

Fred Semrau, Esq. [Attorney Id. No.: 017871993]
Nicholas Wall, Esq. [Attorney Id. No.: 423632023]
DORSEY & SEMRAU, LLC
714 Main Street
Boonton, New Jersey 07005
T: (973) 334-1900
F: (973) 334-3408
Attorneys for Plaintiff Borough of Mendham

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Hon. Frank J. DeAngelis, P.J.Ch.
Morris/Sussex County

BOROUGH OF MENDHAM, a municipal body
of politic and corporate governed and organized
under the laws of the State of New Jersey,

Plaintiff,

-vs-

BRIAN CAVANAUGH, Block 1601, Lot 1;
JANE DOES and/or JOHN DOES 1 through 10;
ABC CORPS., 1 through 10 (the same being
fictitious names for unknown persons and/or
entities holding an interest in title, ownership,
possession, custody, and/or control of the real
property located at 610 Cherry Lane, Mendham,
NJ 07945

Defendant(s).

**SUPERIOR COURT OF NEW JERSEY,
CHANCERY DIVISION: GENERAL
EQUITY PART – MORRIS COUNTY**

DOCKET NO.: MRS-C-4-25

CIVIL ACTION

ORDER TO SHOW CAUSE

THIS MATTER having been brought before the Court by Dorsey & Semrau, LLC,
(Nicholas R. Wall, Esq., appearing) attorneys for Plaintiff, the Borough of Mendham, seeking
relief by way of preliminary injunction at the return date set forth below pursuant to R. 4:52, based
upon the facts set forth in the Verified Complaint filed herewith and the Certifications of the
Borough of Mendham Zoning Official and Borough of Mendham Engineer, and for good cause
shown:

IT IS on this 7th day of April, 2025, **ORDERED** that Defendants, BRIAN
CAVANAUGH, and JANE DOES and/or JOHN DOES 1 through 10; ABC CORPS., 1 through

10, are hereby prohibited from continuing improper use of the property located at 610 Cherry Lane in the Borough of Mendham, in violation of N.J.S.A. 40:55D-18, and the Borough's Land Use Ordinances.

IT IS FURTHER ORDERED that Defendants:

- Denied*
- A. Restore the subject property and the Borough's right-of-way (ROW) to its previous condition, to the satisfaction of the Borough Engineer; and
- B. Bring the property into compliance with the Borough's zoning and land use ordinances to the satisfaction of the Borough Zoning Official; and
- C. Comply with any other and further relief as the Court deems equitable and just.

Frank J. DeAngelis

P.J.Ch.
HON. FRANK J. DEANGELIS, P.J.Ch.

Dated:

☒ OPPOSED

☐ UNOPPOSED

*See the attached
Statement of reasons
incorporated by reference.*

Borough of Mendham v. Brian Cavanaugh**MRS-C-4-25****Statement of Reasons****I. BACKGROUND INFORMATION**

This matter comes before the Court by way of the return of an order to show cause seeking preliminary restraints. The underlying matter arises out of a land use dispute. Defendant Brian Cavanaugh (“Defendant”) resides at 610 Cherry Lane, Mendham, New Jersey (the “Property”). Defendant purchased the Property in or around 1993. Beginning late 2023, Defendant began making requests to the Borough of Mendham (“Plaintiff” or the “Borough”) to construct a stone wall at the Property. Plaintiff denied these requests. Plaintiff alleges that despite the denials, Defendant began construction of the wall, digging a trench within Plaintiff’s Right of Way (“ROW”) at the Property. On October 2, 2023, Plaintiff formally advised Defendant that he was to stop work on the stone wall until all of the required and necessary permits were obtained. Since October 2, 2023, Defendant has attempted various iterations of re-applying to build the stone wall, but Plaintiff has denied such requests on procedural grounds and due to the alleged infringement on Plaintiff’s ROW. Plaintiff asserts that in December 2024, Defendant recommenced construction of the stone wall in the ROW, without approval. On December 5, 2024, Plaintiff issued Defendant a formal Notice of Violation. On December 18, 2024, Plaintiff’s Zoning Officer inspected the Property, and the concrete and stone wall were still present—along with the trench foundation.

On February 5, 2025, this Court denied Plaintiff’s application for temporary restraints. In the instant application, Plaintiff seeks preliminary injunctive relief in the form of an interlocutory order restraining and enjoining Defendant from engaging in any non-permitted use of the Property,

and to return and repair the Property to its pre-disturbed condition to the satisfaction of the Borough Zoning Officer and Borough Engineer.

II. STANDARD OF REVIEW

Injunctive relief is an extraordinary equitable remedy used to maintain the status quo pending a full disposition of the matter by the court. Christiansen v. Local 680 of Milk Drivers and Dairy Employers, 127 N.J. Eq. 215, 219-20 (E. & A. 1940); Suenram v. Society of the Valley Hospital, 155 N.J. Super. 593, 596-97 (Law Div. 1977). Injunctive relief must be administered with sound discretion and consideration for the equities in the case. Zoning Bd. of Adjustment of Sparta Twp. v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985).

The right to interlocutory injunctive relief is governed by the standards set out in Crowe v. De Gioia, 90 N.J. 126 (1982). New Jersey courts are empowered to “prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.” Crowe, supra, 90 N.J. at 132 (quoting Thompson, Attorney General v. Paterson, 9 N.J. Eq. 624 (E. & A. 1854)). Those determinative factors are as follows:

- (1) Substantial, immediate & irreparable injury. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Ibid. “In other words, plaintiff must have no adequate remedy at law.” Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 637 (App. Div. 1997) (citing Green v. Piper, 80 N.J. Eq. 288, 293 (Ch.1912)).
- (2) The legal right must be settled as a matter of law. Crowe, 90 N.J. at 133.
- (3) A reasonable probability of success on the merits. Id.
- (4) In balancing the equities and considering the public interest, a relative hardship of granting or denying the relief weighs in favor of the applicant. Id. at 134.

See also Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303-04 (E. & A. 1878). Each of the Crowe factors must be demonstrated by clear and convincing evidence. Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508 (App. Div. 2008). When limited to preserving the status quo during a lawsuit's pendency, a court may “place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.” Id. at 520.

III. ANALYSIS

a. Irreparable Harm

The threat of immediate and irreparable harm is a necessary precondition to preliminary injunctive relief. Crowe, supra, 90 N.J. at 132. Injunctive relief “should not be entered except when necessary to prevent substantial, immediate, and irreparable harm.” Subcarrier Commc’ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

Plaintiff alleges that it, and the general public, will suffer immediate and irreparable harm absent temporary restraints. Plaintiff asserts that Defendant’s purported unauthorized construction poses a significant threat to public safety, as it infringes on the Borough’s ROW, which is specifically intended for public use and utility access. See N.J.S.A. 40:55D-34; see also Barsel v. Woodbridge Township Zoning Bd. of Adj., 189 N.J. Super. 75 (App. Div. 1983) (finding that “...once a public right-of-way is established, whether or not fully paved, any regulation ... must be in the public rather than a private interest and is within the exclusive jurisdiction ... of the governing body pursuant to N.J.S.A. 39:4-197 et seq.”). Plaintiff contends that the continued presence of the trench and stone wall creates a hazardous condition that could result in physical harm to the public that travels down the public road and possible economic damage to the neighboring properties. Plaintiff argues that no amount of monetary damages can relieve

Defendant's refusal to abide by the Borough's municipal code regarding construction in the Borough's ROW.

In opposition, Defendant submits that temporary restraints are not necessary to prevent any immediate and irreparable harm here, as Defendant's partially constructed wall is below the height required by the Borough Code, and there are many other stone walls within the Borough ROW on other Borough residents' properties similar to Defendant's that were constructed without fence and road opening permits. Moreover, Defendant asserts that Plaintiff has not cited any public safety incidents related to this stone wall since Defendant first began to construct the wall over one year ago. Defendant claims that it is unclear from the record why the presence of the wall creates a safety hazard, while other similar walls in the Borough do not.

Additionally, Defendant alleges that a wood fence had been in the same location on the Property for decades before he began to construct the stone wall, which was not a safety concern to the Borough. Defendant contends that if Plaintiff had concerns regarding the presence of a structure in the public ROW on the Property, it would have taken action long ago.

In opposition to the imposition of preliminary injunctive relief on the return of the order to show cause, Defendant maintains its above argument that Plaintiff fails to demonstrate a threat of immediate and irreparable harm.

In reply, Plaintiff argues that it will suffer immediate and irreparable harm absent injunctive relief. Plaintiff reiterates that the construction at issue poses a significant threat to public safety for all Borough residents that traverse the roadway bordering Defendant's property, as it infringes on the Borough's ROW, and such obstructions can impede emergency services, create significant traffic hazards, and pose increased risk to pedestrians and bicyclists, who are similarly

entitled to use the full width of the street. See N.J.S.A. 40:55D-34; N.J.S.A. 40:67-1; see also Barsel, 189 N.J. Super. at 75. Plaintiff rebuts Defendant's allegation that Plaintiff will suffer no harm as continued presence of a fixed stone wall diminishing sight at an intersection creates a hazardous condition that could result in physical harm to the public that travels down the public road. Plaintiff additionally cites to the former Chief of Police's statement that "there are potential safety concerns" in the October 2023 Stop Work Order. Pl.'s Exhibit A to Verified Compl.

Plaintiff asserts that a municipality has a "duty of maintaining its streets in reasonably safe condition for public travel" and such duty is "non-delegable." Bechefskey v. City of Newark, 59 N.J. Super. 487, 493 (App. Div. 1960); see also Montclair State Univ. v. Cnty. of Passaic, 234 N.J. 434, 457 (2018) (holding, "local governments owe a duty of care to the public regarding their roadways and ancillary public lands."). Further, Plaintiff provides that pursuant to Section 8 of the New Jersey Department of Transportation's Roadway Design Manual, ("Road Design Manual") no obstructions shall be permitted to be installed in the road ROW, and there shall be a "clear zone" measuring approximately seven to ten feet. Plaintiff maintains that the Road Design Manual Section 9, entitled "Crash Cushions," states that "[f]ixed objects within the clear zone distance should preferably be removed, relocated, or modified to be breakaway. Where this is not practical, the obstruction should be shielded to prevent impact of the obstruction by an errant vehicle." Plaintiff contends that the rock wall is a fixed object that is plainly within that zone. As such, Plaintiff argues that it has established that it will face irreparable harm absent injunctive relief.

The Court finds that Plaintiff has not established that it will face immediate and irreparable harm absent preliminary injunctive relief. Plaintiff still has not shown that the changes made to the Property by Defendant are irreparable. Plaintiff's requested relief, that Defendant return the Property to its previously compliant status, indicates that any changes made by Defendant to the

Property are not impossible to remedy. With respect to Plaintiff's alleged safety concerns, Plaintiff has not identified any specific instance or possibility of harm and instead relies on generalized allegations. Defendant claims that the only safety concern on the record with respect to Defendant's permit applications was the former Chief of Police's suggestion that a restriction be placed on the height of the wall, and Defendant's proposed wall complies with that restriction set forth in the Code. Plaintiff has provided additional proof of the former Chief of Police's safety concerns. However, his statement only indicates that "there are potential safety concerns." This statement is very vague and does not definitively state that there are or identify the safety concerns with the stone wall. Plaintiff has not satisfied the first Crowe factor.

b. Well-Settled Legal Right and Likelihood of Success on the Merits

A preliminary injunction should only issue when the movant's underlying legal right is well-settled. Crowe, 90 N.J. at 133. A preliminary injunction should not issue when the material facts are uncontroverted. Crowe, 90 N.J. at 133. Thus, to prevail on an application for a preliminary injunction, a movant must demonstrate a reasonable probability of ultimate success on the merits. Ibid.

Plaintiff contends that it has a reasonable probability of success on the merits. Plaintiff maintains that the Borough has an obligation to enforce the Municipal Land Use Law ("MLUL") and its local zoning ordinances. See N.J.S.A. 40:55D-18 ("[t]he governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder..."). Plaintiff asserts that pursuant to the MLUL, "no permit shall be issued for any building or structure in the bed of any street or public drainage way, flood control basin or public area..." unless upon the grant of variance relief by the appropriate entity. N.J.S.A. 40:55D-34. Moreover, Plaintiff submits that under N.J.A.C. 5:23-2.34(a), "[o]wners who undertake construction, rehabilitation, or

demolition work at their properties shall protect adjoining properties and public rights of way from damage or hazardous conditions caused by the work.” N.J.A.C. 5:23–2.34(a).

Plaintiff offers that caselaw further supports the Borough’s position. Plaintiff provides that “the street and every part of it is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance. The traveling public has a right to assume that there is no dangerous impediment or pitfall in any part of it.” Bechefskey v. City of Newark, 59 N.J. Super. 487, 493 (App. Div. 1960). Following this precedent, Plaintiff argues that Defendant’s actions violate the Borough’s zoning and land use ordinances through his construction of the stone wall within the public ROW without the necessary permits.

In opposition, Defendant argues that Plaintiff has not established a likelihood of success on the merits. Defendant maintains that throughout all of his permit applications, the Borough has failed to cite to one Borough Code provision that would substantiate their consistent denials of his permit applications. Defendant alleges that because Plaintiff did not provide a Borough Code provision to substantiate its denials, Plaintiff’s denial of the permit applications was arbitrary and capricious.

Defendant submits that “the law presumes that . . . municipal governing bodies will act fairly and with proper motives and for valid reasons.” Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 560-61 (App. Div. 2004). However, Defendant offers that where a municipal action is “predicated on unsupported findings,” the action is arbitrary and capricious. In re Certificate of Need of the Visiting Nurse Ass’n of Sussex Cnty., 302 N.J. Super. 85, 95 (App. Div. 1997).

Defendant claims that his proposed stone wall complies with all Borough Code requirements and that it was therefore unreasonable for the Borough to deny the permit applications without citing to any Code provision. Defendant cites to § 215-29(B)(1) of the Borough Code, which states: “A solid, or partially open, fence under 2 ½ feet in height may be erected in any portion of a lot.” Defendant maintains that his fence permit application stated that the proposed wall would be thirty inches high. Defendant provides that the only safety concern in the record was the Police Chief’s suggestion that a restriction be placed on the height of the wall, and Defendant’s proposed wall complies with that restriction set forth in the Code.

Defendant further contends that there is no Borough Code provision that construction shall not be permitted in the ROW. Defendant provides that § 195-27 sets forth the minimum right-of-way width and pavement width of streets with the former minimum being fifty feet for local streets pursuant to § 197-27(C) and the latter minimum being twenty-four feet pursuant to § 197-27(D). Defendant asserts that the paved portion of Cherry Lane is about twenty feet wide, and the proposed wall is four feet outside of the edge of the existing pavement. Thus, Defendant argues that the proposed placement of the wall would not prohibit any extension of the paved portion of the roadway.

Additionally, Defendant takes issue with the meeting held by Plaintiff to discuss Defendant’s first application. Defendant alleges that Plaintiff acted arbitrarily and capriciously in its decision at that meeting because the Borough failed to inform him that the application was on the agenda and made its decision without his presence at the meeting. Defendant claims that Plaintiff then later declined to decide Defendant’s following road open permit application because the Council lacked “jurisdiction” to consider it.

In reply, Plaintiff provides the certification of Borough Engineer Paul Ferriero (“Ferriero”). Ferriero raises concerns regarding vehicular impacts with the stone wall. See Certification of Paul Ferriero (“Ferriero Cert.”), at ¶ 22. Ferriero submits that the replacement of a wooden fence with a stone wall creates an increased safety risk to motorists, not only due to decreased visibility, but also because of the potential for increased injuries resulting from an impact with a solid wall as opposed to a wooden fence. See id. Ferriero alleges that the construction of a stone wall within the Borough’s ROW poses a risk to public safety as such obstructions can impede emergency services, create traffic hazards, and pose increased risk to pedestrians and bicyclists. See id. at ¶ 21.

In further opposition, Defendant maintains that the Plaintiff is not likely to succeed on the merits. Defendant submits that the Borough has failed to cite to one Borough Code provision that would substantiate their consistent denials of Defendant’s permit applications. Defendant continues to allege that the denials of Defendant’s permit applications were arbitrary and capricious. In re Certificate of Need of the Visiting Nurse Ass’n of Sussex Cnty., 302 N.J. Super. 85, 95 (App. Div. 1997). Defendant does not contest that Plaintiff is obligated to enforce its local zoning ordinances. However, Defendant asserts that Plaintiff has pointed to no zoning ordinances that it was enforcing by denying Defendant’s permit applications.

Counsel for Plaintiff suggested at the February 5, 2025 hearing before the Court on temporary restraints for the first time since the Borough initially denied Defendant’s permit applications that § 190-3 of the Borough Code is applicable. That provision states that:

The right-of-way of each street shall be cleared to its full width, and the topsoil shall be removed to a minimum depth of 12 inches from the area to be paved. If the topsoil is less than 12 inches, then only the existing topsoil shall be removed.

Defendant takes issue with this argument as Chapter 190 pertains to “street[], curb and sidewalk[]” construction, see § 190-3, which is all directed by and overseen by the Borough, see § 190-20 (“The construction, repair, maintenance, or replacement of sidewalks and curbs and the material used therein shall be directly under the supervision of the Borough Engineer.”). Accordingly, Defendant contends that § 190-3 is a directive to the Borough, which manages and coordinates such street paving and construction activities described under the Chapter and does not regulate the ROW.

In reply on the return of the order to show cause, Plaintiff asserts that well-settled law established a reasonable probability of its success on the merits. Plaintiff incorporates its arguments made in support of the application for temporary restraints but elaborates on the applicability of § 190-3 of the Borough Code. Plaintiff submits that the plain language of § 190-3 read that “the right-of-way of each street shall be clear to its full width.” Plaintiff provides that § 190-2 requires that right of way width shall not be less than 50 feet for local streets. Additionally, Plaintiff explains that the definition of “street” means any existing municipal or county roadway, or a ROW, as shown upon a plat approved pursuant to law or official municipal action. As municipalities are empowered to regulate streets within their borders and prevent and remove all encroachments, obstructions and encumbrances thereon pursuant to N.J.S.A. 40:67-1, and the definition of street includes the width of the ROW under the Borough Code, Plaintiff alleges that its factual proofs support the likelihood of success on the merits.

The Court finds that while Plaintiff’s underlying legal right is well-settled, Plaintiff has not established a reasonable likelihood of success on the merits by clear and convincing evidence. The Court recognizes that “no permit shall be issued for any building or structure in the bed of any street or public drainage way, flood control basin or public area...,” unless upon the grant of

variance relief by the appropriate entity. N.J.S.A. 40:55D-34. As such, Defendant's construction of the trench and stone wall without the requisite permit appears improper. However, Defendant alleges that Plaintiff's denial of his variance applications was arbitrary and capricious. A wooden fence existed in the same location as the stone wall on the Property, yet Plaintiff never took issue with the fence. Defendant also claims that neighboring properties have similar stone walls in Plaintiff's ROW. Moreover, Plaintiff has not explained or addressed Defendant's claim that his application was denied due to jurisdictional issues.

Previously, this Court noted its concern that Plaintiff had not cited to a provision of the Borough Code which the stone wall violated. On the return of the order to show cause, Plaintiff cites to § 190-3 of the Borough Code. While this code section appears to be applicable to instant action, Defendant argues that Chapter 190 pertains to street, curb, and sidewalk construction, which pursuant to § 190-20 is overseen by the Borough Engineer and is a directive to the Borough in its own construction activities. Thus, discovery is required to understand the legislative intent of Chapter 190 and to determine whether the provisions therein were directives to the Borough in the construction of its streets or meant as a zoning ordinance to be enforced against residents of the Borough. As such, Plaintiff has not established by clear and convincing evidence that it has a reasonable likelihood of success on the merits.

c. Relative Hardship

Finally, in considering an application for preliminary injunctive relief, courts must balance the relative hardship to the parties in granting or denying the relief. Crowe, 90 N.J. at 134. Put differently, the moving party must show that the hardship it stands to suffer if a preliminary injunction does not issue outweighs any hardship the non-moving party will suffer if a preliminary injunction does not issue. Plaintiff further submits that "[a] case that 'presents an issue of

significant public importance’ requires the court to ‘consider the public interest in addition to the traditional Crowe factors.” NJ Election Law Enft Comm’n v. DiVincenzo, 445 N.J. Super. 187, 195 (App. Div. 2016). Plaintiff provides that when the public interest is greatly affected, “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 Mgmt. v. Union Cnty. Utils., 399 N.J. Super. 508, 520–21 (App. Div. 2008).

Plaintiff alleges that instantly, the Borough seeks to stop Defendant from continuing a public nuisance, and to abate the violations of the Borough Code and its land use ordinances, occurring at the subject property. Plaintiff maintains that Defendant has been on notice of the violations of the Borough Code since the October 2023 stop work order issued by the Borough Engineer. Plaintiff argues that because Defendant has failed to cure the violations despite notice, the public interest favors granting temporary restraints as the Property poses a risk to the health, safety, and welfare of the residents of the Borough and the public. Plaintiff asserts that “[e]very potential hazard abutting our roads and highways cannot be eliminated; our roadways cannot be made perfectly safe. But that does not mean that certain known and unacceptable risks that pose great danger should not be minimized.” Seals v. Cnty. of Morris, 210 N.J. 157, 175 (2012).

In opposition, Defendant asserts that the balancing of the parties’ hardships weighs in favor of Defendant. Defendant does not dispute that this case “presents an issue of significant public importance.” See Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). However, Defendant alleges that the interest to the public here lies in the significance of the Borough’s repeated denials and dismissals of Defendant’s purported Code-compliant permit applications.

Additionally, Defendant takes issue with Plaintiff's failure to specify any particular danger to the public presented by Defendant's stone wall. Defendant argues that the stone wall is no more dangerous to the public than any of the other stone walls presently constructed within the Borough ROW without a permit. Therefore, Defendant contends that there is no hardship to Plaintiff caused by the stone wall as it currently stands.

In further opposition on the return of the order to show cause, Defendant maintains and incorporates its arguments as set forth in its opposition to the imposition of temporary restraints.

In reply, Plaintiff asserts that Defendant violated the Borough's ordinances when he began unapproved construction of the rock wall in the Borough's ROW; and neither monetary penalties nor the threat of legal action has persuaded Defendant to abate the violations. Plaintiff contends that the unauthorized construction poses a risk to the community, and the Plaintiff's efforts to enforce compliance with the law are justified. As such, Plaintiff alleges that the hardship to Defendant is self-imposed, as he chose to proceed with construction without the necessary permits and approvals.

The Court finds that the balancing of the equities favors neither party. Neither party has alleged a particularized harm. Plaintiff argues a general safety concern about hazards impeding roadways but fails to provide any particularized evidence that the stone wall at issue is unsafe for the public. On the other hand, Defendant claims that the denials of his permit applications go against the public interest but does not claim any other burden or harm. The fourth Crowe factor is not satisfied.

IV. CONCLUSION

While Plaintiff has not demonstrated the four Crowe factors by clear and convincing evidence, a court may place less emphasis on a particular Crowe factor if another requires the issuance of the remedy to maintain the status quo. Waste Management of New Jersey, Inc., 399 N.J. Super. at 520. Previously, the Court granted Plaintiff temporary restraints to maintain the status quo. Those restraints are to remain in place and Defendant remains enjoined from performing further construction pending the resolution of the matter.