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Pulte Homes of NJ, Limited Partnership

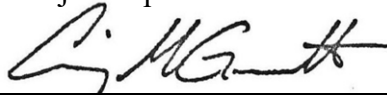
IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF FAR HILLS, COUNTY OF SOMERSET	: SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: SOMERSET COUNTY : DOCKET NO.: SOM-L-903-15 : : (CIVIL ACTION- <i>MOUNT LAUREL</i>) : : CERTIFICATION OF : CRAIG M. GIANETTI IN OPPOSITION : TO KHAN MOTION TO INTERVENE : : :
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I, Craig M. Gianetti, of full age, hereby certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and am a member of the law firm of Day Pitney LLP, attorneys for Movant/Interested Party Pulte Homes of NJ, Limited Partnership (“*Pulte*”) in connection with the above-referenced matter. As such, I am fully familiar with the facts and circumstances set forth herein. I make this Certification in opposition to Khan’s Motion to Intervene.

2. Attached as **Exhibit A** is a copy of the unpublished decision *426 Royal, LLC v. South Brunswick Planning Board*, 2016 WL 3263209 (App. Div. 2016). I am not aware of any unpublished decision contrary to this decision.

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.



Craig M. Gianetti

DATED: April 4, 2024

2016 WL 3263209

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

426 ROYAL, LLC, Plaintiff–Appellant,

v.

PLANNING BOARD OF the TOWNSHIP OF
SOUTH BRUNSWICK and Pineville Brunswick
Development Associates, LP, Defendants–Respondents.

A-1334-14T4

|
Argued Feb. 29, 2016.

|
Decided June 15, 2016.

On appeal from Superior Court of New Jersey, Law Division,
Middlesex County, Docket No. L–7325–13.

Attorneys and Law Firms

[Jennifer Phillips Smith](#) argued the cause for appellant (Gibbons, P.C., attorneys; [Howard D. Geneslaw](#) and Ms. Smith, of counsel and on the brief).

[Benjamin S. Bucca, Jr.](#), and [Paul H. Schneider](#) argued the cause for respondents (Bucca & Campisano, attorneys for respondent Planning Board of the Township of South Brunswick; Giordano, Halleran & Ciesla, attorneys for respondent Pineville Brunswick Development Associates; Mr. Bucca, Mr. Schneider and [Afiyfa H. Ellington](#), on the joint brief).

Before Judges [SABATINO](#), [ACCURSO](#) and [O'CONNOR](#).

Opinion

PER CURIAM.

*1 In this prerogative writs action, plaintiff 426 Royal, LLC, appeals from a Law Division judgment affirming South Brunswick Planning Board's grant of preliminary and final site plan approval to defendant Pineville Brunswick Development Associates, LP, a competing developer. We affirm, substantially for the reasons expressed by Judge

Hurley in his comprehensive and well-reasoned opinion of October 2, 2014.

Pineville owns a forty-five acre unimproved parcel of land on the southeast side of Route 1 and Stouts Lane in South Brunswick for which it sought site plan approval to build a 75,798 square foot supermarket and retail pad. The parcel shares an access road and stormwater infrastructure with the Heritage Village Shopping Center, a large retail complex located on an adjacent parcel, which Pineville developed over fifteen years ago as the first phase of this anticipated two-phase project. The access road provides the supermarket parcel access to Stouts Lane, while driveways through the shopping center's parking lot allow access to Route 1. Owing to the access road and detention basin that service both the site and the shopping center, and a conservation easement Pineville's predecessor in title gave to the Delaware and Raritan Canal Commission in 2001, only a little less than twelve acres of the site is available for development.

Pineville's application to the Planning Board included a design approach carried over from the shopping center, reflective of Pineville's conception of the existing shopping center and its proposed supermarket and additional retail space as one cohesive retail development. At the public hearings on the application, Pineville presented the testimony of its architects, a professional planner, a licensed engineer and a traffic expert. The Board also heard from its own professionals and a traffic expert, licensed engineer and professional planner testifying on behalf of Royal. Three members of the public testified in favor of the application, while one person expressed concern over the parking and traffic circulation.

The Board took extensive testimony on four different dates concerning the site layout, architecture, signage, stormwater management, traffic circulation and the plan for replacing trees removed in developing the site. Among the many issues addressed was whether Pineville needed variances or design waivers for the relief it required from the provisions of the Township's land use ordinance governing the size and placement of landscaped islands separating parking stalls from circulation aisles and prohibiting parking in the front and side yard setbacks. Although Pineville had sought variances under *N.J.S.A. 40:55D–70c(2)* for that relief and the voice vote approving the application mirrored that request, the Board's professionals testified that they and the Board have always considered such requests for relief from the

parking standards of the ordinance as design waivers and not variances.

Pertinent to this appeal, the Board resolution memorializing the approval included the grant of variances to allow the supermarket to be sited at a ninety-degree angle from facing Route 1 as otherwise required, mirroring the variance allowed for the Target retail store in Phase I; to allow parking in the front and side yard setbacks as permitted in Phase I; to permit additional pylon and building signs; omitting bikeways as in Phase I; and relieving Pineville of the requirement that ten percent of the site be devoted to green space, fifty percent of which was to be located in the parking areas.

*2 The resolution also memorialized the grant of design waivers for the sizing, placement and landscaping of parking islands. The resolution notes the Board found both the variance and design waivers relating to the parking lot justified by existing environmental and physical constraints dictating the location of the lot, the extent of the site remaining undeveloped, the need to assure adequate on-site parking, the grant of such waivers to other commercial developments and the landscape buffering and grade of the parking lot making it not highly visible to the traveling public.

Royal challenged the approval in the Law Division contending the Board granted Pineville waivers where variances were required, impermissibly delegated its authority over the stormwater and other issues, lacked jurisdiction because of Pineville's faulty notices, acted arbitrarily in granting the approvals and violated Royal's constitutional rights. In all, Royal raised nine issues in its prerogative writs challenge. Judge Hurley addressed and rejected each of those claims in his forty-two page opinion affirming the Board's action.

After setting forth the testimony elicited at the hearing, the judge first undertook a detailed review of the Township's land use ordinance to address Royal's claim that the Board granted design exceptions or waivers from the zoning ordinance contrary to *Wawa Food Market v. Planning Board of Ship Bottom*, 227 N.J. Super. 29, 36 (App. Div.) (holding a planning board cannot grant a design waiver for off-street parking requirements contained in the zoning ordinance; relief must be by variance), *certif. denied*, 114 N.J. 299 (1988).

The judge noted that instead of adopting separate ordinances for zoning and site plan review, South Brunswick had only one ordinance, Chapter 62 of the municipal code

entitled "Land Use." Chapter 62 contains fifteen different articles; Article III is entitled "Subdivision" and Article IV is entitled "Zoning." There is no article dedicated to site plans. Section 62–205 of Article III, however, provides "[t]he same standards and principles which are applicable to subdivisions and which are set forth in section 62–204 shall be applicable to site plan review." The judge noted that although section 62–205 directs the Planning Board in reviewing a site plan to "consider" in addition to the standards set out in section 62–204, the provision and layout of parking areas for ease of pedestrian and vehicular traffic movement, aesthetic design and safety, neither it nor section 62–204 has any specific provisions relating to parking.

Instead, the site plan standards and requirements relating to safe and efficient vehicular and pedestrian circulation, parking and loading required for inclusion in a site plan ordinance by *N.J.S.A.* 40:55D–41b, appear in Division 6 "Off-Street Parking and Loading Design Standards" a subsection of Article IV, the article entitled "Zoning." Confronted with the ambiguity of the inclusion of Division 6 "Design Standards" "within the general title of 'Zoning,' although clearly not 'use regulations,'" Judge Hurley found that the Township had obviously incorporated its site plan regulations into various sections of its "Zoning" article. He concluded therefore that it was not sufficient to merely look to the titles of the subparts of the ordinance to determine whether any specific provision was a zoning regulation or a design standard. The judge looked instead to the language of each provision at issue to determine whether the governing body intended to allow the Board discretion to grant an exception from the requirement, thus treating the provision as a site plan regulation instead of a zoning provision for which relief would have to be by variance in accordance with *Wawa*.




*3 Undertaking that substantive review regarding the waivers granted to Pineville pursuant to ordinance sections, 62–1794(c)(2) (parking areas to be separated from on-site access roadways by planted islands); 62–1794(c)(4) (parking areas having thirty or more stalls to employ parking islands with a width of at least eight feet); 62–1794(c)(5) (specifying minimum sizes for planted islands adjacent to single and doubles rows of parking stalls); and 62–1794(c)(7) (parking in setbacks)¹, the judge concluded that each was obviously a design standard for which waiver relief was permitted and that the Planning Board did not act arbitrarily in granting the waivers. Undertaking the same substantive review for the variances granted to Pineville pursuant to ordinance sections, 62–1822 (signs); 62–2022 (bikeways); and 62–2023 (ten

percent of site devoted to green space), the judge concluded that the record supported the Board's grant of the variances.²

Addressing Royal's contention that the Planning Board failed to grant all the relief Pineville required for its proposed stormwater management facilities, the judge noted that “[t]he subject of stormwater management is both highly technical and subject to overlapping layers of governmental regulation.” Judge Hurley observed that New Jersey's Department of Environmental Protection encouraged municipalities to adopt rules that follow DEP standards and that South Brunswick had done so. *See N.J.A.C. 7:8–4.1 to –4.6* and ordinance section 62–2571 to 62–2583. Both DEP regulations and the Township's ordinance provide “to the maximum extent practicable, the standards shall be met by incorporating nonstructural stormwater management strategies into the design.” *See N.J.A.C. 7:8–5.3* and section 62–2573(a)(1).

The Board rejected the testimony of Royal's engineer that Pineville's stormwater management system had a fundamental design flaw. It considered the proofs offered by both parties and granted approval conditioned on Pineville's stormwater management plan obtaining DEP approval. Judge Hurley determined that because South Brunswick's ordinance as it relates to stormwater management “mimics” the DEP's regulations, “if the Board had either granted a variance or a waiver to the Township's ordinance, it could not, by such action, vary the rules of the other governmental agencies having jurisdiction.” The judge accordingly dismissed as without merit Royal's claim the Planning Board impermissibly delegated its authority “by imposing the condition that Pineville secure other governmental approvals.”

The judge similarly rejected Royal's claim the Board had impermissibly delegated its authority to its staff to determine the adequacy of Pineville's tree replacement plan. On reviewing the Township's ordinance on this point, the judge found the ordinance permits a developer “to contribute an amount equal to the current cost of each replacement tree not planted, *as determined by the planning department*” in lieu of planting all the replacement trees required. Because the ordinance vested this authority in the Planning Department, the judge found no dereliction in the Board having deferred final determination of Pineville's tree replacement plan to the Township's Planning Department.

*4 Judge Hurley rejected Royal's claims that the multiple notices Pineville published and served pursuant to  *N.J.S.A. 40:55D–11* were inadequate under the principles established in  *Perlmart of Lacey, Inc. v. Lacey Township Planning Board*, 295 *N.J.Super.* 234, 237–38 (App.Div.1996), and  *Pond Run Watershed Ass'n v. Township of Hamilton Zoning Board of Adjustment*, 397 *N.J.Super.* 335, 349 (App.Div.2008). After reviewing the notices Pineville published in April and May 2013, Judge Hurley noted they were obviously sufficient to induce four members of the public and Royal to appear and participate in the public hearings.

Further, the judge found the notices Pineville provided were

sufficient to advise a person of common experience that the proposal is for a shopping center to be similar to, and adjacent to, the Heritage Shopping Center, but on property designated as Block 82, Lot 15.02, further identified as 4154–4174 U.S. Route 1. The notice also advises that the Property has an existing cross access and cross utility easements with the adjoining properties, which indicates that access between the two is proposed. The notice also advises that variances relative to the building, parking and signage will be sought. In conjunction with the foregoing, the provision in the notice that advises that Pineville will seek whichever other variances or waivers that may be required is sufficient. The notice sufficiently describes the application as being in proximity to and essentially an extension (in design) of the Heritage Shopping Center.

The judge accordingly rejected Royal's claims that the insufficiency of the notices deprived the Planning Board of jurisdiction to hear and decide Pineville's application.

Upon review of the entire record of the proceedings before the Planning Board and each of Royal's claims of error,

Judge Hurley rejected Royal's contention that the Board acted arbitrarily or capriciously in any respect in granting Pineville preliminary and final site plan approval for its project. He found Royal could at most establish only a difference of opinion between its experts and those who testified on Pineville's behalf, which was insufficient to overcome the presumption of validity accorded to the Board's decision. See *Zilinsky v. Zoning Bd. of Adjustment of Verona*, 105 N.J. 363, 369 (1987). Because the judge found adequate evidence in the record to support the Board's findings and its resolution, he affirmed the approvals granted to Pineville and dismissed Royal's prerogative writs challenge. See *Smart SMR v. Fair Lawn Bd. of Adjustment*, 152 N.J. 309, 327 (1998).

Royal appeals, reprising the claims it made to the trial court. As our Supreme Court has recently reminded, our courts accord wide latitude to a municipal planning board in the exercise of its delegated discretion. See *Ten Stary Dom P'ship v. Mauro*, 216 N.J. 16, 33 (2013). "A board's decisions are presumptively valid, and a court may not substitute its own judgment for that of the board unless there has been a clear abuse of discretion by the board." *Ibid.* The burden of demonstrating the Board acted arbitrarily, capriciously, or unreasonably is on the challenger. See *Smart SMR, supra*, 152 N.J. at 327.

*5 Applying those standards here, we find no reason to reverse the determination of the trial judge following his extensive review of the proceedings before the Planning Board. To his careful findings, we add only the following.

We agree with Judge Hurley that whether Pineville required design waivers or variance relief from the provisions of the ordinance is controlled by the principle enunciated in *Wawa*, that is, a planning board has no authority to grant waivers or exceptions in the course of site plan review from provisions of the zoning ordinance. 227 N.J.Super. at 31. "Relief from the provisions of a zoning ordinance must be sought under the variance procedure." *Ibid.* We also, however, agree that the facts of *Wawa* are distinguishable from this matter.

As with construing statutes, the aim of courts in construing ordinances is to determine legislative intent. See *Trust Co. of N.J. v. Planning Bd. of Freehold*, 244 N.J.Super. 553, 568 (App.Div.1990). Our Constitution requires that zoning and land use ordinances receive a reasonable construction, N.J. Const. art. IV, § VII, ¶ 11, and our case law requires that they be liberally construed in favor of the municipality. *L &*

L Clinics, Inc. v. Town of Irvington, 189 N.J.Super. 332, 336 (App.Div.), certif. denied, 94 N.J. 540 (1983).

State statutory law is clear. The Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, grants a municipality the power to adopt an ordinance requiring site plan approval by its planning board as a condition for development. N.J.S.A. 40:55D-37a. Any such ordinance must include definite and clear standards for site plan review and approval. N.J.S.A. 40:55D-38, -41; see also *Pizzo Mantin Group v. Twp. of Randolph*, 137 N.J. 216, 230 (1994). The MLUL permits a planning board the authority to grant exceptions from the requirements and standards of a site plan ordinance "as may be reasonable and within the general purpose and intent of the provisions for subdivision and site plan review and approval." N.J.S.A. 40:55D-51a and b, but provides no such authority with respect to the requirements and standards of a zoning ordinance. *Wawa, supra*, 227 N.J.Super. at 34.

The difficulty in interpreting South Brunswick's land use ordinance stems from the ambiguity presented by the Township's obvious inclusion of the standards and requirements mandated in a site plan ordinance by N.J.S.A. 40:55D-41b, in a Division entitled "Design Standards" "within the general title of 'Zoning.'" ³ See Cox & Koenig, *New Jersey Zoning and Land Use Administration* 165 (2016) (noting that although some municipalities include the four major components of a land use regulatory scheme, general procedures, subdivision regulations, site plan regulations and zoning regulations, in one ordinance, "the separate parts thereof are usually discernible").

In *Wawa*, we criticized the trial judge for not considering himself bound by the fact that the parking space and driveway width requirements he characterized as design standards had been included in the municipality's zoning ordinance and were thus not waivable by the Planning Board. *Wawa, supra*, 227 N.J.Super. at 34. Such criticism is not warranted here.

*6 Judge Hurley obviously grasped the difference between zoning and site plan ordinances and the significance of a municipal governing body determining to place a provision in one or the other. The problem confronting him was that the structure of South Brunswick's combined ordinance with its internally conflicting subtitles made it necessary to analyze the content of the particular provisions at issue in order to discern whether the governing body intended to allow the Board discretion to grant an exception from the requirement, thus treating the provision as a site plan regulation instead

of a zoning provision for which relief would have to be by variance in accordance with *Wawa*. That the different parts of a combined land use ordinance are not easily discernible as in *Wawa* does not relieve a court of the burden of trying to divine legislative intent. When a court “is confronted with an ordinance that contains provisions that are ... arguably inconsistent, [its] obligation is to reconcile those provisions, to read them so as to make sense of them, and then to apply the ordinance in accordance with the intent of the municipality.”

 *Rowatti v. Gonchar*, 101 N.J. 46, 56 (1985).


Having reviewed the record, we are satisfied that Judge Hurley conscientiously, and correctly, considered and rejected each of Royal's arguments challenging the approvals granted to Pineville here. We affirm substantially for the reasons he expressed in his opinion of October 2, 2014.

Affirmed.

All Citations

Not Reported in A.3d, 2016 WL 3263209

Footnotes

- 1 Although rejecting Royal's contention that the Board in its resolution granted Pineville a variance to allow parking in the setbacks in one part of the resolution and a design waiver for the same relief in another part, the judge noted some confusion surrounding the issue arising out of the Board's findings of fact. We are satisfied that to the extent the resolution can be read as granting a variance for parking in the setbacks pursuant to *N.J.S.A. 40:55D-70c(2)*, there is adequate evidence in the record to support its decision.
- 2 With regard to the variance granted for the omitted bikeways, section 62-154(g)(4), the judge concluded that no variance was actually necessary as the section addresses how bikeways are to be constructed, if required, making bikeways permissive in the discretion of the Planning Board. The judge found, however, that the record supported a variance if one were required.
- 3 Our review of this matter suggests it would be in the interest of the Township to amend its land use ordinance to remove the sources of ambiguity by separating out those provisions it has adopted pursuant to *N.J.S.A. 40:55D-41b* from those adopted pursuant to  *N.J.S.A. 40:55D-62*, to avoid uncertainty for applicants and objectors as well as the necessity of interpretation by the municipal boards and the courts.

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Attorneys for Defendant-Intervenor Pulte Homes of NJ, Limited Partnership

IN THE MATTER OF THE APPLICATION OF THE BOROUGH OF FAR HILLS, COUNTY OF SOMERSET	: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY : DOCKET NO.: SOM-L-903-15 : : (CIVIL ACTION- <i>MOUNT LAUREL</i>) : : CERTIFICATION OF : RONALD A. KENNEDY, P.E. IN : OPPOSITION TO THE MOTION OF : SOHAIL KHAN FOR LIMITED : INTERVENTION :
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I, Ronald A. Kennedy, P.E, of full age, hereby certifies as follows:

1. I am the President of Gladstone Design, Inc. (“*Gladstone*”), which is the civil engineer retained by Pulte Homes of NJ, Limited Partnership (“*Pulte*”) in connection with the construction of a multi-family development consisting of 105 age-restricted townhouse dwellings and an apartment building consisting of 29 affordable apartments (25 family affordable units and 4 age-restricted affordable units) as well as other related site improvements (the “*Development*”) on property located at 220 Route 202, Far Hills, NJ (formerly Block 5, Lot 4) (the “*Pulte Property*”). I make this Certification based on my personal knowledge and in opposition to the motion for limited intervention filed by Sohail Khan (“*Khan*”), who claims to own property located at 3 Fox Hunt Court in Far Hills, NJ (Block 5, Lot 6.02) (the “*Khan Property*”), which is adjacent to the Pulte Property.

2. On behalf of Pulte, Gladstone prepared for the Development Preliminary and Final Major Site Development and Subdivision Plans, entitled “Residences at Overleigh” and dated March 19, 2021 (the “*Plans*”). The Plans were consistent with the conceptual site layout approved by the

Borough of Far Hills Council and included in the rezoning ordinance adopted by the Borough of Far Hills (“*Borough*”) as part of its affordable housing compliance plan.

3. After revising the Plans several times to address comments from the Borough’s professionals and other comments at public hearings, on February 7, 2022, the Borough’s Planning Board (the “*Board*”) approved the Plans, which included retaining walls in excess of six feet, and issued a resolution granting preliminary and final major site plan and subdivision approval for the Development (the “*Resolution*”).

4. The Resolution and related comments from the Board’s engineer and planner contained certain conditions of approval and comments that required Pulte to address the stormwater management design, including comments received from the New Jersey Department of Environmental Protection (“NJDEP”).

5. Specifically, Condition 33 provided “[a]ny adjustments to the site plan to address stormwater management comments from the Board Engineer or comments from the NJDEP shall not result in any changes to the layout of the buildings or the roadway network. Any such material change must be brought back to the Board for review as an amendment to the current approval.”

6. To address the conditions in the Resolution and other comments from the Board Engineer and NJDEP, Gladstone revised the Plans several more times, including by: (1) adjusting grade elevations across the site to direct stormwater flows to the appropriate locations and divert flow from concentrating along the property boundaries, including the Khan Property boundary; and (2) adding retaining walls that were consistent in design and height as the retaining walls already included in the Plans and previously approved by the Board.

7. The Plans were initially revised during resolution compliance on March 15, 2022 to address comments relating to stormwater management. It was on this revision that the grading was

adjusted and a retaining wall (the “*Retaining Wall*”) was added approximately 60-feet from the Khan Property boundary with a 50-foot wide landscaped buffer in between. Khan’s house is approximately 210-feet from the Retaining Wall, with woods in between.

8. The adjustments to the grade elevation as part of resolution compliance were done to divert stormwater flow *away* from the Khan Property and redirect that flow to the interior of the Pulte Property. Indeed, the grade elevations and Retaining Wall benefited Khan to the extent that they redirected stormwater that flowed onto his property under pre-development conditions and as originally shown on the Plans.

9. The changes to the grade of that area of the Property necessitated the Retaining Wall.

10. There is a bio-filtration basin next to the Retaining Wall that collects and detains the stormwater and then discharges that stormwater through a drainage pipe into a depressed area of riprap (a collection of rocks or rocky material that slows down and displaces the flow of water and helps prevent soil erosion).

11. In the event the water level exceeds the top part of that riprap area, it flows down the wooded side-yard of the Khan Property. That is the way stormwater flowed on that side of the Pulte Property prior to any construction because the Kahan Property is lower than the Pulte Property and continues to slope downward towards the Khan Property’s street frontage..

12. As part of the grading improvements and the construction of the Retaining Wall , the drainage area that flows to the bio-filtration basin that discharges to the Khan Property was reduced from 1.47 acres to .81 acres (45% reduction).

13. On March 28, 2024, I inspected the discharge pipe from the bio-retention basin and the riprap area on the Pulte Property. Attached as **Exhibit A** are two photos taken from that inspection.

14. As can be seen, there are significant amounts of leaves from the Fall in the bottom of the discharge pipe. There are also a significant amount of leaves in the riprap area.

15. This is evidence that there has not been significant amounts of stormwater coming out of the discharge pipe at a high velocity; and certainly not like a “fire hose” shooting out water. If there was significant amounts of stormwater at a high velocity, those leaves would have been displaced, either within the pipe or in the riprap.

16. Further, I did not see any evidence of soil erosion within the riprap area or dirt surrounding it.

17. Based on my inspection, I found no evidence of stormwater flowing from the inlet at a high velocity, as there was no evidence of erosion or displacement of any leaves or debris in the area of the outflow structure.

18. The bio-filtration basin, Retaining Wall, discharge pipe and riprap were constructed in September 2023. There have been significant rain events in the area since that time, including only a week or two before my site inspection.

19. Lastly, with respect to Mr. Khan’s contention that this matter needs to go back to the Planning Board to determine compliance with the Borough’s stormwater management ordinance, I can certify that the stormwater management design of the Plans does comply with the Township’s stormwater management ordinance.

20. The Board Engineer, who reviewed the stormwater management design as part of resolution compliance approved the plans demonstrating compliance with the Township’s stormwater management ordinance.

21. Further, the Borough’s stormwater management ordinance follows the NJDEP stormwater management regulations. In fact, the statewide Residential Site Improvement Standards

(RSIS) requires residential developments to comply with the NJDEP stormwater management regulations. Attached as **Exhibit B** is a copy of the Borough's stormwater management ordinance.

22. As part of the NJDEP wetland permits issued for this Project, the NJDEP reviews the stormwater management design of the Plans for compliance with NJDEP stormwater management regulations.

23. The Plans reviewed by the NJDEP were the Plans revised during resolution compliance, which included the increased grade and Retaining Wall and bio-filtration basin.

24. Attached as **Exhibit C** is the NJDEP wetlands permits issued on December 7, 2022. Comment 5 on page 4 states that "this project meets the requirements of the [NJDEP] Stormwater Management rules."

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.



Digitally signed by Ronald Kennedy
Date: 2024.04.04 13:42:11-04'00'

RONALD A. KENNEDY, P.E.

DATED: April 4, 2024

EXHIBIT
A





EXPLANATION: This Ordinance updates and revises Section 916 entitled "Stormwater Management" of the Borough's Land Management Ordinance (repealing and replacing Ordinance No. 2006-06) to update the Borough's regulations governing stormwater control and management pursuant to the NJDEP's amendments to its stormwater management regulations within the Borough of Far Hills.

**BOROUGH OF FAR HILLS
ORDINANCE NO. 2021-01**

AN ORDINANCE UPDATING AND AMENDING SECTION 916 ENTITLED "STORMWATER MANAGEMENT" OF THE BOROUGH'S LAND MANAGEMENT ORDINANCE (REPEALING AND REPLACING ORDINANCE NO. 2006-06) PURSUANT TO THE NJDEP'S AMENDED STORMWATER MANAGEMENT REGULATIONS.

WHEREAS, in 2020, the New Jersey Department of Environmental Protection ("NJDEP") adopted amendments to N.J.A.C. 7:8, Stormwater Management Regulations, which changed the definition of "major development", as well as incorporated green infrastructure standards, among other updates; and

WHEREAS, the NJDEP requires that municipalities adopt and/or update its local stormwater control and management regulations to comply with its recent updates to the Stormwater Management Regulations; and

WHEREAS, the Mayor and Borough Council, upon the advice of the Borough Engineer, desires to revise and update the Borough's stormwater control and management regulations to comply with the NJDEP Regulations.

NOW, THEREFORE, BE IT ORDAINED by the Borough Council of the Borough of Far Hills, in the County of Somerset and State of New Jersey, as follows:

Section 1. Section 916 entitled "Stormwater Management" of Article IX of the Land Management Ordinance of the Borough of Far Hills is hereby repealed in its entirety and replaced as follows (repealing and replacing Ordinance No 2006-06):

Chapter 916 Stormwater Management

§ 916-1 Definitions

All terms in this section shall be defined in the NJDEP Stormwater Rule (N.J.A.C. 7:8, et seq.). The following additional terms are defined for this chapter only.

- A. EXEMPT DEVELOPMENT – Shall mean any development that creates an increase of less than 1,000 square feet of impervious area and disturbs less than 2,500 square feet of land. Further, an exempt development shall not meet the definition of "minor development."
- B. MINOR DEVELOPMENT – Shall mean any development that results in the creation of an increase of 1,000 square feet or more of impervious area or one that disturbs more than 2,500 square feet of land area. Further, a minor development shall not meet the definition of "major development".
- C. MAJOR DEVELOPMENT – Shall mean any individual "development," as well as multiple developments that individually or collectively result in:
 1. The disturbance of one or more acres of land since February 2, 2004;
 2. The creation of one-quarter acre or more of "regulated impervious surface" since February 2, 2004;
 3. The creation of one-quarter acre or more of "regulated motor vehicle surface" since March 2, 2021; or
 4. A combination of 2 and 3 above that totals an area of one-quarter acre or more. The same surface shall not be counted twice when determining if the combination area equals one quarter acre or more.

Major development includes all developments that are part of a common plan of development or sale (for example, phased residential development) that collectively or individually meet any one or more of conditions 1, 2, 3, or 4 above. Projects undertaken by any government agency that otherwise meet the definition of "major development" but which do not require approval under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., are also considered "major development".

§ 916-2 Design Standards.

- A. Exempt Developments. Any project meeting the definition of "exempt development" shall be exempt from the provisions of this section.
- B. Minor Developments. Minor developments shall be designed to include the following stormwater management measures:

1. Water Quality. Soil erosion and sediment control measures shall be installed in accordance with the Standards for Soil Erosion and Sediment Control in New Jersey.
2. Rate/Volume Control. Seepage pits or other infiltration measures shall be provided with a capacity of three (3") inches of runoff for each square foot of new impervious area. Stone used in the infiltration devices shall be two and one-half (2 1/2") inches clean stone and design void ratio of 33% shall be used. The infiltration measures shall be designed with an overflow to the surface which shall be stabilized and directed to an existing stormwater conveyance system or in a manner to keep the overflow on the developed property to the greatest extent feasible. If the new impervious surface is not roof area, an equivalent area of existing roof may be directed to the infiltration system. This shall be permitted where the existing roof is not already directed to infiltration devices.

- C. Major Developments. All major developments shall have their stormwater management designed in accordance with the Residential Site Improvement Standards (RSIS, N.J.A.C. 5:21) and the NJDEP Stormwater Rule (N.J.A.C. 7:8). These standards shall apply to all projects, residential and nonresidential as well as projects by the Borough, Board of Education and other agencies subject to review by the Borough.

§ 916-3 Waivers and Exceptions.

- A. Standards for Relief. Waivers from strict compliance with the major development design standards shall only be granted upon showing that meeting the standards would result in an exceptional hardship on the applicant or that the benefits to the public good of the deviation from the standards would outweigh ANY detriments of the deviation. A hardship will not be considered to exist if reasonable reductions in the scope of the project would eliminate the noncompliance.
- B. Mitigation. If the reviewing agency for the project determines that a waiver is appropriate, the applicant must execute a mitigation plan. The scope of the mitigation plan shall be commensurate with the size of the project and the magnitude of the relief required. The mitigation project may be taken from the list of projects in the Municipal Stormwater Management Plan. All mitigation projects are subject to the approval of the Borough Engineer.
- C. Reviewing Agency. All applications subject to the review of the Land Use Board shall be reviewed by the Board concurrently with subdivision or site plan review. Applications not subject to Land Use Board review shall be reviewed by the Borough Engineer.

- D. Appeals. The appeal of the determination of the Borough Engineer shall be made in accordance with N.J.S.A. 40:55D-70a.

§ 916-4 Application and Review Fees.

There shall be no additional fees for stormwater review for applications to the Land Use Board. Minor Development applications to the Borough Engineer shall be accompanied by a review fee in the amount of \$500. Major Development applications shall be accompanied by a review fee in the amount of \$1,000. If a project is approved, an inspection escrow deposit shall be made in an amount to be determined by the Borough Engineer.

§ 916-5 Maintenance and repair.

- A. Projects subject to review as in § 916-1 of this chapter shall comply with the requirements of § 916-5B and C.
- B. General maintenance.
 - 1. The design engineer shall prepare a maintenance plan for the stormwater management measures incorporated into the design of a major development.
 - 2. The maintenance plan shall contain specific preventative maintenance tasks and schedules; cost estimates, including estimated cost of sediment, debris, or trash removal; and the name, address, and telephone number of the person or persons responsible for preventative and corrective maintenance (including replacement). Maintenance guidelines for stormwater management measures are available in the New Jersey Stormwater Best Management Practices Manual. If the maintenance plan identifies a person other than the developer (for example, a public agency or homeowners' association) as having the responsibility for maintenance, the plan shall include documentation of such person's agreement to assume this responsibility, or of the developer's obligation to dedicate a stormwater management facility to such person under an applicable ordinance or regulation.
 - 3. Responsibility for maintenance shall not be assigned or transferred to the owner or tenant of an individual property in a residential development or project, unless such owner or tenant owns or leases the entire residential development or project.
 - 4. If the person responsible for maintenance identified under § 916-5B(2) above is not a public agency, the maintenance plan and any future revisions based on § 916-5B(7) below shall be

recorded upon the deed of record for each property on which the maintenance described in the maintenance plan must be undertaken.

5. Preventative and corrective maintenance shall be performed to maintain the function of the stormwater management measure, including repairs or replacement to the structure; removal of sediment, debris, or trash; restoration of eroded areas; snow and ice removal; fence repair or replacement; restoration of vegetation; and repair or replacement of nonvegetated linings.

6. The person responsible for maintenance identified under § 916-5B(2) above shall maintain a detailed log of all preventative and corrective maintenance for the structural stormwater management measures incorporated into the design of the development, including a record of all inspections and copies of all maintenance-related work orders.

7. The person responsible for maintenance identified under § 916-5B(2) above shall evaluate the effectiveness of the maintenance plan at least once per year and adjust the plan and the deed as needed.

8. The person responsible for maintenance identified under § 916-5B(2) above shall retain and make available, upon request by any public entity with administrative, health, environmental, or safety authority over the site, the maintenance plan and the documentation required by § 916-5B(6) and B(7) above.

9. The requirements of § 916-5B(3) and B(4) do not apply to stormwater management facilities that are dedicated to and accepted by the municipality or another governmental agency.

10. In the event that the stormwater management facility becomes a danger to public safety or public health, or if it is in need of maintenance or repair, the municipality shall so notify the responsible person in writing. Upon receipt of that notice, the responsible person shall have 14 days to effect maintenance and repair of the facility in a manner that is approved by the Municipal Engineer or his designee. The municipality, in its discretion, may extend the time allowed for effecting maintenance and repair for good cause. If the responsible person fails or refuses to perform such maintenance and repair, the municipality or county may immediately proceed to do so and shall bill the cost thereof to the responsible person.

C. Nothing in this section shall preclude the municipality in which the major development is located from requiring the posting of a performance or maintenance guarantee in accordance with N.J.S.A. 40:55D-53.

§ 916-6 Violations and penalties.

Any person who erects, constructs, alters, repairs, converts, maintains, or uses any building, structure or land in violation of this chapter shall be subject to one or more of the following penalties: Imprisonment for a term not exceeding 90 days; a fine not exceeding \$2,000; and a period of community service not to exceed 90 days.

Section 2. If any article, section, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this Ordinance and they shall remain in full force and effect.

Section 3. In the event of any inconsistencies between the provisions of this Ordinance and any prior ordinance of the Borough of Far Hills, the provisions hereof shall be determined to govern, and the inconsistencies of the prior ordinance are hereby repealed. All other parts, portions and provisions of the Ordinances of the Borough of Far Hills are hereby ratified and confirmed, except where inconsistent with the terms hereof.

Section 4. The Borough Clerk is directed to give notice at least ten (10) days prior to a hearing on the adoption of this ordinance to the Somerset County Planning Board and to all other persons entitled thereto pursuant to N.J.S.A. 40:55D-15, and N.J.S.A. 40:55D-63 (if required).

Section 5. After introduction, the Borough Clerk is hereby directed to submit a copy of the within Ordinance to the Planning Board of the Borough of Far Hills for its review in accordance with N.J.S.A. 40:55D-26 and N.J.S.A. 40:55D-64. The Planning Board is directed to make and transmit to the Borough Council, within 35 days after referral, a report including identification of any provisions in the proposed ordinance which are inconsistent with the master plan and recommendations concerning any inconsistencies and any other matter as the Board deems appropriate.



STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATERSHED & LAND MANAGEMENT
 Mail Code 501-02A, P.O. Box 420, Trenton, New Jersey 08625-0420
 Telephone: (609) 777-0454 or Fax: (609) 777-3656
 www.nj.gov/dep/landuse

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PERMIT

<p>In accordance with the laws and regulations of the State of New Jersey, the Department of Environmental Protection hereby grants this permit to perform the activities described below. This permit is revocable with due cause and is subject to the terms, conditions, and limitations listed below and on the attached pages. For the purpose of this document, "permit" means "approval, certification, registration, authorization, waiver, etc." Violation of any term, condition, or limitation of this permit is a violation of the implementing rules and may subject the permittee to enforcement action.</p>		Approval Date December 7, 2022
		Expiration Date December 6, 2027
Permit Number(s): 1807-19-0001.1 LUP210001	Type of Approval(s): FWW GP10A Very Minor Road Crossings FWW GP11 Outfalls/Intake Structures TAW - Averaging Plan Water Quality Certificate	Governing Rule(s): N.J.A.C. 7:7A-1.1(a)
Permittee: Anthony Melillo Melillo Equities 350 Main Street, Suite 8 Bedminster, NJ 07921	Site Location: Block & Lot: [5, 4] Municipality: Far Hills County: Somerset	
Description of Authorized Activities: <p>This document authorizes the construction of a paved road (Dillion Boulevard), the construction of two stormwater outfall structures, and construction activities associated with a multi-unit residential development on the parcel referenced above. This authorization to conduct regulated activities in wetlands and/or waters includes the issuance of a Water Quality Certificate.</p> <p>The Division of Land Resource Protection has reviewed the referenced application for a General Permit authorization and Transition Area Waiver pursuant to the requirements of the Freshwater Wetlands Protection Act Rules at N.J.A.C. 7:7A-7. The activities allowed by this authorization shall comply with applicable conditions noted at N.J.A.C. 7:7A-5.7, 7.10A, 7.11, 8.2 and 20.2. Failure to comply with these conditions shall constitute a violation of the Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et. seq.).</p> <p>This permit is not valid and no disturbance of any wetland transition areas is authorized until the conservation restriction as noted in Pre-Construction Condition Number 4 is recorded with the appropriate County officials and a record of said filing is submitted to the Division of Land Resource Protection.</p>		
Prepared by: Mark Harris	Received and/or Recorded by County Clerk:	
If the permittee undertakes any regulated activity, project, or development authorized under this permit, such action shall constitute the permittee's acceptance of the permit in its entirety as well as the permittee's agreement to abide by the requirements of the permit and all conditions therein.		
This permit is not valid unless authorizing signature appears on the last page.		

STATEMENT OF AUTHORIZED IMPACTS:

The authorized activities allow for the permittee to undertake impacts to regulated areas as described below. Additional impacts to regulated areas without prior Department approval shall constitute a violation of the rules under which this document is issued and may subject the permittee and/or property owner to enforcement action, pursuant to N.J.A.C. 7:7A-22.

FWW GP10A Very Minor Road Crossings	Permanent Disturbance (Acres)	Temporary Disturbance (Acres)
Freshwater wetlands	0.168	0
Transition areas	0	0
State open waters	0	0

FWW GP11 Outfalls/Intake Structures	Permanent Disturbance (Acres)	Temporary Disturbance (Acres)
Freshwater wetlands	0	0
Transition areas	0.014	0
State open waters	0	0

TAW – Averaging Plan	Reduction	Compensation
Transition Area	1,198 s.f.	1,206 s.f.

PRE-CONSTRUCTION CONDITIONS:

1. Timing: If this permit contains a condition that must be satisfied prior to the commencement of construction, the permittee must comply with such condition(s) within the time required by the permit or, if no time specific requirement is imposed, then within six months of the effective date of the permit, or provide evidence satisfactory to the Division that such condition(s) cannot be satisfied.
2. Prior to the commencement of any site preparation, clearing, grading or construction, the permittee is responsible for installing and maintaining silt fence sediment barriers around all soils disturbed by construction, which are sufficient to prevent the sedimentation of the unnamed tributary to Mine Brook. These fences shall serve as both a siltation and debris barrier as well as a physical barrier protecting the undisturbed regulated areas from encroachment by construction vehicles or activities. All sediment barriers and other soil erosion control measures shall be maintained on a daily basis in proper working condition throughout the entire duration of the project until such time that the site is stabilized.
3. Pursuant to N.J.A.C. 7:7A-8.1(b)3, prior to construction of the structure (including site preparation), the permittee shall install a split rail fence or equivalent physical barrier at the limits of the modified transition area to ensure that subsequent activities on site do not encroach into the conservation easement areas, the remaining freshwater wetlands and transition areas. The modified transition area and wetlands shall remain undisturbed and natural, and not be maintained as a mowed or landscaped

area. These areas shall be allowed to revert to a natural habitat. The permittee shall erect permanent signs on the barrier that denote the area beyond the fence as deed restricted.

4. **Within 90 days of the permit issuance and/or prior to construction (whichever occurs first), the property owner shall sign a Department-approved conservation restriction for the compensation transition area on the subject parcels in accordance with N.J.A.C. 7:7A-8.1(e). The conservation restriction shall apply to compensated transition area on the site and shall preclude future transition area disturbance on-site, unless said activity is permissible pursuant to the language of the deed restriction. The restriction shall be included on the deed, and recorded in the office of the County Clerk (the Registrar of Deeds and Mortgages), in the county wherein the lands included in the waiver are located.** Said restriction shall run with the land and be binding upon all successive owners. All individual lot surveys shall show the approved wetland and transition area boundaries. Any regulated activities undertaken on the site before a copy of this recorded restriction is submitted to the Department will be considered in violation of the Freshwater Wetlands Protection Act. The conservation restriction shall conform, verbatim, to the format and content of the model Conservation Restriction/Easement for Transition Area on the Division's website at http://www.nj.gov/dep/landuse/download/lur_036.pdf. A copy of the recorded conservation restriction shall be forwarded to the Division's Project Manager via email at Mark.Harris@dep.nj.gov before beginning regulated activities.

SPECIAL CONDITIONS FOR FRESHWATER WETLAND PERMITS:

1. This permit authorizes the following disturbances: **the permanent disturbance of 0.168 acres (7,300 square feet) of Intermediate resource value wetlands under a Freshwater Wetlands General Permit No. 10A for the construction of a paved road (Dillion Boulevard) crossing; and the permanent disturbance of 0.014 acres (631 square feet) of Intermediate resource value transition area under a Freshwater Wetlands General Permit No. 11 for the construction of two stormwater outfall structures.** The wetlands affected by this permit authorization are of Intermediate resource value and the standard transition area or buffer required adjacent to these wetlands is 50 feet. These general permits include a transition area waiver, which allows encroachment only in that portion of the transition area which has been determined by the Department to be necessary to accomplish the regulated activities. Any additional un-permitted disturbance of freshwater wetlands, State open waters and/or transition areas besides that shown on the approved plans shall be considered a violation of the Freshwater Wetlands Protection Act Rules unless the activity is exempt or a permit is obtained from the Department prior to the start of the proposed disturbance.
2. In order to protect general game fish within the unnamed tributary to Mine Brook, or any other tributaries, any proposed grading or construction activities within the banks of this stream **is prohibited between May 1st through July 31st of each year.** In addition, any activity within the 100-year floodplain or flood hazard area of these streams which would introduce sediment into said waters or which could cause more than a minimum increase in the natural level of turbidity is also prohibited anytime, but especially during this period. The Department reserves the right to require additional soil conservation measures if it becomes evident that additional soil conservation measures are required to protect State regulated resources or to suspend all regulated activities on-site should it be determined that the applicant has not taken proper precautions to ensure continuous compliance with this condition.

3. In order to protect the federally listed Indiana Bat, the removal of any trees five inches in diameter at breast height (dbh) or greater **is prohibited from April 1st through September 30th of each calendar year.**
4. The applicant must adhere to the operations and maintenance plan for the stormwater management measures incorporated into the design of this major development in accordance with **N.J.A.C. 7:8-5.8**. Guidance set forth in the New Jersey Stormwater Best Management Practices Manual should be followed to the maximum extent practicable.
5. The Department has determined that this project meets the requirements of the Stormwater Management rules at **N.J.A.C. 7:8**. Any further expansion or alteration of the approved stormwater management system, which would affect water quality, increase the rate or volume of stormwater leaving the site, affect the infiltration capacity on the site, or alter the approved green infrastructure best management practices, shall be reviewed and approved by the Department by obtaining a modification or new permit as appropriate prior to construction. This includes any proposed changes to the discharge characteristics of any basin, the construction of new inlets or pipes that tie into the storm sewer network and/or the replacement of existing inlets or pipes with structures of different capacity.
6. Prior to the start of any construction onsite, the permittee/owner shall record a deed notice for all stormwater management measures authorized under this permit which shall be recorded in the Office of the County Clerk or the Registrar of Deeds and Mortgages of the county in which the development, project, project site, or mitigation area containing the stormwater management measure is located. A form of deed notice shall be submitted to the Watershed and Land Management Program (Program) for approval prior to filing. The deed notice shall contain a description of the stormwater management measure(s) used to meet the green infrastructure, groundwater recharge, stormwater runoff quality, and stormwater runoff quantity standards at **N.J.A.C. 7:8-5.3, 5.4, 5.5, and 5.6** and shall identify the location of the stormwater management measure(s) in NAD 1983 State Plane New Jersey FIPS 2900 US Feet or Latitude and Longitude in decimal degrees. The deed notice shall also reference the maintenance plan required to be recorded upon the deed pursuant to **N.J.A.C. 7:8-5.8(d)**. Prior to the commencement of construction, proof that the above required deed notice has been filed shall be submitted to the Program. Proof that the required information has been recorded on the deed shall be in the form of either a copy of the complete recorded document or a receipt from the clerk or other proof of recordation provided by the recording office. However, if the initial proof provided to the Program is not a copy of the complete recorded document, a copy of the complete recorded document shall be provided to the Program within 180 calendar days of the authorization granted by the Program.
7. The permittee shall dispose of any excess soil or bedding material immediately upon completion of construction. This material shall be disposed of outside of freshwater wetlands, transition areas, State open waters, and areas regulated under the Department's Flood Hazard Area Control Act rules at **N.J.A.C. 7:13**.
8. The uppermost 18 inches of any excavation shall be backfilled with original topsoil material.
9. This authorization for Freshwater Wetlands General Permits is valid for a term not to exceed five years from the date of this letter. If the permittee wishes to continue an activity covered by the permits after the expiration date of the permits, the permittee must apply for and obtain a permit extension or new permits, prior to the permits' expiration. If the term of the authorization exceeds the expiration date of the individual permit issued by rule, and the permit upon which the authorization is based is modified by rule to include more stringent standards or conditions, or is not reissued, the permittee must comply with the requirements of the new regulations by applying for a new General Permit authorization or an Individual Permit.

10. The permittee will be responsible for the installation of a sediment barrier around all disturbed soils, which is sufficient to prevent the sedimentation of the remaining freshwater wetlands, transition area and State open waters.
11. In order to mitigate for the adverse effect, the submitted Historic Building Alternatives Analysis (HBAA) proposes to document the portion of the Overleigh Estate on the subject property to Historic American Buildings Survey (HABS) standards, as well as to utilize family names related to the estate's history for street names that would be constructed as part of the proposed project. In subsequent correspondence, the permittee additionally proposed interpretive signage as mitigation for the adverse effect. The Historic Preservation Office (HPO) has considered the proposed mitigation alternatives and requests the following permit conditions:
 - i. The permittee shall provide an archival copy of the draft Historic American Buildings Survey (HABS) documentation submitted to the Historic Preservation Office on December 15, 2021, by Richard Grubb & Associates, Inc., which was prepared by an Architectural Historian who meets the Secretary of the Interior's Professional Qualifications Standards [48 FR 44738-9] in Architectural History. The documentation shall include both archivally stable, 4-inch by 6-inch black and white prints and high-resolution digital RAW and/or TIFF files on an archival CD-R. The permittee shall provide one original archival copy of the recordation to the HPO and duplicate copies, with original photographs, shall be provided to the following repositories: Clarence Dillon Public Library, the Somerset County Historical Society, the Historical Society of the Somerset Hills, and the New Jersey Historical Society. The HABS documentation shall be submitted to the Historic Preservation Office within three (3) months of permit issuance. A monthly status report shall be submitted to the Division of Land Use Regulation and the Historic Preservation Office.
 - ii. The permittee, using the services of a qualified consultant meeting the Secretary of the Interior's Professional Qualifications Standards [48 FR 44738-9] in History and/or Architectural History, shall develop, fabricate and install two interpretive signs to be placed on Block 5, Lot 4, in publicly accessible areas of the proposed development. The signs shall interpret the history and significance of the Overleigh Estate and the development of country estates in the Somerset Hills as documented in the MPDF. The content of the signage shall include a colorful panel mounted on a pedestal, and the content shall incorporate historic photographs and/or maps as well as text regarding the historic significance of the property. The location, content, size, and text of the signage shall be submitted to the HPO for review and approval within six months of permit issuance and prior to fabrication. The interpretive signs shall be fabricated and installed by the permittee within three months of project completion. A monthly status report shall be submitted to the Division of Land Resource Protection and the Historic Preservation Office.
 - iii. The applicant, using the services of an Architectural Historian or Historian who meets the Secretary of the Interior's Professional Qualifications Standards [48 FR 44738-9] in Architectural History and/or History, shall complete historical research in support of the Country Place-Era Resources of the New Jersey Somerset Hills, 1872-c.1940, MPDF. Specifically, the Historic Preservation Office requests the following information regarding each of the 14 estates that were historically located within Far Hills Borough, as identified in Section H, Appendix A, of the MPDF:
 - a. Dates of construction and any alterations;
 - b. Name of architect(s), including original construction and any outbuildings and/or alterations;
 - c. Name of landscape architect(s), including original construction and any later modifications;

- d. Name of builder(s), including original construction and any later modifications;
- e. Name of owner(s) and owner's occupation at time of construction and at the time of alterations, where applicable.

The information shall be presented in a report containing a brief narrative summarizing the above-referenced information for each property, with citations, as well as a complete list of sources consulted for the project, including any negative search results. The sources consulted must include, but are not limited to, contemporary periodicals, newspapers, and the collections of the Historical Society of the Somerset Hills. In addition to the brief narratives, the information shall also be provided in a tabular format to developed in consultation with the Historic Preservation Office. The Architectural Historian and/or Historian shall meet with the HPO within 60 days of permit issuance for a kickoff meeting, and a draft report shall be submitted to the Historic Preservation Office for review and approval within 6 months of permit issuance. A monthly status report shall be submitted to the Division of Land Resource Protection and the Historic Preservation Office.

SPECIAL CONDITIONS FOR A TRANSITION AREA WAIVER – AVERAGING PLAN

This authorization is based upon a Letter of Interpretation-Line Verification issued by the Division under File and Activity No. 1807-19-0001.1 FWW190001. The Department has determined that the freshwater wetlands present on the above referenced property are of Intermediate resource value. Pursuant to N.J.A.C. 7:7A-3.3(d), a standard transition area of 50 feet is required adjacent to these wetlands. The approved plan shows a modification to this standard transition area through the means of a Transition Area Waiver-Averaging Plan for grading activity and the construction of a paved surface associated with the proposed multi-unit residential development.

1. Section 7:7A of the Freshwater Wetlands Protection Act Rules discusses the conditions under which the standard transition area may be modified if the Department determines that the modifications will result in minimal environmental impact and that the modified transition area will continue to feature the purposes and functions set forth in N.J.A.C. 7:7A-3.3(a) and (b). Based upon a review of the submitted information, the Department has determined that the proposed modified transition area as shown on the plan referenced below will continue to meet the purposes and functions of a transition area as detailed in the Act and implementing rules provided the following conditions are met:
 - i. As shown on the approved plan, the transition area shall be reduced by 1,198 s.f. (0.028 acres) for construction activities associated with the construction of a multi-unit residential development. This reduction shall be compensated for by the expansion of the transition area by 1,200 s.f. (0.028 acres).
 - ii. The transition area shall not be reduced to a width less than that shown on the approved plan.

FRESHWATER WETLAND MITIGATION PERMIT CONDITIONS:

1. The permittee shall mitigate for the permanent disturbance of 0.168 acres of scrub/shrub wetlands through an on-site or off-site creation, restoration or enhancement project or with the purchase of credits from a mitigation bank serving the appropriate watershed management area in accordance with the mitigation hierarchy. (N.J.A.C. 7:7A-11 et seq)
2. **At least 90 days prior to the initiation of regulated activities authorized by this permit**, the permittee shall submit a mitigation proposal to the Division of Watershed Management and

Restoration (Division) for review and approval. Activities authorized by this permit shall not begin until the permittee has obtained written approval of a mitigation plan from the Department (N.J.A.C. 7:7A-11.6(a)).

3. **All mitigation shall be conducted prior to or concurrent with the construction of the approved project** (N.J.A.C. 7:7A-11.3(a)). Concurrent means that at any given time, the mitigation must track at the same or greater percentage of completion as the project as a whole.
4. If the permittee fails to perform mitigation within the applicable time-period the acreage of mitigation required shall be increased by 20 percent each year after the date mitigation was to begin (N.J.A.C. 7:7A-11.3(c)).
5. If the applicant is considering obtaining land to satisfy a mitigation requirement, the Department strongly recommends that the permittee obtain the Division's conceptual review and approval of any land being considered as a potential mitigation area.
6. If the permittee is purchasing credits from a mitigation bank to satisfy a mitigation requirement, prior to the initiation of regulated activities authorized by this permit, the permittee shall submit proof of purchase for 0.168 mitigation credits from an approved wetland mitigation bank to the attention of the Mitigation Unit Supervisor, NJDEP, Division of Watershed Management and Restoration at Mail Code 501-02A, P.O. Box 420, Trenton, NJ 08625-0420.

At this time, the following bank(s) are approved to serve the project area; additional banks may be approved at any time, so please contact the Mitigation unit for the most up to date service area information if you would like additional options.

Cranbury - Doug Lashley, GreenVest, 4201 Northview Drive, Suite 202, Bowie, MD 20716 and he can be reached at (410) 987-5500 ext 102 or via email at Doug@greenvestus.com; or Brian Cramer, GreenVest, 3175 Route 10, Suite 100, Denville, NJ 07834 and he can be reached at (732) 902-6644 or via email at Brian@greenvestus.com

7. If the permittee is considering conducting a creation, restoration or enhancement project, the following conditions shall apply:
 - a. **Prior to the initiation of regulated activities** authorized by this permit the permittee shall submit a final design of the mitigation project for approval and include all of the items listed on the checklist entitled Checklist for Completeness: Creation, Restoration or Enhancement for a Freshwater Wetland Mitigation Proposal located at <http://www.nj.gov/dep/landuse/forms/index.html>.
 - b. The permittee shall obtain a secured bond or other financial surety acceptable to the Division from a firm licensed to provide such services in New Jersey. (N.J.A.C. 7:7A-11.17)
 - c. **Prior to the completion of the mitigation project**, the permittee shall complete, sign and file with the County Clerk (the Registrar of Deeds and Mortgages in some counties), a conservation restriction that meets the requirements of N.J.A.C. 7:7A-12.1. The conservation restriction shall include the wetland and required transition area and conform to the format and content of the Wetlands Mitigation Area model conservation restriction that is available at: <http://www.nj.gov/dep/landuse/forms/index.html>. The applicant is required to include a metes and bounds description shown on a map. Within 180 days of the issuance of the mitigation approval, the recorded conservation restriction shall be provided to the Mitigation Unit,

- Division of Watershed Management and Restoration for verification. (N.J.A.C. 7:7A-12.1 et. seq.)
- d. The permittee shall notify the Mitigation Unit at the Division of Watershed Management and Restoration in writing **at least 30 days prior to the start of construction of the wetland mitigation project** to arrange an on-site pre-construction meeting among the permittee, the contractor, the consultant and the Division.
 - e. To ensure the intent of the mitigation design and its predicted wetland hydrology is realized in the landscape, the mitigation designer shall be present on-site during all critical stages of mitigation construction and during the restoration of any temporarily impacted areas. Critical stages of construction include but are not limited to herbicide applications, earthmoving activities, planting, and inspections.
 - f. The permittee shall be responsible for ensuring that best management practices are used throughout construction to control the spread and colonization of highly invasive plants. Specifically, all equipment, especially tracks and tires, must be thoroughly cleaned every time equipment or vehicles move from an area containing invasive plants or from off-site to the mitigation area. In addition, soil containing root fragments and above-ground vegetative material from invasive plants shall be carefully managed during earthmoving activities and disposed of at a suitable off site location rather than mulched and reused or stockpiled elsewhere on the site. For information on the specific species that are considered to be invasive, please refer to the Invasive Plant Atlas at <http://www.invasiveplantatlas.org/index.html>.
 - g. If changes to the mitigation design are necessary to ensure success of the project as a result of on-site conditions, the mitigation designer shall immediately notify the Division in writing and submit an alternative plan which achieves the proposed wetland conditions. The Division shall review the plan in accordance with N.J.A.C. 7:7A-11.7. Any modifications to the plan that are reviewed and approved by the Division must be shown on a signed and sealed revised plan. The As-Built plans required as a part of the Construction Completion Report may serve as the signed and sealed revised plan required to be submitted as part of the construction modification process described above if time constraints warrant such action and have been approved by the Division in writing.
 - h. **Within 30 days of final grading of the mitigation site and prior to planting**, the permittee shall notify the Mitigation Unit at the Division of Watershed Management and Restoration in writing to arrange a post-grading construction meeting among the permittee, contractor, consultant and the Division.
 - i. **Within 30 days following the final planting of the mitigation project**, the permittee shall submit a Construction Completion Report to the Division detailing as-built conditions (see below) and any changes to the approved mitigation plan that were made during construction (N.J.A.C. 7:7A-11.12). The Construction Completion Report shall contain, at a minimum, the following information:
 - i. A completed Wetland Mitigation Project Completion of Construction Form. This form is located at <http://www.nj.gov/dep/landuse/forms/index.html> and certifies that the mitigation project has been constructed as designed and that the proposed area of wetland creation, restoration or enhancement has been accomplished;

- ii. As-Built plans which depict final grade elevations at one foot contours and include a table of the species and quantities of vegetation that were planted including any grasses that may have been used for soil stabilization purposes; and
 - iii. Photos of the constructed wetland mitigation project with a photo location map as well as the GPS waypoints in NJ state plane coordinates NAD 1983.
- j. **Within 30 days following final planting of the mitigation project**, the permittee shall post the mitigation area with permanent signs which identify the site as a wetland mitigation project and that all-terrain vehicle use, motorbike use, mowing, dumping, draining, cutting and/or removal of plant materials is prohibited and that violators shall be prosecuted and fined to the fullest extent under the law. The signs must also state the name of the permittee, a contact name and phone number, and the Department's permit number.
- k. The permittee shall monitor **all freshwater wetland and transition area projects** for a minimum of 5 years, unless otherwise stipulated within the approved mitigation proposal, beginning the first full growing season after the mitigation project has been completed. The permittee shall submit monitoring reports to the Division of Watershed Management and Restoration no later than December 31st of each full monitoring year (N.J.A.C. 7:7A-11.12(g)). All monitoring reports must include the standard items identified in the checklist entitled, "Wetland Mitigation Monitoring Project Checklist", which can be found at <http://www.nj.gov/dep/landuse/forms/index.html>.
- l. Once the required monitoring period has expired and the permittee has submitted the final monitoring report, the Division will make the finding that the mitigation project is either a success or a failure. This mitigation project will be considered successful if the permittee demonstrates all of the following:
 - i. That the goals of the wetland mitigation project, including acreage and the required transition area, as stated in the approved wetland mitigation proposal and the permit have been satisfied. The permittee shall submit a field wetland delineation of the wetland mitigation project based on the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989) which shows the exact acreage of State open waters, emergent, scrub/shrub and/or forested wetlands in the mitigation area;
 - ii. The site has an 85 percent survival and 85 percent area coverage of the mitigation plantings or target hydrophytes, which are species native to the area and similar to ones identified on the mitigation planting plan. All plant species in the mitigation area must be healthy and thriving and all trees must be at least five feet in height;
 - iii. The site has less than 10 percent coverage by invasive or noxious species.
 - iv. The site contains hydric soils or there is evidence of reduction occurring in the soil; and,
 - v. The proposed hydrologic regime as specified in the mitigation proposal has been satisfied.
- m. The permittee is responsible for assuming all liability for any corrective work necessary to meet the success criteria established above (N.J.A.C. 7:7A-11.12(i)). The Division will notify the permittee in writing if the mitigation project is considered a failure. Within 30 days of notification, the permittee shall submit a revised mitigation plan to meet the success criteria identified above for Division review and approval. The financial surety, if required, will not be

released by the Division until such time that the permittee satisfies the success criteria as stipulated above.

STANDARD CONDITIONS:

1. The issuance of a permit shall in no way expose the State of New Jersey or the Department to liability for the sufficiency or correctness of the design of any construction or structure(s). Neither the State nor the Department shall, in any way, be liable for any loss of life or property that may occur by virtue of the activity or project conducted as authorized under a permit.
2. The issuance of a permit does not convey any property rights or any exclusive privilege.
3. The permittee shall obtain all applicable Federal, State, and local approvals prior to commencement of regulated activities authorized under a permit.
4. A permittee conducting an activity involving soil disturbance, the creation of drainage structures, or changes in natural contours shall obtain any required approvals from the Soil Conservation District or designee having jurisdiction over the site.
5. The permittee shall take all reasonable steps to prevent, minimize, or correct any adverse impact on the environment resulting from activities conducted pursuant to the permit, or from noncompliance with the permit.
6. The permittee shall immediately inform the Department of any unanticipated adverse effects on the environment not described in the application or in the conditions of the permit. The Department may, upon discovery of such unanticipated adverse effects, and upon the failure of the permittee to submit a report thereon, notify the permittee of its intent to suspend the permit.
7. The permittee shall immediately inform the Department by telephone at (877) 927-6337 (WARN DEP hotline) of any noncompliance that may endanger public health, safety, and welfare, or the environment. The permittee shall inform the Watershed & Land Management by telephone at (609) 777-0454 of any other noncompliance within two working days of the time the permittee becomes aware of the noncompliance, and in writing within five working days of the time the permittee becomes aware of the noncompliance. Such notice shall not, however, serve as a defense to enforcement action if the project is found to be in violation of this chapter. The written notice shall include:
 - i. A description of the noncompliance and its cause;
 - ii. The period of noncompliance, including exact dates and times;
 - iii. If the noncompliance has not been corrected, the anticipated length of time it is expected to continue; and
 - iv. The steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.
8. Any noncompliance with a permit constitutes a violation of this chapter and is grounds for enforcement action, as well as, in the appropriate case, suspension and/or termination of the permit.

9. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the authorized activity in order to maintain compliance with the conditions of the permit.
10. The permittee shall employ appropriate measures to minimize noise where necessary during construction, as specified in N.J.S.A. 13:1G-1 et seq. and N.J.A.C. 7:29.
11. The issuance of a permit does not relinquish the State's tidelands ownership or claim to any portion of the subject property or adjacent properties.
12. The issuance of a permit does not relinquish public rights to access and use tidal waterways and their shores.
13. The permittee shall allow an authorized representative of the Department, upon the presentation of credentials, to:
 - i. Enter upon the permittee's premises where a regulated activity, project, or development is located or conducted, or where records must be kept under the conditions of the permit;
 - ii. Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;
 - iii. Inspect, at reasonable times, any facilities, equipment, practices, or operations regulated or required under the permit. Failure to allow reasonable access under this paragraph shall be considered a violation of this chapter and subject the permittee to enforcement action; and
 - iv. Sample or monitor at reasonable times, for the purposes of assuring compliance or as otherwise authorized by the Federal Act, by the Freshwater Wetlands Protection Act, or by any rule or order issued pursuant thereto, any substances or parameters at any location.
14. The permittee shall not cause or allow any unreasonable interference with the free flow of a regulated water by placing or dumping any materials, equipment, debris or structures within or adjacent to the channel while the regulated activity, project, or development is being undertaken. Upon completion of the regulated activity, project, or development, the permittee shall remove and dispose of in a lawful manner all excess materials, debris, equipment, and silt fences and other temporary soil erosion and sediment control devices from all regulated areas.
15. The permittee and its contractors and subcontractors shall comply with all conditions, site plans, and supporting documents approved by the permit.
16. All conditions, site plans, and supporting documents approved by a permit shall remain in full force and effect, so long as the regulated activity, project, or development, or any portion thereof, is in existence, unless the permit is modified pursuant to the rules governing the herein approved permits.
17. The permittee shall perform any mitigation required under the permit in accordance with the rules governing the herein approved permits.
18. If any condition or permit is determined to be legally unenforceable, modifications and additional conditions may be imposed by the Department as necessary to protect public health, safety, and welfare, or the environment.

19. Any permit condition that does not establish a specific timeframe within which the condition must be satisfied (for example, prior to commencement of construction) shall be satisfied within six months of the effective date of the permit.
20. A copy of the permit and all approved site plans and supporting documents shall be maintained at the site at all times and made available to Department representatives or their designated agents immediately upon request.
21. The permittee shall provide monitoring results to the Department at the intervals specified in the permit.
22. A permit shall be transferred to another person only in accordance with the rules governing the herein approved permits.
23. A permit can be modified, suspended, or terminated by the Department for cause.
24. The submittal of a request to modify a permit by the permittee, or a notification of planned changes or anticipated noncompliance, does not stay any condition of a permit.
25. Where the permittee becomes aware that it failed to submit any relevant facts in an application, or submitted incorrect information in an application or in any report to the Department, it shall promptly submit such facts or information.
26. The permittee shall submit to the Bureau of Coastal & Land Use Compliance & Enforcement email notification at CLU_tomsriver@dep.nj.gov or mail notification to 501 E. State St, PO Box 420, Mail Code 501-01A, Trenton, NJ 08625 at least 3 days prior to commencement of site preparation and/or regulated activities, whichever comes first. The notification shall include proof of completion of all pre-construction conditions, including proof of recording of permits, approved plans and/or conservation easements, if required. The permittee shall allow an authorized Bureau representative on the site to inspect to ensure compliance with this permit.
27. The permittee shall record the permit, including all conditions listed therein, with the Office of the County Clerk (the Registrar of Deeds and Mortgages, if applicable) of each county in which the site is located. The permit shall be recorded within 30 calendar days of receipt by the permittee, unless the permit authorizes activities within two or more counties, in which case the permit shall be recorded within 90 calendar days of receipt. Upon completion of all recording, a copy of the recorded permit shall be forwarded to Watershed & Land Management at the address listed on page one of this permit.

APPROVED PLAN:

The drawing hereby approved consist of one (1) sheet prepared by Ronald A. Kennedy, N.J. Professional Engineer of Gladstone Design, Inc., dated October 27, 2021, last revised December 7, 2022, [unless otherwise noted], and entitled:

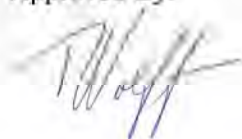
“PULTE HOMES – FAR HILLS BLOCK 5 LOT 4 BOROUGH OF FAR HILLS SOMERSET COUNTY NEW JERSEY NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION PERMITTING PLANS FRESHWATER WETLANDS PERMITTING PLAN”, Sheet No. 1 of 1.

APPEAL OF DECISION:

Any person who is aggrieved by this decision may submit an adjudicatory hearing request within 30 calendar days after public notice of the decision is published in the DEP Bulletin (available at www.nj.gov/dep/bulletin). If a person submits the hearing request after this time, the Department shall deny the request. The hearing request must include a completed copy of the Administrative Hearing Request Checklist (available at www.nj.gov/dep/landuse/forms.html). A person requesting an adjudicatory hearing shall submit the original hearing request to: NJDEP Office of Legal Affairs, Attention: Adjudicatory Hearing Requests, Mail Code 401-04L, P.O. Box 402, 401 East State Street, 7th Floor, Trenton, NJ 08625-0402. Additionally, a copy of the hearing request shall be submitted to the Director of Watershed & Land Management at the address listed on page one of this permit. In addition to your hearing request, you may file a request with the Office of Dispute Resolution to engage in alternative dispute resolution. Please see www.nj.gov/dep/odr for more information on this process.

If you need clarification on any section of this permit or conditions, please contact Watershed & Land Management's Technical Support Call Center at (609) 777-0454.

Approved By:



Tina Wolff



Tina Wolff, Environmental Specialist 3
Watershed & Land Management

- c: Municipal Clerk, Far Hills
- Municipal Construction Official, Far Hills
- Agent (original) – Chris Koutouzakis



BOSTON CONNECTICUT FLORIDA NEW JERSEY NEW YORK PROVIDENCE WASHINGTON, DC

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April 4, 2024

VIA E-FILING

The Hon. Kevin M. Shanahan, A.J.S.C.
Somerset County Superior Courthouse
20 North Bridge Street
Somerville, New Jersey 08876

Re: In Re the Application of the Borough of Far Hills, County of Somerset
Docket No.: SOM-L-903-15 (Mount Laurel)

Dear Judge Shanahan:

This firm represents proposed intervenor/interested party Pulte Homes of NJ, Limited Partnership (“*Pulte*”). Please accept this letter brief in opposition to the motion for limited intervention filed by Sohail Khan (“*Khan*”) in this *Mount Laurel* declaratory judgment action (“*DJ Action*”). Kahn’s motion should be denied because his proposed claims have no relationship to the subject matter of this DJ Action, which was brought by the Borough of Far Hills (“*Borough*”) to obtain a declaration of its compliance with its affordable housing obligations in accordance with *In re. N.J.A.C. 5:96 and 5:97*, 221 N.J. 1, 30 (2015) (“*Mount Laurel IV*”), particularly as it relates to Pulte’s inclusionary development (“*Project*”), which is the most significant component of the Borough’s Judgment of Compliance in the DJ Action. The motion also fails to the extent Khan seeks to compel the Borough to enforce its Land Management Ordinance (“*LMO*”) with respect to the retaining wall adjacent to his property (“*Retaining Wall*”) given that the Borough is already seeking the same relief, which means that any interest Khan may have is adequately protected by



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the Borough. Khan also admits that his alleged interest will not be damaged by any disposition of this action, which is another reason to deny him intervention.

Khan's motion makes clear that his "sole purpose in intervening is to protect his property rights, not to interfere with Pulte's efforts to produce affordable housing on its property." March 27, 2024 Letter Brief (Trans ID: LCV2024806823) ("Ltr. Brf.") at 8; *see also id.* at 8-9 (stating that he is not seeking "entry of an Order enjoining construction should his claims be successful"); *id.* at 18 ("Khan's overriding concern relates to the impacts that Pulte's unlawfully constructed retaining wall imposes on *his* property. His focus only pertains to this small and discrete area of Pulte's development and how it impacts him."). Claims relating to private property interests have no bearing on the Borough's compliance with its affordable housing obligation and its agreements related to the same. While Pulte certainly appreciates Khan's confirmation that he is not seeking to interfere with the Borough's affordable housing obligation or Pulte's construction of same, his repeated admissions that his motion seeks to vindicate individual rights confirms that the DJ Action is not the appropriate forum for his claim.

As compared to Khan's proposed motion for intervention to assert a claim for nuisance and declaratory relief, Pulte's motion to intervene and enforce the Borough's affordable housing obligations and agreements is as at the heart of this DJ Action. Pulte's motion is premised on the Borough's baseless threat in a notice of violation to withhold permits that, if enforced, will unreasonably inflate Pulte's costs and significantly delay the construction of the affordable housing units that the Borough committed to provide in connection this action (which has been delayed already based upon past actions of the Borough). In stark contrast – the relief that Khan

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seeks, to intervene to assert a nuisance and declaratory relief claim relating to the Retaining Wall and associated stormwater management system – bears no relation to the Borough’s affordable housing commitments. Ltr. Brf. at 8-9; Certification of Sohail Khan, dated March 27, 2024 (“Khan Cert.”), ¶¶ 3, 13. Khan even admits that his claim “would normally be dealt with in a separate action under a nuisance theory.” Ltr. Brf. at 10; *see also id.* at 15 (Kahn admitting that his argument that a variance (and not a waiver) is required for the retaining wall “is not the subject of this action”). Khan’s repeated admissions that he is not seeking to delay or otherwise impede the construction of affordable housing should compel the Court to deny his motion without prejudice to his refiling a separate action.

Assuming *arguendo* that Khan has a protectable interest in this affordable housing action (he does not), his interests are adequately protected by a current party to this case – the Borough. Among other things, Khan is seeking to compel Pulte to appear before the Borough’s Planning Board (the “*Planning Board*”) to obtain further approval for the Retaining Wall and stormwater management system. But, the Borough is already seeking to do just that. This is clear from the Borough’s refusal to rescind the notice of violation and apparent intention to oppose Pulte’s motion to intervene and enforce. *See* March 15, 2024 Adjournment Request by the Borough (Trans ID: LCV2024686143). To the extent Khan’s interests differ from the Borough’s interests, Khan argues that his interests will not be impaired or impeded by a ruling on Pulte’s motion. Indeed, in footnote two of his letter brief, Khan argues that even if the Borough is equitably estopped from enforcing the LMO as requested by Pulte, such estoppel arguments have no impact on his ability to seek enforcement of the LMO to protect his own interests. Therefore, according to Kahn, there is



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nothing barring him from bringing a separate action even if the Court rules in Pulte's favor on its motion to intervene and enforce requiring the Borough to rescind the notice of violation and to continue to issue building permits. Accordingly, Khan should not be permitted to intervene under *R. 4:33-1* because a current party represents his purported interest, which Khan argues will not be impaired or impeded in any way by the disposition of this action.

Lastly, Khan's motion is untimely and equity compels that his motion be denied. His certification and letter brief confirm that he has been aware that the Retaining Wall was being constructed since as early as October 2023, and yet he waited until now, five months later and after the Retaining Wall and stormwater management system were constructed at significant cost to Pulte, to seek relief. Ltr. Brf. at 1-2 ("While he was aware of the project having received notices for various applications and permitting activities in years past, the construction activities that commenced in 2023 caused him concern."). Khan attempts to excuse this delay by alleging he received incorrect information from the Borough regarding the approvals for the Retaining Wall and stormwater management system. However, that is no excuse given that all relevant documents relating to Pulte's application for the development and the Planning Board's approvals and resolutions relating to same are publicly available.¹ Therefore, he was on constructive notice of all of the facts that form the basis for his proposed claim at least five months ago, and he should not have waited until after Pulte expended over one million dollars to construct the Retaining Wall and stormwater improvements to seek redress. For these reasons, Khan's motion should be denied.

¹ Pulte acknowledges that the LMO is inexplicably not online and only available at the Borough's office.

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ARGUMENT

Khan seeks intervention of this matter as of right pursuant to *R. 4:33-1*. A party seeking to intervene in a pending matter may do so as of right if:

the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

R. 4:33-1. Intervention as of right requires that the movant:

(1) claim an interest relating to the property or transaction which is the subject of the transaction, (2) show he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, (3) demonstrate that the [movant's] interest is not adequately represented by existing parties, and (4) make a timely application to intervene.

Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (quotation marks and citation omitted).

A. Khan Does Not Have An Interest in the Subject Matter of this DJ Action Given his Admission that He is Not Seeking Any Relief Relating to the Borough's Affordable Housing Obligations.

The Borough filed this DJ Action to seek a declaration of its compliance with its affordable housing obligations in accordance with *Mount Laurel IV*. Accordingly, the "interest" relating to the subject matter of this action is unquestionably affordable housing. As Khan repeatedly states, his "sole purpose in intervening is to protect his property rights," and not to interfere with the Borough's affordable housing obligations pursuant to the Orders and agreements it entered into in connection with this action. These admissions confirm that intervention in this DJ Action is not appropriate. Ltr. Brf., at 12 (stating that Khan "is not concerned with procedure, but rather, the

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actual impacts upon his property associated with the visual impact of the retaining wall and the modified drainage plan that was never considered by the Far Hills Planning Board”). Instead, the appropriate procedure is for Khan to file a separate action against Pulte for nuisance and the Borough for enforcement of the LMO. *See* Ltr. Brf. at 10 (Khan admitting that the relief he seeks are “normally dealt with in a separate action under a nuisance theory”). Khan has not cited to any authority to support his ability to intervene in an affordable housing action in order to assert a claim to protect a private interest in property.

Khan’s primary concern is that the Retaining Wall interferes with the quiet enjoyment of his property based on allegations that it is not sufficiently screened and the stormwater management system detrimentally impacts the flow of stormwater onto his property.² As noted already, Pulte has been and remains willing to install evergreen landscaping to help screen the retaining wall. Further, Khan’s claims of detrimental impacts for stormwater management are without merit. Initially, though Khan may be an engineer of sorts – there are a lot of types of engineers. He is not a civil engineer. As Pulte’s civil engineer, Ron Kennedy, P.E. explained in his certification, the revised Plans with the increased grades and Retaining Wall actually *reduced* the

² Khan’s citation to *In re Freshwater Wetlands Permits*, 185 N.J. 452 (2006) is irrelevant. Pulte does not dispute that the Borough Planning Board reviews and approves stormwater management designs. However, as Khan admits, the Planning Board delegated authority and oversight of the stormwater revision to the Borough engineer, who oversaw and approved the Retaining Wall and Pulte’s stormwater management design, as did the Board chairman and secretary. 3/12/24 Gladstone Cert. (Trans ID: LCV2024651843), ¶ 16; 3/11/24 Mullen Cert. (Trans ID: LCV2024651843), ¶ 8. Further, the statewide Residential Site Improvement Standards require residential developments comply with the NJDEP Stormwater Management Rules, and the Borough’s Stormwater Ordinance (**Ex. B** to Kennedy Cert.) just requires that projects comply with NJDEP Stormwater Management Rules; it does not have its own set of standards. As noted in the Kennedy Cert., the NJDEP reviewed the Plans as part of the wetland permit issued for the Project and concluded in the permit that the Plans conformed to the NJDEP Stormwater Management Rules. *See* Kennedy Cert., ¶24, **Ex. C**

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amount of stormwater being collected and directed to Khan's property. The drainage area going to the bio-filtration basin and through the drainage pipe was reduced by 45% as part of the revised Plans. In addition, Kennedy noted through his visual inspection and photos that there is no evidence of erosion near the drainage pipe and the drainage pipe and riprap (collection of rocks to slow down and disperse stormwater) were filled with leaves as recently as March 28, 2024, which is evidence that stormwater is not coming out of the drainage pipe at a high velocity as suggested by Khan. Further, as stated in footnote 2, *supra.*, the Borough's stormwater management ordinance requires compliance with NJDEP stormwater management rules, and the NJDEP confirmed in the wetland permit issued for the Project that it complies with the NJDEP stormwater management rules. *See* Kennedy Cert., ¶24, Ex. C

Notwithstanding, if Pulte is permitted to intervene and its motion against the Borough is granted so that building permits can be issued, nothing would preclude Khan from seeking relief in a separate action. *See Karagjozi v. Risucci*, 2019 WL 1479803 (App. Div. April 12, 2019) (dismissing plaintiff's claim seeking a writ of mandamus to enforce municipal ordinances because they failed to sue public officials, and adjudicating private nuisance claim against property owner relating to stormwater runoff on the merits). As noted above, Pulte previously discussed with the Borough adding evergreen landscaping to screen the Retaining Wall prior to the Borough issuing the Notice of Violation. Pulte remains willing to negotiate a resolution of Khan's concerns relating to additional screening for the Retaining Wall. If negotiations are unsuccessful, Khan can file a separate lawsuit to pursue relief relating to these purported nuisances.



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Furthermore, according to Khan, his ability to protect his private property rights will not be impaired or impeded in any way if he is not permitted to intervene. In footnote 2 of his letter brief, he states:

Pulte argues that the Borough is estopped from enforcing the LMO on the grounds of its reasonable reliance, and while Khan disagrees with that position, it is obvious that these estoppel arguments have no impact upon Khan's ability to enforce the provisions of the LMO pursuant to N.J.S.A. 40:55D-18, which specifically authorizes him to *commence an action* to 'prevent [the] unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said structure or land, or to prevent any illegal act, conduct or business or use in or about such premises.

(emphasis added). In other words, Khan argues that he can seek his desired relief regardless of the Court's decision here. That is fatal to his motion to intervene under *R. 4:33-1*, which requires him to prove that he "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect [his] interest."

Affordable housing is the crux of this action, and the gravamen of Pulte's pending motion to intervene is to ensure that its construction of affordable housing is not delayed or otherwise impeded by the Borough, including through issuance of the notice of violation. Khan expressly states that his application does not implicate affordable housing at all and argues that his interests will not be impaired by the Court's ruling on Pulte's motion. Therefore, his grievances are not sufficiently related to the subject matter of this DJ Action and his motion should be denied.

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B. The Borough Adequately Protects Khan's Interests.

Rule 4:33-1 requires Khan to “demonstrate that the [his] interest is not adequately represented by existing parties.” *Meehan*, 317 N.J. Super. at 568. Yet, he admits that his purported interest in this action have not diverged from the Borough’s interests, which means that to the extent his interests are implicated they are adequately protected. Khan claims that he is seeking, among other things, to enforce the LMO’s provisions regarding wall height, which is the same position the Borough is taking based on its issuance of the notice of violation and intention to oppose Pulte’s motion to intervene and enforce. According to Khan, only “[i]f the Court finds that the Borough is estopped from enforcing the LMO against Pulte” will his application be timely “because until such an order is entered, his interest has not diverged.”³ Ltr. Brf. at 9. This argument is fatal to Khan’s motion because it is an admission that his interests are adequately protected.

In support, Khan cites *Chesterbrooke Limited Partnership v. Planning of Chester*, 237 N.J. Super. 118 (App. Div. 1989), but that case actually underscores why Khan should not be permitted to intervene at this time. As a threshold issue, *Chesterbrooke* did not relate to affordable housing and instead concerned a motion to intervene by private property owners in an action relating to a developer’s application for subdivision approval and variance relief. In that case, the court found that the property owners/objectors were permitted to intervene to pursue an appeal *after* the defendant planning board decided not to appeal the court’s order approving the subdivision and

³ This argument is at odds with the position Khan takes in footnote 2 of his letter brief (quoted above), *i.e.* that a ruling that the Borough is equitably estopped from enforcing the LMO will not impact his ability to do so.

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variances because the board no longer adequately represented their interests. *Id.* at 124-25. That situation is distinguishable from this case. Here, the Borough intends to oppose Pulte's application, and likely will seek the same relief as Khan – to enforce the LMO's wall height provision. Unless and until an order is entered against the Borough and it subsequently decides not to pursue an appeal, Khan's interest in enforcing the LMO will be protected in this action. *Chesterbrooke* also is distinguishable because the property owners in that case would be bound by the judgment and would not be able to pursue a separate action for nuisance as Khan can here. *See supra* Point A.

C. Khan's Request to Compel Pulte to Seek Further Board Approval of the Retaining Wall is Untimely and Barred by Equitable Estoppel.

In the event the Court is inclined to allow Khan to intervene, Pulte briefly addresses why his request for Pulte to seek further Planning Board approval for the Retaining Wall and stormwater management system should be denied. Rule 49:69-6(a) states 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.” Here, Khan is well past the 45-day time period, and he should not be permitted to intervene to skirt that limitation. In an attempt to excuse his delay, Khan relies on R. 49:69-6(c), which allows a court to enlarge the period of time to bring an action in lieu of prerogative writs “where it is manifest that the interest of justice so requires.” In support of that argument, Khan alleges that the Borough misled him regarding the approvals for the Retaining Wall, but he conveniently ignores the inequity that Pulte would suffer if it is required to go back to the Planning Board after expending approximately \$1,354,000 to construct the Retaining Wall in good faith reliance on the Borough's repeated approvals and issuance of permits.

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Khan also argues that the Borough is incorrect in claiming that Pulte requires a design waiver for the new Retaining Wall; Khan claims, through a convoluted argument, that a variance is required. As a result, he claims he should be allowed to intervene since he disagrees with the Borough's position. Despite the various shortcoming with the Borough's LMO, it is clear the wall height standard is "design standard" for which a design waiver would be required; not a variance. *N.J.S.A. 40:55D-51*. It is clear that variances are required from zoning regulations and design waivers are required from design standards. When ordinances for site plan and zoning review are in a single ordinance instead of separate ordinances (like the LMO), the court should review the sections of the ordinance to see if it was meant to be design standards for site plan or a zoning regulations. *426 Royal, LLC v. South Brunswick Planning Board*, 2016 WL 3263209, p.5 (App. Div. 2016).⁴ The LMO has several sections or "articles," which include dealing with site plan and subdivision procedures (Article IV and Article V), zoning district regulations (Article VII) and design standards (Article IX). Here, the wall height is in the "Design Standards" section, which also deals with environmental impact statements, lighting, bike/trail standards – all items traditionally dealt with as design waivers.

Notwithstanding, it does not matter whether it is a design waiver or variance. This situation also is comparable to *Hill v. Bd. of Adjustment*, 122 N.J. Super. 156, 159 (App. Div. 1972), which was an action brought by the owner of private property against a town's board of adjustment and his neighbor to challenge permits issued to the neighbor in violation of side yard requirements in

⁴ See Certification of Craig Gianetti, Esq. dated April 4, 2024, **Ex. A**, for a copy of the unpublished decision.

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the town's zoning ordinance (requiring a variance). The plaintiff brought the action after the neighbor had completed "substantial work" over the course of five months and spent over half the estimated cost for the project in good faith reliance on the wrongfully issued permit. *Id.* Among other reasons, the Appellate Division upheld the board inspector's issuance of permits to the neighbor based on the doctrine of laches even though the inspector had no authority to and "made a mistake" in issuing the permit without a variance in violation of the town's ordinance. *Id.* at 158-59. In support of its decision, the Appellate Division quoted the following language from *Marini v. Borough of Wanaque*, 37 N.J. Super. 32 (App. Div. 1955), which it found equally applied to the plaintiff's claims:

Finally, we think laches additionally bars plaintiff's way. We are satisfied that he knew what was going on in respect to this structure and withheld his legal fire during a period in which he knew or had every reason to know that a substantial sum of money was being invested in the improvement of this property. We are aware of the policy that laches should be invoked with hesitation against a taxpayer and citizen vindicating a public right, but we deem the application of laches plainly indicated in the present case.

Id. at 163 (quoting *Marini*, 37 N.J. Super. at 41 (internal citations omitted)).

The situation with Khan is strikingly similar. At least five months before bringing this motion, Khan admits that "the construction activities that commenced in 2023 caused him concern." Although he allegedly reached out to the Borough's mayor and engineer about the construction, he also could have reviewed the publicly available approvals relating to Pulte's development and the LMO, which are the very documents that form the basis of his current claim. Instead, he waited to raise his claims until after Pulte had expended over \$1,000,000 constructing the Retaining Wall, of which he was admittedly aware. Under these circumstances, laches should

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be applied against Khan as it would be unduly prejudicial to force Pulte to restart the approval process for the Retaining Wall at this late stage. In comparison, Khan would be prejudiced very little given that he still can file a nuisance action against Pulte to obtain the relief he seeks.

Khan also cites to *Jantausch v. Verona*, 41 N.J. 89 (Law Div. 1956), *aff'd* 24 N.J. 326 (1957) to support his position that the Planning Board engineer had no authority to approve the Retaining Wall or stormwater design system and that Pulte's reasonable and good faith reliance on those approvals and permits is irrelevant to his claim for relief. Stated differently, he argues that equitable estoppel does not apply to his claim. He attempts to hide in a footnote the countervailing authority that disproves this point, including *Hill*. Ltr. Brf. at 13 n.2. Indeed, in *Hill* the Appellate Division upheld the application of the doctrine of equitable estoppel to bar a private property owner's claims against their neighbor. *Id.* at 165 ("If estoppel and laches apply against the municipality so much the more so against plaintiffs, even though they be deemed to be acting vicariously for the municipality."). This Court should come to the same conclusion, and find that Khan also is equitably estopped from enforcing the LMO under these circumstances.⁵

⁵ For completeness and to avoid redundancy, Pulte relies on and incorporates by reference as if set forth at length herein the arguments it made in support of laches, equitable estoppel, and relative hardship set forth in its brief in support of its motion to intervene and enforce against the Borough. Pulte's Brief in Support of its Motion to Intervene and Enforce (Trans ID: LCV2024651843) at 24-27.



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CONCLUSION

For the foregoing reasons, Pulte respectfully requests that the Court deny Khan's limited motion for intervention.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. M. Gianetti', written in a cursive style.

Craig M. Gianetti

CMG/mf