPPDa125).

issues as to the Sisters' property. (FPPDa286).[2] On or about May 2, 1997, an agreement was entered into between the Sisters, the Township, and MCGC in which MCGC was added as a contributor of sanitary flows to the pump station. (FPPDa33).

Throughout 2019 and 2020, the Township, the Borough, and the Sisters engaged in extensive negotiations in which the Sisters requested the Township or the Borough agree to assume the ownership, operation, and maintenance of the pump station and its associated sewerage infrastructure. (FPPDa7). The Borough and the Township could not come to an agreement, and as such, the Township filed an appeal of the trial court ruling bearing Docket No. A-0226-20 (the "2020 Appeal"). (FPPDa440-FPPDa465).

After the 2020 Appeal and subsequent remand, the litigation ensued. (FPPDa440-FPPDa465). At this time, other parties entered the litigation. (FPPDa135-FPPDa154). Specifically, on March 31, 2022, MCGC was brought into the litigation and filed an Answer to the amended complaint. (Ja125 – Ja135).

Prior to MCGC's' involvement in the litigation, the trial court appointed Brian Slaugh, PP, AICP as Special Master for the Township and Defendant to

[2] The FPSA has since been dissolved with its rights and obligations now assumed by the Borough. (FPPDa6).

assist the parties in mediation. (Ja74-Ja75.). However, upon entering the litigation, MCGC did not see the need to participate in the mediation, in light of the fact that its capacity and allocation was not changing; hence, MCGC would remain on the periphery of the mediation. (Ja202 and Ja220). MCGC did, however, appear via counsel at each case management conference to observe and confirm the continued "status quo" nature of its role. (Ja149-150; Ja169-170; Ja176-177; Ja178-179; Ja182-183; Ja186-187; Ja192-193; Ja194-195; Ja199 -200; Ja205-207; Ja214-215).

On May 26, 2023, Sisters filed a motion for summary judgment, which FPP opposed. (FPPDa180-FPPDa424; Ja224- Ja230). On July 13, 2023, the Township filed a motion for summary judgment, which FPP opposed. (FPPDa425- FPPDa430; Ja224 – Ja225; FPPDa468). Next, the Borough filed a motion for summary judgment on September 1, 2023, and FPP opposed. (FPPDa431 – FPPDa439; FPPDa469).

On October 13, 2023, oral arguments were heard on all motions for summary judgment. (T).[3] That same day, the trial court entered orders as follows: 1) granting Sisters' motion for summary judgment and dismissing the counterclaims filed against Sisters, with prejudice; and 2) granting Defendant Township and Defendant Borough's motions for summary judgment and

[3] T= Transcript of October 13, 2023.

dismissing the crossclaims against each of these defendants (collectively referred to as the "October 2023 Orders"). (FPPDa126-FPPDa127 and FPPDa128-FPPDa130). MCGC was not a moving party to any of these motions and hence not present at oral argument. T:3.

LEGAL ARGUMENT

MCGC has remained an impartial party in the litigation; it has no contractual or otherwise legal relationship or obligations with/to FPP. Nevertheless, as MCGC remains a party, it herein asserts all trial court orders should be affirmed, and the appeal denied. Accordingly, MCGC joins the arguments set forth by all co-Respondents in their respective briefs, and supplements with the following:

I. THE TRIAL COURT PROPERLY ENTERED THE CONSENT ORDER

The Supreme Court has held that parties cannot ordinarily appeal as of right from a judgment or order entered with the consent of the parties. Winberry v. Salisbury, 5 N.J. 240, 255 (1950); Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc., 458 N.J. Super. 194, 205 (App. Div. 2019); N.J. Schs. Constr. Cor. V. Lopez, 412 N.J. Super. 298, 309 (App. Div. 2010). Rule 2:2-3 which prescribes an appeal as of right from a final judgment, contemplates a judgment entered involuntarily against a losing party. Id.

"Settlement of litigation ranks high in our public policy." Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961)). "[O]ur courts have refused to vacate final settlements absent compelling circumstances." Ibid. This policy rests on the recognition that "parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone." Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 563 (App. Div. 2007) (quoting Isetts v. Borough of Roseland, 364 N.J. Super. 247, 254 (App. Div. 2003)).

After years of litigation, extensive mediation and settlement negotiations, the parties (aside from FPP) executed an intricate settlement agreement ("Settlement Agreement") pertaining to the ownership and maintenance of the pump station and force main. The accompanying Consent Order prescribed finality of the litigation based on the Settlement Agreement. FPP was in no way aggrieved by the Consent Order. New Jersey public policy and jurisprudence warrants affirming the Consent Order.

II. THE COURT PROPERLY DISMISSED BOTH VILLA'S COUNTERCLAIM AGAINST SISTERS AND THE TORTIOUS INTERFERENCE CROSSCLAIMS AGAINST SISTERS AND APPELLANT'S APPEAL OF THE OCTOBER 2023 ORDERS IS OUT OF TIME.

As stated, MCGC was not a moving party, nor a participant in oral argument at any of the aforementioned 2023 summary judgment motions that are the subject of Appellant's Point II and Point III of its Appellate Brief. Nevertheless, MCGC asserts the October 2023 Orders were properly entered.

Only a cursory glance is sufficient to confirm that FPP's appeal is woefully deficient. As the Notice of Appeal and Amended Notice of Appeal reveals, FPP is seeking appellate review of three trial court orders *entered in 2023*.

R. 2:4-1(a) establishes the time to appeal final orders of a trial court. This Rule provides in clear and unequivocal language as follows:

> … an appeal from a final judgment of a court shall be filed within 45 days of their entry.

Three hundred and thirty-five days lapsed from the date of the entry of the October 2023 Orders before FPP filed the Amended Notice of Appeal. MCGC need not argue the merits of the allegation as to whether or not the trial court erred in dismissing both Villa's counterclaim against Sisters, and Villa's tortious

interference cross-claims, as the clock on the time to appeal the October 2023 Orders has long expired. The October 2023 Orders were not interlocutory in nature; the October 2023 Orders were final, and therefore R. 2:4-1(a) is clearly applicable and warrants dismissal of Appellant's appeal.

CONCLUSION

The Appellate Division's resources should not be deployed to address this appeal in view of 1) New Jersey public policy favoring settlements; and 2) the untimeliness of the appeal, insofar as the lower court orders cited above are concerned. As such, it is respectfully requested that the instant appeal be dismissed.

CALLI LAW, LLC

Attorneys for Respondent, Morris County Golf Club

Dated: November 25, 2024

/s/ Lawrence Calli
Lawrence A. Calli, Esq.

SISTERS OF CHARITY OF SAINT ELIZABETH, Plaintiff/Respondent, vs. TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, THE BOROUGH OF FLORHAM PARK*, THE VILLA AT FLORHAM PARK, INC., and MORRIS COUNTY GOLF CLUB, INC., *Defendants/Appellant, Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003175-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT, LAW DIVISION MORRIS COUNTY DOCKET NO. MRS-L-975-20 Sat below: Hon. Stephan C. Hansbury, J.S.C.
TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, Third Party Plaintiffs, vs. THE BOROUGH OF FLORHAM PARK, Third Party Defendant.	

BRIEF OF PLAINTIFF/RESPONDENT SISTERS OF CHARITY OF SAINT ELIZABETH

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PRELIMINARY STATEMENT

For the past five years, Plaintiff/Respondent, the Sisters of Charity of Saint Elizabeth ("Sisters" or "Plaintiff"), has been seeking, at great expense, through this litigation and the mediation conducted within it, to address sewer issues to allow for development of an inclusionary development on the Sisters property. That inclusionary development is part of a Court-approved fair share plan for the Borough of Florham Park, which will assist the Borough in meeting its Mount Laurel obligations. The Sisters have been working diligently since 2019, when the fair share plan was approved, to provide for a wastewater treatment solution that will allow that inclusionary development to proceed. That wastewater treatment solution is set forth in the Settlement Agreement challenged by the Appellant on this appeal, thereby further frustrating compliance with the Mount Laurel doctrine.

Remarkably, the Brief filed in this Court by Appellant, Florham Park Property, LLC ("FPP") does not even mention that inclusionary development even though it is at the crux of this case. Instead, the FPP Brief implies that the Sisters, whose average age is 83, are greedily hoarding sewer capacity for their own avaricious purposes. The various misstatements and omissions in the FPP Brief are quite disturbing.

To take but one other example at this juncture, the FPP Brief also seeks to convince this Court that FPP was excluded from the settlement discussions below. As explained further infra, the record reveals that FPP and its predecessor in interest were deeply involved in those discussions below, under the supervision of the trial court judge and his Court-appointed Master, for well over a year. At a point in time when it was clear to the other parties that FPP decided not to be a party to the Settlement Agreement at issue, the other parties moved to dismiss FPP's claims against them. Primarily because FPP did not request its own sewer expansion or otherwise do what was required to assert any legal right to its own sewer expansion, the trial court dismissed FPP's claims as being unripe for adjudication and/or a request for an advisory opinion.

After all of their claims were dismissed on summary judgment and FPP was no longer a party below, the other parties entered into the Settlement Agreement below and the trial court entered an Order accordingly, concluding this case. Although it was no longer a party below when the Settlement Agreement was consummated, FPP nevertheless argues on this appeal that the case could not be settled at all unless it was a party to the Settlement Agreement.

The Appellant Villa owner, now FPP, makes its arguments ostensibly based upon contractual documents between the Villa owners and the Sisters pursuant to

which the Villa property was conveyed by the Sisters to the Villa owners in 2016. The gist of FPP's position is that the 2016 documents conveying the Villa property gave the Villa owners veto power over a settlement unless the sewage allocation in question is dedicated to the Villa property instead of being dedicated to its intended user – the inclusionary development meeting the Borough's Mount Laurel obligations. FPP takes this position despite the fact that it has its own right to request an expansion of the capacity, but chose not to do so.

The pump station and the associated infrastructure are owned by the Sisters; not the Villa owners. The Villa owners are unmoved by that notion of ownership, apparently considering it a quaint notion that governs the affairs of others. The Villa owners insist that they have control over the pump station and associated infrastructure based on the 2016 Agreements that conveyed to the Villa owners the Villa property; not the pump station or associated infrastructure, which remain owned by the Sisters.

For the reasons to follow, it is respectfully submitted that the trial court correctly held that the FPP claims were not ripe. It is further submitted that FPP's contractual claims are baseless as a matter of law should this Court reach those issues on the merits. In either event, summary judgment was properly entered and this matter was lawfully settled by the remaining parties to the case.

PROCEDURAL HISTORY

The Procedural History set forth in the Brief of Appellant FPP ("FPPb") is quite cursory and the Procedural History is germane to certain issues on appeal. We therefore provide the following detailed Procedural History.

On May 1, 2020, the Plaintiff/Respondent Sisters of Charity of Saint Elizabeth ("Sisters") filed the Verified Complaint commencing this action against the Township of Morris and the Township Committee of the Township of Morris (collectively, the "Township"). The Verified Complaint (FPPDa196-FPPDa214) sought entry of judgment confirming the Township's obligation to provide sanitary sewer service for the inclusionary development on the Sisters' Property located within the Borough of Florham Park, with that inclusionary development property being located within the Township's NJDEP-approved sewer service area.[1]

The Verified Complaint also sought entry of judgment compelling the Township to accept ownership, maintenance and control of the sanitary sewer pump station and associated sewer lines serving the Sisters' Property. On May 29, 2020, the Township filed an Answer and Third-Party Complaint naming the Borough of Florham Park (the "Borough") and the Florham Park Sewerage

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[1] "FPPDa" references are to the Appendix of Appellant FPP, and "Ja" references are to the Joint Appendix of Respondents, filed and served herewith.

Authority ("FPSA") as Third-Party Defendants (Ja1-Ja10). The Township's Answer denied any responsibility to accept ownership, maintenance and control of the sanitary sewer pump station and sewer lines, and its Third-Party Complaint asserted that it was the Borough that had such an obligation, if any; not the Township.[2]

On June 15, 2020, the first trial court judge hearing this matter below (the Hon. Michael C. Gaus, J.S.C.) held argument on the Order to Show Cause return date[3], and, on August 11, 2020, Judge Gaus issued an opinion addressing all of the relief sought in the Sisters' Verified Complaint, compelling the Township to provide sewer service and to accept ownership, maintenance, and control of the sanitary sewer pump station and sewer lines. (Ja11-Ja73) The Township then appealed.

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[2] On June 1, 2020, Fair Share Housing Center ("FSHC"), a non-profit advocate for affordable housing, filed a Notice of Appearance and letter to the trial court outlining its position. In the letter, FSHC urged the trial court to enter judgment compelling the Township to provide sewer service to the inclusionary developments on the Sisters' Property located in both the Township and the Borough. (Ja271-Ja276). The FSHC did not participate as a party below.

[3] The Borough did not participate in that hearing, apparently not having been served at that time.

The Appellate Division, in a decision issued June 24, 2021, (FPPDa440-FPPDa465) affirmed Judge Gaus's Order in part, compelling the Township to provide sewer service to the inclusionary developments, but reversed that portion of the Order which required the Township to accept ownership, maintenance, and control of the sanitary sewer pump station and sewer lines. The decision remanded the matter for additional proceedings.

On September 7, 2021, Judge Gaus issued an Order appointing Brian Slaugh, PP, AICP, as Special Master to review submissions by the parties, render written recommendations to the court, and assist the parties in mediation. (Ja74-Ja75) On September 13, 2021, the Borough then filed its Answer (Ja76-Ja85) and, on October 7, 2021, the Parties submitted a Consent Order deleting the Florham Park Sewerage Authority ("FPSA") from the caption and removing it as a Third-Party Defendant[4]. (Ja86-Ja88)

On November 17, 2021, the Sisters filed a motion to amend the Verified Complaint to name Morris County Golf Club and The Villa at Florham Park ("TVFP") as additional defendants. (Ja89-Ja90) On January 14, 2022, the Township filed a motion to amend its pleadings to add Toll Brothers, Inc., as a

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[4] FPSA is no longer in existence and Florham Park itself now stands in its shoes.

Third-Party Defendant.[5] (Ja91-Ja92) On January 18, 2022, Judge Gaus issued an Order granting the Sisters' motion (Ja93-Ja103) and, on the same day, the Sisters filed an Amended Complaint, naming Morris County Golf Club ("Golf Club" or "MCGC") and TVFP as Defendants. (FPPDa135-FPPDa144). On February 7, 2022 , Judge Gaus denied the Township's motion as moot since Toll Brothers had terminated their contract. (Ja104-Ja109)

TVFP filed its Answer with Cross-Claims and Counterclaim on March 23, 2022 (FPPDa155-FPPDa179), and MCGC filed its Answer on March 31, 2022. (Ja125-Ja135) In its Counterclaim, TVFP alleged that the Sisters, in seeking to expand the sewer service for the inclusionary development, had breached a 2016 Agreement through which the Villa property was sold by the Sisters to TVFP. On April 20, 2022, the Sisters filed an Answer to TVFP's Counterclaim. (Ja141-Ja148) On April 26, 2022, a case management conference was held by the Honorable Stephan C. Hansbury, J.S.C. (ret.t/a on re-call), to whom the matter had been assigned for handling. By Order dated April 26, 2022, (Ja149-Ja150) Judge Hansbury ordered the Parties to submit mediation statements to Special Master Brian Slaugh, PP, AICP, and to participate in a mediation session on May 16,

[5] At the time, Toll Brothers was under contract to purchase the Florham Park inclusionary development portion of the Sisters' property. That transaction was terminated.

2022. Pursuant to a letter issued on May 31, 2022 by the Special Master (Ja164-Ja168), all Parties, with the exception of MCGC, attended and participation in that initial mediation session.

The Township and the Borough next met at a mediation session with the Special Master on June 14, 2022. That mediation session, according to the Special Master's report to Judge Hansbury on June 20, 2022 (Ja172-Ja173) focused on the financial terms under which the municipalities would enter into an agreement related to the provision of sewer service to the inclusionary developments on the Sisters' Property. At the following session on June 23, 2022, the Township and Borough participated again, and, according to the Special Master's June 26, 2022 report to Judge Hansbury (Ja174-Ja175), continued to make progress on resolving their financial issues related to the provision of sewer service. The two municipalities met again on August 17, 2022 and August 22, 2022 for mediation sessions, and, according to the Special Master's report issued August 24, 2022, (Ja180-Ja181) narrowed down the issues concerning the question of which municipality would own the pump station and associated sewer lines, and the circumstances under which that would occur.

On September 6, 2022, the Parties participated in a mediation session with the Special Master related to the expansion of the pump station to serve the

inclusionary development to be located on the Florham Park side of the Sisters' Property and the turnover of the pump station and related facilities to the municipalities. Though no resolution was yet reached, the Special Master wrote in his September 9, 2022 report to the trial court that he was hopeful a resolution would be accomplished. (Ja184-Ja185)

The trial court continued to hold case management conferences and issue Orders periodically - on June 2, 2022 (Ja169-Ja170) June 27, 2022 (Ja176-Ja177), July 15, 2022 (Ja178-Ja179), August 25, 2022 (Ja182-Ja183), and September 13, 2022 (Ja186-Ja187), with all Parties, including TVFP and MCGC, attending.

On September 22, 2022, Florham Park Property ("FPP"), as contract purchaser of the Villa Property then owned by TVFP, filed a motion to intervene in the action (FPPDa132). The trial court granted FPP's motion on October 28, 2022 (FPPDa131). The other Parties, including TVFP/FPP, the owners of the Villa Property, continued to participate in mediation and, also in November 10, 2022 and December 15, 2022 case management conferences with Judge Hansbury (Ja192-Ja195). Subsequently, a case management conference was held on January 4, 2023, which was memorialized by an Order dated January 12, 2023. (Ja199-Ja200). On January 18, 2023, the Special Master issued a report to the court on the status of discussions for the provision of sewer service and the ownership, control, and

maintenance of the sewer facilities, including the pump station. (Ja201-Ja204) It was at this time that the Special Master first highlighted as a disputed issue the Villa parties' legal positions and demands.

On March 14, 2023, the trial court held a case management conference at which all Parties, including FPP, appeared.[6] Judge Hansbury ordered the Parties to continue negotiating towards reaching an agreement, and to provide the status of negotiations at the next case management conference. (Ja205-Ja207) On April 17, 2023, the Special Master issued a letter to the trial court setting forth the positions of FPP with regards to its claims. (Ja208-Ja209) On April 18, 2023, the Sisters filed a letter with the trial court opposing FPP's positions. (Ja210-Ja211)

On May 26, 2023 the Sisters filed a motion for summary judgment seeking dismissal of FPP's Counterclaim against the Sisters. (FPPDa180-FPPDa182) On July 13, 2023, the Township filed a motion for summary judgment seeking dismissal of FPP's Cross-Claims against the Township (FPPDa425-FPPDa428) and, on September 1, 2023, the Borough filed a motion for summary judgment seeking dismissal of FPP's Cross-Claims against the Borough. (FPPDa431-

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[6] Having purchased the Villa Property, FPP formally substituted in as a party for TVFP by way of Order entered June 20, 2023. FPPDa133.

FPPDa433). FPP opposed all three motions, and, on October 9, 2023, FPP filed a motion seeking the recusal of Judge Hansbury. (Ja236-Ja249)

On October 13, 2023, Judge Hansbury held oral argument on the motions for summary judgment and granted all three motions. (FPPDa126-FPPDa130) In a bench opinion issued on that date, the transcript of which has been submitted to this Court by FPP, he noted that FPP's claims were premature and unripe, and that FPP was seeking an advisory opinion. As we elaborate upon infra, the trial court further noted that FPP's rights would have to be violated prior to the filing of a claim, and that no rights have yet been violated. The trial court further noted that the Township and Borough had "done nothing wrong" and that FPP did not have any claims against the municipalities. The trial court therefore granted all three summary judgment motions for the reasons expressed on the record, with all claims raised by TVFP/FPP in their pleadings being dismissed. Thus, as of the entry of the three October 13, 2023 Orders dismissing FPP's claims, FPP was no longer a party to this case. On November 17, 2023, Judge Hansbury issued an Order denying FPP's motion for recusal. (Ja261-Ja263)

Subsequently, the remaining parties continued to negotiate a Settlement Agreement, and, on April 26, 2024, by letter to the trial court (Ja270), the Sisters submitted the Settlement Agreement to the trial court for the court's review and, on

April 30, 2024, the Sisters submitted a proposed Consent Order incorporating the Settlement Agreement. On May 2, 2024, the trial court entered that Consent Order (FPPDa1) concluding this case below. This appeal by FPP followed.

COUNTER-STATEMENT OF FACTS

Plaintiff, Sisters of Charity of Saint Elizabeth ("Plaintiff' or "Sisters") owns 151.77 acres of property located in both the Township of Morris and the Borough of Florham Park, with 49.98 acres being located in Morris Township (the "Morris Township Property"), and 101.79 acres being located in the Borough of Florham Park (the "Florham Park Property"). The Morris Township Property and the Florham Park Property are collectively referred to herein as the "Sisters' Property."

The Sisters' Property is occupied by several uses and generators of sewage flow. The uses presently existing on the Sisters' Property include the Motherhouse for the Sisters, residences, a chapel and other buildings utilized by the Sisters, Saint Elizabeth University and the Academy of Saint Elizabeth. Those uses are all served by the pump station, force main and gravity sewer line that are at issue in this litigation. See Verified Complaint at FPPDa197 to 215) regarding the overall factual background.

The Villa at Florham Park, Inc. ("TVFP"), a named defendant in this matter, previously owned property designated as Block 1201, Lot 3, that is also served by the pump station, force main and gravity sewer line that is at issue in this litigation. Said property, Block 1201, Lot 3 ("the Villa Property") was conveyed during this litigation to the Appellant, Florham Park Property, LLC ("FPP"), which ultimately moved to substitute in as party in place of TVFP.

Defendant Morris County Golf Club, Inc. also owns property ("Golf Club Property") that is served by the pump station, force main and gravity sewer line that is at issue in this litigation.

Morris Township owns and operates its own sewage treatment plant, the Woodland Sewage Treatment Plant, and other sewerage infrastructure. All of the Sisters' Property, including the Florham Park Property, is located within the Morris Township sewer service area approved by the New Jersey Department of Environmental Protection ("NJDEP"). The same holds true for the Villa Property and the Golf Club Property.

On July 8, 2015, the Borough of Florham Park (hereinafter "Borough" or "Florham Park") filed the declaratory judgment action captioned In the Matter of the Application of the Borough of Florham Park for a Determination of Mount Laurel Compliance, Docket Number MRS-L-1698-15 (the "DJ Action"), seeking

court approval of a housing plan to satisfy its constitutional fair share housing obligations, imposed by the Mount Laurel doctrine, for the period 1999-2025.[7]

The Sisters actively participated in said action. On July 6, 2017, following extensive negotiations, Florham Park, along with the various intervenors and interested parties, including the Fair Share Housing Center ("FSHC") and the Sisters, executed a settlement agreement (the "DJ Action Settlement Agreement"). (FPPDa215-FPPDa277) Section 13 of the DJ Action Settlement Agreement identifies a 22-acre site owned by the Sisters, consisting of a portion of the parcel designated Block 1301, Lot 2 on the tax map of Florham Park and fronting on Park Avenue, as an inclusionary development/affordable housing site in order to assist Florham Park in meeting its Mount Laurel obligations. The DJ Action Settlement Agreement stipulates that the site is suitable for development of multi-family housing in the form of townhouses and garden apartments, of which 20 percent are to be set aside for low- and moderate-income households, and it obligated Florham Park Borough to rezone the site for that purpose to satisfy a portion of the Borough's constitutional fair share housing obligations, which was then done.

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[7] See e.g. Southern Burlington County NAACP v. Tp. of Mount Laurel, 92 N.J. 158 (1983)("Mount Laurel II")

On July 28, 2017, following a Fairness and Preliminary Compliance Hearing, the trial court approved the DJ Action Settlement Agreement. On March 1, 2019, the trial court in that Florham Park DJ Action conducted a Final Compliance Hearing concerning the DJ Action Settlement Agreement. On March 7, 2019, the Honorable Maryann L. Nergaard, J.S.C., entered an Order granting final judgment of compliance and repose in the Florham Park DJ Action, concluding that the DJ Action Settlement Agreement brought the Borough into compliance with its Mount Laurel obligations. (FPPDa278-FPPDa285)

The Sisters currently own and operate a sanitary sewer pump station located on the Property on Park Avenue in Florham Park, along with a force main and gravity sewer line that are used to convey wastewater to and from the pump station (sometimes collectively referred to herein as the "SC System"). The SC System currently provides wastewater conveyance for the Property of the Sisters, and also for the Villa Property and the Golf Club Property, with sewage flows from said properties being conveyed to the Morris Township sewer system, and being treated at the Woodland Sewage Treatment Plant owned and operated by Morris Township.

The SC System was constructed, installed and operated by the Sisters pursuant to the terms of a certain agreement by and between the Sisters, Morris

Township and the Borough of Florham Park dated July 28, 1981 (the "1981 Agreement") (FPPD287-FPPDa299). Among other things, the 1981 Agreement allows for sewage flows of up to 95,000 gallons per day. (FPPDa292)[8]

The 1981 Agreement contemplated that the SC System could be made available to other users whose property is located in Florham Park or Morris Township. Since the execution of the 1981 Agreement, the SC System has been owned, maintained and operated by the Sisters for their benefit as well as the benefit of the other users, with the 1981 Agreement being amended by an Agreement, dated May 2, 1997, by and between the Sisters, the Township of Morris and the Morris County Golf Club, Inc. ("MCGC"). (FPPDa300-FPPDa307)

Further, on or about September 15, 2016, an Asset Purchase Agreement was executed by the Sisters and TVFP, pursuant to which the Villa Property was sold by the Sisters to TVFP. (FPPDa308-FPPDa380) The Asset Purchase Agreement conveyed only the Villa Property, which did not include any part of the SC System. The SC System has always remained the property of the Sisters.

In addition to the sewage from the Sisters' Property, sewage from the Golf Club Property and the Villa Property also utilize the SC System, with the

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[8] Since 1981, the Sisters have been paying charges to reserve the portion of the 95,000 gallons per day allocation that is not being used.

wastewater flowing by gravity to the pump station. All of the aforementioned sewage flows are then pumped via a sanitary sewer force main which runs the length of Punchbowl Road from Park Avenue in Florham Park to Madison Avenue in Morris Township, where it connects to a gravity sanitary sewer line. All of the aforementioned sewage flows are then conveyed to the Woodland Sewage Treatment Plant in Morris Township.

Recognizing that the Sisters Property to be developed with multi-family inclusionary development pursuant to the DJ Action Settlement Agreement would generate additional sewage flows, an expansion of the pump station/SC System was proposed by the Sisters. In this regard, on or about March 15, 2019, a meeting was held between representatives of the Sisters, Florham Park and Morris Township, during which it was confirmed that Florham Park did not have the capacity in its sewer system or treatment system to accept additional flow, and it was further confirmed that the Sisters' Property is within the Morris Township sewer service area and not within Florham Park's sewer service area.

Also at said meeting, it was requested that the Sisters pay to improve the pump station/SC System so as to accommodate the additional flow required for the inclusionary development, and the Sisters therefore commissioned a study to confirm the scope of required improvements. The Sisters have agreed to make the improvements to the pump station/SC System (the "SC System Expansion"), at their cost, which would increase the capacity of the SC System from 95,000 gallons per day (the amount set forth in the 1981 Agreement) to 142,550 gallons

per day ("gpd"), ("SC System Expansion") with the additional 47,550 gpd to be used for the inclusionary development to be located on the Sisters' Property.

As noted above, said inclusionary development is a key component of the court-approved Borough of Florham Park Housing Element and Fair Share Plan (Ja277-Ja297), as memorialized in the DJ Action Settlement Agreement and in the March 7, 2019 Order granting a final judgment of compliance and repose in the Florham Park Mount Laurel case. In addition to seeking the expansion for the purpose of serving the inclusionary development, and because the Sisters, having an average age of 83 years old, are not a public utility and must "get out of the sewer business," this litigation has also sought a conveyance of the SC System, including the pump station, to the municipalities that are parties to this case.

As described further below, Morris Township has agreed to accept and treat the sewage flow resulting from the SC System Expansion and Florham Park Borough has agreed to own and operate the SC System upon the terms outlined in the Settlement Agreement challenged by the Appellant herein.

THE COURTS' RULINGS AND THE MEDIATION

At the outset of this litigation, Plaintiff asserted, and the trial court previously found, by way of Order and Statement of Reasons dated August 11, 2020, that Morris Township must accept ownership of the SC System in order to allow for development of the inclusionary project at issue. (Ja11-Ja73) However, upon appeal by Morris Township of the trial court's rulings of August 11, 2020, this Court, by way of Opinion dated June 24, 2021, reversed the trial court's ruling of August 11, 2020

ordering Morris Township to accept ownership and operation of the SC System, and remanded this matter to the trial court for further proceedings. (FPPDa440-FPPDa465)

This case was thereafter managed by the Hon. Stephan C. Hansbury, J.S.C. (retired T/A on recall). Further, the trial court directed Brian Slaugh, P.P., AICP, the Court-appointed Master, to conduct mediation toward the end of achieving a settlement of the claims raised in this case.

A lengthy mediation process between all Parties ensued, and it appeared that the claims raised in this case would be resolved, with the essence of the resolution being that Florham Park will ultimately own and operate the SC System (the pump station, force main and the portion of the gravity line within Florham Park) after the pump station is expanded and improved at the expense of the Sisters, with Morris Township to then assume ownership of a length of sewer gravity line located within Morris Township.

However, as the process of resolving the matter seemed to be winding down, the owners of the Villa Property staked out demands and legal positions that were unacceptable to the Sisters, Florham Park, and Morris Township, ostensibly based upon the 2016 Agreements discussed further infra, thereby thwarting the global agreement that appeared imminent before those positions were taken.

As noted in an April 20, 2023 letter (FPPDa387) and in the Counterclaim, TVFP, (FPPDa155), and now its successor in title, Appellant FPP, base their

claims as against the Sisters on the documents executed in 2016 when the Villa Property was sold by the Sisters to TVFP.

THE 2016 AGREEMENTS BETWEEN TVFP AND THE SISTERS

As noted above, the Villa Property was conveyed by the Sisters to TVFP pursuant to an Asset Purchase Agreement, dated September 15, 2016 (FPPDa308-FPPDa380). As part of that conveyance, the Sisters and TVFP also executed a Sanitary Sewer Agreement (the "Sewer Agreement").[9] (FPPDa386-FPPDa395) Two provisions of that Sewer Agreement are most relevant to this appeal. Section 22 of the Sewer Agreement provides certain rights to the owners of the Villa Property to seek their own expansion of the sewer system, as follows:

> 22. The Sisters of Charity agree that the Sisters of Charity shall not prevent TVFP from seeking to expand the conveyance capacity of the portion of the SC System that conveys or pumps flow from Lot 3 so as to convey additional flow from Lot 3 (an "Expansion"), and the Sisters of Charity agree to reasonably assist in that regard at no cost to the Sisters of Charity, **provided that the following conditions are met:**
>
> a. The engineering plans for the modification of the facility to address the Expansion shall be prepared by New Jersey licensed professionals and shall be reviewed and approved by the Sisters of

[9] It was first envisioned that Morris Township would sign the Sanitary Sewer Agreement, but it declined to do so. The Sisters and TVFP therefore also executed a document on September 30, 2016, captioned Agreement Regarding Sewer Rights. (FPPDa402-FPPDa418)

Charity, such approval not to be unreasonably withheld, conditioned or delayed. TVFP will provide certified copies of the as-built plan, upon completion of the work. All work and added equipment will be warranted by TVFP for one year.

b. TVFP shall obtain all required governmental and regulatory approvals for the modification of the SC System as well as approvals for the conveyance of additional sanitary sewer flow through Morris Township's system and into the ultimate treatment facility including, but not limited to approval from the Township of Morris, with copies of same provided to the Sisters of Charity. The parties expressly acknowledge that the Sisters of Charity cannot approve the treatment of additional sewer flow by the downstream sewer treatment plant, the allocation of capacity for same, or the right to convey additional flow within the Township owned sewer system and that any agreement by the Sisters of Charity as to Expansion is exclusive of such additional authority or approvals that must be obtained by TVFP.

c. TVFP shall cause the modification of the sanitary sewer system to be competed in a proper, workman like manner so as to minimize disruption to any and all users of the SC system and on reasonable advance notice to all parties; and

d. TVFP shall be responsible for the payment of all costs of the design, planning, approval and construction of all improvements to affect the modification of this system for the Expansion.

Neither TVFP nor its successor in title, FPP, have never pursued any such expansion plans for the SC System, although they have the contractual right to pursue such plans and apply to Florham Park and Morris Township for the required approvals. Instead, TVFP, and then FPP, have asserted that they can simply claim the expanded treatment capacity that has been proposed by the Sisters for use by the inclusionary development that will assist Florham Park in meeting its Mount Laurel obligations and/or veto that expansion.

Paragraph 28 of the Sewer Agreement, which is also at issue in this appeal, reads:

> 28. The parties hereto shall have equal rights and responsibilities regarding any unused by [sic] sewer capacity associated with the pump station and, as indicated above, shall share in the cost of maintaining same based on percentage of sewer flow. (Emphasis added.) (FPPDa394)

We further address those contractual provisions within the Legal Argument section of this Brief, infra,

THE LEGAL POSITIONS OF THE OWNERS OF THE VILLA PROPERTY

Based upon the contents of those 2016 Agreements, FPP contends that: (1) the SC System proposed by the Sisters, Florham Park, and Morris Township, must be further expanded to accommodate the demands of FPP, which demands include a gallonage allocation allowing for far greater development on the FPP Property than currently exists (or that is permitted by the applicable zoning); and (2) FPP's demands for a greater capacity allocation are ostensibly justified because it claims entitlement to one-half of the unused capacity of the existing pump station that is part of the SC System. FPP claims that, by not allowing it to veto the Settlement Agreement which will expand the capacity of the SC System for the inclusionary development, the Sisters have violated the 2016 Agreements and all Parties have otherwise acted unlawfully.

In this regard, it was noted below that the C-3 zoning provisions governing assisted-living residences, such as the facility located on the Villa Property,

(FPPDa419), allow for "a maximum number of 110 units, with a maximum bed capacity of 120."

As confirmed in the December 1, 2022 letter report of Menlo Engineering Associates submitted below on behalf of the Villa Property owner (FPPDa422), 8,100 gallons per day is the flow required to accommodate the facility located on the Villa Property. The Settlement Agreement challenged by FPP herein allocates 8,100 gallons per day of capacity to FPP's Villa Property to serve the development on that property. However, as stated in the April 20, 2023 letter from FPP's prior counsel to the court (FPPDa381), FPP demanded that the Sisters make available a total of over 30,000 gallons per day of capacity for the Villa Property (16,650 gallons immediately and 13,500 gallons at a later date), numbers picked from the sky, unrelated to the existing development or the zoning, that cannot be accommodated by the Expanded SC System that has been negotiated by the parties for well over a year. As noted above, the SC System Expansion, allowing for conveyance of an additional 47,550 gallons per day, was proposed so as to serve the inclusionary development on the Sisters Property; not the Villa Property.[10]

By Order issued at the May 4, 2023 case management conference (Ja214-Ja215) the trial court ordered as follows:

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[10] FPP baselessly asserts in its Brief filed with this Court that it did not participate in the discussions below. We address that unfounded assertion in the Legal Argument section of this Brief.

> [Counsel for the Sisters] shall consult with other counsel and advise the court when an executed settlement agreement can be presented to the court resolving all issues except the issues raised by Florham Park Property LLC (FPP) as well as brief seeking resolution of these issues with FPP which cannot be resolved.

Recognizing that the FPP demands could not be met, and that the issues between FPP and the other parties were solely issues of law arising out of the interpretation of the Agreements between the Sisters and the Villa Property owners, the Sisters, Florham Park, and Morris Township filed their summary judgment motions below, which were granted, and then, along with the MCGC, concluded their drafting of the Settlement Agreement challenged herein, which may be summarized as follows.

THE SUBJECT SETTLEMENT AGREEMENT

On April 25, 2024, the Borough, the Township, the Sisters, and MCGC entered into a Settlement Agreement resolving all issues related to the maintenance, ownership, operation and control of the pump station, force main and gravity sewer main, thereby resolving all remaining issues in the suit. (FPPDa5-FPPDa125) Importantly, the Settlement Agreement provides that "**Florham Park Property, LLC shall maintain whatever rights it may have, pursuant to contract or otherwise**". (FPPDa11) Further, 8,100 gallons per day of sewage treatment capacity are allocated by the Settlement Agreement to the Villa Property. As noted above, that is the amount of capacity identified by the expert for the Villa Property for the treatment of sewage arising from the development on that property.

For the reasons to follow, FPP's claims against the Sisters were correctly dismissed and the Settlement Agreement was appropriately approved.

LEGAL ARGUMENT

On this appeal, and through its Brief filed with this Court (FPPB"), Appellant FPP challenges the validity of four Orders entered below. Three of those Orders dismissed the claims raised by FPP against the Sisters, the Borough and the Township in FPP's Counterclaim and Cross-Claims. Those Orders were all entered by the trial court on October 13, 2023. (FPPDa126-FPPDa130). The fourth Order under appeal is the May 2, 2024 Consent Order accepting the Settlement Agreement below and concluding this case. (FPPDa1-FPPDa3).

FPP challenges the lawfulness of the Settlement Agreement entered below because it was not a party to that Settlement Agreement. However, FPP was no longer in a party to this case when the Settlement Agreement was entered, as all of its claims had been dismissed. At Points I and II to follow, the Sisters respectfully submit that FPP's Counterclaim and Cross-Claims were properly dismissed by way of the three Orders entered on October 13, 2023. Those claims were, as held by the trial court, premature, unripe and, requests for advisory opinions. Even if considered on the merits, those claims are without any basis. Therefore, at Point III

to follow, the Sisters submit that the Consent Order concluding this case, the fourth Order under appeal, was appropriately entered.

POINT I

THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT DISMISSING FPP'S COUNTERCLAIM AGAINST THE SISTERS OF CHARITY.

A. JUDGE HANSBURY CORRECTLY RULED THAT FPP'S CLAIMS WERE NOT RIPE FOR ADJUDICATION.

FPP's Counterclaim against the Sisters essentially raised two claims: (1) FPP claimed that, under Section 22 of the 2016 Agreement, (FPPDa392) the Sisters could not lawfully enter into the Settlement Agreement with the other parties providing for an expansion of the subject sewer pump station to serve the inclusionary development on the Florham Park side of the Sisters' Property; and (2) under Section 28 of that same Agreement (FPPDa394), FPP is entitled to one-half of the unused capacity in the pre-expansion (current) pump station.

Section 22 is very specific as to what the owners of the Villa Property were obligated to do to seek an expansion of capacity beyond the 8,100 gallons per day already allocated to the Villa Property to serve the existing facility thereon. The Villa Property owners have done none of those things, and the trial court therefore dismissed their claims as being unripe, as they were seeking an advisory opinion.

As to Section 28, that is a separate contract claim against the Sisters that has nothing to do with the expansion of the SC System envisioned by the Settlement Agreement in this case. It certainly has nothing to do with the Borough or the Township since it is a claim solely based upon the Agreement between the Sisters and the owners of the Villa Property, to which the municipalities were not parties. In any event, it is no less unripe than the Section 22 claim, and is a request for an advisory opinion, and was therefore appropriately dismissed below. Our more detailed reasoning follows.

The Section 22 Claim.

The 2016 Sewer Agreement between the Sisters and the then-owner of the Villa Property – TVFP - very carefully lays out what TVFP (and now its successor — FPP) must do to seek an expansion of the system. In support of its claim that FPP has the right to prevent a sewer system expansion unless its demands are met, FPP relies on ¶22 of the Sanitary Sewer Agreement, which reads in full as follows:

> 22. The Sisters of Charity agree that the Sisters of Charity shall not prevent TVFP from seeking to expand the conveyance capacity of the portion of the SC System that conveys or pumps flow from Lot 3 so as to convey additional flow from Lot 3 (an "Expansion"), and the Sisters of Charity agree to reasonably assist in that regard at no cost to the Sisters of Charity, **provided that the following conditions are met**: (**Emphasis added**).
>
> a. The engineering plans for the modification of the facility to address the Expansion shall be prepared by New Jersey licensed professionals

and shall be reviewed and approved by the Sisters of Charity, such approval not to be unreasonably withheld, conditioned or delayed. TVFP will provide certified copies of the as-built plan, upon completion of the work. All work and added equipment will be warranted by TVFP for one year.

b. TVFP shall obtain all required governmental and regulatory approvals for the modification of the SC System as well as approvals for the conveyance of additional sanitary sewer flow through Morris Township's system and into the ultimate treatment facility including, but not limited to approval from the Township of Morris, with copies of same provided to the Sisters of Charity. The parties expressly acknowledge that the Sisters of Charity cannot approve the treatment of additional sewer flow by the downstream sewer treatment plant, the allocation of capacity for same, or the right to convey additional flow within the Township owned sewer system and that any agreement by the Sisters of Charity as to Expansion is exclusive of such additional authority or approvals that must be obtained by TVFP.

c. TVFP shall cause the modification of the sanitary sewer system to be competed in a proper, workman like manner so as to minimize disruption to any and all users of the SC system and on reasonable advance notice to all parties; and

d. TVFP shall be responsible for the payment of all costs of the design, planning, approval and construction of all improvements to affect the modification of this system for the Expansion.

The Sisters have made it perfectly clear, on the record and otherwise, that they recognize TVFP's contractual right to seek their own expansion of the SC System, and the Sisters have raised no objection to any such efforts by TVFP, in complete compliance with Section 22. However, neither TVFP nor FPP have complied with any provision of Section 22. They did not provide any engineering

plans to the Sisters for their review, as required by Section 22(a). Further, TVFP has not sought or obtained any required governmental and regulatory approvals for the modification of the SC System as required for the conveyance of additional sanitary sewer flow through Morris Township's system and into the Morris Township treatment facility, despite the language of Section 22 (b).

Section 22(b) makes it unequivocally clear that:

> The parties expressly acknowledge that **the Sisters of Charity cannot approve the treatment of additional sewer flow** by the downstream sewer treatment plant, the allocation of capacity for same, or the right to convey additional flow within the Township owned sewer system and that any agreement by the Sisters of Charity as to Expansion is exclusive of such additional authority or approvals that must be obtained by TVFP.

Nevertheless, neither TVFP nor FPP have sought the approval of Morris Township or Florham Park for any such capacity expansion that might serve the Villa Property, but they have nevertheless sued the Sisters despite the language of Section 22(b) which makes it eminently clear that the Sisters cannot approve any such expansion or additional flow for the Villa Property. Such authority to treat any additional flow belongs to Morris Township as it owns and operates the Treatment Plant; not the Sisters.[11]

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[11] The FPP Brief oddly asserts that it should not be held to this contractual language because they claim they would have to build a proposed development,

Having recognized that TVFP and FPP had done none of the things outlined in Section 22, with no application having been made to Morris Township, Florham Park, or anybody else, the trial court correctly held at the October 13, 2023 hearing below on the Motions for Summary Judgment as to the Counterclaim and Cross-claims:

> I believe it is seeking what I will call an advisory opinion which is not appropriate. It's anticipating events that could happen or not. 1T 74:20-23 (Emphasis added),
>
> …there's no rights violated right now. There's no justiciable claims that are present right now. If and when they become present, a new complaint can be filed. That's not two bites of the apple, it's relying upon the advisory—the prohibition of seeking advisory opinions versus actual conflicts. 1T 76:1-6 (Emphasis added)

With specific regards to ¶22 of the Sewer Agreement, Judge Hansbury noted:

> [T]here's no showing that they've [FPP]-- they -- they've made an application and consistent with the provisions of 22 to say that they've -- they've been denied anything that they shouldn't get. ….

(1T 75:6-9; Transcript of October 13, 2023 Bench Opinion below)

As Judge Hansbury observed, courts will not render advisory opinions or function in the abstract. New Jersey Turnpike Authority v. Parsons, 3 N.J. 235, 240

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whatever it might be, to pursue their own sewer expansion, and that is "illogical." That is clearly not what the Agreement says.

(1949). Nor will they decide a case based on facts which are uncertain to occur or not yet developed. Burlington Tp. v. Middle Dep't Inspection Agency, Inc., 175 N.J. Super. 624 (Law. Div. 1980). "Not only must the plaintiff prove his tangible interest in obtaining a judgment, but the action must be adversary in character, that is, there must be a controversy between the plaintiff and a defendant, subject to the court's jurisdiction, having an interest in opposing his claim." Parsons at 240. Simply put, the threshold question is whether the controversy presented is actual and bona fide. Id at 241. "We have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness." Crescent Park Tenants Ass'n v. Realty Equities Corp. 58 N.J. 98, 107 (1971). In other words, the courts will not render "recommendations" but rather "decide only concrete contested issues conclusively affecting adversary parties in interest." Parsons, 3 N.J. 240.

As Judge Hansbury recognized, there is no concrete dispute to settle. There has been no breach of any contract, and FPP's claims are only related to what it allegedly thinks may happen in the future if it complies with its Section 22 obligations if and when it requests an expansion for the Villa Property, and the trial court's decision declining to render an advisory opinion was appropriate.

As to the doctrine of ripeness, also cited by the trial court below, "Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements." Garden State Equal. v. Dow, 434 N.J. Super. 163, 188 (Law Div.), certif. granted, 216 N.J. 1, stay denied, 216 N.J. 314 (2013). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. " Texas v. U.S., 523 U.S. 296, 300 (1998). "Such claims are ripe for adjudication 'only when there is an actual controversy, meaning the facts present concrete contested issues conclusively affecting the parties' adverse interests." In re Firemen's Ass'n Obligation, 230 N.J. 258, 275 (2017).

Appellant's claims based upon Section 22 were not ripe, as held by the trial court below, since TVFP/FPP had done none of the things required by Section 22 in order to seek a capacity expansion – it provided no such plans and it made no applications to neither the Township or the Borough to expand the capacity. Instead, TVFP/FPP essentially tried to hijack for their own purposes the Sisters' planned expansion of the SC System which has been designed to serve the inclusionary development at issue. The trial court appropriately dismissed the Section 22-based claim since no TVFP/FPP applications were made, and there can be no valid claims based upon "contingent future events that may not occur as

anticipated, or indeed may not occur at all." FPP maintains the clear right to design, request and apply for its own expansion, and it cannot be assumed that any such efforts would be unavailing. Its premature claims were therefore appropriately dismissed.

Appellant's second claim is based upon Section 28 of the 2016 Sewer Agreement, which reads:

> 28. The parties hereto shall have equal rights and responsibilities regarding any unused by [sic] sewer capacity associated with the pump station and, as indicated above, shall share in the cost of maintaining same based on percentage of sewer flow. (Emphasis added.)

As to this claim, the trial court ruled:

> Paragraph 28 is a little trickier, but I think I have to -- I do reach the same conclusion. It is, again, there's no anticipation -- at the present time the parties disagree as to what capacity that covers. But, again, that's seeking an advisory opinion. I -- I can't -- I'm not in a position today to interpret which way that means although I will offer a thought. But it's simply premature. The plaintiff's [sic] rights have to be violated and capacity not given that they think they're entitled to before it's ripe for adjudication. It is, again, an advisory opinion. (emphasis added.) 1T 75:12-22

As noted above, this claim has nothing to do with the Township or the Borough, or the expansion for the inclusionary development proposed by the Settlement Agreement FPP has challenged. It is a separate contractual claim

against the Sisters based upon Section 28 of the 2016 Agreement between TVFP and the Sisters. However, it is no less unripe than the Section 22 claim. No demand for any particular gallonage has been made. Appellant now disavows its engineer's letter report suggesting what the unused capacity is, and what the Appellant claims. (FPPDa422-FPPDa424) FPP has not even asserted that it has paid its "share in the cost of maintaining [any claim to unused flow] based on percentage of sewer flow" (which it has not done). As the trial court held, FPP needs to do such things before it even has a cognizable claim to any unused flow in the exiting SC System. If it does all those things and presents a demand, it is at least possible that there will be no dispute between FPP and the Sisters. But it has not done those things, and it was seeking nothing but an advisory opinion below, as held by the trial court. As the trial court succinctly held on the Section 28 issue: "The [Appellant's] rights have to be violated and capacity not given that they think they're entitled to before it's ripe for adjudication."

In sum, the trial court correctly dismissed the Appellant's claims as being unripe, and as being a request for an advisory opinion, and those rulings, reflected in the three trial court Orders entering summary judgment below, should be affirmed.

B. AS A MATTER OF LAW, THE SISTERS OF CHARITY DID NOT BREACH THE 2016 SEWER AGREEMENT.

In addition to the claims of the Appellant being unripe requests for an advisory opinion, it is clear that those claims are baseless as a matter of law and were correctly dismissed on motions for summary judgment, should this Court decide to address those claims on the merits. Resolution of the substantive issues in this case requires analysis of the 2016 Agreements between the Sisters and TVFP, with FPP now standing in TVFP's shoes. While the trial court declined to issue summary judgment based upon a ruling on the substantive contractual issues, such judgment is appropriate should this Court wish to reach the merits.

Per R. 4:6-2, summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Id. To overcome a motion for summary judgment, a non-moving party must show evidence that creates a "genuine issue as to any material fact challenged." Id. Merely highlighting any fact in dispute is insufficient. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995).

In evaluating whether a genuine issue of material fact exists, courts must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill, 142 N.J. at 540.

Relevant to the issues presently before this Court, interpretation of contracts is a legal question suitable for decision on a motion for summary judgment. See CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 119 (App. Div. 2009). In cases where, as here, the outcome of the dispute turns on the construction of a clear and unambiguous agreement, resort to extrinsic evidence is not necessary as there are no material issues of fact in dispute. See Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003).

Basic contract principles govern this case. It is hornbook law that "courts cannot make contracts for parties. They can only enforce the contracts which the parties themselves have made." McMahon v. City of Newark, 196 N.J. 526, 545 (2008). Where the contractual language is clear, courts should attribute to it the plain meaning ordinarily associated with it. Nester v. O'Donnell, 301 N.J. Super.

198, 210 (App. Div. 1957). And even where "context" is relevant, courts should consider the contractual language "in the context of the circumstances at the time of drafting and *** apply a rational meaning in keeping with the expressed general purpose." Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293, 302 (1953).

In cases where the outcome of the dispute turns on the construction of a clear and unambiguous agreement, resort to extrinsic evidence is not necessary. See Wellington, supra, 359 N.J. Super. at 496.

As to the Section 22 claim, FPP has failed to show that the Sisters have violated the 2016 Sewer Agreement by entering into a Settlement Agreement providing for expansion of the SC System to serve the inclusionary development at issue. As noted above, the Sisters do not propose to "prevent TVFP (or its successor — FPP) from seeking to expand the conveyance capacity..." for their own purposes, pursuant to the terms of ¶22 of the Sewer Agreement. That is the only duty of the Sisters with regard to the FPP claims regarding an expansion of the capacity. The Sisters have no contractual obligation to do FPP's work for them, nor does FPP have the contractual right to claim the expanded capacity being made available by the Sisters, through the Settlement Agreement, for the inclusionary development in the Sisters' Property.

As noted above, FPP's Brief does not dispute that neither TVFP nor FPP have taken any of the steps outlined in ¶22 of the Sewer Agreement as to any system capacity expansion they may wish to pursue. They have met none of the conditions outlined in ¶22. They have provided no engineering plans, much less plans that have been approved by the Sisters as required by sub-paragraph (a). They have not "obtained all required governmental and regulatory approvals for the modification of the SC System as well as approvals for the conveyance of additional sanitary sewer flow through Morris Township's system and into the ultimate treatment facility including, but not limited to approval from the Township of Morris…" as required by sub-paragraph (b).

Sub-paragraph 22(b) expressly anticipated the situation now presented, where the Sisters propose an expansion to the sewer infrastructure they own, with the Sewer Agreement stating:

> The parties expressly acknowledge that the Sisters of Charity cannot approve the treatment of additional sewer flow by the downstream sewer treatment plant, the allocation of capacity for same, or the right to convey additional flow within the Township owned sewer system and that any agreement by the Sisters of Charity as to Expansion is exclusive of such additional authority or approvals that must be obtained by TVFP. (FPPDa392)

Indeed, the Sisters clearly cannot approve any additional capacity expansion, allocation, or right to convey sewage that FPP may desire, and the agreement of the Sisters to expand the pump station and related infrastructure "is exclusive of such additional authority or approvals that must be obtained by TVFP." This contractual language makes it clear as a matter of law that such additional expansion requests by the owners of the Villa Property to Florham Park or Morris Township can be made by the owners of the Villa Property, and the Sisters cannot prevent those requests from being made, but that is not to say that the Villa Property owners can prevent the Sisters from arranging for their own expansion, and that is all the Sisters are doing by entering into the Settlement Agreement. The Sewer Agreement makes it eminently clear that the Sisters' right to seek such an expansion is independent of the right of FPP to seek an expansion should they meet the conditions of the Sewer Agreement.

As noted above, the second contractual claim asserted by FPP is that it is ostensibly entitled to one-half of the unused sewer capacity in the existing (pre-expansion) system. Prior to addressing the details of that claim, it must be stressed that the Sisters did not sell the pump station, the force main or the gravity sewer lines to the Villa Property owners in 2016. Those infrastructural elements remain owned by the Sisters. This is made plain by a reading of the 2016 Asset Purchase

Agreement p. 2 of which (FPPDa309) notes that the "Premises" sold through that Agreement consist of "the building and land…upon which the Facility is located," the Facility being described therein as the 80 bed nursing facility and the 21 bed assisted living facility.

As to sewer in particular, Section 1.1(m) of the Asset Purchase Agreement includes among the conveyed "Assets" "the right to convey sanitary sewer and waste water flow from the Land and Facility, **as now exists** [in 2016] to the public sewage disposal system owned and maintained by the Township of Morris…" (FPPDa312)[12] That same section of the Asset Purchase Agreement refers to the possibility of an attempt to expand the sewer system by the owner of the Villa Property, but stresses the need of the Villa Property owners to acquire the approval of Morris Township and the Borough of Florham Park. Indeed, the Sewer Agreement stresses that as well, as discussed above. Despite that contractual language, FPP essentially claims that it has de facto ownership rights to additional sewage flows based upon its reading of Section 28 of the Sanitary Sewer Agreement, which reads in full as follows:

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[12] As addressed above, wastewater flow required for the FPP facility as it existed when the 2016 conveyance was made, and as it exists today, is 8,100 gallons per day – the amount of flow allocated to the Villa Property in the Settlement Agreement.

> 28. The parties hereto shall have equal rights and responsibilities regarding any unused by [sic] sewer capacity associated with the pump station and, as indicated above, shall share in the cost of maintaining same based on percentage of sewer flow. (Emphasis added.)

The "above" referenced in the quoted language refers to Section 8 and Section 20 of the Sanitary Sewer Agreement. Section 8 reads, in part, that FPP's:

> share of the service charges billed to the Sisters of Charity by the Township for both the metered sewer flow at the discharge of the pump station and any unused but reserved capacity for same shall be determined upon the metered water usage [at the Property].

Section 20 presents an example of the method used to calculate the sewer flow and maintenance charges for the Villa Property, as described in Section 8. The calculation determines FPP's usage as a percentage of the total usage for the Sisters' property as a whole. For instance, if FPP uses 2,300,000 gallons of the 24,000,000 gallons of flow per year, it is responsible for 9.58% of the total flow. That 9.58% is then used to calculate FPP's share of the payment for maintenance, and for unused flow. In other words, the Sewer Agreement calculations provide, as to the sewer charges, that FPP (or its predecessor) would pay only for a portion of the unused capacity in proportion to the amount of the total flow it uses. FPP is also obligated to pay, per Paragraph 14 of the Sewer Agreement, a share of the maintenance costs "proportionate to the sewer effluent derived from Lot 3".

Therefore, it follows that FPP (or its predecessor) has been responsible for only its pro-rata share of the costs to maintain the system and flow. In the December 1, 2022 letter from its engineer (FPPDa423), FPP acknowledges that it generated 8,100 gallons per day of the 95,000 gallons per day by the 1981 Agreement. This represents approximately 8.5% of the total flow. FPP nevertheless claims it is entitled to 50% of the unused but reserved flow regardless of how much that flow is, and regardless of how much the Sisters have paid since 1981 to reserve that flow. As noted by Judge Hansbury this position is illogical and untenable:

> But I will say also this. That it seems to me illogical to say that they have the right to use a capacity for which they don't have to pay. That makes no sense whatsoever. I do not read it—this provision that way. 1T 75:23-25, 76:1-2

In interpreting contracts, the Court must view the words used by the drafters and interpret those words "not in isolation, but as a whole, in order to ascertain their meaning". Schnakenberg v. Gibraltar Say. & Loan Ass'n, 37 N.J. Super. 150, 155 (App. Div. 1955). The italicized language in Section 28, above, when read in pari materia with the preceding clause, indicates that the Sewer Agreement intended only to allocate rights and responsibilities based on the parties' actual usage of flow, as is evident by a reading of the other quoted provisions in the agreement. FPP is trying to have it both ways to achieve a windfall, and its effort

in this regard should be rejected. To accept FPP's isolated reading of the first few words of Section 28 without analyzing those words in relation to the entirety of the contract would produce an absurd result, and unjustly enrich FPP at the expense of the Sisters.

From time to time, FPP has also seemed to place reliance upon the Sanitary Sewer Easement, dated September 30, 2016, granted by the Sisters to TVFP. (FPPDa396-FPPDa401) However, that non-exclusive Sanitary Sewer Easement provides, in pertinent part, as follows:

> The Grantor grants and conveys a permanent, non-exclusive sanitary sewer easement across and over the property of the Grantor, situated in the Borough of Florham Park, County of Morris, State of New Jersey, being known and designated as a portion of Lot 2, in Block 1301, which property is more fully described on the attached Schedule A which is made a part hereof.
>
> **THIS EASEMENT** is dedicated to the Grantee for the purpose of the conveyance of sanitary sewer flow, by gravity and or under pressure through improvements or structures, for the benefit of property owned or to be owned by Grantee and known as Lot 3, in Block 1201, as shown on the tax maps of the Borough of Florham Park, County of Morris, State of New Jersey. For reference, and not by way of limitation, the burdened estate contains, inter alia, a sanitary sewer pump station and sewer flow from the benefited estate.
>
> 1. That the Grantee shall quietly enjoy the said easement and right-of-way along with others connected to the sanitary sewer and Grantee's rights are more specifically set forth in an "Agreement Regarding Sewer Rights" between the parties,

> dated September 30, 2016, as amended, and incorporated herein by reference.

A reading of that non-exclusive easement confirms that it does nothing more than allow FPP the easement right to run a sewer line to the subject pump station and have the sewage from the Villa property flow through that pump station. It does not provide FPP with a right to veto the Sisters' expansion of the pump station owner by the Sisters or prevent its use by others upon expansion, including the occupants of the inclusionary development proposed on the Sisters' property. FPP's reliance on the easement is simply a red herring.

In sum, FPP's contractual positions are simply not supported by any language in the 2016 Agreements. Its attempt to leverage a windfall as the other parties seek to sewer the inclusionary development at issue is not supported by those Agreements as a matter of law. This provides an additional basis to affirm the three Orders dated October 13, 2023 granting summary judgment.

FPP also argues on appeal makes the disingenuous argument that additional discovery should have been conducted before the Court granted summary judgment. This argument is baseless. Very substantial discovery was conducted, it was all provided to counsel for TVFP, FPP's predecessor (Ja232-Ja235), and FPP failed, and still fails, to specify what further discovery was required with regard to

material issues as required. Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977). This is a contractual dispute, and the Sewer Agreement speaks for itself. The FPP Counterclaim was properly dismissed.

POINT II

THE TRIAL COURT CORRECTLY ENTERED SUMMARY JUDGMENT DISMISSING FPP'S CROSS-CLAIMS AGAINST MORRIS TOWNSHIP AND FLORHAM PARK BOROUGH.

The Sisters are confident that co-Respondents Morris Township and Florham Park Borough will amply brief their opposition to the Appellants' Cross-Claims against the Township of Morris and the Borough of Florham Park. Strikingly, TVFP/FPP filed those claims against the two municipalities, seeking damages, long before the subject Settlement Agreement was even negotiated and executed, in an apparent intimidation attempt. The Cross-Claims are tenuous indeed, as concluded by the trial court in his bench opinion at the October 13, 2023 hearing when dismissing those claims on summary judgment:

> In other words, this entire application, the motions are granted because they're not ripe for adjudication. This is particularly so as to Morris Township and Florham Park because they've done nothing wrong.... Breach of contract, well, as I pointed out, some of them aren't even -- even contractual obligations the Townships have.

(1T 74: 2-6, 17-19)

That dismissal, as reflected in the trial court's Orders of October 13, 2023 under appeal, should be affirmed.

POINT III

THE TRIAL COURT CORRECTLY ENTERED THE CONSENT ORDER APPROVING THE SETTLEMENT AGREEMENT AND CONCLUDING THIS CASE, AND THAT ORDER SHOULD ALSO BE AFFIRMED.

FPP's Brief on appeal omits any discussion of the legal standard for entry of a consent order settling litigation and misstates the facts surrounding the negotiating process leading to the execution of the Settlement Agreement and the entry of the Consent Order approving the same. For the reasons to follow, FPP's objections to the entry of the May 2, 2024 Consent Order are without merit and should be rejected.

Rule 4:42-1 provides that a "no judgment or order shall be signed by the court unless the form thereof has been settled on motion on notice to all parties affected thereby who are not in default for failure to appear, or unless the written approval of such attorneys or parties to the form thereof is endorsed thereon" (emphasis added). Rule 4:42-1 applies only to the settlement of the form of judgment and orders between the parties to the litigation. State v. Redinger 64 N.J. 41, 46 (1973). The Court generally will only allow a non-party to an agreement to challenge that

settlement agreement if the challenge is "necessary to preserve some right which cannot otherwise be protected". Warner Co. v. Sutton, 270 N.J. Super 658, 662 (App. Div. 1994).

In Hanson v. Hanson, 339 N.J. Super. 128 (App. Div., 2001), this Court held that an insurer had no basis to challenge a settlement of claims between other parties, even though it had been granted intervenor status in the action. The Court noted that "parties who are not concerned with the claim or claims" being settled are not required to consent to a settlement. Id. at 136. Here, the issue addressed by the Settlement Agreement – the expansion of the pump station to serve the inclusionary development - do not concern FPP. It is not entitled to challenge the Settlement Agreement solely by virtue of its past participation in the litigation prior to the dismissal of its claims. FPP was correctly dismissed from this litigation in October 2023. Upon the entry of summary judgment, it had no remaining claims against any party as a matter of law and it became a non-party to the litigation below.

Indeed, the Settlement Agreement specifically provides that "**Florham Park Property, LLC shall maintain whatever rights it may have, pursuant to contract or otherwise**". (FPPDa11) In other words, nothing in the Settlement

Agreement foreclosed any of the rights FPP had under the 2016 Sewer Agreement or otherwise and it was not required to approve the Settlement Agreement, or the Consent Order under appeal.

In support of its arguments asserting that it was unfairly treated, FPP seeks to convince this Court that it was not involved in the settlement discussions but was "frozen out." The record belies that claim. TVFP and/or FPP were present at every case management conference between April 2022 and May 2023, and they participated in mediation sessions with the Special Master on May 16, 2022, January 18, 2023, and April 14, 2023. See Special Master's letters dated May 31, 2022 (Ja164-Ja168), January 18, 2023 (Ja201-Ja204), and April 17, 2023 (Ja208-Ja209)). Indeed, two attorneys who were counsel to FPP filed certifications with the trial court below confirming that they had indeed participated in multiple conferences during which settlement issues were discussed. (Ja250-Ja256) Regardless, FPP now argues to this Court that it was not involved in those discussions below – that it was excluded from those discussions. That argument is disturbingly false, as the record reflects, and it should be rejected.

In fact, FPP had an opportunity to voice any objections even after its claims were dismissed and it was no longer a party with any active claims in the case. FPP

was undoubtedly on notice of the Settlement Agreement and proposed Consent Order. The Settlement Agreement was uploaded to eCourts on April 26, 2024 (Ja270), and the Consent Order was not signed and entered by the trial court below until May 2, 2024 (FPPDa1). Despite having the opportunity to object yet again, FPP chose not to do so but instead filed this appeal. The trial court's entry of the May 2, 2024 Order should be affirmed.

CONCLUSION

For the reasons of fact and law set forth above, all four Orders challenged on this appeal should be affirmed.

Respectfully submitted,

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Attorneys for Plaintiff/Respondent
Sisters of Charity of Saint Elizabeth

By: _____
Thomas F. Carroll, III, Esq.

Dated: November 25, 2024

SISTERS OF CHARITY OF SAINT ELIZABETH, Plaintiff/Respondent, v. TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, THE BOROUGH OF FLORHAM PARK, THE VILLA AT FLORHAM PARK, INC*., and MORRIS COUNTY GOLF CLUB, INC., *Defendants/Appellant, Defendants/Respondents TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, Third-Party Plaintiffs, v. THE BOROUGH OF FLORHAM PARK, Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket No. A-003175-23 Submission Date: November 25, 2024 On Appeal from a Final Order/Final Judgment of the Superior Court Law Division, Morris County Sat Below: Hon. Stephan C. Hansbury, J.S.C. (ret. t/a, on recall) Trial Court Docket No. MRS-L-975-20

BRIEF OF DEFENDANT/RESPONDENT, BOROUGH OF FLORHAM PARK

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PRELIMINARY STATEMENT

By way of the instant appeal, Defendant/Appellant, The Villa at Florham Park, Inc. and its successor in interest and intervenor, Florham Park Property, LLC. (hereinafter collectively referred to as the "The Villa"), seeks to frustrate the multi-party resolution of a long-running litigation which had been carefully negotiated over the course of several years by the other parties to the underlying action. As determined by the Trial Court, the Villa's claims are not ripe but, even if they were, judgment should nevertheless be entered in favor of the Defendant/Respondent, the Borough of Florham Park (the "Borough"), as none of the affirmative claims raised by the Villa against the Borough are cognizable at law.

PROCEDURAL HISTORY

On May 1, 2020, the Plaintiff/Respondent, Sisters of Charity of Saint Elizabeth ("Sisters"), filed the Verified Complaint for Declaratory Relief in Lieu of Prerogative Writs and an Order to Show Cause commencing this action against the Township of Morris and the Township Committee of the Township of Morris (collectively, the "Township"). (FPPDa196-FPPDa214[1]). The Verified Complaint (FPPDa196-FPPDa214) sought entry of judgment confirming the Township's obligation to provide sanitary sewer service for an inclusionary development on the

[1] For the purposes of citation, in referencing The Villa's Appendix, the Borough adopts the format used by The Villa. Thus, The Villa's Appendix is herein referred to as "FPPDa" and the Joint Appendix of Respondents is herein referred to as "Ja".

Sisters' Property located within the Borough of Florham Park, with that inclusionary development property being located within the Township's NJDEP-approved sewer service area. (FPPDa211).

The Verified Complaint also sought entry of judgment compelling the Township to accept ownership, maintenance and control of the sanitary sewer pump station and associated sewer lines serving the Sisters' Property. (FPPDa211). On May 29, 2020, the Township filed an Answer and Third-Party Complaint naming the Borough and the Florham Park Sewerage Authority ("FPSA")[2] as Third-Party Defendants (Ja1-Ja10). The Township's Answer denied any responsibility to accept ownership, maintenance and control of the sanitary sewer pump station and sewer lines, and its Third-Party Complaint asserted that it was the Borough that had such an obligation, if any; not the Township.

On June 15, 2020, the first trial court judge hearing this matter below (the Hon. Michael C. Gaus, J.S.C.) held argument on the Order to Show Cause return date[3], and, on August 11, 2020, Judge Gaus issued an opinion addressing all of the relief sought in the Sisters' Verified Complaint, compelling the Township to provide sewer service and to accept ownership, maintenance, and control of the sanitary sewer pump station and sewer lines. (Ja11-Ja73). The Township then appealed.

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[2] The FPSA is no longer in existence as the Borough's sewerage system is now operated as a municipal utility. Subsequent pleadings corrected this initial misfiling. See Ja86.

[3] The Borough did not participate in this hearing, as it had not yet been properly served. FPPDa440.

The Appellate Division, in a decision issued June 24, 2021, (FPPDa440-FPPDa465) affirmed Judge Gaus's Order in part, compelling the Township to provide sewer service to the inclusionary developments, but reversed that portion of the Order which required the Township to accept ownership, maintenance, and control of the sanitary sewer pump station and sewer lines. The decision remanded the matter for additional proceedings. (FPPDa440-FPPDa465).

On September 7, 2021, Judge Gaus issued an Order *sua sponte* appointing Brian Slaugh, PP, AICP, as Special Master to review submissions by the parties, render written recommendations to the court, and assist the parties in mediation. (Ja74-Ja75). On September 13, 2021, the Borough then filed its Answer (Ja76-Ja85), and, on October 7, 2021, the Parties submitted a Consent Order deleting the Florham Park Sewerage Authority from the caption and removing it as a Third-Party Defendant[4]. (Ja86-Ja88).

On November 17, 2021, the Sisters filed a motion to amend the Verified Complaint for Declaratory Relief in Lieu of Prerogative Writs and an Order to Show Cause to add Third-Party Defendant, the Borough, as a direct defendant, and to add The Villa and Morris County Golf Club as additional defendants. (Ja89-90; Ja93-94). On January 14, 2022, the Township filed a motion to amend its pleadings to add

[4] FPSA is no longer in existence.

Toll Brothers, Inc., as a Third-Party Defendant.[5] (Ja91-Ja92). On January 18, 2022, Judge Gaus issued an Order granting the Sisters' motion (Ja93-94) and, on the same day, the Sisters filed an Amended Complaint, naming the Borough, Morris County Golf Club ("MCGC") and the Villa as Defendants. (FPPDa135-FPPDa154). On February 7, 2022, Judge Gaus denied the Township's motion as moot since Toll Brothers had terminated their contract. (Ja104-Ja109).

On March 23, 2022, The Villa filed an Answer and Counterclaim/Crossclaim against the Sisters and against the Township, the Borough and MCGC. (FPPDa155-FPPDa179). In its Counterclaim, The Villa alleged that the Sisters, in seeking to expand the sewer service and transfer the sewer infrastructure to serve the inclusionary development, had breached a 2016 Agreement through which The Villa property was sold by the Sisters to The Villa. The Borough filed an Answer on May 6, 2022. (Ja151). On April 26, 2022, a case management conference was held by the Honorable Stephan C. Hansbury, J.S.C. (ret. t/a on recall), to whom the matter had been assigned for handling. By Order, dated April 26, 2022 (Ja149-Ja150), Judge Hansbury ordered the Parties to submit mediation statements to Special Master Brian Slaugh, PP, AICP, and to participate in a mediation session on May 16, 2022. Pursuant to a letter issued on May 31, 2022, by the Special Master (Ja164-Ja168),

[5] At the time, Toll Brothers was under contract to purchase the Florham Park inclusionary development portion of the Sister's property. That transaction was terminated. (Ja106-109).

all Parties, with the exception of MCGC, attended and participated in that mediation session.

The Township and the Borough next met at a mediation session with the Special Master on June 14, 2022. That mediation session, according to the Special Master's report to Judge Hansbury on June 20, 2022 (Ja172-Ja173) focused on the financial terms under which the municipalities would enter into an agreement related to the provision of sewer service to the inclusionary developments on the Sisters' Property. At the following session on June 23, 2022, the Township and Borough participated again, and, according to the Special Master's June 26, 2022, report to Judge Hansbury (Ja174-Ja175), continued to make progress on resolving their financial issues related to the provision of sewer service. The two municipalities met again on August 17 and August 22, 2022 for mediation sessions, and, according to the Special Master's report issued August 24, 2022, (Ja180-Ja181) narrowed down the issues concerning the question of which municipality would own the pump station and associated sewer lines, and the circumstances under which that would occur.

On September 6, 2022, the Parties participated in a mediation session with the Special Master related to the expansion of the pump station to serve the inclusionary development to be located on the Borough side of the Sisters' Property and the turnover of the pump station and related facilities to the municipalities. (Ja184-185).

Though no resolution was yet reached, the Special Master wrote in his September 9, 2022, report to the trial court that he was hopeful a resolution would be accomplished. (Ja184-Ja185).

The trial court continued to hold case management conferences and issue Orders periodically - on June 2, 2022 (Ja169-Ja170), June 27, 2022 (Ja176-Ja177), July 15, 2022 (Ja178-Ja179), August 25, 2022 (Ja182-Ja183), and September 13, 2022 (Ja186-Ja187), with all Parties, including The Villa and MCGC, attending.

On September 22, 2022, Florham Park Property, LLC. ("FPP"), as contract purchaser of the Property then owned by The Villa, filed a motion to intervene in the action (FPPDa132). The trial court granted FPP's motion on October 28, 2022 (FPPDa131).[6]

Meanwhile the Parties, including The Villa, continued to participate in mediation and case management conferences (Ja192-Ja195). Subsequently, a case management conference was held on January 4, 2023, which was memorialized by an Order dated January 12, 2023. (Ja199-Ja200). On January 18, 2023, the Special Master issued a report to the court on the status of discussions for the provision of sewer service and the ownership, control, and maintenance of the sewer facilities,

[6] Except as otherwise specifically indicated, no distinction is made herein between The Villa at Florham Park, Inc., and Florham Park Property, LLC., and any and all references herein to "The Villa" should be understood to individually and collectively refer to both The Villa and FPP.

including the pump station. (Ja201-Ja204). It was at this time that the Special Master first highlighted as a disputed issue - The Villa parties' demands. (Ja202-204).

On March 14, 2023, the trial court held a case management conference at which all Parties, including The Villa, appeared.[7] (Ja205-207). The judge ordered the Parties to continue negotiating towards reaching an agreement, and to provide the status of negotiations at the next case management conference. (Ja205-Ja207). On April 17, 2023, the Special Master issued a letter to the trial court setting forth the position of The Villa with regards to its claims. (Ja208-Ja209). On April 18, 2023, the Sisters filed a letter with the trial court opposing The Villa's positions. (Ja210-Ja211).

On May 26, 2023, the Sisters filed a motion for summary judgment seeking dismissal of The Villa's Counterclaim against the Sisters. (FPPDa180-FPPDa424). The Township also filed a motion for summary judgment seeking dismissal of The Villa's Crossclaims (FPPDa425-FPPDa428; Ja224). On September 1, 2023, the Borough filed a motion for summary judgment seeking dismissal of The Villa's Cross-claims against the Borough. (FPPDa431-FPPDa439). The Villa opposed all three motions, and, on October 9, 2023, The Villa filed a motion seeking the recusal of Judge Hansbury. (Ja236-Ja249).

[7] Having purchased the Property, FPP formally substituted in as a party for The Villa by way of Order entered June 20, 2023. FPPDa133.

On October 13, 2023, Judge Hansbury held oral argument on the motions for summary judgment and granted all three motions. (FPPDa126-FPPDa130). In a bench opinion issued on that date, the transcript of which has been submitted to this Court by The Villa, he noted that The Villa's claims were premature and unripe, and that The Villa was seeking an advisory opinion. As we elaborate upon infra, the trial court further noted that The Villa's rights would have to be violated prior to the filing of a claim, and that no rights have yet been violated. The trial court further noted that the Township and Borough had "done nothing wrong" and that The Villa did not have any claims against the municipalities. The trial court therefore granted all three summary judgment motions for the reasons expressed on the record, with all claims raised by The Villa in their pleadings being dismissed. Thus, as of the entry of the three October 13, 2023, Orders dismissing The Villa's claims, The Villa was no longer a party to this case. On November 17, 2023, Judge Hansbury issued an Order denying The Villa's motion for recusal. (Ja261-Ja263).

Subsequently, the parties continued to negotiate a Settlement Agreement, and, on April 26, 2024, by letter to the trial court (Ja270), the Sisters submitted the Settlement Agreement to the trial court for the court's review and, on April 30, 2024, the Sisters submitted a proposed Consent Order incorporating the Settlement Agreement. On May 2, 2024, the trial court entered that Consent Order (FPPDa1) concluding this case below. This appeal by The Villa followed.

STATEMENT OF FACTS

The Villa and the Sisters are the owners of property that is currently within the Township sewer service area and for which the Township has historically and presently provides such service. (FPPDa135-154; FPPDa434-339; Ja301).

On March 7, 2019, the Court entered a Final Judgment of Compliance and Repose as to the Settlement Agreement in the Borough's affordable housing litigation. (FPPDa135-154; FPPDa278-285; FPPDa434-339; Ja301). The aforementioned affordable housing litigation settlement provides for development and construction of affordable housing units on a portion of the property currently owned by the Sisters. (FPPDa135-154; FPPDa278-285; FPPDa434-339; Ja301). Neither the Final Judgment of Compliance and Repose, nor the Settlement Agreement, contemplated use or provision of sewer service or infrastructure by or through the Borough with regard to the Sister's property. Id.

The Sister's own and operate a sewer pump station located on the property, along with a force main and gravity line that convey wastewater to and from the pump station (the sewer pump station, force main and gravity line are collectively referred to as the "sewer infrastructure"). (FPPDa135-154; FPPDa286-380; FPPDa434-339; Ja301). The sewer infrastructure is currently utilized to provide sewer service to The Villa's property. Id.

The Sisters, the Township and the Borough previously entered into an agreement, dated July 28, 1981, that provided for the construction and operation of the sewer infrastructure for purposes of connecting and servicing the Plaintiff and other users through the Township sewer service area. (FPPDa135-154; FPPDa155-179; FPPDa434-339; Ja301).

By way of an agreement between Plaintiff, the Township and The Morris County Gold Club, Inc. ("MCGC"), dated May 2, 1997, the sewer infrastructure also serviced the MCGC property. (FPPDa135-154; FPPDa155-179; FPPDa434-339; Ja301). The Villa was not party to either the 1981 agreement, nor the 1997 agreement. Id. The Borough was not party to the 1997 agreement. Id.

Plaintiff and The Villa subsequently entered into an Asset Purchase Agreement, dated September 15, 2016, by virtue of which Plaintiff conveyed to The Villa the property which it presently owns and occupies, and which is serviced by the sewer infrastructure. (FPPDa155-179; FPPDa308-380; FPPDa434-339; Ja301). The Sisters and The Villa also entered into a Sanitary Sewer Agreement, dated September 30, 2016, another Agreement entitled "Agreement Regarding Sewer Rights" as well as a Sanitary Sewer Easement. (FPPDa286-307; FPPDa386-418; FPPDa434-339; Ja301). Neither of the municipal defendants in this matter, *to wit*, the Borough and the Township, were party to any of the Sewer Agreements between the Sisters and The Villa. Id. No contract, easement or other agreement exists

between the Borough and The Villa or to which both are signatories as to the provision of sewer service or the use, rights, interests or ownership in the use of the sewer pump station or other sewer related infrastructure. Id.

The Borough did not provide, and has never at any time provided, sewer service to The Villa's or the Sister's properties, which are located in Morris Township's sewer service area. (FPPDa135-154; FPPDa434-339; Ja301). The Township of Morris currently and historically has provided sewer service to The Villa property. Id.

Prior to this litigation, The Villa had not made any past or present application or request to the Borough relative to the provision of sewer service or the use of sewer related infrastructure. (FPPDa155-179; FPPDa135-154; FPPDa434-339; Ja301). On August 10, 2020, the Borough of Florham Park Planning Board adopted a resolution granting preliminary and final major site plan approval with variance relief and final minor subdivision approval in connection with the development and construction affordable housing and other residential units on the Plaintiff's property located at 2 Convent Road, Block 1301, Lot 2 on the Official Tax Map of the Borough of Florham Park. (FPPDa434-339; Ja301; Ja27; Ja36; Ja64; Ja72).

Sewer was specifically not addressed in the aforementioned development application. Id. Plaintiff has sought to improve and expand the sewer pump station to facilitate the additional flows that will result from the construction of the

development on its property and has alleged such improvement and expansion is required to facilitate the construction of affordable housing. (FPPDa135-154).

LEGAL ARGUMENT

I. THIS COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ORDER BECAUSE THE VILLA'S PLEADINGS FAILED ON ITS FACE TO STATE A BASIS FOR RELIEF AND THE RECORD WAS OTHERWISE INDEPENDENTLY SUFFICIENT

R. 4:46-2(c) provides that summary judgment "shall" be granted when the pleadings and discovery show "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." A genuine issue of material fact exists only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, "are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"Rule 4:46-2(c)'s genuine issue [of] material fact standard mandates that the opposing party do more than 'point [ ] to any fact in dispute in order to defeat summary judgment." Id. At 529. To properly oppose a motion for summary judgment, the non-moving party must proffer specific facts demonstrating a genuine issue of material fact. Housel v. Theodoridis, 314 N.J. Super. 597, 603-04 (App. Div. 1998). "[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, supra, 142 N.J. at 529. The opposing party

must "demonstrate by competent evidential material that a genuine issue of fact exists[.]" Id. at 479-80. Where the non-moving party does not offer such evidence, and thus does not "dispute any of the assertions in [the moving party's] statement of material facts," "[t]he consequence ... is clearly prescribed": the moving party's statement of material facts is deemed admitted. Housel, supra, 314 N.J. Super. at 602. The summary judgment procedure, as outlined in Rule 4:46-2, is "designed to 'focus [our] ... attention on the areas of actual dispute,' " if any, and to " 'facilitate [our] review' of the motion." Claypotch v. Heller, Inc., 360 N.J. Super. 472, 488 (App. Div. 2003).

Clearly, however, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Lembo v. Marchese, 242 N.J. 477, 495-496 (2020); Scheidt v. DRS Technologies, Inc., 424 N.J. Super. 188, 193 (App. Div. 2012) (for claim to survive, plaintiff must allege sufficient facts, and not only conclusory allegations, to support a cause of action); Demas v. Nat. Westminster Bank, 313 N.J. Super. 47 (App. Div. 1998), certif. den. 161 N.J. 151 (1999)(summary judgment for the defendant when the plaintiff's allegations, even if true, do not state a cause of action).

An issue regarding interpretation of a contract clause presents a purely legal question that is particularly suitable for decision on a motion for summary judgment. Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020). "Where the terms

of a contract are clear and unambiguous there is no room for interpretation or construction and [courts] must enforce those terms as written." Kutzin v. Pirnie, 124 N.J. 500, 507 (1991). Because, in the instant matter, the entire basis of The Villa's causes of action asserted as counter and cross-claims rests on the rights and interests that it allegedly derives from contractual agreements referenced in the pleadings [FPPDa169 – 177; FPPDa142-143], there is no reason such issues were not capable of resolution on summary judgment.

Here, in addition to being specifically referenced in its pleading [FPPDa175 – 6; FPPDa142], the contractual agreements between the Villa and the Sisters upon which the Villa rested its offensive claims were in the record before the Court on summary judgment and admitted as genuine. See FPPDa190-1; FPPDa308; FPPDa386; FPPDa396; FPPDa402; Ja299. Moreover, the Villa not only describes these contractual agreements, in detail, in its pleading, it is also the entire predicate for its claims. Accordingly, the record considered by the Court on summary judgment was no different than the record upon which it would have decided a motion to dismiss.

A court may consider documents specifically referenced in the complaint "without converting the motion into one for summary judgment." E. Dickerson & Son, Inc. v. Ernst & Young, LLP, 361 N.J.Super. 362, 365 n. 1 (App. Div. 2003), aff'd, 179 N.J. 500 (2004). "In evaluating motions to dismiss, courts consider

'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). "It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue." Id. "[W]hen allegations contained in a complaint are contradicted by the document it cites, the document controls." See Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (citing Rapaport v. Robin S. Weingast & Assocs., 859 F.Supp.2d 706, 714 (D.N.J.2012)).[8]

"Summary judgment is not premature merely because discovery has not been completed." Badiali v. N.J.Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015). Moreover, the fact that discovery is not complete, or has not begun, is not alone sufficient to defeat a motion for summary judgment. See R. 4:46-2(c); R. 4:46-5(a); Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (claims of incomplete discovery will not defeat summary judgment if further discovery will not patently alter the outcome). On the contrary, the nonmoving party must set forth the nature of the specific facts that have yet to be revealed in discovery and how, if obtained, they present a genuine issue of material fact in dispute. A party opposing a motion

[8] The Villa falsely alleged in its crossclaim that, in addition to the Sisters, it "has entered into contracts, agreements and easements with [] the Borough and Township" (FPPDa173-174). This, however, was disproven in the documents themselves and subsequently conceded for purposes of the Borough's motion for summary judgment. See as to contracts FPPDa308; FPPDa386; FPPDa396; FPPDa402; See also FPPDa436 at ¶ 11-13; FPPDa434-339 and Ja301 as to fact admission.

for summary judgment on the grounds that discovery is incomplete must show that "there is a likelihood that further discovery would supply... necessary information to establish a missing element in the case." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012); See also Badiali., supra, 220 N.J. 544. And in opposing summary judgment, a party must identify the specific discovery needed. See Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) ("A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete.").

Villa's offensive claims were woefully deficient insofar as it did not fairly apprise the Borough, the Township and the Sisters, the parties against whom claims were asserted, of the basis for any of the claims. While a plaintiff may bolster a cause of action through discovery, one may not file a conclusory complaint to find out if such a claim exists. Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Envtl. Prot., 320 N.J.Super. 59, 64 (App.Div.1999) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory"). It follows that "the legal requisites for plaintiff's claim must be apparent from the complaint itself." Edwards v. Prudential Prop. and Cas. Co., 357 N.J.Super. 196, 202 (App.Div.2003).

In the context of an action in lieu of prerogative writ, such as was before the court in this action, summary judgment is expressly authorized at any time after the filing of the complaint. R. 4:69-2; See also Affiliated FM Ins. Co. v. State, 338 N.J. Super. 540, 557 (App. Div. 2001) (summary judgment appropriate in prerogative writ); See also United Savings Bank v. State, 360 N.J. Super. 520, 525 (App. Div.), certif. den. 177 N.J. 574 (2003) (affirming the grant of summary judgment in prerogative writ action because claim not ripe).

"Nevertheless, a purely legal question of whether a defendant is insulated from liability because of an immunity or some other statutory provision ideally should be resolved, if possible, at an early stage of the litigation." Gomes v. Cnty. of Monmouth, 444 N.J. Super. 479, 486 (App. Div. 2016); see also Rivera v. Gerner, 89 N.J. 526, 536 (1982) (noting that resolving issues involving the ***Tort Claims Act*** through the pretrial process "is to be encouraged") (emphasis added); Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 305–306 (App. Div. 2014) (observing in a statutory immunities case that issues involving those immunities should be adjudicated at an "early stage of litigation," and that an "unfettered right to discovery" would "dilut[e] the practical benefit of the immunity protection").

In addition to the contractual agreements referenced in the Crossclaim, the tort claim notice, or perhaps more aptly, lack thereof, was properly before the Court on summary judgment, and at all times upon the filing of an offensive claim, by virtue

of its status as a jurisdictional prerequisite to tort based claims. Although The Villa did not file, nor make reference to, a tort claim notice in its pleading, the law is clear in that a tort claim notice is an essential element and jurisdictional prerequisite of a tort based claim against a governmental entity and that documents that form the basis of a claim are properly considered by the court even in a motion to dismiss. Evidently, beyond the allegations of the complaint itself, it is entirely proper for the court to also matters of public record, and documents that form the basis of a claim on even on a motion to dismiss. Banco Popular N. Am., supra 184 N.J. at 183.

With respect to a claim filed under the Tort Claims Act, the notice of claim is "a jurisdictional precondition to filing suit" that is properly considered on a motion to dismiss. Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 343 (App. Div. 2004); Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 534 (App. Div. 1989) ("[T]rial court lacks jurisdiction in light of the failure to file a timely notice of claim."); N.J.S.A. 59:8–3 ("[n]o action shall be brought against a public entity or public employee under [the TCA] unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter"). Here, no Tort Claim Notice was referenced in or filed with the complaint, in summary judgment record, nor even alleged to have existed. A tort claim notice is, however, an essential jurisdictional component of a claim against a governmental entity.

Accordingly, no further discovery was required for the court to definitely rule on the issues dispositive to the motion for summary judgment and there was ample evidence in the record properly before the court for the court to render decision on the merits.

II. THE COURT SHOULD AFFIRM SUMMARY JUDGMENT ORDERS ON THE VILLA'S COUNTER/CROSSCLAIMS AND THE UNDERLYING ACTION BECAUSE THE VILLA DID NOT HAVE STANDING TO INDEPENDENTLY ASSERT AN OFFENSIVE CLAIM AND THERE WAS NO JUSTICIABLE CONTROVERSY BEFORE THE COURT

Initially, The Villa conceded on the record, on several separate occasions, during motion for summary judgment that its offensive claims against the Borough were premature. The Borough respectfully submits that this was alone dispositive as to its motion for summary judgment and that for the same reason the trial court did not err in granting summary judgment on the basis of The Villa's claim being unripe for adjudication and The Villa not otherwise having standing. Specifically, Counsel for The Villa repeatedly acknowledged the following as to its Counter/Crossclaims:

> Some of the claims which may be being asserted at the moment in this case with regard to the Sisters and their breach of contract or as to the Townships and their interference with the contractual rights of FPP, they admittedly be premature because they have not until they go forth with the settlement and we see how the exact rights of FPP are affected, we'll know what damages they -- they suffered.

(T[9]17:25; T18:1-8).

[9] "T" refers to the transcript of the June 27, 2024, proceedings on the motions for summary judgment.

> I would suggest to Your Honor that, as I indicated earlier, some of these issues may actually be premature. And we recognize that because I'm told the Sisters and the Townships take action that truly adverse our rights, that the -- the damages that we will suffer are unknown.

(T24:7-12).

> Well, it goes to the point that some of this may be premature, Your Honor, until they take action that adversely impacts the rights of the Sisters or, sorry, the rights of FPP, Your Honor.

(T30:12-15).

> Thank you, your Honor. I -- I think it goes back to what I said earlier in the manner in which Villa and now FPP was brought into the case and the need at that time to, in essence, assert whatever claims might be pertinent for fear of them being later barred by the Entire Controversy Doctrine. As I indicated before and as suggested by Mr. Bell, you know, the -- the initial claims we acknowledge were -- were pled as -- and the derivative claims of that which was asserted by the Sisters, I think the true potential claim that FPP holds is the interference with contract.
>
> And I think I would acknowledge that until either Township takes some action which is adverse to FPP and its contractual lights, that claim may be premature because it was alleged not knowing what was going on. And until they enter into a formal settlement agreement or takes some action which impacts the existing rights of FPP, there may not be any interference.

(T60:13-25; T61:1-7).

The Borough respectfully submits that the above alone is fatal to The Villa's ability to maintain an offensive claim against the Borough.

In its Mt. Laurel opinions, the Supreme Court has made it very clear that the housing rights of low- and moderate-income persons can be asserted only by the

persons themselves, by public interest organizations representing their interests, and by developers offering to build affordable housing. Alexander's Dep't Stores of New Jersey, Inc. v. Borough of Paramus, 243 N.J. Super. 157, 165 (App. Div. 1990), aff'd, 125 N.J. 100 (1991). There is, quite simply, no basis in law or logic under which an adjacent owner that shares certain sewer infrastructure with a separate property on which affordable housing is to be constructed has standing to prosecute offensive claims against the municipality relative to the municipality's fulfillment of its constitutional obligations with respect to the development of affordable housing on the other property merely due to The Villa's status as an adjacent owner alone. The Villa's interest as a party in this litigation exists only to the extent that it is intertwined with the provision of sewer service to its property and the responsibility of ownership and operation of the same sewer infrastructure that would service the proposed affordable housing development. Plainly stated, The Villa, at best, had an interest in the litigation in general; it was not injured, damaged, aggrieved by a decision or even a direct party in interest with respect to the actual basis upon which the Sister's brought the action. In that regard, The Villa's crossclaims are entirely predicated upon the supposition that its extremely narrow and limited interest in this litigation also confers upon it sufficient standing with respect to the municipal defendant's fulfillment of their independent and/or collective constitutional obligations as it pertains to affordable housing.

Standing is a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal. See In Re Adoption of Baby T., 160 N.J. 332, 340 (1999); see also In re Adoption of Baby T., 160 N.J. 332, 341 (1999) ("[S]tanding is an element of justiciability that cannot be waived or conferred by consent"). Rather, it is a threshold inquiry because "[a] lack of standing by a plaintiff precludes a court from entertaining any of the substantive issues for determination." Id. at 340. Typically, "standing requires that a litigant have a sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision." Neu v. Planning Bd. of Township of Union, 352 N.J. Super. 544, 552 (App. Div. 2002) (quoting In re N.J. Bd. of Pub. Utils., 200 N.J. Super. 544, 556 (App. Div. 1985)).

Standing, however, is not automatic, and a litigant has no standing to assert the rights of a third party. See Spinnaker Condo. Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105, 111 (App. Div.), certif. denied, 176 N.J. 280 (2003). One may not claim standing to vindicate the constitutional and other rights of some other third party. Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div.), certif. denied, 171 N.J. 442 (2002). State of N.J., Dep't of Envtl. Prot. & Energy v. Dopp, 268 N.J. Super. 165 (App. Div. 1993); Borough

of Seaside Park v. Comm'r of New Jersey Dep't of Educ., 432 N.J. Super. 167 (App. Div. 2013).

In its Mt. Laurel opinions, the Supreme Court has made it very clear that the housing rights of low- and moderate-income persons can be asserted only by: (1) the persons themselves; (2) public interest organizations representing their interests; and (3) developers offering to build affordable housing. Alexander's Dep't Stores of New Jersey, Inc. v. Borough of Paramus, 243 N.J. Super. 157, 165 (App. Div. 1990), aff'd, 125 N.J. 100 (1991). The Court assumed that developers would take a major role in vindicating the doctrine, but its intended beneficiaries were the poor, not the developers. Southern Burlington County N.A.A.C.P. v. Mount Laurel, 92 N.J. 158, 208 (1983); See also Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 54 (1986). There is no direct authority for the proposition that a landowner "may be entitled to a builder's remedy merely because of [its] active or even helpful participation in the revision process and compliance hearing." Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 526 (App. Div. 2001), certification granted, cause remanded, 174 N.J. 359 (2002).

The focus of The Villa's Crossclaim is rooted in the Sister's Amended Complaint, which is predicated on the financial burden the pump station and force main pose on the Sister's and the correlated impact on the prospective inclusionary development on the Sister's property. (FPPDa135; FPPDa155). Evidently, all of the

facts as plead in the crossclaim are wholly and unequivocally rooted in the false premise that the claims as alleged by the Sisters are also of constitutional significance to The Villa. Although The Villa does have an interest with respect to matters affecting the sewer service to its property and the rights and interests in the infrastructure that services its property, The Villa is not a party in interest as it pertains to the cost burdens on the developer of the project associated with the determination of realistic opportunity or the fulfillment by the municipal defendants of their constitutional obligations.

Furthermore, the manner and means by which The Villa seeks such relief bears no procedural resemblance to that of the Sisters and that of an action to vindicate the rights of the housing rights of low income persons themselves with respect to the entitlement to affordable housing because it primarily sought relief in the form of monetary damages as opposed to equitable relief. That is aside from seeking the same relief against the Borough as sought by the Plaintiff in the form of equitable relief, in its Crossclaims The Villa is specifically sought monetary relief in the form of compensatory, consequential and punitive damages, restitution, attorney's fees and costs. There was absolutely no basis for this under the facts or in an action with respect to affordable housing.

In short, The Villa cannot demonstrate an important or novel constitutional question absent a decision to challenge and or an identifiable constitutional harm.

The Villa's claims are of no moment because they have no direct or indirect bearing on the purpose of ensuring realistic opportunity for inclusionary development. Additionally, the interest asserted in this matter is an inherently private interest that exists merely and solely by virtue of The Villa's status as an adjacent property owner, not as a developer or the owner and developer. To even have threshold basis to claim the adjudication is necessary for an important public interest, the party claiming that there is no realistic opportunity for inclusionary development in light of the cost, i.e., the developer, would need to be the proponent of the relief sought. As such, the dismissal of The Villa's claims was appropriate.

III. THE BOROUGH WAS ENTITLED TO SUMMARY JUDGMENT AS TO THE CROSSCLAIMS FOR CONTRIBUTION AND INDEMNITY, AND ALL OTHER TORT AND NEGLIGENCE BASED CAUSES OF ACTION DUE TO VILLA'S FAILURE TO FILE A TORT CLAIM NOTICE

A. The Villa Could Not Maintain An Action In Tort Against the Borough Under Any Of The Four Counts Of Its Crossclaim In The Absence Of A Tort Claim Notice

The New Jersey Tort Claims Act ("TCA" or "Act"), N.J.S.A. 59:1-1 to 12-3, is the statutory mechanism through which the New Jersey Legislature effected a limited waiver of sovereign immunity. See D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 133 (2013). "The guiding principle of the [Act] is that 'immunity from tort liability is the general rule and liability is the exception[.]'" Coyne v. State,

Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998)).

The Act "establishes the procedures by which claims may be brought[.]" Beauchamp v. Amedio, 164 N.J. 111, 116 (2000). One (1) of the procedures the Act imposes on a party seeking to bring a tort claim is a requirement to file a notice of tort claim ("TCN"). See D.D., supra, 213 N.J. at 134; see also N.J.S.A. 59:8-1 to -11. The notice has a number of required components including: (1) when it has to be filed, N.J.S.A. 59:8-8; (2) what information it must contain, N.J.S.A. 59:8-4; and (3) where it has to be filed, N.J.S.A. 59:8-7.

Pursuant to the TCA, a litigant is required to file a notice of tort claim within ninety (90) days of the accrual of the alleged cause of action before he or she can file a complaint against a municipality. N.J.S.A. 59:8-8. *This notice requirement is "a jurisdictional precondition to filing suit.*" Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 343 (App. Div. 2004) (emphasis added); Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 534 (App. Div. 1989) ("[T]rial court lacks jurisdiction in light of the failure to file a timely notice of claim."); N.J.S.A. 59:8–3 ("[n]o action shall be brought against a public entity or public employee under [the TCA] unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter").

The Supreme Court has made clear that the TCA's requirements are to be strictly construed, McDade v. Siazon, 208 N.J. 463, 474 (2011), and with regard to the contents of the notice, the public entity must be identified. See Velez v. City of Jersey City, 180 N.J. 284, 290 (2004). The Court has also explained the purposes of the notice requirements, which are:

> (1) to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit; (2) to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense[ ]; (3) "to afford the public entity a chance to correct the conditions or practices which gave rise to the claim; and (4) to inform the State [or local public entity] in advance as to the indebtedness or liability that it may be expected to meet.

[Beauchamp, supra, 164 N.J. at 121-122 (citations omitted)].

The contents of a proper notice of claim under the TCA are governed by N.J.S.A. 59:8–4, which specifies the following minimum information that a claimant's notice must contain: A claim shall be presented by the claimant ... and shall include:

> a. The name and post-office address of the claimant;
> b. The post-office address to which the person presenting the claim desires notice to be sent;
> c. The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
> d. A general description of the injury, damage, or loss incurred so far as it may be known at the time of presentation of the claim;
> e. The name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and
> f. The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury,

> damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

This provision is "designed to provide the public entity with sufficient information to enable it promptly to evaluate its liability and potential exposure and, if it chooses, to correct a defective condition and also to engage in settlement negotiations prior to the commencement of suit." Newberry v. Twp. of Pemberton, 319 N.J. Super. 671, 675 (App. Div. 1999).

In light of the Legislature's express intent, "[g]enerally, immunity for public entities is the rule and liability is the exception." McDade v. Siazon, 208 N.J. 463, 474 (2011) (citing Fleuhr v. City of Cape May, 159 N.J. 532, 539 (1999). The Tort Claims Act is "strictly construed to permit lawsuits only where specifically delineated." Gerber ex rel. Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24, 34 (App. Div. 2000); see also N.J.S.A. 59:2-1(b); Polyard v. Terry, 160 N.J.Super. 497, 506 (App.Div.1978), aff'd, 79 N.J. 547 (1979); Kolitch v. Lindedahl, 100 N.J. 485,495–497 (1985). The Tort Claims Act's notice requirements are an important component of the statutory scheme. See N.J.S.A. 59:8–8 and –9. "[P]ublic entities shall only be liable for their negligence within the limitations of" the TCA. N.J.S.A. 59:1-2. The requirements of the TCA are "stringent" and place a "heavy burden" on plaintiffs seeking to establish public entity liability. Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 136 (1993).

Here, the filing of a tort claim notice was a jurisdictional prerequisite to the right to maintain an action against the Borough in tort. It was never disputed that Villa did not comply with this obligation. Therefore, this Court should affirm the entry of summary judgment and dismissal of all tort and negligence based causes against the Borough, including Count Four.

B. The Villa Could Not Maintain A Claim For Indemnity And Contribution Against The Borough Without First Filing A Tort Claim Notice

In its pleading, The Villa broadly asserted a "general counterclaim and crossclaim for contribution and indemnification" against Plaintiff and all other named defendants, including the Borough. As discussed in the above subheading A of this Point Heading III, the failure to file a tort claim notice is fatal to the Villa's ability to maintain an action against a public entity in tort.

It is well established that a third-party plaintiff is required to file a notice of claim before asserting a claim for contribution or indemnification against a public entity or employee. Jones v. Morey's Pier, Inc., 230 N.J. 142, 155-157 (2017). Parties filing tort claims against public entities must "serve a notice of claim within ninety days of the date on which the cause of action accrues." Id. More importantly, the Court found that N.J.S.A. 59:8-8 "is expansively phrased," does "not distinguish between a plaintiff's claim and a defendant's cross-claim or third-party claim against a public entity," and does "not exempt from the tort claims notice requirement a

defendant's claim for contribution and indemnification, or any other category of claims." Id. at 157.

The Court further determined the accrual of a claim against a public entity under N.J.S.A. 59:8-8 occurs on the date the plaintiff's claim accrues, and not, as is often claimed, the date the defendant first knows or has reason to know it has a contribution or indemnification claim arising from the plaintiff's accident and injuries. Id. It further endorsed the interpretation by certain lower court decisions finding that N.J.S.A. 59:8-8 served "to bar all claims, including contribution and indemnification claim, where the claimant failed to serve" a notice of tort claim within ninety days of the plaintiff's accrual of the plaintiff's cause of action. Id. at 156.

The Court also recognized that its interpretation of N.J.S.A. 59:8-8 may "deprive a defendant of its right to pursue a claim against a joint tortfeasor before the defendant is aware that the claim exists," Id. at 158, and that "a defendant 'may not even learn that he [or she] has a potential contribution claim within [the ninety-day] period [under the statute], since the plaintiff may not file suit until well after the [ninety]-day period,' " Id. at 158 (quoting S.P. v. Collier High Sch., 319 N.J. Super. 452, 475 (App. Div. 1999)). Nonetheless, the Court determined N.J.S.A. 59:8-8 requires that a defendant asserting a claim for indemnification or contribution

against a public entity file a notice of claim within ninety days of the accrual of the plaintiff's claim. Id. at 148, 157-58.

Accordingly, pursuant to *Jones*, The Villa's counter and cross claims for indemnification and contribution are barred by virtue of the failure to file the requisite notice of claim. As the Supreme Court held in *Jones*, where a defendant fails to "serve a timely notice of claim on a public entity pursuant to N.J.S.A. 59:8-8, the [TCA] bars that defendant's crossclaim or third-party claim for contribution and common law indemnification against the public entity." Id. at 157-58. Thus, this Court, as with the trial judge, is constrained to uphold the dismissal of the claim for indemnity and contribution.

IV. THE BOROUGH WAS ENTITLED TO SUMMARY JUDGMENT AS TO ALL COUNTS BECAUSE THE CROSSCLAIM FAILED, ON ITS FACE, TO ALLEGE THE ESSENTIAL ELEMENTS OF A CAUSE OF ACTION

As an initial matter, although Count One, in particular, is alleged against all of the named defendants, it is clearly directed solely at the Township.[10] FPPDa170. Indeed, no indication whatsoever is actually provided within the text of the pleading itself as to the nature or basis of the claim that is being asserted in general, or as alleged against the Borough, the factual basis for which is apparently wholly set

[10] For clarification, this is in reference to "First Count" under the heading "Crossclaim as to the Morris Township Defendants and Claims Against Florham Park" of The Villa's Answer and Counter/Crossclaim.

forth in the Sister's Amended Complaint. FPPDa170.[11] Notwithstanding The Villa's express and specific reliance on the allegations set forth in the Sister's Amended Complaint as to this particular count, it should be noted that The Villa denied or plead insufficient knowledge as to the overwhelming majority of the seventy-two (72) separately enumerated paragraphs of the Amended Complaint. FPPDa155; FPPDa437. Specifically, The Villa's Answer only admits to a total of thirteen (13) of the seventy (72) paragraphs of the Amended Complaint, to wit, Paragraphs 8, 10, 29, 30, 31, 32, 33, 34, 44, 66, 67, 69 and 71, while denying or pleading insufficient information as each and every other allegation. FPPDa155; FPPDa437. Undoubtedly, no cause of action can be fairly or reasonably inferred from the incorporation by reference of a near blanket denial of the allegations of the Sister's Amended Complaint as to this and every other count of the Crossclaim against the Borough.

Moreover, there is, quite simply, no basis in law or logic under which a claim that makes no reference whatsoever to any action or omission attributable to the Borough could proceed. In that regard, not only does Count One omit reference to any act for which the Borough may be responsible, it merely alleges a claim for relief

[11] As discussed in further detail infra, in each count of its four (4) count Crossclaim, "The Villa incorporates by reference in lieu of repetition, and realleges the allegations and claims set forth in the Plaintiff's Amended Complaint ("Complaint") by reference in lieu of repetition as if the same were alleged by The Villa, as well as the other allegations of The Villa in its counterclaims and crossclaims." See FPPDa170; FPPDa171; FPPDa172; FPPDa173.

without a basis in alleged fact. Accordingly, the Trial Judge did not err in finding Count One failed, on its face, to allege a cause of action or basis for a claim for which relief can be granted and that the Borough was thus entitled to summary judgment as to Count One.

As with each of the other counts, the First and Third Counts[12] of The Villa's Crossclaim against the Borough "incorporates by reference … and realleges the allegations and claims set forth in the Plaintiff's Amended Complaint … as if the same were alleged by The Villa." (FPPDa170; FPPDa172). Without affirmatively identifying or implying a particular cause of action, the same counts go on to state that "for the reasons stated in the [Amended] Complaint, Plaintiff and The Villa are entitled to an order confirming the Township's obligation to serve the Villa's property and compelling the Township to accept, ownership, maintenance and control of the subject pump station and force main." FPPDa170; FPPDa172. Oddly, the same count requests that the Court grant the same relief as sought by Plaintiff and further award compensatory, consequential and punitive damages, attorney's fees and costs. (FPPDa170; FPPDa172). In other words, these causes seek relief without setting forth the elements of the cause of action upon which the availability

[12] But for the relief sought in the form of an order compelling acceptance of such obligations, in the alternative, be directed at the Borough, the Third Count is otherwise identical to the First Count in nature, substance and as to the parties. (FPPDa170; FPPDa172). Thus, except as otherwise indicated, the analysis herein does not distinguish between the First and Third Counts and should be understood to apply to both.

of such relief depends. It is also absolutely implausible that one could rely on the facts as alleged by another party to form the factual basis for their own cause of action. Thus, both such counts of The Villa's crossclaim are deficient on their face, as a matter of law, and cannot survive summary judgment.

Count Two of The Villa's crossclaim alleges a claim pursuant to the New Jersey Civil Rights Act ("NJCRA"). As with the other counts, Count Two expressly incorporates and substantially relies on the allegations as set forth in the Sister's Amended Complaint for the cause asserted.[13] Notably, as with all counts of the crossclaim, the facts as alleged in Count Two do not independently plead all of the elements of a cause of action under the NJCRA. The ability of this count to survive summary judgment fairs no better in incorporating the thirteen (13) paragraphs of the Sister's Amended Complaint to which The Villa admitted in its answer.

Critically, each of the first three counts of The Villa's crossclaim are predicated upon the same underlying factual and legal basis in expressly incorporating and substantially relying upon the allegations of the Sister's Amended Complaint. Similarly, none of these counts independently sets forth the essential elements of a cause of action within the text of the pleading itself. Thus, the very essence of Counts One, Two and Three is clearly and plainly directed at the

[13] The Villa's undue and unwavering reliance on the Sister's Amended Complaint to form the basis of its own cause of action serves to eliminate any and all room for doubt as to the ability to decide the fate of its claims on the face of the pleading.

obligations of the municipal defendants to facilitate the development of affordable housing, which is, of course, the central allegation and predicate for the Sister's Amended Complaint. The Villa, however, by virtue of its status as an adjacent landowner and sewer service user, has no standing to make such a claim in its crossclaim against the Borough.

A. The Borough Was Entitled To Summary Judgment As To Count Two Of The Villa's Cross Claim Because It Fails To Assert A Basis For A Violation Of A Constitutional Right

In Count Two of the crossclaim, The Villa alleges a violation of the New Jersey Civil Rights Act ("NJCRA"). Such claim is supported only by the bare conclusion that the Borough violated the due process rights of other lower income households as guaranteed under the New Jersey Constitution as well as rights conferred by municipal ordinance and the municipal land use law. The Borough respectfully submits that the Court should affirm the order of the Trial Judge granting its motion for summary judgment as to Count Two of The Villa's crossclaim because it fails, on its face, to state a cause of action for which relief can be granted or to plead the essential elements of a claim under the NJCRA.

N.J.S.A. 10:6–2(c) provides, in relevant part:

> Any person who has been deprived of any substantive due process … rights, privileges or immunities secured by … laws of the United States, or … of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person

> acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief ….

The CRA further provides that actions "may be filed in Superior Court. Upon application of any party, a jury trial shall be directed." N.J.S.A. 10:6-2(d). The CRA is modeled after the federal Civil Rights Act, 42 U.S.C. § 1983. AmeriCare Emergency Med. Serv., Inc. v. City of Orange Twp., 463 N.J. Super. 562, 574 (App. Div. 2020). To be cognizable under the CRA a claim must allege either that Plaintiffs were: (1) "deprived of a right;" or (2) their rights were "interfered [with] by threats, intimidation, coercion or force" Felicioni v. Admin. Office of Courts, 404 N.J. Super. 382, 400 (App. Div. 2008), certif. denied, 203 N.J. 440 (2010).

A cause of action under the CRA contains two (2) essential elements. First, a state actor, i.e., a person acting under color of law is responsible for the deprivation of a right, privilege or immunity. See Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363 (1996) (citing Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658, 663 (1978)). Second, the plaintiff must identify a right guaranteed under State or Federal Law that was violated. Id. (quoting 42 U.S.C. § 1983). As to this second element, the CRA, like § 1983, is not itself a source of substantive rights, but merely provides a vessel for vindicating substantive rights elsewhere conferred. Gormley v. Wood-El, 218 N.J. 72, 98 (2014). Therefore, to bring a cause of action under the CRA, the second element requires a party to allege a specific constitutional violation. The case law is clear that an individual may

prevail on a claim under the CRA only when: (1) the plaintiff has actually been deprived of a right; or (2) one acting under color of law has threatened, intimidated, or coerced a person or attempted to do so, in such a way that it interferes with the person's exercise or enjoyment of his rights. Felicioni v. Admin. Office of Courts, 404 N.J. Super. 382, 400 (App.Div. 2008); AmeriCare Emergency Med. Serv., Inc. v. City of Orange Twp., 463 N.J. Super. 562, 574 (App. Div. 2020).

As an initial and threshold matter, Villa's counterclaim did not allege with particularity each and every element of a cause of action brought under the CRA. Likewise, the crossclaim failed to identify the particular right(s) violated by virtue of Borough's alleged misconduct.

The elements of a substantive due process claim under the CRA are the same as the statute it was modeled after, 42 U.S.C. § 1983. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 115 (App. Div. 2011). A substantive due process claim under the CRA requires plaintiff to: (1) "identify the state actor, 'the person acting under the color of law,' that has caused the alleged deprivation"; and (2) "identify a 'right, privilege or immunity secured to the claimant" by the constitutions of the state and federal governments or by state and federal laws." Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363 (1996) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)).

In its crossclaim, Villa alleges the Borough violated N.J.S.A. 10:6-2(c) by "violat[ing] the due process and other constitutional rights of the Villa and lower income households as guaranteed by the New Jersey Constitution, as well as rights secured by the Villa under applicable ordinances, Court Orders, and the Municipal Land Use Law." FPPDa171; FPPDa172. No specific allegation is contained in the counterclaim as to the means, conduct or action by which the Borough purportedly violated its rights. Rather, the Villa refers to and realleges the allegations set forth in Plaintiff's amended complaint to provide substance to this claim. However, it is axiomatic that The Villa cannot establish a constitutional violation as to itself merely by virtue of its incorporation by reference of such an allegation as to the Sisters.

To allege civil rights violations in a land use context, moreover, a substantive due process claim requires evidence of governmental action that "shocks the conscience." Rivkin, supra, 143 N.J. at 366. Therefore, for a claim of substantive due process violation under N.J.S.A. 10:6–2(c) arising from land use decisions, a plaintiff must show that the official action "shocks the conscience." In *Rezem Family Associates, LP v. Borough of Millstone*, the court held that a substantive due process claim in a land use dispute requires both governmental misconduct that "shocks the conscience" and exhaustion of remedies available under land use law. Rezem Family Associates, LP, supra, 423 N.J. Super. at 108.

Here, even the most deferential review of The Villa's crossclaim cannot reasonably be interpreted to contain any allegation that could be arguably sufficient to shock the conscience. Indeed, Count Two of the crossclaim is predicated entirely on the bare allegation that the Borough, in allegedly violating the rights of third parties, also violated the constitutional rights of The Villa. The Villa's cross claim simply outright fails to establish the essential elements of a cause of action under the NJCRA and, for the same reason, there are certainly not any material disputed facts that would allow Count to survive dismissal on summary judgment.

In 41 Maple Associates v. Common Council of the City of Summit, 276 N.J.Super. 613, 619–20 (App. Div. 1994), the Court held that a § 1983 claim was correctly dismissed because it was not ripe for adjudication without a showing that the plaintiffs had attempted to remedy the deprivation of their land use rights through available administrative and judicial proceedings. In that case, the plaintiffs received a variance and site plan approval from the city's planning board to build an addition to their property. Municipal officials, however, asserted that no building permit would be issued because the city intended to challenge the variance and site plan approval through litigation. The plaintiffs did not apply formally for a building permit but instead sued alleging civil rights violations. Id. at 615–17. In affirming dismissal of the complaint, the Court explained that the plaintiffs could have challenged the construction official's failure to review their application and issue a

building permit by pursuing local remedies and filing an action in lieu of prerogative writs in the Superior Court under Rule 4:69. Id. at 618. The Court further stated: "The alleged improper moratorium or municipal antipathy to the development could not have improperly deprived plaintiffs ... of a mere expectation which had not ripened into a property right by the issuance or improper denial of an appropriate permit." Id. at 619.

Likewise, in OFP, L.L.C. v. State, 395 N.J.Super. 571, 590 (App.Div.2007), aff'd o.b., 197 N.J. 418 (2008), the Court held that a landowner could not bring a constitutional challenge alleging a regulatory taking of its property until it had exhausted available remedies and permitted the agency responsible for the regulation to issue a final ruling on a potential waiver of the regulations for the plaintiff's property. See also House of Fire Christian Church v. Zoning Bd. Of Adj. of City of Clifton, 379 N.J.Super. 526, 547–48 (App. Div. 2005) (claim that city's land use decisions were in violation of law was not ripe for adjudication until church applied to the local zoning board for relief and obtained a ruling). See also Rezem Family Associates, LP, supra, 423 N.J. Super. at 116–17.

Here, the Borough was entitled to summary judgment on Count Two of The Villa's crossclaim because it contains no allegation that The Villa exhausted available administrative and judicial remedies, or sought a final decision on any development application or other request or application, as a prerequisite to its

crossclaim. FPPDa155. Axiomatically, a claim is not ripe for adjudication under the NJCRA without a showing that the claimant attempted to remedy deprivation of a substantive due process right through available administrative and judicial remedies. Because The Villa neither pleaded, nor established, an essential prerequisite to a suit under the NJCRA, Count Two is not ripe of adjudication and should be dismissed on summary judgment.

Additionally, The Villa did not seek, nor file, a prerogative writ seeking judicial review of any decision by the Borough or any department or agency of the Borough. FPPDa155; Ja11; Ja14. Instead, the Villa seeks to assert direct offensive claims against the Borough as well as the Township on the basis of decisions and rights claimed by the Sisters in connection with an inclusionary development to be constructed on the Sister's property pursuant to a Mt. Laurel settlement agreement to which The Villa is not a party. Ja299; FPPDa139; FPPDa140; FPPDa141; FPPDa185; FPPDa186; FPPDa189; FPPDa199; FPPDa215; FPPDa278; FPPDa435; Critically, neither the Final Judgment of Compliance and Repose affirming the Borough's Affordable Housing Settlement, provided for, and at no point outside the context of this litigation did the Sister's ever seek, exactly the type of relief The Villa is now seeking against the Borough in this proceeding. Id. In other words, The Villa is seeking to bootstrap judicial review of a decision that was simply never made, nor sought, by or from the Borough as the predicate for assertion of its own independent

causes of action in the counterclaim against the Borough. Such a tactic should not withstand entry of summary judgment in the Borough's favor.

B. The Borough Is Entitled To Summary Judgment On The Tortious Interference Claim Because The Crossclaim Does Not Allege The Essential Elements Of A Cause Of Action

A complaint based on tortious interference must allege facts that show some protected right—a prospective economic or contractual relationship. Although the right need not equate with that found in an enforceable contract, there must be allegations of fact giving rise to some "reasonable expectation of economic advantage." Harris v. Perl, 41 N.J. 455, 462 (1964). A complaint must demonstrate that a plaintiff was in "pursuit" of business. Second, the complaint must allege facts claiming that the interference was done intentionally and with "malice." Kopp, Inc. v. United Technologies, Inc., 223 N.J. Super. 548, 559 (App. Div. 1988). For purposes of this tort, "[t]he term malice is defined to mean that the harm was inflicted intentionally and without justification or excuse. Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 563 (1955). Third, the complaint must allege facts leading to the conclusion that the interference caused the loss of the prospective gain. A plaintiff must show that "if there had been no interference[,] there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits." Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 185–86 (App. Div.), certif.denied sub nom. Leslie

Blau Co. v. Reitman, 77 N.J. 510 (1978). Fourth, the complaint must allege that the injury caused damage. Norwood Easthill Assocs. v. Norwood Easthill Watch, 222 N.J.Super. 378, 384 (App. Div. 1988).

The next inquiry is whether the complaint alleges that defendants' actions were done with the "malice" required to sustain an action for intentional interference with a prospective economic relation. See Rainier's Dairies v. Raritan Valley Farms, Inc., supra, 19 N.J. at 563. That element of the cause of action focuses on defendants' behavior. Although the common meaning of malice connotes ill-will toward another person, Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 588 (1934), "[m]alice in the legal sense is the intentional doing of a wrongful act without justification or excuse." Louis Schlesinger Co. v. Rice, 4 N.J. 169, 181 (1950). It is the claimants that defendants acted intentionally and wrongfully without justification, Levin v. Kuhn Loeb & Co., 174 N.J. Super. 560, 573 (App. Div. 1980).

In the case at bar, the crossclaim does not allege sufficient facts showing causation and damage. A plaintiff shows causation when there is "proof that if there had been no interference there was a reasonable probability that the victim of the interference would have received the anticipated economic benefits." Leslie Blau Co. v. Alfieri, supra, 157 N.J. Super. at 185–86. The failure to satisfy the requirement for allegation of facts demonstrating that a claimant has suffered

damage is fatal to a claim, and warranted the entry of summary judgment in the Borough's favor.

Further, the Villa's cross claims against the Borough could certainly not survive on a motion to dismiss for failure to state a claim as they are lacking an essential element of the malicious interference cause of action, in that The Villa has suffered no injury or damage. More specifically, The Villa cannot demonstrate, nor has it alleged, that it incurred any actual damages because of the Borough's alleged interference. Not only do these facts show absence of damage incurred or attributable to the actions of the Borough, but they also negate proximate cause or the requisite "actual interference" by the Borough with the contracts and easements. In fact, the contracts and easements to which The Villa refers in this cause of the complaint (and to which the Borough is not a party) remain in full force and effect, and thus no interference actually occurred.

Additionally, there are no factual allegations in the Complaint which in any way suggest the Borough's liability under negligence. In order to prove a claim of negligence successfully, a plaintiff must demonstrate: (1) a duty of care owed to the plaintiff by the defendant; (2) that defendant breached that duty of care; and (3) that plaintiff's injury was proximately caused by defendant's breach. See Endre v. Arnold, 300 N.J. Super. 136, 142 (App.Div.1997). The burden of proving a negligence claim rests with the plaintiff. See Reichert v. Vegholm, 366 N.J. Super.

209, 213 (App. Div. 2004). As part of that burden, it is vital that plaintiff establish that his or her injury was proximately caused by the unreasonable acts or omissions of the defendant. See Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 309–311 (App. Div. 1998), certif. denied, 156 N.J. 386 (1998).

The Villa has failed to properly plead the elements of any cause of action in the purported crossclaim. It is evident that the crossclaim fails to set forth any contention that The Villa was actually injured due to any conduct for which the Borough could be liable. Indeed, the gravamen of the Villa's claims is rooted in the implication that the Borough is liable to The Villa because it is liable to the Sisters. However, the Borough is not party to the agreement under which the Villa's claims arise, and the Villa has suffered no injury, nor has the Villa alleged any act or omission on the part of the Borough for which the Borough may be liable. As such, the Trial Court properly dismissed the entirety of The Villa's claims with prejudice.

1. Even If There Was A Decision From Which To Seek Review, The Cross Claims Asserted Would Be Out-Of-Time

Initially, as addressed in further detail in the foregoing, there is no discernable event from which the forty-five (45) day deadline for the filing of the instant action would begin to accrue. While the Borough respectfully maintains that the "right to review" does not exist given the lack of a discrete action from which to accrue, any possible semblance of an action from which The Villa could seek review, which is

not at all evident on the face of the Answer and Counter/Cross Claim, is neither articulated in the Villa's pleading, nor even reasonably within the time constraints of the Rule.

Rule 4:69–6(a) requires that an action in lieu of prerogative writs must be filed no later than "[forty-five] days after the accrual of the right to the review, hearing or relief claimed." See also Biddle v. Biddle, 163 N.J. Super. 455, 461 (Law Div. 1978) (holding there is no justification for permitting a defendant to plead a cross claim, otherwise barred, when that claim constitutes a new cause of action which is clearly affirmative in nature); see also Burns v. Hoboken Rent Leveling & Stabilization Bd., 429 N.J. Super. 435, 447-48 (App. Div. 2013) (cross-claims that take the form of actions in lieu of prerogative writs are specifically subject to the Rule's forty-five day limit). Similarly, the rules expressly provide that an action "shall not be maintainable as long as there is available a right of review that has not been exhausted," which presupposes the viability of the action, when, as here, no initial review was undertaken or attempted. R. 4:69-5.

Here, The Villa does not actually seek review of any act or decision attributable to the Borough, nor did it file an action related to the same, within the time restriction required by Rule 4:69-6(a). Moreover, any equitable basis upon which the Court may otherwise be permitted to relax the application of the rule in the interests of justice simply does not exist under the circumstances presented in

this case. Indeed, the facts do not allow for the possibility of a lack of notice as to any event to which could serve as the predicate for any right of review applicable to the Borough.

A court may not entertain an action in lieu of prerogative writs until the municipal action is finalized even where it appears that the municipal agency is about to issue a decision. Harris v. Borough of Fair Haven, 317 N.J. Super. 226, 230 (Ch. Div. 1998). United Savings Bank v. State, 360 N.J. Super. 520, 525 (App. Div.), certif. den. 177 N.J. 574 (2003) (affirming the grant of summary judgment because plaintiff's claim was not "ripe"). Allowing an untimely additional challenge poses an unfair risk of turmoil and instability for the Borough, which had every right to expect that it would receive the full measure of the period of respite provided by entry of the Judgment of Repose. Therefore, the time-based limitations under R. 4:69-6(a) preclude the viability of an offensive claim against the Borough.

The same forty-five (45) day limitation governing the initiation of any prerogative writ action applies to The Villa's purported cross-claim against the Borough. See R. 4:69–6(a) (requiring actions in lieu of prerogative writs to be commenced no "later than 45 days **after the accrual of the right to the review, hearing or relief claimed**"). Consequently, the naming of The Villa as a defendant in the action in the amended complaint filed by the Sisters did not create an independent basis for The Villa to assert an affirmative cause for relief. See Burns,

supra, 429 N.J. Super. 435; see also Biddle, supra, 163 N.J.Super. at 461 (holding "there is no justification ... for permitting a defendant to plead a cross[-]claim, otherwise barred, when that claim constitutes a new cause of action which is clearly affirmative in nature"). As such, the Villa's claims were properly dismissed on motion by the trial court with prejudice.

C. The Borough Is Entitled To Summary Judgment On The Tortious Interference Claim Because Failed To Establish A Cause Of Action In Contract Against The Borough

Despite having initially alleged in its Answer and Counter/Crossclaim the existence of an enforceable contract between itself and the Borough, the veracity of this contention was belied by the facts in the record on summary judgment, which included the contractual agreements expressly referenced in Villa's Answer and Counter/Crossclaim between itself and the Sisters [FPPDa175; PPDa176; FPPDa142] and subsequently admitted as genuine. See FPPDa190; FPPDa191; FPPDa308; FPPDa386; FPPDa396; FPPDa402; FPPDa436; FPPDa437; Ja299.

In Wanaque Borough Sewerage Authority v. Township of West Milford, 144 N.J. 564, 574 (1995), the Supreme Court of the State of New Jersey examined the law regarding types of contracts:

> Contracts are traditionally classified as express, implied-in-fact or implied-in-law. The contract is express if the agreement is manifested by written or spoken words, and implied-in-fact if the agreement is manifested by other conduct. "Contract implied in law" is a somewhat

> disfavored synonym for "quasi-contract." The authorities agree that a quasi-contract is not a contract at all, since there is no actual manifestation of assent. The common law of quasi-contract is supposed to have developed for procedural reasons [there simply being no writ of the form of action into which such a claim could fall.
>
> Thus, contracts implied in fact are no different than express contracts, although they exhibit a different way of form of expressing assent than through statements or writings. Courts often find and enforce implied promises by interpretation of a promiser's word and conduct in light of the surrounding circumstances.
>
> A contract implied in the law is a bird of another feather. While it is commonly referred to as a quasi-contract, in reality it is no a contract at all.
>
> As explained by the court in Saint Paul Fire & Marine Ins. Co, a quasi-contractual obligation is wholly unlike an express or implied-in-fact contract in that it is "imposed by the law for the purpose of bringing about justice without reference to the intention of the parties. In the case of actual contracts, the agreement defines the duty, while in the case of quasi contract the duty defines the contract.

In the instant matter, Defendant The Villa failed to identify any document, conduct, behavior or body of law that would constitute a "contract" between the parties, either expressed or implied, under Wanaque. Further, as memorialized in the summary judgment record, The Villa failed to demonstrate a contractual right to claim any existing flow allocation beyond the allocation proposed by Plaintiff.

V. THE CLAIM FOR PUNITIVE DAMAGES WAS PROPERLY DISMISSED THE BY THE TRIAL COURT BECAUSE PUBLIC ENTITIES ARE STATUTORILY EXEMPT FROM PUNITIVE DAMAGES

The Villa's Crossclaim against the Borough affirmatively sought relief in the form of punitive damages. N.J.S.A. 59:9-2 prohibits the awarding of punitive damages against a public entity. See Scott-Neal v. State Dep't of Corr., 366 N.J. Super. 570, 577 (App. Div. 2004); Marion v. Borough of Manasquan, 231 N.J. Super. 320 N.J. Super. 320, 323 (App. Div. 1989); Wildoner v. Borough of Ramsey, 316 N.J. Super. 487, 507-508 (App. Div. 1998), rev'd on other grnds 162 N.J. 375 (2000); and Woodsum v. Pemberton Tp., 172 N.J. Super. 489, 520, 523 (Law Div. 1980), aff'd 177 N.J. Super. 639 (App. Div. 1981) (where the courts held that punitive damages were not recoverable against a municipal entity). As such, the Villa's claim for punitive damages was properly dismissed by the Trial Judge.

CONCLUSION

Accordingly, Defendant/Respondent, Borough of Florham Park, respectfully requests that this Court affirm the orders of the court below granting summary judgment as to all counts of The Villa's offensive claims and dismissing the action outright, with prejudice.

Respectfully submitted,
BELL, SHIVAS & BELL, P.C.
Attorneys for the Borough of Florham Park

Dated: November 25, 2024

/s/ Joseph J. Bell, IV.
Joseph J. Bell, IV.

SISTERS OF CHARITY OF SAINT ELIZABETH, Plaintiff/Respondent, vs. TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, THE BOROUGH OF FLORHAM PARK*, THE VILLA AT FLORHAM PARK, INC. and MORRIS COUNTY GOLF CLUB, INC., *Defendant/Appellant Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003175-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT, LAW DIVISION MORRIS COUNTY DOCKET NO. MRS-L-975-20 Hon. Stephan C. Hansbury, J.S.C. Sat below Date of Submission: December 23, 2024
TOWNSHIP OF MORRIS AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, Third Party Plaintiffs, vs. THE BOROUGH OF FLORHAM PARK, Third Party Defendant	

REPLY BRIEF OF APPELLANT FLORHAM PARK PROPERTY, LLC

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PROCEDURAL HISTORY

The Appellant relies upon the Procedural History set forth in its initial brief.

STATEMENT OF FACTS

The Appellant relies upon the Statement of Facts set forth in its initial brief.

LEGAL ARGUMENT

I. THE OPPOSITION BRIEFS SUBMITTED BY THE RESPONDENTS ARE WITHOUT MERIT.

(The rulings relating to this section are located in the appendix FPPDa1-FPPDa27, FPPDa126-FPPDa127, FPPDa129-FPPDa130 and in the transcript at T.74:2 to 75:22.)

The parties attempt to avoid reversal by referencing R4:42-1. Per that Rule, prior to a settlement by motion or consent, all parties must be noticed (via motion or the five day rule), or all parties must provide their written consent. The brief of Sisters of Charity also admits that per case law, any party with "rights to preserve" must also be noticed and given an opportunity to object. (See Sisters of Charity Brief, page 45 to 46). Obviously, the Appellant was a party to the case and had rights to preserve. Appellant, however, was given no notice of the Consent Order. As set forth in the Appellant's initial brief, this is just the latest attempt in a long line of neglect aimed at erasing the rights of the Appellant with no notice to the Appellant. Even after being reversed once by

the Appellate Division for failure to include relevant parties, the Respondents continue in their wrongful strategies.

The Appellant was named in the Amended Complaint of the Sisters of Charity. (FPPDa135-FPPDa154). That Complaint contained Count IV, specifically against the Appellant (Appellant's predecessor in interest). That Count, in the words of the Sisters of Charity, paragraph 72, directly asserted that the orders in the case will "impact upon the interests of the" Appellant and will "be binding upon them". The same paragraph further asserted that the appellant was added to the suit "so that they will have an opportunity to provide the Court with input as to the requested relief, and so that they will be bound by the Orders to be entered in this matter." The plea for relief demanded, similarly, that the Appellant be bound by the Orders in this matter.

Unfortunately, the Sisters of Charity and other Respondents still moved forward with the Consent Order with no notice, which they absolutely knew would affect the rights of the Appellant. This is improper and it is also tortious interference with the prior contractual rights and economic advantage of the Appellant. There is no way from the record that a party can seriously claim lack of knowledge as to these facts. The trial judge recognized the existing rights of the Appellant per the existing contracts specifically in his ruling. The Respondents are basically asserting that this never happened and that no rights

of the Appellants were affected. This is simply not true. The clear intent of the Rules of Court and all surrounding law is that the Appellant should have been given notice, and should have been heard. Rule 4:37 is similar. That Rule also forbids dismissal of an action after a responsive pleading has been filed without the signatures of all parties. The Appellant is and was a party at all times and was certainly a party with interests to protect. Although the counterclaims of the Appellant were dismissed, the Appellant remains a party. That is why the Appellant is able to appeal the law division ruling. Furthermore, the affirmative claims of the Sisters of Charity (that admittedly affected the interests of the Appellant and attempted to bind them) were never dismissed until the entry of the Consent Order. Thus, Appellant had active, and undismissed claims against it until the Consent Order was signed. Per the very Rule and cases cited by the respondents, the Appellant should have been given notice and an opportunity to respond. The Respondents did act improperly and knowingly in entering the Consent Order. The Consent Order did affect the rights of the Appellant very significantly. For these reasons, and all of the reasons in the initial brief, the Respondents are not correct.

Respectfully submitted,

ROSELLI GRIEGEL LOZIER, PC

Dated: December 23, 2024 By: /s/***Mark Roselli***

Dated: December 23, 2024 By: /s/***Steven W. Griegel***