

June 21, 2016

Michael S. Barth
P.O. Box 832
Far Hills, New Jersey 07931
(917) 628-6145

The Honorable Lois H. Goodman
United States Magistrate Judge
District of New Jersey
402 East State Street
Trenton, New Jersey 07625 08608

R E C E I V E D

JUN 22 2016

Re: I.S.B.R. et al v. Bernards et al (3:16-CV-01369)

AT 8:30 _____ M
WILLIAM T. WALSH
CLERK

Dear Judge Goodman,

Please accept this letter memorandum in support of the undersigned Federal Civil Procedure Rule 24 Motion for Leave to Intervene for the limited purpose to file a Motion to Dismiss Plaintiffs' Complaint as lacking statutory standing under RLUIPA. A motion to dismiss Plaintiffs' Complaint for lack of statutory standing is consistent with the purpose of Rule 24 that is designed to protect certain interests in a judicial efficient manner. (Citation omitted.) Mr. Howard Mankoff, Counsel for Bernards Defendants did not object over the phone to the filing of this Motion to Intervene. Counsel for ISBR stated opposition to any Public non-party attendance at the Rule 16 Conference in this matter.

Defendants' Answer (Paragraph 17 at Document #15) to Plaintiffs' Complaint (Paragraph 17 at Document #1) incorrectly admits Plaintiffs' standing under RLUIPA to the detriment of the public non-parties. While Defendants at a future point in time may consider moving to dismiss plaintiffs' complaint for a lack of statutory standing, such a delay in so moving prejudices the Public Non-Parties Constitutional Rights in this matter currently protected by your Honor's Letter Order staying discovery (Document #42). The public should have never received a subpoena in this matter if defendants would have moved to dismiss Plaintiffs' complaint, making moot Plaintiffs' other claims and the need for discovery.

Moreover, since your Honor's Letter Order staying discovery, the United States Department of Justice (DOJ) has contacted a number of non-parties to voluntarily meet with the DOJ regarding their targeted investigation of Bernards Township Officials. It would appear logical that if Plaintiffs' Private RLUIPA Cause of Action is dismissed for lack of statutory standing; that presumably Plaintiffs lack statutory standing to file a RLUIPA complaint with the Department of Justice. Although the DOJ stated the Bernards Officials are the target of their investigation; it seems logical to presume that if Plaintiffs have no standing under RLUIPA for either a Private or DOJ cause of action, there would be no need for the Public non-parties to voluntarily meet with Attorneys from the DOJ's Washington DC Office as the DOJ requested as part of their targeted investigation of Bernards Township Officials. (DOJ email omitted.)

Plaintiffs' lack of Federal statutory standing is based on the Courts application of the definition of a Land Use Regulation in RLUIPA at 42 U.S.C. 2000cc-5(5). There it states that a "land use regulation" is statutorily defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land ... if the claimant has an ownership, leasehold, **easement**, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. 2000cc-5(5). [emphasis added].

The Courts have held that clause to mean that where an aspect of a land use application lacks a legally cognizable interest, a complaint arising under RLUIPA must be dismissed for a lack of statutory standing until that interest is perfected. *See among others Muslim Communication Association of Ann Arbor v. Pittsfield Charter* (12-CV-10803) [originally attached to the Letter Memorandum in support of a Temporary Restraining Order]. As noted in that case, a very small defect required a Summary Judgment dismissal for lack of statutory standing.

There were a number easement issues presented by the Plaintiffs in the land use application before the Bernards Township Planning Board. For example, there were two interstate natural gas transmission pipelines across Plaintiffs property that were legally recognizable by deed. The pipeline owner's legally recognizable interest was relevant to the planning board proceeding as to a wide area covered by that legally recognizable easement was an "unbuildable".

However, Plaintiffs also submitted as part of their application before the Bernards Township Planning Board, a utility drawing that reflected a sewer line across adjoining private property. (NP 1-2.) As Mr. Drill, Counsel for the Bernards Planning Board, stated on October 8, 2013; the applicant (Plaintiffs) "never said they have a recorded easement or right of way" for a sewer line required to connect to Plaintiffs' proposed structure at 124 Church Street. [Planning Board Audio at approximately 3:14:58.] Plaintiffs' expert testified that ISBR would need additional permission they did not have from that adjoining landowner to maintain a sewer line (reference omitted). As the transcripts should reflect: Mr. Robert Raymar stated he did not know what legal interest plaintiffs' had in that sewer line. (Reference omitted.) In fact, the adjoining property owner stated that a formal, legally recognizable easement was never recorded and the Plaintiffs did not have permission to use the landowner's property for a sewer easement. (NP 3 showing applicable portion of planning Board minutes.)

Accordingly, plaintiffs' admission below that it lacked a legally cognizable interest in a sewer easement across an adjoining property means that Plaintiffs lack statutory standing under RLUIPA and that Plaintiffs' Complaint of RLUIPA claims must be dismissed until Plaintiffs' interest is perfected.

It is logical to conclude why an interest must be legally cognizable to prevail under RLUIPA as a general principle in order to succeed in a legal challenge as Plaintiffs, that the alleged harm suffered they seek relief for has to be "redressible". (Citation omitted.) However, based on plaintiffs' testimony, statements and exhibits, clearly the harm alleged is not currently redressible as plaintiffs don't currently have a legally cognizable way of connecting a sewer line to their property. Based on the presentation before the Bernards Board, Plaintiffs would first

need to go to a New Jersey Superior Court to obtain a legally cognizable interest in a sewer easement they currently do not enjoy. Also, it is unlikely that due to extensive wetlands on the property and other limitations that an alternative septic system could be built. (Reference omitted.) Furthermore, the property is also outside of the Township's sewer service area. (Reference omitted.)

It is clear in the instant litigation that Plaintiffs' lack Federal statutory standing under RLUIPA because of their admitted lack of a sufficient cognizable legal interest in an easement that is necessary for a sewer line included as a critical basis for their land use application before Bernards Township Planning Board. Accordingly, plaintiffs' Complaint should be dismissed at a minimum until that interest is perfected and legally cognizable.

The Bernards Planning Board stated they lacked jurisdiction to resolve a private property easement dispute. (NP4 showing applicable portion of Planning Board Minutes of 7/21/15.) However, once the Court dismisses Plaintiffs' complaint for lacking statutory standing under RLUIPA, it is not certain this court needs to resolve the question as to whether an applicant can have statutory standing to file a land use application before a Municipal Planning Board and not have standing to file a RLUIPA claim in Federal District Court. Plaintiffs' do not appear to have raised such concern in their complaint.

While it may seem academic at first, Pittsfield Charter noted above also elaborated why a Plaintiff's may have United State Constitution Article III standing that would otherwise be dismissed by a Rule 12(b) Motion; but why the same Plaintiff does not have "statutory standing" under RLUIPA that would support the dismissal of a complaint by a Rule 56 Motion. While Defendants counsel may not have to make a Rule 56 motion to Dismiss for lack of standing before filing an Answer as perhaps Rule 12(b) would require; Defendants' delay to so move for Dismissal of Plaintiffs' Complaint unnecessarily drags out the litigation and the Public much further along in this proceeding than should be required.

The likelihood of the need for this Summary Judgment Motion appears necessary based not only on the narrowness of the briefings on Plaintiffs' two pending motions for Judgment on the Pleadings but also the defiant tone of Plaintiffs' counsel letter response to your Honor's letter Order. (NP5.) Counsel's threat they will be in contact with the Public once the Stay is lifted is rather offensive considering at a minimum that your Honor stated the matter would have to be briefed if even that point was reached.

However, Defendants should not be allowed to delay perhaps an obvious defense to dismiss Plaintiffs' complaint due to lack of standing under RLUIPA to the detriment of the public non-parties Constitutional interests without allowing those Public non-parties to move to dismiss Plaintiffs' Complaint under a Rule 24 Motion to Intervene.

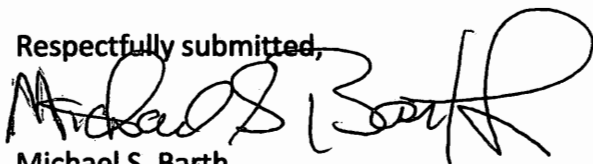
The Honorable Magistrate Judge Bongiovanni of the Trenton Division recently addressed the standard for Motions to Intervene under both Rule 24 a. Intervention of Right, and Rule 24 b. Permissive Intervention. (See Cole v. Nibco, April 4, 2016 WL 1313106, 3:13-CV-07871-FLW-

TJB.) Applying the instant request in summary to the standard in Cole; whether under Section 24a. or 24b. this Motion for Leave to Intervene is:

1. Timely (Very close to issuance of the Restraining Order and before the Rule 16 Conference.),
2. The intervention will not cause undue delay or prejudice to the original parties' rights (Conversely this motion will actually speed up the process through the related motion to dismiss Plaintiffs' Complaint for lack of statutory standing.),
3. Existing parties do not adequately represent [publics non parties'] interest (Defendants' later consideration to file a Rule 56 motion to move to dismiss the complaint for lack of standing does not adequately protect the public non-parties' Constitutional rights currently protected by Your Honor's Letter Order.),
4. Applicant has a sufficient interest in the litigation (Non-parties Constitutional rights are currently protected by the Letter Order whereas Plaintiffs' counsel follow up letter to that seems to be in defiance of the Letter Order. Plaintiffs provided the non-parties with Article III standing to file a Rule 24 motion to intervene upon its abusive attempt to serve a subpoena that attempts to infringe on Constitutional rights.)
5. Interests will be affected or impaired as a practical matter by the disposition of the matter (As a practical matter, the need to further adjudicate Plaintiffs' Complaint becomes moot if the Complaint is dismissed for lack of statutory standing under RLUIPA. Conversely, the Publics Constitutional Rights becomes subject to further abuse of process as suggested in the defiant tone of Plaintiffs counsel letter.)

There appears to be broad discretion as to what interests Rule 24 is designed to protect. (Citation omitted.) While the Courts have stated there is no complete list of what interests the Rule is designed to protect, and the Courts have ruled the list specifically excludes certain items, for the purpose of judicial efficiency and the protection of the public non-parties Constitutional Rights, it appears appropriate to grant a Rule 24 Motion to intervene for the limited purpose to make a motion to dismiss Plaintiffs RLUIPA complaint alleging religious discrimination where applying the facts of this case to other case law, Plaintiffs lack a legally cognizable interest in an easement as defined in the RLUIPA statute. For those reasons, the undersigned respectfully request Leave to Intervene for the limited purpose of moving this Honorable court for summary judgment to dismiss plaintiffs' RLUIPA claims for lacking statutory standing.

Respectfully submitted,



Michael S. Barth

C: Michael F. Buchanan, Esq., Counsel for ISBR et al.
Howard Mankoff Esq., Counsel for Bernards et al.
Christopher J. Paoella, Esq., Counsel for Amicus
Ravinder S. Bhalla Esq., Counsel for Amicus

easement; Mr. Raymar said this issue was before the Township Sewerage Authority. Mr. Barth asked about the size of the current and proposed system. The Board discussed if they needed to take a straw poll re Mr. Barth asking further questions on this topic. The Board discussed and noted, as per Mr. Drill's recommendation, that they may condition any approval upon the applicant meeting Sewerage Authority requirements.

- Mr. Barth allowed Christopher Quick, 15 Church Street, to interrupt his questions to present testimony. Mr. Quick was sworn in. He said the applicant does not have a filed sewer easement or right-of-way. Mr. Drill said this was a private property dispute. Mr. Quick confirmed that there was no pending litigation.
- Michael Barth, ~~REDACTED~~ finished his questions on the design of the detention basins.

Frances Florio
Secretary to the Board

- Mike Barth, ~~REDACTED~~, was sworn in.
 - o Mr. Barth made a motion to dismiss this application for lack of standing because the applicant does not have a sewer easement on the adjoining Quick property. Mr. Raymar objected; Mr. Plaza overruled on behalf of the Board. Mr. Drill asked Mr. Barth why the lack of a sewer easement on property the applicant does not own impacts their ability to apply for site plan approval, Mr. Barth said there is no recorded sewer easement and that if that easement is granted, the adjacent property owner must agree to it. Mr. Raymar objected on the grounds that the Planning Board does not have jurisdiction. Mr. Plaza agreed with Mr. Raymar and denied the motion.

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

Diana M. Conner
Associate
(212) 336-2789
Fax: (212) 336-2222
dconner@pbwt.com

May 26, 2016

By FedEx

~~REDACTED~~
Michael S. Barth

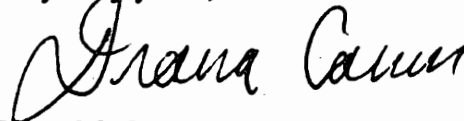
Far Hills, New Jersey 07931-2501

Re: Subpoena Duces Tecum to Michael Barth in Islamic Society of Basking Ridge, et al. v. Township of Bernards, et al., No. 16 Civ. 1369 (D.N.J.)

Dear Mr. Barth:

We represent Plaintiffs in the above-entitled action. Earlier today, we sent to you a corrected subpoena by FedEx and certified mail. Subsequently, the court issued an order staying all discovery in this case until further order of the court in view of two pending motions filed by Plaintiffs. In light of the court's order, we will be in contact with you regarding the subpoena issued to you and your motion to quash after the stay has been lifted.

Very truly yours,



Diana M. Conner

cc: Michael S. Barth
P.O. Box 832
Far Hills, New Jersey 07931

NPS