WEINER LAW GROUP LLP

ATTORNEYS AT LAW
www.weiner.law

RONALD D. CUCCHIARO
Member of the Firm
rcucchiaro@weiner.law

November 3, 2023

Via eCourts
Honorable David A. Nitti, J.S.C.
Superior Court of New Jersey
Monmouth County Courthouse
71 Monument Street
Freehold, NJ 07728

Re: Natalie Perretta, et al. v. Tp. of Howell Planning Board
Docket No.: MON-L-001723-23
File No. HOW-963L

Dear Judge Nitti:

This firm represents the Defendant, Township of Howell Planning Board ("Board") in the above-referenced matter. Please accept this letter in lieu of a more formal brief in reply to the Brief in opposition to the Motion to Dismiss filed by Plaintiffs.

The Board continues to rely upon its Brief in support of its Motion to Dismiss and adds the following to supplement the argument.

I. Plaintiffs Have Failed to Include an Indispensable Party

Plaintiffs do not dispute that they have failed to name the three different Applicants as parties. Plaintiffs attempt to persuade this Court that the New Jersey Court Rules do not require that Applicants be named as indispensable parties and that the Board merely relies upon an unreported decision. Plaintiffs, however, curiously do not even address the comments to the New Jersey Court Rules cited by the Board.

The preeminent treatise on the New Jersey Court Rules explicitly states:

> "the successful applicant for a variance must be joined as a party-defendant in the action in lieu of prerogative writs brought by objectors to the grant."

Pressler & Verneiro, Current N.J. Court Rules, cmt. on R. 4:28-1 (2023) (citing Stokes v. Township of Lawrence, 111 N.J. Super. 134 (App. Div. 1970)). As the Appellate Division held in Stokes:

> Peterson, the successful applicant, was an indispensable party in the action to set aside the grant of the variance. Peterson had a real and substantial interest in the subject matter of the action, and a judgment could not justly be made without adjudging or necessarily affecting his interest. *See* Allen B. Du Mont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298, 152 A.2d 841 (1959); Sturmer v. Readington Tp., 90 N.J. Super. 341, 343, 217 A.2d 622 (App. Div. 1966). 111 N.J. Super. at 138 (emphasis added). See also Cox & Koenig, New Jersey Zoning and Land Use Administration, §33-1.3 (2005) (citing Stokes).

Plaintiffs have simply ignored the comment on the New Jersey Court Rules, the published case law as well as the comments in the leading land use treatise authored by Cox and Koenig. Plaintiffs have also had ample time to file a motion seeking to amend its Complaint to add the indispensable parties and have chosen not to do so. Plaintiffs have further failed to even completely articulate the standard for extending the time to file a prerogative writ action our of time naming the three (3) Applicants.

Judge Skillman cogently summarized the standard for enlarging the time period in Willoughby v. Planning Bd. of Deptford Tp., 306 N.J. Super. 266, 276 (App. Div. 1997) where the Appellate Division held:

> Although Rule 4:69-6(a) provides that "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed," Rule 4:69-6(c) authorizes the court to enlarge this period of time "where it is manifest that the interest of justice so requires." An enlargement of the time for filing a prerogative writ action is recognized to serve "the interest of justice" in cases involving "(1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Reilly v. Brice, 109 N.J. 555, 558, 538 A.2d 362 (1988) (quoting Brunetti v. Borough of New Milford, supra, 68 N.J. at 586, 350 A.2d 19).

Plaintiffs have not addressed any of these elements. The Appellate Division has held that enlargement of the 45-day time period represents an: "exception rather than the rule". Rocky Hill Citizens For Responsible Growth v. Bor. of Rocky Hill Planning Bd., 405 N.J. Super, 384, 401 (App. Div. 2009). The opposition brief makes some reference to the knowledge each of the three (3) applicants may have had of this action. Plaintiffs attach a newspaper article which does not discuss this action as well as a document from the New Jersey Planning Commission which also does not discuss this action as apparent proof of constructive knowledge on the part of the Applicants. A certification is also included from Marc Parisi which references a conversation with a third-party realtor who it alleges stated that the Applicants were aware of the filing of the Complaint. Plaintiffs, however, apparently still made an informed and deliberate strategic decision not to name the Applicants and also to not even serve the Applicants with the Complaint.

It is not disputed that to this date, the Applicants are not even named in this action and have no ability to represent their own interests. Plaintiffs also concede that this purported knowledge would only have been gleaned after the forty-five time period would have elapsed.

Plaintiffs Complaint must therefore be dismissed with prejudice.

II. Plaintiffs Lack Standing to Represent Other Parties

Plaintiffs have failed to cite any land use decision where an interested party has been permitted to represent the interests of other non-party residents. Plaintiffs have also failed to address the well-established legal principle articulated by the New Jersey Supreme Court which has held that ordinarily, a litigant may not claim standing to assert the rights of a third party. Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 84 N.J. 137, 144 (1980) (citing State v. Norflett, 67 N.J. 268, 276 n.7 (1975)); Frazier v. Liberty Mutual Insurance Company, 150 N.J. Super. 123, 137 (App. Div. 1977).

Plaintiffs have not overcome this prohibition and their claims to represent unknown third parties must be rejected.

III. Plaintiffs are Not Permitted To Challenge Three Separate Board Decisions in a Single Complaint

Plaintiffs have not disputed that three (3) separate applications were filed which all involved separate tracts of property and that each application was filed by a distinct and separate corporate entity. Plaintiffs do not contest that the Board conducted three (3) separate public hearing processes. The Plaintiffs also do not contest that three (3) separate votes were taken, and that three (3) separate Resolutions were adopted memorializing the Board's decisions. The three (3) applications did not even involve all of the same attorneys.

Plaintiffs have also failed to cite a single case where separate land use board approvals have been permitted to be challenged in a single action in lieu of prerogative writs. A vast body of case law exists interpreting the Municipal Land Use Law and not a single case could be cited. Plaintiffs also ignore the case law which does exist. The law requiring prerogative writ actions be limited to the record below was succinctly articulated in Willoughby v. Planning Bd. of the Tp. of Deptford, 306 N.J. Super. 266 (App. Div. 1997) where Judge Skillman explicitly held that the decision of a planning board is a:

> …quasi-judicial decision of a municipal administrative agency, see Kotlarich v. Mayor of Ramsey, 51 N.J. Super. 520, 540-542, 144 A.2d 279 (App. Div. 1958), which is subject to review in the Law Division in an action in lieu of prerogative writs. R. 4:69 . . . **and the Law Division review of the Planning Board's decision must be based solely on the agency record**. (emphasis added).

The governing case law requires that the three (3) separate decisions incorporated into the single Complaint in this matter must be adjudicated separately and based solely on the record developed below in each individual hearing. Plaintiffs' argument must therefore be rejected.

IV. Plaintiffs Improperly Relied Upon Matters De HORS

Plaintiffs plainly concede that they are attempting to expand and modify the record in each individual application by concocting a single application which never existed for purposes of this appeal. Plaintiffs' argument must therefore be rejected.

V. Count IV of the Complaint Must Be Dismissed For Failure to State a Claim

Count IV of Plaintiffs' Complaint is based upon an alleged failure of the Board to require the construction of a sound wall as a condition of approval. Plaintiffs now seek to expand the

Count to be a general claim that the overall decision was arbitrary, unreasonable and capricious. This, however, is not contained within the plain language of Count IV.

The arguments contained in the Board's original brief remain valid and Plaintiffs appear to concede in the opposition Brief that the Board's power to impose conditions is completely discretionary. Cout IV must therefore be dismissed.

VI. Count I of the Complaint Must Be Dismissed For Failure to State a Claim

Plaintiffs do not address any case law cited by the Board. The Board reiterates its limited circumscribed jurisdiction in site plan review. "The purpose of site plan review is to assure compliance with the standards under a municipality's site plan and land use ordinances. " W.L. Goodfellows and Co. v. Washington Tp. Planning Bd., 345 N.J. Super. 109, 115 (App Div. 2001); Pizzo Mantin Group v. Tp. of Randolph, 137 N.J. 216, 228-229 (1994); Cox & Koenig New Jersey Zoning and Land Use Administration, s. 23-10 (GANN 2023). A planning board is also constrained from using site plan review as a way to exercise legislative power to prohibit a permitted use. Wawa Food Market v. Planning Bd. of the Borough of Ship Bottom, 227 N.J. Super. 29, 40 (App. Div. 1988), certif. den. 114 N.J. 299 (1988). New Jersey courts have characterized a planning board's jurisdiction in site plan review as "circumscribed" when considering a site plan application. Shim v. Washington Tp. Planning Bd., *298* N.J. Super. *395,* 411, (App.Div.1997*).* A planning board is further prohibited from denying a permitted use based upon traffic generation. Such a denial can only be justified where ingress and egress is not safe. Dunkin Donuts v. Tp. of North Brunswick Planning Bd., 193 N.J. Super. 513 (App. Div. 1984).

Plaintiffs have failed to cite a specific standard that has been violated. It has also failed to address the fact that its assertions are tantamount to a demand that the Board usurp the legislative jurisdiction and determined that permitted uses are not appropriate. Plaintiffs' arguments must therefore be rejected.

VII. Count III of the Complaint Must Be Dismissed With Prejudice

Count III of Plaintiffs' Complaint never alleged that the Environmental Impact Report failed to accurately identify the existing conditions of the various properties. The Ordinance is cited in its entirety in the Board's original brief and the requirements of the Ordinance were satisfied. Count III must therefore be dismissed with prejudice.

VIII. Conclusion

For the foregoing reasons as well as the arguments contained in the Board's original brief in support of its motion to dismiss, the Board respectfully requests its motion be granted and the Complaint dismissed with prejudice.

Respectfully submitted,

WEINER LAW GROUP LLP

By: _____
Ronald D. Cucchiaro

RDC/rk
#3401127v1
cc: Bennet Susser, Esq. (via email ***bennet@jmslawyers.com)***