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Gaziano, Thomas S. Russo, Jr. and John Carpenter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON

**** ELECTRONICALLY FILED ****

THE ISLAMIC SOCIETY OF
BASKING RIDGE and MOHAMMAD
ALI CHAUDRY,

Plaintiffs

v.

TOWNSHIP OF BERNARDS,
BERNARDS TOWNSHIP PLANNING
BOARD, BERNARDS TOWNSHIP
COMMITTEE, BARBARA KLEINERT,
in her official capacity,
JEFFREY PAZA, in his official
capacity, JIM BALDASSARE, in
his official capacity, JODI
ALPER, in her official
capacity, JOHN MALAY, in his
official capacity, KATHLEEN
"KIPPY" PIEDICI, in her
official capacity, LEON
HARRIS, in his official
capacity, PAULA AXT, in her
official capacity, RANDY
SANTORO, in his official
capacity, RICH MOSCHELLO, in
his official capacity, SCOTT

CASE NO.: 3:16-CV-01369-MAS-LHG

Civil Action

ROSS, in his official
capacity, CAROL BIANCHI, in
her official capacity,
CAROLYN GAZIANO, in her
official capacity, THOMAS S.
RUSSO, JR., in his official
capacity, and JOHN CARPENTER,
in his official capacity ,

Defendants

BRIEF IN OPPOSITION TO MOTION TO QUASH THE PLANNING BOARD'S
APRIL 19, 2016 RESOLUTION AND TO ENJOIN THE PLANNING BOARD FROM
TAKING FURTHER ACTION ON ISBR'S SITE PLAN APPLICATION

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LEGAL/105311194.v1
FOLDER 4 - PLEADINGS

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N.J.S.A. 40:55D-10.5, "Time of Application Law" 6, 14

Defendants, Township Of Bernards, Bernards Township Planning Board ("Planning Board"), Bernards Township Committee, Barbara Kleinert, Jeffrey Plaza, Jim Baldassare, Jodi Alper, John Malay, Kathleen "Kippy" Piedici, Leon Harris, Paula Axt, Randy Santoro, Rich Moschello, Scott Ross, Carol Bianchi, Carolyn Gaziano, Thomas S. Russo, Jr. and John Carpenter respectfully submit this memorandum in opposition to the motion filed by the Plaintiffs seeking to quash the Planning Board's "Resolution Regarding Board's Willingness to Relax the 20-Day Time Period to Allow the Applicant to Move for a Rehearing" dated April 19, 2016 (the "April Resolution") and to enjoin further action. For the reasons that follow, the Plaintiffs' motion should be denied.

PRELIMINARY STATEMENT

The current lawsuit stems from the Plaintiff's failure to obtain site-plan approval for a proposed mosque, as a consequence of its serially deficient site plans, which failed to comply with required site plan standards. In a good-faith effort to amicably resolve the dispute, the Planning Board passed a resolution permitting the Plaintiffs to obtain the approvals they claim they seek, simply by correcting the deficiencies in their site plan and seeking a rehearing.

Rather than doing so, the Plaintiffs filed the present motion, which seeks this Court to quash the April Resolution and

to enjoin future action by the Board. The Plaintiffs' motion is long on rhetoric and short on facts.¹ It repeats the baseless accusations of discriminatory animus, but fails to even mention that of the six Board members who voted to deny the application, four of the six expressed, both on the record at the time of the denial and recently in the April Resolution, their willingness to approve the application if the site plan deficiencies clearly expressed and articulated by the Board were addressed. The notion that the Board adopted the religious animus of the objectors is simply unsupportable.

Moreover, the motion seems designed not to resolve the legal questions before this Court but to create a media firestorm and generate exorbitant legal fees, presumably in the hopes of obtaining notoriety in the court of public opinion by making false and reckless allegations of prejudice and bigotry. That the Plaintiffs filed this motion rather than seek rehearing and approval of a revised site plan suggests that the Plaintiffs' real goals lie not in building a house of worship.

As this brief will demonstrate, the plaintiff's motion is fatally flawed, as grounds for properly invoking the All Writs

¹ Indeed, given the reliance the Plaintiffs placed on media reports and the impressions of news reporters in its motion, it is interesting to note that the Plaintiffs have yet to order and produce the transcripts of the lengthy hearings and, as such, cannot cite to a single statement by any Board member which would suggest the existence of the supposed religious animus.

Act are simply not present. The April Resolution was nothing other than an invitation to the Plaintiffs to settle the present dispute by correcting the noted deficiencies, which were the sole cause of the application's denial, and resubmitting the matter for approval. Even the Plaintiffs concede that acts taken to effectuate a settlement are an exception to the jurisdiction argument they rely upon. (See, plaintiff's brief at 7.) The April Resolution is simply one such act.

Since that is the case, the All Writs Act has no bearing here and consequently, the plaintiff's motion should be denied.

STATEMENT OF FACTS

1. This case stems from an application for preliminary and final site plan approval, made to the Planning Board for the construction of a mosque and associated site improvements. (See, ECF No. 1 ("Compl."), generally.)

2. At the time of the initial application, houses of worship were considered a permitted use under the Bernards Township zoning ordinance in the R-2 zone, which is the zone in which the subject property is situated. (Resolution Regarding Board's Willingness To Relax The 20-Day Time Period To Allow The Applicant To Move For A Rehearing, Plaintiffs' Exhibit 1, at P.2)

3. During the subsequent and extended hearings, the Plaintiffs never satisfied the required site plan standards,

stemming from the failure of the Plaintiff's professionals to adequately address the issues raised by the Board. (Id., at pp. 1-2.)

4. The Application was denied and the reasons for that denial were made a part of the record. (Id.)

5. Contrary to the Plaintiffs' false allegations of discriminatory animus, the rationale for the denial of the application was solely based on the merits of the application. (Id.)

6. Specifically, as summarized in the April Resolution (but spelled out in detail in a 40-page single spaced resolution that was adopted on January 19, 2016), the reasons for the application's denial were that:

- (1) the Board could not "specifically approve" as required by the site plan ordinance the proposed 7,500 square foot detention basin wholly within the 50-foot wide buffer because allowing such a large drainage improvement wholly within the buffer represents the exception swallowing the rule and defeats the very purpose of the buffer;
- (2) the applicant failed to prove compliance with all of the landscaping requirements and fencing regulations established in the ordinance;
- (3) contrary to ordinance requirements, the applicant failed to design internal traffic circulation to minimize the use of aisles serving parking area and the internal circulation system will not be able to handle access and circulation

of fire trucks due to the parking lot aisle widths adjacent to the 90 degree parking stalls on the easterly side and westerly side of the site as well as to the rear of the building being 24 feet wide, where the ordinance required them to be 26 feet wide, and the parking lot aisle adjacent to the westerly side of the building leading to the parking lot to the rear of the building being as narrow as 20 feet, where the ordinance requires parking lot aisles adjacent to any building to provide a travel lane with a minimum 24 feet clear width; and,

- (4) ordinance compliant Stormwater drainage plans were not submitted to the Board for approval.

(Id., at p. 2)

7. The Planning Board recognized that while the Plaintiffs had failed to put forth a viable site plan which would comply with the Township site plan ordinance standards, there was nothing about the property which would make it impossible for the Plaintiffs to do so; the Plaintiffs, to date, simply had not. (Id., at pp. 1-2)

8. In a good-faith effort to give the Plaintiff every opportunity to resolve the dispute by way of settlement and in light of procedural impediments which existed to the Plaintiff re-filing an application, the Board passed the April Resolution to extend the time within which to seek a "rehearing." (Id.)

9. At the time of the Plaintiffs' initial application, houses of worship were a permitted use in the R-2 zone but

during the pendency of the application, the Bernards Township Committee, consistent with modern zoning norms, amended the zoning ordinances to make houses of worship a conditionally permitted use, knowing fully that the amended ordinance would not apply to the application at issue. Absent the April Resolution, the Time of Application Law, N.J.S.A. 40:55D-10.5, would have worked to make the change in the zoning law applicable to any further site plan application. (Id., at pp. 2-3)

10. Further, the April Resolution detailed the history of the application and its denial, set out the reason for the denial and noted that a majority of the Board members who voted on the application were on record as either (1) favoring the application subject to the imposition of conditions which would address the reasons for the denial or (2) against the application but willing to vote for site plan approval if changes addressing the reasons for denial were implemented and a resubmission of site plans were made. (Id., at p. 2)

11. The April Resolution also recognized that rehearing was permitted, and invoked the Rule's permission to relax the rules where justice demands in order to expand the time to apply for rehearing to 90 days from the date of the resolution, and to treat any rehearing application under the April Resolution as a principally permitted use, as that was the existing zoning at

the time of the Plaintiffs' original application. (Id., at p. 3)

12. At the time of this writing, the Plaintiffs have chosen not to seek to resolve the dispute and to obtain the approval they allegedly desire by way of settlement, as the April Resolution makes available.

LEGAL ARGUMENT

The Plaintiffs' motion seeking to quash the April 19, 2016 resolution and to enjoin the Planning Board from taking further action on the site plan application improperly invokes the All Writs, on the pretext that the April Resolution passed by the Planning Board somehow affects this Court's jurisdiction and that there is no jurisdiction for the Planning Board to have entertained the April Resolution in light of the Plaintiffs' lawsuit.

As the following will demonstrate, the Plaintiffs are incorrect about whether the application of the All Writs Act in this case is warranted and about whether the Planning Board's action in passing the April Resolution was proper. Respectfully, this Court is requested to deny the motion.

A) The All Writs Act.

The All Writs Act is "a residual source of authority to issue writs that are not otherwise covered by statute." Massey v. United States, 581 F.3d 172, 174 (3d Cir. 2009), (quoting

Pennsylvania Bureau of Correction v. U.S. Marshals Serv., 474 U.S. 34, 43, 106 S. Ct. 355, 88 L. Ed. 2d 189 (1985).

Found at 28 U.S.C. § 1651(a), it provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act confers on courts "'extraordinary powers' that are 'firmly circumscribed.'" Grider v. Keystone Health Plan Cent., Inc., 500 F.3d 322, 328 (3d Cir. 2007), (quoting Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1132 (11th Cir. 2005)).

Further, the Third Circuit Court of Appeals in Grider explained the "narrow circumstances under which [an All Writs injunction] would be appropriate," explaining that:

...an injunction under the All Writs Act is appropriate only when the state court action threatens to frustrate proceedings and **disrupt the orderly resolution of the federal litigation**. That is, the state action must not simply threaten to reach judgment first, it **must interfere with the federal court's own path to judgment**.

Grider, at 328-330, (internal citation omitted, emphasis added.) As the Grider Court also noted, an injunction under the All Writs Act "invokes the equitable power of the court." Id., at 332.

B) Whispering Woods Permits Acts In
Furtherance Of Settlement.

The Plaintiffs' motion posits that the injunction under the All Writs Act is appropriate, on the strength of three New Jersey Law Division cases: Cicchine v. Tp. of Woodbridge, 413 N.J. Super. 393 (N.J. Law Div., 2010), Orloski v. Planning Bd. of Borough of Ship Bottom, 226 N.J. Super. 666 (N.J. Law Div. 1989), and Kramer v. Bd. of Adjustment, Sea Girt, 80 N.J. Super. 454 (Law Div. 1963). The cases, the Plaintiffs suggest, stand for the proposition that a planning board is divested of jurisdiction concerning a land use application upon the appeal of that decision in court.

However, as even the Plaintiffs are forced to concede, this does not make every action taken by a board after the filing of a complaint improper. The Plaintiffs recognize that the decision in Whispering Woods v. Middletown Planning Bd., 220 N.J. Super. 161 (N.J. Law Div. 1987) represents an exception to the rule on jurisdiction when the acts are in furtherance of a settlement of the dispute. (Plaintiff's brief at 7.)

In fact, as the Whispering Woods Court made plain, when the issue concerns acts in pursuit of settlement, the issue is not actually about jurisdiction, but whether the Board has the power to legitimately act to facilitate a settlement. It found the Board has that power, even absent a remand.

In reaching that conclusion, the Court distinguished Kramer, supra. and Morton v. Mayor & Council of Twp. of Clark, 102 N.J. Super. 84 (N.J. Law Div. 1968), aff'd, 108 N.J. Super. 74 (App. Div. 1969), two cases which had been asserted as establishing the jurisdiction principle which the Plaintiffs here relied upon.

In Kramer, a prerogative writ complaint was filed challenging the validity of the approval of a variance. The variance was recommended by the Zoning Board of Adjustment by a vote in executive session and challenged as a violation of the Right to Know Law. N.J.S.A. 10:4-1, et seq. During the pendency of the suit, the board met in public, after publishing notice of the meeting, and attempted to correct its mistake by re-voting on the application.

The Whispering Woods Court found simply that the issue in Kramer was not one of jurisdiction, but simply that the Board had initially failed to follow the Right To Know Law and had no power to act to revisit its determination so the subsequent vote was a legal nullity. Whispering Woods, 220 N.J. Super. at 170.

The Whispering Woods court addressed Morton. In Morton, after a governing body adopted the recommendation of the Board of Adjustment and approved a use variance, citizens of the municipality filed an action in prerogative writ. While the

action was pending, the body simply voted again to rescind the prior approval, which it had no authority to do.

The Whispering Woods Court held that the governing body "had exhausted its power to act" under the applicable law and that its vote to reverse its initial determination after the matter proceeded to suit "was void. [The governing body] simply chose to arrogate a non-existent power." Id., 220 N.J. Super. at 171.

The Whispering Woods Court then reasoned that the matter before it was *not* a case akin to Morton, because the power exercised by the Board was in pursuit of settling the dispute, which the Board unquestionably had the power to do. The Court recognized that the question was whether "the parties to an action in lieu of prerogative writs [can] ever settle their litigation or must the case continue to a final determination?" It determined that the Board retained the power to act in pursuit of such settlements and that remands over jurisdictional concerns were wholly unnecessary:

The analysis from the standpoint of jurisdiction was unnecessary and misleading. Here in the context of the litigation the Board and applicant settled the litigation on a conditional basis; subject to public scrutiny. To argue that a remand order was necessary before the parties could discuss settlement is without merit. The intervenors cannot cite any authority for the proposition that a public body involved in litigation over one of its official acts

cannot, through counsel, discuss and arrive at a conditional settlement of the litigated issues -- absent a "remand" by the court. The lack of such authority is persuasive that such a requirement does not accord with common sense.

* * *

Courts do, of course, favor settlements. They conserve judicial time but, more importantly, represent a rational resolution of a problem by the parties most closely involved and affected. That principle applies with equal force in prerogative writ litigation -- so long as the public interest is not disserved thereby. If the settlement must be made known to the public; subject to the public voice and voted upon in legal fashion, the public interest has been served....

In that light the "jurisdictional" issue raised by the intervenors is exposed as without merit. The Board did have the power to settle the pending litigation by tentatively agreeing to an amended plan subject to public presentation, a public hearing thereon and a public vote. There is no need for a "remand".

Whispering Woods, 220 N.J. Super. at 171-173. See, also, Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd., 407 N.J. Super. 404, 422 (App. Div. 2009), (recognizing that acts in pursuit of settlement are not an issue of jurisdiction and that "there was no need for a formal remand for the board to pursue these settlement endeavors.") Since the

acts by the Board were in pursuit of settlement, the acts were proper.²

Thus, Whispering Woods did nothing more than confirm that the Board had the authority to take action necessary to resolve a land-use dispute, by way of settlement without remand, even when the matter is subject to a prerogative writ action.

In that light, the question presented in this motion thus becomes one asking whether the act of the Planning Board, in passing the April Resolution, was within the Board's power to settle the pending litigation or whether the resolution somehow "disrupt[ed] the orderly resolution" of the federal litigation or "interfered" with this court's "path to judgment." Grider, at 328-330.

C) The Resolution Is Nothing More Than An Invitation To Settle The Litigation.

The text of the April Resolution demonstrates that there was no improper disruption of or interference with this Court's resolution of the matter. Rather, it was an act in good faith

² Moreover, in each of the cases where jurisdiction was claimed as a basis to reject the acts of the respective Boards, the actions complained of sought to undo previous actions; to establish a change in the legal status of the matter by the operation of the resolution; or to simply side-step the ongoing process. See, e.g., Kramer, Morton, Cicchine, supra.

The April Resolution, by contrast, does none of these, but was forward looking and attempted to facilitate the terms of the settlement of this dispute.

seeking to settle the dispute by detailing the reasons why the plaintiff's application was denied, specifying the changes that, had they been made, would have led to the application being approved and taking the action necessary to remove an impediment in the Plaintiff seeking reconsideration.

The last was necessary as a consequence of the change in the zoning law in Bernards Township which made religious houses of worship a conditionally permitted use and not a principally permitted use in the R-2 zone, so if the Plaintiffs simply submitted a new application, it would have had to be treated under the amended zoning rather than the previous zoning under the Time of Application Law, N.J.S.A. 40:55D-10.5.³

The Board determined that the interests of justice to the Plaintiffs required giving them a fair opportunity to resolve the dispute under the zoning standard pertaining to religious

³ Which reads:

Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

N.J.S.A. 40:55D-10.5

houses of worship in effect when the Plaintiffs first filed their application, should reconsideration be sought. Further, the existing Board Rules limited reconsideration to twenty days, which was likely too short a time to properly present such an amended plan. Thus, in order to resolve the dispute in this matter by way of reconsideration, the Board exercised its power to remove these procedural barriers to facilitate settlement.

The difference between this case and Whispering Woods is minimal. In Whispering Woods, the Board action was the culmination of the settlement, whereas in this case, the Board action is essentially an invitation to the Plaintiffs to resolve the dispute. The Defendants submit that this is a distinction without a difference.

The Whispering Woods Court held that there was no merit to the contention that the parties required a remand in order for the Board to negotiate a settlement. Indeed, the Court recognized that it was a matter of "common sense" that no such remand was necessary in order to negotiate terms for settlement. Whispering Woods, at 171-172. The April Resolution in this case is functionally identical to such negotiations of settlement terms. It did nothing more than set out the terms by which the Board would agree to resolve this dispute, if the Plaintiffs sought to do so.

It would be folly to believe that, although nothing in the law or even "common sense" limits the ability of parties to negotiate a settlement through counsel without a remand, a remand is nevertheless required for the Board to bind itself to the same settlement terms, as it did here.

Thus, under Whispering Woods, the April Resolution was a proper exercise of the Board's power and did not require a remand.

D) There Is No Basis In This Case For This Court To Apply The All Writs Act.

In light of the foregoing, the April Resolution in no way interferes with this Court's path to resolution, necessary for the invocation of the All Writs Act, due to the simple fact that by itself, the resolution does nothing substantive. It is only if the Plaintiffs were to agree to take advantage of the offer and seek to resolve the matter by way of reconsideration that its provisions would be effective. Otherwise, they are inert.

In other words, this Court's jurisdiction and its administration of justice is wholly unaffected by the April Resolution because it either works to effectuate a settlement of the dispute, or it has no effect whatsoever.

As such, the extraordinary and firmly circumscribed powers under the All Writs Act have no application under the

circumstances raised in the Plaintiffs' motion. Consequently, that motion should be denied.

CONCLUSION

For all the foregoing reasons, the Plaintiffs' claim that the April resolution was an action taken without jurisdiction is simply false. The April Resolution by the Board was nothing more than a good faith effort to resolve the dispute by way of settlement, something the law clearly permits the Board to pass. Consequently, nothing in the passage of the resolution would justify the invocation of the All Writs Act. This Court is respectfully requested to deny the Plaintiffs' Motion.

Respectfully submitted,

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