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FILED & RECEIVED #1  
2015 JUL - 1 A 8: 56  
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Attorney for Declaratory Plaintiff,  
Township of South Brunswick

<p>IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF SOUTH BRUNSWICK FOR A JUDGMENT OF COMPLIANCE AND REPOSE AND TEMPORARY IMMUNITY FROM <u>MOUNT LAUREL</u> LAWSUITS</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY</p> <p>DOCKET NO.:</p> <p>CIVIL ACTION – <i>MOUNT LAUREL</i></p> <p>COMPLAINT SEEKING TEMPORARY IMMUNITY FROM <u>MOUNT LAUREL</u> LAWSUITS, APPROVAL OF THIRD ROUND SPENDING PLAN AND JUDGMENT OF COMPLIANCE AND REPOSE</p>
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Declaratory Plaintiff, Township of South Brunswick (hereinafter the "Township" or "South Brunswick") a municipal corporation of the State of New Jersey, County of Middlesex, with principal offices located at 540 Ridge Road, Monmouth Junction, New Jersey, alleges and says:

**JURISDICTIONAL AND LEGAL SETTING**

1. South Brunswick is a municipal corporation of the State of New Jersey.
2. The Mayor and Township Council constitute the governing body of the Township of South Brunswick and is responsible, *inter alia*, to ensure that South Brunswick takes the actions necessary to achieve and maintain compliance with its obligations under the laws collectively known as the "Mount Laurel doctrine."

3. The “Mount Laurel doctrine” refers to the affordable housing laws of New Jersey resulting from the landmark cases commonly referred to as “Mount Laurel I” (So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 67 N.J. 151 (1975), cert. denied, 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975)), “Mount Laurel II” (So. Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983)), the New Jersey Fair Housing Act or “FHA” (N.J.S.A. 52:27D-301 et seq.) and related laws.
4. The Planning Board of the Township of South Brunswick is a municipal agency responsible under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., (“MLUL”), for formulating the Housing Element of the Township’s Master Plan in a manner that complies with the Township’s obligations under the Mount Laurel doctrine.
5. South Brunswick is a community comprised of a substantial percentage of low and moderate-income households, developed through a variety of inclusionary and non-exclusionary housing types.
6. South Brunswick therefore has not used its zoning powers to exclude the region's low and moderate-income households.
7. Nevertheless, under the last version of regulations promulgated by the New Jersey Council On Affordable Housing (“COAH”), South Brunswick had a potentially significant Third Round affordable housing obligation.
8. COAH's Third Round regulations, however, were invalidated by the Supreme Court in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 215 N.J. 578 (2013), and therefore it is not possible to ascertain any municipality's third round responsibilities at this time, based upon COAH’s Third Round rules.
9. In the matter of In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015)(“In re COAH”), the N. J. Supreme Court determined that

COAH is not capable of functioning as intended by the FHA because there are no Third Round Rules.

10. Accordingly, municipalities must submit to judicial review for a determination of their compliance with the constitutional obligation to provide for opportunities for the development of low and moderate income housing.
11. In this regard, municipalities may file a declaratory judgment action seeking an order of temporary immunity from “builder’s remedy” lawsuits as well as entry of a judgment of compliance and order of repose, protecting it from such suits.
12. In reviewing such actions, the court must use the methodologies used by COAH in the First and Second Round Regulations in order to calculate a municipality’s share of the present and prospective statewide and regional affordable housing need.
13. In In re COAH, the Supreme Court sought to create a judicial process (a) that reflects “as closely as possible the FHA’s processes and provide the means for a town transitioned from COAH’s jurisdiction to judicial actions. . .” and (b) that gives municipalities that transfer from COAH to the courts “like treatment to that which was afforded by the FHA to towns that had their exclusionary zoning cases transferred to COAH when the Act was passed. See N.J.S.A. 52:27D-316.” In re COAH, at 21-22.
14. Based upon these rulings, trial courts must comply with the mandatory provisions of N.J.S.A. 52:27D-307 by (a) determining regions; (b) calculating the present and prospective regional need for Round 3; and (c) establishing the standards with which municipalities must comply (including a determination of the municipality’s fair share obligation) to secure approval of their Affordable Housing Plans.

15. N.J.S.A. 52:27D-309 and 316 provided that municipalities would have five months to prepare a plan from the date upon which COAH adopted “criteria and guidelines.”
16. The Supreme Court, relying upon N.J.S.A. 52:27D-309 and 316, stated that once a municipality under COAH’s jurisdiction submits itself to the jurisdiction of a trial judge, it would have five months to prepare, adopt/endorse and file a plan. Id. at 27.
17. Consistent with these statutory provisions, municipalities formerly under COAH’s jurisdiction that now find themselves in court due to COAH’s failures, should be given five months from the date upon which the trial judge establishes the “criteria and guidelines” with which they must comply to prepare a plan.

#### **TOWNSHIP’S FIRST AND SECOND ROUND COMPLIANCE**

18. In reviewing a municipality’s compliance, trial courts must first examine if there is any unmet prior round obligation.
19. South Brunswick has almost 30 years of voluntary participation in the COAH process since COAH’s initial adoption of affordable housing regulations for the First Round (1987 –1993) after the establishment of the FHA in 1985.
20. In the First Round, the Township adopted a housing element and fair share plan addressing a 669-unit pre-credited need (603 new construction/66 rehabilitation), petitioned COAH and received First Round substantive certification from COAH on August 3, 1987.
21. The Township petitioned COAH for Second Round substantive certification on March 6, 1995. The Township’s 1987 - 1999 cumulative Second Round obligation, as determined by COAH per N.J.A.C. 5:93, consisted of a 937-unit pre-credited need (842 new

construction/95 rehabilitation). COAH approved the Township's Second Round housing element and fair share plan and granted Second Round substantive certification on February 4, 1998.

22. To address its 95-unit rehabilitation share, the Township sought and was granted a waiver by COAH to satisfy its rehabilitation share with new construction pursuant to N.J.A.C. 5:93-5.1.
23. This rehabilitation share, which was based on the 1990 census, was updated by COAH after the 2000 census to a rehabilitation share of 36.
24. In addition to new construction, the Township also sought to satisfy its rehabilitation share through participation in the Middlesex County Urban Housing Preservation Program, which provides funds to low- and moderate-income households for rehabilitation.
25. To address its known 842-unit new construction obligation based on COAH's Second Round regulations (N.J.A.C. 5:93), the Township previously provided crediting documentation to COAH.
26. Pursuant to COAH's Second Round rules at N.J.A.C. 5:93, et seq., the Township is entitled to the following credits/bonuses for affordable units actually built:

<u>Development</u>	<u>Units</u>
Deans Apartments	40 (prior cycle credits)
Charleston Place I	54 (prior cycle credits)
Regal Point	5 (affordable family sales)
Monmouth Walk	43 (affordable family sales)
Nassau Square	49 (affordable family sales)
Woodhaven	80 (affordable family rentals)
Charleston Place II	30 (affordable senior rentals)
Summerfield	70 (affordable family sales)
Deans Pond Crossing	20 (affordable family sales)
Southridge/Southridge Woods	124 (affordable family rentals)
CIL-Wynwood	7 (alternative living arrangements)
CIL Woods	16 (alternative living arrangements)
Wheeler Rd Group Home	3 (alternative living arrangements)
Major Rd Group Home	3 (alternative living arrangements)
Oak Woods	73 (affordable senior rentals)
Buckingham Place	23 (affordable senior rentals)
ARC of Middlesex County	15 (alternative living arrangements)
Dungarvin/Eclipse	8 (alternative living arrangements)
Community Options	8 (alternative living arrangements)
Triple C Housing	6 (alternative living arrangements)
REACH (Market to Affordable)	18 (affordable family sales)
Rental Bonuses (Prior Round)	<u>187</u>
TOTAL CREDITS	882

27. The Township's crediting of 187 prior round rental bonuses is based on COAH's certification reports as well as based on COAH's Second Round regulation at N.J.A.C. 5:93- 5.15, which permits a 2-for-1 rental bonus for built non-senior affordable rentals up to the municipal prior round rental obligation.
28. Pursuant to N.J.A.C. 5:93-5.15(d), the Township is eligible for prior round rental bonuses up to its prior round rental obligation of 187 rentals. The prior round rental obligation is based on COAH's formula at N.J.A.C. 5:93-5.15(a) which sets a rental obligation at 0.25 [municipal pre-credited need – prior cycle credits (1980 – 1986 credits) – the impact of the 20 percent cap – the impact of the 1,000 unit limitation – the rehabilitation

component]. Thus, for South Brunswick  $0.25((842 + \text{rehab share}) - 94 - 0 - 0 - \text{rehab share}) = 187$ .

29. In summary, the Township has fully addressed its prior round (combined First and Second Rounds) 878-unit obligation (842 new construction/95 (reduced to 36) rehabilitation) with 882 built affordable units, leaving a credit of 4 units to be applied to the as yet unknown Third Round obligation.

### **TOWNSHIP'S THIRD ROUND COMPLIANCE EFFORTS**

30. On December 16, 2005, the Township petitioned COAH for Third Round substantive certification by submitting a Third Round housing element and fair share plan addressing COAH's original Third Round rules at N.J.A.C. 5:94. The Township also sought COAH approval of its Third Round Spending Plan at that time.
31. COAH had not acted on the Township's 2005 Third Round plan before the Appellate Division invalidated COAH's Third Round 'growth share' methodology and portions of COAH's initial Third Round affordable housing regulations in In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1 (App. Div. 2007), and directed COAH to adopt revised Third Round rules.
32. Municipalities that had not received substantive certification under the initial Third Round rules and wished to continue with the COAH process (such as South Brunswick) were required to re-petition COAH for substantive certification under its revised 2008 rules by December 31, 2008.
33. An Amended Third Round plan and revised Third Round Spending Plan were prepared for the Township consistent with COAH's revised Third Round rules at N.J.A.C. 5:97,

which went into effect on June 2, 2008 and were amended on October 20, 2008. The Township again petitioned COAH for Third Round certification on December 31, 2008 with a Housing Element and Fair Share Plan and proposed Spending Plan, adopted by the Planning Board on December 10, 2008, and endorsed by the governing body on December 16, 2008 that addressed the Township's cumulative 1987 - 2018 affordable housing obligation of a 36-unit Rehabilitation Share, a prior round obligation of 841 units (First and Second Rounds combined) and a Third Round growth share obligation of 948 units.

34. Although COAH began to conduct a substantive review of the Township's 2008 Plan, it did not certify the Plan, nor did it approve the Township's proposed Spending Plan, prior to the Appellate Court decision of October 8, 2010, invalidating COAH's Third Round growth share methodology, or prior to issuance of the Supreme Court decision in September 2013, which invalidated the Amended Third Round regulations.
35. Despite the fact that COAH never certified the Township's Third Round Plan, the Township proceeded to take steps to produce affordable housing.
36. The Township is entitled to the following Third Round credits for units that have actually been built and/or approved:

<u>Development</u>	<u>Units</u>
Woodhaven Terr (Deans Apts) Extension of controls	40 (affordable family rentals)
Sassman development	1 (affordable family sales)
Menowitz development	8 (affordable senior sales)
Dungarvin/Eclipse	4 (alternative living arrangements)
REACH (Market to Affordable)	128 (affordable family sales/rentals)
Wilson Farm Redevelopment (1.33 credits per 1 unit)	399 (affordable senior and alternative living rentals)
Prior Round Excess credits	4
<b>TOTAL CREDITS</b>	<b>584</b>



37. As such, the Township has taken significant steps toward satisfying its as yet undetermined Third Round obligation.
38. Since the Township petitioned COAH for Third Round certification in 2005 and again in 2008, and its petition for certification was pending at the time of the invalidation of the Third Round rules in October 2010, it is considered to be a “participating” municipality before COAH.
39. As a “participating” municipality, the Township is in a special class in that the Supreme Court held in In re COAH that the trial court should view more favorably a request for immunity where the municipality had devised a Third Round Housing Element and took action toward adopting ordinances and/or producing housing in furtherance of its plan, as long as said municipality files a Declaratory Judgment Action along with a motion for Temporary Immunity between June 8, 2015 and July 8, 2015.
40. In light of these various actions, and by filing this Complaint and the associated Motion To Maintain Immunity from Mount Laurel Lawsuits, South Brunswick has demonstrated its commitment to comply voluntarily, rendering any exclusionary lawsuit unnecessary.

## **COUNT ONE**

### **Temporary Immunity**

41. The allegations contained in paragraphs 1 – 40 are hereby repeated, reiterated and incorporated herein as if fully set forth at length.
42. In Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158, 265-266 (1983) (hereinafter "Mount Laurel II"), the N.J. Supreme Court encouraged trial courts to be creative in implementing the Mount Laurel doctrine:

"municipalities and trial courts are encouraged to create other devices and methods for meeting fair share obligations."

43. In J.W. Field Co., Inc., v. Franklin Tp., 204 N.J. Super. 445, 456 (Law Div. 1985), the Honorable Eugene D. Serpentelli, A.J.S.C., one of the three original Mount Laurel trial judges, responded to the Supreme Court's call to creativity by offering immunity from Mount Laurel lawsuits, pending ordinance revision, to all municipalities that seek to voluntarily comply through a declaratory relief procedure announced in that decision.
44. In Hills Development Co. v. Bernards Tp. in Somerset County, 103 N.J. 1, 65 (1986)("Mount Laurel III"), the Supreme Court praised the Mount Laurel trial judges for "their innovative refinement of techniques for the process of litigation," thereby giving "credibility to the implementation of the Mount Laurel doctrine."
45. Temporary immunity represented an "innovative refinement of techniques for the process of litigation" and the Supreme Court acknowledged this technique in Mount Laurel III.
46. In K. Hovnanian Shore Acquisitions, L.L.C. v Berkeley Township, Docket No. A-594-01T1 (App. Div. 2003), found on Westlaw at 2003 WL 23206281, the Appellate Division affirmed the temporary immunity procedure referenced in J.W. Field and specifically applied by Judge Serpentelli in the Berkeley Township case.
47. In K. Hovnanian Shore Acquisitions, L.L.C. v Berkeley Township, the Appellate Division also stated that a "builder's remedy" should only be granted as a "last resort" and that voluntary compliance is one of the fundamental goals of the Mount Laurel doctrine.

48. The Township has adopted a Housing Element and Fair Share Plan.
49. The Township has taken formal action to commit to comply with its Mount Laurel obligations voluntarily, thereby rendering any Mount Laurel lawsuits against it as "unnecessary litigation."
50. Specifically, on May 8, 2012, the Township Council adopted Resolution 2012-251 wherein it committed to spend in excess of \$9.7 million in municipal affordable housing trust fund money on various programs/projects in order to provide for the creation of low- and moderate-income housing opportunities in South Brunswick. By doing so, the Township demonstrated its continuing, firm commitment to comply voluntarily with its obligations to provide for affordable housing.
51. More recently, on December 23, 2014, the Township adopted Resolution 2014-505, wherein the Township (a) stipulated that, subject to further analysis, it has satisfied its known affordable housing obligations; and (b) declared its commitment to take action to satisfy not only its current Mount Laurel obligations but also whatever Third Round obligations are ultimately assigned.
52. Simultaneous with the filing of this declaratory complaint, the Township is also filing a Motion for Temporary Immunity, seeking protection from any Mount Laurel lawsuits as it complies with its Mount Laurel obligations voluntarily.
53. Given all that South Brunswick has done to ensure the creation of low and moderate income housing, and its commitment to comply with any future obligation once that obligation is determined, it would be particularly unfair for the Township to suffer exposure to any exclusionary zoning lawsuits.

54. The declaratory relief and temporary immunity procedure authorized by the above cases will facilitate the Township's objectives as set forth herein.
55. While the Court reviews the Township's Affordable Housing Plan, and while the Township and its Planning Board respond to any concerns that the Court and/or its Special Master may express, immunity must remain in place under common law and statutory principles.

**WHEREFORE**, the Township of South Brunswick, as a Declaratory Plaintiff, hereby demands judgment granting the following relief:

1. The entry of an Immunity Order protecting the Township, its Mayor and Council and its Planning Board from all Mount Laurel lawsuits:
  - (a) while the Court determines the Township's fair share obligations and the other standards with which municipalities must comply;
  - (b) while the Township prepares, adopts, endorses, and files its amended Affordable Housing Plan and provides the required public Notice to comport with the Supreme Court's directives and intent in In re COAH;
  - (c) while the Court and any Master the Court may appoint reviews the Township's amended Affordable Housing Plan and considers any comments to the Plan filed by any interested parties;
  - (d) while the Township and its Planning Board respond to any concerns the Court or its Master may express; and
  - (e) for such further period of time as the Court deems just and reasonable under the circumstances.
2. In the event the Court declines to grant the relief set forth in paragraph 1, the entry of an Immunity Order for five months subject to periodic extensions upon application to the Court.

## COUNT TWO

### Approval of the Township's Third Round Housing Element and Fair Share Plan and Entry of a Judgment of Compliance and Repose

56. The allegations contained in paragraphs 1 - 55 are hereby repeated, reiterated and incorporated herein as if fully set forth at length.
57. Pursuant to In re COAH, the trial court is required to determine the Third Round present and prospective statewide and regional affordable housing need.
58. In doing so, the court must use the methodologies used by COAH in the First and Second Round Regulations.
59. Once statewide and regional needs are determined, the trial court is required to calculate a municipality's share of the Third Round present and prospective need.
60. The Township will fully address its Third Round responsibilities upon a determination by the court of the Township's share of present and prospective need.
61. The Township is entitled to five (5) months from the date the trial court determines the Township's share of present and prospective need to work with the Planning Board to develop, adopt and endorse a Third Round Housing Element and Fair Share Plan to satisfy its Third Round obligation, subject to all credits and adjustments to which South Brunswick may be entitled.
62. Once the Township files its adopted and endorsed affordable housing plan, it will seek Court approval of same pursuant to a properly-noticed Compliance Hearing.
63. Ultimately, the Township requests that this Court enter a Judgment of Compliance and Repose formally declaring that the Township's Third Round affordable housing plan provides a "realistic opportunity" for its known affordable housing obligations.

64. In taking this course of action, the Township intends to voluntarily comply with its Mount Laurel obligation with no need for any "last resort" builder's remedies or other Mount Laurel lawsuits.
65. This course advances the public interest because it enables the Township and its Planning Board to focus the Township's limited resources on compliance and avoids the need to divert those finite resources to defending lawsuits by developers and/or by nonprofit organizations seeking builder's remedies.

**WHEREFORE**, the Township of South Brunswick, as a Declaratory Plaintiff, hereby demands judgment granting the following relief:

1. Giving the Township, its governing body and its Planning Board at least five (5) months from the date its Third Round obligation is determined by the court in order to adopt an amended Housing Element and Fair Share Plan to address its Third Round obligations.
2. Granting a Judgment of Compliance and Repose approving those components of the Township's Affordable Housing Plan that the Township designates to satisfy any unmet prior round components of the Township's fair share obligation as well as the Township's Third Round obligations, which will insulate the Township, its Mayor and Council and its Planning Board from any Mount Laurel suit for a period of 10 years.
3. Granting the Township such additional relief as the Court deems reasonable and just.

### COUNT THREE

#### Approval of the Township's Amended Mount Laurel Spending Plan and Guidelines Concerning When Trust Funds are Properly "Committed"

66. The allegations contained in paragraphs 1 - 65 are hereby repeated, reiterated and incorporated herein as if fully set forth at length.
67. Subject to certain conditions, the FHA expressly permits municipalities to collect fees from residential developers and requires municipalities to collect development fees from non-residential developers. See N.J.S.A. 52:27D-329.2.
68. Upon collection, municipalities must deposit all relevant fees into a Mount Laurel Trust Fund.
69. Municipalities cannot expend Mount Laurel funds without securing Spending Plan approval from COAH, which has "exclusive jurisdiction" to do so pursuant to N.J.S.A. 52:27D-329.2.
70. COAH has approved the Township's Spending Plan in the past; however, it has not approved the Township's Third Round Spending Plan.
71. Since COAH is no longer a functioning agency, the Appellate Division ruled that COAH violated its statutory duty to adopt regulations providing guidance to municipalities on the "commit to expend" requirement set forth in N.J.S.A. 52:27D-329.2. In re Failure of the Council on Affordable Housing To Adopt Trust Fund Commitment Regulations, 440 N.J. Super 220 (App. Div. 2015) ("In re Affordable Housing Trust Funds").
72. Since that ruling, COAH has also declined to approve Spending Plans, leaving that task to trial judges who will determine the viability of whatever affordable housing plan evolves out of the judicial process.

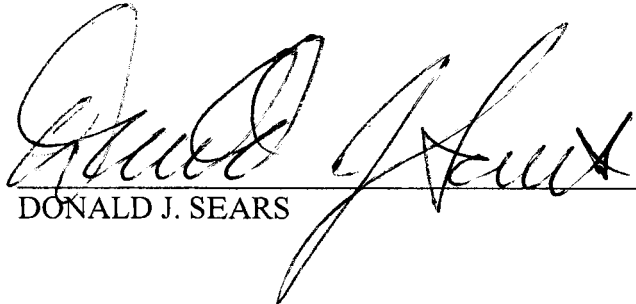
73. The Township intends to submit a duly-adopted amended Mount Laurel Spending Plan to the Court for review and approval so that it can continue to expend funds to facilitate implementation of the Township's Affordable Housing Plan.
74. As to the commit to expend requirement previously referenced, the FHA also requires Mount Laurel funds to be expended or committed for expenditure within four years of collection. N.J.S.A. 52:27D-329.2.
75. Relative to this provision, however, the Legislature directed COAH to promulgate regulations to define when trust funds are properly "committed." Ibid.
76. In In re Affordable Housing Trust Funds, the Appellate Division ruled that COAH violated its statutory duty to adopt regulations providing guidance to municipalities on the "commit to expend" issue.
77. Consistent with the Supreme Court's rulings in In re COAH, the Appellate Division held: "The use and disposition of [trust] funds will hereafter be decided, in the first instance, by Mount Laurel-designated trial judges." Ibid.
78. In light of the relevant statutory provisions and the conclusions recently rendered by the Appellate Division, the Township is seeking (a) a judicial determination defining when its trust funds are properly "committed;" and (b) a reasonable period of time to permit the Township to demonstrate that none of its collected Mount Laurel funds should be forfeited to the state.

**WHEREFORE**, the Township of South Brunswick, as a Declaratory Plaintiff, hereby demands judgment granting the following relief:



1. The entry of an Order approving the Township's Mount Laurel Spending Plan and declaring the Township is free to expend the funds consistent with the programs contemplated in its Spending Plan.
2. The entry of an Order defining the circumstances and proofs needed to demonstrate when Mount Laurel funds are properly committed pursuant to N.J.S.A. 52:27D-329.2.
3. An order indicating that the Township has complied with the "commit to expend" requirement of N.J.S.A. 52:27D-329.2, or, in the alternative, a reasonable amount of time to meet the "commit to expend" standard as defined by the court.
4. The grant of such other relief as may be just and equitable.

Attorney for Declaratory Plaintiff,  
Township of South Brunswick



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DONALD J. SEARS

Dated: July 1, 2015

CERTIFICATION

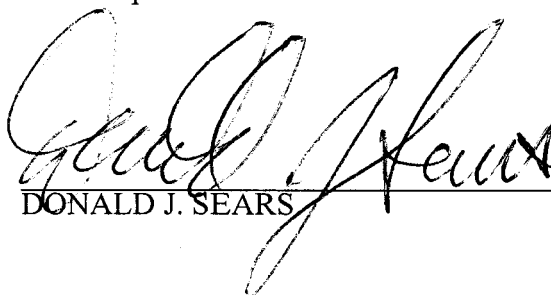
I hereby certify that the within matter is not the subject of any other related action pending in any other Court or arbitration process of which the undersigned is aware, except for the matter entitled South Brunswick Center, LLC, v. Mayor and Municipal Council of the Township of South Brunswick in their Official Capacities; Township of South Brunswick; Planning Board of Township of South Brunswick, bearing Docket No. MID-L-3669-14, currently pending in the Superior Court, Law Division, Middlesex County.

I further certify that no other related action or arbitration process is contemplated by the Township at this time.

I further certify that it is not contemplated that any other party should be joined in this action at this time other than the South Brunswick Planning Board and such other “interested parties” as may be determined pursuant to the N. J. Supreme Court’s decision in In re Adoption of N.J.A.C. 5:96 & 5:97 by N.J. Council on Affordable Housing, 221 N.J. 1 (2015). I certify that I did serve or will promptly cause to be served a Notice of the filing of the within action upon such “interested parties” as are known at this time.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Attorney for Declaratory Plaintiff,  
Township of South Brunswick



DONALD J. SEARS

Dated: July 1, 2015