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March 5, 2020

VIA E-COURTS

Hon. Linda Grasso Jones, J.S.C.
Superior Court of New Jersey
Law Division
Monmouth County Courthouse
71 Monmouth Park
Freehold, New Jersey 07728

Re: In the Matter of the Application of the Borough of Rumson, County of Monmouth, Docket No. MON-L-2483-15
Objections for Fairness Hearing

Dear Judge Grasso Jones:

We represent Rumson Open Space and Affordable Housing, Inc. (ROSAH), which is a nonprofit organization established to support the development, financing, construction and public support of decent, safe, sanitary and affordable housing for low income persons and families (including the elderly, physically handicapped and intellectually handicapped, where appropriate) in the State of New Jersey, while also seeking to preserve a permanent legacy of historical buildings, open space, the environment and natural habitat, with respect for the real property rights of taxpayers and affected residents. ROSAH has as members both residents of Rumson, and individuals who have property interests within and beyond 200 feet of the properties that are the subject of the settlement agreements objected to herein. Specifically, ROSAH objects to the settlements proposed in this constitutional compliance action, because the settlements are inconsistent with the direction of the Court in In re: Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015) ("Mt. Laurel IV"), inconsistent with COAH's regulations, inconsistent with sound planning principles, and inconsistent with the ultimate goal of the Mount Laurel doctrine to create realistic opportunities for the construction of affordable housing within Rumson.

ROSAH has filed a companion complaint out of necessity, challenging the validity of the resolutions of the Borough of Rumson ("Borough") authorizing the execution of the settlement agreements, and the settlement agreements themselves, based on violations of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.; the unlawful delegation of authority to negotiate and settle litigation by the Borough; arbitrary, capricious and unreasonable action by the Borough; and various violations of the Fair Housing Act, the second round regulations of the New Jersey Council on Affordable Housing ("COAH"), and the Supreme Court's directives in Mt. Laurel IV, amounting a deprivation of both procedural and substantive due process. The companion litigation, captioned as Rumson Open Space and Affordable Housing, Inc. v. Borough of Rumson et al., Docket No. MON-L-755-20, challenges the fundamental validity of the agreements being considered by the Court. Accordingly, ROSAH respectfully submits that the fairness hearing should be held in abeyance until the companion litigation can be resolved, in order to best conserve judicial resources.

In the event the Court does determine to move forward with the fairness hearing as scheduled, ROSAH submits the following enclosed expert reports in support of its position:

LFB Land Planning, "Objection to Settlement Agreements, Rumson Borough, Monmouth County, New Jersey," dated March 4, 2020 ("Bruder Report");

Petry Engineering, LLC, "Evaluation of Potential Development of Property for 91 Rumson Road and 132 Bingham Avenue," dated March 5, 2020 ("Petry Report").In summary, the conclusions reached by ROSAH's experts are briefly summarized as follows:

1. There is no rational or planning basis for the inclusion of 91 Rumson Road or 132 Bingham Road as part of the proposed fair share plan, and the inclusion of these

properties seems reactive, short-sighted, and inconsistent with the Borough's history of long-term comprehensive planning.

2. Inclusion of these properties is inconsistent with the municipal Master Plan, and sound planning principles.

3. The proposed settlement agreements are not consistent with COAH's rules and regulations, and effectively grant a proposed rezoning that does not create a realistic likelihood to yield the development of any affordable housing.

4. The realistic development potential for Rumson as set by the settlement agreement with FSHC is not consistent with COAH's regulations.

5. The settlement agreements fail to provide any specificity on expected yields from the overlay zones, and the overlay zones appear to be reactive to an application by an opportunistic developer, rather than a reasoned long-term planning approach.

6. Substantial doubt exists as to whether 91 Rumson Road and 132 Bingham Road are actually suitable for development under COAH's regulations, given the presence of substantial wetlands, and the designation of 91 Rumson Road on the State Register of Historic Places and National Register of Historic Places.

ROSAH will support and supplement these objections as necessary at the fairness hearing as well, and submits the following in further support of its objection to the proposed settlement agreements.

ANALYSIS

1. The Context of Fairness Hearings

The fairness hearing is a critical step in the settlement of this constitutional compliance litigation. This is the sole venue in which interested parties – including the public – have been afforded an opportunity to review and comment on whether the proposed settlement agreements between Fair Share Housing Center, Inc. ("FSHC") and the Borough, and between Yellow Brook Property Co., LLC ("Yellow Brook") and the Borough, are fair and reasonable to low- and moderate-income households. As the Appellate Division recognized in East/West Venture v. Borough of Fort Lee, the fairness hearing is of limited, but important, scope:

> a trial judge may approve a settlement of *Mount Laurel* litigation after a "fairness" hearing to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built. That analysis involves a consideration of the number of affordable housing units being constructed, the methodology by which the number of affordable units has been derived, any other contribution being made by the developer to the municipality in lieu of affordable units, other components of the agreement which contribute to the municipality's satisfaction of its constitutional obligation, and any other factors which may be relevant to the "fairness" issue."

286 N.J. Super. 311, 328 (App. Div. 1996). See also Morris Co. Fair Housing Cl. v. Boonton Tp., 197 N.J. Super. 359, 371 (Law Div. 1984) ("It is not practical to catalogue definitively the factors which will be relevant to the court's review of a proposed settlement of a *Mount Laurel* case."). The issues to be considered by the Court are not finite, but a fluid process through which the Court evaluates the proposed settlement agreements in their overall context. In Morris County Fair Housing Council, Judge Skillman noted the concerns regarding settlements, and the need for the Court to make a focused threshold determination on the issue of fairness:

> While there are substantial considerations favoring settlement of *Mount Laurel* litigation, it also must be recognized that the improvident entry of a judgment of compliance would be harmful to the lower income persons on whose behalf the litigation is brought. . . . [T]here must be assurance that a settlement is consistent with the best interests of lower income persons before a judgment of compliance is issued.
>
> The risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in *Mount Laurel* litigation brought by developers. A plaintiff developer and defendant municipality have complementary objectives in settlement negotiations which are likely to result in an agreement which does not advance the goals of *Mount Laurel*. A municipality's objective is to be assigned a small fair share of lower income housing. A developer's objective is to secure approval of his project. If a judgment of compliance is entered approving a settlement which advances both of these objectives, the result would be the construction of a small number of lower income housing units while insulating the municipality from further *Mount Laurel* litigation . . .
>
> The danger of entering a judgment of compliance which does not adequately protect the interests of lower income persons is substantially reduced when a *Mount Laurel* claim has been brought by the Public Advocate or other public interest organization, since it may be assumed that generally a public interest organization will only approve a settlement which it conceives to be in the best interests of the people it represents. However, even a public interest organization may incorrectly evaluate the strengths and weaknesses of its claim or be overly anxious to settle a case for internal organizational reasons.

Id. at 377. The Supreme Court has directed that the proceedings should "conform wherever possible . . . to the criteria and guidelines of COAH." Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 63 (1985). As further part of this analysis, the Court should also consider "'the expeditious construction of a significant number of lower income housing units.'" East/West Venture, 286 N.J. Super. at 335 (quoting Morris County, 197 N.J. Super. at 372). Overall, the Court is required to provide a preliminary, but thorough, review of the components of a settlement to confirm that the goals of the *Mount Laurel* doctrine are being adequately advance and protected. See also Livingston Builders, Inc. v. Tp. of Livingston, 309 N.J. Super. 370, 380 (App. Div. 1998).

In this context, the fairness hearing is not a simple consideration, but instead one that requires an analysis of the propriety of and motivations for the proposed settlement, and for the Court to make affirmative findings of compliance with the regulatory scheme prior to blessing the compliance package. In re: Petition for Substantive Certification, Tp. of Southampton, 338 N.J. Super. 103, 114 (App. Div. 2001). In this instance, serious issues exist regarding the process through which the Borough determined that settlement of this litigation was appropriate, as outlined in ROSAH's companion litigation. However, notwithstanding those issues, the Court can readily determine that this settlement does not appropriately advance the interests of low- and moderate-income households because it fails to adequately ensure the construction of affordable housing for the reasons which follow.[1]

2. The Process Is Not Consistent with Mt. Laurel IV, Because Constitutional Compliance Cases Were Intended to *Only* Address Municipal Plans, Not Site Specific Relief Demands.

The Borough was a participating municipality before COAH, and has never been found to be constitutionally non-compliant. This settlement, however, serves to effectively cast the Borough as a municipality that is non-compliant, and remove its statutorily protected power to zone. Accordingly, both case law and this Court's decisions counsel that any site-specific relief being granted or considered by way of these settlement agreements is both inappropriate and premature. The Court should invalidate the settlement with Yellow Brook as a matter of law, and invalidate

[1] To the extent that these issues overlap with ROSAH's companion litigation, ROSAH suggests that these matters should either be consolidated formally, or case managed together, in an effort to conserve judicial resources.

any provision of the settlement with FSHC requiring specific relief to particular sites owned by Yellow Brook.

Throughout the Court's decision in Mt. Laurel IV, the Supreme Court was clear to avoid any implication that site-specific remedies or relief are to be granted by way of the constitutional compliance litigation. See, e.g., Mt. Laurel IV, 221 N.J. at 26, 29 and 36 (all recognizing that only after a determination of non-compliance should site-specific remedies be entertained). A similar barrier to site-specific relief has been enshrined in Mount Laurel jurisprudence in evaluating the fairness of compliance packages, making clear that this is a process driven by the municipality, not a particular developer or party. See, e.g., Allan-Deane Corp. v. Bedminster Tp., 205 N.J. Super. 87, 114 (Law Div. 1985). Unfortunately, the compliance package in this matter was apparently, based on the representations by the Borough at its January 14, 2020 public meeting, delayed by FSHC until the specific sites proposed by Yellow Brook were addressed. For this reason alone, the Court should view this settlement agreement with significant skepticism, as – if true – such a delay plainly runs contrary to the protections afforded to participating municipalities under Mt. Laurel IV.[2]

In one of the first written decisions regarding intervention following Mt. Laurel IV, the trial court made clear that developers were not permitted to intervene to propose sites for development, but only to participate in constitutional compliance cases and to provide commentary

[2] ROSAH's companion litigation addresses this point in more detail, but such considerations should be taken into account by the Court in analyzing the fairness of this settlement to both the protected class and the public at large.

on the municipal plan, as they would have under COAH. See Opinion, In re: Monroe Township Housing Element and Fair Share Plan, Docket No. MID-L-3365-15 (July 9, 2015), pp. 10-15, annexed hereto as **Exhibit A** ("Wolfson Op."). This settlement – and the process of settlement driven by FSHC in this litigation – has effectively eliminated the protections afforded to the Borough under Mt. Laurel IV and the Fair Housing Act. Municipalities, under the Fair Housing Act, expressly retain a right "to exercise their zoning powers independently and voluntarily. " Hills Dev. Co., 103 N.J. at 22; Wolfson Op., fn. 10. These settlement agreements suggest otherwise.

Notably, the trial court in this matter has expressly barred intervention for purposes of demanding rezoning of certain parcels, and has barred counterclaims for such relief. Indeed, both of Judge Perri's riders made clear the purpose of intervention was not to seek such site-specific relief, contrary to Yellow Brook's actions. The Court recognized, when it first denied Yellow Brook's motion to intervene, that no person or entity has a right "to demand inclusion of its property in the Borough's fair share housing plan or to position itself for a pre-emptive builder's remedy action if it is found that the Borough has not complied with its Third Round obligations." Rider to Order dated September 29, 2017, IMO Borough of Rumson, Docket No. MON-L-2483-15, p. 4 (Perri, J.), annexed hereto as **Exhibit B**. Even upon granting Yellow Brook's motion to intervene, the Court was very careful to note that Yellow Brook's interest in developing the properties it has under contract "cannot be harmonized with the temporary immunity granted to the Borough during the pendency of this litigation." Rider to Order dated July 18, 2019, IMO Borough of Rumson, Docket No. MON-L-2483-15, p. 2 (Perri, J.) , annexed hereto as **Exhibit C**.

Mt. Laurel IV echoed what is well-enshrined in years of case law: the municipality shall only be deprived of its power to zone, and a site-specific remedy approved, after a finding of municipal non-compliance. Here, Rumson has been a participating municipality, and has actively taken steps to adopt an accessory apartment ordinance, a development fee ordinance, and worked through this constitutional compliance process in good faith. There is no reasonable basis to declare fair to low- and moderate-income households a settlement that does not provide a realistic likelihood of construction for affordable housing, and instead rewards an opportunistic developer with site-specific relief.

3. The Settlements as Proposed Are Not Consistent with Sound Planning Principles.

The Supreme Court in Mt. Laurel II, made clear that "natural long-range land use planning" should guide the development of construction of low- and moderate-income housing. 92 N.J. at 211. "The Constitution of New Jersey does not require bad planning." Id. at 238. Furthermore, the same long-term planning objectives are enshrined in the Fair Housing Act, and in the aims of creating COAH, in whose stead the Court is directed to act. See, e.g., N.J.S.A. 52:27D-304(a), 311; Hills Dev. Co., 103 N.J. at 22 ("the location and extent of lower income housing will depend on sound, comprehensive statewide planning, developed by the Council and aided by the State Development and Redevelopment Plan. . . ") The proposals put forward by Yellow Brook, and advanced by way of the settlement agreements, are reactive and fundamentally at odds with sound long-term planning principles.

As set forth at length in the Bruder report, the location of the Bingham Avenue and Rumson Road parcels is not appropriate for the proposed rezoning. Specifically, she notes that the R-1 zone is well established, and nothing presented in the settlements warrants a reactive rezoning. Bruder Report, paras. 2-4.Furthermore, Ms. Bruder's analysis examined the Master Plan and other planning documents prepared by the Borough, and found no rational basis for this proposed rezoning. Thus, the only logical conclusion is that these sites are being reactively rezoned based on Yellow Brook's opportunistic engagement, and not any reasoned or sound planning basis.

4. The Settlements as Proposed are Not Consistent with COAH's Regulations or the Fair Housing Act.

The overarching goal of any municipal compliance program is satisfaction of the municipality's fair share housing obligation, and to encourage that satisfaction through affirmative municipal actions. In Mt. Laurel IV, the Supreme Court was clear that any municipal compliance plan needs to be consistent with the rules and regulations of COAH, namely the second round regulations, N.J.A.C. 5:93 et seq., as amended by the Court's decision. Mt. Laurel IV, 221 N.J. at 29-34. The compliance scheme proposed by the Borough, Yellow Brook, and FSHC is fundamentally inconsistent with these regulations.

The Fair Housing Act places an affirmative duty on the municipality to zone to create realistic opportunities for the construction of housing for low- and moderate-income households, and allowed municipalities to petition COAH for certification of its zoning and planning mechanisms. See, e.g., N.J.S.A. 52:27D-309, -311. Mount Laurel IV was intended to parallel that process. No judgment of constitutional non-compliance has been entered, and Mount Laurel IV

makes clear that there is no presumption of non-compliance that should be applied to the Borough as a participating municipality, particularly where it has taken affirmative steps towards achieving compliance. See, e.g., Mount Laurel IV, 221 N.J. 1, 36-37 (2015).

A. The Proposed Settlements Make No Factual Representations on Site Suitability, and No Such Analysis Has Been Provided to the Borough.

COAH's second round regulations, N.J.A.C. 5:93-1 et seq., expressly require that a site proposed for inclusionary development be available, suitable, developable, and approvable, as those terms are defined in N.J.A.C. 5:93-1. The settlement agreement with Yellow Brook expressly notes that it is unknown whether the Carton Street property, which is the only property on which affordable housing is actually proposed for development, is available, suitable, developable, and approvable. See Yellow Brook Settlement, paras. 4.2.1, 4.2.2 (recognizing that Yellow Brook may pay $3.15 million dollars and avoid donation or development of Carton Street if the parcel is "not developable"). Additionally, no evidence has been provided by the Borough that either the property at 91 Rumson Road or the property at 132 Bingham Avenue are available, suitable, developable, and approvable. Representations by an enthusiastic developer are not sufficient to establish a basis for developability of a property. See, e.g., In re: Petition for Substantive Certification, Tp. of Southampton, 338 N.J. Super. at 118.

These determinations are fundamental to the consideration of whether there is a realistic likelihood of construction of low- and moderate-income housing. See, e.g., Allan-Deane Corp. v. Tp. of Bedminster, 205 N.J. Super. at 115; In re: Tp. of Denville, 247 N.J. Super. 186, 201-02 (App. Div. 1991) (requiring COAH to make findings on site suitability), rev'd on other grounds,

In re: Tp. of Warren, 132 N.J. 1 (1993); In re: Tp. of Warren, 132 N.J. 1 (1993) (overturning a settlement without clear findings of fact supporting the inclusion of an occupancy preference). If sites are included that are neither available, suitable, developable, nor approvable, these are unrealistic sites for development on their face. The burden of demonstrating this fairness and appropriateness is placed on the Borough and Yellow Brook as the proponents of the settlement agreements. These parties have an obligation "to determine whether construction of high density housing on the sites would conflict with the regulatory polices those agencies are charged with implementing." In re: Petition for Substantive Certification, Tp. of Southampton, 338 N.J. Super. at 114.

Where Yellow Brook asserts that the market-rate developments on the Rumson Road and Bingham Avenue tracts are capable of development, analyses of the development potential of both tracts conducted by ROSAH's expert yields threshold concerns. A copy of this report, prepared by Petry Engineering, Inc. and dated March 5, 2020, accompanies this submission. In his report, Mr. Petry finds that there are serious concerns on both tracts regarding wetlands disturbance, disturbance of vernal habitats, and endangered species, along with the basic considerations of compliance with the Coastal Area Facility Review Act (CAFRA). Furthermore, the inconsistencies between the concept plans presented to the Borough at large and the filings with the Department of Environmental Protection as part of seeking a Freshwater Wetlands Letter of Interpretation - Line Verification, raise significant concerns as to the viability of the proposed development at 91 Rumson Road. See Petry Report, pp. 9-10.

Furthermore, reliance on the donation of the Carton Street property to the Borough if the development on other sites moves forward represents a conditional chance for affordable housing, not a realistic likelihood. No contract with a proposed developer has been proposed, and no evidence of site suitability has been provided. The settlement agreements provide competing timelines for the donation and construction of the proposed project, as the settlement with FSHC requires municipal construction on the site to begin within two years, and the settlement with Yellow Brook is conditioned on receipt of all non-appealable development approvals. Moreover, the settlement agreement recognizes that there is a need for remediation of the Carton Street property, and that the Borough will agree to undertake some of that remediation, intentionally exposing the Borough to potential liabilities as a remediating owner and owner of a contaminated property. In sum, without further information and analysis, the propriety of the Carton Street site for the proposed affordable housing project cannot be properly evaluated by the Court.

Concerns further exist regarding the adequacy of infrastructure in the area for supporting the additional developments proposed, including roadway capacity, utility services, and other municipal services. Nothing regarding these issues has been prepared by either Yellow Brook or the Borough, and consideration of these issues is fundamental to making a threshold determination as to the site suitability concerns expressly required by COAH's regulations. As a result, without this information, consideration of the settlement proposal with Yellow Brook is simply premature, as the Court cannot adequately consider whether the sites are developable in a way that would provide adequate yield on the market-rate sites. In turn, the Court cannot analyze whether these developments would adequately incentivize the contribution from Yellow Brook of property and

a payment-in-lieu to allow the construction of affordable housing. Accordingly, the Court should determine at a minimum that further information is required, or otherwise reject the proposed settlements with Yellow Brook for lack of information on the proposed tracts.

B. No Proposed Rezoning for the Carton Street Property on Which Affordable Housing is Actually Proposed.

As a threshold matter, ROSAH notes that no zoning is proposed for the Carton Street property, despite the fact that it is the only site within the settlement agreements on which affordable housing is actually proposed for construction. Without even a sketch outline of what would be proposed on the lynchpin of the settlement agreement, the Borough, FSHC, and Yellow Brook all wish the Court to find that this proposal is fair to low- and moderate-income families. This is fundamentally inappropriate, and any findings by the Court would lack a factual foundation. Accordingly, the Court should find that the Yellow Brook settlement lacks sufficient factual basis to make a determination as to the developability of the proposed sites.

C. No Factual Basis for the Proposed Densities on Rumson Road or Bingham Avenue as Being Necessary to Preserve Economic Feasibility of the Construction of Affordable Housing.

Under the Fair Housing Act, a fundamental tenet is that any proposed inclusionary development should have sufficient density and set-aside to render the proposed development "economically feasible." See N.J.S.A. 52:27D-311(a), -311(h). Instead of presenting any associated evidence or representations that such rezonings are necessary in order to make the development of the property on Carton Street "economically feasible," neither Yellow Brook nor the Borough have provided any evidence that the existing zoning on Bingham Avenue and Rumson

Road is not economically feasible, or that the permitted single-family developments under the existing zoning would not adequately support the construction of affordable housing in Rumson. Notably, any such development would be subject to the Borough's development fee ordinance, which would have a similar practical effect as the payment in lieu of construction currently proposed.

D. The Realistic Development Potential Calculation is Not Consistent with COAH's Regulations.

The realistic development potential ("RDP") calculations proposed by the settlement agreement with FSHC are not consistent with COAH's regulations.

In reviewing the proposed calculations, the inclusion of the properties at 91 Rumson Road and 132 Bingham Avenue as part of the RDP is inconsistent with COAH's regulations. See, e.g., Bruder Report at paras. 7, 8.

The settlement agreements provide for and rely on the construction of luxury market rate duplex and triplex units in place of the existing structure at 91 Rumson Road, which has been recognized as historically significant, and is listed on both the National Register of Historic Places and the New Jersey Register of Historic Places under its historic name of Lauriston. Lauriston has been listed since 2001. However, N.J.A.C. 5:93-4.2(e)(3)(i) expressly excludes historic sites listed on the State Register of Historic Places from consideration in determining the RDP for a municipality.

Based on representations by the Borough, Lauriston was not part of the required RDP calculation originally, because it is a currently developed residential property. Similarly, the property on Bingham Avenue was not included either. Only after Yellow Brook's intervention and proposal of these sites was the RDP adjusted upward to incorporate these sites. Given the designation of 91 Rumson Road on the State Register of Historic Places, it was improper to include that site in the RDP calculation.

Furthermore, by including these sites, Yellow Brook fails to meet a base threshold for the number of affordable units that would have been required through the application of COAH's presumptive minimum densities, and actually proposes a development that requires additional support from the Borough under its fair share plan. See Bruder Report, para. 8. Based on the size of Yellow Brook's development, the presumptive yield for affordable units would be fourteen (14); the Yellow Brook settlement, however, yields only nine (9) units of affordable housing, which requires the Borough to make up the difference by payments from its trust fund. Put another way, instead of providing a benefit to the Borough's compliance, Yellow Brook's proposal actually burdens the Borough by leaving a gap between the number of units funded by Yellow Brook and those required by the settlement agreements. This is by no means appropriate or fair to low- and moderate-income households, as those trust fund monies can be best allocated to actually creating new opportunities for development, rather than underwriting site specific relief that fails to pass constitutional muster.

E. The Proposed Fee in Lieu of Construction is an Illegal *Quid Pro Quo*.

The settlement agreements currently before the Court are not consistent with the laudable goals of the Mount Laurel doctrine, and do not create realistic opportunities for the construction of low- and moderate-income housing. Instead, these settlement agreements propose a substantial and unfounded up-zoning of two parcels in exchange for a potential contribution of land and a fee in lieu of construction. Yellow Brook has a burden to demonstrate that the existing zoning for each of these market-rate sites would be unworkable or economically infeasible as a precondition to demanding the rezoning as proposed, particularly in light of Rumson's protected status as a "participating" municipality.

Furthermore, the zoning as proposed is not inclusionary, but instead sets an arbitrary *quid pro quo* for the price of the proposed rezoning, wrapped in the veil of affordable housing. The process of negotiations to effect zoning changes particularly beneficial for a developer are subject to heightened scrutiny. See, e.g., Nunziato v. Planning Board of Borough of Edgewater, 225 N.J. Super. 124, 134 (App. Div. 1998) (contributions must be based on ordinance requirements, not "free-wheeling bidding" with the municipal agency granting approval).

The settlement agreement with Yellow Brook contractually obligates the Borough to rezone properties at 132 Bingham Avenue and 91 Rumson Road to allow for the construction of luxury market rate duplex and triplex units. In exchange for this rezoning, Yellow Brook will pay money and contribute to the Borough certain real property located on Carton Street, totaling a

purported value of $3.15 million dollars. Pursuant to the settlement agreement with FSHC, Yellow Brook will also make a payment of $31,000 to FSHC to its cover attorneys' fees.

The settlement agreement with Yellow Brook values the Carton Street property without consideration of an appraisal or any established valuation standard. The Borough lacks standards validly adopted by ordinance for the valuation of the Carton Street property, or for determining the amount of the in-lieu fee. In the absence of an ordinance providing for an affordable housing set-aside, the settlement agreement with Yellow Brook amounts to an unlawful *quid pro quo*, as the value of the fee was apparently negotiated between Yellow Brook and the Borough. The only apparent basis for the related upzoning is to address economic considerations outside of the need for affordable housing in Rumson (i.e., the general lack of a market for larger estate homes), which is simply reactive and not conducive to sound, long-term planning, as set forth in the Bruder Report. See Bruder Report, paras. 4, 13. If Yellow Brook is interested in building a development that is consistent with this purported market change, the proper mechanism is to do so either by seeking a use variance or by requesting a rezoning.

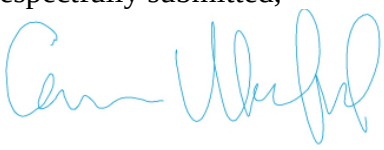
Instead, Yellow Brook has decided to take a process focused on the provision of actual housing for those in need of affordable housing, and attempted to use it as a bypass of the municipal power to zone.This is a tact plainly rejected by the Supreme Court in Mt. Laurel II. See, e.g., S. Burlington Co. NAACP v. Tp. of Mt. Laurel, 92 N.J. 158, 280 (1983) ("Care must be taken to make certain that *Mount Laurel* is not used as an unintended bargaining chip in a builder's negotiations with the municipality, and that the courts not be used as the enforcer for the builder's

threat to bring *Mount Laurel* litigation if municipal approvals for projects containing no lower income housing are not forthcoming."). Instead of advancing the interest of low- and moderate-income households, the proposed developments simply use this litigation as a mechanism of receiving a significant upzoning under the guise of Mount Laurel. The Court should see these efforts for what they are, and reject the proposed settlement agreements on that basis.

CONCLUSION

For the foregoing reasons, as well as those to be set forth at the fairness hearing, ROSAH respectfully requests this the Court find that the proposed settlement agreements between the Borough, FSHC, and Yellow Brook are not fair to the interests of low- and moderate-income households, and fail to provide a realistic likelihood of construction of housing affordable to such households.

Respectfully submitted,



Cameron W. MacLeod
Associate

Encl.

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EXHIBIT A

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION – CIVIL PART (MT. LAUREL)

In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances

DOCKET NO: **MID-L-3365-15**

CIVIL ACTION

OPINION

Decided July 9, 2015

Not for Publication Without the Approval of the Committee on Opinions

Jerome J. Convery, Esq. and Marguerite M. Schaffer, Esq. (*Shain, Schaffer & Rafanello, P.C.*) appeared on behalf of the Township of Monroe

Thomas F. Carroll, III, Esq. and Stephen Eisdorfer, Esq. (*Hill Wallack, LLP*) appeared on behalf of proposed intervener, Monroe 33 Developers, LLC

Kevin D. Walsh, Esq., appeared on behalf of proposed intervener Fair Share Housing Center

WOLFSON, J.S.C.

I. Jurisdictional Posture

Following the March 10, 2015 decision of the Supreme Court of New Jersey in In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015), hereinafter referred to as Mount Laurel IV, the adjudication of a municipality's compliance with its constitutional obligation to create a realistic opportunity for producing a fair share of

affordable housing was removed from the Council on Affordable Housing ("COAH") and returned to the judiciary. The Supreme Court instructed the designated Mount Laurel judges within the State to adjudicate the issue of whether a given municipality's housing plan satisfies its Mount Laurel obligations and provided detailed guidelines regarding the manner in which the judges should do so. The within matter comes before me by virtue of that grant of jurisdiction.

II. Statement of the Case

The Township of Monroe filed this declaratory judgment action pursuant to the authorization provided by Mt. Laurel IV, *supra*, 221 N.J. 1, seeking a judicial declaration that its housing plan is presumptively valid, and, while the declaratory matter relating to its constitutional compliance proceeds to adjudication, a five-month period of temporary immunity from exclusionary zoning lawsuits. Monroe 33 Developers, LLC ("Monroe 33") sought to intervene as a defendant and for leave to file a counterclaim, which included a demand for site-specific relief – a builder's remedy. Fair Share Housing Center ("FSHC") also sought to intervene as a defendant and for leave to file a counterclaim challenging the constitutionality of Monroe's affordable housing plan.

For the reasons set forth below, the Township of Monroe's motion for a five-month period of immunity is **GRANTED**; the cross-motions of Monroe 33 Developers, LLC and Fair Share Housing Center to intervene as defendants are **GRANTED**; the cross-motion of Monroe 33 Developers, LLC to file a counterclaim seeking site-specific relief is **DENIED without prejudice**; and the cross-motion of FSHC to file a counterclaim challenging Monroe's proposed compliance plan is **GRANTED**.

III. Procedural History

Throughout its opinion in Mt. Laurel IV, *supra*, 221 N.J. 1, the Supreme Court addressed COAH's failure to adopt revised constitutional rules ("Third Round Rules") regarding municipal housing obligations under the Fair Housing Act, N.J.S.A. 52:27D-301 to -392 (the "FHA"). As a result of COAH's failure to comply with prior Orders of the Supreme Court, a new procedure was established whereby the issues relating to compliance with a municipality's constitutional obligation to create a realistic opportunity for producing a fair share of affordable housing would be returned to the courts.[1]

Recognizing that some municipalities had embraced the COAH process in good faith, but were stymied by that agency's inability to function, the Supreme Court set forth procedures by which municipalities that had either received substantive certification from COAH or had filed resolutions of participation prior to the judicial invalidation of COAH's the third-round methodology, could seek a judicial declaration that its housing plan satisfied its constitutional obligations. The process outlined by the Court affords such towns a reasonable opportunity to demonstrate constitutional compliance to a court's satisfaction (including time to take curative action if the municipality's plan requires further supplementation), without the specter of a

[1] See Mt. Laurel IV, *supra*, 221 N.J. at 6 ("Our order effectively dissolves, until further order, the FHA's exhaustion-of-administrative-remedies requirement. Further, as directed, the order allows resort to the courts, in the first instance, to resolve municipalities' constitutional obligations under Mount Laurel."); see also Southern Burlington County NAACP v. Twp. Of Mount Laurel, 67 N.J. 151 (1975) (hereinafter referred to as Mt. Laurel I); and see Southern Burlington County NAACP v. Twp. Of Mount Laurel, 92 N.J. 158 (1983) (hereinafter referred to as Mt. Laurel II).

builder's remedy action hanging over them like a "sword of Damocles."[2] Importantly, the Supreme Court authorized the courts to grant a period of temporary immunity for up to five months, "preventing any exclusionary zoning actions from proceeding,"[3] to those municipalities that promptly sought such declaratory relief.[4]

Accordingly, I am tasked with determining first, whether Monroe has demonstrated an entitlement to a period of immunity, and second, whether the procedures and protocols crafted by the Supreme Court authorize the relief sought by the proposed interveners.

IV. The Township of Monroe's Request for Temporary Immunity

The Township of Monroe enjoys "participating" status and has now affirmatively sought judicial approval of its affordable housing plan through the filing of its declaratory judgment action. Thus, it "should receive like treatment to that which was afforded by the FHA to towns that had their exclusionary zoning cases transferred to COAH when the Act was passed." Mt.

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[2] See e.g., Mt. Laurel IV, *supra*, 221 N.J. at 3 ("In the event of a municipality's inability or failure to adopt a compliant plan to a court's satisfaction, the court may consider the range of remedies available to cure the violation, consistent with the steps outlined herein and in our accompanying order."); id. at 24 ("[A]s part of the court's review, we also authorize… a court to provide a town whose plan is under review immunity from subsequently filed challenges during the court's review proceedings, even if supplementation of the plan is required during the proceedings.").

[3] Id. at 23-24.

[4] See id. at 5-6. ("We will establish a transitional process and not immediately allow exclusionary zoning actions to proceed in recognition of the various states of municipal preparation that exist as a result of the long period of uncertainty attributable to COAH'S failure to promulgate Third Round Rules. During the first thirty days following the effective date of our implementing order, the only actions that will be entertained by the courts will be declaratory judgment actions filed by any town that either (1) had achieved substantive certification from COAH under prior iterations of Third Round Rules before they were invalidated, or (2) had "participating" status before COAH.").

Laurel IV, *supra*, 221 N.J. at 27, *citing* N.J.S.A. 52:27D-316.[5] These towns received "insulating protection" by virtue of their submission to COAH's jurisdiction, "provided that they prepared and filed a housing element and fair share plan within five months." N.J.S.A. 52:27D-316. So too here, as a "participating" town, Monroe similarly has "no more than five months in which to submit their supplemental housing element and affordable housing plan. During that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding." Mt. Laurel IV, *supra*, 221 N.J. at 27-28.

Since Monroe had actually devised a housing element and took action toward adopting ordinances in furtherance of its plan, it has earned a more "favorable" or "generous" review of its request for immunity.[6] Even where granted, however, immunity "should not continue for an undefined period of time; rather, the trial court's orders in furtherance of establishing municipal affordable housing obligations and compliance should include a brief, finite period of continued immunity, allowing a reasonable time as determined by the court for the municipality to achieve compliance." Id. at 28. Only where that goal cannot be accomplished, with good faith effort and reasonable speed, and the town is "***determined to be constitutionally noncompliant***" may

[5] While the Court cautioned that the judicial role "is not to become a replacement agency for COAH," the process developed in Mt. Laurel IV "seeks to track" the processes provided for in the FHA "as closely as possible," so as to create "a system of coordinated administrative and court actions." Id. at 6, 29.

[6] For those municipalities that made good faith attempts to implement their affordable housing obligations by, for example, devising a housing element and taking action toward adopting ordinances in furtherance of its plan, the Supreme Court "expect[s] a reviewing court to view more favorably such actions than that of a town that merely submitted a resolution of participation and took few or perhaps no further steps toward preparation of a formal plan demonstrating its constitutional compliance." Id. at 28.

exclusionary zoning actions seeking a builder's remedy proceed against "certified" or "participating" towns.[7]

Based upon my preliminary review of the Township's submissions, detailed below, I am satisfied that Monroe has made a good faith attempt to satisfy its affordable housing obligations, and hence, deserves immunity from exclusionary zoning actions, on the condition that it prepares and files its housing element and fair share plan within five months (as would have been required if it were subject to COAH's jurisdiction).[8]

In or around December 2008, Monroe adopted its Third Round Housing Element and Fair Share Plan, as well as its Third Round Housing Trust Fund Spending Plan. Promptly thereafter, the Township petitioned COAH for substantive certification by submitting: (1) a document regarding the status of inclusionary development Stratford Monroe with its proposed two-hundred and five (205) affordable units; (2) a document regarding the status of inclusionary development Monroe Manor with its proposed one-hundred and twenty-seven (127) affordable units; and (3) a document encompassing a general description of the Township's Rehabilitation Program, which included sixty-one (61) units proposed for rehabilitation.

During early 2009, Monroe created the Planned Residential Development Affordable Housing District ("PRDAH"). Said district requires that 23.03% of the dwelling units be designated and set aside for low- and moderate-income households. According to the Board Planner for the Monroe Township affordable Housing Board ("the Planner"), the PRDAH zone

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[7] Id. at 33 (emphasis added); see also id. at 29 ("Only after a court has had the opportunity to fully address constitutional compliance and has found constitutional compliance wanting shall it permit exclusionary zoning actions and any builder's remedy to proceed.").

[8] See N.J.S.A. 52:27D-316(a) ("If the municipality fails to file a housing element and fair share plan with the council within five months from the date of transfer [to COAH], or promulgation of criteria and guidelines by the council pursuant to section 7 of this act, whichever occurs later, jurisdiction shall revert to the court.").

should produce two-hundred and ninety-three (293) age-restricted affordable housing units and one-hundred and eight (108) family rental affordable housing units.

During 2011, the Monroe Township Planning Board denied a developer's application to construct a previously-approved plan to all non-age restricted units. Through a reconsideration by the parties, said developer dedicated part of its site to the municipality for a municipally sponsored 100% affordable housing complex which is expected to yield one-hundred and fifty (150) family rental units. Later in 2011, the Monroe Township Zoning Board approved an application which required the construction of twenty-six (26) affordable family rental units at the Monroe Chase site, ten (10) of which have already been constructed.

In May 2012, the Township amended its Third-Round Housing Element and Fair Share plan to include a municipally sponsored affordable housing project and, in addition, designated two new overlay zones – actions intended to produce additional affordable housing. The Township Council also passed a Resolution endorsing the recommendation of its Affordable Housing Board reserving and dedicating funds for affordable housing purposes, and thereafter adopted an ordinance authorizing the creation of an Affordable Housing Irrevocable Trust.

In February 2014, a developer was granted a use variance for construction of residential units on State Highway 33. The approval required construction of forty-seven (47) affordable family rental units in the VC-2 Village Center Overlay Zone. In July 2014, as a result of other, unrelated litigation, the Township also rezoned two sites – one along Route 33, which, when developed, will yield one-hundred and thirty-one (131) affordable age-restricted rental units; and another known as "the Villages," which, when developed, will generate an additional sixty-six (66) affordable age-restricted rental units.

In September 2014, Monroe amended the Affordable Housing Mixed Use Development/Highway Development overlay zone (hereinafter "AHMUD/HD overlay zone"), which, according to the Planner, should produce two-hundred and ninety-five (295) affordable housing units under a 100% municipally sponsored development. Monroe also amended the VC-1 and VC-2 Village Center overlay zones to create mixed-use environments which, according to the Planner should produce an additional one-hundred (100) affordable housing units and twelve (12) family rental affordable housing units, respectively, under the set-aside provisions of those zones.

As the Supreme Court recognized: "…not all towns that had only 'participating' status may have well-developed plans to submit to the court initially. A town in such circumstances poses a difficult challenge for a reviewing court, particularly when determining whether to provide some initial period of immunity while the town's compliance with affordable housing obligations is addressed." Undoubtedly, Monroe (a "participating" municipality) has provided *prima facie* documentation of its good faith efforts to comply with its fair share obligation. Accordingly, the Township's motion seeking a five-month period of temporary immunity from exclusionary zoning suits is granted.[9]

V. Proposed Interveners' Motions to File Answers and Counterclaims

a. The Right of Interested Parties to Participate in the Adjudication of Constitutional Compliance

Both substance and procedure permit, and perhaps, demand that "interested parties" be permitted to "participate" in any assessment of a municipality's purported compliance with its affordable housing obligation. First, absent intervention, a municipality's declaratory judgment

[9] See Mt. Laurel IV, *supra*, 221 N.J. at 27-28; see also N.J.S.A. 52:27D-316(a).

action would be, essentially, unopposed. While the appointment of a Special Master is, ideally, both a welcome and necessary protocol, a blanket rule prohibiting any interested party from intervening, fundamentally silences potentially useful and critical voices which may have legitimate insights or analyses relevant to the constitutionality of the town's proposed plan. Second, while I am mindful of the Supreme Court's clear mandate to adjudicate such actions as quickly as prudence and justice will allow, it is amply clear that the Court specifically contemplated, and in the case of FSHC, for example, directly encouraged, interested parties to weigh in on the extent and methods by which a given municipality proposed to fulfill its affordable housing obligations.

The Supreme Court was unequivocal in its mandate that all declaratory judgment cases are to be brought on notice to interested parties and with an opportunity for them to be heard. Id. at 35. I can discern no legitimate basis, therefore, to deny any interested party the opportunity to intervene as a defendant, albeit limited to the question of whether the particular town has complied with its constitutional housing obligations. Accordingly, Monroe 33 and FSHC's motions to intervene as defendants and to file Answers are both granted.

b. Counterclaims Seeking Site-Specific Relief – i.e., Builder's Remedy Actions – are Barred as Against "Certified" or "Participating" Municipalities

Despite the Supreme Court's clear directive affording interested parties an "opportunity to be heard," I am equally confident that this right does not extend so far as to authorize them 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 FHA and COAH's oversight[10], 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.

i. Monroe 33's Counterclaim

At its core, Monroe 33's counterclaim seeks site-specific relief – i.e., a builder's remedy, relief that goes beyond the limited participation envisioned the Supreme Court. In discussing whether and when exclusionary zoning actions and builder's remedies would actually be permitted (or, if permitted, "stayed"), the Court used various limiting phrases such as "may be brought"[11] and "may proceed."[12] Irrespective of its choice of language, the Supreme Court's overarching intent was clearly to foreclose such litigation until such time as constitutional compliance has been judicially addressed and found "wanting." Mt. Laurel IV, *supra*, 221 N.J. at 29. Then, and only after the court has concluded that a municipality is "determined to be noncompliant" (by refusing to supplement or amend its plan to remedy any perceived

[10] See generally N.J.S.A. 52:27D-309-311; see also Hills Dev. Co. v. Bernards Tp., 103 N.J. 1, 22 (1986) (hereinafter referred to as Mt. Laurel III) (Under the FHA, municipalities retain the right "to exercise their zoning powers independently and voluntarily" along with the means to determine what combination of ordinances and other measures will achieve their fair share of affordable housing).

[11] See e.g., Mt Laurel IV, *supra*, 221 N.J. at 28.

[12] See e.g., id. at 26, 27 and 35.

deficiencies) would exclusionary zoning actions be warranted.[13] Limiting participation of interested parties in such a fashion comports with the specified protocols mandated by the Supreme Court that: (1) interested parties must be given notice and an opportunity to be heard ***on the issue of constitutional compliance***; and (2) exclusionary zoning suits are not authorized unless the court fully addressed the issue of constitutional compliance, and has determined the town's affordable housing plan to be deficient.[14]

Barring 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.[15] Indeed, site-specific relief is wholly irrelevant to the larger, and preliminary, question of constitutional compliance. Builders choosing to participate as defendants[16] in constitutional compliance actions pending before the trial courts may do so in much the same manner as they

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[13] Id. at 33; see also n. 6, *supra*.

[14] See id. at 33-34 (stating that if the court is unable to secure "prompt voluntary compliance from municipalities… with good faith effort and reasonable speed, and the town is determined to be constitutionally noncompliant, ***then*** the court may authorize exclusionary zoning actions seeking a builder's remedy to ***proceed***." (emphasis added)).

[15] As recognized nearly thirty years ago in Mt. Laurel III:

> If there is any class of litigant that knows the uncertainties of litigation, it is the builders. They, more than any other group, have walked the rough, uneven, unpredictable path through planning boards, boards of adjustments, permits, approvals, conditions, lawsuits, appeals, affirmances, reversals, and in between all of these, changes in both statutory and decisional law that can turn a case upside down. No builder with the slightest amount of experience could have relied on the remedies provided in Mt. Laurel II, in the sense of justifiably believing that they would not be changed, or that any change would not apply to the builders.
> Id., *supra,* 103 N.J. at 55.

[16] Irrespective of whether a "certified" or "participating" municipality chooses to file a declaratory judgment action or waits to be sued, "***the trial court may grant temporary periods of immunity prohibiting exclusionary zoning actions from proceeding***[.]" Mt. Laurel IV, *supra*, 221 N.J. at 35.

would have, had COAH not ceased to function; a parallel process that neither affords builders any greater rights, nor deprives them of any that they would have had, including the rights to participate in the processes authorized under both Mount Laurel II and the FHA – conciliation, mediation, with the use and assistance of special masters.[17] Certainly, the Court's dissolution of the FHA's exhaustion-of-administrative-remedies requirement and its resurrection of the judiciary's role as the forum of first resort to evaluate municipal compliance was not intended to signal a return to Mount Laurel II and its "reward-based" system for vindicating the constitutional rights of the poor.[18] In point of fact, the Court's newly established framework fundamentally alters that "reward-based" approach. In so doing, it rendered obsolete the "first to file" priority scheme adopted in J.W. Field Co., Inc., v. Franklin Tp., 204 N.J. Super. 445 (Law Div. 1985), since the ultimate location and satisfaction of a certified or participating municipality's affordable housing obligation ought be based upon a more interactive process,

[17] As noted by the Supreme Court in Mt. Laurel II, *supra*, 92 N.J. at 283, special masters were intended to be "liberally used" to provide expertise and to assist the parties as "a negotiator, a mediator, and a catalyst." See also N.J.S.A. 52:27D-315 (mediation and review process by council).

[18] The procedures articulated herein are not intended to prevent builders or other interested parties from bringing exclusionary zoning actions against any municipality that was neither certified nor participating. Indeed, the approximate 200 towns that never subjected themselves to COAH's jurisdiction remain "open to civil actions in the courts… [and] will continue to be subject to exclusionary zoning actions as they have been since inception of Mount Laurel…" Mt. Laurel IV, *supra*, 221 N.J. at 23.

guided by the equities[19] of the particular participants and principles of sound planning,[20] rather than on a race to the courthouse.[21]

Indeed, even under Mount Laurel II, no builder's remedy would be awarded unless the plaintiff's proposed site was "***located and designed in accordance with sound zoning and planning concepts, including its environmental impact***."[22] As originally intended, builder remedies were authorized to incentivize builders to vindicate this constitutional imperative largely because the Court's landmark decision in Mount Laurel I was widely ignored and failed to achieve the desired goal of producing balanced communities and affordable housing, but also

[19] As opposed to the "date of filing," such equitable considerations could include, for example, an assessment of "whether any project was clearly more likely to result in actual construction than other projects and whether any project was clearly more suitable from a planning viewpoint than other projects." See J.W. Field Co., Inc., *supra*, 204 N.J. Super. at 460.

[20] The Court has consistently demonstrated its sensitivity to and the importance of sound planning and environmental conditions over builder preference. See, e.g., Mount Laurel II, *supra*, 92 N.J. at 211 (The obligation to encourage lower income housing, therefore will depend on "natural long-range land use planning" rather than upon "sheer economic forces."); and see id. at 238 ("the Constitution of the State of New Jersey does not require bad planning.").

[21] While the priority system articulated in J.W. Field Co., Inc., *supra*, 204 N.J. Super. 445, has never been specifically embraced by any appellate authority, it has, for all intents and purposes, become embedded and generally followed in Mount Laurel jurisprudence for more than thirty years. It seems reasonable to conclude that it remains a viable protocol for determining priorities among multiple plaintiffs in litigation against towns that were neither "certified" nor enjoyed "participating status" before COAH. Nonetheless, with regard to the certified and participating municipalities now before the courts, the Court encouraged "present day courts" to employ "flexibility in controlling and prioritizing litigation." Mt. Laurel IV, *supra*, 221 N.J. at 26.

[22] Mount Laurel II, *supra*, 92 N.J. at 218 (emphasis added); see also id. at 279 (a builder's remedy award is only appropriate where a builder demonstrates that "the construction can be implemented without substantial negative environmental or planning impact.").

because, after eight years, the decision had produced only "papers, process, witnesses, trials and appeals."[23]

By way of contrast, the Supreme Court's current framework expressly *prohibits* exclusionary zoning litigation until *after* the compliance phase of the declaratory judgment action has concluded.[24] As such, a builder/plaintiff may be hard pressed to assert convincingly that its actions were the catalyst or procuring cause in vindicating the constitutional rights of low and moderate income persons. This is especially so in the context of a municipally initiated declaratory judgment action, or one defended by a town that was "certified" or enjoyed "participating status" but opted to "wait until sued" before seeking a judicial blessing of its affordable housing plan.[25]

This is not to say that participation by builders or other interested parties in the constitutional compliance action is unwelcome or unnecessary. In fact, the opposite is true. Involvement of, and input from such parties may be among the most beneficial sources of practical and economic information in helping to achieve expedient municipal compliance. By

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[23] Mount Laurel II, *supra*, 92 N.J. at 199; see also Orgo Farms & Greenhouses, Inc. v. Colts Neck, 192 N.J. Super. 599, 601 (Law. Div. 1983) (wherein Judge Serpentelli, one of the three original Mount Laurel judges, recognized that "unless a strong judicial hand was applied, Mount Laurel I would not result in the housing which had been expected."). Consequently, the builder's remedy was designed "to assure a builder who shouldered the burden of Mount Laurel litigation that the end result of a successful litigation would be some specific relief in terms of a right to proceed with construction of a specific project." Orgo Farms, *supra*, 192 N.J. Super. at 602. At present, the framework crafted in Mt. Laurel IV, *supra*, 221 N.J. 1, has replaced, at least temporarily, the builder's remedy as the "strong judicial hand."

[24] Mt. Laurel IV, *supra*, 221 N.J. at 35-36.

[25] See Mt. Laurel IV, *supra*, 221 N.J. at 28 (stating that both "certified" and "participating" towns have the option either to proceed with their own declaratory judgment actions during the thirty-day period post the effective date of the Order, or to wait until their affordable housing plan is challenged for constitutional compliance).

engaging in mediation, negotiation, conciliation, and, with the assistance and planning expertise of special masters, there exists a unique opportunity for municipal officials, on the one hand, and ready, willing and able builders, on the other, to craft mutually workable plans for the construction of affordable housing.[26] In addition to the practical benefits that such a streamlined approach provides all participants, such a cooperative resolution of these competing interveners may very well diminish the likelihood of future litigation.

ii. FSHC's Counterclaim

As distinct from Monroe 33's pleading, FSHC's counterclaim does not seek site-specific relief. Instead, its two-count counterclaim alleges: (1) that the Township's Housing Plan Element and Fair Share Plan is unconstitutional – i.e., a violation of its Mount Laurel obligation; and (2) that the Township has violated the New Jersey Civil Rights Act, N.J.S.A. 10:6-2, by failing to comply with the Mount Laurel doctrine and other sources of law. Since both of these claims fit squarely within the scope of issues authorized by the Supreme Court in Mount Laurel IV – challenges to compliance – FSHC's motion for leave to file its counterclaims is hereby granted.

VI. Conclusion

The Supreme Court's newly crafted framework for ensuring municipal compliance with Mount Laurel obligations, unlike the "reward" based process envisioned in Mount Laurel II, is

[26] Compare, Mount Laurel II, *supra*, 92 N.J. at 284 (acknowledging the need for the special master to "work closely" with all those connected to the litigation, including "interested developers.").

not dependent upon site-specific remedies to achieve constitutional compliance.[27] Instead, as envisioned by the Supreme Court, "certified" and "participating" towns will likely subject themselves to a judicial evaluation of their constitutional compliance either by initiating declaratory judgment actions, or defending them – circumstances which, for all practical purposes, preclude, at least during the compliance phase of litigation, any party from being a "successful" plaintiff as required by Mount Laurel II.[28] Accordingly, all declaratory judgment actions involving "certified" or "participating" municipalities 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;
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

[27] To be clear, this conclusion pertains only to "certified" or "participating" towns (whether they filed declaratory judgment actions or whether they chose to "wait to be sued"), and not to those towns that were neither "certified" nor "participating." Nothing in this opinion is meant to diminish the rights of parties seeking builder's remedies through the filing of exclusionary zoning actions in the latter category of town. The builder's remedy schemes laid out by both Mt. Laurel II and J.W. Field Co., Inc. seem perfectly viable ***in those towns that made no effort to satisfy their fair share obligations***, as the need to incentivize builders to bring constitutional compliance and/or exclusionary zoning litigation in such towns remains of paramount importance. See Mt. Laurel IV, *supra*, 221 N.J. at 23.

[28] See Mt. Laurel II, *supra*, 92 N.J. at 279.

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.

Adherence to these protocols will help focus the litigation and assist in fostering a prompt, efficient, and fair resolution of the constitutional compliance issues, without unnecessary distractions or impediments from builder/developers or other interested parties.

It is so ordered.

EXHIBIT B

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ATTORNEYS FOR Intervenor/Defendant
Yellow Brook Property Co., LLC

Craig M. Gianetti, Esq.
Attorney ID # 036512003

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO.: MON-L-2483-15

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF RUMSON, COUNTY OF MONMOUTH

Civil Action

ORDER GRANTING INTERVENTION OF YELLOW BROOK PROPERTY CO., LLC

THIS MATTER having been opened to the Court upon the motion of Day Pitney LLP, attorneys for proposed Intervenor/Defendant Yellow Brook Property Co., LLC, on notice to Martin M. Barger, Esq. and Jeffrey R. Surenian, Esq., attorneys for the Borough of Rumson and Kevin Walsh, Esq., attorney for Intervenor-Defendant Fair Share Housing Center; and the Court having considered the papers submitted by the parties in support of and in opposition to the application; and having heard the arguments of counsel, if any; and good cause having been shown therefor;

IT IS on this 29th day of September, 2017 **ORDERED** as follows:

(1) The motion of proposed Intervenor/Defendant Yellow Brook Property Co., LLC ("Yellow Brook") to intervene in this matter as a party defendant is hereby GRANTED; DENIED

(2) Yellow Brook shall file a responsive pleading to the Borough's Complaint in the form attached to the Certification of Counsel accompanying this Motion within ten (10) days of Yellow Brook's counsel's receipt of this Order; DENIED

(3) A true copy of this Order shall be served upon all counsel of record within seven (7) days of receipt of same by counsel for Yellow Brook as entered by the Court.

HON. JAMIE S. PERRI, P.J.Cv.

Opposed ✓

Unopposed ____

Oral argument conducted on 9/29/17

SEE ATTACHED RIDER

RIDER TO ORDER DATED 9/29/17
IMO Borough of Rumson
Docket No. MON-L-2483-15
(Motion to Intervene on behalf of Yellow Brook Properties Co., LLC)

The court makes the following findings of fact and conclusions of law regarding the motion(s) identified in the attached Order:

This action was commenced by the Borough of Rumson ("the Borough") by way of Complaint for declaratory judgment pursuant to In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (hereafter "Mount Laurel IV"), seeking temporary immunity from constitutional compliance claims and builder's remedy litigation pending final determination of the Borough's constitutional affordable housing obligation and compliance therewith under the Fair Housing Act of 1985 ("FHA"), N.J.S.A. 52:27D-301, et seq. Temporary immunity was granted to the Borough by Order dated September 8, 2015.

On August 28, 2017, Yellow Brook Properties Co., LLC ("Yellow Brook") filed a motion for leave to intervene in this matter. Yellow Brook became the contract purchaser of certain property located within the Borough immediately prior to filing the motion and acquired an interest in a second piece of property shortly thereafter. Yellow Brook proposes to construct inclusionary housing on the two parcels which total approximately 15 acres. Yellow Brook argues that its primary purpose in seeking intervention is to address the vacant land adjustment sought by the Borough. Yellow Brook argues that in this regard, its situation is different from those of proposed intervenors in Howell and Wall, whose motions were recently denied by the court. At the same time, however, Yellow Brook acknowledges in its motion papers that intervention is sought to "ensure" that the Borough factors its property into its affordable housing obligation.

The Borough argues in opposition that granting intervenor status to Yellow Brook, or any other such developer, constitutes an infringement on its immunity as defined by the Court in Mount Laurel IV. The Borough further argues that Yellow Brook's motion is nothing more than an attempt to obtain relief in the nature of a builder's remedy in violation of the its immunity from such suits. The Borough argues that Yellow Brook's interests can be more than adequately addressed by conferring "interested party" status on its and cross moves to establish the parameters of Yellow Brook's participation.

The court heard oral argument on the motions on September 29, 2017, and now renders its decision.

In Mount Laurel IV, the Supreme Court established "an orderly process by which towns can have their housing plans reviewed by the courts for constitutional compliance. . . ." Id. at 23. In an effort to insure a greater degree of transparency and participation than in past compliance actions, the Court held:

> If a municipality seeks to obtain an affirmative declaration of constitutional compliance, it will have to do so on notice and opportunity to be heard to FSHC [Fair Share Housing Center] and "interested parties." Courts assessing the notice requirement should understand that the term 'interested parties' presumptively includes, at a minimum, the entities on the service list in this matter. Ex parte applications, even for initial immunity pending review, shall not be permitted under any circumstances. Id.

No further guidance was provided regarding the anticipated role of FSHC and other "interested parties" beyond the reference to "the opportunity to be heard." Although the Court did not explain the anticipated parameters of such participation, it did address the scope of the litigation to be entertained by the courts in these matters. The Court authorized certain towns "to file actions if they so choose, on notice and opportunity to be heard as described earlier, affirmatively seeking to demonstrate constitutional compliance". Id. at 26.

On September 4, 2015, the court granted a motion by Highview Homes, LLC, to intervene in this matter. The court found that in the context of an adversarial action to establish the Third Round Rules and constitutional compliance, the appropriate mechanism for permitting participation in the litigation was as an intervener pursuant to R. 4:33-1. The court specifically held that Highview was permitted to address issues of constitutional compliance but that all other prayers for relief, including any demand for site-specific relief, were denied. The court stated in paragraph 4 of its September 4, 2015, Order, that "[i]nterested parties who have not moved to intervene may make written submissions or comments to the court, on notice to all parties. Only those parties that have been joined in the litigation may be heard on motions or other court proceedings unless prior leave of court has been granted".

The court previously determined that all pending Mount Laurel IV cases in Monmouth County would be consolidated for the purposes of determining the methodology to be used in calculating the state, regional and municipal Third Round affordable housing obligations of the respective towns. Following a global case management conference, the court entered Omnibus Order #1 dated September 24, 2015. Paragraph 10 of the Order addressed intervenor status in the context of the submission of expert reports on the issue of fair share methodology and stated:

> Any person or entity wishing to submit an expert report must be a party to these proceedings and must move to intervene, which motion shall be accepted by the court on short notice, or intervene by consent, no later than October 9, 2015.

The court granted motions to intervene by individuals and entities in other pending Mount Laurel actions consistent with the above Order and with the Supreme Court's intention to provide court access to "parties concerned about municipal compliance with constitutional affordable housing obligations" as well as "municipalities that believe they are constitutionally compliant or that are ready and willing to demonstrate such compliance." Id. at 5. FSHC, the New Jersey Builders' Association, the New Jersey League of Municipalities and various private entities filed timely motions to intervene in one or more pending matters.

The court entered Omnibus Order #4 on January 27, 2016. Paragraph 4 of the Order required that all expert reports "on the issues of methodology and calculation of the state, regional and municipal fair share housing need and allocations shall be exchanged no later than April 22, 2016". All parties have provided or relied upon multiple expert reports addressing methodology and have engaged in extensive expert discovery. In those cases in which it has not formally intervened, FSHC has nonetheless taken a very active role in advocating on behalf of low and middle income residents on a statewide basis and has participated in all negotiated settlements in Monmouth County on a municipality by municipality basis. Indeed, FSHC has shown a particular interest in this litigation and previously moved to revoke the Borough's immunity.

Yellow Brook argues that its purpose in seeking intervention in this matter is to address significant issues regarding the Borough's affordable housing obligations, specifically the nature and extent of any vacant land adjustment that may be granted to the Borough. At the same time, however, it is clear that Yellow Brook also seeks party status in the litigation to place its property

in the forefront for development. While Yellow Brook repeatedly states that it is not seeking site specific relief or to pursue a builder's remedy action in any way, the net effect of obtaining party status is to place greater pressure on the Borough to include Yellow Brook's properties in its affordable housing plan.

The Borough argues at length that intervention was never envisioned as part of the Mount Laurel IV litigation and that it unnecessarily exposes it to litigation which impedes the process of establishing constitutional compliance. It further argues that permitting intervention, as a practical matter, impairs the Borough's previously granted immunity and in all essential elements is a pre-emptive builder's remedy action.

This court has granted motions to intervene as part of the framework for the orderly process of conducting discovery and addressing the issue of the methodology to be applied in determining state, regional and municipal affordable housing obligations. The court is also mindful of the analysis that is required when deciding a motion to intervene under R. 4:33-1 which states that anyone shall be permitted to intervene as of right 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.

A motion for leave to intervene should be liberally viewed. Atlantic Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), certif. den. 122 N.J. 147 (1990). The movant must show an interest in the subject matter of the litigation, an inability to protect that interest without intervention, lack of adequate representation of that interest, and timeliness of the application. DYFS v. D.P., 422 N.J. Super. 583, 590 (App. Div. 2011); Sutter v. Horizon Blue Cross, 406 N.J. Super. 86, 106 (App. Div. 2009). A motion for leave to intervene should be liberally viewed. Atlantic Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), certif. den. 122 N.J. 147 (1990). A motion for intervention may be denied if the applicant's interest is already being represented in the litigation. White v. White, 313 N.J. Super. 637 (Ch. Div. 1998).

Further, the court has the discretion to determine the timeliness, under all of the circumstances, of the intervention application, and may deny the application if deemed untimely. State v. Lanza, 39 N.J. 595 (1963). "Whether intervention as of right should be granted may be determined by evaluating the extent to which a grant 'of the motion will unduly delay or prejudice the rights of the original parties.'". In Clarke v. Brown, 101 N.J. Super. 404 (Law Div. 1968), the motion to intervene was denied where it was made after judgment had been entered. A motion to intervene should be viewed liberally.

Yellow Brook's motion was filed nearly two years after the deadline set by the court in its September 4, 2015, Order. The fact that Yellow Brook did not obtain an interest in property within the Borough until late in the litigation does not impress the court as a sound basis for granting untimely intervention. A trial has already been conducted in Mercer County, a county within Monmouth's region, in which the Hon. Mary Jacobson, A.J.S.C. will be addressing methodology for the region based upon extensive expert testimony developed during the trial. The court has previously found, and finds here, that granting sequential motions to intervene at this juncture, after municipalities have expended substantial time and resources in formulating their plans (albeit in this case a plan with which Yellow Brook takes issue) and engaged in mediation with FSHC, has the capacity to encourage dilatory or opportunistic action on the part of proposed intervenors.

Of particular significance, in the context of the declaratory judgment actions authorized by Mount Laurel IV, is the Court's decision to carve out the new classification of "interested parties" rather than limiting participation in the litigation to the named parties or those who seek intervention, either as a matter of right or permissively. In so doing, the Court sought to insure that those who were not formally included in the litigation could not only receive notice of court proceedings and a municipality's request for an Order seeking confirmation of compliance with their constitutional fair housing obligations but would also be given the opportunity to be heard on any such application.

The court finds that "interested party" status bestows on Yellow Brook all the rights necessary to meet its goals as articulated in its motion. As with any interested party, Yellow Brook would be free to make proposals to the Borough for inclusion of its properties in the Borough's affordable housing plans. As with any municipality, it will be up to the Borough to make the ultimate determination of those properties which may be suitable for inclusion in its plan and the overall manner in which it chooses to meet its constitutional obligation. The Special Master, in his or her discretion, may invite Yellow Brook or other interested property owners to participate in settlement negotiations or mediations as he or she may deem appropriate. Yellow Brook would similarly be free to offer comments on the plan and to be heard at the time of any Fairness or Compliance hearing on the issue of the adequacy or deficiency of the Borough's proofs. Neither Yellow Brook nor any person or entity has the right at this point in the litigation to demand inclusion of its property in the Borough's fair share housing plan or to position itself for a pre-emptive builder's remedy action if it is found that the Borough has not complied with its Third Round obligations.

Accordingly, Yellow Brook's motion to intervene is denied. With regard to the Borough's cross motion, which attempts to set the scope for participation by Yellow Brook as an interested party, the motion is similarly denied. The court has already established the parameters by which interested parties may participate both by way of its September 4, 2015, Order and its ruling in this matter as set forth above.

JAMIE S. PERRI, J.S.C.

EXHIBIT C

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO.: MON-L-2483-15

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF RUMSON, COUNTY OF MONMOUTH

Civil Action

ORDER GRANTING INTERVENTION OF YELLOW BROOK PROPERTY CO., LLC

THIS MATTER having been opened to the Court upon the motion of Day Pitney LLP, attorneys for proposed Intervenor/Defendant Yellow Brook Property Co., LLC, on notice to Jeffrey R. Surenian, Esq., attorneys for the Borough of Rumson and Kevin Walsh, Esq., attorney for Intervenor-Defendant Fair Share Housing Center; and the Court having considered the papers submitted by the parties; and having heard the arguments of counsel, if any; and good cause having been shown therefor;

IT IS on this 18th day of July, 2018 **ORDERED** as follows:

(1) The motion of proposed Intervenor/Defendant Yellow Brook Property Co., LLC ("Yellow Brook") to intervene in this matter as a party defendant is hereby GRANTED;

(2) Yellow Brook shall file a responsive pleading to the Borough's Complaint in the form attached to the Certification of Counsel accompanying this Motion within ten (10) days of Yellow Brook's counsel's receipt of this Order;

(3) A true copy of this Order shall be served upon all counsel of record within seven (7) days of receipt of same by counsel for Yellow Brook as entered by the Court.

HON. JAMIE S. PERRI, J.S.C.

Opposed ✓

Unopposed _____

Oral argument concluded 5/10/19

SEE ATTACHED RIDER

RIDER TO ORDER DATED 7/18/19
IMO Borough of Rumson
Docket No. MON-L-2483-15
7/18/19

The court makes the following findings of fact and conclusions of law regarding the motion(s) identified in the attached Order:

This declaratory action was commenced by the Borough of Rumson ("the Borough") by way of Complaint pursuant to In re Adoption of N.J.A.C. 5:96 and 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015) (hereafter "Mount Laurel IV"), seeking temporary immunity from constitutional compliance claims and builder's remedy litigation pending final determination of the Borough's constitutional affordable housing obligation and compliance therewith under the Fair Housing Act of 1985 ("FHA"), N.J.S.A. 52:27D-301, et seq. Temporary immunity was granted to the Borough by Order dated September 8, 2015.

In September, 2017, Yellow Brook Properties Co., LLC ("Yellow Brook") moved for leave to intervene in this matter immediately after it became the contract purchaser of certain property located within the Borough and acquired an interest in a second piece of property shortly thereafter. Yellow Brook proposed to construct inclusionary housing on the two parcels which total approximately 15 acres. Yellow Brook argued that its primary purpose in seeking intervention was to address the vacant land adjustment sought by the Borough and that its situation differs from other proposed intervenor's whose motions had been denied. At the same time, however, Yellow Brook acknowledged that intervention was sought to "ensure" that the Borough factors its property into its affordable housing obligation. The Borough argued in opposition that granting intervenor status to Yellow Brook, or any other such developer, constituted an infringement on its immunity as defined by the Court in Mount Laurel IV and that Yellow Brook's motion was nothing more than an attempt to obtain relief in the nature of a builder's remedy in violation of the its immunity from such suits. The Borough argued that Yellow Brook's interests can be more than adequately addressed by conferring "interested party" status on its and cross moves to establish the parameters of Yellow Brook's participation.

The court ultimately denied the motion, citing among other reasons paragraph 10 of Omnibus Order #1 dated September 24, 2015, which addressed intervenor status in the context of the submission of expert reports on the issue of fair share methodology. The court previously granted motions to intervene by individuals and entities in other pending Mount Laurel actions consistent with the above Order and with the Supreme Court's intention to provide court access to "parties concerned about municipal compliance with constitutional affordable housing obligations" as well as "municipalities that believe they are constitutionally compliant or that are ready and willing to demonstrate such compliance." Id. at 5. Fair Share Housing Center ("FSHC"), the New Jersey Builders' Association, the New Jersey League of Municipalities and various private entities filed timely motions to intervene in one or more pending matters.

Thereafter, the Borough, FSHC, Yellow Brook and others engaged in extensive settlement negotiation. When the negotiations hit an impasse and it appeared that a trial would be needed to resolve disputed issues regarding the validity of the Borough's vacant land analysis and its Realistic Development Potential ("RDP") , Yellow Brook renewed its motion. The court heard oral argument on May 10, 2019, but reserved its decision when it appeared that the parties

were nearing a settlement. The court has since been advised that another stalemate has been reached and, due to the court's imminent retirement, the motion could be deferred no longer.

Yellow Brook argues that its purpose in seeking intervention is to address significant issues regarding the Borough's affordable housing obligations, specifically the nature and extent of any vacant land adjustment that may be granted to the Borough. The Borough has argued at length that intervention was never envisioned as part of the Mount Laurel IV litigation and that it unnecessarily exposes it to litigation which impedes the process of establishing constitutional compliance. It further argues that permitting intervention, as a practical matter, impairs the Borough's previously granted immunity and in all essential elements is a pre-emptive builder's remedy action.

This court has granted motions to intervene as part of the framework for the orderly process of conducting discovery and addressing the issue of the methodology to be applied in determining state, regional and municipal affordable housing obligations. The court is also mindful of the analysis that is required when deciding a motion to intervene under R. 4:33-1 which states that anyone shall be permitted to intervene as of right 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.

A motion for leave to intervene should be liberally viewed. Atlantic Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), certif. den. 122 N.J. 147 (1990). The movant must show an interest in the subject matter of the litigation, an inability to protect that interest without intervention, lack of adequate representation of that interest, and timeliness of the application. DYFS v. D.P., 422 N.J. Super. 583, 590 (App. Div. 2011); Sutter v. Horizon Blue Cross, 406 N.J. Super. 86, 106 (App. Div. 2009). A motion for leave to intervene should be liberally viewed. Atlantic Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), certif. den. 122 N.J. 147 (1990). A motion for intervention may be denied if the applicant's interest is already being represented in the litigation. White v. White, 313 N.J. Super. 637 (Ch. Div. 1998).

The court finds that the rights of low and middle income families are adequately protected by the active participation of FSHC in this matter. In the context of Mount Laurel litigation, the individual interests of parties such as Yellow Brook in developing its property for profit,as a basis for intervention as a matter of right, cannot be harmonized with the temporary immunity granted to the Borough during the pendency of this litigation. Rather, the court finds that under the unique circumstances of this case, permissive joinder is appropriate.

R. 4:33-2 states:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Rule vests considerable discretion in the trial court. Evesham Township Zoning Bd. of Adjustment v. Evesham Township Council, 86 N.J. 295, 299 (1981). It is to be liberally construed with a view to whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties and whether intervention will eliminate the need for subsequent litigation. Zirger v. General Accident Ins. Co., 144 N.J. 327, 340-341 (1996).

FSHC has offered support for Yellow Brook's motion on the basis that granting party status to Yellow Brook will facilitate the presentation of evidence regarding its property in the context of the Borough's vacant land analysis and ultimate calculation of the Borough's RDP. Clearly, Yellow Brook's property and any other similarly situated sites for future development, will be championed by FSHC. While FSHC has exhibited an exceptional level of sophistication in its arguments on behalf of the protected class, the court finds that the participation of Yellow Brook will not in any way prejudice the Borough and may assist the trial court by providing a more thorough explanation of FHSC's position that Yellow Brook's property serves as an example of the developable property that should be considered by the court.

The court reiterates that Yellow Brook's participation is in no way to be considered as an endorsement of the ultimate inclusion of Yellow Brook's property in the Borough's plan or that it should be given preference over other proposed developers. Rather, the court finds that Yellow Brook's participation may assist the court by providing a more coherent and comprehensive understanding the issues in the case.

For all of these reasons, the motion is granted.

JAMIE S. PERRI, J.S.C.