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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

**~~PROPOSED~~ 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 5th day of February, 2025 **ORDERED** that defendants shall
 appear and show cause at the Morris County Superior Court in Morristown, N.J., at 11:00 clock am
 or as soon as thereafter counsel can be heard, on the 6th day of March, 2025 as to why

an Order should not be issued preliminarily enjoining and restraining Defendants, BRIAN CAVANAUGH and JANE DOES and/or JOHN DOES 1 through 10; ABC CORPS., 1 through 10, 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, the Borough's Land Use Ordinances, and

IT IS FURTHER ORDERED that Defendants:

- A. Restore the subject property 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.

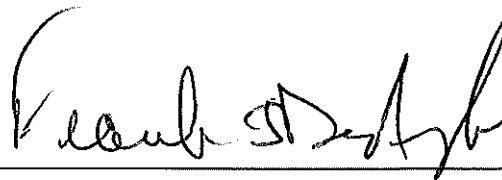
AND IT IS FURTHER ORDERED that:

- 1. Defendants may move to dissolve or modify the temporary restraints herein contained on two (2) days' notice to Dorsey & Semrau, LLC, attorneys for Plaintiff.
- 2. A copy of this order to show cause, verified complaint, brief and any supporting affidavits or certifications submitted in support of this application be served upon the defendant(s) personally within 3 days of the date hereof, in accordance with R. 4.4-3 and R. 4.4-4, this being original process.
- 3. The plaintiff must file with the court its proof of service of the pleadings on the defendant(s) no later than 10 ~~three (3)~~ days before the return date.
- 4. Defendant(s) shall file and serve a written answer to this order to show cause and the relief requested in the verified complaint and proof of service of the same by Feb. 20, 2025. The documents must be filed with the Clerk of the Superior Court in the county listed above and a copy of the papers must be filed with the Clerk of the

Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawf.pdf. You must send a copy of your opposition papers to Hon. Frank DeAngelis, ^{P.J. Ch.} whose address is Morris County Vicinage, Chancery Division, Washington and Court Streets, P.O. Box 910, Morristown, New Jersey 07963. You must also send a copy of your opposition papers to the plaintiff's attorney whose name and address appears above. A telephone call will not protect your rights; you must file your opposition and pay the required fee and serve your opposition on your adversary, if you want the Court to hear your opposition to the relief the plaintiff is seeking.

5. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by Feb. 27, 2025. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge Frank DeAngelis, P. J. Ch.
6. If the defendants do not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least ¹⁰~~three~~ days prior to the return date.
7. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than ¹⁰~~three (3)~~ days before the return date.

8. Defendants take notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer and proof of service before the return date of the order to show cause.
9. These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf. Include a \$ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer with the fee or judgment may be entered against you by default.
10. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at njcourts.gov/forms/10153_deptyclerklawref.pdf.
11. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than 3 days before the return date.



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 an order to show cause seeking temporary 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.

In the instant application, Plaintiff seeks temporary 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.

The Court finds that Plaintiff has not established that it will face immediate and irreparable harm absent temporary restraints. Plaintiff has not shown that the changes made to the Property by Defendant are irreparable. Plaintiff's temporary restraints request that Defendant return the Property to its previously compliant status, which 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. Further, Defendant claims that the only safety concern on the record with respect to Defendant's permit applications 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. 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.

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 cited to a Borough Code provision that the stone wall violates, but instead denies Defendant's renewed due to alleged jurisdictional issues.

With respect to Ferriero's certification, the Court has concerns with Plaintiff's new allegation of the stone wall serving as an impact hazard. Plaintiff did not rely on this position previously when denying Defendant's permit applications, and as such, the facts are controverted. To be clear, this Court is not saying that Plaintiff's decision was arbitrary and capricious. However, 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 Enf't 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.

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 evidence that the stone wall at issue is unsafe for the general 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. Here, the Court finds it necessary to maintain the status quo. Accordingly, Defendant is not required to remove the stone wall or return the Property to its pre-disturbed condition. However, Defendant is not to conduct any further construction pending the resolution of this matter.