Reply to:
25 Independence Boulevard
Warren, New Jersey 07059-6747
(908) 647-1022
(908) 647-7721 Fax
www.heroldlaw.com

570 Lexington Avenue, Suite 1600
New York, New York 10022
(646) 227-0180
By Appointment Only

HEROLD LAW
Professional Association
Attorneys at Law

70 NE 5th Ave
Delray Beach, Florida 33483
(561) 501-6073
Fax: (561) 501-6069

150 N. Radnor-Chester Road, Suite F-200
Radnor, Pennsylvania 19087
Office: (610) 977-2023
Cell: (215) 680-1860

Email: rsimonheroldlaw.com
Extension: 113

July 14, 2022

VIA ECOURTS

Honorable Peter G. Geiger, J.S.C.
Superior Court of New Jersey
Bergen County Courthouse
10 Main Street, 2nd Floor
Hackensack, NJ 07601

Re: ***Michael Akerman, et al. v. Township of Teaneck, et al.***
Docket No. BER-L-2234-22

Dear Judge Geiger:

Please accept this letter brief in lieu of a more formal brief in opposition to the motion filed on June 24, 2022 by non-party Holy Name Medical Center, Inc. ("HNH"), seeking to intervene in this action (the "Motion"). As HNH identifies on page 2 of its letter brief filed in support of the Motion, Plaintiffs filed a Complaint in Lieu of Prerogative Writs dated April 21, 2022 against Defendants, Township of Teaneck (the "Township") and Township of Teaneck Planning Board (the "Board") seeking to invalidate Township Ordinance 9-2022 (the "Complaint"). HNH has failed to satisfy the requirements of R. 4:33-1 and 4:33-2 for intervention with regard to the Complaint, and its Motion should therefore be denied.

HNH's proposed Answer in Intervention fails to meet the requirements of R. 4:33-1.

HNH seeks to intervene in this action as a defendant, and the requirements for intervention are governed by R. 4:33-1:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, **unless the applicant's interest is adequately represented by existing parties.**
>
> [(emphasis added)]

To establish a right to intervene under R. 4:33-1, a proposed intervenor must establish the following:

> (1) claim an interest relating to the property or transaction which is the subject of the transaction, (2) show that the movant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, (3) demonstrate **that the movant's interest is not adequately represented by existing parties**, and (4) make a timely application to intervene.
>
> [Am. Civil Liberties Union of N.J., Inc. v. Cty. of Hudson, 352 N.J. Super. 44, 67 (App. Div. 2002) (emphasis added, citations and quotation marks omitted).]

"[M]otions to intervene are not granted automatically, nor does their filing constitute an automatic stay. Rather, the moving party must satisfy the court that it has met the four elements required for a motion to intervene to be granted." Williams v. State, 375 N.J. Super. 485, 531 (App. Div. 2005) (quoting UFJ Bank v. J&A Int'l Corp., 354 N.J. Super. 542, 546, (Ch. Div. 2002)).

> The rule must be liberally construed with a view to whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether intervention will eliminate the need for subsequent litigation.
>
> [N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 286 (App. Div. 2018) (citations and quotation marks omitted).]

"Rule 4:33-1 HN3 requires intervention, assuming the other criteria are met, only if the movant's interest is not "adequately represented" by the existing parties." City of Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 10-11 (App. Div. 2006). In affirming the denial of a motion to intervene, the Appellate Division in Builders League of S. Jersey, Inc. v. Gloucester Cty. Utils. Auth., 386 N.J. Super. 462, 469 (App. Div. 2006) determined a proposed intervenor's interests are adequately represented by the existing parties if the intervenor and the party share the same interest. In addition, the Asbury Park court determined the fact the existing defendant was a municipality gave greater weight to the fact it would adequately represent the interests of a redeveloper claiming an interest in the outcome of the litigation:

> We note that the City [has an] obligation to "turn square corners" in dealing with the public...We also presume that a public entity of this State will act diligently, responsibly and honorably. We have recognized that there is a prima facie presumption that the power and discretion of governmental action has been properly exercised.
>
> [Asbury Park, 388 N.J. Super. at 11 (quotation marks omitted).]

Here, HNH has failed to establish the requirement of showing its interests are not adequately protected by the Township and the Board. The answer proposed by HNH does not assert any counterclaims, crossclaims, or third-party claims. Indeed, HNH does not seek any affirmative relief of its own. Instead, all it does is deny facts and allegations asserted against the

Township and Board, and, oddly, present proposed affirmative defenses against claims asserted against the existing Defendants. The fact HNH and the Township are directly and completely aligned with one another in this dispute shows HNH's interests are already adequately represented, and intervention is inappropriate.

HNH interprets the fact Defendants did not deny Paragraphs 63-64 of the Complaint to mean the Township is unable to defend itself. This argument is nonsensical. The question of whether the municipality is in possession of facts while filing its initial pleading has nothing to do with its ability to protect its interests, and it does not by any means provide a basis for standing to HNH.[1] Also, if HNH officials are in possession of relevant facts, that makes them witnesses, not necessary parties.

HNH also argues, "the disposition of this action will impair HNH's to protect its interests regarding its own property." HNH Brief, at 2. This is not accurate. HNH's property interests are not at stake in this matter, only the validity of a municipal ordinance. Regardless, even if it were true, this argument does not show HNH's interests are not properly represented.

HNH also presents a specious argument that its interests differ from those of the municipality:

> HNH's interests are different than and supplemental to those interests that the defendants seek to protect. While the primary relief sought by Plaintiffs is the invalidation of Ordinance No. 9-2022, the Complaint is rife with allegations, both direct and indirect, of alleged wrongdoing **by** HNH....In many ways, Plaintiffs' complaint is just as much an attack against HNH as it is against the named defendants. And while the named defendants may defend the propriety of Ordinance No. 9-2022, there is no guarantee they will, or are even able to, defend against the allegations of purported wrongdoing against HNH.
>
> [Id. (emphasis in original).]

The Complaint is a lawful challenge to an improper ordinance, and HNH has no property interest in an invalid ordinance. The fact HNH had to qualify its argument with "in many ways" only illustrates the fact it is a gross exaggeration. There are no ways the Complaint is an attack against HNH. HNH's interests in its own property are not at issue in this litigation, only the validity of an ordinance and conflicts of interest among Township officials. The Complaint does not assert any claims against HNH and seeks no relief from HNH. There is nothing for HNH to defend against because HNH's interests are entirely irrelevant to this litigation.

Finally, it should be noted HNH admitted, "HNH is the **only** party whose property interests are implicated in this matter." Id. (emphasis in original). Although this statement does not provide HNH with standing to participate, it does illustrate the fact Ordinance 9-2022 was improperly

[1] HNH claims Defendants are unable to deny paragraphs 63-64 of the Complaint. Yet, Defendants did deny paragraph 63. Also, paragraph 64 deals with the date the Township Construction signed zoning permits. This is a simple fact issue that should be resolved in discovery, and is completely irrelevant to whether the Township can adequately represent its own interests.

enacted for the purpose of benefitting a single property owner, and HNH is the only property owner to benefit from the Ordinance.

These facts also show HNH lacks standing to participate in this litigation. "Under the plain language of [RR. 4:33-1 and -2], intervention is not appropriate unless the putative intervenor can assert its own claim or defense." N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 287 (App. Div. 2018). The fact HNH has no claims or defenses separate from those of the Township further shows intervention under R. 4:33-1 is inappropriate.

HNH has not presented any grounds to entitle it to permissive intervention.

Where intervention of right is not allowed, an entity can seek "permissive" intervention under R. 4:33-2.:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Permissive intervention involves an exercise of the Court's discretion. R. 4:33-2; see also ACLU, 352 N.J. Super. at 70. R. 4:33-2 "is to be liberally construed by trial courts, with a view to whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether intervention will eliminate the need for subsequent litigation." Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 341 (1996) (citations omitted).

Here, addition of another defendant that has no independent claims of its own and no claims asserted against it is unduly prejudicial to the Plaintiffs. Adding HNH will only complicate and lengthen the time necessary for discovery, motion practice, and trial. And, it will provide Defendants with additional opportunities for briefing and argument. These benefits are not afforded to the numerous Plaintiffs, who are briefing and arguing this matter together.

Also, granting HNH's Motion will do nothing to eliminate the need for subsequent litigation. The fact HNH has no claims of its own, and there are no claims asserted against it shows there is no basis for HNH to litigate. Permissive intervention under R. 4:33-2 requires a prospective intervenor to show "the claim or defense and the main action have a question of law or fact in common." R. 4:33-2. This HNH cannot do without any claims or defenses on its own. There is no daylight between the Township's and HNH's interests in the outcome of this litigation. All HNH is doing is seeking to throw another voice in support of the Defendants, who are capable of defending themselves.

Finally, Intervention is properly allowed where an important public issue is presented to the court. Ocean Cablevision Associates v. Hovbilt Inc., 210 N.J. Super. 626, 632-33 (Law Div. 1986). In that case, the public issue was the authority of the New Jersey State Board of Public Utilities to entertain a petition, and the court determined the case had statewide application and implicated a regulation adopted by the agency.

Here, HNH has failed to identify any public interest, let alone an important one. As the moving papers clearly show, HNH is concerned with its ability to develop its own property. And, HNH freely admits the fact it is the only property owner to benefit from this Ordinance. HNH's interests are decidedly personal, and do not implicate any important public interest that would warrant permissive intervention. Plaintiffs submit HNH has not established sufficient grounds to warrant an exercise of this Court's discretion to grant intervention under R. 4:33-2.

We thank the Court for its many courtesies, and respectfully request the Motion be denied.

Respectfully submitted,

Robert F. Simon

cc: All counsel – via eCourts & email
Clients – via email