TOWNSHIP OF SOUTH BRUNSWICK

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January 21, 2016

Via email and regular mail

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

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

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick ("Township") in opposition to the Motion for Reconsideration filed by American Properties at South Brunswick, LLC, ("American Properties"), in the above referenced matter, currently returnable before Your Honor on February 5, 2016.

American Properties initially filed a Motion to Intervene in the above-referenced matter on or about December 15, 2015. The Township filed opposition to the motion by way of Letter Memorandum dated December 23, 2015 (Exhibit A). By order dated January 8, 2016, this court denied the motion.

American Properties now argues that the court's decision of January 8, 2016, should be reconsidered because "the court failed to appreciate the significance of the narrow relief sought by American Properties." See American Properties' Letter Memorandum dated January 19, 2016, p. 4-5. It argues that it seeks intervention "solely for the purpose of addressing whether the Township has proposed a constitutionally compliant affordable housing plan." Id. at p. 5.

Contrary to the argument of American Properties, one of the standards by which motions for reconsideration are judged is not whether "the court failed to appreciate the significance of the narrow relief sought." Although American Properties correctly quotes the actual standard, it misconstrues the standard in a strained attempt to justify reconsideration.

As conceded by American Properties, "[r]econsideration is a matter within the sound discretion of the court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990) (citing Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987)). Motions for reconsideration "cannot be used to expand the record and reargue a motion." Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div.), certif. den. 195 N.J. 521 (2008). Nor can they be used to offer a "new theory" as to liability in a case where the factual predicates were previously available. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Rather,

> [r]econsideration should be utilized only for those cases which fall into that narrow corridor in which either (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. D'Atria, supra. at 401; see also Town of Phillipsburg v. Block, 380 N.J. Super. 159, 175 (App. Div. 2005).

American Properties attempts to rely upon the second category set forth above to justify its motion for reconsideration. It is apparent, however, that the standard to be applied is not whether "the court failed to appreciate the significance ***of the narrow relief sought***" but rather that "the court either did not consider, or failed to appreciate the significance ***of probative, competent evidence.***" Nothing contained in American Properties' January 19, 2016, Letter Memorandum or the accompanying certification indicates what "probative, competent evidence" the court failed to appreciate. Thus, there is absolutely no basis for reconsideration of the court's decision.

On the contrary, American Properties merely reiterates the same argument it made in support of its initial motion for intervention. At that time, it presented no opposition to the assertions made by the Township in its Declaratory Judgment complaint, with the proposed Answer and Counterclaim merely "[leaving] Petitioner to its proofs." Without offering any substantive basis for doing so, American Properties' proposed Answer and Counterclaim then merely makes an unsupported allegation that the Township has failed to meet its "obligation to provide a realistic opportunity for development of its fair share of the region's need for affordable housing." (See draft Answer and Counterclaim, Exhibit E to certification of Marc D. Policastro, Esq.). There was no hint of any "probative, competent evidence" set forth in the motion or the proposed pleading that the court could have "failed to appreciate." Likewise, no new information or facts have been submitted by American Properties to justify a reconsideration of the court's decision based upon the court's alleged "failure to appreciate" what was presented.

Accordingly, American Properties has failed to satisfy the requirements for grant of a Motion for Reconsideration since it has not demonstrated any facts which tend to show that the court failed to appreciate the significance of any probative, competent evidence.

For all of the foregoing reasons, the Motion for Reconsideration filed on behalf of American Properties should be denied. In the event the court decides to grant the Motion for Reconsideration, it is respectfully submitted that the court should continue to deny American Properties' Motion to Intervene for the reasons set forth in the court's order dated January 8, 2016, as well as for the reasons previously expressed in the Township's Letter Memorandum dated December 23, 2015, the substance of which is incorporated herein by reference.

Respectfully submitted,

s/Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw

Cc: Middlesex County Superior Court – Motions Clerk
Robert A. Kasuba, Esq., attorney for AVB
Henry Kent-Smith, Esq., attorney for Richardson
Kenneth D. McPherson, Jr., Esq., attorney for SBC
Kevin Moore, Esq., attorney for Stanton Girard
Brett Tanzman, Esq., attorney for Windsor
Marc D. Policastro, Esq., attorney for American Properties
Kevin Walsh, Esq., and Adam Gordon, Esq., attorneys for FSHC
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
Christine Nazzaro-Cofone, PP, Special Master

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December 23, 2015

Via email and regular mail

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

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

Dear Judge Wolfson:

Please accept this Letter Memorandum on behalf of the Township of South Brunswick ("Township") in opposition to the Motion to Intervene filed by American Properties at South Brunswick, LLC, ("American Properties"), in the above referenced matter, currently returnable before Your Honor on January 8, 2016.

This Court has already established the parameters by which these motions are to be measured and when, and under what conditions, such motions are to be granted, in In the Matter of the Adoption of the Monroe Township Housing Element and Fair Share Plan and Implementing Ordinances, unpublished opinion dated July 9, 2015, Superior Court of New Jersey, Law Division, Docket # MID-L-3365-15 ("In Re Monroe")[1].

THE MOTION TO INTERVENE SHOULD BE DENIED

The Uniform Declaratory Judgments Act, N.J.S.A. 2A:16-51, et seq., governs declaratory judgment actions in New Jersey. Although the act requires that "all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding" (See N.J.S.A. 2A:16-56), certain additional requirements must be met before an interested party is permitted to intervene. Among these threshold requirements, the primary object of a party's interest in any pending matter must be to "afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." N.J.S.A. 2A:16-51; Bergen County v. Port of New York Authority, 32 N.J. 303 (1960). In addition, there must be a "justiciable controversy"

[1] Attached to the Certification of Matthew N. Fiorovanti, Esq., as Exhibit C.

between adverse parties. Young v. Byrne, 144 N.J. Super. 10 (Law Div. 1976). Indeed, a Court's ability to issue a declaratory judgment should not be used to obtain an advisory opinion. Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008). On the contrary, where an interested party's claim does not raise a judicial controversy that is "ripe for judicial determination," that party should not be permitted to assert its claim via a declaratory judgment proceeding. See Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295 (App. Div. 2005).

Motions to intervene are governed by Rule 4:33-1, which states:

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

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

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

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

The Motion to Intervene is not Timely

The court has the discretion to determine the timeliness, under all the circumstances, of the intervention application, and may deny the application if it is deemed untimely. See State v. Lanza, 39 N.J. 595 (1963); ACLU v. Hudson County, 352 N.J. Super. 44, 64 (App. Div.), certif. den. 174 N.J. 190 (2002). The Township's Declaratory Judgment Action was filed on July 1, 2015. Various parties filed motions to intervene within weeks of that filing, all of which the court decided on July 30, 2015. Since that time there have been several Case Management Conferences; preparation of a draft preliminary Third Round Housing Element and Fair Share Plan; review of the draft preliminary plan by the court, the Special Master and all parties; numerous meetings and discussion between the parties with the assistance of the Special Master; and submission of an amended draft preliminary Third Round Plan that includes some of the objector/intervenors' properties. The court is scheduled to review the amended draft preliminary plan at the next Case Management Conference, scheduled for January 13, 2016.

Some six months later, American Properties now seeks to intervene for the first time. Given the advanced stage of this matter, and the significant work that has already been devoted toward

formulating a Third Round Plan that is acceptable to the court, American Properties should not be permitted to intervene at this late juncture.

American Properties' Interest in the Transaction has not been Adequately Established

As this Court has already determined, in a declaratory judgment action filed by a municipality in response to the decision in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. (2015) ("Mount Laurel IV"), interested parties may intervene, but their intervention is "limited to the question of whether the particular town has complied with its constitutional housing obligations." In Re Monroe, supra., at 9. In its proposed Answer and Counterclaim, American Properties offers no opposition to the assertions made by the Township in its complaint, and merely "leaves Petitioner to its proofs." Without offering any substantive basis for doing so, American Properties then merely makes an unsupported allegation that the Township has failed to meet its "obligation to provide a realistic opportunity for development of its fair share of the region's need for affordable housing." (See draft Answer and Counterclaim, Exhibit D to certification of Matthew N. Fiorovanti, Esq.).

American Properties therefore offers no evidence that it has an adequate interest in the matter pending before the court. The ability of American Properties to advance the issues in the litigation is suspect at best. More likely, American Properties will add nothing more to the litigation than what is already being contributed by the other objector/intervenors in the case. Its participation will therefore merely be a duplication of what is already present through the other parties in the case.

Moreover, although it is alleged in the Letter Memorandum submitted by American Properties that it owns certain property in South Brunswick, nothing in the proposed Answer and Counterclaim indicates that it has any interest in property located in South Brunswick. The only property identified in the proposed Answer and Counterclaim is located in Iselin, NJ. Thus, there is even a question as to its standing to pursue leave to intervene.

There is Already Adequate Protection of American Properties' Interests

A motion for intervention may be denied if the applicant's interest is already being represented in the litigation. See Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1 (App. Div. 2006); White v. White, 313 N.J. Super. 637 (Ch. Div. 1998). The only arguable interest asserted by American Properties for intervention is "to participate in the preliminary judicial determination of the Township's compliance with its constitutional affordable housing obligations." (See American Properties' Letter Brief dated December 14, 2015, page 3). There are no less than five (5) objector/intervenors already participating in this case, plus Fair Share Housing Center. Each has been permitted to intervene so as to participate in the preliminary judicial determination of the Township's compliance with its constitutional affordable housing obligations. As such, this issue will be fully analyzed, briefed and tested by the current intervenors to the fullest extent possible. There is no need for yet another party to intervene to do the same. At some point, the

"assistance" to be offered by these intervenors merely becomes duplicative and will not further assist the court or the parties in completing the necessary determination of constitutional compliance.

In addition, there is no "uncertainty [or] insecurity with respect to [American Properties' specific] rights, status and other legal relations." This Court has already adequately protected its rights related to any proposed exclusionary zoning/builder's remedy claims that American Properties might have, holding that: "If, after having received a full and fair opportunity to comply with its constitutional obligations, the Court concludes that [the Township] is 'determined to be noncompliant,'" this Court has firmly established that American Properties "may then initiate and prosecute exclusionary zoning actions against the [Township]." In Re Monroe, supra., at 17. This resolves any "uncertainty" with respect to American Properties' specific rights and indeed more than adequately protects those rights in the instant matter.

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

Respectfully submitted,

s/Donald J. Sears

Donald J. Sears
Director of Law

DJS/lw

Cc: Middlesex County Superior Court – Motions Clerk
Robert A. Kasuba, Esq., attorney for AVB
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Matthew N. Fiorovanti, attorney for American Properties
Kevin Walsh, Esq., and Adam Gordon, Esq., attorneys for FSHC
Benjamin Bucca, Jr., Esq., attorney for SB Planning Board
Christine Nazzaro-Cofone, PP, Special Master