MARTIN W. KAFAFIAN (NJ, NY, DC BARS)
ADOLPH A. ROMEI (NJ, NY BARS)
JOHN J. LAMB (NJ BAR)
ANTIMO A. DEL VECCHIO (NJ, NY, DC BARS)
ROBERT A. BLASS (NJ, NY BARS)
ARTHUR N. CHAGARIS (NJ BAR)
STEVEN A. WEISFELD (NJ, NY BARS)
RENATA A. HELSTOSKI (NJ, NY BARS)
MICHAEL STERNLIEB (NJ BAR)
DANIELE CERVINO (NJ, NY BARS)
ARTHUR M. NEISS (NJ, NY BARS)
DANIEL L. STEINHAGEN (NJ, NY BARS)
MARTIN R. KAFAFIAN (NJ, NY BARS)
JAMES V. ZARRILLO (NJ, NY BARS)

COUNSEL TO THE FIRM
BRENDA J. STEWART (NJ BAR)
JEANETTE A. ODYNSKI (NJ, NY BARS)
CRISTIN M. KEEGAN (NJ, NY BARS)
BARBARA M. MARTIN (NJ, NY BARS)
MATTHEW J. ROSS (NJ, NY, OH BARS)
CHARLES J. RABOLLI, JR. (NJ BAR)

BEATTIE PADOVANO LLC

COUNSELLORS AT LAW
200 MARKET STREET, SUITE 401
MONTVALE, NEW JERSEY 07645

(201) 573-1810

www.beattielaw.com

NEW YORK OFFICE:
99 MAIN STREET, SUITE 319
NYACK, NEW YORK 10960
(845) 512-8584

KIMBERLEY A. BRUNNER (NJ, NY BARS)

IAN M. EASTWICK (NJ, NY BARS)
SHKELQIM (JIM) PILINCI (NJ, NY, MT BARS)
ALEXANDER J. MORGENSTERN (NJ, NY BARS)
DEMETRIA M. BOGOSIAN (NJ BAR)
GABRIELLA M. PASCARELLI (NJ BAR)
CONOR C. O'SHAUGHNESSY (NJ BAR)
NICOLE A. SERELL (NJ, CT BARS)

OF COUNSEL
IRA J. KALTMAN (NJ, NY BARS)
EMERY C. DUELL (NJ, NY BARS)
PATRICK J. MONAGHAN, JR. (NJ, NY BARS)
IRA E. WEINER (NJ BAR)

RALPH J. PADOVANO (1935-2016)
JAMES R. BEATTIE (1935-2021)

Reply to New Jersey Office
Writer's Direct Access
Email: dsteinhagen@beattielaw.com
Direct Dial and Fax: (201) 799-2128

April 8, 2024

Via eCourts and Regular Mail
Hon. Kevin Shanahan, A.J.S.C.
Superior Court of New Jersey, Somerset County
20 North Bridge Street
Somerville, NJ 08876-1262

Re: In the Matter of the Borough of Far Hills
SOM-L-903-15
Reply Brief in Further Support of Notice of Motion for Limited Intervention of Sohail Khan

Dear Judge Shanahan:

This firm is counsel to Sohail Khan, the owner of 3 Fox Hunt Court, Far Hills, New Jersey, whom the moving papers filed by Pulte Homes of NJ, LP in the Borough's declaratory judgment action refer to as the "Neighbor". Please accept this letter brief in further support of Mr. Khan's motion for limited intervention in the Borough's declaratory judgment action to assert a third-party complaint for declaratory relief that seeks enforcement of the Borough's Land Management Ordinance ("LMO") pursuant to *N.J.S.A.* 40:55D-18.

When the Borough commenced this action nearly 9 years ago, it sought an immunity to prepare a conforming Housing Element and Fair Share Plan in satisfaction of its constitutional obligation to provide its fair share of the regional need for low and moderate cost housing. [*See*

Complaint]. The Borough entered into a settlement agreement with the Fair Share Housing Center [referenced herein as the "Initial Gianetti Cert.", Ex. "A", "B"] and a memorandum of understanding with Melillo Equities, LLC [Initial Gianetti Cert., Ex. "D"], and on December 23, 2019, the Borough adopted Ordinance 2019-08, which created the TH-6-IAR Zone that rezoned the Errico Acres property so that Pulte could develop it with inclusionary housing. [Steinhagen Cert., Ex. "E" at p. 7]. While Pulte's motion to intervene and enforce, the Borough's cross-motion to enforce and Khan's motion for limited intervention this motion are in the Borough's declaratory judgment action, they all relate to Pulte's land use development, not the Borough's zoning ordinance approved in this case nor the Borough's overall compliance plan.

A. Khan's motion is timely.

As set forth in Khan's March 27, 2024 filing, he sought leave to intervene only after Pulte undertook an effort to prevent the Borough from enforcing the LMO. Pulte conflates the timeliness of Khan's intervention motion with his obligation to file a separate action under *N.J.S.A.* 40:55D-18. If Pulte has its way that Khan should file a separate suit, it can make those timeliness arguments there. However, the standard for timeliness pursuant to *R.* 4:33-1 is not based upon the requirements of *R.* 4:69-6; instead, it is when Khan's interests materially diverged from the Borough's pursuant to *Warner v. Sutton,* 270 *N.J. Super.* 658 (App. Div. 1994), and *Chesterbrooke Limited Partnership v. Planning of Chester*, 237 *N.J. Super.* 118 (App. Div. 1989). Pulte only addresses *Chesterbrooke* in its opposition [Pulte Br. at p. 9], and its efforts to distinguish that case are unavailing because the only reason Khan would need to intervene to protect his interest is if the Borough is unable to do so (which is the functional equivalent of the Planning Board's refusal in *Chesterbrooke* to continue the

litigation). That is why the first sentence of Subpart D of Khan's moving brief noted that his application was conditional. If the Borough's efforts to compel Pulte to return to the Planning Board are successful without Khan, then Khan has his remedy, but he was not willing to sit on the sidelines and hope for that to happen.

B. Khan has an interest in the subject matter of this litigation, namely the development of the Errico Acres property, which is adjacent to his own.

The "property" that is the "subject matter" of this action is now Errico Acres. The Borough rezoned Errico Acres. [Steinhagen Cert., Ex. "E" at p. 7]. Pulte secured land use approvals and construction permits for Errico Acres. [Initial Gianetti Cert., Ex. "I"; Mullen Cert., Ex. "D", "E"]. The Borough issued the Notice of Violation that is the subject of Pulte's Motion to Enforce Litigants' Rights [Mullen Cert., Ex. "F"] and the Borough's Cross-Motion. There can be no dispute that Khan has an interest in how Pulte developed Errico Acres; the Municipal Land Use Law does not just define him as an "interested person" under *N.J.S.A.* 40:55D-4. Instead, it has a special definition for him: a "party *immediately* concerned" because he owns property within 200 feet of Errico Acres. *N.J.S.A.* 40:55D-6.

Pulte's notice and plans presented to the Far Hills Planning Board did *not* alert him to the fact that a 17-foot tall, unscreened retaining wall would be constructed in such close proximity to his home so as to be visible from every room in his home. [Khan Cert. at ¶ 11]. His efforts to determine the legality of the construction were undermined by the Borough's officials (apparently unintentionally) after Pulte made material changes to its plans in violation of the Planning Board's approval without properly alerting the Planning Board Engineer to the change. [Khan Cert., Ex. "B"; Ferriero Cert. at ¶ 20-28]. Khan's

interest is his property, and the impact that Pulte's development causes to it. He seeks, through his motion, to protect that interest.

The formalistic approach Pulte takes to this prong of intervention as-of-right pursuant to *R.* 4:33-1 undermines the spirit of the Rule. The matter before the Court is not the Borough's preparation of an affordable housing compliance plan; that has been adjudicated and final judgment was entered. Instead, the matter being litigated in this proceeding is only about the nature and scope of Pulte's development approvals and the Court has the power to condition Khan's intervention such that he be granted leave to participate only in relation to same. It should do so in the limited nature sought.

C. If the Borough of Far Hills cannot enforce the LMO and compel Pulte to return to its Planning Board for amended approvals because of estoppel or other reasons, it cannot adequately represent Khan's interests

The Borough's opposition to Pulte's motion to enforce demonstrates that it does not and cannot adequately represent Khan's interest. The Borough Attorney's Certification states, "On or about October 16, 2023, Borough officials became aware that there were retaining walls constructed at the Kimbolton Development more than the six (6') feet height limitation which were not presented to the Planning Board for review and approval." [Cruz Cert. at ¶ 18]. These officials apparently did not include the Planning Board Engineer, given his email to Khan over one month later. [Khan Cert., Ex. "B"]. The reason for this miscommunication – which Khan now understands is because Pulte failed to disclose the change to the Board Engineer (rather than being an effort to mislead) – suggests that the Board Engineer did not properly review this change at the time Pulte submitted its revised plans and got a building permit. It now seeks to do so. If the Borough's efforts to enforce the LMO are successful, Pulte is correct – the Borough

does represent Khan's interest, and there would be no reason for him to intervene because Pulte will have to go back to the Planning Board anyway and Khan will get the relief he seeks through the Borough's efforts to enforce the LMO pursuant to the Notice of Violation. But if the Borough is barred from enforcing the LMO and the conditions of the Planning Board's Resolution and cannot compel Pulte to seek and obtain amended approval, it is apparent that the Borough cannot adequately protect Khan's property interests either. Thus, Khan moved to intervene here because Pulte has took the position in its March 12, 2024 motion that the Borough is barred from representing Khan's interest (or anyone else's interest) under estoppel principles.

Substantively, Khan and the Borough have different positions concerning the nature of the relief that Pulte requires for the 17-foot retaining wall constructed in violation of § 905(A)(5) of the LMO. The Borough's Notice of Violation claims that Pulte needs a site plan design exception, which is generally a formality. By contrast, Khan believes that variance is needed, which imposes a much higher burden on a developer. This distinction is important because Pulte has asserted that it presented proofs to the Planning Board for a design exception for other retaining walls and that those proofs should justify the addition of a new retaining wall not presented to the Planning Board, but those proofs cannot be sufficient to justify a variance not shown on the Site Plan presented to the Planning Board, not sought, and not granted. Khan interest in protecting his property includes ensuring that Pulte returns to the Planning Board where it is obligated to put on proofs regarding the negative criteria for the variance it clearly requires so that it mitigates the impact to his property. Because the Borough does not believe a variance is required, it clearly cannot advance his interest in this regard.

On this issue, Pulte's reliance on *Wawa Food Market v. Planning Bd. of Ship Bottom*, 227 *N.J. Super.* 29, 36 (App. Div.), *certif. denied*, 114 *N.J.* 299 (1988), and the unpublished decision of *426 Royal, LLC v. So. Brunswick Planning Bd., slip op.*, A-1334-14, 2016 WL 326209 (App. Div. June 15, 2016)(Gianetti Supp. Cert., Ex. "A"), are not only misplaced, but actually demonstrates why Pulte required variance relief for its retaining walls. The import of *Wawa* is that a governing body can clearly require, through legislative action, variances for deviations from land use requirements that typically implicate site plan design by so specifying it the ordinance. The Appellate Division's decision in *426 Royal, LLC v. So. Brunswick Planning Bd., slip op.*, A-1334-14, 2016 WL 326209 (App. Div. June 15, 2016)(Gianetti Supp. Cert., Ex. "A"), recounts that Judge Hurley undertook the exact analysis that Khan asks this Court to undertake regarding § 905(A)(5) of the LMO. [Initial Gianetti Cert., Ex. "M" at p. 10].

Although it is an unpublished decision, on a substantive level, *426 Royal, LLC v. So. Brunswick Planning Bd., slip op.*, A-1334-14, 2016 WL 326209 (App. Div. June 15, 2016)(Gianetti Supp. Cert., Ex. "A"), is instructive. There, the Appellate Division noted that although the developer sought variance relief, the South Brunswick Planning Board granted site plan design exceptions for requirements from South Brunswick's ordinance regarding landscaping in parking areas, it was apparent that these requirements were "standards and requirements mandated in a site plan ordinance by 40:55D-41b" even though they were found "in a Division entitled 'Design Standards' 'within the general title of `Zoning.'" *426 Royal, LLC v. So. Brunswick Planning Bd., slip op.*, A-1334-14, 2016 WL 326209 at *2-3 (App. Div. June 15, 2016). [Gianetti Supp. Cert., Ex. "A" at p. 2].

The distinctions here could not be clearer. First, there is no section in *N.J.S.A.* 40:55D-41 that allows municipalities to adopt ordinances – for the purposes of site plan review – that regulate the height of accessory structures like retaining walls. Khan pointed out that the ability to so regulate was exclusively within the zoning power in his March 27, 2024 brief (eCourts LCV LCV2024806823 at p. 15), but Pulte ignored this fact. Second, the plain language of § 905(A)(5) of the LMO could not be clearer – the regulation applies in all *zoning districts*. If § 905(A)(5) were a general design standard applicable to only applications for site plan and subdivision, there would have been no need to include this clause within the ordinance. But if this section of the LMO were a site plan design standard that could not be applied to single family dwellings, a resident of a single family dwelling could seek a building permit from Far Hills for authorization to construct a retaining wall in excess of 6 feet without any relief from a land use board. By way of example, could Khan – an owner of a single family dwelling who is exempt from site plan review pursuant to *N.J.S.A.* 40:55D-37 and Section 201 of the LMO – build a 17-foot tall wall along the property line he shares with Pulte's property by merely seeking filing a permit application? Could Far Hills rightfully deny him one? Of course not. Third, unlike in *426 Royal, LLC v. So. Brunswick Planning Bd., slip op.,* A-1334-14, 2016 WL 326209 (App. Div. June 15, 2016)(Gianetti Supp. Cert., Ex. "A"), the Far Hills Planning Board did not grant Pulte a site plan design exception for any of its retaining walls, so there is nothing for the Court to defer to. *Cf. Last Chance Development Partnership v. Kean,* 119 *N.J.* 425, 435 (1990)(long-standing interpretation of an agency "will generally be granted great weight as evidence of its conformity with the legislative intent"); *Henry v. N.J. Dep't of Human Services,*

204 *N.J.* 320, 344 (2010)(Rabner, *C.J.*, concurring)("Historical practice alone rarely proves the correctness of a legal proposition").

As for Pulte's comments about its new stormwater design, its engineer has certified that the increase slope in the outfall from the bioretention basin near Khan's property is immaterial because Pulte modified its drainage plan "to divert stormwater ***away*** from the Khan Property and redirect that flow to the interior of the Pulte Property. Indeed, the grade elevations and Retaining Wall benefitted Khan to the extent that they redirected stormwater that flowed onto his property under pre-development conditions and as originally shown on the Plans." [Supplemental Kennedy Cert. at ¶ 8; emphasis in original]. This is another way of saying that Pulte fundamentally altered its stormwater management plan. This by itself requires a return trip to the Planning Board. *Cf., Field v. Franklin Twp.* 190 *N.J. Super.* 326, 332-333 (App. Div. 1983).

The notion that a planning board could delegate authority to its engineer to oversee a complete overhaul of a "fundamental element of a development plan" is anathema to our system. Pulte cites no authority for same, and although the project complies with the RSIS according to the NJDEP pursuant to the Stormwater Management Act, *N.J.S.A.* 40:55D-93 to -99 (which is the predicate[1] statutory authority for the stormwater management regulations contained in the RSIS), the Borough of Far Hills Planning Board does not get a pass simply because the NJDEP approved a one-page wetlands sheet in December of 2022. [Supplemental Kennedy Cert., Ex. "C" at p. 4, ¶ 5]. Pulte's efforts to sidestep *In re Freshwater Wetlands Permits*, 185 *N.J.* 452 (2006), must be rejected because while the Far Hills Planning Board may have delegated oversight over technical revisions to the stormwater management design that Pulte presented to

[1] *See In re Stormwater Mgmt. Rules*, 384 *N.J. Super.* 451, 454 (App. Div.) *certif. denied*, 188 *N.J.* 489 (2006)

the Board, it did not authorize Ferriero to approve an entirely *new* drainage design that changes the manner and direction of stormwater discharge.

The Borough does not protect Khan's interest because it holds a different one than he does. With different substantive interests and a potential inability to protect Khan's procedural interest in being heard at the Planning Board regarding an amended site plan application where Pulte would have to present evidence in support of the negative criteria pursuant to *N.J.S.A.* 40:55D-70(c) for a variance from § 905(A)(5) of the LMO and mitigation for the retaining wall, the Borough does not and cannot protect Khan's interest in protecting his property.

D. Functionally, Khan will not be able to protect his interest if the Court allows Pulte to proceed with its development

Khan does not have the ability to deny Pulte permits. He cannot compel Pulte to return to the Planning Board to seek a variance absent an Order from this Court. Had he not sought leave to intervene and followed the "advice" that Pulte and FSHC offer, in the event that the Court granted Pulte's motion to enforce, he is sure that Pulte would have relied upon this Court's Order to argue that he cannot enforce the LMO pursuant *N.J.S.A.* 40:55D-18 in connection with a motion to dismiss for lack of timeliness under *R.* 4:69-6 and estoppel. Khan's decision to seek leave to intervene under *R.* 4:33-1 recognized that Pulte presented the issue for consideration to the Court and both it and the Borough intended to address it here, and there was no reason, other than formalism, to wait or file a separate action, but if that is the decision, so be it.

Pulte's overreliance on *Hill v. Bd. of Adj.*, 122 *N.J. Super.* 156 (App. Div. 1972), for the proposition that laches bars his claims is wrong because the later decision of *Jesse A. Howland, Inc. v. v. Freehold*, 143 *N.J. Super.* 484 (App. Div.), *certif. denied*, 72 *N.J.* 166 (1976), modifies

the *Hill* majority's estoppel reasoning, and instead adopts the reasoning of Judge Fritz in concurrence:[2]

> But we are persuaded to the differing view of the concurrence in *Hill,* for the reasons there stated, and accordingly believe that the "intermediate situation" left undecided in *Jantausch v. Verona,* 41 *N.J. Super.* 89 (Law Div. 1956), aff'd 24 *N.J.* 326 (1957) should not in any case be resolved exclusively on the question of whether the building permit was issued "in good faith" by a building inspector acting "within the ambit of [his] duty" as long as there is "proper good faith reliance thereon." *Hill, supra,* 122 *N.J. Super.* at 162.
>
> The requirement we would add (which is suggested in the rationale of *Jantausch,* by reference, albeit cautionary, to *Adler v. Irvington Dept. of Parks,* 20 *N.J. Super.* 240 (App. Div. 1952)) is the necessity for the appearance of an issue of construction of the zoning ordinance or statute, which, although ultimately not too debatable, yet was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted *without any reasonable basis* or that the owner proceeded without good faith. 41 *N.J. Super.* at 94. This, we believe, would go a long way toward defining "[t]he line between acceptance of the doctrine of estoppel against a municipal corporation and the inherent aversion thereto," characterized by the "dichotomy created by the decision in *Freeman v. Hague,* 106 *N.J.L.* 137 (E. & A. 1929) and such cases as * * * *Adler v. Department of Parks* * * *." *Tillberg v. Kearny Tp.,* 103 *N.J. Super.* 324, 335 (Law Div. 1968). We point out that *Adler* preceded *Gruber v. Raritan Tp. Mayor and Tp. Comm.,* 39 *N.J.* 1 (1962), in point of time. We are persuaded as well that such a flexible formulation satisfies the concern *of Tremarco Corp. v. Garzio,* 32 *N.J.* 448 (1960), an opinion after *Adler* which totally ignored that case and advised:
>
> There is no easy formula to resolve issues of this kind. The ultimate objective is fairness to both the public and the individual property owner. We think there is no profit in attempting to fix some precise concept of the nature and *quantum* of reliance which will suffice. Rather a balance must be struck between the interests of the permittee and the right and duty of the municipality through planning and the implementation of that scheme through zoning "to `make, ordain and establish all manner of wholesome and of reasonable laws, not repugnant to the Constitution,' as may be deemed to be `for the good and welfare of the commonwealth, and all the subjects of the same.'" *Roselle v. Wright,* 21 *N.J.* 400, 408-409 (1956). * * * [at 457]
>
> If the appearance of some reasonable basis for issuance of the permit is what was meant by the majority in *Hill* when they spoke of the issuance of a building permit "in good faith," then our departure from *Hill* may be more apparent than real.
>
> [*Jesse A. Howland, supra,* 143 *N.J. Super.* at 489-490].

[2] Judge Fritz authored the decision in *Jesse A. Howland*.

Without even asserting the applicability of *Hill* by claiming that the Board Engineer's actions fell within the "intermediate situation" described in *Jantausch,* Pulte seeks to avoid the consequences of its own actions by blaming Khan and arguing that he should be equitably estopped from undertaking any actions to challenge its permits.

The Planning Board Engineer's Certification in opposition should dispel any notion that equity lies with Pulte. Pulte submitted a highly detailed "compliance narrative" along with its March 15, 2022 revision to its Site Plan that conveniently omitted any mention of the 15-foot (now 17-foot) tall retaining wall that is all but in Khan's back yard. [Ferriero Cert., Ex. "J"]. It detailed nearly every other change to its Site Plan in response to Ferriero's November 5, 2021 review letter (which did not require any grading changes in the area of Khan's property) as part of Resolution Compliance package in that *30-page* letter, but neglected to mention this material change even once. [Ferriero Cert. at ¶ 25]. Yet it nevertheless asks the Court to allow the Planning Board Engineer's decision to approve a variance as part of a hearing – which is an utterly void act – to stand. *Cf., CARE of Tenafly, Inc. v. Bd. of Adj.,* 307 *N.J. Super.* 362 (App. Div. 362, 375-376 (App. Div.), *certif. denied,* 154 *N.J.* 609 (1998)(rejecting developer's reliance argument, predicated upon *Hill* and *Jesse A. Howland* where underlying decision was void, rather than voidable, even though developer spent $1,200,000 in furtherance of underlying approval). One must wonder whether there is "some reasonable basis for issuance of the permit," *Jesse A. Howland,* 143 *N.J. Super.* at 490, for the retaining wall when Pulte failed to disclose it to Ferriero! *See, also, Grasso v. Bo. of Spring Lake Heights,* 375 *N.J. Super.* 187, 197 (Law Div. 2003)(noting that in a meeting with the zoning officer prior to the issuance of the permit, developer "**pointed out the details of his proposal**" but "[a]s a professional builder . . .

should have known of the height requirement, and that his omission by not reviewing the Spring Lake Heights zoning ordinance renders it difficult to support a finding of 'good faith' reliance"), *rev'd on other grounds,* 375 *N.J. Super.* 41 (App. Div. 2004).

Pulte's plea for equitable relief should fall flat because one who seeks equity must do equity. *See, e.g., Thompson v. City of Atlantic City,* 190 *N.J.* 359, 384 (2007). Pulte, unlike Khan, was well-aware of the issue that its retaining walls violated the LMO given that it was actually present during the hearings on its application for development. It was well-aware that this particular retaining wall was not on its Site Plan that was presented to the Far Hills Planning Board and Khan had no reasonable opportunity to contest its construction or seek mitigation from its visual impacts. While Pulte has indicated that it is willing to provide screening landscaping, only the Far Hills Planning Board can decide what mitigation is sufficient to protect Khan, and whether landscaping alone is enough to mitigate the harm that the retaining wall causes to his property. *Cf., Ten Stary Dom P'Ship v. Mauro*, 216 *N.J.* 16, 34, 38 (2013). Its failure to present this information at the hearing[3] when it had those comments undercuts any

[3] Notably, the Planning Board's decision on February 7, 2022 was not a memorialization of an earlier decision pursuant to *N.J.S.A.* 40:55D-10(g)(2), but rather, the actual vote to approve the application. By that point, Pulte had the Planning Board Engineer's November 5, 2021 review letter for over three months. It is not reasonable to believe that it was unaware that it needed to make a significant change to its Grading Plan based upon the Board Engineer's comments. In fact, Sheet 16 of the Site Plan confirms that Pulte made, but apparently did not submit "General Revisions" Number 2, on December 2, 2021 to the Planning Board after it received the Board Engineer's November 5, 2021 review letter. [Certification of Ronald Kennedy, dated March 12, 2024 at Exhibit "D", p. 5]. For ease of reference, the revisions box, which is difficult to read on eCourts, is reproduced below:

REVISIONS		
NO.	DATE	DESCRIPTION
1.	10-01-21	REV. PER BORO COMMENTS
2.	12-02-21	GENERAL REVISIONS
3.	3-15-22	RESOLUTION COMPLIANCE
4.	6-3-22	TWA SUBMISSION
5.	12-6-22	REV. PER NJDEP TWA COMMENTS
6.	12-20-22	RESOLUTION COMPLIANCE
7.	2-10-23	REV. PER SCD COMMENTS
8.	03-01-23	RESOLUTION COMPLIANCE

claim to be acting in good faith. Instead, Pulte submitted the plan with a 15-foot retaining wall along the property line only after Planning Board approved the application so that Khan had no opportunity to see the wall that should have been on the drawings, and appear and be heard about it by the Planning Board, and ask for mitigation that could have and, in all likelihood, would have been required.

Moreover, Pulte knew that it did not disclose the addition of the retaining wall to its March 15, 2022 Site Plan. It also knew, and knows, that the Planning Board Engineer has no authority to approve a retaining wall in excess of 6 feet in height, whether a variance or a design exception is required. In addition to failing to put the retaining wall on the plans during the Planning Board proceedings, Pulte never gave Khan any sort of notice that it received a construction permit to build any retaining wall near his property at any time. The wall simply appeared, and when Khan began to complain about it, he was provided incorrect information about it by the Borough officials. [Khan Cert., Ex. "A"; "B"]. Pulte's arguments in favor of its reliance are not supported by the current state of the law, and whether Khan is heard now, or in a future action, his legitimate concerns deserve their day in Court.

Pulte's argument that Khan can protect his interest in a separate action is a form-over-substance argument that should not carry the day. Khan seeks leave to intervene because he recognizes the expediency with which the Court acts in affordable housing matters. Indeed, the same logic that compelled Pulte to move for an Order in this case, rather than instituting a new action to vacate the Notice of Violation or exhausting its administrative remedies, is what drove Khan to seek leave to participate here. Moreover, Khan understands that a decision that allows Pulte to proceed without returning to the Planning Board will fundamentally affect him because

he will, in all likelihood, be faced with that same outcome in a separate action. He should be allowed to protect his interests now so that he is not foreclosed from doing so in the future.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant Sohail Khan limited intervention for the purposes of allowing him to file a third-party complaint pursuant to *N.J.S.A.* 40:55D-18 and the Declaratory Judgment Act, should it find that the Borough is estopped from enforcing its Notice of Violation. Pulte Homes of NJ, LP must be required to return to the Borough of Far Hills Planning Board for amended approval to allow the Borough of Far Hills Planning Board to require mitigation for the unlawful construction of the 17-foot tall retaining wall, as well as conduct such additional reviews of Pulte's stormwater management design as are reasonable and appropriate to ensure that the design complies with all applicable standards.

Respectfully submitted,

BEATTIE PADOVANO, LLC
Attorneys for Sohail Khan

By: */s/ Daniel L. Steinhagen*
Daniel L. Steinhagen, Esq.

Cc: All Counsel of Record (via ecourts and email)
James Kyle, P.P. (Special Master)(via email)
Client