

RICHARD DIETERLY
JAMES H. KNOX
RICHARD P. CUSHING
MARK H. CHAZIN ▲
WILLIAM W. GOODWIN, JR. ★
ROBERT C. WARD, JR.
JOHN G. MANFREDA +
JACOB A. PAPAY, JR. □
JOSEPH F. TRINITY ❖
WILLIAM J. RUDNIK □★
STEVEN D. FARSIUO □
JUDITH A. KOPEN ○
LORI KOPF MACWILLIAM ▲
DEBORAH B. ROSENTHAL □
ARTHUR D. FIALK
CYNTHIA R. RICHARDS ❖
LESLIE A. PARIKH ▼
ROBERT V. FODERA ▼
SUSAN M. FLYNN
LORRAINE C. STAPLES
DIANA N. FREDERICKS ▼
TRACY B. BUSSEL

Founded 1884

**GEBHARDT
& KIEFER**
A PROFESSIONAL CORPORATION

L A W O F F I C E S

1318 ROUTE 31
PO BOX 4001 · CLINTON, NJ 08809-4001
TELEPHONE (908) 735-5161
FACSIMILE (908) 735-9351
WWW.GKLEGAL.COM

SOMERSET COUNTY OFFICE
1170 ROUTE 22 EAST · BRIDGEWATER, NJ 08807
TELEPHONE (908) 725-5157

WILLIAM C. GEBHARDT
1884-1929
W. READING GEBHARDT
1919-1980
PHILIP R. GEBHARDT
1924-1986
E. HERBERT KIEFER
1933-1988

+ ALSO MEMBER OF MA BAR
○ ALSO MEMBER OF MN BAR
□ ALSO MEMBER OF PA BAR
▲ ALSO MEMBER OF
▼ NY AND PA BARS
ALSO MEMBER OF NY BAR

★ CERTIFIED BY THE SUPREME
COURT OF NJ AS A
MATRIMONIAL LAW ATTORNEY

❖ CERTIFIED BY THE SUPREME
COURT OF NJ AS A
CIVIL TRIAL ATTORNEY

REPLY TO CLINTON, NJ

June 5, 2012

PRIVILEGED & CONFIDENTIAL

Mayor & Council

Berkeley Heights Township

29 Park Avenue

Berkeley Heights, NJ

Re: Hotel Acquisition Corporation v. Township of Berkeley Heights
Docket No. UNN-L-1201-09
G&K File No. 0028825 C/LAP

Dear Mayor and Council:

This matter is being presented in connection with a settlement of the above-captioned matter which is subject to the consent of the Township. It is my understanding that this matter is scheduled to be discussed on June 12, 2012 at 7:30 p.m.

The proposed settlement in this matter has been structured as follows as is explained in detail in the body of this letter:

- \$100,000.00 will be paid by Scottsdale Insurance Company (on behalf of the Township) to the Plaintiff, which will represent attorney fees incurred by Joseph Murray, Esq. as described below
- Plaintiff is also to receive \$16,000.00 which represents the professional engineering/architect fees incurred by plaintiff for the second application/hearing before the Board necessary to secure the approval for the suite-style hotel. (\$11,000 of that amount will be paid by Scottsdale Insurance Company on behalf of the Township. The remaining \$5,000.00 will consist of monies to be returned to Hotel Acquisition Corp that are currently being held in escrow by the Township in connection with the second application and hearing for approval.

For purposes of the meeting, please note that the Township's deductible is \$10,000.00, which has been met. Thus, all settlement proceeds will be paid by Scottsdale, with the exception of the amount being held in escrow by the Township, as previously stated.

For the Mayor and Council's consideration, the following represents a factual and procedural background of the matter and is followed by a legal analysis of the settlement reached.

BACKGROUND

Plaintiff secured approvals from the Berkeley Heights Planning Board to construct a hotel. The approval secured, relied on an ordinance that had been recently amended. An adjoining property owner ("Pretto") opposed and appealed the approval. During the course of the appeal, Pretto's attorney alleged that one of the critical ordinances relied upon by the plaintiff for its approval had not been properly filed with the Union County Planning Board. The filing of an Ordinance within the County is a statutory requirement. As a result, that approval was voided, a new Ordinance was drafted and plaintiff reapplied for approvals and secured them. Plaintiff brought this suit seeking damages from the Township by virtue of its failure to properly file its ordinance with the County Planning Board. The issue in the case became whether there is immunity under the New Jersey Tort Claims Act for the failure to file an Ordinance.

LEGAL ISSUES/PROCEDURAL HISTORY

At the outset of the case, before discovery began, the plaintiff immediately moved for summary judgment on the liability aspect of the case. The Township immediately filed a cross motion for summary judgment in response and raised arguments under the immunities set forth in the Tort Claims Act.

The following immunities were asserted on behalf of the Township:

1. N.J.S.A. 59:2-3 (a) for discretionary activities (recent case law has come down since the filing of the suit in this matter holding that the filing of an ordinance with the county is a ministerial activity and based on that holding, this argument would now be difficult to make); and
2. N.J.S.A. 5:2-4 Immunity for adopting or failing to adopt a law or to enforce any law (which in this case would be the township's failure to properly adopt the ordinance in question by virtue of the failure to file it with the County. The section would also immunize the Township for failing to enforce the land use provision which requires the filing of the ordinance in the first place NJSA 40:55D-16). This is the strongest argument.

Inexplicably, the Court granted summary judgment to the plaintiffs on liability. The Court's Order indicated that damages (including plaintiff's attorney fees pursuant to the Tort Claims Act at N.J.S.A. 59:9-5) were to be decided at the time of trial. Based on the foregoing Order, the parties engaged in discovery on the damages aspect of the case.

DAMAGES SOUGHT

The damages alleged in this case essentially include the costs incurred as a result of the design group (Consulting Traffic Engineers, Engineering Consultants and the Architect) having to participate in the second application hearing which became necessary to obtain the approval. The fees incurred total approximately \$17,161.23.

As stated, Plaintiff also seeks attorney fees as compensatory damages and also pursuant to N.J.S.A 59:9-5, the attorney fee provision in the Tort Claims Act. Most recently, as of the time of the mediation arbitration in December of 2011, the plaintiff's attorney fees had reached \$208,000.00.

The attorney fees sought fall into the following categories:

- 1) Attorney fees associated with plaintiff's attorney's "investigation" into the non-filing of the Ordinance.
- 2) Attorney fees associated with plaintiff's attorney's oversight of the redrafting of the Ordinance and Master Plan changes prior to the second application.
- 3) Attorney fees associated with plaintiff's attorney's participation in the Second Application for Conditional Use Approvals
- 4) Attorney fees associated with the instant litigation

This matter was originally scheduled for trial in late 2010 and early 2011, and the parties, with the consent of Scottsdale, opted to participate in binding arbitration in order to keep Mr. Murray's attorney fees down. Two attorneys on behalf of plaintiff would have had to appear at trial in order to put in the testimony on fees as plaintiff's attorney was acting as his own expert and witness. The ultimate goal on behalf of the Township was to have the matter heard before the Appellate Division in order to have the court's ruling on the summary judgment motion on the liability aspect of case revisited. Thus, the arbitration agreement indicated that the once the arbitrator placed on attorney fee award on the case, the defendants would be free to immediately proceed to the Appellate Division on the liability question. To the extent the trial court's liability ruling was reversed, the attorney fees awarded would not have to be paid by the Township. However, if liability were lost on appeal, the fees would be the responsibility of the Township.

Prior the scheduled arbitration date, the arbitrator, retired Judge Serpentelli, asked the parties to attempt mediation first, and to the extent mediation could not resolve the case, arbitration could be revisited. Any settlement reached through mediation, however, extinguishes the right to an appeal. The parties agreed to attempt mediation first, and ultimately came to a potential settlement

ATTORNEY FEE DAMAGES

As stated, plaintiff breaks down his attorney fee claim into different categories for certain work performed prior to the instant litigation through the present time period.

Category A seeks attorney fees in the amount of \$6,568.50. These fees are associated with Mr. Murray's purported investigation into whether the Township failed to file the ordinance

in question. (For the sake of brevity, the Township's arguments in connection with all of the fees sought are set forth in the attached Arbitration Statement).

Category B includes a claim of \$15,566.15 for Joseph Murray's expenses attributable to his efforts to "redraft" the Ordinance that was never filed prior to the initial hearing. Joe Murray claims that his involvement in the process was necessary in order to make the Ordinance "impervious" to legal attack by the Prettos on the second approval with respect to spot zoning issues and issues in connection with it being in conformity with the Master Plan.

Category C expenses relate to the fees associated with the second application for site plan and conditional use approval. The fees sought in connection with this category are \$14,916.14.

Categories (d) and (e) are the largest with respect to damages sought and represent the legal work performed by Mr. Murray in connection with the instant litigation. To date, the plaintiff is claiming attorney fees in the amount of \$67,967.50 for services from June 13, 2007 through December 31, 2009 and \$42,038.00 from January 1, 2010 to November 30, 2010. The fees from November 30, 2010 through the time of the mediation was \$40,883.00. These are the fees that are sought in connection with the Tort Claims Act.

MEDIATION

During the mediation, arguments regarding the fees were presented which are consistent with the Arbitration Statement attached. Additionally, we went through the billing entries with Judge Serpentelli, who was of the opinion that the billing was unreasonably excessive. He further indicated that the legal issue involved in the case was an interesting and potentially significant one, which he could see eventually going to the New Jersey Supreme Court. He indicated his concern, however, that the Appellate Division could do the "easy" thing and remand the case back to the trial court level in order for the parties to perform discovery as to the specific circumstances surrounding the failure to file the Ordinance. This was an issue that was never able to be addressed during the litigation, as summary judgment was granted at the inception of the case by Judge Wertheimer.

ANALYSIS

Notwithstanding the foregoing, there are three potential outcomes if the case does not settle, but rather proceeds to Binding Arbitration:

1. As stated, there is the possibility that the case will be remanded back to the trial court level for further discovery by the Appellate Division. If for some reason this occurs and we proceed on with discovery, the parties will then have to prepare and file dispositive motions. If the motion is lost, plaintiff would make another application for additional fees at the end of discovery, which would essentially put us back in the same position as we are in now, with a considerably higher fee application to contend with in the event the appeal is not won. This is not the desirable option.
2. While we believe we have a very strong liability case on appeal, if the Appellate Division denies our appeal regarding the liability aspect of the case, we would then be responsible

to pay the fee that Judge Serpentelli awards on the case, in addition to any other fees that were incurred throughout the appellate process.

3. Finally, the Appellate Division could rule in our favor on the liability issue which would absolve any obligation on behalf of the Township to pay plaintiff's attorney fees. The only fees that would be paid on behalf of the Township would be the Professional Design Team fees for the second Planning Board hearing (\$17,161.23), as well as the fees associated with the arbitration proceeding with Judge Serpentelli. Judge Serpentelli indicated that *to date* his fees are around \$10,000.00, however if arbitration proceeds because this case cannot settle, the arbitration proceeding will continue for at least two to three days, given the amount of billing entries that will have to be addressed by counsel during the proceeding. Judge Serpentelli's fees are in the neighborhood of \$495.00 per hour.

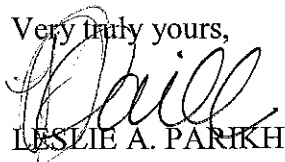
SUMMARY

As stated, the following settlement was proposed, subject to the Township's approval:

- Plaintiff would be paid \$100,000.00 in attorneys fees only, and Mr. Murray would be writing off an additional \$108,000.00 in fees chargeable to his client;
- No appeal will follow the settlement;
- The Township will pay approximately \$5,000 from the funds remaining in escrow and the Insurance Company will contribute \$11,000.00 to account for the professional fees for the second application and hearing.

I will be present at the June 12, 2012 meeting to discuss any questions that you may have with regard to the above as well as any questions you may have regarding the underlying litigation. Additionally, if you require anything further in the meantime, please do not hesitate to contact me.

Very truly yours,



LESLIE A. PARIKH

RICHARD DIETERLY
JAMES H. KNOX
RICHARD P. CUSHING
MARK H. CHAZIN ▲
WILLIAM W. GOODWIN, JR. ★
SHARON HANDROCK MOORE ◆
ROBERT C. WARD, JR.
JOHN G. MANFREDA +
JACOB A. PAPAY, JR. □
JOSEPH F. TRINITY ♦
WILLIAM J. RUDNIK □ ★
STEVEN D. FARSIU □
JUDITH A. KOPEN ○
LORI KOPF MACWILLIAM ▲
DEBORAH B. ROSENTHAL □
ARTHUR D. FIALK
CYNTHIA R. RICHARDS ♦
LESLIE A. PARIKH ▼
ROBERT V. FODERA ▼
ADRIAN K. COUSENS
SUSAN M. FLYNN
LORRAINE C. STAPLES
DIANA N. FREDERICKS ▼
TRACY B. BUSSEL

Founded 1884

**GEBHARDT
& KIEFER**
A PROFESSIONAL CORPORATION
L A W O F F I C E S

1318 ROUTE 31
PO BOX 4001 · CLINTON, NJ 08809-4001

TELEPHONE (908) 735-5161
FACSIMILE (908) 735-9351
WWW.GKLEGAL.COM

SOMERSET COUNTY OFFICE
1170 ROUTE 22 EAST · BRIDGEWATER, NJ 08807
TELEPHONE (908) 725-5157

WILLIAM C. GEBHARDT
1884-1929
W. READING GEBHARDT
1919-1980
PHILIP R. GEBHARDT
1924-1986
E. HERBERT KIEFER
1933-1986

◆ ALSO MEMBER OF CA BAR
+ ALSO MEMBER OF MA BAR
○ ALSO MEMBER OF MN BAR
□ ALSO MEMBER OF PA BAR
▲ ALSO MEMBER OF NY AND
PA BARS
▼ ALSO MEMBER OF NY BAR
★ CERTIFIED BY THE SUPREME
COURT OF NJ AS A MATRIMONIAL
LAW ATTORNEY
♦ CERTIFIED BY THE SUPREME
COURT OF NJ AS A CIVIL TRIAL
ATTORNEY
REPLY TO CLINTON, NJ

December 2, 2011

By e-mail and overnight mail

The Hon. Eugene D. Serpentelli, J.S.C.
Benchmark Resolution Service
411 Princeton Avenue
Brick, NJ 08724

Re: Hotel Acquisition Corporation v. Township of Berkeley Heights
Docket No. UNN-L-1201-09
G&K File No. 0028825 C/LAP

Dear Judge Serpentelli:

As you know, I represent the Township of Berkeley Heights in connection with this matter. Please accept the foregoing position statement in connection with the initial mediation session on December 6, 2011 and subsequent binding arbitration session on December 7, 2011 in connection with the above-captioned matter. The following is a brief history of the Case as well as a brief recitation of defendant's position going forward.

THE PRETTO LITIGATION

There was a preexisting litigation in connection with a prerogative writ action in this case which was filed in the Superior Court of New Jersey, Law Division, Union County, Docket No. UNN-L-4287-06, titled John C. Pretto v. Planning Board of the Township of Berkeley Heights and Hotel Acquisition Corporation. ("Pretto case") (See Plaintiff's Exhibit P1).

The Complaint alleged that, among other things, the Planning Board's grant of the Hotel Acquisition Corporation's ("HAC") application permitting construction of a suite style hotel was arbitrary, capricious, unreasonable and an abuse of discretion. The Complaint also alleged that the Board lacked jurisdictional authority to grant the variance necessary for site plan approval.

During the first suit, it was alleged by Pretto that the ordinance upon which the approval was granted had not been properly filed with the County as required by N.J.S.A. 40:55D-15. As such, during an April 13, 2007, Case Management Conference, in connection with the first litigation, Pretto was granted leave to file an Amended Complaint, which, in addition to attacking the HAC approval, also attacked the adoption of Ordinance 01-06. (See plaintiff's Exhibit P3).

Specifically, the Amended Complaint in the Pretto case alleged that Hotel Acquisition Corporation ("HAC") applied to the Planning Board for site plan and conditional use approval, with variances, to construct a hotel at premises in Berkeley Heights known as Block 702, Lot 18, as permitted by the Land Use Ordinance, Section 7.1.5, of the Municipal Land Use Ordinance. (Exhibit P4, ¶¶3, 10, 11). The Amended Complaint in the Pretto case further alleged that Section 7.1.5 of the Municipal Land Use Ordinance was amended pursuant to Ordinance 01-06 in January 2006 in certain particulars which benefited the plan of HAC. (See plaintiff's proposed Exhibit P4, ¶¶34, 35).

Of particular importance is the fact that the Amended Complaint in the Pretto case alleged that the amendment of Section 7.1.5 was invalid because (a) it was not referred by the Governing Body to the Planning Board prior to adoption; (b) the Planning Board failed to submit a report to the Governing Body prior to adoption; (c) the Township failed to file the Amendment with the Union County Planning Board; and (d) the amendment changes were not in accordance with the Master Plan. (See plaintiff's proposed Exhibit P4, ¶¶36,37,38,39).

The Amended Complaint in the Pretto case also alleged that the granting of the HAC application by the Planning Board was arbitrary, capricious, unreasonable, contrary to law, and that the Board lacked jurisdiction. (See plaintiff's Exhibit P4, Counts One & Two). The relief sought by the Amended Complaint in the Pretto case was a declaration of the invalidity of the ordinance amendment, and reversal of the granting of the HAC application. Id.

A Consent Order of Dismissal with prejudice was then entered by the Court on September 19, 2007, relative to the Pretto case, vacating the Planning Board's Approval. However, the Consent Order did not specify the reason(s) for said vacation. (Plaintiff's proposed Exhibit P7). Rather, the Consent Order contemplated that Plaintiff would subsequently apply to the Planning Board for approval of the same or different development project after the adoption of "any further amendment to the Berkeley Heights Municipal Land Use Procedures Ordinance ... that relate in any way to such future applications for development." Id.

THE REDRAFTING OF THE ORDINANCE AND SECOND APPROVAL

The Pretto case was resolved by a Consent Order, dated September 19, 2007, under the terms therein. The Consent Order makes no reference to reserving any damages claims against the Township in favor of any party therein. Prior to filing the second application for construction approval, plaintiff's attorney alleges that it was necessary that the original Ordinance be revised and that he, as plaintiff's attorney, should be involved in the re-drafting and oversight of the new Ordinance upon which the second application would be made.

Specifically, plaintiff's attorney contends that he advised his client that his participation in the process was advisable because of an anticipated further challenge to any new Ordinances by Pretto's attorney regarding contract zoning, spot zoning and inconsistency with the master plans. On February 6, 2008, the Township Council of Berkeley Heights adopted Ordinance 1-08.

Plaintiff filed a new application with the Planning Board ("Second Application") for approval of the Suite Hotel. The Second Application contained no substantial changes to the

proposed development from that which was previously approved by the Planning Board on November 1, 2006. The Second Application was approved on June 23, 2008. A written resolution memorializing the approval was adopted by the Planning Board on July 21, 2008.

THE INSTANT LITIGATION

The Complaint in the present matter, Hotel Acquisition Corporation v. the Township of Berkeley Heights, Docket No. UNN-L-1201-09, is an action for monetary damages against the Township of Berkeley Heights ("Township") for the alleged failure to file Zoning Ordinance 1-06, adopted January 24, 2006, with the Union County Planning Board, where the Complaint contends that filing was required by N.J.S.A. 40:55D-16. The Complaint was filed on March 27, 2009. (See plaintiff's Exhibit P11).

Plaintiff's Complaint alleges that the Township had a duty to file a copy of the ordinance, which was breached. Plaintiff alleges that it relied upon the lawful adoption of the ordinance in pursuing its application, and as a result of the alleged breach, Plaintiff incurred monetary expenses, including attorney fees in defending the Pretto complaint, in overseeing the redrafting of the Ordinance, and in HAC's reapplication before the Planning Board in relation to compliance with the newly drafted Ordinance that was adopted. Plaintiff seeks compensatory damages and counsel fees from the Township.

THE SUMMARY JUDGMENT APPLICATION

On or about September 28, 2009, plaintiff filed a motion for summary judgment for a determination as to the liability of Defendant. No discovery had been taken at the time the motions were filed and no determination had been made as to whether the Township failed to file the Ordinance or whether the County may have received the Ordinance for filing but merely failed to file it once it was received by the County. Notwithstanding, on or about October 6, 2009, Defendant filed a cross-motion for summary judgment for dismissal of plaintiff's case as a whole.

The Township raised arguments under the immunities set forth in the Tort Claims Act. Namely, that immunity applied with regard to the plaintiff's allegations pursuant to

1. N.J.S.A. 59:2-3 (a) for discretionary activities; and
2. N.J.S.A. 59:2-4 Immunity for adopting or failing to adopt a law or to enforce any law. In this case immunity would extend for the township's failure to properly **adopt** the ordinance in question by virtue of the failure to file it with the County. The section would also immunize Berkeley Heights for failing to **enforce** the Land Use Provision which requires the filing of the ordinance in the first place NJSA 40:55D-16).

On November 25, 2009, the court entered summary judgment as to liability in favor of the plaintiff, denying defendant's cross-motion for summary judgment, and ordering that plaintiff's claim for counsel fees pursuant to N.J.S.A. 59:9-5, *be determined at the time of trial*. (See plaintiff's Exhibit P25). Thus, the proper measure of damages incurred as a result of the alleged failure to file the aforementioned Ordinance is the only issue to be addressed in connection with the instant arbitration. Once arbitration occurs and an award is made, Defendants will file an appeal with respect to the underlying liability aspect of the case arguing that the Trial Court failed to properly apply the aforementioned immunities and, at the very least, the Court should have denied plaintiff's application based on the fact that no discovery took place regarding the failure to file the Ordinance and whether the failure, was actually an omission by Berkeley Heights, as opposed to an oversight by the County.

THE DAMAGES ASPECT OF THE CASE

In short, by the time it was determined that this matter would proceed to arbitration, Plaintiff was seeking attorney fees in the amount of \$147,048.00 as 1) compensatory damages and 2) pursuant to N.J.S.A. 59:9-5, the attorney fee provision in the Tort Claims Act.

Mr. Murray's Expert Report, Certification as well as his billing entries have been submitted to Your Honor. The fees sought fall into the following categories:

- | | |
|---|-------------|
| A. Plaintiff's attorney's "investigation" into the non-filing of the Ordinance | \$6,568.50 |
| B. Overseeing Ordinance and Master Plan changes prior to the second application | \$15,566.15 |
| C. Participation in the Second Application for Conditional Use Approvals | \$14,916.14 |
| D. Fees in connection with instant litigation for services from June 13 2007 | |

through December 31, 2009	\$67,967.50
E. Fees in connection with instant litigation for services from January 1, 2010 to the present	\$42,038.00

Defendants submit this amount is not only outrageous but also includes fees for work performed that has no relation whatsoever to the alleged failure to file the initial Ordinance in question. On September 10, 2010, Robert Simon, of Herold Law, issued a report as to the whether attorney fees should be awarded and the reasonableness of the attorney's fees in this matter. Defendants will be specifically relying on Mr. Simon's Report during the arbitration in this matter. **(Exhibit A)**. Additionally, attached hereto for Your Honor's further consideration are the defendants' Trial Brief **(Exhibit B)** and certain arguments raised in connection with Defendants Brief in Opposition to Plaintiff's Motion to Strike Mr. Simon's Expert Report.¹ **(Exhibit C)**. Defendants will also be addressing Mr. Murray's billing entries at the time of arbitration.

Briefly however, Defendants address each Category of damages sought by plaintiff.

CATEGORY A

As to category (a), time expended relative to the investigation of costs to confirm that the Ordinance was not filed, counsel billed 20.4 hours, and 1.9 hours for a paralegal's time. However, the time spent in discovering that Ordinance 01-06 had not been filed was unnecessary as there was no *independent* need for Mr. Murray to incur so many hours when the answer could have been achieved in a mere phone call or OPRA request. In short, based upon a 40-hour work week, Mr. Murray spent one-half the week, without working on anything else, determining whether the Ordinance had been filed. Defendant's expert, Mr. Simon opined that no more than three (3) hours should have been spent in ascertaining/investigating the non-filing of the Ordinance. According to Simon, \$1,087.50 is a reasonable charge. Clearly the charge of

¹ The parties' respective positions at trial that the opposing expert reports should be stricken are now irrelevant in connection with the instant arbitration, however, certain arguments raised therein are pertinent to the issue of the amount and reasonableness of fees sought by plaintiff.

\$6,568.50, almost six (6) times the amount deemed reasonable by Simon, is excessive and unwarranted.

At the time of his deposition, Mr. Murray conceded that his activities consisted of various phone calls to the Township attorney, the Township Administrator, the Planning Board attorney, and the Board Secretary, which did not result in any concrete information. Mr. Murray admitted that he did not undertake any other investigative efforts to find out if the Ordinance had been filed. No phone calls to the county were made nor did he submit a Open Public Records Act (OPRA) request for the information. Mr. Murray did indicate that he recognizes that an OPRA request could have been made to the County in order to determine whether there was a filing or not early on in the investigative process.

CATEGORY B DAMAGES

With regard to category (b), the participation of plaintiff's attorney with others relative to the creation, drafting and adoption of ordinances which took place prior to the filing of the Tort Claims Notice and this lawsuit, plaintiff incurred \$15,566.15 in legal expenses. Mr. Murray spent 44.1 hours related to these events, while another attorney in his office spent 6.7 hours. The crux of Plaintiff's Complaint seeks expenses related to the Township's failure to file Ordinance 1-06. Plaintiff should not be entitled to one iota of those expenses related to his efforts in making sure that the new ordinances were not vulnerable to attacks on the second go around by the neighboring objector. The efforts for which plaintiff seeks fees had "absolutely nothing" to do with the municipal clerk's alleged tort. All efforts that led to the adoption of Township Ordinances 01-08 and 02-08 are irrelevant to any alleged negligence in failing to file Ordinance 01-06. (See Simon Report).

Simply put, Plaintiff should not benefit from receiving a "re-do" which rectified a prior Ordinance which, had it been filed, would have been prone to legal attack. Thus Plaintiff should not recover any monies expended related to these efforts.

CATEGORY C DAMAGES

As to category (c), those expenses related to the preparation and presentation of the second application, Defendant does not dispute that attorneys' fees and expert fees are due for this presentation.

However, the damages related to processing the second application for site plan and conditional use approval (40+ hours plus 13 paralegal hours) are excessive. The fees sought in connection with this category are \$14,916.14. Specifically, the approvals were secured in one night of hearings and most of the evidence was not required to be re-presented, and thus the fees incurred for a second application that was almost identical to the first Application should be reduced. (**Exhibit A**, p. 21).

During his deposition, Mr. Murray did concede that there were certain activities, such as his fees for dropping off exhibits with the Board, which were not proper. Additionally, it appears as if Mr. Murray did include paralegal fees for some of the work performed in preparing the application, which he acknowledges were improper and will be taken from the amount stated above.

CATEGORY D AND E

Categories (d) and (e) are the largest with respect to damages sought and represent the legal work performed by Mr. Murray in connection with the instant litigation. To date, the plaintiff is claiming attorney fees in the amount of \$67,967.50 for services from June 13, 2007 through December 31, 2009 and \$42,038.00 from January 1, 2010 to the present. These are the fees that are sought in connection with the Tort Claims Act.

With regard to category (d), which includes the institution of the suit against Defendant, Plaintiff's procedural and substantive institution and process of its suit against the Township,

fees incurred for preparing, researching and reviewing summary judgment briefs with regard to a nine-page, one count tort claim, are grossly excessive. (**Exhibit A**, p. 23).

According to Plaintiff's April 13, 2010 Response to Demand for Documents, Plaintiff billed over 220 hours relative to this claim, plus paralegal fees and those of another attorney in his office, for a total of \$68,291.76. "Specifically, defendant submitted a ten page brief in opposition to Plaintiff's summary judgment motion, an eight page brief in support of its cross-motion for summary judgment, and a three page, double spaced letter reply brief in support of summary judgment" (**Exhibit A**, p. 23). Put into perspective, plaintiff claims to have worked on his Complaint, Notice of Tort Claim, Mediation Statement, motion for summary judgment, reply brief and opposition to Defendant's motion for summary judgment, for five-and-a-half (5 ½) weeks straight based upon a 40-hour work week.²

Here, the hours expended by counsel exceed those which competent counsel would have expended to achieve a comparable result. The legal concepts are not novel, difficult or complex, and did not warrant over 200 billable hours. In fact, Plaintiff's attorney has been practicing law in New Jersey for well over forty (40) years. His curriculum vitae sets forth that Mr. Murray has been involved in the practice of estate planning and administration, general business contracts, real estate (commercial and residential) sales and purchases, business formations, matrimonial, land development, including zoning and planning and board applications for site plans, subdivisions, variances and zone change petitions on behalf of applications for development, as well as municipal court matters, since 1963.

The same holds true for Category (e) damages and the excessive nature of the fees billed in connection with the instant litigation set forth in Categories (d) and (e) will be further addressed at the mediation/binding arbitration.

² Plaintiff's Mediation Statement and Summary Judgment Brief are almost identical.

At the time of the arbitration, Defendants will demonstrate that the amount of fees both conceptually, and as set forth in Mr. Murray's billing statements were not only unnecessary but grossly excessive and should either be disallowed and/or reduced.

Respectfully submitted,

/s/ Leslie A. Parikh
LESLIE A. PARIKH

LAP:nsj

cc: Joseph E. Murray, Esq. (reg.mail)