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BY ECOURTS FILING

Honorable Marlene Lynch Ford, A.J.S.C.
Ocean County Courthouse
100 Hooper Avenue, Courtroom 3
P.O. Box 2191
Toms River, NJ 08754

Re: Paul G. Brennan et al. v. Bay Head Planning Board et al.
Docket No. OCN-L-340-21

Dear Judge Lynch-Ford:

I represent Plaintiffs, Paul G. Brennan, Esther Koai, Jakob Weingroff, Jessica Weingroff, Ronald Puorro, and Kathryn Puorro, (collectively referred to as "Plaintiffs") in opposition to the Order to Show Cause filed by Defendants, Kaitlyn Tooker Burke and Donald F. Burke Jr. ("Defendants" or "Burke").

The Order to Show Cause included interim restraints without the requisite information regarding dissolution of the restraints required by the Rules of Court. The Court hand-wrote in the right to move to dissolve the interim restraints on two days' notice as required by the Rules of Court.

This brief is submitted in support of the motion to dissolve interim restraints and in opposition to the preliminary restraints that Burke seeks.

We believe that the substantial constitutional and factual issues advanced in opposition to preliminary restraints are sufficient to deny preliminary injunctive relief and to include dissolution of the temporary restraints. Thus, this Brief is submitted for those purposes.

PRELIMINARY STATEMENT

Plaintiffs challenge the Bay Head Planning Board's approval of the application by Burke for variances and other relief for property known as 174 Twilight Rd, Block 3, Lot 13, Bay Head, New Jersey ("Lot 13") under this Docket Number OCN-L-340-21. Burke did not file a cross-appeal from the Board's approval to challenge conditions.

While the variance application was still pending before the Planning Board, Burke filed a separate case against the Bay Head Planning Board ("Board") involving the same variance application under Docket Number OCN-L-1402-20, in which Burke claims default approval based on the Board's alleged failure to approve or deny the application within the statutory time constraints. ("Default Approval Litigation")

Plaintiffs sought to consolidate these cases, and the Planning Board attorney consented. The Court denied the motion for consolidation.

In both cases, Plaintiffs are interested parties as defined by the MLUL and are particularly interested as landowners within 200 feet of Lot 13, some of whom have experienced adverse flooding after Burke filled Lot 13. Plaintiffs are now forced to move to intervene in the

Default Approval Litigation to protect their rights as interested parties and their constitutional rights to due process and First Amendment free speech.

Burke deliberately chose to use the Default Approval Litigation as the vehicle to engage in secret negotiations with the Borough, using affordable housing as a threat, and knowing that Plaintiffs' challenge to the validity of the variance approval was meritorious and has a high likelihood of success. As will be shown below and in the brief in support of the motion to intervene, the Default Approval Litigation reveals a misunderstanding of the law and a failure to comply with mandatory requirements applicable to default approval claims.

The Order to Show Cause is a tempest in a teapot in which the Burke family seeks to continue concealment of a distasteful settlement negotiated with Borough Council and provided to the Planning Board attorney as revealed in public records. When the executive session minutes are released without redactions, the full extent of this devious scheme will be revealed.

Neither the Planning Board nor Borough Council has supported the relief sought in the Order to Show Cause. Burke lacks standing to challenge the release of the Bay Head Borough Council Executive Session minutes.

Any confidentiality is voided due to the fact that Burke included the Borough, a third party that is not subject to the Confidentiality Order entered in the Default Approval Litigation under Docket Number

OCN-L-1402-20.

Burke has failed to meet the criteria for issuance of extraordinary relief in the form of temporary restraints and a preliminary injunction. These untoward circumstances propose the grant of preliminary injunctive relief that violates the First Amendment and due process rights of Plaintiffs.

We will address these substantial issues below.

STATEMENT OF FACTS

Paul Brennan has prepared a lengthy Certification that is being filed in support of the motion to file an amended complaint in this litigation, in opposition to the Order to Show Cause and dissolution of restraints, and in support of the motion to intervene in the Default Approval Litigation. To avoid unnecessary duplication, confusion and repetition of exhibits, the Certification is the same document in each matter, except for identification of the appropriate docket number and association with different procedures in each matter.

Due to time constraints, Plaintiffs are not citing to the voluminous record and exhibits. Although not required by the Rules of Court to do so at the Law Division level, counsel for Plaintiffs customarily does so. Time constraints and health issues preclude the inclusion of the specific citations at this time, and the citations are unnecessary for the current stage of proceedings.

As noted in the lengthy certification of Paul Brennan, Mr. Brennan suspected after learning of the first affordable housing

threat by Burke and Donald Burke Sr. ("Burke Sr.") (Collectively "Burkes"), that the Default Approval Litigation was a ploy to change conditions of approval of the application that is the subject of this appeal. Plaintiffs sought to consolidate the Default Approval Litigation and this case ("Approval Litigation"). The Court denied consolidation even though the Planning Board consented.

In April 2021, Burkes conspired to obtain an *ex parte* Confidentiality Order signed by this Court that allows Plaintiffs and third parties to be excluded from obtaining information about settlement negotiations even if the negotiations affected Plaintiffs' rights. Public records attached to the Certification of Paul Brennan reveal that Burkes negotiated with the Borough's special counsel for affordable housing to enter a standstill order to negotiate a settlement.

Mr. Brennan has laboriously and consistently engaged in obtaining public documents under the Open Public Records Act ("OPRA") without assistance of counsel. If there was no Confidentiality Order, Mr. Brennan could obtain and analyze public records that reveal discussions of possible settlement of the Default Approval Litigation regarding the very same application that Plaintiffs are challenging in the Approval Litigation. Burkes probably did not anticipate that public records would be released to Mr. Brennan that reveal the settlement without consideration of the unredacted minutes and, therefore, filed an Order to Show Cause.

Plaintiffs were shocked to learn that the Board could enter into a Confidentiality Order by consent that excluded them when they had opposed the application on substantial grounds. Public records revealed that the Borough itself was directly involved in the settlement negotiations although not parties to the Default Approval Litigation. Plaintiffs were even more surprised when the Court denied the motion to consolidate these cases.

Even though Burkes knew that their litigation adversaries were entitled to be heard on the settlement of their case, they deliberately used the Confidentiality Order to keep the negotiations secret, and this Court allowed that request to proceed without Plaintiffs.

Mr. Brennan learned of the full extent of these shenanigans in September 2021 only by accident, when he made a public record request for Bay Head Council meeting minutes. Borough attorney Jean Cipriani acknowledged in her letter of October 4, 2021 that her firm redacted the executive session minutes using a tool in word and the Borough custodian emailed the documents in PDF format.

As Mr. Brennan normally does with documents that he obtains, he opened these documents on his mobile phone so that he could read them easily and excerpt some of the important contents to send to Plaintiffs' attorney, Michele R. Donato. Brennan undertook these actions without any intention of exposing the text under the redactions. Upon the opening the documents in this manner, the redactions disappeared, and he was able to read the entire document.

He discovered what he considered to be improper conduct by public officials, and, of course, he shared this information with co-Plaintiffs and other potentially interested citizens. The Burke controversy is one that has caused considerable public involvement and Mr. Brennan has openly communicated with his fellow citizens.

As explained in his certification, Mr. Brennan does not agree that all of the redactions are appropriate. He has pursued matters before the Government Records Council ("GRC") on other OPRA violations by Bay Head and will continue to do so if necessary to protect his rights.

Mr. Brennan provided this information to Ms. Donato, who shared the unredacted minutes with Jean Cipriani, Bay Head Borough attorney. Ms. Donato explained what her client discovered and was completely above board in her dealings with Ms. Cipriani. Ms. Cipriani was aware that Borough Council was negotiating a settlement without the participation of Plaintiffs, who were well known to be interested parties in the development of Lot 13. In the meantime, the confidential contents of the documents were then discussed at a public meeting.

Although Brennan was not aware of the legal issues throughout the country regarding insufficient and improper redactions, he consulted with national organizations involved in public interest and citizen rights. Mr. Brennan learned that many commentators have addressed these issues in recent years. One such article was written by Judge Herbert Dixon and published by the American Bar Association in 2019.

(See Exhibit K to Certification of Paul Brennan) Another is a technical document from Adobe first published in 2006 regarding using Adobe for redactions. (See Exhibit L to Certification of Paul Brennan) Plaintiffs' counsel also consulted with the organizations and learned of the extensive authorities regarding mistaken release of potentially restricted information, who provided meaningful guidance and authorities.

It appears from the use of the work "clawback" in the Order to Show Cause that the Burkes were also aware of these authorities. The law is set forth below.

ENTITLEMENT TO TEMPORARY RESTRAINTS AND PRELIMINARY INJUNCTIVE RELIEF

"[T]he power to issue injunctions is the strongest weapon at the command of a court of equity, and its use, therefore, requires the exercise of great caution, deliberation, and sound discretion." Light v. National Dyeing & Printing Co., 140 N.J. Eq. 506, 510 (Ch. 1947). Thus, the Court must find clear and convincing evidence that relief is warranted. Am. Employers' Ins. Co. v. Elf Atochem N. Am., 280 N.J. Super. 601, 611 (App. Div. 1995).

It is well established in New Jersey that a party seeking a preliminary injunction must satisfy the four elements enunciated in Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982).

Burkes do not meet the Crowe v. DeGioia tests and Plaintiffs will demonstrate that: (1) there is no immediate and irreparable harm that should be averted until opportunity for a full hearing is available;

(2) there is not a substantial likelihood of success on the underlying legal rights; (3) there are significant material facts in dispute; and (4) the relative hardship does not favor granting the temporary restraints and preliminary injunctive relief. Crowe v. DeGioia, *supra*, 90 N.J. at 132-134.

IMMEDIATE AND IRREPARABLE HARM

The critical test to entitle a party to preliminary injunctive relief is a demonstration of immediate and irreparable harm. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe v. De Gioia, 90 N.J. 126, 132-133 (1982). In other words, there must be no adequate remedy at law. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

Burke fails to meet the critical test of immediate and irreparable harm. First Amendment law cited in this brief prohibits the withdrawal of publicly disseminated information, referred to as "clawback". Since the contents of the executive session minutes were released prior to the Order to Show Cause, and other readily available public documents also reveal that settlement discussions in the Default Approval Litigation were being negotiated between Borough Council and special counsel for affordable housing, in these circumstances, release of the information is not irreparable harm.

To prevent Mr. Brennan from disseminating allegedly confidential information within the executive session minutes would be an order preventing Mr. Brennan from disseminating information he knew prior to

receiving those minutes. In accordance with the case law cited in a subsequent point regarding likelihood of success on the merits, the the "cat was out of the bag."

Further, the Burkes violated their own confidential order by engaging third parties in negotiation. Brennan knew of much of the information within the executive session minutes prior to their release, and prior to the temporary restraints that are now in place. The information was disseminated and, consistently with established law, federal courts have routinely held that once information is released, the release cannot be undone.

Constand v. Cosby, 833 F.3d 405, 410 (3d Cir. 2016) holds that appeals seeking to restrain further mistaken dissemination of publicly disclosed information is "moot" because "[p]ublic disclosure cannot be undone") (internal quotation marks and citations omitted).

Again, in Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 n.11 (2d Cir. 2004), the court held that "[s]ecrecy is a one-way street: Once information is published, it cannot be made secret again." "We simply do not have the power, even if we were of the mind to use it if we had, to make what has thus become public private again. The genie is out of the bottle, albeit because of what we consider to be the district court's error. We have not the means to put the genie back." (citations omitted).

Similarly, in SmithKline Beecham Corp. v. Pentech Pharms., Inc., 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003), the court refused to

redact information that had previously been disclosed in a court opinion because "the cat is out of the bag").

Defendants have failed to address these authorities, based on which Defendants do not have a substantial likelihood of success in suppressing the truth. If there was irreparable harm the Board and Borough Council would have joined in the request for preliminary injunctive relief, but they have not done so.

The unredacted minutes are already required by the Open Public Meeting Act ("OPMA") to be released as public documents since the closed session minutes were to be revealed in ninety days. Mr. Brennan's Certification provides numerous other reasons why the unredacted minutes are properly public.

Burke's argument that the Bay Head Council executive session meeting minutes could cause irreparable harm is solely due to his behavior in deceiving the Court by seeking a Confidentiality Order in the Default Approval Litigation, then threatening the Borough with affordable housing difficulties and negotiating the settlement of Default Approval with third party Bay Head affordable housing counsel. Burke made his bed, now he must lie in it. The only irreparable harm is the embarrassment and frustration of Burkes' scheme. If Burke believes he has suffered irreparable harm due to a release of information by a government source, his sole recourse lies with the government source and his own shameful conduct.

Notably Mr. Brennan, as a result of the temporary restraint in place and permanent restraints sought, is the only party who is being subject to irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 359 (1976).

SUBSTANTIAL LIKELIHOOD OF SUCCESS

"A second principle is that temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe v. DeGioia, 90 N.J. 126, 133 (1982).

The Burkes filed an Order to Show Cause that entirely depended on allegations contained in the October 4, 2021 letter of Jean Cipriani, Borough attorney, and relied largely on inapposite authority addressing the trade secrets of private businesses, while omitting controlling First Amendment authority from the Supreme Court of the United States. Shockingly, despite the fact that Burke was seeking a judicial remedy restraining the freedom of citizens to criticize their own government, the brief in support of the Order to Show Cause made no mention of the First Amendment. By using the word "clawback," Burkes were obviously aware of these authorities.

In fact, the Supreme Court has repeatedly addressed the issue of what happens when government bodies mistakenly release information that is protected from public disclosure by state statutes intended to protect the personal privacy of, for example, juveniles or sexual assault victims, and it has consistently held that the First Amendment

trumps the claimed privacy right. Florida Star v BJF, 491 U.S. 524, 541 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), Oklahoma Publishing Co. v. Oklahoma County District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, (1975).

In Florida Star, the Duval County Sheriff's Department prepared a report of a victim's claim of sexual assault, including the victim's full name, and placed that report in its pressroom. A newspaper intern found the report and copied it verbatim; the newspaper then published an account of the alleged assault, including the victim's full name. The victim sued the newspaper for damages and recovered a verdict, but the Supreme Court reversed, holding that the right to publish truthful information obtained from the government, even though the government should have kept the name secret, was protected by the First Amendment. Similarly, in Smith and Oklahoma Publishing, newspapers published the names of juveniles who had been charged in juvenile proceedings, in violation of state statutes, after one of the media companies got the names by being in an open courtroom from which the court had failed to exclude reporters; the other company got the names by monitoring the police band. But, in both cases, the Supreme Court found unconstitutional a judicial gag order forbidding the media from repeating the names (Oklahoma Publishing) and an indictment of two newspapers for having published the names (Daily Mail).

The Supreme Court returned to the issue of the publication of private information in violation of a state privacy statute in Bartnicki v, Vopper, 532 U.S. 514 (2001), where a radio commentator

played the surreptitiously recorded conversation between two teacher union leaders, held by cellphone, about their union's contentious contract negotiations. Although the interception and recording of the call were themselves illegal, the radio commentator was not the person who made the recording; he only received it and played it. Both federal and state laws made interception and recording of phone conversations illegal, and the statutes provided causes of action against those who disclose an illegally recorded communication with knowledge of the illegality. Nevertheless, the Supreme Court held that because the radio commentator was neither involved in the illegal recording, nor complicit in the illegal interception, he could not be sued for truthfully reporting its contents or, indeed, for playing the recording.

Similarly, in this case, Paul Brennan received public documents which, due to the carelessness of the responsible party who sent it to him, disclosed information that Burke contends was exempt from disclosure under an exception to the Open Public Records Act. Even if the responsible person for the redactions acted improperly in releasing the document without effective redactions, Mr. Brennan had no involvement in that error of judgment. Indeed, Brennan did not act deliberately to unredact the document. He opened the document so that he could share relevant portions with his counsel, and the very act of opening the document stripped away the redactions, which occurred solely because of the Borough of Bay Head's mistake. Consequently, under Bartnicki, no cause of action lies against Mr. Brennan for

redistributing the document that he obtained in an entirely lawful manner.

Especially problematic is the aspect of the Court's order that enjoins Brennan from further dissemination of the document, an order that is an impermissible prior restraint. Injunctions against the future exercise of First Amendment rights are almost always impermissible and require a countervailing interest of the magnitude of a severe threat to life and limb, such as the disclosure of troop movements, to warrant the issuance of a prior restraint. New York Times v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697, 706 (1931). Thus, for example, when court officials carelessly allowed reporters to be present in court during a juvenile proceeding, the Supreme Court held in Oklahoma Publishing that it was an impermissible prior restraint to enjoin the press from publishing the name and photographs of the eleven-year-old boy who was subject to the proceeding, even though a state statute prohibited publication.

Similarly, after a government employee walked off with copies of classified documents, in violation of his oath of secrecy and of various criminal statutes, and the New York Times began to publish them in the face of warnings from the government that disclosure would cause grave and irreparable damage to the national security, the Supreme Court found an impermissible prior restraint. In the words of Justice Hugo Black: "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and

continuing violation of the First Amendment." New York Times Co. 403 U.S. at (1971).

And when a realtor complained that a community group's distribution of leaflets accusing him of "blockbusting" was damaging his business and reputation, as well as invading his privacy, the Supreme Court again found an impermissible prior restraint. Organization for a Better Austin, 402 U.S. at 419-420.

The purported interest of Burkes in concealing private Bay Head Council discussions that some town leaders had regarding developer Burke does not even rise to the level of privacy that were asserted by the child in Oklahoma Publishing, the sensitive military secrets in New York Times, or the reputation of the realtor in Organization for a Better Austin, and which even so, were not sufficient to justify a prior restraint.

Even if the trade secrets of private companies were at stake, as Burke's argument relies, a prior restraint against publication would be impermissible. Procter & Gamble Co. v. Bankers Tr. Co., 78 F.3d 219, 226 (6th Cir. 1996), citing In the Matter of Providence Journal Company. 820 F.2d 1342, modified on reh'g 820 F.2d 1354 (1st Cir.1986).

Consequently, the Court's prohibition against publication of the unredacted documents should be dissolved as an impermissible prior restraint.

The proposed Order to Show Cause that requires Brennan identify all of the individuals who have received the documents should be

denied because it conflicts with the right to speak and to read anonymously. Presumably, the purpose behind this part of the order is to identify potential respondents for further motions brought by the Burkes intended to overwhelm private citizens. The record before the Board during the Planning Board hearings reveal that Burkes filed complaints against neighbors and has repeatedly threatened to file frivolous lawsuits against them.

Although the Borough is not a party to either of the litigations, Ms. Cipriani on behalf of the municipality, asked Plaintiffs to withhold distribution of the unredacted minutes, to which Mr. Brennan agreed. Burke now seeks to have this court "claw back" the insufficiently redacted documents that Bay Head provided to Brennan.

In addition to the various reasons set forth above why the gag order directed at Mr. Brennan violates the First Amendment, even if the Court concludes, contrary to the evidence, that something that Mr. Brennan did that resulted in the dismantling of the redactions was improper, the recipients of the documents were not involved in the unredaction and so, because of Bartnicki v. Vopper, no claim can be pursued against them for either receiving or publishing the documents, or for talking about the contents. Given the fact that no claim can lawfully be pursued against them, a court order depriving them of their current anonymity would violate the standards set for discovery to identify anonymous speakers set by Dendrite International, Inc. v.

Doe No. 3, 342 N.J. Super. 134, 775 A.2d 756 (2001).[1]

The Court may well have had in mind its own order authorizing the Bay Head Planning Board to treat the documents as confidential under the Open Public Records Act, but Brennan was not aware of that order at the time when he opened the documents on his phone and accidentally unredacted them. It was only after reading the documents that he found out about the Confidentiality Order. Consequently, his acts of unredaction were not undertaken in defiance of that order, which, in any event, did not bar him from engaging in unredaction, for three reasons. First, the order on its face does not purport to direct third parties. Second, the order pertains only to discussions between Burke and the Planning Board, the "parties" to the order and prohibits disclosure to "third parties." Mr. Brennan received minutes of the Bay Head Borough Council, which is outside the express terms of the order, since Borough Council is not a party to the Default Approval Litigation and the Confidentiality Order.

Even if the order is read more broadly than stated in writing to cover minutes of Borough Council, the order was obtained *ex parte*, in a proceeding in which Plaintiffs and Mr. Brennan are interested parties. Plaintiffs were deliberately excluded and hence not given any opportunity to argue against entry of the order. It is a violation of constitutional due process and First Amendment rights to

[1] Although Dendrite addressed the right to speak anonymously. the First Amendment also protects the right to read, Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-67 (1982), and the right to read anonymously. Stanley v. Georgia, 394 U.S. 557, 564

hold that Mr. Brennan and his co-Plaintiffs are bound by the Confidentiality Order, which "runs up against the deep-rooted historic tradition that everyone should have his own day in court." Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008), citing Richards v. Jefferson County, 517 U.S. 793, 798 (1996), (internal quotation makes omitted).

Notably in this case, neither Bay Head Council nor the Bay Head Planning Board has taken a position on the matter in this forum, or outside of it. Burke is a third party attempting to assert a right to protect the confidentiality of Bay Head Borough Council meeting minutes. Burke's rationale for his right to protect the minutes of the Bay Head Council is that he has a Confidentiality Order with the Planning Board. There is no agreement in place giving Burke any standing regarding Bay Head Council meeting minutes. Burke cites criminal statutes, yet no crime has been committed, nor reported. Burke cites the rules of the Open Public Meeting Act and Open Public Records Act, yet Mr. Brennan is not the responsible party to uphold laws put in place to guide government function.

The New Jersey Government Records Council has provided guidance to record keepers to prevent redaction failures, telling recordkeepers to make redactions manually, not by electronic means:

> [**C]ustodian's should:**
>
> **Make a paper copy of the original record and manually "black out" the information on the copy with a dark colored marker;**
>
> Then provide a copy of the blacked-out record to the

(1969).

requester.

> The blacked out area shows where information was redacted, while the double copying ensures that the requester will not be able to "see-through" to the original, non-accessible text. If "white-out" correction fluid is used to redact material, some visual symbol should be placed in the space formerly occupied by the redacted material to show the location of redacted material.
>
> If full pages are to be redacted, the custodian should give the requester a visible indication that a particular page of that record is being redacted, such as a blank sheet bearing the word "Page redacted" or a written list of the specific page numbers being withheld. The purpose is to provide formal communication to the requester making it clear that material was not provided.
>
> **If an electronic document is subject to redaction** (i.e., word processing or Adobe Acrobat files) custodians should be sure to delete the material being redacted. **Techniques such as "hiding" text or changing its color so it is invisible should not be used as sophisticated users can detect the changes**
>
> Redacting Government Records, https://www.nj.gov/grc/
>
> custodians/redacting/ (emphasis added)

Review of the Internet Archive reveals that this page, with the same advice, has been available on the New Jersey Government Record Council's website since 2009.

As Mr. Brennan notes in his certification, the facts regarding the use of affordable housing as a threat to change the Planning Board's conditions of approval were known to him prior to receiving the minutes. He learned that special counsel for affordable housing was negotiating the Default Approval Litigation. The fact that the issue Burke needed to settle was the Warren Place road widening

conditions was easily observed from public records and Burke's own demand for admissions.

The Default Approval Litigation was filed while the Planning Board hearings were taking place. Plaintiffs suspected that it was a ploy to force the Planning Board to act quickly on the application. Only later did that litigation become a vehicle to disguise affordable housing threats and exact concessions from Bay Head. Not only does the requested Order to Show Cause violate numerous First Amendment decisions, Burke has not even complied with the minimum provisions to claim default approval.

Notably, the Default Approval Litigation is entirely meritless.

The Municipal Land Use Law ("MLUL") contains stringent requirements to claim default approval. Burkes have complied with none of these requirements, and have improperly conflated the time periods required to decide the application set forth in N.J.S.A. 40:55D-61 with the requirements to claim default approval under N.J.S.A. 40:55D-10.4, which requires official notice to Plaintiffs and the newspaper.

First, the relevant time period of 120 days from date of completion was not even expired when Burkes filed the Default Approval Litigation. Second, Burkes were offered an earlier hearing date but opted to continue the application after correcting the notice to the next month. Third, the pandemic hit and the ability to hold meetings was compromised. Fourth, legislation was adopted to extend time periods for approvals due to the pandemic.

Further, Burke did not provide required notice to the newspaper or to landowners within 200 feet of the default approval claim, as required. Evidence by Burke as part of Default Approval Litigation shows a newspaper clipping from January 3, 2020 which notices the application hearings, and does not provide notice of default approval as required. (See Exhibit V.) Further, there was no notice to the residents within 200 feet of default approval.

N.J.S.A 40:55D-10.4 entitled "Default Approval" provides:

> An applicant shall comply with the provisions of this section whenever the applicant wishes to claim approval of his application for development by reason of the failure of the municipal agency to grant or deny approval within the time period provided in the "Municipal Land Use Law," P.L. 1975, c. 291 (C. 40:55D-1 et seq.) or any supplement thereto.
>
> a. The applicant shall provide notice of the default approval to the municipal agency and to all those entitled to notice by personal service or certified mail of the hearing on the application for development; but for purposes of determining who is entitled to notice, the hearing on the application for development shall be deemed to have required public notice pursuant to subsection a. of section 7.1 of P.L. 1975, c. 291 (C. 40:55D-12)."
>
> b. The applicant shall arrange publication of a notice of the default approval in the official newspaper of the municipality, if there be one, or in a newspaper of general circulation in the municipality.

N.J.S.A. 40:55D-12 requires that Plaintiffs, as landowners within 200 feet of the proposed development, are entitled to notice that the applicant seeks default approval. No such notice was provided.

MATERIAL ISSUES OF FACT NOT IN DISPUTE

The third test to entitle a party to preliminary injunctive relief is that there are no material issues of fact in dispute.

Generally, the Court must find clear and convincing evidence that relief is warranted. Am. Employers' Ins. Co. v. Elf Atochem N. Am., 280 N.J. Super. 601, 611 (App. Div. 1995).

Prior to the issuance of temporary restraints, the contents of the executive session minutes had already been distributed. As cited above regarding clawback "The cat is out of the bag." Burke's erroneously believe that their improper Confidentiality Order is intact. Even if this Court were to grant a preliminary injunction, it would only affect future citizens who are not already aware of the deceptive scheme.

Burkes' assertion that the Confidentiality Order in the Default Approval Litigation protects "negotiations" between Bay Head Borough and Burke is a false assertion. The negotiations improperly include the Borough, who is not a party to either litigation, but instead is a prohibited "third party" to the Default Approval Litigation. Rather than protecting any legitimate right, the Confidentiality Order and the Order to Show Cause only protect the Burkes' campaign to threaten the Borough with affordable housing and expose the Borough's failure to complete mandated affordable housing obligations

Burkes' continued allegations of criminality are certainly in dispute. There is no evidence a crime was committed; Burke Sr. is the only person accusing anyone of a crime. Burke's claim that Ms. Cipriani's letter supports his allegations is in dispute. The Borough attorney has not alleged any crimes, the strongest wording supplied is the belief that it was "improper to use the minutes." The case law

cited above and the facts clearly reveal that Mr. Brennan did nothing improper. The redactions were not properly secured.

Burke assumes that Plaintiffs are properly excluded from the default approval litigation. The material fact that Plaintiffs are interested parties in the Default Approval Litigation is also in dispute. Plaintiffs as landowners within 200 feet, who are directly affected by drainage, access, and other legitimate concerns, are interested parties. Due to consolidation being denied with this matter, Plaintiffs now intend to file a motion to intervene to assert their rights as interested parties, and to rectify their improper exclusion from settlement discussions.

Burke Sr. acknowledged at the second pretrial conference that his allegations rely entirely on the letter of Ms. Cipriani dated October 4, 2021. There are no other facts to support the temporary restraints and the preliminary injunction.

BALANCING OF THE EQUITIES

Plaintiffs request that the Court deny preliminary injunction and dissolve the temporary restraints. Instead, the Burkes must be required to tell the truth and abide by the law.

The First Amendment rights of the citizens of Bay Head are violated by the temporary restraints and by any potential preliminary injunction. The public has been excluded from important settlement negotiations with the Borough that would allow the continued destruction of wetlands and wooded areas required by the Board’s subdivision approval in 2005 to be protected.

The rights of due process are offended by the circumstantial information that reveals that Burkes are proposing elimination of an important condition of approval that will occur if a potential settlement is presented to the Planning Board. Sadly, if the statement of Chairman William Furze is accurate, the Planning Board may have already indicated its willingness to eliminate the condition. Although Whispering Woods at Bamm Hollow, Inc. v. Twp. of Middletown Planning Bd., 220 N.J. Super. 161, 531 A.2d 770 (Law Div.1987) requires a public hearing, the deal may already have been done.

This case is a matter of broad public interest in that there are substantial issues raised by leveraging affordable housing obligations to excise safety conditions of the Planning Boards approval. By deceptively entering into a Confidentiality Order to address issues that are not subject matter of the Default Approval Litigation, the Burkes acted in bad faith. Defendants hoped to avoid the possibility that Plaintiffs would discover the scheme and to exclude them from a settlement that directly affects them. Defendants apparently anticipated the efforts by Plaintiffs to participate in the Default Approval Litigation by entering into a Confidentiality Order and attempting to conceal them. Plaintiffs' discovery of the truth has disrupted the nefarious scheme of Burke to bully the Borough and the Board with threats of affordable housing and exposure of the Borough's failure to obtain a judgment of compliance and repose.

By threatening affordable housing, with no intent to create it, Burke has required the Borough to engage affordable housing counsel

for twelve months. In doing so, Burke has exploited Bay Head and taxpayer funds have been squandered. Public interests have been further harmed by the use of the Default Approval Litigation as a vehicle to disguise the affordable housing threats, representing an abuse of the legal system, and a further waste of Bay Head taxpayer resources.

Mr. Brennan acts here to represent the public interest and stop Burkes' abuse of Bay Head and the Bay Head taxpayers. This public interest is further established by Borough attorney Cipriani's letter dated October 4, 2021: "Since Mr. Breanna [sic] correspondence, the governing body members have received a multitude of correspondences supporting the concept of acquisition of the property…."

New Jersey courts "have recognized the important role the public interest plays when implicated ... and have held that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Waste Management v. Morris County, 433 N.J. Super. 445 (App. Div. 2013). On occasion, New Jersey case law has added "that the public interest will not be harmed" by the relief requested. Waste Management v. Morris County, 433 N.J. Super. 445 (App. Div. 2013).

If Burke's actions are allowed to continue unchecked, there will be continued harm to the civil and constitutional rights of the public. Any court order to further disguise the truth will result in a

substantial harm to the public interest and specifically, the public interest of Bay Head taxpayers.

CONCLUSION

We ask the Court to dissolve temporary restraints and deny preliminary injunctive relief and for the remaining requests sought by the Order to Show Cause.

Respectfully submitted,

Michele R. Donato

Michele R. Donato

MRD:dp
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