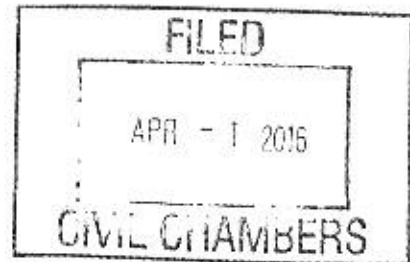


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GH Property Co. Branchburg, LLC and  
Branchburg, LLC



IN THE MATTER OF THE TOWNSHIP OF BRANCHBURG'S HOUSING ELEMENT AND FAIR SHARE PLAN	SUPERIOR COURT OF NEW JERSEY SOMERSET COUNTY LAW DIVISION  DOCKET NO. I-898-15  <u>CIVIL ACTION</u>  MOUNT LAUREL  ORDER
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THIS MATTER having been opened to the Court by proposed Intervenor/Defendants, K. Hovnanian North Jersey Acquisitions, ("K. Hovnanian North"), GH Property Co. Branchburg, LLC ("GH") and Branchburg, LLC ("Branchburg"), by way of Motion for Intervention Pursuant to Rule 4:33-1 and/or Rule 4:33-2 and the Court having considered the moving papers and any opposition submitted thereto, and for good cause having been shown:

IT IS ON THIS 1<sup>st</sup> day of April, 2016, ORDERED that:

1. The motion of K. Hovnanian North, GH and Branchburg seeking intervention in this matter is hereby GRANTED, and they

are hereby granted leave to file the Answer in Intervention in the form submitted on this motion.

2. A true and correct copy of this Order be served upon all counsel/interested parties within (7) seven days of the date hereof.



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HONORABLE THOMAS C. MILLER, P.J.Cv.

## MOTION TO INTERVENE

### A. PARTIES TO THE INTERVENOR MOTION

The Proposed Intervenors, K. Hovnanian North Jersey Acquisitions (“K. Hovnanian North”), GH Property Co. Branchburg, LLC (“GH”) and Branchburg, LLC (“Branchburg”), move to intervene in this matter.

### B. FACTUAL CONTENTIONS IN SUPPORT OF PROPOSED INTERVENORS

K. Hovnanian North Jersey Acquisitions (“K. Hovnanian North”), GH Property Co. Branchburg, LLC (“GH”) and Branchburg, LLC (“Branchburg”) claim to be an interested party who is the contract purchase of property in the Township that is 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. Factual Contentions

Defendants K. Hovnanian North Jersey Acquisitions (“K. Hovnanian North”), GH Property Co. Branchburg, LLC (“GH”) and Branchburg, LLC (“Branchburg”) seek to develop a property which they are in the process of finalizing a contract for the purchase of which encompass the entire project.

GH is the contract purchaser of Block 70, Lot 18 and Lots 24 and 24.01 which is approximately 27 acres. K. Hovnanian North is the contract purchaser of the contracts on Lot 18 and Lots 24 and 24.01. Branchburg is the contract purchaser of Block 70, Lot 18 which is approximately 44.4 acres. The Intervenors are interested in constructing an inclusionary project on the property which will include a substantial amount of units reserved for occupancy by low and moderate income households.

Intervenors have been actively meeting with Township Officials to discuss the development of the property since 2008. Intervenors revised the proposed development and met with members of the Township Committee through 2012, 2013, 2014 and 2015. The latest meeting was in January 2016. During these meetings, Intervenors provided a variety of planning studies, fiscal analysis and numerous variations of concept plans of the property. Intervenors and the Township have been unable to amicably resolve the rezoning of the property. Intervenors allege to have spent a significant amount of time and money seeking to develop an inclusionary

development on the Property over the years. By letter dated March 11, 2016 the Intervenors submitted a response to the Township's request for Affordable Housing Development Projects.

**C. JUDGE WOLFSON'S 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**

**I. 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.S.A. 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 Mechan 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.

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 be to create a process that is so expensive and unwieldy 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<sup>1</sup>. 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 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. Any possible delay is outweighed by the interests of justice that are served by providing the movant to its day in Court on the issues before the Court. Furthermore, Proposed Intervenors did not delay in making this filing, as it was promptly filed after Branchburg filed its litigation.

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<sup>1</sup> 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.



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, Sycamore'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 Sycamore Developers, LLC will be GRANTED.

#### COURT'S CONCLUSION

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.