TOWNSHIP OF SOUTH BRUNSWICK

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September 8, 2015

Via email and regular mail

Honorable Douglas K. Wolfson, J.S.C.
Superior Court of New Jersey
Middlesex County Courthouse
56 Paterson Street
P.O. Box 964
New Brunswick, NJ 08903-0964

Re: South Brunswick Declaratory Action and Motion for Temporary Immunity from Mount Laurel Lawsuits
Docket No.MID-L-3878-15
Our File No. L1347

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick ("Township") in opposition to the Cross-Motion to Intervene filed by Windsor Associates ("Windsor"), in the above referenced matter, returnable before Your Honor on September 18, 2015.

Initially, the cross-motion to intervene is out of time. The Township's Declaratory Judgment Complaint and Motion for Temporary Immunity, to which the Windsor motion purports to be a "cross-motion," was filed on July 1, 2015. The Motion for Temporary Immunity was heard and decided by this court on July 31, 2015. Other cross-motions that were timely filed were also heard and decided on that same date. Windsor's "cross-motion" is filed far beyond the time requirements set forth in R. 1:6-3.

Motions to intervene are governed by Rule 4:33-1, which requires that all such applications be filed in a "timely" manner. It is within the court's discretion to determine the timeliness of all such applications, considering the totality of the circumstances, and the court may deny the application if deemed untimely. See generally State v. Lanza, 39 N.J. 595 (1963). See also ACLU v. Hudson County, 352 N.J. Super. 44, 64 (App. Div.), certif. den. 174 N.J. 190 (2002). In the instant case, the Township's Motion for Temporary Immunity, and the other interveners' Cross-Motions to Intervene, were all filed, considered and decided on July 31. The court has held several Case Management conferences in this and other similarly situated Declaratory Judgment Actions pending in Middlesex County and various legal issues have already been briefed and scheduled for oral argument (ie – 1,000-unit cap issues to be argued on September 17, prior to

the return date of Windsor's motion). Given the progress made to date in these affordable housing matters, Windsor's late motion to intervene is not timely pursuant to the rules of court and should therefore be denied.

If the motion will be considered on its merits, Windsor indicates that it seeks to intervene in this matter because it:

> "…has an interest in utilizing [its property in South Brunswick] as an inclusionary, multi-family, residential complex with units for affordable housing, to assist the Township in the satisfaction of its affordable housing obligations." (See Tanzman Certif., para. 5; Proposed Answer and Counterclaim).

The Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-51, et seq., governs declaratory judgment actions in New Jersey. Although the act requires that "all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding" (See N.J.S.A. 2A:16-56), certain additional requirements must be met before an interested party is permitted to intervene. Among these threshold requirements, the primary object of a party's interest in any pending matter must be to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." N.J.S.A. 2A:16-51; Bergen County v. Port of New York Authority, 32 N.J. 303 (1960). In addition, there must be a "justiciable controversy" between adverse parties. Young v. Byrne, 144 N.J. Super. 10 (Law Div. 1976). Indeed, a Court's ability to issue a declaratory judgment should not be used to obtain an advisory opinion. Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008). On the contrary, where an interested party's claim does not raise a judicial controversy that is "ripe for judicial determination," that party should not be permitted to assert its claim via a declaratory judgment proceeding. See Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295 (App. Div. 2005).

Pursuant to R. 4:33-1:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As such, a party seeking to intervene must show that it:

1) has an interest in the property or transaction;
2) is so situated that the disposition of the action may impair or impede the ability to protect that interest; and
3) there is no adequate representation of its interests by existing parties.

In the instant case, Windsor cannot meet the requirements for intervention in the Township's declaratory judgment action. As such, its motion should be denied.

As this Court has already determined, in a declaratory judgment action filed by a municipality in response to the decision in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. (2015) ("Mount Laurel IV"), interested parties may intervene, but their intervention is "limited to the question of whether the particular town has complied with its constitutional housing obligations." In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, unpublished opinion dated July 9, 2015, Superior Court of New Jersey, Law Division, Docket # MID-L-3365-15, at page 9 ("In Re Monroe"). This right to intervene

> ……does not extend so far as to authorize [interveners] to contest the municipality's site selections and/or methods of compliance by suggesting or claiming that other sites (owned or controlled by them) are superior to, or perhaps, better suited for an inclusionary development. While such parties' "participation" may, of course, include proofs related to whether the proposed affordable housing plan passes constitutional muster, so long as the plan does so, the municipality's choices (including site selection and the manner and methods by which it chooses to satisfy its affordable housing obligations) remains, as it was under the [Fair Housing Act] FHA and [the Council on Affordable Housing] COAH's oversight, paramount. Accordingly, claims that a "better" and/or "more suitable" site is, or may be available will not be entertained in any declaratory judgment action brought by a certified or participating municipality. Simply stated, to hold otherwise would be to permit an interested party to do indirectly that which the Supreme Court has specifically prohibited from being done directly. In Re Monroe, supra., at 9-10.

Indeed, Mt. Laurel IV "expressly prohibits exclusionary zoning litigation until after the compliance phase of the declaratory judgment action has concluded". In Re Monroe, supra., at 14 (citing Mt. Laurel IV, supra., at 35-36).

Windsor seeks to intervene in order to argue to this Court that the Township's "site selections and/or methods of compliance" in its Third Round plan are deficient. Moreover, it plans to do so "by suggesting or claiming that other sites (owned or controlled by them) are superior to, or perhaps, better suited for an inclusionary development." These types of arguments are exactly what were prohibited by the Court in In Re Monroe. Contrary to the assertion that it seeks only to assist the Court in determining whether the Township's actions and/or proposed plans are constitutionality compliant, the real motive is to obtain a builder's remedy against the Township. Indeed, this is well evidenced by the candid statements that it "has an interest in utilizing [its property in South Brunswick] as an inclusionary, multi-family, residential complex with units for affordable housing (See Tanzman Certif., para. 5; Proposed Answer and Counterclaim). Such site-specific interest cannot be the basis for intervention.

This Court has made abundantly clear that all declaratory judgment actions involving "certified" or "participating" municipalities[1] shall be subject to the procedures and protocols set out below:

> 1. Interested parties shall be permitted to intervene, but only for the limited purpose of participating (through meditation, negotiation, conciliation, etc.) in the Court's adjudication of the subject municipality's constitutional compliance with its affordable housing obligation;
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> 2. Interested parties shall not be permitted to file exclusionary zoning/builder's remedy actions, via counterclaims or through independently filed separate actions, until such time as the Court has rendered an assessment of the town's affordable housing plan and has decided that the municipality is constitutionally noncompliant, and is determined to remain so by refusing to timely supplement its plan to correct its perceived deficiencies; and
>
> 3. If, after having received a full and fair opportunity to comply with its constitutional obligations, the Court concludes that a municipality is "determined to be noncompliant," builders and any other interested parties may then initiate and prosecute exclusionary zoning actions against the town, through which any builder's remedies to be awarded would be guided by equitable considerations and principles of sound planning, and not upon who filed first. In Re Monroe, supra., at 16-17.

Accordingly, the Court has already precluded the type of intervention sought by Windsor. Thus, at this point, there is no "judicial controversy that is ripe for judicial determination" in relation to the claims sought to be presented by Windsor. Its claims, if they are permitted at all, must await this Court's determination on the Township's compliance with its obligation to provide for affordable housing.

In addition, there is also no "uncertainty [or] insecurity with respect to rights, status and other legal relations" of Windsor. This Court has already adequately protected its rights related to its proposed exclusionary zoning/builder's remedy claims: "If, after having received a full and fair opportunity to comply with its constitutional obligations, the Court concludes that [the Township] is 'determined to be noncompliant,'" this Court has firmly established that Windsor "may then initiate and prosecute exclusionary zoning actions against the [Township]." In Re Monroe, supra., at 17. This resolves any "uncertainty" with respect to Windsor's rights and indeed more than adequately protects those rights in the instant matter. As this Court has observed, "[b]arring interested parties from pursuing builder's remedies, either via an independent action, or as here, by way of a counterclaim, results in no discernible prejudicial impact. Indeed, site-specific relief is wholly irrelevant to the larger, and preliminary, question of constitutional compliance." In Re Monroe, supra., at 11.

[1] South Brunswick is a "participating" municipality pursuant to Mt. Laurel IV.

For all of the foregoing reasons, the motion to intervene filed on behalf of Windsor should be denied.

No oral argument is needed or requested and the Township hereby consents to a disposition on the papers.

Thank you for your considerations in this matter.

Respectfully submitted,

/s/ Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw
Enclosures

Cc: Middlesex County Superior Court Clerk
Henry Kent-Smith, Esq., attorney for Richardson
Kenneth D. McPherson, Jr., attorney for SBC
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Bret Tanzman, Esq., attorney for Windsor
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
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