IN THE MATTER OF THE APPLICATION OF TOWNSHIP OF BRANCHBURG, A Municipal Corporation of the State of New Jersey, Petitioner.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-898-15 CIVIL ACTION (Mount Laurel)

I. PRELIMINARY STATEMENT

This matter comes to the Court as a Declaratory Judgment action brought by the Township of Branchburg pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. and the Supreme Court's decision in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 20 (2015). The Township has filed a Verified Complaint which it requests the following relief:

1. Grant Branchburg a period of immunity of at least five months from exclusionary zoning litigation in order for it to finalize its HEFSP;

2. Declare that the HEFSP and its implementing ordinances are presumptively valid in the event that Branchburg must later defend itself against exclusionary zoning litigation during the period for which the Third Round Rules would apply.

3. Grant Branchburg a judgment of compliance and repose.

Branchburg contends that since it has steadfastly pursued administrative approval of its housing plan, received substantive certification from Council on Affordable Housing (COAH) under the now invalidated COAH Third Round Rules, and seeks to further advance its obligation under the *Mount Laurel* Doctrine it respectfully requests that the Court enter an Order granting it temporary immunity.

Branchburg Township has provided notice to many miscellaneous property owners and groups which it indicates in its complaint may be interested parties in this litigation.

II. PLAINTIFF'S PROCEDURAL HISTORY AND FACTUAL BACKGROUND[1]

Supreme Court Order and Decision of March 10, 2015

1. In the March 10th Decision, the Supreme Court established a procedure for New Jersey municipalities to subject themselves to judicial review for constitutional compliance with their obligations to zone in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families.

2. The Supreme Court held that municipalities are no longer required to exhaust their administrative remedies before COAH.

3. Rather, the Supreme Court held that municipalities that believe they are constitutionally compliant or that are ready and willing to demonstrate such compliance should be able to secure declarations that their housing plans and implementing ordinances are presumptively valid in the event they later must defend against exclusionary zoning litigation.

4. The Supreme Court stayed its order for 30 days, giving the order an effective date of June 8, 2015.

5. The Supreme Court held that during the first thirty days following June 8, 2015, "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 the Third Round Rules before they were invalidated, or (2) had 'participating' status before COAH." 221 N.J. at 5-6. Branchburg brings this action pursuant to the language quoted in the preceding sentence.

Branchburg Had "Participating" Status and is Authorized to File this Action

6. Branchburg had "participating" status before COAH because prior to the Supreme Court's invalidation of COAH's Third Round Rules, Branchburg sought Third Round Substantive Certification. COAH has placed Branchburg in the category of municipalities with "participating" status. See http://www.nj.gov/dca/services/lps/hss/archive.html.

7. Because Branchburg had "participating" status, the March 10th Decision authorizes Branchburg to bring this declaratory judgment action.

[1] For the purpose of this application, the Court has adopted the Procedural History and Factual Background from the Plaintiff's submissions.

8. The Township Resolution authorizing the filing of this Complaint is attached as Exhibit 1 hereto.

9. The certification of affordable housing consultant Elizabeth C. McKenzie ("McKenzie Cert.") is attached as Exhibit 2 to this Complaint. Branchburg's Revised Housing Element and Fair Share Plan ("Revised Third Round Plan"), previously submitted to COAH, is attached as Exhibit B to the McKenzie Certification provided to the Court. Because of its length, the Revised Third Round Plan is not attached to the copies provided to the other parties or persons receiving notice of this action. The full Revised Third Round Plan is found at http://www.nj.gov/dca/services/lps/hss/archive.html by clicking on "Municipal Participation in the Third Round" and scrolling to Number 262 on Excel spreadsheet, under "Repetition Date."

Process for Municipalities with "Participating" Status

10. In the March 10th Decision, the Supreme Court established a transitional process for participating municipalities to establish compliance.

11. The Supreme Court emphasized that the transitional process is not intended to "punish" towns that are "in a position of unfortunate uncertainty," due to the lack of Third Round Rules, but rather to establish avenues of constitutional compliance similar to those available under COAH. 221 N.J. at 23-24.

12. In the March 10th Decision, the Supreme Court held that "[i]f a town had devised a housing element and took action toward adopting ordinances in furtherance of the plan, then we would expect 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." 221 N.J. at 27.

13. Branchburg did much more than merely submit a resolution of participation. Rather, Branchburg devised a housing element, and took significant steps towards demonstrating constitutional compliance. See McKenzie Cert., Exh. B.

14. On or about December 31, 2008, Branchburg submitted a Third Round Housing Element and Fair Share Plan to COAH and petitioned for Third Round certification.

15. After several entities filed objections to the plan, Branchburg attempted, both with and without COAH's assistance, to mediate the issues raised by the objectors.

16. In December, 2009, COAH issued a Report Requesting Additional Information ("RRAI") from Branchburg.

17. Branchburg was able to provide some of the information requested by COAH in the RRAI by the January 30, 2010 deadline for responding, and hoped to address the remaining issues through continued mediation.

18. By May of 2010, however, mediation was terminated by COAH at the request of the objectors.

19. Branchburg recognized that it would need to prepare and adopt a Revised Housing element and Fair Share Plan ("Revised Third Round Plan").

20. Branchburg submitted its Revised Third Round Plan to COAH on July 19, 2010.

21. On September 9, 2010, Branchburg's submission was deemed complete. http://www.nj.gov/dca/services/lps/hss/archive.html (Municipal Participation in the Third Round).

22. Branchburg's submission was based on COAH's then existing Third Round Rules, which used a methodology based on "growth share" to determine each municipality's affordable housing obligations.

23. On October 8, 2010, the Appellate Division invalidated the "growth share" methodology used in COAH's Third Round Rules. In re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 416 N.J. Super. 462, 488 (App. Div. 2010). The Supreme Court substantially upheld the Appellate Division's decision and held that the growth share methodology was incompatible with the Fair Housing Act, N.J.S.A., 52:27D-301 to 329. In re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013). The Supreme Court directed COAH to propose regulations using a methodology similar to that used in the First and Second rounds.

24. Because COAH's Third Round Rules were invalidated, Branchburg was not able to complete the process of obtaining substantive certification.

25. Because Branchburg took formal steps towards achieving substantive certification, this Court should view favorably its request for immunity from builders' remedy lawsuits. Branchburg should have a period of immunity of not less than five months in which to finalize its HEFSP.

26. The Supreme Court also held that "[i]n determining whether to grant such a town a period of immunity while responding to a constitutional compliance action, the court's individualized assessment should evaluate the extent of the obligation and the steps, if any, taken toward compliance with that obligation." 221 N.J. at 28. Relevant factors may include current

conditions within the community, including whether a housing element has been adopted, any activity that has occurred in the town affecting need, and progress in satisfying past obligations.

27. As set forth in more detail below, Branchburg satisfied its past obligations, adopted a formal housing plan, and took steps to implement the plan.

Branchburg Satisfied its First and Second Round Obligations

28. On June 13, 1990, Branchburg was certified by COAH as to its First Round Housing Element and Fair Share Plan. See http://www.nj.gov/dca/services/lps/hss/archive.html (Towns Certified in the First Round, pg. 4).

29. Branchburg's fair share allocation from COAH for the first six year period (1987-1993) was 200 units, consisting of a 197 unit new construction obligation and a 3 unit rehabilitation obligation. The First Round obligation was addressed through a 100 unit Regional Contribution Agreement ("RCA") with the City of New Brunswick, the construction of 40 affordable for-sale units at a development called Cedar Brook, and the construction of 73 affordable rental units at a development called Whiton Hills.

30. On August 11, 2004, COAH granted Branchburg's petition for substantive certification of its Second Round Housing Element and Fair Share Plan. See http://www.nj.gov/dca/services/lps/hss/archive.html (Municipal Participation in the Second Round).

31. The Second Round addressed the cumulative need for affordable housing for the period from 1987 through 1999. See N.J.A.C. 5:93 Appendix A.

32. Branchburg's cumulative twelve year (Second Round) fair share obligation was 309 units, consisting of a 7 unit rehabilitation obligation and a 302 unit new construction obligation, part of which had been addressed in the First Round.

33. Branchburg's Second Round Housing Element and Fair Share Plan addressed this cumulative obligation with a combination of credits for its previous housing activities and a proposal to establish 4 new alternative living arrangements in cooperation with Midland, plus the creation of 4 new low-income family rental units in a building located at the Terrace Edgewood Mobile Home Park.

34. COAH determined at the time it granted substantive certification that Branchburg's Second Round plan actually resulted in 8 surplus credits over and above the prior round obligation.

35. Branchburg's plan also called for the construction of a new five-bedroom alternative living arrangement by Midland at a site on Robbins Road. COAH did not give Branchburg credit for the bedrooms on the Robbins Road facility because it was uncertain at the time as to whether and when it would be built. That building is now constructed and occupied, and Branchburg is eligible for a credit for each bedroom within that facility in addition to .25 bonus credits per bedroom, or one additional bonus credit, for a total of 6 credits from that facility.

36. Thus, Branchburg began the Third Round eligible for 14 credits over and above the credits used in satisfaction of Branchburg's prior round obligation.

Branchburg's Third Round Obligation

37. The last rules proposed by COAH addressed the Third Round obligation for the period from 1999 through 2024. 46 N.J.R. 924 (June 2, 2014).

38. As of the date of the filing of this Complaint, it is not clear how many units of affordable housing Branchburg is obliged to provide for the period of the Third Round. Neither the Statewide need, nor the regional need nor Branchburg's share of those needs has been determined by any administrative agency or court.

39. Previously, COAH had proposed fair share obligations based on a growth share methodology that was invalidated by the Supreme Court. Under the growth share methodology, COAH determined that Branchburg's Third Round obligation was 348 units through 2018("Growth Share Obligation"), which Branchburg was prepared to meet through its Revised Third Round Plan. McKenzie Cert., Exh. B.

40. On June 2, 2014, COAH published in the New Jersey Register proposed substantive rules (the "Proposed Rules") addressing each municipalities' obligation for affordable housing during the Third Round. 46 N.J.R. 924 (June 2, 2014). However, at COAH's October 20, 2014 meeting, the COAH members split 3-3 on the vote and the Proposed Rules were not adopted.

41. The Proposed Rules established Branchburg's total Accrued and Prospective Fair Share Obligation for the period from 1999 to 2024 of 512 units, not counting credits for past affordable housing completions or reductions for approved inclusionary developments. 46 N.J.R. 999, 1025 (June 2, 2014).

42. The Proposed Rules were said by COAH to use a methodology similar to that used for the first and second rounds, consistent with the Supreme Court's ruling in In the Matter of

Adoption of N.J.A.C. 5:96 and 5:97 of the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013). 46 N.J.R. 924-25 (June 2, 2014).

43. Branchburg does not believe that any of the Third Round numbers provided by COAH are accurate.

44. Other than the Growth Share Obligation and the Proposed Rules Obligation, neither COAH nor any other administrative agency or court has established a Third Round obligation for Branchburg.

45. The Revised Third Round Plan attached to the McKenzie Certification sets forth the basis for satisfying Branchburg's Third Round obligation if the obligation is the Growth Share obligation. McKenzie Cert., Exh. B.

46. Branchburg has authorized McKenzie and Township Planner Michael F. Sullivan, PP, AICP to prepare amendments to the Revised Third Round Plan and to undertake any other studies needed to address Branchburg's Third Round obligation, once the extent of that obligation has been determined by the judiciary. Exh. 1 [Resolution].

Branchburg's Good Faith Effort to Comply with its Third Round Obligation

Bonus Credits

47. Branchburg entered the Third Round with 8 excess credits approved by COAH from the prior round plus 6 additional credits for the 5 bedrooms in the Robbins Road special needs housing facility. McKenzie Cert., Exh. B, pg. 3. One of these 6 credits was attributable to bonus credits for special needs housing, which bonuses the Supreme Court approved in its March 10th Decision. 221 N.J. at 32.

47A. Our House, Inc. is a corporation with a place of business at 76 Floral Avenue, Murray Hill, NJ 07974-1511, Attention: Diane Driscoll, Director of Housing Development.

The Triangle Site

48. Prior to completing its Revised Third Round Plan, Branchburg had been actively working toward the acquisition of a three-lot tract of land located at the intersection of Old York Road and Route 202, Block 74, Lots 3, 3.01 and 3.02 (the "Triangle Site") for the purposes of contracting with an affordable housing provider to construct a total of 120 affordable family rental units at this location.

49. When it filed its Revised Third Round Plan, Branchburg had already acquired two of the three lots that comprise the Triangle Site and was preparing to move forward via eminent domain, if necessary, on the third lot.

50. On March 30, 2015, Branchburg acquired the third lot that comprises the Triangle Site.

51. Branchburg now owns the entire 9.48 acre site on which to build affordable housing.

52. Zoning for 100% affordable housing is an acceptable means of providing such affordable housing. See N.J.A.C. 5:93-5.3.

River Trace

53. On or about June 9, 2010, Branchburg entered into a Stipulation of Settlement ("River Trace Stipulation") that required developer River Trace to provide 11 units of affordable housing in exchange for Branchburg dismissing a lawsuit that it had filed to contest certain variances granted to River Trace.

54. Pursuant to the River Trace Stipulation, River Trace was permitted to construct two buildings. First, River Trace would construct the "South Building," which would include two units of affordable housing, and then it would construct the "North Building," which would include six units of affordable housing. River Trace also agreed to purchase three off-site units of affordable housing, and gave Branchburg a letter of credit to secure the three off-site units.

55. By March 6, 2014, River Trace had only provided the two affordable units in the South Building. It had not yet constructed the North Building and had not purchased the three off-site units.

56. Therefore, on March 6, 2014, Branchburg sought an Order to Show Cause to enjoin River Trace from selling or transferring any units in its development unless the unit was sold as an affordable unit. See Branchburg Committee v. River Trace, et al, Docket Nos. SOM-L-1795-09 and SOM-L-124-10 (Order to Show Cause, March 6, 2014). Branchburg wanted to prevent River Trace from selling market rate units on the property while evading its obligations to provide affordable units.

57. On March 24, 2014, the Law Division, Somerset County denied the relief sought in Branchburg's Order to Show Cause and ordered Branchburg to dismiss a *lis pendens* that it had filed against River Trace's development.

58. Branchburg dismissed the *lis pendens* as ordered.

59. By letter dated April 16, 2014, Branchburg informed River Trace that it would draw down on the letter of credit that River Trace had given as security for the three off-site affordable units to provide funds for affordable housing.

60. On May 1, 2014, River Trace filed a Motion in Aid of Litigants' Rights, seeking to prevent Branchburg from drawing on the Letter of Credit. River Trace argued that COAH's dysfunction and failure to adopt Third Round Rules made it impossible for River Trace to provide the three off-site units.

61. On May 14, 2014, the Law Division, Somerset County, granted River Trace the relief that it sought and ruled that Branchburg was "prohibited from drawing on the $420,000 Letter of Credit posted by River Trace, LLC until COAH rules are approved ... ." Branchburg Committee, supra, Docket Nos. SOM-L-1795-09 and SOM-L-124-10.

62. The Law Division held that without Third Round Rules, "it is not only impractical, it is also legally impossible for River Trace" to provide the three off-site units.

63. Branchburg disagreed with the Law Division conclusions. On June 3, 2014, Branchburg filed a notice of appeal with the Appellate Division. The appeal was fully briefed.

64. On March 31, 2015, Branchburg entered into an Amended Stipulation with River Trace pursuant to which River Trace agreed to build 8 on-site affordable units, in addition to the two that have already been provided, and to pay $160,000 in lieu of the eleventh unit, which Branchburg will use to further its affordable housing obligations. River Trace has paid the $160,000 to Branchburg's Housing Trust Fund. Branchburg dismissed the appeal.

65. The Revised Stipulation will allow River Trace to complete the North Building and provide the 8 more units of affordable housing that are still owed to Branchburg. The $160,000 was placed in Branchburg's affordable housing trust fund, and will be used for the purchase of affordable housing.

Advance Realty/Fox Hollow III

66. Branchburg's Zoning board of Adjustment had granted a use variance to Advance Realty for an age-restricted development, referred to as "Fox Hollow II."

67. Advance Realty agreed to provide 28 units of age-restricted affordable housing, evenly split between low income and moderate income units at Fox Hollow III.

68. In 2015, the Zoning Board of Adjustment approved the conversion of the Fox Hollow II development to a non-age-restricted project, hereafter referred to as "Fox Hollow III." The

Zoning Board of Adjustment also granted a use variance to modify the types of market units that would be constructed in the development. The Board of Adjustment approval is for up to 92 market units and up to 28 affordable units.

Midland Adult Services

69. Branchburg has had a successful continuing relationship with Midland, which serve adults with special needs. Midland has become an experienced provider of special needs housing.

70. By agreement with Midland, Branchburg has subsidized 5 Midland special needs group homes with a total of 17 bedrooms that were completed and occupied as part of Branchburg's Second Round Plan. Branchburg also subsidized another five bedroom group home (identified in the Revised Third Round Housing Element and Fair Share Plan on Robbins Road). Robbins Road has been completed and is occupied.

71. Branchburg has welcomed an additional Midland 5-bedroom special needs group home known as Parsonage Hill, reflecting Branchburg's ongoing relationship with Midland.

Rehabilitation Obligation

72. Branchburg maintains an active ongoing affordable housing rehabilitation program.

73. For the First and Second Rounds, Branchburg had a seven unit rehabilitation obligation. McKenzie Cert., Exh. B, pg. 2.

74. Branchburg actually rehabilitated 16 units, more than needed to comply with its obligation. McKenzie Cert., Exh. B, pg. 3.

75. Since April 1, 2010, Branchburg has rehabilitated five additional units.

Other Activities

76. Branchburg has established an Affordable Housing Subcommittee to identify suitable sites and appropriate densities for inclusionary and/or 100 percent affordable housing development in sufficient numbers to satisfy Branchburg's Third Round obligation. The Subcommittee has identified 11 additional sites that could produce affordable housing if needed.

Construction Based on Demonstrated Need

77. Branchburg wants to ensure that inclusionary developments are financially viable. If all inclusionary developments are built at the same time, Branchburg believes that there may not be a sufficient market for all of the market-rate and affordable units to be sold or rented at one time, potentially leading to developments in financial distress, failure to complete affordable units, and disincentives to produce affordable housing.

78. Therefore, Branchburg intends to allow inclusionary sites to be approved, constructed and sold in a controlled manner.

79. Branchburg expects to ensure the viability of its affordable housing plans set forth in its HEFSP by avoiding having multiple developments offered for sale at the same time.

III. COURT'S DECISION

IS THE TOWNSHIP ENTITLED TO TEMPORARY IMMUNITY AS IT RECRAFTS A FAIR SHARE PLAN?

A. Regarding the Supreme Court's *Mount Laurel* Process

i) The *Mount Laurel Doctrine*

The New Jersey Supreme Court prohibited the discriminatory use of zoning powers and mandated that each developing municipality "must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 179, 187, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975)

Thereafter, in 1983, the New Jersey Supreme Court reaffirmed the constitutional obligation that towns provide "a realistic opportunity for the construction of [their] fair share of the present and prospective regional need for low and moderate income housing." S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 205 (1983) (citing Mount Laurel I, supra, 67 N.J. at 174), (together with Mount Laurel I, the *Mount Laurel Doctrine*).

"The *Mount Laurel* series of cases recognized that the power to zone carries a constitutional obligation to do so in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families." In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 3-4 (2015); (footnote omitted).

It is the intent and purpose of the *Mount Laurel Doctrine* to prohibit the discriminatory use of zoning powers and zoning practices which have the exclusionary effect of making housing unavailable to persons of low and moderate income and to provide remedies to address such practices when they are proven to exist.

ii) Regarding the Council on Affordable Housing and 3rd Round Rules

The Legislature codified the *Mount Laurel Doctrine* in the Fair Housing Act ("the Act"), N.J.S.A. 52:27D-301, et seq. and further established COAH as the administrative agency charged with implementing and administering the Act.

Under the Act, COAH is empowered, through its procedural and substantive rules to establish municipal affordable housing obligations, and review and approve housing plans submitted to it by granting "substantive certification" if they create a realistic opportunity for the creation of affordable housing. N.J.S.A. 52:27D-313. Under a grant of substantive certification, a municipality is insulated to a substantial extent from exclusionary zoning litigation for a period of ten years[2]. Ibid.

On October 20, 2008, COAH adopted Third Round Rules intended to assess municipal affordable housing obligations for the period from 1999 to 2018 utilizing a "growth share" methodology. N.J.A.C. 5:96 and 5:97. The revised Third Round Rules were initially invalidated by the Appellate Division on October 8, 2010, in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 416 N.J. Super. 462 (App. Div. 2010). That ruling was ultimately affirmed and modified by the Supreme Court on September 26, 2013, In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 215 N.J. 578 (2013), and COAH was ordered to promulgate new rules, utilizing a First and Second Round

[2]COAH initially adopted substantive rules, governing the period from 1987 to 1993, ("The First Round Rules"), N.J.A.C. 5:92-1.1 to -18.20, Appendices A to F. It thereafter adopted substantive rules governing the period from 1987 to 1999, ("The Second Round Rules"), N.J.A.C. 5:93-1.1 to -15.1, Appendices A to H. After a lengthy period of study and review ultimately characterized by the New Jersey Superior Court - Appellate Division as "dramatic and inexplicable," In re Six Month Extension of N.J.A.C. 5:91 et seq., 372 N.J. Super. 61, 95-96 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005), COAH proposed Initial Third Round Rules on October 6, 2003.

Upon receipt of voluminous comments, COAH re-proposed Third Round Rules which were adopted on December 20, 2004. 36 N.J.R. 5895(a). These Initial Third Round Rules, which contained a "growth share" approach, were designed to address a cumulative municipal affordable housing obligation beginning 1987 and ending 2014.

The Initial Third Round Rules were invalidated in a significant number of respects, and the matter remanded to COAH, by the Superior Court - Appellate Division on January 25, 2007. In Re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, (App. Div. 2007), certif. den. 192 N.J. 71 (2007).

methodology, within five months of that decision. Upon COAH's requests, the Court extended the time for adoption under an Order entered on March 14, 2014. Ultimately, however, COAH failed to adopt regulations in a stale-mated 3-3 vote. In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 10 (2015).

Consequently, an application was made to the Supreme Court by the Fair Share Housing Center (FSHC), (a party which had challenged COAH's rules), to enforce litigants' rights under Rule 1:10-3. On March 10, 2015, in In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1 (2015), the Court granted FSHC's application, finding that "There is no question that COAH failed to comply with this Court's March 2014 Order that was designed to achieve the promulgation of Third Round Rules and the maintenance of a functioning COAH," such that "the administrative forum is not capable of functioning as intended by the [Fair Housing Act] due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities," and, accordingly, "the courts may resume their role as the forum of first instance for evaluating municipal compliance with *Mount Laurel* obligations. . . " Id. at 19 – 20.

iii) Jurisdiction of this Court and Authority to Enter Order

The Law Division of the Superior Court, Somerset County, has jurisdiction over the within matter which seeks a Declaratory Judgment of Third Round Mount Laurel Compliance and Repose pursuant to R. 4:42-3, R. 4:3-1(a)(4), N.J.S.A. 2A:16-53, J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985), favorably referenced in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30 (1986), N.J.S.A. 52:27D-313(a), and In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015), and venue of the action is before the designated Mount Laurel Judge for Vicinage 13 in accordance with paragraph 10 of the implementing order accompanying the 2015 Decision. Id. at 36.

As the Court held in In re Adoption of N.J.A.C. 5:96 & 5:97, 221 215 N.J. 1 (2015) (the "2015 Decision"), part of the process of judicial review of a municipal Third Round Housing Plan Element and Fair Share Plan ("HPE&FSP") includes the Mount Laurel trial courts providing municipalities with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the HPE&FSP. As the Court explained:

> "Because municipalities that received a grant of substantive certification promulgated housing plans in compliance with the invalidated growth share based Third Round Rules, additional court review of such towns' housing plans will be

necessary. The ordinances adopted by any such municipality, in furtherance of an approved housing element, must be evaluated to determine if they provided for a realistic opportunity for the municipality to achieve its "fair share of the present and prospective regional need for low and moderate income housing." Mount Laurel II, supra, 92 N.J. at 205, 456 A.2d 390 (citing Mount Laurel I, supra, 67 N.J. at 174, 336 A.2d 713). Supplementation of a plan may be necessary to ensure to the court's satisfaction that the town has provided a realistic opportunity for its fair share or present and prospective regional affordable housing need in keeping with prior rounds' methodologies. The consideration to be employed in that analysis are addressed in Part V., infra.

That said, towns in this category may choose affirmatively to seek, through a declaratory judgment action filed on notice to FSHC and interested parties, a court order declaring its housing element and implementing ordinances – as is or as to be supplemented – constitutionally sufficient. We also acknowledge that a municipality that had received a grant of substantive certification may elect to wait to be sued. In either case, **while not entitled to the statutory presumption of validity the FHA normally would provide, these towns deserve an advantage in the judicial review that shall take place.** Implemented ordinances should not be lightly disturbed unless necessary; supplemental actions to secure compliance with newly calculated prospective need may provide a preferred court for obtaining constitutional compliance.

While reviewing for constitutional compliance the ordinances of a town that achieved substantive certification, courts should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during that necessary review process, unless such process is unreasonably protracted. As courts adapted processes to manage the multiplicity of pre-FHA filed Mount Laurel actions, see, e.g. J.W. Field, supra, 204 N.J. Super. 445, 449 A.2d 251, the present day courts handling these new matters should employ, similar flexibility in controlling and prioritizing litigation. We repose such flexibility in the Mount Laurel trust designated judges in the vicinages, to whom all Mount Laurel compliance-related matters will be assigned post-order, and trust those courts to assiduously assess whether immunity, once granted, should be withdrawn, if a particular town abuses the process for obtaining a judicial declaration of constitutional compliance. Review of immunity orders therefore should occur with periodic regularity and on notice."

Id. at 25-26 (emphasis supplied)

B. Construction of the Statutes in Question In A Manner Which Advances The Legislative Policy And Purpose

In construing a statute, the court's "fundamental duty is to effectuate the intent of the Legislature." Merin v. Maglaki, 126 N.J. 430, 435 (1992). Judges must also consider the **legislative**

policy underlying the statute and "any history which may be of aid." State v. Madden, 61 N.J. 377, 389 (1972) (emphasis added).

"It is a **fundamental duty** of this court to construe a statute in a manner which **advances the legislative policy** and purpose." Royal Food Distributors, Inc. v. Dir., Div. of Taxation, 15 N.J.Tax 60, 73 (1995) (emphasis added) citing Lesniak v. Budzash, 133 N.J. 1, 8 (1993); Voges v. Bor. of Tinton Falls, 268 N.J. Super. 279, 285 (App. Div. 1993), certif. denied, 135 N.J. 466 (1994). As eloquently stated by Justice Heher in discussing the meaning of Section 18 of the "Unsatisfied Claim and Judgment Fund Law:"

> The sense of a law is to be collected **from its object** and the nature of the subject matter, the contextual setting, and the statutes *In pari materia*; and the import of a particular word or phrase is controlled accordingly. Isolated terms cannot be invoked to defeat a 'reasonable construction.' Wright v. Vogt, 7 N.J. 1 (1951). See also State v. Brown, 22 N.J. 405 (1956). The statute is to be liberally construed to advance the remedy, due regard being had to the protection of the Fund against fraud and abuse **and to the fulfillment of the essential legislative policy**. The literal sense of terms is not to have ascendancy over the **reason and spirit** of the expression as a whole.
>
> [Giles v. Gassert, 23 N.J. 22, 33-34 (1956) (emphasis added).]

The Court's goal is to fulfill "**the essential legislative policy**" of the FHA and to give meaning to its "**reason and spirit**."

i) Purpose of The FHA

To understand the purpose of the FHA, it is important to understand the facts and circumstances that gave rise to the legislation. In January of 1983, a few years prior to the enactment of the FHA in July of 1985, the Supreme Court decided Mount Laurel II. That landmark decision precipitated a flood of over 100 Mount Laurel suits. See Frizell, 36 N.J. Prac., Land Use Law § 18.4 (2d ed.); see also J.W. Field Co. v. Tp. of Franklin, 204 N.J. Super. 445, 54-55 (Law Div. 1985) (wherein Hon. Judge Serpentelli stated that "[t]he experience of this court demonstrates that the level of Mount Laurel litigation ***has increased dramatically*** since Mount Laurel II and **every suit has been brought by a builder rather than a nonprofit or public agency**.") (emphasis added).

Given the flood of builder's remedy lawsuits precipitated by Mount Laurel II, it is understandable why the Legislature intervened and enacted a law that targeted the builder's remedy and so vigorously sought to curtail its role.[3]

The Legislature clearly stated its purpose in Section 303, entitled: "Legislative ***Declarations and Intention***." In this section, the FHA states:

> The Legislature **declares** that the State's preference for the resolution of existing and future disputes involving exclusionary zoning ***is*** the mediation and review process set forth in this act and ***not litigation***. . . .
>
> [Ibid. (emphasis added).]

The Legislature followed its declaration with its express intent:

> **[I]t is the *intention* of this act** to provide ***various alternatives*** **to the use of the builder's remedy as a method of achieving fair share housing**.
>
> [Ibid. (emphasis added).]

It is evident that the FHA represented the Legislature's declaration that "New Jersey has seen way too much builder's remedy litigation. We need to restrict such litigation and facilitate the ability of a municipality to comply voluntarily without such litigation. That is how we intend to implement the affordable housing policies of our state."

As the bill worked its way through the legislative process,[4] former Governor Thomas H. Kean expressed his identical understanding of the purpose of the legislation:

> [I]s designed to provide an administrative mechanism to resolve exclusionary zoning disputes **in place of protracted and expensive litigation.** The expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations.
>
> To accomplish this the bill establishes **a voluntary system** through which municipalities can submit plans for providing their fair share of low and moderate income housing to a State Council on Affordable Housing which would certify the plan…

[3] An examination of J.W. Field Co., Inc. v. Tp. of Franklin, 204 N.J. Super. 445 (Law Div. 1985), reveals that no less than ***eleven*** developers had brought builder's remedy suits against the Township.

[4] Senators Lipman, Stockman, and Lynch initially introduced the FHA on June 21, 1984 as S-2046. See Legis. History of the FHA at http://repo.njstatelib.org:8080/handle/10929.1/22933

> [State of New Jersey Executive Department Veto Message for the Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334, April 26, 1985 (emphasis added).]

One of the purposes of the Legislation is clear. The Legislature sought to limit builder's remedy lawsuits and facilitate voluntary municipal compliance.

ii) The Legislature Advanced The Purpose of the FHA By Empowering Municipalities To Obtain Immunity Easily So They Could Pursue Plan Approval Free From The Considerable Burden Of Exclusionary Zoning Lawsuits

The Legislature sought to limit the role of the builder's remedy so clearly that it imposed a ***moratorium*** on the remedy and created a variety of ways for municipalities to obtain immunity from exclusionary zoning litigation. Consider the following:

1. The Legislature imposed a moratorium on trial judges awarding builder's remedies from July 2, 1985, the effective date of the Act, until five months from when COAH established its criteria and guidelines through the rulemaking process. N.J.S.A. 52:27D-328 (referencing the five-month time frames established in N.J.S.A. 52:27d-309).

2. The Legislature also created two classes of municipalities -- (a) municipalities subject to ongoing builder's remedy litigation, and (b) municipalities not engaged in such litigation -- and took special measures to protect each class from builder's remedy lawsuits. N.J.S.A. 52:27D-309 and 316.

3. *As to municipalities embroiled in ongoing Mount Laurel litigation*, the Legislature established a very soft standard - the "manifest injustice" standard – for municipalities to obtain immunity by securing a transfer of their lawsuits from the courts to COAH.[5] Through such transfers, municipalities embroiled in litigation not only secured immunity, but also, to the extreme consternation of developers, secured the right to vacate any builder's remedies previously awarded by the trial judge. N.J.S.A. 52:27D-316. Mount Laurel III, 103 N.J. at 54-55.

4. *As to municipalities **not** embroiled in Mount Laurel lit*igation, the Legislature established an **extraordinarily** easy way to obtain immunity from builder's remedy lawsuits. All such a municipality would have to do to obtain immunity would be to file a "resolution of participation" within four months from the enactment of the FHA.

[5] In interpreting N.J.S.A. 52:27D-316, the Supreme Court refers to "the Act's clear and strong preference for Council rather than court treatment" and notes that "the "preference" is set forth explicitly [in N.J.S.A. 52:27D-303]; the Act as a whole is better described as a "mandate" for administrative resolution." Mount Laurel III, 103 N.J. at 48.

N.J.S.A. 52:27D-309. A "Resolution of Participation" is a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with the Act. N.J.A.C. 5:93-1.3.

5. Regardless of whether the municipality obtained immunity by securing an early transfer of its case from the court or by adopting a resolution of participation within four months from the enactment of the FHA, that municipality could obtain additional immunity from builder's remedy lawsuits by filing a housing element and fair share plan with COAH within five months from COAH's adoption of "criteria and guidelines." N.J.S.A. 52:27D-309 and 316.

6. If a municipality failed to file a plan within this five month window following COAH's adoption of "criteria and guidelines", it could obtain immunity thereafter if it filed a housing element and fair share plan with COAH before an exclusionary zoning lawsuit is filed in Court. N.J.S.A. 52:27D-309 and 316.

Those summaries highlight the Legislature's desire to diminish the role of the builder's remedy in existing and future Mount Laurel disputes and explains the lengths to which the Legislature went to achieve these goals.

Two additional facts further demonstrate that the Legislature intended to limit the builder's remedy and facilitate voluntary compliance. First, the Legislature made it easier to obtain immunity even prior to the enactment of the FHA. Before the enactment of the FHA, a municipality had to "stipulate noncompliance and obtain the court's approval of a proposed fair share number." J.W. Field, supra, 204 N.J. Super. at 456. After the enactment of the FHA, a municipality that had not been sued merely had to adopt a "resolution of participation." N.J.S.A. 52:27D-309. Even if a municipality had already been sued, it could easily transfer the matter to COAH, thereby ***vacating any builder's remedy orders*** and securing immunity from additional lawsuits, provided that the case had not reached a final and unappealable judgment. See Mount Laurel III, 103 N.J. at 54-55 (interpreting the term "manifest injustice" in N.J.S.A. 52:27D-309 so narrowly that a municipality could easily transfer and obtain immunity provided that the case had not proceeded to a final and unappealable judgment). Since the Legislature was presumptively aware of the immunity procedure (see Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 543-44 (2013)), this Court should give great weight to the fact that the FHA drastically ***lowered*** the bar to secure and retain immunity. Indeed, such action shows that the Legislature was ***not content*** with the common law immunity standard. See Farmers Mut., supra,

215 N.J. at 543 ("If the Legislature were content with the [court's] decision . . . **there would have been little point to** [amend the relevant statute.""") (emphasis added).

Second, not only did the Legislature radically lower the common law pre-immunity requirements, the initial enacted version of the FHA allowed towns that secured COAH's jurisdiction ***to take up to six years*** to do nothing before deciding whether to petition the agency to certify its Housing Element and Fair Share Plan. See Jedziniak Cert. at Exhibit J, Page 12. Although a subsequent amendment to the FHA reduced this period to two years, **providing automatic immunity and six years of immunity without any additional action**, those actions illustrate the Legislature's determination to curtail the builder's remedy cause of action.

C. The Scope and Nature of the Judicial Process

The Supreme Court thus reinstituted a judicial mechanism to address municipal *Mount Laurel* obligations. The Supreme Court's decision indicates that municipalities will be reviewed against the First and Second Round Rules and the mechanisms those rules permit.

The mechanisms permitted under the Prior Round Rules include the following:

a. Rehabilitation (N.J.A.C. 5:93-5.2)

i. Rehabilitation Program requires municipalities to spend $10,000 per unit ($8,000 hard costs, $2,000 soft costs).

ii. Alternatively, this requirement can be satisfied with a new construction credit or an Elder Cottage Housing Opportunity (ECHO), which is a conditional use in all three of the Township's residential districts: Agricultural Residential ("AR-1") Zone (Ordinance Section 11-286 (F); Farmland Preservation ("FP") Zone (Ordinance Section 11-300(F); and the Village Residential ("VR") Zone 11-303(F).

b. Municipally Sponsored Construction & Gut Rehabilitation (N.J.A.C. 5:93-5.5), Four requirements:

i. Must have municipal control of the site.

ii. Administrative mechanism to construct the proposed housing.

iii. Funding plan and evidence of adequate funding capacity.

iv. Timetables for construction of the units.

c. Inclusionary Development Zoning (N.J.A.C. 5:93-5.6)

i. Must conform to requirements of N.J.A.C. 5:93-5.3 - "Developable site" means a site that has access to appropriate water and sewer infrastructure, and is consistent with

the applicable area-wide water quality management plan (including the wastewater management plan) or is included in an amendment to the area-wide water quality management plan submitted to and under review by DEP.

ii. Single-family developments – 4 units/acre, 15% set-aside.

iii. 5 units/acre, 17.5% set-aside.

iv. 6 units/acre, 20% set-aside.

d. Alternative Living Arrangements (N.J.A.C. 5:93-5.8)

i. "Means a structure in which households live in distinct bedrooms, yet share kitchen and plumbing facilities, central heat and common areas. Alternative living arrangement includes, but is not limited to: transitional facilities for the homeless, Class A, B, C, D, and E boarding homes as regulated by the New Jersey Department of Community Affairs; residential health care facilities as regulated by the New Jersey Department of Health; group homes for the developmentally disabled and mentally ill as licensed and/or regulated by the New Jersey Department of Human Services; and congregate living arrangements."

ii. Credit issued per bedroom.

iii. Minimum affordability controls of 10 years. To be eligible for a rental bonus, controls must be in effect for at least 30 years.

e. Accessory Apartments (N.J.A.C. 5:93-5.9), which are permitted as conditional uses in all three of the Township's residential zones: the Single Family Agricultural Residential Zone (Ordinance Section 11-291(H)), Village Residential Zone (Ordinance Section 11-308(E), and the Farmland Preservation Zone (Ordinance Section 11-300 (G)).

i. Up to 10 accessory apartments may be used to address a housing obligation.

ii. Must provide at least $10,000 per unit to subsidize the creation of the apartment.

iii. Minimum affordability controls of 10 years. To be eligible for a rental bonus, controls must be in effect for at least 30 years.

f. Purchase Existing Homes (N.J.A.C. 5:93-5.10) - Purchase homes that have been vacant for at least 18 months and resell them at affordable prices and/or rents.

g. Write-down/Buy-down (N.J.A.C. 5:93-5.11) - (Most recently known as market to affordable)

i. Up to 10 units may be converted.

ii. Buy and resell homes at an affordable price.

iii. Must spend at least $20,000 per unit.

iv. Place a 30-year deed restriction on the home.

h. Assisted Living Residence (N.J.A.C. 5:93-16)

i. Apartments in these facilities qualify if the resident qualifies as a low/moderate income household or if the resident is the recipient of a Medicaid waiver.

ii. 30 year deed restriction shall be placed on the assisted living residence.

Under that system, municipalities that have complied with the *Mount Laurel Doctrine* may initially seek a declaratory judgment, and are entitled to immunity from exclusionary zoning lawsuits, before being subject to challenges by developers and interest groups. In that regard, the Supreme Court held, in part, that: "[W]e establish a transitional process before allowing exclusionary zoning actions against towns that had sought to use the [Fair Housing Act] mechanisms in recognition of the various stages of municipal preparation that exist as a result of the long period of uncertainty attributable to COAH's failure to promulgate Third Round Rules." In Re Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing, 221 N.J. 1, 20 (2015).

The process developed by the Supreme Court seeks to track the process established under the Fair Housing Act:

> Our goal is to establish an avenue by which towns can demonstrate their constitutional compliance to the courts through submission of a housing plan and use of processes, where appropriate, that are similar to those which would have been available through COAH for the achievement of substantive certification. Those processes include conciliation, mediation, and the use, when necessary, of special masters. The end result of the processes employed by the courts is to achieve adoption of a municipal housing element and implementing ordinances deemed to be presumptively valid if thereafter subjected to challenge by third parties. Our approach in this transition is to have courts provide a substitute for the substantive certification process that COAH would have provided for towns that had sought its protective jurisdiction. And as part of the court's review, we also authorize, as more fully set forth hereinafter, 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.
>
> Id., at 23-24.

The process devised by the Supreme Court plainly directs that only municipal declaratory judgment actions will be received by the courts for consideration during a transitional period:

> 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.
>
> Id. at 5-6.

Only upon the expiration of the thirty day period may a party institute a "constitutional compliance" action against a municipality: "*After that thirty-day period expires*, a challenge to a town's constitutional compliance may be filed against a municipality by FSHC or any other interested party." Id. at 27; (emphasis supplied). Even then, no "builder's remedy" action may proceed until a court ultimately finds that a municipality's plan does not adequately meet its affordable housing obligation. 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. Id. at 29.

D. The Court's Authorization of Temporary Immunity

The Court directed that moving forward, the process developed is meant "to track the progress provided for in the [Fair Housing Act]." Id. at 29. Drawing from the Fair Housing Act, the Court noted that with regards to municipalities that had received substantive certification "[o]rdinarily, *N.J.S.A.* 52:27D-313 and -317 would afford the ordinances implementing the housing elements of such municipalities a strong presumption of validity in any exclusionary zoning action" however, providing "that same presumption of validity based solely on substantive certification in these circumstances would be to ignore [the Court's] acknowledgement of the problems with the 'growth share' methodology on which the invalidated Third Round Rules were premised." Id. at 24. Therefore, the Court determined that because "municipalities that received a grant of substantive certification promulgated housing plans in compliance with the invalidated growth share based Third Round Rules, additional court review of such towns' housing plans will be necessary." Id. at 25

The Court also noted that certified towns "may choose affirmatively to seek, through a declaratory judgment action filed on notice to FSHC and interested parties, a court order declaring its housing element and implementing ordinance – as is or as to be supplemented – constitutionally

sufficient." Id. at 26. Moreover, the Court noted that although a certified municipality may not be "entitled to the statutory presumption of validity the FHA normally would provide, [certified] towns deserve an advantage in the judicial review that shall take place" and "[i]mplemented ordinances should not be lightly disturbed unless necessary" Id. Rather, the Court prefers a course in which "supplemental actions" are taken "to secure compliance with newly calculated prospective need…for obtaining constitutional compliance." Id.

As such, the Court directed that in reviewing the ordinances of a township that received substantive certification, "courts should be generously inclined to grant applications for immunity from subsequently filed exclusionary zoning actions during that necessary review process, unless such process is unreasonably protracted." Id. Further, the Court direct that no builder's remedy are authorized to proceed against a town with substantive certification "unless a court determines that the substantive certification that was granted is invalid or that no constitutionally compliant supplementing plan is developed and approved by the court after reasonable opportunity to do so, and the court determines that exclusionary zoning actions, including actions for a builder's remedy, are appropriate and may proceed in a given case." Id. at 26-27.

Branchburg petitioned for substantive certification with COAH and thus demonstrated a willingness to participate in the process. Branchburg is one of the many municipalities that did not receive substantive certification.

i) Court's Role in the Determination of Need and Review of Housing Plans

Finally, upon submission of a municipal housing element and fair share plan, courts are to conduct an individualized assessment of the submission based on the court's determination of present and prospective regional need for affordable housing as allocated to the municipality using mechanisms outlined in the Act and the assistance of "interested parties." Id. at 29-30.

ii) The Judicial Process is Preemptive

The Supreme Court has established a detailed, and preemptive, process for the judiciary's consideration of *Mount Laurel* matters. It provides for a series of steps for judicial consideration of *Mount Laurel* following an initial period reserved for municipalities to trigger court jurisdiction. Those steps likewise proceed from municipal applications for immunity for lawsuits and the development of municipal fair share plans. Where a town has availed itself of the procedural mechanism crafted by the Supreme Court, that mechanism is exclusive and no other actions or related efforts to circumvent the process should be tolerated.

E. Plaintiff's Request for Temporary Relief

Branchburg requests that the Court order that:

1. Grant Branchburg a period of immunity of at least five months from exclusionary zoning litigation in order for it to finalize its HEFSP;

2. Declare that the HEFSP and its implementing ordinances are presumptively valid in the event that Branchburg must later defend itself against exclusionary zoning litigation during the period for which the Third Round Rules would apply.

3. Grant Branchburg a judgment of compliance and repose.

In making that request of the court, Branchburg acknowledges that it will need to assess to the continued viability of the accessory apartment and special needs components of its Fair Share Plan and perhaps even develop additional mechanisms to ensure that additional be provided. Branchburg acknowledges that it will also need to devise strategies to address the rehabilitation obligation that has not been previously identified and to compensate for the loss of any bonus credits.

Branchburg petitioned for substantive certification with COAH and thus demonstrated a willingness to participate in the process. Branchburg is one of the many municipalities that did not receive substantive certification.

F. Should the Court Grant the Township and the Board Temporary Immunity from any and all Exclusionary Zoning Lawsuits to Allow the Court to Review the Township's Affordable Housing Plan Undaunted by the Filing of Exclusionary Zoning Lawsuits?

After the Mount Laurel II decision, 92 N.J. 158 (1983), and prior to the 1985 adoption of the Fair Housing Act, N.J.S.A. 52; 27D-301 et seq. (the "FHA"), Judge Serpentelli, one of the original three Mount Laurel judges, established an immunity procedure to be utilized in Mount Laurel litigation,[6] which he explained in J.W. Field v. Twp. of Franklin, 204 N.J. Super. 445, 456-458 (Law Div. 1985). After balancing all of the "overriding policy objectives" established by the

[6] "Mount Laurel litigation" or a "Mount Laurel lawsuit" refers to exclusionary zoning litigation filed against a municipality and includes (a) "constitutional compliance actions" challenging a municipality's ordinances as unconstitutional under the Mount Laurel doctrine and usually brought by public interest plaintiffs and (b) "builder's remedy" actions in which a plaintiff developer (as distinguished from a public interest plaintiff) seeks not only a declaration that a municipality's ordinances are unconstitutional under the Mount Laurel doctrine but also seeks a site specific re-zoning of its property, which must include a substantial amount of low and moderate income housing which has been defined by the Supreme Court as a minimum of 20% of the project. See, Mount Laurel II, 92 N.J. at 279.

New Jersey Supreme Court in Mount Laurel II, Judge Serpentelli determined that "immunity" from Mount Laurel lawsuits, including but not limited to builder's remedy lawsuits, should be conferred upon any municipality that committed to comply voluntarily with its affordable housing obligations through either stipulating to noncompliance and agreeing to comply in an on-going lawsuit or filing a Declaratory Judgment action seeking a judgment of compliance and repose. Id.

The immunity mechanism was created to encourage municipal voluntary compliance and to refocus efforts away from unnecessary and expensive litigation and towards voluntary compliance. Although the Supreme Court never expressly reviewed this type of order, the Court favorably referenced this immunity procedure in Hills Dev. Co. v. Bernards Twp., 103 N.J. 1, 29-30, 62-64 (1986) as a creative and effective management tool in a Mount Laurel case, noting that this innovative procedure had been used and praising the trial judges for developing innovative techniques to implement the Mount Laurel doctrine. To repeat from above, after balancing all seven "overarching policy objectives" established by the Court in Mount Laurel II, Judge Serpentelli in J.W. Field conferred immunity from Mount Laurel lawsuits upon any municipality that committed to comply voluntarily. More specifically, if a municipality had been sued, the immunity would insulate the municipality from subsequent suits. If the municipality had not been sued, the immunity would attach upon the filing of a Declaratory Judgment action to empower the municipality to comply free from any Mount Laurel lawsuits. J.W. Field, 204 N.J. Super. at 456.

The 2015 Decision formally approves a temporary immunity procedure as part of the process of judicial review of a municipal Third Round HPE&FSP. As set forth above in this opinion, the Court held in the 2015 Decision that part of the process of judicial review of a Third Round HPE&FSP includes the Mount Laurel trial court providing the municipality with temporary immunity from exclusionary zoning litigation during the period when the court is reviewing the HPE&FSP, even if supplementation of the HPE&FSP is required during the proceedings. 221 N.J. at 24.

As the Court explained, "towns that had submitted their HPE&FSP and had petitioned for substantive certification and had obtained substantive certifications" and that now affirmatively seek to obtain a court declaration that their affordable housing plans are presumptively valid should have no more than five months in which to submit their supplemental housing element and affordable housing plan [and] [d]uring that period, the court may provide initial immunity preventing any exclusionary zoning actions from proceeding." Id. at 27-28. As the Court held, "as

part of the court's review [of a municipality's Third Round HPE&FSP], . . . we 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." Id. at 24. "[T]he trial court may enter temporary periods of immunity prohibiting exclusionary zoning actions from proceeding pending the court's determination of the municipality's presumptive compliance with its affordable housing obligation." Id. at 28.

The Township has now filed a Declaratory Judgment action seeking to voluntarily comply with the Township's Third Round Mount Laurel affordable housing obligation, and intends for its Board to adopt and the Township subsequently to endorse an amended Third Round HPE&FSP, the 2015 HPE&FSP, which will be submitted to the court for review and approval.

Two of the FHA's criteria for securing immunity are relevant in this case, and they illustrate that the Legislature sought to facilitate the ability of municipalities to obtain immunity.

First, merely by adopting a "resolution of participation" within four months from the effective date of the Act, a municipality not subject to a builder's remedy suit at that point could achieve immunity. N.J.S.A. 52:27D-309(a). Second, any municipality could obtain immunity by filing a Housing Element and Fair Share Plan with COAH prior to the institution of exclusionary zoning litigation in court. N.J.S.A. 52:27D-309 and 316.

The Court is satisfied that the Township of Branchburg satisfied both these criteria.

In addition to securing Round 2 substantive certification from COAH, Plaintiff has also satisfied the "resolution of participation" criterion by recently adopting a "catalyst resolution" (Resolution 15-040), which directs its Mount Laurel professionals to take all reasonable actions to maintain the Township's immunity and to help it achieve compliance as expeditiously as possible. Plaintiff's Exhibit B. In the Court's view, the Resolution clearly satisfies the "resolution of participation" requirement.

The filing of the Plaintiff's Declaratory Judgment corroborates that action. A municipality that files a Declaratory Judgment action is not simply promising to participate at some future date and preserving the possibility that it may change its mind in the interim. Rather, the action ***fulfils the promise*** contemplated by a "resolution of participation" by actually participating. Moreover, such action exposed the municipality to the potential draconian "remedies for non-compliance" established by the Supreme Court in Mount Laurel II if it later chose to renege on its commitment

to comply voluntarily. Mount Laurel II, 92 N.J. at 285-86. No such risk or burden attaches to a municipality that merely adopted a resolution of participation.

The Plaintiff has also satisfied the second criterion, which requires a town to file an Affordable Housing Plan prior to the filing of a builder's remedy suit. In fact, contemporaneously with the filing of this action, the Plaintiff attached its adopted Housing Element and Fair Share Plan. See Plaintiff's Exhibit A to the Declaratory Judgment Complaint, incorporated herein by reference. Since Branchburg has filed its duly adopted and endorsed Affordable Housing Plan with this Court before a developer instituted a builder's remedy lawsuit in court, the Township satisfied this second statutory criterion to secure immunity. N.J.S.A. 52:27D-316.

Moreover, by filing an amended plan within the five months allotted by the Supreme Court, the Township represents that it will reaffirm its entitlement to immunity based upon the standards established by the Legislature in the FHA.

Since Branchburg passes both statutory criteria under the FHA for immunity, this Court will enter an Order which fulfills "**the essential legislative policy**" of the FHA and to give meaning to its "**reason and spirit**" by temporarily immunizing the Plaintiff from exclusionary zoning litigation. Giles v. Gassert, 23 N.J. at 33-34.

The Court will enter an Order in accordance with this opinion.

MOTION TO INTERVENE

A. PARTIES TO THE INTERVENOR MOTION

The Proposed Intervenors, Ken Pizzo, Sr. and Owners of Block 10, Lot 5 on the Branchburg Tax Map, through their managing agent, HarBina Management Company, LLC, move to intervene in this matter.

B. FACTUAL CONTENTIONS IN SUPPORT OF KEN PIZZO, SR. and HARBINA MANAGEMENT COMPANY, LLC

Ken Pizzo, Sr. ("Pizzo") and Owners of Block 10, Lot 5 on the Branchburg Tax Map, through their managing agent, HarBina Management Company, LLC, claim to be interested parties who own properties in the Township that are suitable sites for development of affordable housing so that they claim that should the Township need these properties to fulfill its to-be-determined Third Round Affordable Housing obligation under the Prior Round methodology, they deserve to be part of the Township's or the Court's consideration.

a. Pizzo's Factual Contentions

Pizzo is the owner of property in the Township which is identified on the tax maps of the Township as Block 7, Lot 1.03 ("Property"). See Certification of Ken Pizzo, Sr. at ¶3.

The Property consists of approximately 10 acres. Id. at ¶4.

Pizzo claims to be an experienced real estate developer in the State of New Jersey and through affiliated entities has developed inclusionary developments across the State. See Certification of Ken Pizzo, Sr. at ¶4.

Pizzo claims that he is interested in constructing an inclusionary project on the Property which project will include a substantial amount of units reserved for occupancy by low and moderate income households. Id. at ¶3.

On May 7, 2015 Pizzo requested that the Property be considered for inclusionary development in accordance with N.J.S.A. 52:27D-310(f). Id. at ¶5; see also May 7, 2015 letter from Richard J. Hoff, Jr., Esq. to Township Clerk, a true and correct copy of which is attached as Exhibit B to the Certification of Richard J. Hoff, Jr., Esq.

The Township has apparently not yet responded to Pizzo's June 1, 2015 letter. See Hoff Certification at ¶4; see also Pizzo Certification at ¶6.

b. Owners of Block 10, Lot 5 on the Branchburg Tax Map, through their managing agent, HarBina Management Company, LLC Factual Contention

The subject property, which is approximately 27 acres in area, is identified on the Tax Map of the Township of Branchburg as Block 10, Lot 5 (the "Premises") and described in the Complaint at ¶32 as owned by "Guttmann Karen et al & Appleman". This designation, apparently taken from Branchburg Tax Assessor's records, is presumably a shorthand notation for the actual owners, which include Karen Applebaum Guttmann, Appleman Investments, C and A. Appleman Holdings, LLC, among others. The Complaint includes the subject Premises as one of the sites that "may be included in Branchburg's Housing Element & Fair Share Plan ("HEFSP").

The Premises are currently zoned Industrial I-3, as to which residential housing is not currently a permitted use. HarBina, however, on behalf of the Owners, believes that the Premises are suitable for multi-family housing, including a set-aside for affordable housing in a percentage that would be determined by the overall density allowed.

C. JUDGE WOLFSON'S RECENT DECISION RELATING TO THE DECLARATORY JUDGMENT ACTION FILED BY MONROE TOWNSHIP

In a recent, yet unpublished decision authored by Judge Douglas Wolfson in Middlesex County, the Court addressed a substantially similar motion to intervene in a recently filed Declaratory Judgment action in a Mt. Laurel case. In that case, Monroe 33 Developers, LLC and the Fair Share Housing Center's Motions to Intervene were granted.

Judge Wolfson aptly noted that:

> 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 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.

On that basis Judge Wolfson granted the motions of Monroe 33 (a perspective developer of affordable units) and the FSHC (a party interested in advocating certain positions regarding constitutional compliance) to intervene in the matter and file Answers.

D. APPLICABLE STANDARD OF REVIEW

1. The Movants' Legal Argument Regarding the Standard to Apply

The Movants contend that they should be able to intervene as of right as an interested party in the Plaintiff's Declaratory Judgment action and, in the alternative, the Court should favorably consider their application under the permissive intervention standards.

a) The Applicability of the Uniform Declaration Judgment Act and R. 4:33-1

The Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-51, et seq. (hereafter, "UDJA"), governs declaratory judgment actions in New Jersey. The UDJA shall be "liberally construed and administered, and shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws, rules and regulations on the subject of declaratory judgments" N.J.S.A. 2A:16-51. The purpose of the Declaratory Judgments Law is "to settle and afford relief from uncertainty and insecurity." N.J.S.A. 2A:16-51.

The Act mandates that "[w]hen declaratory relief is sought, *all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding*." N.J.S.A. 2A:16-56 (emphasis added). The UDJA requires that "[n]o declaratory judgment shall prejudice the rights of persons not parties to the proceeding." N.J.S.A. 2A:16-57. As such, courts have deemed it critical to join any party "who has the right and the interest to litigate the same issues at another time or before another forum" to properly adjudicate the claim. *Finley v. Factory Mutual Liability Ins. Co. of America*, 38 N.J. Super. 390 (Law Div. 1955).

The UDJA requires joinder of parties in interest because "[t]he absence of these necessary parties would deprive any declaratory judgment rendered herein of that final and pacifying function it is calculated to serve." Ibid. (internal quotations omitted).

Moreover, Rule 4:33-1 provides:

> *Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a*

practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

For a court to determine an intervention as of right under R. 4:33-1, the moving intervener must claim: (1) "an interest relating the property or transaction which is the subject of the transaction;" (2) show the applicant is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest;" (3) demonstrate that its interest is not adequately represented by existing parties; and (4) make a timely application to intervene. See Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998). A motion to intervene should be liberally viewed. Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), certif. denied, 122 N.J. 147 (1990). Whether to grant intervention under R. 4:33-1 is not discretionary. Chesterbrooke Limited Partnership v. Planning Board of Township of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989). Rather, if all of the rule's criteria are met, intervention must be approved. Ibid.

b) Applicability of R. 4:33-2 and Permissive Intervention

In the alternative, the movants contend that pursuant to R. 4:33-2, permissive intervention should likewise be granted because intervention will not result in undue delay and will prejudice the adjudication of their rights. The movants indicate that whether pursuant to R. 4:33-1 or 4:33-2, intervention as of right should be granted. The movants contend that they have demonstrated that they have an interest in the disposition of this litigation that would impair and impede its ability to protect its interest.

c) The Court's Decision Concerning the Applicable Standard of Review

The Court finds that the Township's Declaratory Judgment action is filed with authority and in accordance with the UDJA. N.J.S.A. 2A:16-51, et seq. In fact, declaratory judgments filed in New Jersey Courts are generally governed by that "Act". The UDJA specifically states that it shall be liberally construed as to effectuate its general purpose to make uniform law … [within New Jersey] … and to harmonize, as far as possible, with federal laws, rules and regulations on the subject of declaratory judgments." N.J.SA. 2A:16-51. The Act has been effective in New Jersey since its passage in 1951.

In fact, this Court finds that this action is filed pursuant to the authority vested in a litigant by the UDJA.

R. 4:33-1 provides:

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

For a court to determine an intervention as of right under R. 4:33-1, the moving intervener must claim: (1) "an interest relating the property or transaction which is the subject of the transaction;" (2) show the applicant is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest;" (3) demonstrate that its interest is not adequately represented by existing parties; and (4) make a timely application to intervene. See Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998). A motion to intervene should be liberally viewed. Employers v. Tots & Toddlers, 239 N.J. Super. 276 (App. Div.), certif. denied, 122 N.J. 147 (1990). Whether to grant intervention under R. 4:33-1 is not discretionary. Chesterbrooke Limited Partnership v. Planning Board of Township of Chester, 237 N.J. Super. 118, 124 (App. Div. 1989). Rather, if all of the rule's criteria are met, intervention must be approved. Ibid. In this case the Court finds that the proposed Intervenors have provided a sufficient showing to meet each of the applicable criteria. The court makes this finding even after consideration of Branchburg's objection to the Pizzo application. Although the Township characterizes Pizzo's interest as vague, the Court finds that it is sufficiently specific to be considered as an interested party. Notably, Pizzo notified Branchburg of his interest by letter dated May 7, 2015.

In support of the Court's finding, the Court also adopts the well-reasoned opinion of Judge Wolfson which was quoted in part in this opinion.

This Court is mindful of the laudatory intent and purpose of the Mt. Laurel Doctrine which is to prohibit the discriminatory use of zoning powers and zoning practices which have the exclusionary effect of making housing unavailable to persons of low and moderate income and to provide remedies to address such practices when they are proven to exist. Certainly a process in which the Township's declaratory judgment action is essentially unopposed does not foster the Court's goal. Nor would a completely non-adversarial process enable the Court to assess whether the Township has engaged in zoning practices or other activities that materially affect zoning practices (such as sewer availability) that is contrary to the principles espoused in Mt. Laurel and its progeny.

In that regard, interested parties should be welcomed to present potential useful and critical voices which may have legitimate insights, arguments or analysis that are relevant to the Township's proposed plan. At worst, the Intervenors may present insights, arguments and analysis that is not useful to the Court or that their positions are so tainted and biased that their ideas or arguments should not be or will not be adopted. Notwithstanding these possibilities, the Court finds that in order for the issues that are likely to be presented in this matter to be properly vetted, that it should err on the side of encouraging and permitting participation and discourse rather than to exclude participation. That is especially true at this early stage of the matter when the issues have not been able to be analyzed. The Court's primary goal is to search for the truth. Active participation of interested parties is likely to aid the Court in that process. There are good reasons to permit limited intervention in this case.

With regards to any concern that is raised by requiring the Township to litigate this matter on several fronts with the various Intervenors with each of them having full and unbridled rights to demand discovery it will cause the process to be costly and inefficient but will also create a potential for abuse. In this regard, there is a legitimate issue that may be required to be addressed during the course of the litigation.

The Court agrees that the net effect of the Court's ruling should not to be to create a process that is so expensive and unwieldly that it unnecessarily costs the taxpayers money and take away from funds that should or could be used to create low and moderate income housing or even infrastructure improvements that facilitate that goal.

Again, however, the Court is confident that the process can be managed in a manner to avoid these pitfalls. The process will be managed by a Special Master[7]. The Court is confident that the experienced Masters who are appointed in these matters will be able to gauge the necessity for discovery or to seek Court assistance regarding an issue as is done in virtually any civil case. If the Master or the Court finds that the process is being abused, orders or rules will be put in place to curb the abuse.

The Court also recognizes that the addition of the Intervenors in this suit will make a complex matter more complex. A Mt. Laurel action, however, is complex by its nature. Even though the addition of a party may only serve a purpose of being able to satisfy only a small portion

[7] If the Special Master requires legal advice during the process in order to manage discovery issues, if any, the Master can apply to the Court for guidance or assistance.

of the Township's obligation, the inclusion of the Intervenors provides alternatives to consider when addressing the issues. The Court finds that these benefits outweigh the detriments.

Lastly, the Court believes that the inclusion of the Intervenors will foster the completion of a more complete record and thus limit the probability of subsequent litigation.

E. COURT'S DECISION CONCERNING INTERVENTION IN THIS CASE

The issues raised by the Proposed Intervenors in seeking to intervene are in accord to the issues raised by Branchburg in this declaratory judgment litigation. It is likely that there will be no material delay if the Proposed Intervenors are permitted to intervene because Proposed Intervenors are proposing a definite period of time to dispose of the legal issues raised by in this litigation. Furthermore, Proposed Intervenors did not delay in making this filing, as it was promptly filed after Branchburg filed its litigation.

Moreover, intervention would allow the intervenors the same procedural due process rights and protections as they would have enjoyed if this matter were filed with the Council on Affordable Housing ("COAH") under N.J.S.A. 52:27D-309. The ultimate result will be to provide facts and arguments to facilitate a Housing Element and Fair Share Plan that meets the constitutional requirements of the Mount Laurel doctrine. These submissions may provide the Court with useful and valuable information regarding the Township's fair share obligation resulting in a more thorough substantive plan review. Also, Pizzo's request is in full accord with the Fair Share Housing Act and the Court's holding in *In re N.J.A.C. 5:96 and 5:97*, by advocating the Court's adherence to the same procedural due process and substantive legal protections afforded to objectors under COAH Regulations.

Additionally, for all of the same reasons that were outlined in the Court's opinion concerning the standard of review to employ in this matter and in Judge Wolfson's opinion, this Court agrees that the Intervenor Motion filed by Pizzo will be GRANTED.

COURT'S CONCLUSION

Branchburg has participated in the COAH process to produce realistic and achievable plans for meeting its affordable housing obligations in full compliance with COAH requirements. Certification of the most recent 2008 plan is clear evidence of this. The Township continues in good faith to honor and implement those plans and add to its stock of affordable housing.

Going forward, the Township represents that it will continue to assess the continued viability of the rehabilitation, accessory apartment and special needs components of its plan and develop additional mechanisms if necessary to ensure that affordable units are provided.

The Court GRANTS the Township's Motion for Temporary Immunity.

The Court GRANTS the Intervenor's Motion to Intervene in this matter by filing the Answer (without a counterclaim) as proposed in its moving papers.

Counsel for Plaintiff is directed to prepare an appropriate Order in accordance with the Court's decision.