NATALIE PERRETTA, MICHAEL JAKOVCIC, KEVIN SCOTT, LUSHENG WANG, JULIANA ORDUNA, MEGHAN SHARIN, CAREN ALVARADO, WARREN YOUNGCLAUS, JENNIFER OKERSON and MARC PARISI, individually, and on behalf of others similarly situated residential objectors, Plaintiffs, v. TOWNSHIP OF HOWELL PLANNING BOARD, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO.: MON-L-01723-23 CIVIL ACTION

BRIEF OF DEFENDANT TOWNSHIP OF HOWELL PLANNING BOARD IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

WEINER LAW GROUP LLP
Ronald D. Cucchiaro, Esq.
629 Parsippany Road
P.O. Box 438
Parsippany, N.J. 07054-0438
Phone: (973) 403-1100
Fax: (973) 403-0010
Attorneys for Defendant, Township of Howell Planning Board

Of Counsel:
Ronald D. Cucchiaro, Esq., No. 041191998, rcucchiaro@weiner.law

On the Brief:
Ronald D. Cucchiaro, Esq., No. 041191998, rcucchiaro@weiner.law
Donald A. Klein, Esq., No. 281791972, dklein@weiner.law

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PRELIMINARY STATEMENT

This matter is an action in lieu of prerogative writs wherein plaintiffs are objectors to one or more of three separate development applications approved by the Township of Howell Planning Board ("Planning Board"). Although filed as a single Complaint, the three approvals involve different properties, different facts, different applicants, different public hearings, and different Resolutions of approval, and were noticed and voted upon at separate public hearings. Plaintiffs' Complaint is fraught with a panoply of deficiencies which are fatal:

It is black-letter law in New Jersey that a successful applicant for land use approval is an indispensable party to an appeal and must be named as a party-defendant in a subsequent action in lieu of prerogative writs. Plaintiffs made a tactical legal decision and failed to name any of the applicants as defendants in this litigation. Indeed, plaintiffs do not even identify the applicants in their Complaint.

Rule 4:69-6(b)(3) requires that an action in lieu of prerogative writs be commenced within 45 days from a publication of notice of determination of an approval. Plaintiffs failed to assert any claims against any of the three applicants within this limitations period. Given the fact that these applicants, known to

plaintiffs, were indispensable parties, plaintiffs' Complaint is fatally flawed and should be dismissed with prejudice.

Plaintiffs also improperly purport to represent anonymous plaintiffs - "other similarly situated residential objectors." However, plaintiffs have no standing to do so. A litigant cannot claim standing to assert the rights of a third party. Nor, of course, is this a representative action or a class action.

Perhaps most egregiously, plaintiffs join in their Complaint three separate Planning Board applications/approvals, where the properties, the facts, the public hearings, the Resolutions memorializing the approvals, and the applicants are different. Were it not for the fundamental deficiencies noted, which themselves mandate dismissal, such separate actions should be severed pursuant to Rule 4:30.

By improperly joining what, in fact, requires three separate actions in lieu of prerogative writs with completely separate records, plaintiffs improperly attempt to rely on matters *de hors* the records in these three distinct proceedings. Determinations made by planning boards must be based on the record before the Board in each case, not on extrinsic evidence.

The entire controversy doctrine also does not require that these three separate Planning Board appeals be joined. Absent a

factual nexus grounded in a core set of related factual circumstances, the entire controversy doctrine does not apply.

Many of the individual Counts in the Complaint also fail to state a claim and must be dismissed with prejudice. The running theme throughout the Complaint is the effort of the plaintiffs to fundamentally disregard and ignore the well-established law regulating site plan review process.

Count I asserts a general failure to consider the "cumulative environmental impacts" associated with the three applications impacting noise and air pollution. Noise and purported air pollution, however, are not regulated by the Township zoning, site plan, or design criteria ordinances and are therefore beyond the jurisdiction of the Planning Board.

Count IV asserts that the Planning Board should have required a sound attenuation wall in conjunction with one of the applications. Conditions of approval, however, are completely at the discretion of a land use board. The Planning Board's decision cannot be arbitrary, unreasonable or capricious based upon whether it chose to exercise a purely discretionary act. This is particularly compelling considering that the sound attenuation wall would obviously address noise concerns which are outside of the Planning Board's jurisdiction.

Count VIII asserts that the Planning Board failed to adequately consider "anomalies" associated with one of the applications. Plaintiffs, however, fail to disclose that this issue had been resolved by the Superior Court/Law Division in a related proceeding. The issue had been adjudicated and the Planning Board's actions were required by the doctrine of res judicata.

Plaintiffs' Complaint should be dismissed with prejudice.

PROCEDURAL HISTORY

On June 5, 2023, plaintiffs, Natalie Perretta, Michael Jakovcic, Kevin Scott, Lusheng Wang, Juliana Orduna, Meghan Sharin, Caren Alvarado, Warren Youngclaus, Jennifer Okerson, and Marc Parisi, "individually, and on behalf of other similarly situated residential objectors", filed a Complaint commencing this Action in Lieu of Prerogative Writs against defendant Township of Howell Planning Board ("Planning Board"). (Klein Cert., Ex. A). Plaintiffs' Complaint purportedly joins challenges to three separate Planning Board application approvals, involving different properties, different facts, and different applicants. The applications were also considered by the Planning Board at separately noticed public hearings and the approvals were memorialized in three separate resolutions. (Klein Cert., Exs. B, C, and D). Three separate notices of decision were also published. (Id.). Plaintiffs failed to join any of the applicants or, indeed, even refer to them by name in their Complaint.

The three applications approved by the Planning Board relate to the following properties in the Township of Howell:

- Property consisting of approximately 29.6 acres located at 29 Howell Road and designated on the Official Tax Map as Block 164, Lot 5.01 - Application No. SP-1085 (Compl. ¶16).

- Property consisting of approximately 49.3 acres located at 375 Fairfield Road and designated on the Official Tax Map as Block 177, Lot 8.01 – Application No. SP-1095 (Compl. ¶17).

- Property consisting of approximately 11.8 acres located at 308 and 413 29 Fairfield Road and designated on the Official Tax Map as Block 168, Lots 17, 18, 19.02, 19.04, and 19.08 – Application No. SP-1102 (Compl. ¶18).

Plaintiffs' Complaint acknowledges that the three applications were filed by separate single-member limited liability companies. (Compl. ¶21). Although intermingled *inter se* and mixed with a handful of "general" allegations, the vast majority of plaintiffs' Complaint addresses allegations unique to each of the three separate applications:

- Application SP-1085 (Compl. ¶36-89, 119-125, 131, 134-136, 164-170, 174-179, 181-184.

- Application SP-1095 (Compl. ¶¶101-112, 132, 134-136, 138-149, 151-159, 162, 174-179, 185-186.

- Application SP-1102 (Compl. ¶¶91-99, 160-162, 174-179.

The Counts of plaintiffs' Complaint are a conglomeration of these allegations.

ARGUMENT

POINT I

THE STANDARD OF REVIEW

When a party moves to dismiss a Complaint for failure to state a claim upon which relief can be granted under Rule 4:6-2(e), the inquiry is confined to a consideration of the legal sufficiency of facts alleged in the Complaint. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). To this end, New Jersey courts consider "all facts alleged in the complaint and legitimate inferences drawn therefrom". Smith v. City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975).

However, a dismissal "is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (citation omitted). Further: "It is not enough for plaintiffs to assert . . . that any essential facts that the court may find lacking can be dredged up in discovery." Printing Mart, 116 N.J. at 768. See also Glass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 582 (App. Div. 1998) ("Pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit."); Scheidt v. DRS Technologies, Inc., 424 N.J. Super. 188, 193 (App.

Div. 2012) (same).

In evaluating motions to dismiss, New Jersey courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005).

While the New Jersey Supreme Court stated in Printing Mart that dismissal of a Complaint pursuant to R. 4:6-2(e) should generally be without prejudice, that is not so where, as here, an amendment will not cure the deficiency and would therefore be futile - that is, where the complaint as amended would still fail to state a claim upon which relief can be granted. See Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006) (courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law).

Upon application of these standards, plaintiffs' Complaint against defendant Township of Howell Planning Board should be dismissed with prejudice.

POINT II

PLAINTIFFS FAIL TO NAME AS DEFENDANTS INDISPENSABLE PARTIES: THE APPLICANTS.

It is fundamental that "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 (Gann 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 (Gann 2023) (citing Stokes).

Thus, "an objector who appeals a municipal approval must join as defendants both the municipal agency and the applicant pursuant to R. 4:28-1". Nuckel v. Borough of Little Ferry Planning Board, 2005 WL 3196583 at *3 (App. Div. Nov. 30, 2005) (citing the above-referenced authorities). Plaintiffs failed to do so and, indeed,

the applicants are not even identified in plaintiffs' Complaint. Plaintiffs' Complaint should be dismissed with prejudice.

Plaintiffs' allegation that the applicants – separate single-member limited liability entities – are not the real parties in interest in this litigation (Compl. ¶21) is simply wrong. See, e.g., N.J.S.A. 42:2C-5 ("A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities."). In any event, plaintiffs have made a tactical decision and have not even timely named as a defendant the parent company that they erroneously allege is the real party in interest.

The Complaint must therefore be dismissed with prejudice.

POINT III

PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE, PURSUANT TO RULE 4:69-6, AS TIME-BARRED, GIVEN PLAINTIFFS' FAILURE TO NAME AS DEFENDANTS INDISPENSABLE PARTIES.

Rule 4:69-6(b)(3) provides, in relevant part, that: "No action in lieu of prerogative writs shall be commenced . . . to review a determination of a planning board . . . after 45 days from a publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality . . . ." See also Davis v. Planning Board of the City of Somers Point, 327 N.J. Super. 535, 539 (App. Div. 2000) ("an action in lieu of prerogative writs to review a determination of a planning board must be initiated within forty-five days after the publication of an appropriate notice in the official newspaper of or a newspaper of general circulation in the municipality") (citing R. 4:69-6(b)(3)).

Plaintiffs' appeal from the several application approvals in this case, which were each memorialized on April 13, 2023, accrued on the date of publication of the Planning Board's approval resolutions, which in each case was on April __, 2023. **[Cite?]**. While plaintiffs' Complaint against defendant Township of Howell Planning Board was filed within 45 days of the date of publication of the subject Resolutions, plaintiffs did not include in their

Complaint any claims against the indispensable party applicants. Since plaintiffs' Complaint cannot proceed without these defendants and since plaintiffs' claims against the applicants are time-barred, plaintiffs' Complaint must be dismissed with prejudice.

There is no basis for enlarging plaintiffs' time for appeal as to the indispensable party applicants. It is not manifest that the interest of justice so requires. R. 4:69-7. On the contrary, plaintiffs failed to timely file their appeal as to the applicants in disregard of well-established law in this State. Furthermore, plaintiffs did not, and could not, invoke the "Fictitious Names" rule to preserve the timeliness of their Complaint because the applicants' true names, which appeared on each of the three development Applications as well as in the public notices and memorializing Resolutions but were studiously avoided in plaintiffs' Complaint, were not "unknown to" plaintiffs. Rule 4:26-4. Plaintiffs' Complaint includes a Rule 4:69-4 Certification confirming that all transcripts have been ordered. The name of each Applicant was known in such a request.

POINT IV

PLAINTIFFS IMPROPERLY PURPORT TO REPRESENT ANONYMOUS PLAINTIFFS – OTHER SIMILARLY SITUATED RESIDENTIAL OBJECTORS – AS TO WHOM THEY HAVE NO STANDING TO SUE.

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). Yet, that is precisely what plaintiffs attempt to do in their Complaint: "Plaintiffs bring this action individually, and on behalf of other similarly situated residential objectors." (Compl. ¶11; *see also* caption to Complaint). Nor, of course, do, or can, plaintiffs bring this action as a representative action or a class action.

It is also unclear whether all plaintiffs have standing to sue, since the Complaint does not differentiate between which objectors are objecting to which approvals. The Complaint therefore should be dismissed with prejudice.

POINT V

PLAINTIFFS IMPROPERLY JOIN IN THEIR COMPLAINT THREE SEPARATE PLANNING BOARD APPLICATIONS AND DECISIONS, INVOLVING DIFFERENT PROPERTIES, DIFFERENT FACTS, AND DIFFERENT APPLICANTS.

"While the Law Division has inherent and, indeed, constitutional power to review facts in prerogative writs actions, such power must be employed appropriately on a case-by-case basis." Cox & Koenig, New Jersey Zoning and Land Use Administration §40-3.1 (Gann 2023). (emphasis added). "It is important to bear in mind that zoning appeals involve prerogative writ actions tried on a record made by a local agency, and thus, the state of the record ordinarily controls." Id. Accord Pressler & Verneiro, Current N.J. Court Rules, Cmt. on R. 4:69-4 (Gann 2023) (citing Ten Stary Dom Partnership v. Mauro, 216 N.J. 16, 33 (2013) (a board acts arbitrarily, capriciously, or unreasonably if its findings of fact "are not supported by the record"); New Brunswick Cellular Telephone Company v. Borough of South Plainfield Board of Adjustment, 160 N.J. 1, 14 (1999) (the issue for a reviewing court is whether the board decision "is supported by the record" and is not so arbitrary, capricious, or unreasonable as to amount to an abuse of discretion). See also Smart SMR of New York, Inc. v.

Borough of Fair Lawn Board of Adjustment, 152 N.J. 309, 327 (1998) (same).

Joining other issues on appeal "in no way changes the character of that portion of the case which deals with the appeal from a board decision; it is still an appeal on the record and must be decided on the basis of the evidence before the board and the findings and conclusions of the board as set forth in its resolution." New Jersey Zoning and Land Use Administration (Gann 2023) §40-4.4 (emphasis added). "The record speaks for itself, as does the resolution of the board, and the court's inquiry is usually limited to a determination as to whether the board's decision was arbitrary and capricious." Id. (emphasis added).

The law requiring that prerogative writ actions be limited to the record below was succinctly articulated in Willoughby v. Planning Board of the Township 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).

That means here that the objectors' appeal from each of the

three separate Planning Board applications/approvals should be determined on its individual merits and strictly on the basis of the record in each individual matter. At a minimum, the three matters appealed should be severed pursuant to R. 4:30. In conjunction with the other severe deficiencies noted herein, however, the entire Complaint should be dismissed with prejudice.

POINT VI

PLAINTIFFS IMPROPERLY RELY ON MATTERS *DE HORS* THE RECORD OF EACH OF THE THREE PLANNING BOARD PROCEEDINGS.

"The board's findings of fact in making a decision must be based upon evidence appearing in the record." Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann 2023), §21-3 (emphasis added). "It cannot decide on off-the-record information." Id. "For the governing body or a court to review the decision of a municipal agency it is obviously necessary for it to know what facts were brought out at the hearing in order to determine whether the board properly fulfilled its statutory function." Id. See also Antonelli v. Planning Board of Waldwick, 79 N.J. Super. 433, 440-42 (App. Div. 1963)(whether the Planning Board's action was unreasonable, arbitrary, or capricious "must be decided upon the basis of what was before the Planning Board and not on the basis of a trial De novo, by affidavit or otherwise, before the Law Division"); Gayatriji v. Borough of Seaside Heights Planning Board, 372 N.J. Super. 203, 207 (Law Div. 2004) (same).

It is undisputed that each application was filed separately, assigned a separate application number, was the subject of separate notices published in the Asbury Park Press as well as mailed to property owners, had a separate public hearing, had separate

exhibits marked into evidence, had separate expert testimony, was approved in a separate vote, was approved and memorialized in a separate resolution, and was the subject of a separate notice of decision published in the Asbury Park Press. The exhibits and testimony were limited to the individual applications. For example, the proofs concerning safety of ingress and egress were not the same in each application. Plaintiffs' Complaint also plainly concedes the separate nature of the applications. The Complaint contains sections entitled "Facts Relevant to Application No. SP-1085" (Compl. ¶¶35-89); "Facts Relevant to Application No. SP-1102" (Compl. ¶¶90-99); and "Facts Relevant to Application No. SP-1095)" (Compl. ¶¶100-112). Although not disclosed by plaintiffs in the Complaint, Application SP1085 was also the subject of prior litigation between the Planning Board and the Applicant. Plaintiffs seek to conjure a single application from these three distinct records of which one includes prior judicial history. This involves mixing and matching separate records, which is prohibited by both the New Jersey Court Rules and well-established common law. The Complaint must therefore be dismissed with prejudice.

POINT VII

THE ENTIRE CONTROVERSY DOCTRINE DOES NOT REQUIRE THAT THE THREE SEPARATE PLANNING BOARD ACTIONS BE JOINED.

"Obviously, absent a factual nexus grounded in a core set of related factual circumstances, the [entire controversy] doctrine does not apply." Pressler & Verneiro, Current N.J. Court Rules, Comment R. 4:30A (citing Wadeer v. New Jersey Manufacturers Insurance Company, 220 N.J. 591 (2015)). Here, there is not one core set of facts that applies to all three applications. There are different properties. There are different facts. There are different applicants. The entire controversy doctrine is not applicable.

POINT VIII

COUNT IV OF THE COMPLAINT MUST BE DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiffs assert in Count IV of the Complaint that the approval of Application SP-1095 was arbitrary, unreasonable, and capricious because it was not conditioned upon the construction of a sound attenuation wall. This argument is fatally flawed because a municipal land use board is limited to evaluating land use and ordinance compliance issues. Also, the Board did not grant any relief from noise ordinance requirements. Count IV must therefore be dismissed with prejudice for failure to state a claim.

Plaintiffs appear to proceed from incorrect assumptions concerning the jurisdiction of a planning board in the site plan review process. The Board therefore finds it necessary to clearly delineate its permitted and limited scope of review:

"The purpose of site plan review is to assure compliance with the standards under the municipality's site plan and land use ordinances. "W.L. Goodfellows and Co. v. Washington Township, Planning Board, 345 N.J. Super. 109, 115 (App Div. 2001)(internal citations omitted); Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 228-229 (1994); Cox & Koenig New Jersey Zoning and Land Use Administration, §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 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 as "circumscribed" when considering a site plan application. Shim v. Washington Township Planning Board, 298 N.J.Super. 395, 411 (App. Div.1997).

A planning board has the power to impose certain conditions on site plan approvals. See N.J.S.A. 40:55D-49a; Orloski v. Planning Bd. of Borough of Ship Bottom, 226 N.J. Super. 666, 677 (Law Div. 1988), aff'd 234 N.J. Super. 1 (App. Div. 1989) ("The Board unquestionably has the right to impose reasonable conditions. The condition was an exercise of the Board's quasi-judicial power") "'Conditions' are requirements that are entirely at the discretion of the board to impose." (emphasis added) Cox & Koenig, New Jersey Zoning and Land Use Administration, §19-4 (Gann 2023).

Plaintiffs argue that a sound attenuation wall should have been required as a condition of approval for SP-1095. It is important to note that this Count is not related in any manner to the other two applications. Plaintiffs' Complaint cites to the Township Noise Ordinance at Section 208-7 as well as State noise

requirements at N.J.A.C. 7:29. The Township's noise ordinance is not codified within the site plan, zoning or design criteria ordinances. The Planning Board, therefore, was not vested with any jurisdiction to deny the site plan application based upon noise. The Board also has no power over noise regulation pursuant to the above cited section of the New Jersey Administrative Code. The Planning Board therefore lacked jurisdiction to either approve or deny an application based upon noise. As previously stated, conditions of approval are also completely discretionary. The Board was, therefore, also not required to engage in a quasi-judicial act which was optional. Plaintiffs' argument concerning such a condition therefore lacks any legal foundation.

Count IV of the Complaint does not relate to any issue regarding compliance with ordinance provisions codified within the Township's site plan, zoning, or design criteria ordinances. It is also important to note that the Applicant has not been granted any relief and is required to comply with all noise Ordinance requirements. Count IV therefore must be dismissed with prejudice for failure to state a claim.

POINT IX

COUNT I OF THE COMPLAINT MUST BE DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs assert that the three approvals granted by the Board were arbitrary, unreasonable, and capricious because they somehow failed to consider the cumulative impacts from all three applications. More specifically, plaintiffs contend that the Planning Board failed to consider the cumulative impact of the three projects on "noise" and "air pollution" (Paragraph 116 of Count I of Complaint). Plaintiffs refer to these factors as being related to "health, safety and welfare". Count I, however, fails to state a claim and must be dismissed with prejudice. The Planning Board relies on the law of site plan review which is contained in Point VIII.

The issue of noise has been discussed supra. Once again, the applicable noise requirements are not codified in the Township's zoning, site plan, or other land development ordinances. The issue is therefore outside of the Planning Board's jurisdiction. Further, all the applicants are required to comply with all Township and State noise requirements. Not only is the issue of noise outside of the Board's jurisdiction, the Applicants are all required to comply with all noise regulations. Plaintiffs

therefore fail to state a claim with regard to general noise issues.

Air pollution is also not regulated by the Township's zoning, site plan or land development ordinances. Once again, the Applicants are required to comply with all relevant local, County, State and Federal Requirements. This includes N.J.A.C. 7:27-1 through 34 (New Jersey Air Pollution Control) and the federal Clean Air Act, 42 U.S.C. §7401 et seq. (1970). Plaintiffs' general health and welfare concerns are therefore protected through these regulations.

The Board also finds it necessary to provide greater discussion concerning its jurisdiction regarding environmental issues in general. New Jersey courts have routinely held that planning boards are prohibited from denying a site plan application based upon off-site environmental concerns. In Stochel v. Tp. of Edison Planning Board, 348 N.J. Super. 636, 647 (Law Div. 2000), the Court held that off-site environmental impacts were beyond the jurisdiction of a planning board and on-site environmental impacts were typically preempted by state law such as the New Jersey Freshwater Wetlands Protection Act.

Plaintiffs in the instant matter have failed to assert a claim which was within the jurisdiction of the Planning Board to

consider. These claims are regulated by Ordinances and statutes outside of the Township's zoning, land use, and land development ordinances. Count I must therefore be dismissed with prejudice for failure to state a claim upon which relief can be granted.

POINT X

COUNT VII OF THE COMPLAINT MUST BE DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs assert that Application SP-1095 was improperly approved because the Planning Board failed to consider the "anomalies" on that property. Count VII does not address any issue concerning the other applications. This issue, however, has already been adjudicated and Count VII therefore fails to state a claim and must be dismissed with prejudice.

This application was originally denied by the Planning Board in a Resolution memorialized on January 9, 2023. (Klein Cert., Ex. E). The Applicant challenged the denial and filed an action in lieu of prerogative writs. The parties thereafter entered into a Whispering Woods settlement agreement and conducted a subsequent public hearing to evaluate a settlement plan. The settlement plan, however, was also denied. The Superior Court, Law Division then conducted a trial and issued a written opinion dated January 9, 2023 reversing the Planning Board. The parties then once again discussed settlement, which would avoid the Board filing an appeal from the trial court's decision. The parties then once again entered into a Whispering Woods agreement and held a public hearing

wherein the settlement plan was approved. That decision was memorialized in the Resolution dated January 9, 2023.

It is important to understand that the settlement resulted in a revised plan being approved but the Agreement was not consummated until after the Law Division Opinion had been issued. The Law Division opinion therefore remains in full force.

The Planning Board engaged in a comprehensive review of the "anomalies" which were found on the subject Property. The Planning Board primarily found that the evidence indicated that these anomalies were associated with the neighboring cemetery and could be underground coffins or plots located on the subject Property. The Planning Board further found that the Applicant had failed to provide any testimony from the party who performed the ground penetrating radar study which revealed the anomalies and that the witness who did provide testimony conceded that he was not an expert in such testing.

The Superior Court, Law Division rejected the Planning Board's findings concerning the "anomalies." The "Statement of Reasons" in the Order dated January 9, 2023 states:

> Thus, unlike Field, nothing here indicates that the anomalies create an issue that is fundamental to the public health and welfare nor that the application's inclusion of a deed-restricted buffer makes the plan unfeasible. Accordingly, based on the foregoing, the

court concludes Howell's conclusion in this regard was arbitrary and capricious.

The Board did not have the legal right to simply disregard the Order. The claims in Count VII are specifically barred by the doctrine of res judicata. In Wadeer v. New Jersey Manufacturers Insurance Company, 220 N.J. 591, 606 (2015), the New Jersey Supreme Court held:

> The principle "contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." *Lubliner v. Bd. of Alcoholic Beverage Control*, 33 *N.J.* 428, 435, 165 *A.*2d 163 (1960). Application of res judicata "requires substantially similar or identical causes of action and issues, parties, and relief sought," as well as a final judgment. *Culver, supra*, 115 *N.J.* at 460, 559 *A.*2d 400. Thus, "[w]here the second action is no more than a repetition of the first, the first lawsuit stands as a barrier to the second." *Ibid.*

Plaintiffs plainly seek to have the exact same issue concerning "anomalies" involving the exact same parties on the exact same property relitigated. The Law Division held that the "anomalies" did not support a denial. The Planning Board was required to comply with this decision. The doctrine of res judicata prohibited the Board from disregarding the Order of the trial court and Count VII therefore fails to state a claim.

Plaintiffs also never filed an appeal of the final judgment which was their right. See Chesterbrooke Ltd. v. Planning Board

of Townshiop of Chester, 237 N.J. Super. 118 (App. Div. 1989), certif den. 118 N.J. 234 (1989) (objector group permitted to intervene after final judgment for purposes of filing appeal); Warner Co. v. Sutton 270 N.J. Super. 658 (App. Div. 1994) (environmental advocacy group permitted to intervene after execution of a consent final judgment). Plaintiffs chose not to appeal and cannot use this action to somehow laterally appeal the prior Law Division final judgment. Count VII must therefore be dismissed with prejudice for failure to state a claim.

POINT XI

COUNT III OF THE COMPLAINT MUST BE DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs assert that the approvals granted by the Planning Board were arbitrary, unreasonable, and capricious and must be reversed because an "outdated" environmental resource inventory was used. Plaintiffs specifically cite to Section 188-6(A) of the Ordinance and assert that a prior environmental resource inventory was used in drafting an "environmental impact report". Count III, however, fails to state a claim and must be dismissed with prejudice. Plaintiffs have chosen to cherry pick specific words and phrases from the Ordinance requirement. The entire section provides as follows:

> § 188-6 Environmental impact report.
> A.
> Except for minor subdivisions as defined in this chapter, unless same requires construction of new roads and improvements, an environmental impact report shall accompany every application for development, unless such requirement is waived pursuant to Subsection E of this section. Said environmental impact report shall be coordinated with the natural resources inventory in the Township of Howell, but shall be based upon the conditions which actually exist on the property to be developed. Said environmental impact report shall include the following data and shall be reviewed and passed upon as follows: (emphasis added).

Plaintiffs do not assert that the information contained in the survey did not accurately depict the conditions which "actually exist" on the various properties. This includes any environmentally sensitive areas and required buffer zones, which would have been identified in a Letter of Interpretation ("LOI") issued by the NJDEP. Count III must therefore be dismissed with prejudice for failure to state a claim.

CONCLUSION

For the foregoing reasons, defendant Township of Howell Planning Board respectfully requests that plaintiff's Complaint be dismissed with prejudice.

Respectfully submitted,

WEINER LAW GROUP LLP
Attorneys for Defendant,
Township of Howell Planning Board

By: *s/ Ronald D. Cucchiaro*
Ronald D. Cucchiaro

WEINER LAW GROUP LLP
Attorneys for Defendant,
Township of Howell Planning Board

By: *s/ Donald A. Klein*
Donald A. Klein

Dated: July 10, 2023

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