

**Thomas Powers, Plaintiff Pro Se**

51 Bridle Path Lane  
Mahwah, NJ 07430

January 2, 2020

Honorable Lisa Perez-Friscia, J.S.C.  
Superior Court of New Jersey  
Bergen County Law Division  
10 Main Street  
Hackensack, New Jersey 07601

Re: Plaintiff's Opposition to Motion to Dismiss  
Thomas Powers v Township of Mahwah, et als.  
Docket No: BER-L-6223-19

Dear Judge Perez-Friscia:

I am the pro se Plaintiff in the above case. Kindly accept this letter brief and accompanying Certification in opposition to Defendant's and Nominal Defendant's Motion to Dismiss my Amended Action in Lieu of Prerogative Writs Complaint ("PW Complaint"). Both the Defendants' and Nominal Defendant's motions are premature as they are misplaced by either failing entirely to address the actual substance of the claims pleaded in the PW Complaint, or seeking to recast such claims more to their liking. As will be explained at length herein, with supporting facts provided by my accompanying certification, the Court should deny Defendants and Nominal Defendant's efforts to prevent these important issues from being heard.

**Introduction**

At the outset, neither the Defendants nor the Nominal Defendants (collectively the "Movants") accurately characterize the relief sought by the PW Complaint. In order to *euchre* this Court into a rush to judgment, the Movants claim that Plaintiff asks this Court to place restrictions on the Nominal Defendants' use of the property so as to prevent the Nominal Defendants' "religious" use on the property. This is simply not what the PW Complaint is about.

By way of background, the subject property located at 95 Halifax Road, Mahwah (the "Subject Property") is a land-locked property that is inaccessible except by way of a (i) private bridge and (ii) private roads (the "Private Bridge and Roads"). The Private Bridge and Roads are the private property of the Ramapo Hunt & Polo Club Association, Inc, a homeowners association ("HoA").

Starting in 2009, the Nominal Defendants occasionally utilized the Subject Property to conduct small gatherings. Previously (from 2000 to 2008) the Subject Property had flourished as a Wildlife Habitat Restoration Project created jointly with the US Fish & Wildlife. No one had ever complained about how the Nominal Defendants' used their property.

Disputes began to occur, however, when the Nominal Defendants began expanding their use of the Subject Property. Specifically, the Nominal Defendants began to erect permanent structures on the Subject Property, in violation of local zoning ordinances.

Of even greater concern to a property owner like myself – whose property is directly across the street from the Subject Property – the Nominal Defendants began advertising and running “public events” at the Subject Property in 2016. In fact, the so-called “Settlement Agreement” at issue in this case, now authorizes the Nominal Defendants to conduct public gatherings -- of up to 150 people – at the Subject Property.

Again, I want to be clear that I have never objected to the Nominal Defendants’ “religious use” of the Subject Property. The issue here is not the “use” of the property; it is the scope of that usage to permit public gatherings of up to 150 people.

What I contend, and what I challenge by way of my PW Complaint, is the following:

(1) My property rights as an adjacent property owner, as well as a member of the HoA, were negatively affected, in violation of due process of law, when the Township not only authorized “public gatherings” of up to 150 people on the Subject Property, but then effectively directed the HoA to open its Private Bridge and Road to allow for these large “public gatherings.” The Township acted illegally by essentially confiscating private property rights in the Private Road and Bridges, without compensating me, other members of the HoA, and/or the HoA. It is one thing to authorize “public gatherings” at the Subject Property of up to 150 people; it is quite another to direct a private landowner that it MUST allow its private property to be used to accommodate that usage.

The Township acted illegally, arbitrarily, and capriciously when it essentially confiscated the Private Bridge and Roads, without compensation, to permit the public gatherings. The Nominal Defendants may have the right to use the Subject Property for religious purposes. They do not, however, have the right to invite members of the public to trespass over private property to get to the public gathering – and that remains true even if the event is a “religious” event protected by the First Amendment. Similarly, The Township lacked the authority to permit trespass over the Private Bridge and Roads.

(2) The Township acted illegally, arbitrarily, and capriciously when it authorized public gatherings, of up to 150 people, without conducting any evaluation, from a safety perspective, of the ramifications of such large events. As noted above, the only access to the Subject Property is over the Private Bridge and Roads. Prior Township Planning Board Resolutions did address safety issues associated with large gatherings for a contemplated equestrian arena that ultimately did not get developed, particularly traffic volume / flow and parking; refer to PW Complaint (#29-33 and Exhibit E & F).

(3) The Township acted illegally, arbitrarily, and capriciously by approving the Settlement Agreement without performing any site-plan review pertaining to the “public gatherings.”

Specifically, the Settlement Agreement (“Agreement”) authorizes traffic accessing the Subject Property for these “public gatherings” to use an ingress/egress point that is directly across the street from my existing driveway. As this Court no doubt understands, towns never approve of new driveways, for any new use or construction, that back into another, existing driveway – due to the enormous safety hazards posed by driveways that back into each other. This concern holds when a new house is built across the street from another house. A driveway for the new house would never be approved so that it back into the existing driveway. Here, the safety concerns are multiplied 150 times on a street that is 20% narrower than standard street width (24’ v 30”) with over 3 foot deep drainage ditches running the length of the street. On the

day of a public gathering, the safety of my family is endangered by the frequency by which cars pull into and out of the Subject Property in a direct line with my existing driveway.

The Nominal Defendants urge in their brief that this state recognizes a municipality's "broad" authority to settle disputes over the municipality's zoning ordinances, relying on *Deg, LLC v. Village of Fairfield*, 198 N.J. 242 (2009). But nothing in that decision authorizes a municipality so notoriously to infringe on private property rights and disregard safety issues to accomplish that settlement. The Township cannot direct the use of the Private Bridge and Roads to accomplish the Agreement. The Township cannot ignore safety concerns, pertinent to neighboring property owners, and wager the safety of others, to accomplish the Agreement.

In the end, this case has nothing to do with a challenge to a "religious" use of the Subject Property. Instead, this case is about whether a municipality can so substantially burden the private property rights of third persons with a total disregard to safety issues in order to settle a case with another party.

### **Procedural Background**

This case has an extremely tortured history. The PW Complaint challenges a series of mistakes made in the Defendant Township's haste to settle a zoning enforcement dispute, together with a subsequent RLUIPA claim, between the Township and the Nominal Defendant, the Ramapo Mountain Indians, Inc ("Nominal Defendant" or "RMI"). More specifically, the PW Complaint challenges the actions undertaken by the Township in furtherance of the Agreement it reached with the RMI, as the terms and conditions of that Agreement plainly exceeded the Township's authority by trampling over the rights of neighboring property owners, including myself. In sum, the claims raised by the PW Complaint include the Township's circumvention of the of the NJ Municipal Land Use Law (MLUL), permitting the RMI to violate the existing Township Zoning Code without requiring RMI to obtain use variances, site plans and other land use reliefs from the separate Zoning Board of Adjustment.

All told, the PW Complaint challenges the Township's actions that violated the law, violated the property rights of adjacent property owners, and essentially thumbed its nose at the very laws and ordinances that are intended to protect the health, safety and welfare of residents. These claims not only warrant a thorough examination by this Court by way of this litigation, the public's right to hold the Township accountable for its arbitrary and capricious conduct here demands it.

### **Argument**

#### **A. The PW Complaint was Not Filed Out of Time.**

Movants argue that Plaintiff failed to file its complaint within the 45-day period required by R. 4:69-6. What Defendants fail to acknowledge in their pleadings is that the Township unlawfully withheld and suppressed from the public a copy of the underlying ~~Settlement~~ Agreement despite persistent and timely demands that the Township produce a copy of that document for public inspection and scrutiny. And, as described at length in the accompanying Certification, what the defendants further fail to acknowledge that the PW Complaint was in fact filed within 45-days after the Township finally relented and released the Agreement to the public on July 2, 2019. For "accrual" purposes under Rule 4:69-6, my cause of action "accrued" upon release of the written settlement agreement, and not on the date on which it was allegedly signed on June 28,

2019. It was only upon the release of the agreement that I would have first learned of my reasons for challenging the agreement. *Ben Elazar v. Macreitta Cleaners, Inc.*, 230 N.J. 123, 134-35 (2017) (interpreting meaning of “accrual” in Torts Claims Act to be consistent with the meaning generally used in New Jersey law).

Briefly, the Township disclosed that it was intending to discuss then proposed Agreement in closed session at the May 9, 2019 Township Council meeting. Although the agenda for that evening’s meeting claimed that a copy of the Agreement was listed as being attached to Resolution 186-19, it was not attached nor was it provided for review by the public. See PW Complaint Exhibit A. That very same evening, and without the benefit of seeing the Agreement, Plaintiff and other neighbors did speak against a proposed settlement. Obviously, without the benefit of actually reading the undisclosed agreement, the public was not aware, nor could the public be aware of the its material terms. Importantly, the Township refused to disclose a copy of the Agreement to the HoA, of which Plaintiff is a member.<sup>1</sup> Although it was later discovered that the Agreement trampled upon the properties covered by the HoA, the HoA was not a party to the Agreement.

Since the Township refused to disclose the Agreement, Plaintiff filed an OPRA request for a copy of the Agreement on June 10, 2019. The Township refused to comply with my OPRA request, claiming the document stating that the Agreement had not yet been executed, thereby rendering it privileged, confidential and could not be disclosed publicly. This stonewalling continued until July 2, 2019, when the local media (Mahwah Patch), published an article claiming that the Agreement had in fact been executed on July 2. Township Clerk, Kathy Coviello, acknowledged that she read the article and later that morning provided Plaintiff with a copy of the Agreement. See Certification at Exhibit A

NJ Court Rule 4:69-6 provides that “No 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, except as provided by paragraph (b) of this rule.” Here, Plaintiff’s Action in Lieu of Prerogative Writs Complaint was filed in a timely manner as it was filed within 45-days of the Defendant providing the Agreement to the Plaintiff for review on July 2, 2019. Had the Defendant provided the Agreement earlier Plaintiff could have filed the Complaint earlier. The Township should not be rewarded by unlawfully suppressing distribution of a vitally important public record as was done here. Since the Township unlawfully withheld disclosure of the Agreement being challenged until July 2, 2019, Plaintiff’s PW Complaint was filed in a timely manner. In the alternative, these facts suggest that the Court can and should extend the filing deadline in the interests of justice should that be necessary, particularly given the Township’s refusal to disclose information when Plaintiff demanded it.

#### **B. Movants Misstate the Bases Underlying the PW Complaint.**

To be clear, the PW Complaint in no way, shape or form questions the Nominal Defendants right to use their own property as permitted under the existing Zoning Ordinances, nor does Plaintiff seek to impede the RMI’s right to hold prayer services on their own private property. Defendants know this full well.

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<sup>1</sup> Plaintiff, although a member of the HoA (as one of twenty-nine lot owners in the Private Planned Residential Community), is not a represented class or part of the previous litigation between the HoA, Defendants and Nominal Defendant. Plaintiff has not been a Trustee of the HoA since 2014.

Nevertheless, Defendants motion attempts to cast the PW Complaint as doing exactly that, so Defendants' own motion seeks to dismiss claims that were never pleaded. Rather, Plaintiff filed the PW Complaint because the uses permitted for RMI's property are wholly inconsistent with the uses permitted by the existing Zoning Ordinances. The PW Complaint argues that the Township cannot be permitted to undertake an end run around the mandatory zoning and planning processes simply by entering into a Settlement Agreement with a property owner, RMI.

The PW Complaint was filed by Plaintiff because of the safety issues posed by activities permitted under the Agreement, including traffic volume/flow for the large public gatherings and the existing and proposed driveway and parking lot. Although the existing and proposed driveways require a permit and site plan as per Township Ordinances, the Agreement has circumvented that process. The Plaintiff raised the safety issues in communications with the Defendants numerous times over two years as identified in Plaintiff's PW Complaint and the Township Engineer / Zoning Officer has acknowledged such issues.

The Defendant has previously acknowledged that Zoning Uses allowed under Agreement are Zoning Use and Site Plan violations and that the Subject Property driveway is a Zoning Use and Site Plan Violation in numerous letters to Nominal Defendant including April 24, 2018 letter (see Exhibit D of PW Complaint).

The Agreement allows the Subject Property to be a place of assembly. Such large public gatherings are Zoning violations requiring a Zoning variance by way of a proper Notice, public hearing and a decision by an impartial Zoning Board. By not having a public hearing the safety issues that include Floodway, traffic and parking have not been addressed, which contradicts prior Town Planning Board Resolutions (see PW Complaint). This is Spot Zoning and/or Contract Zoning and violates Plaintiff's right to due process.

Please note that prior to 2016 there had not been large gatherings on Subject Property other than on May 5, 2012 that resulted in traffic and parking related safety issues, including a blockage of the single lane vehicular bridge that required police intervention (as referenced in PW Complaint). The large gatherings that started in 2016 caused additional safety issues that led to the litigation between the HoA, Defendant and Nominal Defendant, but the safety issues have not been addressed in the Agreement.

Importantly, the proposed assembly / large gatherings allowed under the Agreement were formally acknowledged as "contrary to the Zoning Ordinance" by the current Township Special Counsel and former Township Attorney, Brian Chewcaskie; see Certification at Exhibit B letter dated April 20, 2018.

The Defendant's actions under the Agreement is not only contrary to its prior determinations and notices, it is a direct contradiction of the Municipal Court Decision by Judge McGeady on Nov 17, 2017 in *New Jersey v Ramapough Mountain Indians, Inc.* (Docket No 0233-SC-08941); see Certification at Exhibit C, including Judge McGeady's Decision Transcript and the salient excerpts below:

p13: "there was testimony from Mr. Mulvey and Mr. Kelly about the fact that the public assembly on the premises is a violation of the C-200 zone"

p19: "Then T-9, Mahwah exhibit, a letter from Mr. Kelly to Thomas Williams, as opposed to the planner, Williams - Thomas Williams being one of the

attorneys for the Tribe - states that on April 6th of 2017, a zoning permit application had, in fact, been filed, but it was rejected by Mr. Kelly, in that it requested the use for a public assembly, and religious and cultural purposes, and Mr. Kelly concluded that that's inconsistent with the C-200 zone, and therefore, rejected the zoning application."

p29: "The problem this Court has is that the Tribe seems to be asserting that defense - that it conducts religious ceremonies on the property, and that therefore, the Township of Mahwah cannot regulate it at all. Both the Township and the Tribe have submitted case law in their briefs, where conventional religions have been required to submit applications to planning boards, and boards of adjustment for permits, for site plans, for variances. The Tribe's argument appears to be premature. It would appear that they need to make a completed variance application to conduct their religion on the property, and if that was rejected by the Board of Adjustment, then perhaps the religious exercise, freedom of religious exercise defense may be relevant."

As such, the Township Engineer and former Zoning Officer (Kelly), current Zoning Officer (Geri Entrup), Property Maintenance Inspector (Mulvey) all testified that the Zoning Use of public assembly is an illegal Zoning Use (violation). Additionally, Special Counsel and former Township Attorney (Chewcaskie) formally stated the same.

The series of mistakes made by the Township actually began as early as 2010, as a result of the Defendant's 'taking' of a portion of the Nominal Defendant's Subject Property without just compensation. Shortly thereafter, when the RMI challenged the Township's unlawful taking, the Defendant committed its next misstep by issuing an illegal Zoning Permit for Religious and Public Assembly, neither of which are Zoning Uses that are permitted in a Conservation Zone (C200) in which the property is located on January 25, 2012. See Certification at Exhibit D. The illegal Zoning Permit was issued a month after the Nominal Defendant's threat of RLUIPA lawsuit. See Certification at Exhibit E (George Cotz's letter December 22, 2011). There should have been a Zoning Variance hearing by the Zoning Board that would be open to the public for comments and/or objections.

During the years 2012-2017 representatives of the Township lied to the Plaintiff and neighbors about the issuance of the illegal Zoning Permit and dismissal of Zoning Violations for the Subject Property. See Certification at Exhibit F (emails are included in the Plaintiff's Notice of Tort Claim). Plaintiff and neighbors only learned about the illegal Zoning Permit in August 2017 when the Nominal Defendant posted it on a Facebook page. A neighbor filed an appeal of the permit with the Township Zoning Board. Within days of the appeal being filed the Township rescinded the Zoning Permit, acknowledging that it was illegally and invalidly issued See Certification at Exhibit G.

As explained in the PW Complaint, the Township's efforts to avoid either rezoning RMI's property, or requiring RMI to obtain a use variance to allow such uses, completely upends the zoning and planning powers expressed by the MLUL and the Township's own Zoning Ordinances. Without a public hearing process, there is no way the Township could have been satisfied that the RMI's proposed use of its property could be taken without any substantial detriments to the neighboring properties, or without substantial impairment of the municipal zone plan. As examples, there remain safety issues and concerns posed by activities permitted under the Agreement, including traffic volume/flow for the large public gatherings and the

existing and proposed driveway and parking lot. Although the existing and proposed driveways require a permit and site plan as per Township Ordinances, the Agreement all but circumvents the processes and procedures required by every other property owner in town.

As concerning safety, Plaintiff raised these issues with the Defendants numerous times over two years as identified in Plaintiff's PW Complaint and the Township Engineer / Zoning Officer has acknowledged such issues. See Certification at Exhibit H. In fact, the Defendant has previously acknowledged that uses of RMI's property permitted under the Agreement was inconsistent with what is now permitted by municipal ordinance. The Township's own attorney admitted these were violations.

These issues are of considerable relevance to Plaintiff as the RMI lacks any easement or right to use HoA's Private Bridge and Roads, which are the only ingress and egress to the Subject Property other than swimming or boating across the Ramapo River. Defendant Township has only limited easement rights to use the HoA's Private Bridge and Roads, with the HoA permitting municipal access only for sanitation, police, fire and emergency related purposes. See Certification at Exhibit I. Neither Defendant nor Nominal Defendant pay the HoA a Usage Fee or any fee to use of the HoA Private Bridge and Roads. Nevertheless, by permitting the RMI by way of Agreement alone to use properties and facilities for which the Township has no jurisdiction, necessarily condones the RMI's use and trespass over private property. By seeking to dismiss these claims at the outset of this case, the Township is seeking to sweep these inconvenient facts (and plainly unlawful acts) under the carpet. The Court should not permit the Township to so easily avoid accountability for such actions.

### **C. The PW Complaint Raises Issues of Considerable Public Importance.**

The PW Complaint raises issues of considerable public importance which have implications beyond the illegality of the Agreement itself, such as:

- Spot Zoning,
- Contract Zoning,
- A 'Taking' by the Defendant of private property without just compensation,
- Violation of the Plaintiff's and neighbors right to due process
- Safety issues not being addressed, including Floodway, traffic, parking and driveway access for large public gatherings

If the Agreement should somehow survive scrutiny of this Court notwithstanding the above infirmities, even more litigation will likely result, especially since the multiple Tort Claim notices and Demand Letter and Litigation Hold that have been filed against the Township. See Certification at Exhibit J and K The important issues raised by the PW Complaint cannot be dismissed at the outset of the case. To do so would amount to countenancing the myriad illegal actions and activities undertaken by the Township to date.

### **D. The PW Complaint Further Implicates Important Constitutional Rights.**

As noted above, the illegal actions taken by the Township when taking RMI's property in 2010, and then seeking to cover up for that by issuing RMI a Zoning Permit that the Zoning Officer admits should never have been issued, initiated a series of unlawful actions of which the PW Complaint only scratches the surface. The following are excerpts from the Plaintiff's Notice of Tort Claim:

- Township representatives clandestinely, surreptitiously, and under color of law negotiated with the RMI in combination and by way of a joint enterprise and/or conspiracy, to permit the illegal and/or improper use of property owned by the RMI contrary to the Mahwah Zoning Ordinances, and purposely failed to issue or enforce the Ordinances, despite clear violations. The Township unlawfully issued a zoning permit for the RMI property to allow unlawful zoning uses, which has now been disclosed to be in furtherance of this scheme and/or unlawful agreement.
- Following the improper and illegal issuance of the zoning permit, Township representatives then purposely misled the HoA as to the status of the zoning violations and court matters. Furthermore, the Township did not comply with the OPRA requests by members of the HoA as to documents pertaining to the Zoning violations and/or the scheme and/or unlawful agreement.
- The Township willfully failed to enforce zoning violations. The Township previously limited enforcement to primarily construction violations, but not zoning use violations, site plan violations, driveway access, activities in a floodway / flood plain and Flood Damage Prevention ordinance violations.
- Under the Settlement Agreement the Township agreed to allow the continuance of zoning use violations, site plan violations, driveway access violations, and unsafe activities in a floodway / flood plain – all in direct violation of Township ordinances.
- Under the Settlement Agreement the Township unlawfully granted public access to use the privately owned bridge and roads owned by the HoA. The public access of the privately owned bridge and roads has burdened the Claimant and HoA residents with an increased liability related to the public's use of the HoA's bridge and roads.

At the very least the Defendant's actions represent violations of the Plaintiff's right to due process.

While the Agreement resolved the Defendant's "Taking" of a portion of the Nominal Defendant's private property, it has resulted in yet another "Taking" of the private property of the HoA and that of the Plaintiff *[as one of twenty-nine HoA lot owners]*. The Township cannot continue to shirk the need to be held accountable for its unlawful conduct.

Furthermore, the implementation of the Agreement has violated the Claimant's right to due process and equal protection of the law as set forth in 42 USC Section 1983, the Fifth and Fourteenth Amendments to the United States Constitution as well as the same guaranteed protection by the Constitution of the State of New Jersey.

The Agreement is a taking of the HoA's Private Bridge and Roads without just compensation in violation of the Fifth Amendment to the United States Constitution (as incorporated against the states through the Fourteenth Amendment).

#### **E. Safety Issues of RMI's Driveway Were Circumvented by the Agreement.**

Notwithstanding the HoA's own potential claims and issues, Plaintiff alone has an individual interest that is protected by the Procedural Due Process Clause because the safety issues posed by the Subject Property driveway have been recognized by the Defendant, but were



circumvented by the Agreement; see Certification at Exhibit H Township Engineer / Zoning / Administrative Officer, Mike Kelly, emails and excerpts below:

Nov 22, 2017:

"The Municipal Judge made his ruling on Friday, November 17, 2017. The defendant (RMI) has 20 days to appeal, during this time we are not going to pursue any additional action for existing items, structures and improvements on site. This would include the driveway."

Mar 26, 2018

"As indicated before, the issues you raise with respect to the driveway would be addressed at the time of site plan approval..." "I believe these items are addressed in the Proposed Settlement Agreement, which requires them to submit for proper approvals from the applicable Township Land Use Board."

The Proposed Settlement Agreement referred to by Mike Kelly in his email Mar 26, 2018 was not executed by the Nominal Defendant. Importantly it did require proper Land Use Board approvals; see Defendant's Exhibit A – Transcript of Settlement Hearing February 28, 2018.

Although Township Ordinances require a permit and site plan for a driveway, no permit or site plan is required for the existing driveway nor is one required for future driveway and parking lot off Bridle Path Lane under the Agreement. Not only is Bridle Path Lane significantly narrower than standard streets (24' vs, 30' standard), it does not have street curbs and it has over 3 feet deep drainage ditches to accommodate rain / water runoff from the higher elevation Ramapo Mountains that feed into drainage pipes that run to the river.

As explained in the PW Complaint, use of RMI's driveway as permitted under the Agreement deprive Plaintiff's own ability to use and enjoy his own property to a material degree.

There is no effective enforcement mechanism under the Agreement for the Township to address how many gatherings and number of guests are actually at such gatherings.

It is blatantly incorrect for Nominal Defendant to claim that the Plaintiff's safety concerns are adequately addressed in the Agreement as the driveway needs to be approved by both the Township Engineer and the New Jersey Department of Environmental Safety in that there is no requirement under the Agreement to move the existing driveway. Moreover, there is no requirement for a Permit or Site Plan and review by the appropriate Land Use Board for the existing or proposed driveways as required under the MLUL and existing Township Ordinances. The Agreement states

"Regarding parking on the Subject Property, to the extent permitted by the New Jersey Department of Environmental Protection, the RMI shall be permitted to install a driveway approximately in the vicinity of the existing woodchip drive appropriately offset from any existing driveways on Bridle Path Lane and construct a parking area... The existing driveway on Bridle Path Lane shall be eliminated when the new one is created."

So there is no requirement to do anything with regard to the existing illegal driveway.

#### **F. Municipal and Use Law (MLUL)**

The purpose of the MLUL of New Jersey, according to Title 40 Chapter 55 section 40:55 D-2 is:

- a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;
- b. To secure safety from fire, flood, panic and other natural and man-made disasters;

Emphasis added with regard to promoting public safety.

The Municipal Land-Use Law (MLUL) is the legislative foundation of Planning Boards and Zoning Boards of Adjustment in the State of New Jersey.

According to 40:55 D-20.

Exclusive authority of planning board and board of adjustment:

Any power expressly authorized by this act to be exercised by (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act.

According to 40:55 D-38:

Contents of Ordinance: An ordinance requiring approval by the planning board of either subdivisions or site plans, or both shall include the following provisions ensuring:

- (1) Consistency of the layout or arrangement of the subdivision or land development with the requirements of the zoning ordinance;
- (2) **Streets in the subdivision or land development of sufficient width and suitable grade and suitably located to accommodate prospective traffic and to provide access for firefighting and emergency equipment to buildings** and coordinated so as to compose a convenient system consistent with the official map, if any, and the circulation element of the master plan

Prior Township Planning Board Resolutions did address safety issues associated with large gatherings for a contemplated equestrian arena that ultimately did not get developed, particularly traffic volume / flow and parking; refer to PW Complaint (#29-33 and Exhibit E & F).

Furthermore, interpretation of zoning ordinances is a power exclusively held by the Board of Adjustment per N.J.S.A. 40:55D-70(b) ("The board of adjustment shall have the power to: [...] b. Hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such a board is authorized to pass by any zoning or official map or ordinance, in accordance with this act").

So the pleadings by the Movants are inaccurate in stating that the Township Council can interpret the Township's Zoning Ordinances. The Defendant's actions was not an interpretation, it was a circumvention of the law.

Importantly, as the Township's Attorney himself formally acknowledged that assembly / large gatherings was not permitted, the Township's Agreement with the RMI permitting such unlawful uses was ultra vires its delegated authority, rendering the agreement itself arbitrary, capricious and unreasonable.

- see Certification at Exhibit B letter dated April 20, 2018.

The Defendant can not change their position on current and future Zoning and Site Plan Violations and Zoning Variance requirements, magically making believe that they don't exist, because it circumvents the Defendants responsibility to address safety issues and it violates the Plaintiff's right to due process.

### **G. The Agreement Also Undermines the Flood Damage Prevention Ordinance**

The Agreement is also a direct violation of Township's Flood Damage Prevention Ordinance No 1878; see Exhibit H and excerpts below. According to Chapter 27, section 27-5:3:

Since the Floodway is an extremely hazardous area due to the velocity of flood waters which carry debris, potential projectiles, and erosion potential, the following provisions apply:

- a. Prohibit encroachments, including fill, new construction, substantial improvements, and other development unless a technical evaluation demonstrates that encroachment shall not result in any increase in flood levels during the occurrence of the base flood discharge

See Certification at Exhibit L. Any development on the Subject Property, including a driveway and /or parking lot could impact flood levels and endanger public safety and that of the Plaintiff and neighbors. At least 88% of the Subject Property is in the Floodway, the balance being largely sloped elevation not conducive to development.

### **H. Collateral Estoppel Is An Affirmative Defense Which Cannot Be Resolved On A Motion to Dismiss; Nonetheless, No Party Has Ever Contested The Settlement Agreement On These Grounds**

The Defendants improperly raise collateral estoppel on a motion to dismiss, even though it is an affirmative defense, "Collateral estoppel is that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *State v. Gonzalez*, 75 N.J. 181, 186, 380 A.2d 1128 (1977) It is an affirmative defense. R. 4:5-4 (stating *res judicata* is an affirmative defense). By necessity, the Defendants ask this Court to look beyond the allegations of the Amended Complaint by improperly asking this Court to adjudicate collateral estoppel at this point. Like any affirmative defense, the burden is on the defendants to plead and prove the defense.

It boggles the imagination, however, to suggest that any other party had the opportunity to contest the specific terms of the Settlement Agreement, or whether it was an illegal, arbitrary, or capricious decision for the Township to enter the agreement. The Township first published the decision on July 2, 2019. Who else could have challenged that agreement before?

### **Conclusion**

The Township's motion to dismiss should be denied as it plainly ignores both the facts and the law. The Township's actions that lead to entry of a Settlement Agreement that wholly tramples upon the rights of adjoining and nearby property owners, who were not joined in any such settlement, cannot be permitted to avoid judicial scrutiny. As explained above and as described more thoroughly in the PW Complaint, the Township's actions do not pass muster. Under both local ordinance and State law, the Township was required to join all impacted property owners in any settlement that involved use of their private properties. Even more basically, the Township was required to provide proper and adequate notice of its intentions and

actions, and to hold public hearings to allow the public a fair and reasonable opportunity to present facts and evidence that could persuade the Township to seek an alternative course.

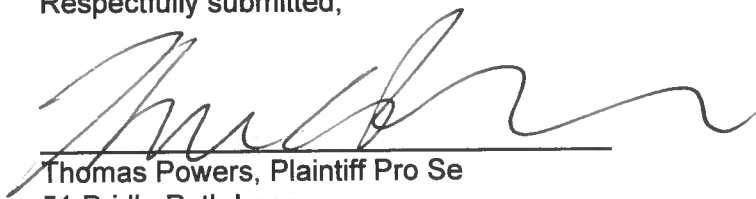
The Defendant's approval of the Agreement was nothing short of arbitrary and capricious as it was not based upon consideration of relevant factors, particularly safety issues and ignores existing Ordinances. Whether or not Plaintiff ultimately prevails at trial is besides the point at this early stage of the litigation. The Township's moving papers have not satisfied the extraordinarily high burden to allow this case to be dismissed at the outset. Assuming all of the facts pleaded by the Plaintiff to be true, without reliance upon any facts beyond the four corners of the PW Complaint itself, can lead to no other result. But even more important are the essential public issues and concerns that demand scrutiny. Absent the same, the public will forever remain suspicious that the Township and the RMI were able to "get away with it", knowing full well that their shared actions were in violation of the law.

The Agreement does not address the safety issues presented by the proposed large public gatherings as well as access under the existing or proposed future driveway. There are genuine safety issues with regard to traffic flow and parking on a street that is 20% narrower than standard (24' vs 30') and that has over 3 foot drainage ditches running along the street.

Plaintiff's PW Complaint requests that the Court cancel, annul and set aside both the Settlement Agreement and Resolution#186-19 in order to finally get the Township to address the safety issues posed by large public gatherings, including Floodway, traffic, parking and the illegal driveway access as required under MLUL and existing Township Ordinances as well previous Township Planning Board Resolutions that stated "Any future development and/or use of said roadway by adjacent property owners will necessitate further bridge and road improvements to be reviewed and approved by this board."

Plaintiff respectfully requests oral argument.

Respectfully submitted,



Thomas Powers, Plaintiff Pro Se  
51 Bridle Path Lane  
Mahwah NJ 07430