
ELY EDDI,

Plaintiff-Appellant,

v.

ELBERON MEMORIAL
PRESBYTERIAN CHURCH, 1101
INVESTOR LLC AND COLIN
GAINES,

Defendants-Respondents.

:
: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
: DOCKET NO.: A-00070-24
:
: ON APPEAL FROM THE SUPERIOR
: COURT OF NEW JERSEY,
: LAW DIVISION, MONMOUTH
: COUNTY
:
: Docket No. Below:
: DOCKET NO. MON-L-1866-21
:
: Sat Below:
: Honorable Linda Grasso Jones, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT ELY EDDI

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PRELIMINARY STATEMENT

This is a breach of contract and tortious interference case arising out of a contemplated sale and subdivision of a portion of property in Long Branch, New Jersey owned by defendant Elberon Memorial Presbyterian Church (the “Church”). The Church entered into a contract (the “Eddi Contract”) with plaintiff Ely Eddi under which the Church would pursue a subdivision of its lot, and associated required variances, before the Long Branch Planning Board (the “Board”), and would sell Mr. Eddi, for \$725,000, the rear part of that property (the “Proposed Subdivision”) on which he intended to construct a single-family home. The Church needed the money Mr. Eddi would pay so that the Church could perform repairs on the Church’s aging church building on the property.

Mr. Eddi fulfilled his duties under the Eddi Contract. However, as the Law Division found, the Church breached the Eddi Contract. The Church failed to pursue the Proposed Subdivision and associated required variances and otherwise did not comply with its obligations under the Eddi Contract. The Church’s liability is now undisputed, as it has not cross-appealed.

The Church violated the Eddi Contract because it and a neighboring property owner, defendant Colin Gaines, were unhappy with Mr. Eddi’s proposed construction. Mr. Gaines had previously offered \$375,000 for the Proposed Subdivision, but the Church rejected that offer because the Church needed a sale

price of at least \$700,000 for its building repairs. Yet, after the Eddi Contract became effective, Mr. Gaines induced the Church to sell the Proposed Subdivision for \$675,000 (the “Gaines Contract”) to him and his company, defendant 1101 Investor LLC, and to wrongfully terminate the Eddi Contract. Through that tortious interference with the Eddi Contract, Mr. Gaines then acquired the rights in the Proposed Subdivision that the Eddi Contract gave to Mr. Eddi.

The only issues presented on appeal pertain to damages and Mr. Eddi’s tortious interference claim. Though the Law Division found that the Church breached the Eddi Contract, that court found that Mr. Eddi had not sufficiently proved damages, specifically the lost profits from the construction of the home to be built on the Proposed Subdivision, which Mr. Eddi documented with detailed and undisputed expert testimony. As will be discussed infra, the court committed legal error in holding that (a) Mr. Eddi did not prove that the Board would have approved the Proposed Subdivision and variances, and (b) Mr. Eddi did not prove his lost profits with sufficient particularity.

The court also erred in rejecting Mr. Eddi’s tortious interference claim against Mr. Gaines. Mr. Gaines connived with the Church to blow up the Eddi Contract in Mr. Gaines’s own selfish interest of blocking development adjacent to his other property. He did that without valid justification or excuse. His separate right to object

at proceedings to obtain subdivision approval does not excuse his tortious interference, contrary to the Law Division’s legally erroneous view.

Mr. Eddi is entitled to damages from the Church’s (now uncontested) breach of contract and Mr. Gaines’s tortious interference. This Court should so rule and reverse the decision below.

STATEMENT OF PROCEDURAL HISTORY

Mr. Eddi filed suit against the Church on May 28, 2021. Ja1-9.¹ On June 7, 2023, he filed an Amended Complaint that, as relevant to this appeal, added 1101 Investor LLC and its managing member, Mr. Gaines, see Ja523-27,² as defendants with a claim against them for tortious interference with contractual relations. Ja25-47. Defendants filed Answers, and the Church asserted counterclaims, which Mr. Eddi answered in kind. Ja10-20; Ja21-24; Ja48-74; Ja75-80.

Cross-motions for summary judgment were filed, with Mr. Eddi seeking to dismiss defendants’ affirmative defenses of impossibility and impracticability, and defendants seeking to dismiss Mr. Eddi’s claims entirely. See Ja81-82; Ja83-84. On February 28, 2024, the court denied defendants’ motion, Ja83-84, and granted Mr.

¹ In accordance with Rule 2:6-8, “Ja” refers to the joint appendix that accompanies this brief; the date and numbered designation of each transcript volume is listed in the Table of Transcripts. “T” denotes the various transcript volumes, such that 1T 8-3 refers to the first transcript volume, page 8, line 3.

² For the purposes of this appeal, Mr. Gaines and 1101 Investor LLC are interchangeable. Thus, this brief uses “Mr. Gaines” to refer to either or both of them.

Eddi's—dismissing the defenses of impossibility and impracticability with prejudice, Ja81-82. With regard to the latter, the court held that an offer by a neighboring property owner does not preclude (c)(1) variance hardship relief. 1T 35-18 to -24. Despite that ruling, defendants improperly asserted at trial that the purchase offer by Mr. Gaines defeated (c)(1) hardship relief.

The case proceeded to trial over nine days. On July 29, 2024, the trial court entered an Order for Judgment dismissing all of Mr. Eddi's claims and dismissing the Church's counterclaims. Ja85-86. The Law Division found that the Church had breached its contract with Mr. Eddi. Ja120-21, 124. But the court dismissed Mr. Eddi's claims because Mr. Eddi had not adequately proven his claimed damages. Ja125, 130.

There were several levels to that ruling. First, the court held it could not determine whether the Board would have approved the Proposed Subdivision. Ja133-34. Second, assuming it could determine whether the Board would approve the Proposed Subdivision, the court found that Mr. Eddi had not proven that he would have obtained subdivision and variance approvals from the Board, Ja133-35, a purely legal issue.

The parties' experts disagreed as to whether such approvals satisfied N.J.S.A. 40:55D-70(c)(1) or (c)(2). Ja125-27. The court was unsure whether the Board would credit either expert's analysis. Ja133-34. Yet, the only case that defendants' expert

relied on for her view that no (c)(1) variance was available was Dallmeyer v. Lacey Township Board of Adjustment, 219 N.J. Super. 134 (Law Div. 1987), see Ja40, a non-binding case that (1) she did not read until after forming her opinion, 16T 77-13 to -18, and (2) has been limited by subsequent authorities. Her opinion as to the (c)(2) variance was based on the wrong legal inquiry. Both of those issues are discussed further infra.

Assuming the Board would have approved the Proposed Subdivision and granted the necessary variances, the trial court then held that Mr. Eddi failed to adduce enough evidence to support the \$2,152,000 he claimed as lost profits. Ja135-36. The court cited no authority and did not take account of the law holding that, as discussed infra, Mr. Eddi was not required to prove the amount of damages with precision, though he in fact adduced uncontroverted expert testimony that did so. See Ja135-36.

As to Mr. Eddi's tortious interference claim against Mr. Gaines, the court offered several rationales to dismiss that claim. The primary reason was Mr. Gaines's status as a neighboring property owner who had a right to object before the Board. Ja147. That did not privilege him, however, to take the separate step of inducing the Church to first to breach and later to terminate the Eddi Contract. Ja103, 148-49. The court also relied on the idea that the Gaines Contract was merely a "back-up contract" in case contingencies in the Eddi Contract were not satisfied. Ja147-50.

Again, the court’s discussion failed to recognize that Mr. Gaines’s intervention induced the Church to void the Eddi Contract, the very definition of tortious interference, without a privilege to do so. Finally, the court reiterated its ruling that Mr. Eddi had not proven damages, an element of tortious interference as well as breach of contract, with particularity. Ja150.

STATEMENT OF FACTS

The Church owns a historic, Ja476, century-old church building located at 70 Park Avenue in Long Branch, New Jersey (the “Property”).³ Ja177, 319; see also Ja311, 324, 326, 470, 497. The Property is an oversized lot, 5T 196-15 to -19, located in the R-1 Zone, 16T 17-19 to 18-3, approximately 170.27 feet deep and approximately 300 feet wide when viewed from Eaton Avenue. Ja311. Mr. Gaines owns two properties abutting the Property from the south and west—Lots 13.03 and 14, 11T 66-13 to -21; see also Ja470.⁴

³ The Property is designated Lot 16 on the relevant maps.

⁴ Those properties are 1102 Eaton Avenue and 1101 Elberon Avenue, respectively. Ja240, 424.

location of a parsonage on the Property), and 170.27 feet deep—fronting Eaton Avenue. See 12T 235-2 to -11; Ja469, 497.

If the Board approved the Proposed Subdivision, it would lack approximately twenty square feet of frontage and less than five square feet in depth to comply with the R-1 Zone’s requirements. 7T 17-9 to 19-15. As such, the Proposed Subdivision would require lot width, depth, and total area variances. Ibid.

In 2019, Thomas Woolley, a member of the Church’s board of trustees, 11T 96-24 to 97-2, approached Mr. Gaines to see whether he had an interest in purchasing the Proposed Subdivision. 11T 61-18 to 62-14; Ja49-50. Mr. Gaines offered approximately \$375,000, 15T 8-8 to -25, which the Church rejected, 13T 29-12 to 30-12.

On January 20, 2020, the Church’s board authorized its treasurer, Robert Broege, to try to sell the Proposed Subdivision. Ja175. Mr. Broege was to work with the Sonya Grill Real Estate Agency (“Sonya Grill”) to effectuate the sale. Ibid.; 13T 8-20 to 9-13. The Church sought “the best possible return” for the Proposed Subdivision, Ja175, and a minimum of \$700,000, 13T 8-25 to 9-13.

On February 18, 2020, the Church, through dual agent Sonya Grill, Ja176, 186, agreed to sell the Proposed Subdivision to Mr. Eddi for \$725,000. Ja176-89; 3T 52-12 to -16. Mr. Eddi intended to build a single-family residence on the Proposed Subdivision. 9T 40-11 to -15; see Ja491-99. The Eddi Contract was amended during

attorney review and finalized on July 9, 2020. Ja190-220. All time-of-the-essence language was removed from the Eddi Contract. Compare Ja191, with Ja218-19.

The Eddi Contract made the Church responsible for obtaining Board approval of the Proposed Subdivision and all necessary variances. 4T 203-14 to -17; Ja196-99. This would require, among other things, a survey and subdivision plat of the Proposed Subdivision that provided exact delineations of the property boundaries and the building plans for Mr. Eddi’s proposed house. 13T 188-6 to -9; Ja192, 196-99. The Church was to determine the exact location of the new lot line during its preparation of the subdivision plat. Ja197. That requirement was included because when the Church first considered selling the Proposed Subdivision in 2019, an architect told the Church that the Board would need to know the precise dimensions of the Proposed Subdivision. Ja173.

The Eddi Contract required the Church to keep Mr. Eddi “fully informed as to the [s]ubdivision process and status. The [Proposed] Subdivision will be approved for a single[-]family home with 40% lot coverage with a lot size of” 80 feet by 170 feet. Compare Ja191, with Ja195.

Mr. Eddi was to provide the Church with “appropriate plans of the proposed dwelling” to be built on the Proposed Subdivision. Ja195. These plans, however, were necessary only after the Church established the Proposed Subdivision’s lot lines. Ja109, 517. The Eddi Contract gave the Church six months to obtain approval

for the Proposed Subdivision and the necessary variances, with a three-month extension if it was continuing to pursue the application. Ja198-99.

Mr. Eddi timely provided the required \$25,000 deposit to the escrow account of the Church's attorney, V. David Shaheen, 5T 37-15 to -18, 53-16 to 54-22; Ja202, 221, 226-27. For the eventual home to be built on the Proposed Subdivision, Mr. Eddi hired an architect, 9T 64-1 to -17; see Ja491-96, and Blue Creek Homes, Inc. ("Blue Creek"), 9T 40-11 to -21, which ultimately recommended a design that it recently built on a smaller lot less than two miles away in Deal, New Jersey, 9T 43-17 to 44-7, 44-21 to -25; 14T 236-9 to 238-5, 246-11 to 247-7; see Ja471-90. The total cost to build this home on the Proposed Subdivision would be \$1.2 million, exclusive of items necessary to obtain a certificate of occupancy. 15T 153-7 to -11, 166-15 to 167-12, 179-16 to -21; Ja500-06.

The Church, however, wanted the Proposed Subdivision to remain vacant because of "the effects of . . . having [a] house next door." 13T 113-25 to 114-12. To this end, the Church required Mr. Eddi "agree[]" to be mindful of the need to respect the [Church's] need for quiet," during the summer, Ja207, but there would be no deed restrictions to that effect, Ja220. The Church wanted a contract with Mr. Gaines (who would have left the Proposed Subdivision vacant, Ja519) but given Mr. Gaines's initial low offer, reluctantly entered the Eddi Contract. 13T 114-13 to -18.

So, the Church stalled in pursuing the Proposed Subdivision and made one final effort to contract with Mr. Gaines. See 15T 10-14 to 11-14; Ja168.

In September 2020, Mr. Woolley spoke with Mr. Gaines to see if he might still purchase the Proposed Subdivision. 15T 10-14 to 11-14; Ja168, 229-31. Mr. Gaines was also unhappy with the Eddi Contract and did not want a new house near his properties. 15T 29-10 to 30-4; Ja520-21. He intended to oppose a subdivision application made pursuant to the Eddi Contract. 15T 29-10 to 30-4, 92-6 to -24, 93-4 to 94-10.

Mr. Gaines offered \$675,000, Ja55, and obtained an appraisal for the Proposed Subdivision in the Fall of 2020, see Ja233-35, to obtain an estimate of the Proposed Subdivision's value, 15T 13-15 to 16-22. In a December 15, 2020 email to Mr. Gaines, the Church accepted his \$675,000 offer, thus effectively creating the Gaines Contract. See Ja237, 522. Under the Gaines Contract, the Proposed Subdivision would be combined with Mr. Gaines's existing property at 1102 Eaton Avenue. Ja237, 423.⁸

The first iteration of the Gaines Contract stated that upon final agreement, the Church "will immediately take such actions as are appropriate to terminate the [Eddi

⁸ The Gaines Contract also allowed Mr. Gaines to consolidate all three properties—1101 Elberon Avenue, 1102 Eaton Avenue, and the Proposed Subdivision—into one, 60,000 square foot property. 14T 108-9 to -23; Ja424; see Ja470. Mr. Gaines testified that he intended to exercise this option. 15T 212-22 to 213-3.

Contract]” Ja379. Not until later versions was the Gaines Contract styled a “back up contract,” see Ja430, perhaps showing a belated recognition that Mr. Gaines was tortiously interfering with the Eddi Contract, with the Church’s connivance.

The Church did not inform Mr. Eddi that it was seeking additional offers. 3T 165-22 to 166-8; 9T 21-11 to -17. Nor did it ask Mr. Eddi for permission to negotiate with Mr. Gaines. 5T 172-4 to -14. Toward the end of 2020, the Church told Mr. Eddi only that a neighboring property owner expressed interest in the Proposed Subdivision, see 3T 75-21 to 77-3; 9T 21-11 to -17, a statement that was at best misleading since the Church had initiated the negotiations with Mr. Gaines, Ja168; see 15T10-14 to 11-14; Ja229-31, and soon reached an agreed price of \$675,000, Ja237. Mr. Eddi did not learn about an offer from Mr. Gaines until late December 2020, 9T 92-9 to 83-4; see Ja238-39, when the Church informed Mr. Eddi that it no longer wished to proceed with the Eddi Contract, Ja57-58.

At that time, the Church informed Mr. Eddi that it believed applying for the Proposed Subdivision and requisite variances would be futile because of Mr. Gaines’s interest in acquiring the Proposed Subdivision. 9T 98-23 to 200-9; Ja170. According to the Church, Mr. Gaines’s offer to purchase the Proposed Subdivision made any attempt at obtaining variance relief from the Board difficult, if not impossible, based on its understanding of the law on (c)(1) variance relief. Ja57-58,

69, 170; see 13T 57-22 to 59-15. Similarly, the Church felt (c)(2) variance relief was inapplicable. Ja170. As stated supra, the Law Division would later strike the Church’s “impossibility” and “impracticability” defenses prior to trial.

Mr. Eddi rejected the Church’s position and expressed his desire to continue with the contract. 9T 23-11 to -19, 25-13 to -20; see Ja286. He hired Jennifer Krimko, an experienced land use attorney, 9T 23-24 to 24-6, to assist the Church in obtaining approval of the Proposed Subdivision. See Ja238, 287-88. Mr. Eddi also sent Mr. Gaines a cease-and-desist letter in March 2021 to prevent him from interfering with the Eddi Contract. Ja287-94. Meanwhile, the Church and Mr. Gaines continued to negotiate the final terms of the Gaines Contract throughout late 2020 and early 2021. Ja240-41, 409-22. It was not until April 2021 that Mr. Eddi learned that the Church agreed to sell the Proposed Subdivision to Mr. Gaines. 9T 30-8 to -14; see Ja287 (stating Mr. Eddi understood that “Mr. Gaines . . . [was] soliciting the Church . . . to instead sell the [Proposed Subdivision] to [him] or his company” as of March 26, 2021).

Meanwhile, the Church did nothing to secure approval of the Proposed Subdivision as required by the Eddi Contract. Efforts made by Sonya Grill to communicate with Mr. Broege went unanswered. Ja228, 232, 236. The Church never provided Sonya Grill with a contact person for the subdivision application, 3T 66-22 to 67-22; nor did Sonya Grill ever receive any definitive update on the subdivision

process, 3T 91-15 to -24; 9T 50-21 to 51-11. Though the Church told Sonya Grill in November 2020 that it was mailing out notices and hoped to be before the Board by January 12, 2021, Mr. Eddi later discovered this was a lie. 9T 14-22 to -22, 22-13 to 23-10, 51-14 to -19, 83-24 to 85-1.

The Church also failed to provide Mr. Eddi with any survey or subdivision plat of the Property with the exact location of the new lot line, violating the Eddi Contract's express terms. 13T 188-19 to 189-6; 14T 213-18 to -24. It did not ask its surveyor, Charles Bell, see 4T 248-3 to -8, to prepare a survey for Mr. Eddi, see 4T 251-12 to -15, or introduce Mr. Eddi to him, 4T 252-9 to 253-9. Without that information, Mr. Eddi could not provide adequate building plans for the application. Ja109, 517. The Church did not prepare a subdivision plat with the exact dimensions of the Proposed Subdivision, as the Church had been told the Board would require, until July 28, 2021. 4T 248-9 to -12. That eventual plat was made for Mr. Gaines' benefit, not Mr. Eddi's. 5T122-6 to -19.

Ms. Krimko reached out to the Church in January 2021 and sought to amend the Eddi Contract on Mr. Eddi's behalf to make him responsible for obtaining approval for the Proposed Subdivision. See Ja287-88, 296-306. Ms. Krimko also sent the Church a subdivision application but never received a completed copy in return. 9T34-9 to -21; Ja297, 300, 309-11.

Again, the Church remained silent; for several months, Mr. Eddi followed up and inquired with the Church about the potential amendments to the Eddi Contract. Ja287-88, 296-300. The Church’s attorney, Mr. Shaheen, however, did not respond until April 12, 2021, and proposed changes to the amendments that were not approved by the Church. 5T135-4 to -16; see Ja302-303, 307. Mr. Shaheen’s revisions required Mr. Eddi to pay for the subdivision application. Ja307; see 5T136-4 to 136-20. Specifically, Mr. Eddi would be responsible for “[a]ll costs and expenses from this date forward, relative to pursuing the approvals contemplated in the [Eddi] Contract”; should Mr. Eddi receive approval for the Proposed Subdivision, he would “further agree[] to reimburse [the Church] in the amount of \$_____ [sic] in generating the initial subdivision plan, which was prepared by Charles Bell.” Ja307.

The Church never provided Mr. Eddi with any of the initial subdivision plan costs it incurred. 5T 145-20 to -24. Nor did it cooperate with Ms. Krimko. Ja296-99. Not until May 21, 2021, did Mr. Shaheen inform her that the Church would “be making a final decision” and would let her know thereafter. Ja296. On May 27, 2021, the Church notified Mr. Eddi that it was repudiating the Eddi Contract. Ja404-05.

The Church and Mr. Gaines finalized the Gaines Contract on June 4, 2021. Ja423-32. Pursuant to the Gaines Contract, the subdivision application would be handled by Mr. Gaines, with Mr. Gaines reimbursing the Church for fees and expenses associated with the subdivision application. Ja424. The Gaines Contract

required Mr. Gaines to indemnify the Church “from any claims, actions, damages, costs or the like, including the costs of [the Church’s] legal fees in defending any such matters which may be made or initiated by” Mr. Eddi under the Eddi Contract. Ja430. Further, the Gaines Contract allowed Mr. Gaines to control any litigation arising out of the Proposed Subdivision. Ja430. In this capacity Mr. Gaines prevented any attempt at settlement between Mr. Eddi and the Church. Ja520-21.

STANDARD OF REVIEW

On appeal, questions of law are subject to de novo review. Comprehensive Neurological, P.C. v. Valley Hosp., 257 N.J. 33, 79 (2024). All issues raised in this brief are purely legal questions to which de novo review applies. And although factual findings are given deference, Balducci v. Cige, 240 N.J. 574, 594 (2020), this Court may overturn the trial court’s factual findings if they are “manifestly unsupported by the reasonably credible evidence in the record,” id. at 595 (internal quotation marks omitted). Moreover, the trial court’s “interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” Comprehensive Neurological, 257 N.J. at 80 (quoting Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019)).

ARGUMENT

I. **THE COURT COULD HAVE DETERMINED WHETHER THE LONG BRANCH PLANNING BOARD WOULD HAVE APPROVED THE PROPOSED SUBDIVISION AND SHOULD HAVE WEIGHED ANY UNCERTAINTY AGAINST DEFENDANTS. (Raised Below: Ja124-35)**

The Law Division principally dismissed Mr. Eddi's breach of contract and tortious interference claims because it held that it could not determine whether the Board would approve the Proposed Subdivision. Ja131-33. Analogizing the case to a legal malpractice claim, Ja132, the court found that because the Board might have relied on information beyond the scope of the New Jersey Rules of Court and Evidence and different than the evidence presented at trial, Mr. Eddi's claims must fail, Ja132-33. Assuming it could decide the issue, the court wrongly held the uncertainty created by the Church's breach of its obligation to pursue approvals before the Board and Mr. Gaines's tortious interference against Mr. Eddi. Ja133-36, 150. Each conclusion was legal error.

A. **The Trial Court Erred in Holding It Could Not Determine Whether the Board Would Approve the Proposed Subdivision and Variances. (Raised Below: Ja131-35)**

First, the Rules of Court and Evidence are no obstacle to review of municipal land use decisions, which are regularly appealed to determine if the board acted arbitrarily, capriciously or unreasonably. See, e.g., Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 33 (2013); Jacoby v. Zoning Bd. of Adjustment, 442 N.J. Super. 450,

462 (App. Div. 2015). A board “may not unreasonably reject expert testimony ‘based only upon bare allegations or unsubstantiated beliefs,’” Cohen v. Bd. of Adjustment, 396 N.J. Super. 608, 618 (App. Div. 2007) (quoting N.Y. SMSA, L.P. v. Bd. of Adjustment, 370 N.J. Super. 319, 338 (App. Div. 2004)), or “deny variances where the proofs incontestably establish the need for variance relief and demonstrate no threat to the neighborhood or zone plan,” Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 58 (1999).

Thus, although local zoning and planning boards may rely upon a broader array of information—including board members’ personal knowledge, Kramer v. Bd. of Adjustment, 45 N.J. 268, 284 (1965)—they are not immune from judicial review. Even facts gleaned by personal knowledge must be made part of the record when determinative, ibid., and the decision whether to credit expert witnesses “must be reasonably made,” Bd. of Educ. of Clifton v. Zoning Bd. of Adjustment of Clifton, 409 N.J. Super. 389, 434 (App. Div. 2009).

Second, when acting as factfinders, courts are limited to the facts adduced at trial. See Horne v. Edwards, 477 N.J. Super. 302, 312 (App. Div. 2023) (requiring factual findings be “supported by adequate, substantial and credible evidence” in the record (quoting Rova Farms Resort v. Inv’rs Ins. Co., 65 N.J. 474, 484 (1974))). They cannot “base a judgment on speculation or guesswork,” Zenith Radio Corp. v. Hazeltine Rsch., 395 U.S. 100, 124 (1969), and at most may rely “upon probable

and inferential, as well as direct and positive proof,” *id.* (quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946)). See Balducci, 240 N.J. at 595 (stating factual findings may be overturned when they are “‘manifestly unsupported’ by the ‘reasonably credible evidence’ in the record” (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011))).

No party offered testimony from members of the Board at trial. That the Board, hypothetically, might have considered evidence outside of the purview of a court or jury was an impermissible basis for the trial court’s decision. This is particularly erroneous given defendants’ wrongful conduct prevented the Board from considering the Proposed Subdivision in the first place.

B. Because Defendants’ Own Misconduct, Including the Church’s Undisputed Breach of the Eddi Contract, Created the Uncertainty as to Whether the Board Would Have Granted Approvals, Defendants Should Not Have Been Allowed to Use That Uncertainty to Defeat Mr. Eddi’s Claims. (Raised Below: Ja124-35)

Assuming it could rule on whether the Board would have approved the Proposed Subdivision and variances, the trial court held that Mr. Eddi failed to prove he was harmed by the Church’s contractual breach. Ja125-27, 33-34. Reviewing the opinions of each side’s land use experts, Ja125-27, the court observed neither could say with certainty whether the Board would have permitted the Proposed Subdivision and variances, Ja133-34. This ruling overlooked basic principles of contract and tort law and erroneously allowed defendants to profit from their own

wrongful conduct in preventing the Proposed Subdivision application from coming before the Board.

The party liable for a breach of contract is responsible for the natural and probable consequences of its breach. Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 342 (App. Div. 2021) (quoting Totaro, Duffy, Cannova & Co. v. Lane, Middleton & Co., 191 N.J. 1, 13 (2007)). This applies to claims of lost profits. Schwartz v. Menas, 251 N.J. 556, 561, 576 (2022). “[T]he damages ‘must be a reasonably certain consequence of the breach’” Nelson, 466 N.J. Super. at 343 (quoting Donovan v. Bachstadt, 91 N.J. 434, 444 (1982)). This same principle applies to tortious interference claims. Schwartz, 251 N.J. at 561; see also Landmark Inv. Grp., LLC v. CALCO Constr. & Dev. Co., 124 A.3d 847, 863-65 (Conn. 2015). In the context of torts, the evidence need only “support a just and reasonable inference that [the plaintiff] w[as] damaged by [the defendant’s] action” Bigelow, 327 U.S. at 266; see also Schwartz, 251 N.J. at 575-76.

Where damages are rendered speculative or remote, both the United States and New Jersey Supreme Courts have long recognized that a defendant cannot “avoid real damages by raising an issue made hypothetical by his very wrong.” E.g., Harris v. Perl, 41 N.J. 455, 464-65 (1964) (torts); Bigelow, 327 U.S. at 264-66 (same); Hetzl v. Balt. & Ohio R. Co., 169 U.S. 26, 38-39 (1898) (contracts) (quoting Baker v. Drake, 53 N.Y. 211, 220 (1873)). Similarly, a party cannot render

contractual performance impossible by its own inaction. Petrozzi v. City of Ocean City, 433 N.J. Super. 290, 303 (App. Div. 2013). This black-letter principle extends further, however, generally resolving doubts against a culpable defendant. Restatement (Second) of Contracts § 352 cmt. a (Am L. Inst. 1981); Restatement (Second) of Torts §§ 774A cmt. c, 912 cmt. d (Am. L. Inst. 1965) (courts may consider all the circumstances and may permit a lesser degree of certainty in determining damages). See also infra, Point IV.

The trial court itself made note of the Church's role in rendering the issue hypothetical. 1T 35-6 to -17, 37-17 to 41-6, 41-17 to 42-1; see Ja121 ("Quite simply, the subdivision plat was the first necessary step, and the Church failed to take any steps to obtain this necessary document."). But rather than applying these bedrock principles of contract and tort law, the trial court allowed defendants to benefit from their own misconduct and use the uncertainty that they created to defeat Mr. Eddi's claims. See Ja125, 131-35. Defendants should not have been heard to contend, and the Law Division should not have concluded, that the uncertainty defendants manufactured negated Mr. Eddi's expert's testimony that (c) variance relief was more likely than not, as discussed infra, Point II. This Court should reverse the decision below on this basis alone.

II. THE COURT ERRONEOUSLY RELIED UPON DEFENDANTS’ EXPERT IN DETERMINING THE LIKELIHOOD OF (c)(1) AND (c)(2) VARIANCE RELIEF. (Raised Below: Ja125-28, 131, 133-35)

In reviewing the evidence produced at trial, the court found the parties’ expert opinions in equipoise and concluded that Mr. Eddi failed to show that the Board would have granted the variances by a preponderance of the evidence. Ja134. In doing so, it failed to recognize changes in the relevant law, both contemporaneous and after Dallmeyer v. Lacey Township Board of Adjustment, 219 N.J. Super. 134 (Law Div. 1987), the only case defendants’ expert (Ms. Barbara Ehlen) relied upon to conclude (c)(1) variance relief was unavailable. 16T 80-1 to -4, 136-17 to 137-7. Similarly, the court failed to recognize that Ms. Ehlen’s testimony as to (c)(2) variance relief failed to focus on the relevant inquiry. This Court should vacate the trial court’s judgment and remand the case for a proper application of the law.

A. Mr. Eddi Established an Undue Hardship Sufficient for (c)(1) Variance Relief. (Raised Below: Ja125-28, 131)

Pursuant to N.J.S.A. 40:55D-70(c)(1) of the Municipal Land Use Law (“MLUL”), N.J.S.A. 40:55D-1 to -163, a board of adjustment⁹ may grant a variance from local zoning ordinances where “by reason of exceptional narrowness, shallowness or shape of a specific property, . . . the strict application of any

⁹ Planning boards have ancillary jurisdiction over (c) variances if the property also requires a subdivision, Kaufmann v. Planning Bd., 110 N.J. 551, 558 (1988) (citing N.J.S.A. 40:55D-60), as was required here.

regulation pursuant to article 8 . . . of this act would result in peculiar and exceptional practical difficulties to, or exceptional or undue hardship upon,” the property owner “to relieve such difficulties or hardship.” See also Ten Stary Dom, 216 N.J. at 29. A plaintiff seeking a (c)(1) variance “must demonstrate (1) that he ‘will suffer exceptional or undue hardship if the variance is not granted—the so-called positive criteria; and (2) that the variance will not result in a substantial detriment to the public good or the zoning plan—the so-called negative criteria.’” Cohen, 396 N.J. Super. at 615 (quoting Nash v. Bd. of Adjustment, 96 N.J. 97, 102 (1984)).

Both (c)(1) and (c)(2) variances are referred to as “bulk” or dimensional variances, Ten Stary Dom, 216 N.J. at 28-30, as opposed to “use” variances governed by N.J.S.A. 40:55D-70(d)(1), see TSI E. Brunswick, LLC v. Zoning Bd. of Adjustment, 215 N.J. 26, 42 (2013).

For (c)(1) variance relief, hardship “is not synonymous with complete inutility due to the land use restriction, although the inability to use the property for any productive use absent a variance often informs the decision to grant a variance from bulk requirements.” Ten Stary Dom, 216 N.J. at 29 (citations omitted). Inutility is a sufficient, but not necessary, condition to prove hardship worthy of a (c)(1) variance. Kaufmann v. Planning Bd., 110 N.J. 551, 562 (1988). Despite such Supreme Court rulings, some courts equated a showing of hardship with inutility, an inquiry

originating from takings jurisprudence and relevant to use variances. See, e.g., Kaufmann, 110 N.J. at 561-62 (noting “confusion” about (c)(1) hardship).

Dallmeyer exemplifies this confusion. There, the court held that if the owner of an undersized lot was offered fair market value for the property, “the owner might not suffer an ‘undue hardship.’” 219 N.J. Super. at 139 (quoting Gougeon v. Bd. of Adjustment, 52 N.J. 212, 224 (1968)) (emphasis added). The Dallmeyer court then meandered into Fifth Amendment Takings Clause jurisprudence, id. at 141-44, even though it found the zoning board’s factual findings and legal conclusions concerning the (c)(1) positive criteria were erroneous, id. at 140-41, and the negative criteria factfinding was threadbare, id. at 146-47. Before remanding the case to the zoning board, the court cautioned the denial of variance relief might cause a regulatory taking. Id. at 146-47.

This muddying of distinct claims and variances required repeated clarification from the Supreme Court. See Lang, N.J. at 54-55 (citing cases). Indeed, several Supreme Court opinions and concurrences reiterated that claims of inutility are best understood to apply to use variances, not bulk variances. E.g., id. at 54; Davis Enters. v. Karpf, 105 N.J. 476, 493-94 (1987) (Stein, J. concurring). Those opinions reveal that a neighbor’s fair-market offer to purchase property is at best relevant to finding a hardship, but not dispositive of the absence of (c)(1) variance hardship. Indeed, Davis states this very principle: “a fair market value offer to purchase [a] property

by an adjoining owner is a relevant, but not dispositive, consideration in determining whether hardship exists.” 105 N.J. at 483. Such offers “do[] not become relevant to the board’s decision until the applicant has established that he or she is otherwise entitled to the variance.” Ibid.

The focus of the hardship inquiry is on whether the property’s exceptional condition is the principal reason why a variance is needed. Lang, 160 N.J. at 56. Exceptional conditions pertain to the property’s dimensions, topography, “or some other extraordinary or exceptional feature unique to the property.” Ten Stary Dom, 216 N.J. at 29. It does not consider the property owner’s personal hardship. Ibid.

Although a hardship relating to the property’s condition vis à vis the applicable zoning ordinances may effectively render the property inutile, see Davis Enters., 105 N.J. at 493 (“[T]he claimed hardship need not result in the inability to make any use of the property.” (emphasis in original)), the two concepts—hardship and inutility—are distinct. Again, a (c)(1) variance focuses on the property itself, Ten Stary Dom, 216 N.J. at 29; use variances and claims of inutility focus primarily on the landowner and what he or she seeks to do on the property, compare JWC Fitness, LLC v. Murphy, 469 N.J. Super. 414, 434 (App. Div. 2021) (regulatory taking), with Price v. Himeji, LLC, 214 N.J. 263, 285 (2013) (use variance). See also Bressman v. Gash, 131 N.J. 517, 532 (1993) (Stein, J., concurring) (observing that

“in dimensional-variance applications . . . the use ordinarily conforms to the ordinance”). As Justice Stein stated in his Davis Enters. concurrence:

Obviously, an offer to purchase any property that is the subject of a variance application, under either [N.J.S.A.] 40:55D-70(c) or (d), would, in the broadest sense, eliminate the need for a variance. . . . The only variance cases in which offers to purchase the affected property may be properly considered are those in which the offer is germane to the particular claim of hardship that is advanced to support the variance. As our cases demonstrate, such offers have heretofore been found pertinent only where the claim of hardship is the inability to use the property for any purpose.

[105 N.J. at 494 (emphasis in original).]

Thus, the absence of offers to buy or sell property can prove hardship; but the presence of such offers do not negate hardship. Such offers should be kept in mind when deciding to grant (c)(1) variance relief, Ten Stary Dom, 216 N.J. at 29, but a fair market offer to purchase the property does not negate a hardship when the claimed hardship results from the land’s condition. See ibid.

Although Dallmeyer has not been fully abrogated, Davis and three decades of subsequent case law demonstrate that, for purposes of the law of (c)(1) variance hardship, Dallmeyer (a non-binding Law Division opinion) is no longer good law to the extent it holds a neighbor’s fair market offer negates a showing of hardship for (c)(1) variance relief. The cases Dallmeyer cited, 219 N.J. Super. at 139, all relied upon case law preceding the MLUL’s adoption or derived from the MLUL’s prior

iterations, when the distinctions between bulk and use variances and takings jurisprudence were erased or confused. See Lang, 160 N.J. at 54.

This “misperception” that inutility is essential for a (c)(1) variance stems from when use variances could be obtained pursuant to either subsection (c) or (d) of the MLUL’s predecessor and the pre-1948 land use statutes where evidence of undue hardship for a use variance “consisted of proof that the property could not reasonably be adapted to a conforming use.” Ibid. That is no longer required: Davis states an offer does not become relevant until after a hardship is already proven, 105 N.J. at 482; Ten Stary Dom holds evidence of the absence of offers are permitted, but not mandatory, 216 N.J. at 30.

Here, Ms. Ehlen concluded that a (c)(1) variance was unavailable because Mr. Gaines offered to purchase the Proposed Subdivision, 16 T39-17 to 40-22, 55-2 to -11, and because any hardship would be self-created, 16T 140-3 to -23. Neither conclusion is grounded in the law.

First, the Gaines offer does not qualify as a fair market offer. This Court has already determined that with contingent contracts like the Eddi Contract, an adjoining property owner’s offer must equal or exceed the contract price. Kogene Bldg. & Dev. Corp. v. Edison Twp. Bd. of Adjustment, 249 N.J. Super. 445, 450 (App. Div. 1991) (quoting Allen v. Hopewell Twp. Zoning Bd. of Adjustment, 227

N.J. Super. 574, 592 (App. Div. 1988)). The offer of \$675,000 is \$50,000 less than the Eddi Contract's purchase price. Compare Ja177, with Ja423-24.

Second, in crediting Ms. Ehlen's reliance upon Dallmeyer, a case she admitted that she did not read before concluding the Church lacked a (c)(1) hardship, 16T 77-13 to -21, the trial court erroneously accepted an outdated legal interpretation of hardship, as discussed supra. Put simply, Mr. Eddi's expert (Mr. Art Bernard) was correct: Mr. Gaines' offer for the Proposed Subdivision, without more, cannot defeat an application for a (c)(1) variance. 7T 53-17 to 55-12.

Moreover, the decision at trial flew in the face of the Law Division's previous ruling, discussed supra, that struck the Church's impossibility and impracticability defenses. That ruling was the law of the case. Underwood v. Atl. City Racing Comm'n, 295 N.J. Super. 335, 340 (App. Div. 1996) ("Prior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous."). The trial court erred in failing to recognize or follow that prior decision.

Third, Ms. Ehlen's secondary rationale—that the hardship would be self-created, 16T 140-2 to -17—fails for similar reasons. A property owner's creation of a non-conforming condition is not dispositive of whether a qualifying hardship exists. Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 591 (2005) (quoting Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 606 (1980)). Indeed,

the prototypical reason why a hardship is deemed self-created is when the landowner had a means of avoiding the need for variance relief and failed to do so. See, e.g., Jacoby, 442 N.J. Super. at 470 (finding the property’s condition did not require a reduction in the number of parking spaces that necessitated (c)(1) variance relief); Egeland v. Zoning Bd. of Adjustment, 405 N.J. Super. 329, 335 n.1 (App. Div. 2009) (observing the plaintiff could have “rejoin[ed] the two lots to create a single fully conforming lot”); Green Meadows v. Montville Planning Bd., 329 N.J. Super. 12, 21 (App. Div. 2000) (finding a self-created hardship when the developer could seek one fewer subdivision to create seven conforming lots).

Here, the location of the parsonage prevented the Church from creating a subdivision with sufficient frontage and area. 7T 18-6 to 19-10. As the Property exists, it is impossible for the Church to create a subdivision with sufficient depth to comport with the R-1 Zone’s requirements. 7T 17-9 to 18-3. These undisputed facts pertaining to the exceptional conditions of the Property and the Proposed Subdivision demonstrate a qualifying hardship for (c)(1) variance relief.

Because Mr. Gaines’s offer does not negate (c)(1) hardship, and because the Proposed Subdivision would not be a self-created hardship, it was erroneous for the court to credit Ms. Ehlen’s conclusion that (c)(1) variance relief was unavailable.

B. Mr. Eddi Established the Positive Criteria for (c)(2) Variance Relief When the Law is Correctly Applied. (Raised Below: Ja125-28, 131, 134)

Alternatively, the record demonstrates the trial court erred in holding Mr. Eddi failed to establish that the Board would have granted (c)(2) variance relief for the Proposed Subdivision. Rather than applying the law regarding (c)(2) variance relief to the facts adduced at trial, the court held it did not know whether the Board would find either expert’s analysis persuasive, adding that it did not find the presence of undersized lots throughout the R-1 Zone would convince the board to grant the application. Ja134. Again, this was legal error.

A board may grant a (c)(2) variance “where in an application or appeal relating to a specific piece of property the purposes of this act . . . would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment” N.J.S.A. 40:55D-70(c)(2); Ten Stary Dom, 216 N.J. at 30. No hardship is required for a (c)(2) variance, but an applicant must prove the negative criteria. See Ten Stary Dom, 216 N.J. at 30-31. The focus is on the land’s characteristics “that present an opportunity for improved zoning and planning that will benefit the community.” Kaufmann, 110 N.J. at 563 (emphasis in original).

An applicant for a (c)(2) variance must establish that (1) “the purposes of the MLUL [(listed in N.J.S.A. 40:55D-2)] will be advanced,” in addition to the negative criteria: (2) “the variance can be granted without substantial detriment to the public

good,” with the benefits of the variances outweighing any detriment, and (3) “the variance will not substantially impair the intent and purpose of the zoning plan and ordinance.” See Jacoby, 442 N.J. Super. at 471. Not every purpose enumerated at N.J.S.A. 40:55D-2 must be met to satisfy the first factor. See id. at 471-72; Kaufman, 110 N.J. at 563-64.

On the first factor, Mr. Bernard testified that the Proposed Subdivision would advance four purposes of the MLUL. 7T 43-18 to -22. The Proposed Subdivision would (1) promote the public health, safety, morals and general welfare, 7T 43-23 to 45-8; (2) provide adequate light, air, and open space, 7T 45-9 to 46-10; (3) promote the establishment of appropriate population densities that will contribute to the wellbeing of persons, neighborhoods, communities, ad regions and a preservation of the environment, 7T 46-12 to 47-3; and (4) promote the conservation of historic sites and districts’ open space, energy resources, and valuable natural resources of the State and prevent urban sprawl and the degradation of the environment through improper use of the land, 7T 47-4 to 47-20.

In contrast, Ms. Ehlen determined the Proposed Subdivision would not promote the MLUL’s purposes based on legally erroneous and conclusory assertions. For subsection (a), Ms. Ehlen said the Proposed Subdivision would not promote the general welfare because a single-family residence is not an inherently beneficial use. 16T 41-12 to 42-12. This, however, confuses the issue; an applicant does not have

to show the property’s use is inherently beneficial to qualify as promoting the general welfare. Cox & Koenig, N.J. Zoning & Land Use Admin. § 29-3.3, at 435 (GANN 2024); see N.J.S.A. 40:55D-70(c)(2) (“[T]he fact that a proposed use is an inherently beneficial use shall not be dispositive of a decision on a variance under this section”).

For subsection (c), Ms. Ehlen merely observed an undersized lot “by its nature will intrude more into the light, air, and open space,” because it “would be closer to the adjoining properties.” 16T 42-13 to -23. This conclusion was predicated on a loss of a mere six feet in setback. 16T 123-12 to 124-7. Ms. Ehlen’s only additional testimony was that the proposed house could be considered “visually oversized” for the Proposed Subdivision. 16T 44-4 to -16. The record shows that no structure exists on Mr. Gaines’s Lot 13.03, that Mr. Gaines never intended to build a structure on that lot, see 15T 212-22 to 213-3; Ja519, and that the Proposed Subdivision’s house would be at least fifty feet away from the church building, 7T 49-1 to -6. Any intrusion on the light, air, and open space of the neighboring properties would be de minimis. Cf. Loscalzo v. Pini, 228 N.J. Super. 291, 297-98, 304 (App. Div. 1988) (neighboring property owner “used her lights constantly, even on a sunny day, and her air flow ha[d] been practically extinguished”).

On subsection (e), Ms. Ehlen said the Proposed Subdivision would somehow contradict the establishment of appropriate population density by adding one, single-

family house to the R-1 Zone. 16T 46-8 to -22. She added that the Proposed Subdivision would “revers[e]” the trend of lot consolidation and movement toward oversized lots. 16T 46-8 to -22. The fact the Proposed Subdivision would be non-conforming purportedly violated subsection (g) as well. 16T 46-23 to 47-8. For subsection (i), Ms. Ehlen stated the Proposed Subdivision would “visually disrupt the continuity of this portion of the neighborhood” and thus “would be noticeable,” because it would be the only lot with less than 100 feet of frontage. 16T 47-9 to -22. Ms. Ehlen also found subsection (j) violated because the construction of a house on the Proposed Subdivision would interfere with the church’s historical context by placing a home near the church and parsonage. 16T 47-23 to 48-10. Lastly, for subsection (m), Ms. Ehlen stated only that the Proposed Subdivision would not fall under this criterion. 16T 48-11 to -21.¹⁰

Nothing in Ms. Ehlen’s testimony as to subsections (e) through (j) demonstrates a conflict with the MLUL’s purposes. The Proposed Subdivision would support a single-family residence, consistent with the R-1 Zone. See Kaufmann, 110 N.J. at 565-66 (finding the benefits substantially outweighed the detriments when the variance would promote a use consistent with the applicable zoning ordinances).

¹⁰ Ms. Ehlen’s testimony concerning subsection (m) should be ignored as it is not implicated by the Proposed Subdivision. See Ten Stary Dom, 216 N.J. at 33 (observing valid zoning purposes may not be implicated by a particular application and should not be considered).

Ms. Ehlen’s reliance on visual continuities and historical contexts serve only to vindicate why variance relief is appropriate. Cf. Chirchello v. Zoning Bd. of Adjustment, 78 N.J. 544, 561 (1979) (“The less of an impact, the more likely the restriction is not that vital to valid public interest.”); Morris Cnty. Fair Hous. Council v. Boonton Township, 230 N.J. Super. 345, 357 (App. Div. 1989) (finding the denial of a variance arbitrary “because [the] plaintiff would not commit itself to a particular architectural style”). When not outright conclusory, Ms. Ehlen’s opinions do not negate Mr. Bernard’s findings that four of the MLUL’s purposes would be advanced by the Proposed Subdivision.

C. Mr. Eddi Established the Negative Criteria Required for (c)(1) and (c)(2) Variance Relief. (Raised Below: Ja125-28, 131, 134)

N.J.S.A. 40:55D-70 makes clear that “[n]o variance . . . relief may be granted under the terms of this section . . . without a showing that such variance . . . relief can be granted without [(1)] substantial detriment to the public good and [(2)] will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.”¹¹ The public good factor is predicated upon the variance’s effect on adjacent properties. Lang, 160 N.J. at 57. The operative word is “substantial.” Medici v. BPR Co., 107 N.J. 1, 22 n.12 (1987) (quoting Yahnel v. Bd. of Adjustment,

¹¹ The Court has interpreted “zone plan” to mean the municipality’s master plan. See Medici, 107 N.J. at 21.

79 N.J. Super. 509, 519 (App. Div. 1963)). The inquiry is limited to the surrounding properties to balance the benefits of variance relief against any claimed detriments to the public good. Jacoby, 442 N.J. Super. at 471.

The second factor focuses on “whether the grant of the variance can be reconciled with the zoning restriction from which the applicant intends to deviate.” Lang, 160 N.J. at 57. With regard to (c)(1) and (c)(2) variances, the burden is slight—being no more than a “relatively uncomplicated issue” Id. at 57-58. Indeed, the Supreme Court has acknowledged undersized lots are “almost always entitled to a dimensional variance.” Ten Sary Dom, 216 N.J. at 31 (quoting 36 N.J. Prac. Land Use L. § 15.9, at 364 (David J. Frizell) (3d ed. 2005)).

Mr. Bernard testified that the Proposed Subdivision would not cause a substantial detriment to the public good. 7T 48-8 to 50-25. Reviewing the surrounding neighborhood, Mr. Bernard found that the need for a depth variance would pose no obstacle to subdivision approval as most of the properties on Eaton Avenue’s west side had the same lot depth, showing the lot would easily fit in the surrounding neighborhood. 7T 48-8 to -19; see Ja499. For lot width and area, Mr. Bernard also found the requisite variances would not pose a substantial detriment to neighboring properties. 7T 48-19 to -22. The house Mr. Eddi proposed to build would have had a height consistent with the R-1 Zone, complied with all setbacks, and been set sufficiently apart from other nearby buildings. 7T 48-22 to 49-1.

Mr. Bernard added that, on the Proposed Subdivision's north side, the house would be at least fifty to sixty feet from the church, which is "substantially further back than a house would have to be on an adjoining lot." 7T 49-1 to -6. Even further, Mr. Bernard "emphasize[d]" the Proposed Subdivision would have benefited the public good because the sale's proceeds would be used to maintain the Church's building. 7T 49-7 to -13. This would benefit not just the immediate neighborhood, but the wider area. 7T 49-14 to -19.

On the impact to the zoning plan, Mr. Bernard found the Proposed Subdivision's impact would be mitigated by the fact both single-family residences and churches are permitted in the R-1 Zone. 7T 49-20 to -24. Since Mr. Eddi committed to building a house that complied with the R-1 Zone's height and setback requirements, Mr. Bernard likewise found the Proposed Subdivision's impact with regard to its lot width and area shortfalls were also mitigated. 7T 49-25 to 50-4. He added that the Proposed Subdivision would enhance the zoning plan, rather than take away from it. 7T 50-4 to -9. In conclusion, Mr. Bernard noted the Proposed Subdivision was one lot that required three (c)(1) variances in an area with numerous non-conforming lots, with lot sizes of a similar area across the street and on both sides of Stuyvesant Avenue. 7T 50-10 to -16. Based on this analysis, Mr. Bernard testified that, to a reasonable degree of certainty based on all the aforementioned

information, if the Church had applied for the Proposed Subdivision and variances, such relief would have been granted. 7T 28-5 to -16.

Ms. Ehlen, on the other hand, improperly considered lots scattered throughout the R-1 Zone, 7T 50-17 to -25—almost 350 lots all over the district, 16T 23-7 to 24-7, instead of just “the surrounding properties,” as required under Jacoby, 442 N.J. Super. at 471. From this, Ms. Ehlen repeated much of her flawed, conclusory testimony about the first (c)(2) factor. She found the Proposed Subdivision would fail the negative criteria because the Proposed Subdivision’s deficient frontage “would be in direct conflict with the visual continuity of the . . . neighborhood” and “would be contrary to the zone plan and master plan.” 16T 52-19 to 53-8. Similarly, Ms. Ehlen added that the Proposed Subdivision would be contrary to historical trends in the R-1 Zone. 16T 53-9 to -22. In short, Ms. Ehlen identified the detriments of the Proposed Subdivision as “creating an undersized parcel and breaking up the visual continuity of the neighborhood.” 16T 55-2 to -16.

Discontinuity of lot width—of either the visual or historic-tend type—does not rise to the substantial harm envisioned by the negative criteria. Any deviation has some tendency to impair the public good. See Medici, 107 N.J. at 22 n.12. What matters is whether the Proposed Subdivision would “cause such damage to the character of the neighborhood as to constitute ‘substantial detriment to the public good.’” Ibid. (quoting Yahnel, 79 N.J. Super. at 519). Further, any “discontinuity”

harms that might exist are far outweighed by the benefits Mr. Bernard testified to at trial. See Kaufmann, 110 N.J. at 565-66.

When the law is properly applied, the evidence adduced at trial shows Mr. Eddi established that it was more likely than not that the Board would have approved the Proposed Subdivision, 7T 28-5 to -16. This, of course, assumes contrary to Point I-B, supra, that defendants could even question the certainty of variance relief since the situation was made hypothetical by their own wrongdoings.

For (c)(1) variance relief, the record shows Mr. Eddi proved a hardship based on the Proposed Subdivision's physical characteristics. The only factor defendants mustered in opposition was Mr. Gaines's post-Eddi Contract offer of \$675,000, which (1) was legally insufficient to constitute a fair market offer, Kogene Bldg., 249 N.J. Super. at 450 (quoting Allen, 227 N.J. Super. at 592), and (2) is not dispositive of hardship, as discussed supra, with the added infirmity of being based on the "impossibility" and "impracticability" defenses that the Law Division struck before trial. For (c)(2) variance relief, Mr. Bernard's testimony that the Proposed Subdivision would advance the MLUL's purposes is uncontroverted as Ms. Ehlen could offer only conclusory and unsupported assertions in opposition.

On the negative criteria, defendants' reliance on supposed visual discontinuity and dubious historic trends fail to show a substantial disruption to neighboring properties or that the Proposed Subdivision's single-family home would

substantially impair the master plan. Such de minimis impact to the public good and the zoning plan's intent and purpose do not constitute the substantial detriment required by the MLUL.

For all these reasons, this Court should reverse the decision below as regards the Church, with instructions to enter judgment in the amount of \$2,152,000 (the amount proven by Mr. Eddi at trial, see Point IV, infra) based on the now-undisputed Law Division finding of the Church's breach of contract. Alternatively, this Court should vacate the dismissal of Mr. Eddi's claims against the Church and remand for a new trial on the quantum of damages only.

III. THE TRIAL COURT MISAPPLIED THE LAW OF TORTIOUS INTERFERENCE IN DISMISSING MR. EDDI'S CLAIMS AGAINST MR. GAINES. (Raised Below: Ja141-43, 147-50)

In dismissing Mr. Eddi's tortious interference claim against Mr. Gaines, the trial court erroneously found the Gaines Contract was executed after the Eddi Contract was terminated. Ja149-50. Further, the trial court's conclusions as to tortious interference and back-up contracts, Ja148, were legally insupportable.

Tortious interference with contractual relations exists when one "intentionally and improperly interferes with the performance of a contract . . . between another and a third person not to perform the contract," causing the other pecuniary loss due to the third person's failed performance. Nostrame v. Santiago, 213 N.J. 109, 122 (2013) (quoting Restatement (Second) of Torts § 766). In

determining impropriety, courts apply a balancing test, looking at the factors in the Restatement (Second) of Torts § 767. Nostrame, 213 N.J. at 122. A party intentionally interferes with a contract when there is no justification or excuse for the conduct. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 736, 751 (1989).

The trial court first erred by finding the Gaines Contract could not be a factual basis for Mr. Eddi's tortious interference claim because the written Gaines Contract was executed on June 4, 2021. Ja149-50. As the court itself found, the December 15, 2020 email between defendants "clearly indicates that the offer by [Mr. Gaines], and the acceptance by the Church, was subject to" the Eddi Contract. Ja148. A contract is formed from offer and acceptance. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). A contract is legally enforceable when the "parties agree on essential terms and manifest an intention to be bound by those terms" Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 135 (2020) (quoting Weichert Co., 128 N.J. at 435).

Defendants agreed to the sale of the Proposed Subdivision for \$675,000 on December 15, 2020, Ja237, meaning the Gaines Contract arose during the pendency of the Eddi Contract, not after it. That the final agreement was not signed until after the Church sought to terminate the Eddi Contract is of no import. See Flanzman, 244 N.J. at 135-36 ("So long as the basic essentials are sufficiently definite, any gaps left by the parties should not frustrate their intention to be bound." (quoting Berg Agency

v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 377 (App. Div. 1975)); see also Landmark Inv. Grp., 124 A.3d at 853, 858-60 (discussed further infra).

Second, the trial court’s holding that the Church’s “failure to perform its contractual obligations . . . do[es] not create the basis for a claim that [Mr.] Gaines interfered with” the Eddi Contract, Ja149, is misplaced. Tortious interference arises only when a defendant “induc[es] or otherwise caus[es] the third person not to perform the contract” Restatement (Second) of Torts § 766; see also id. at § 766B. One cannot tortiously interfere with a contract unless a third party (here, the Church) fails to perform its contractual duties; the tortious interference inquiry thus focuses on the defendant-actor, Mr. Gaines, not the Church, contrary to the Law Division’s position. Id. at § 767; see Nostrame, 213 N.J. at 122.

Third, although there is little New Jersey case law on the effect of back-up contracts, the out-of-state case law the court did find demonstrates it erred as a matter of law in excusing Mr. Gaines’s conduct. Specifically, Landmark Inv. Grp. shows that even a true back-up contract (unlike the Gaines Contract here, which was labeled a back-up contract only belatedly, evidently to try to evade tortious interference liability) can trigger liability for a tortious interference claim.¹²

¹² The other cases the trial court relied upon include only passing references to back-up contracts, devoid of any relevant analysis. See Ja148.

There, the plaintiff entered a contract to purchase an environmentally contaminated property subject to several contingencies. 124 A.3d at 851-52. Unbeknown to the plaintiff, the defendant's president then initiated negotiations with the property owner to purchase the same property. Id. at 852. The property owner told the defendant of the existing contract but nevertheless entered a back-up contract for the property. Id. at 852-54. When the property owner learned public funding for environmental remediation was unavailable, it took the position that the plaintiff's contract was void. Id. at 853. The plaintiff disagreed and attempted to resolve the issue, while the property owner and the defendant further established contractual terms. Ibid. After the property owner repudiated the plaintiff's contract, the plaintiff filed suit; a formal contract between the defendant and property owner was finalized thereafter. Ibid.

The jury found the defendant tortiously interfered with the plaintiff's contract. Id. at 855. The trial court, however, granted the defendant's motion for judgment notwithstanding the verdict, finding, relevant here, that back-up offers were not tortious as a matter of law. Id. at 855-56.

The Connecticut Supreme Court unanimously reversed. Id. at 851. The Court stated that the defendant's conduct must be viewed as a whole, considering the factors elaborated upon at the Restatement (Second) of Torts § 767. See Landmark Inv. Grp., 124 A.3d at 860-61. In this endeavor, the Court held the defendant's back-

up contracts were evidence of tortious interference. See id. at 861. This included consideration of the back-up contracts' terms. See id. at 854, 861. From the totality of the evidence, the jury's verdict was adequately supported in the record. Id. at 862. In light of the dearth of precedential authority and the similarities between this case and Landmark, this Court should adopt the Connecticut Supreme Court's thorough reasoning and hold that back-up contracts can be evidence of tortious interference.

With this legal framework, the record shows Mr. Gaines tortiously interfered with the Eddi Contract and procured the Church's breach. For these reasons, this Court should reverse the trial court's dismissal of Mr. Eddi's tortious interference claim with instructions to enter judgment against Mr. Gaines in the amount of \$2,152,000. Alternatively, this Court should vacate and remand to assess the totality of the evidence considering the factors in Restatement (Second) of Torts § 767.

IV. THE TRIAL COURT MISAPPLIED THE LAW ON DAMAGES.
(Raised Below: Ja135-36, 150)

As a final reason to dismiss Mr. Eddi's claims, the court found Mr. Eddi's calculation of lost profits damages to be insufficient. Ja135, 150. Citing discrepancies between the properties compared to determine the Proposed Subdivision's value and finding Blue Creek's estimate for building costs "incomplete," the court held Mr. Eddi was unable to establish damages. Ja135-36. In so doing, the court failed to credit the trial testimony and misapplied the law as to damages. This Court should reverse the damages ruling below and hold that Mr. Eddi

sufficiently proved his claimed damages of \$2,152,000 or, alternatively, vacate the damages ruling and remand for application of proper damage principles.

Factfinders are permitted “considerable speculation” in determining the amount of damages. 27-35 Jackson Avenue, LLC v. Samsung Fire & Marine Ins. Co., 469 N.J. Super. 416, 222 (App. Div. 2022) (quoting V.A.L. Floors, Inc. v. Westminster Cmtys., Inc., 355 N.J. Super. 416, 424 (App. Div. 2002)). The standard of reasonable certainty applies to the fact of damage, not the amount. Ibid. (quoting Tessmar v. Grosner, 23 N.J. 193, 203 (1957)). A plaintiff need only provide a “reasonably accurate and fair basis for the computation of alleged lost profits” V.A.L. Floors, 355 N.J. Super. at 424 (quoting J.L. Davis & Assocs. v. Heidler, 263 N.J. Super. 264, 276 (App. Div. 1993)). Precision is not required. Ibid. (quoting Inter Med. Supplies v. EBI Med. Sys., 181 F.3d 446, 463 (3d Cir. 1993)).

But Mr. Eddi did prove his damages with precision. Mr. Eddi used the testimony of Dr. Donald Moliver, a licensed New Jersey real estate appraiser and professor of economics, finance, and real estate at Monmouth University, 6T 284-16 to 285-6, as an expert, 6T 290-23 to 291-1, to prove damages. From his assessment, Dr. Moliver concluded that Mr. Eddi sustained \$2.375 million in damages. 6T 292-19 to 293-17. Tellingly, Mr. Eddi’s damages proofs went un rebutted at trial.

Dr. Moliver reached his quantum of damages by first appraising the home to be built on the Proposed Subdivision and determining the market value to be \$4.3

million. 6T 293-18 to 294-15. This figure was informed by the very desirable neighborhood in which the Proposed Subdivision lay as well as the exponential growth in real estate values during the pandemic. 6T 297-8 to 299-8.

From there, Dr. Moliver reviewed the plans for the proposed home and the builder's construction estimate, 8T 224-19 to 225-12, assessed the proposed home and—based on its size and square footage—reviewed four comparable sales in the Elberon neighborhood of Long Branch, 7T 182-10 to 184-14, from 2021 and 2022, 7T 192-25 to 193-20. After accounting for the comparable properties' variations and unique features, Dr. Moliver arrived at present-day values for each of the comparable properties, which led him to a valuation of \$4.3 million for the Proposed Subdivision. 8T 223-11 to 224-11. Dr. Moliver then subtracted from the \$4.3 million projected sales figure the contract price (\$725,000) and the construction costs (\$1.2 million) provided by Blue Creek, Ja500-06, and verified through Marshall Valuation Service, 8T 229-2 to 230-2, 236-13 to 237-1, to reach the figure of \$2.375 million in damages. 6T 294-16 to 295-7.

In opposition, defendants only raised issues about hypothetical additional costs related to the quality of finishes and features, e.g., 9T 198-3 to 200-6; 10T 208-7 to 212-8; 15T 168-14 to 170-17, and the specificity of the cost approximations, 15T 160-18 to 162-22. When asked about the unique amenities accompanying the comparable properties (such as pools), Dr. Moliver testified he accounted for those

features by adjusting his valuation downward. 9T 200-19 to 10T 202-7; 10T 225-13 to -17. Similarly, when asked about the features and fixtures that were absent from the building and architectural plans (such as kitchen cabinetry, appliances and other household finishes), Dr. Moliver assumed the installation of average finishings in his valuation. 10T 208-7 to 209-14; see 10T 227-4 to 228-8. If higher-end appliances and finishings were utilized, the home's valuation would only increase, and monetary damages would increase accordingly. 10T 208-7 to 210-3, 225-19 to -22, 226-11 to -14. On redirect, Dr. Moliver testified that the cost of the finishes would amount to between \$100,000 to \$150,000. 10T 228-16 to 229-8. In short, Dr. Moliver's damages calculation reflected an averaged minimum of lost profits, based on the reasonable assumption of average finishes.

Similarly, Mikhael Kakiashvili, the owner of Blue Creek, 14T 227-17 to -25, calculated permit fees, survey fees, home warranty fee, and the Freehold Soil fee to total approximately \$23,475, see 14T 254-8 to 255-2; 15T 163-15 to 165-1. He also approximated that the cost for the architect to be no more than \$5,000 since the proposed home would require minimal changes to fit on the Proposed Subdivision. 15T 171-2 to 172-12. Mr. Kakiashvili even pointed out that many of the items that defendants focused on were not required for a certificate of occupancy or would be mutually exclusive. 15T 151-20 to 153-11. Moreover, he explained that the \$1.2 million construction cost included allowances for the cost of labor to install finishes.

14T 253-4 to 254-7; 15T 166-15 to 167-12. Defendants' examination of Dr. Moliver and Mr. Kakiashvili simply reduced Mr. Eddi's lost profits from \$2.375 million, to \$2.152 million when one then accounts for the New Jersey Realtors Transfer Fee taken from the \$4.3 million valuation.

The trial court, however, failed to account for the downward adjustments Dr. Moliver made toward the valuation and determined Blue Creek's "incomplete" estimate of construction costs made it impossible to determine lost profits. Ja135-36. The fact that construction costs were incomplete does not prevent redress for Mr. Eddi's injury when a minimum, reasonable valuation of lost profits was ascertained. This was all that Mr. Eddi was required to proffer. Supra at Point I-B.

The lack of detailed costs regarding interior fixtures, finishings and appliances was rendered uncertain solely because the Church failed to take any step towards fulfilling the Eddi Contract. Ja121. The same applies to the hypotheticals defendants threw at Mr. Kakiashvili. Mr. Eddi never reached the point of considering the details of kitchens, cabanas or landscaping because his time, money and focus was directed at ensuring that the Church applied for the Proposed Subdivision, see, e.g., Ja228, 236; 3T 73-6 to 75-20; 9T 23-24 to 24-6, a necessary precondition to the construction details, Ja517, and one that the Church never tried to satisfy, Ja121. Mr. Eddi never had an opportunity to move past the stage of initial building plans. Ja517; 9T64-1 to -13; see also Ja491-96.

Far from speculation or conjecture, Mr. Eddi presented uncontested proofs from Dr. Moliver, and the building plans and testimony of construction cost from Mr. Kakiashvili, who built an identical home less than two miles away, see 9T 43-17 to 44-7, 44-21 to -25; 13T 236-9 to 238-5, 246-11 to 247-7; 14T 236-9 to -25. In response, defendants raised only doubts and speculation that defendants made unverifiable due to their own inaction and misconduct. Harris, 41 N.J. at 464-65. The law does not countenance such a defense: “The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created.” Bigelow, 327 U.S. at 265; see also Harris, 41 N.J. at 465; supra at Point I-B.

CONCLUSION

For the foregoing reasons, Mr. Eddi respectfully requests that this Court reverse that part of the Law Division’s July 29, 2024 Order for Judgment with regard to his breach of contract claim against the Church and tortious interference claim against Mr. Gaines with instructions to enter judgment against defendants in the amount of \$2,152,000. In the alternative, Mr. Eddi respectfully requests that this Court (1) vacate the dismissal of his breach of contract claim against the Church with a limited remand to determine the quantum of damages and (2) vacate the dismissal of Mr. Eddi’s tortious interference claim against Mr. Gaines and remand for determinations of liability and damages under proper legal principles.

LITE DEPALMA GREENBERG & AFANADOR, LLC

Dated: February 26, 2025

/s/ Bruce D. Greenberg

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Superior Court of New Jersey

Appellate Division

Docket No. A-00070-24

ELY EDDI,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
<i>Plaintiff-Appellant,</i>	:	SUPERIOR COURT
	:	OF NEW JERSEY,
	:	LAW DIVISION,
vs.	:	MONMOUTH COUNTY
	:	
	:	DOCKET NO. MON-L-1866-21
	:	
ELBERON MEMORIAL	:	Sat Below:
PRESBYTERIAN CHURCH, 1101	:	
INVESTOR LLC AND COLIN	:	
GAINES,	:	HON. LINDA GRASSO JONES,
	:	J.S.C.
	:	
<i>Defendants-Respondents.</i>	:	

BRIEF FOR DEFENDANTS-RESPONDENTS

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PROCEDURAL HISTORY

Plaintiff filed his Complaint against the Church on May 28, 2021. Ja 1-9¹ Thereafter on June 7, 2023, Plaintiff filed an Amended Complaint over Respondent Church's objection. The Amendment added 1101 Investor LLC and Colin Gaines, its managing member [Ja 523-527], as Defendants, asserted a Consumer Fraud Count against the Church, and a Tortious Interference Count against 1101 Investor and Gaines. [Ja 25-47]. The Defendants filed their Answer, the Church asserted Counterclaims, and Plaintiff Eddi responded thereto. [Ja 10-20; Ja 21-24; Ja 48-74; Ja 75-80].

Cross-Motions for summary judgment were filed wherein Plaintiff sought to dismiss Defendants' affirmative defenses of impossibility and impracticability, and Defendants sought to dismiss the Amended Complaint in its entirety. [Ja 81-82; Ja 83-84]. On February 28, 2024, the Court denied Defendants' motion [Ja 83-84], and granted Plaintiff's motion striking the defenses of impossibility and impracticability [Ja 81-82]. The import of the Court's ruling striking these defenses reflected its finding that the offer by Mr. Gaines on behalf of 1101 Investor to purchase the proposed subdivided parcel to consolidate with his adjacent property for a fair market value did not render

¹ Respondents are utilizing the same designations for the Joint Appendix and the Trial Transcripts as have been employed by Appellant. Respondents have added a Respondents' Appendix, which contains one item marked as Da1-2.

the grant of the variances required by Eddi to be impossible. Nevertheless, the ruling did not prevent Defendants from asserting their argument that the Gaines offer eradicated the Church's hardship under (c)(1) thereby removing the positive criteria for relief thereunder, and that the factfinder at trial, be it a judge or jury could still find that Eddi had not proved the subdivision and variances would be granted by the Planning Board. In that event, Eddi would have nothing. [1T62:12 to 63:8; 63:9 to 64:8].

The case was tried before Judge Grasso Jones over a nine day period between March 18 and April 2, 2024 followed by post-trial submissions. At the end of Plaintiff's case, Eddi withdrew his claim for specific performance with prejudice thereby relinquishing any claim against the Church's subdividable property with prejudice and walking away from the opportunity to seek the subdivision and variances from the Planning Board under his Contract. [Ja 95, Ja 97, Ja 99].

On July 29, 2024, the Trial Court entered its Order for Judgment and Decision [Ja 85 etc.] dismissing all of Plaintiff's claims, granting the Church's Counterclaim to vacate the lis pendens on its property and denying the Church's Counterclaim seeking damages for Eddi's violation of the Good Faith Fair Dealing Implied Covenant. [Ja 85-86]. The ruling dismissing Eddi's claims was principally based on his failure to prove by the preponderance of

evidence that the Planning Board would have granted the subdivision and variances under his Contract. As a result, Eddi could prove no damages thereby causing his claims to fail. [Ja 131-132]. Secondly, the Court found that Eddi had not proven the amount of damages he would have sustained had the Planning Board granted the subdivision and variances. [Ja 135].

STATEMENT OF RELEVANT FACTS PROVEN AT TRIAL

Elberon Memorial Presbyterian Church (the “Church”) is the owner of property known as 70 Park Avenue, Long Branch, New Jersey, which is designated on the Tax Map as Block 18, Lot 16 (the “Property”). The Property is located in the R-1 Zone, and is improved with a two-story Church building, a one-story Parsonage and various walkways and driveways. There is also a vacant area of the Property located between the Parsonage and the southern boundary of the Property adjacent to both the neighboring properties identified as Lot 13.03, also known as 1102 Eaton Avenue on the south, and Lot 14, also known as 1101 Elberon Avenue on the west. These adjacent properties are owned beneficially by Colin Gaines through his entity 1101 Investor LLC. [11T H. Woolley 48:8 to 49:10; 51:14 to 23; 16T, B. Ehlen, PP 49:3 to 50:12; Ja 469 D-1 EV (Proposed Subdivision under Eddi Contract); Ja 470 D-2 EV (Proposed Consolidation of Subdivided Portion with Adjacent Property of 1101 Investor LLC under Gaines Offer)].

Lots 13.03 and 14 are not only adjacent to and contiguous with the Church Property, but also with each other, and together comprise a holding owned by 1101 Investor, LLC, which consists of approximately 47,000 square feet and meets all of the bulk requirements of the R-1 Zone. The Managing Member of 1101 Investor, LLC is Colin Gaines, who has constructed a two-story dwelling on Lot 14. [Ja 518 C. Gaines Deposition at Ja 523 (94:5-14); Ja 508 1101 Investor LLC, Amended & Restated Operating Agreement; Ja 470 D-2 EV Survey of Property].

Driven by the need for funds to maintain and repair its buildings, Elberon Memorial Presbyterian Church (the “Church”), determined during the early Spring, 2019 to sell the southernmost portion of its property by creating a proposed parcel for subdivision measuring 80 feet of frontage along Eaton Avenue and with a lot depth of 170.27 feet. These dimensions would create a total lot area of only 13,621.6 square where 17,500 square feet are required in the R-1 Low Density, Residential Zone, which also requires 100 feet of frontage and width as well as 175 feet of depth. [11T H. Woolley 51:14 to 52:2, 57:6 to 58:21]. In order to obtain the proposed subdivision, bulk variances for frontage/width, depth and lot area were also required to be approved. [16T B. Ehlen PP 20:4 to 13]. Based upon the location of the

Parsonage building and the required setback, this was all of the property that the Church could allocate to the subdivision. [11T H. Woolley 51:14 to 23].

Having spoken to the Long Branch Planning Director, who advised that the creation of a non-conforming, undersized lot would cause significant resistance to the subdivision application [11T H. Woolley 60:1 to 61:17] , Mr. Woolley initially engaged in or about mid- April, 2019 with Defendant Colin Gaines, the beneficial owner of the two properties adjoining the Church, to determine his interest in purchasing the proposed subdivided lot. [11T H. Woolley 61:18 to 62:25; Ja 173 JT-36 EV]. This inquiry made sense since Mr. Gaines as the adjoining owner could consolidate the undersized subdivided lot into his holdings and thereby avoid the need for the Church to obtain the bulk variances required for a stand-alone nonconforming lot. The concept of selling the proposed subdivided parcel to Mr. Gaines' entity, 1101 Investor LLC, for consolidation with its adjacent holdings, was also better received by the Long Branch Director of Planning. [11T H. Woolley 64:18 to 65:20; Ja 173 JT-36 EV].

Mr. Gaines expressed interest in purchasing the subdivided lot, but the Church was unable to come to agreement with him as to price. By late May, 2019, Howard Woolley acting on behalf of the Church had walked away and believed the negotiations with Mr. Gaines had been permanently terminated.

[15T C. Gaines 8:8 to 9:1-8]. The Church, at the suggestion of Church Board Member Robert Broege, then turned to the Sonya Grill Real Estate agency to see if a buyer could be obtained. [11T H. Woolley at 48:8 to 49:10].

On February 18, 2020, the Church entered a Realtor Form Contract with Plaintiff Eddi for the sale of the proposed subdivided lot measuring 80' by 170' on Eaton Avenue for \$725,000 subject to "owner getting a subdivision for a single family home with 40% lot coverage" and "zoning approval to build a single family home." [Ja 176 JT-2 EV]. The Realtor Contract was rejected by counsel for both parties [Ja 190 JT-4 EV] through JT-8 EV], and the contract underwent a lengthy period of attorney review during which the Church through its counsel emphatically advised Plaintiff that it was sincere in its desire to sell the proposed subdivided portion. [Ja 190 to Ja 202 JT-4 EV to JT 6 EV and JT 8 EV].

After nearly five months in attorney review, the Contract between the Church and Plaintiff was finalized on July 9, 2020. [Ja 202 JT-8 EV]. Pursuant to the Contract with Plaintiff, the Church undertook responsibility to prepare and submit the subdivision and variance application, and Plaintiff was responsible to provide the Church with building plans and other items required by the Planning Board demonstrating the proposed use for the subdivided property as a stand-alone lot. The Contract provided for an initial period of 6

months ending January 9, 2021 to obtain the approvals (the “Contingency Period”), which could be extended an additional 3 months ending April 9, 2021 at the Church’s election (the “Extended Contingency Period”). In the event that the required approvals were not obtained by the expiration of the Extended Contingency Period, either the Church or Eddi could terminate the Contract. [Ja 196 JT-6 EV at Section T., subparagraphs ii and iii].

Two pathways were theoretically available to the Church to apply for the bulk variances: (i) a hardship variance under *N.J.S.A.* 40:55d -70(c)(1) requiring the Church to demonstrate that “exceptional or undue hardship will result if the variance is not granted, the positive criteria,” and “that the variance(s) will not result in a substantial detriment to the public good or the zoning plan, the negative criteria.” *Dallmeyer v. Lacey Township Board of Adjustment*, 219 N.J. Super. 134, 139 (Law Div. 1987); *Commons v. Westwood Zoning Board of Adjustment*, 81 N.J. 597, 605 (1980), “Undue hardship involves the underlying notion that no effective use can be made of the property in the event the variance is denied.” and (ii) a flex variance under Section (c)(2), which requires a showing in addition to the foregoing negative criteria that the proposed variance(s) constitute a better zoning solution for the community than the zoning requirements. The (c)(2) variance was not a viable alternative in this instance since our Supreme Court has found in *Kaufman v.*

Planning Bd. For Warren Tp., 110 N.J. 551, 563 (1988) that, “no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community [as a better zoning solution]” (clarifying brackets added). Clearly, creating an undersized lot with multiple nonconformities was not a better zoning alternative for the community than adherence to the zoning standards. [Cox & Koenig, *NJ Zoning and Land Use Administration* at Section 29-3.3, p. 442-443 (GANN Print Edition 2023); T16 B. Ehlen, P.P. 39:12 to 48:23].

Consequently, the Church was left with the (c)(1) hardship approach as the only viable option. Since the adjoining beneficial owner Mr. Gaines had not come to terms with the Church on price, and was not selling any of his property to the Church to avoid the variances, and the Church had no additional property to spare, Robert Broege, the Board Member managing the transaction, believed that the variance application would not be easy, but was at least not impossible. [13T R. Broege at 70:8 to 18].

The Church engaged the services of Charles Bell, L.S. to prepare the subdivision plat, but Mr. Bell could only go so far in that preparation without obtaining building plans from Plaintiff. [Ja 513 C. Bell Deposition at 65-67]. Although Eddi does not dispute that the Church needed these plans in order to prepare a complete subdivision application, Eddi contends that he was unaware

of this requirement and the Church was obligated to provide him notice thereof. Nevertheless, the Church did not provide any notice to Eddi that the subdivision application was being delayed due to the lack of building plans, as the Trial Court found the Church was obligated to do under the Contract with Eddi. [Ja 85 Decision at Ja 113-114].

In the course of this delay, however, in mid-September, 2020 Howard Woolley was given an unexpected opportunity to speak with Mr. Gaines, who inquired as to the status of the subdivision and advised that he was still interested in purchasing the proposed lot and consolidating it with his existing lots. Mr. Woolley informed Mr. Gaines that the Church was under a conditional contract that could not be terminated, but that the Church would consider a conditional contract with Mr. Gaines that would be subject to the Church's present obligation. This position was confirmed by Mr. Woolley and Mr. Gaines in e-mails with Mr. Broege on September 16, 2020. [Ja 229 JT-16 EV]. Mr. Gaines expressed that his goal was not to have somebody put up a house in my backyard. It significantly decreases the value of our property. [Ja 521 C. Gaines Deposition at Ja 521 83:4-10].

By late September or early October, 2020, Gaines agreed in principle with Broege on behalf of the Church to the purchase price of \$675,000, which equaled the amount of the fair market appraisal that the Church had previously

commissioned [JT-40 ID], contingent on Gaines' own appraisal supporting that value. [13T R. Broege at 61:3 to 9].

At this point, Broege informed Nelson Cunha, the broker working with Eddi, and the sole channel used by Eddi to communicate concerning his Contract, that the Church was considering a backup Contract with Mr. Gaines. This resulted in a more detailed discussion with Cunha on "the effect it would have on the subdivision if Mr. Gaines is interested in buying it or is offering to buy it." [13T R. Broege at 57:22 to 58:18; 70:8 to 18]

At the time that the Church entered into the Contract with Eddi on July 9, 2020 following attorney review, Mr. Broege believed that it was not impossible for the Church to obtain the subdivision in connection with the Eddi Contract. After Mr. Gaines offered \$675,000 in October, 2020, Mr. Broege believed that the Church's subdivision application under the Eddi contract "could not survive Mr. Gaines being involved." Mr. Broege based this belief upon his participation as a member of the Oceanport Planning Board for 15 years and his practice of law since 1971. [13T R. Broege at 57:22 to 58:18; 59:11 to 15].

The basis for any bulk variance that the Church required under (c)(1) for the Eddi contract was wholly dependent upon the Church being able to demonstrate hardship. [Cox and Koenig, *New Jersey Zoning and Land Use*

Administration (GANN, 2023) at Section 29-1, p. 429]. A valid hardship basis is essential to seek one or more bulk variances under (c)(1). [16T B. Ehlen, PP 50:13 to 51:6]. The concept of hardship in this regard refers to the characteristics and conditions of the subject property in that the owner seeking to subdivide and create an undersized lot requires the variance due to the size, shape, topographical conditions and other features that create the hardship.

The existence of the Gaines offer at fair market value to purchase and consolidate the proposed undersized lot into his adjacent larger land holding that required no variances wholly avoided the creation of an undersized, residential lot in the Low Density R-1 Zone and eliminated the Church's hardship. "When an adjoining property owner is willing to pay a fair and reasonable price for the undersized vacant property, the applicant may either sell or retain the property. Should the applicant decide to retain the property, however, the court could find that since he is able to receive full price for the property, exceptional hardship no longer exists and, therefore, the requested variance should not be granted." *Nash v. Board of Adjustment*, 96 N.J. 97, 106 (1984); *Chirichello v. Zoning Board of Adjustment*, 78 N.J. 544, 555-556 (1979):

It would certainly be consonant with the interest of all parties to deny a variance conditioned on the purchase of the land by adjoining property owners at a fair price. The immediate benefit

to the adjoining property owners of maintenance of the zoning scheme and aesthetic enjoyment of surrounding vacant land adjacent to their homes is self-evident. The owner of the odd lot would suffer no monetary damage having received the fair value of the land. Of course, if the owner refused to sell, then he would have no cause for complaint.

The (c)(2) flex variance could not apply because the subdivision under the Eddi Contract did not constitute a better zoning alternative than the Zoning Ordinance provisions for the R-1 Zone.²

The required hardship could only be substantiated by the Church demonstrating that there was no such offer from an adjoining owner to purchase the proposed subdivided parcel, that it could not provide any additional portion of its Property for inclusion within the subdivided portion, and that no adjoining property could be purchased by the Church to add to the subdivided lot in order to render it conforming to the requirements of the R-1

² Cox & Koenig, supra. at Section 29-3.3, p.442: “*Kaufman v. Planning Bd. For Warren Tp.*, 110 N.J. 551, 563 (1988), speaking to the general concept of the (c)(2) variance, stated, that: ‘by definition, then, no (c)(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a (c)(2) case, then, will not be the characteristics of the land, that, in light of current zoning requirements, create a ‘hardship’ on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.’”

Zone. [Cox & Koenig (Drill and John-Basta), *New Jersey Land Use and Administration* (GANN, 2023 Print Edition), Section 30-1-2, pp.456-457]

On December, 15, 2020, Mr. Gaines, having received the appraisal that he commissioned and thereby confirming the value of the subdivision lot, made a firm offer to the Church to purchase the lot for \$675,000 subject to the contingencies of subdivision and consolidation approvals. [Ja 237 JT-19 EV].

Mr. Broege accepted the offer on behalf of the Church [*Id.* at JT-19 EV] and the parties commenced discussions for a backup contract, which was finalized on June 4, 2021 with the Church signing same on that date. [Ja 423 JT-33 EV]. At the time that Mr. Gaines signed this Contract with the Church on behalf of 1101 Investor LLC on June 1, 2021, he remained under the belief that this Contract was a backup contract subordinate to the Church's Contract with Eddi. [15T C. Gaines at 31:8 to 37:3]. Moreover, the Church consistently identified the Contract with 1101 Investor LLC as a back-up contract subject to the prior agreement with Eddi. [Addendum with Shaheen revisions sent to Crane on April 12, 2021 (Ja 296 JT-30 EV at Ja 302 and Ja 307) sets forth the Church's intent to enter into a backup contract with the "immediate neighbor," i.e., Mr. Gaines].

At this point in late December, 2020, Broege made inquiries through Cunha to determine whether Eddi would agree to terminate his contract with

the Church. [Ja 286 JT-21 EV containing Eddi's reaction to the Church's inquiries].

Plaintiff readily concedes that the subdivision to be sought by the Church under the Eddi Contract would require bulk (c) variances for Lot Area, Lot Frontage (Width) and Lot Depth. In addition, there are potential Side Yard, Rear Yard and Maximum Lot Coverage variances depending upon the design and additional improvements, such as a pool, that Eddi initially elected to construct. [9T E. Eddi at68:24 to 70:15].

On or about March 26, 2021, Eddi through his counsel, Mr. Crane, proposed an Addendum enabling him to extend the time to obtain approvals by ninety (90) days (from and after April 9, 2021) and proceed with the subdivision and variance application as the Applicant. [Ja 287 JT-28 EV at Ja 295]. On April 7, 2021, Mr. Crane sent to Mr. Shaheen two (2) pages from the Long Branch Application Form with a request that the Church sign and return same [Ja 296 JT-30 EV at Ja 303, 309-310], which would have authorized Plaintiff to proceed with the subdivision and variance application in his name as Applicant. As of April 9, 2021, the Eddi Contract was scheduled to expire pursuant to its terms. [Ja 195 JT-6 EV at Section T. subparagraphs ii and iii at p-0008-0009; JT-7 EV at Section T., subparagraphs ii and iii at P-0003-0004]. Neither Eddi nor the Church issued a time of the essence notice.

There remained, however, open issues as to the Addendum previously circulated by Mr. Crane concerning the specifics as to what would be deemed to be a final approval under the Contract with Eddi, reimbursement of certain costs (expressed as a blank line in Mr. Shaheen's revised draft), and confirmation that the Church was proceeding with a back-up Contract with the "immediate neighbor," i.e., Mr. Gaines.

To address these points, on April 12, 2021, Mr. Shaheen made reasonable additions to the Addendum, sent the revised Addendum to Mr. Crane, and advised him in the transmitting e-mail that the Church would sign the document as modified. [Ja 296 JT-30 EV at Ja 302 and Ja 307]. Although the amount of reimbursement sought by the Church was readily available to fill in the blank on the revised draft of Addendum, that information was never requested by Plaintiff, the revised Addendum was not signed by Eddi, and the opportunity was not pursued.

Throughout the latter weeks of April, 2021 and into May, 2021, the Church awaited Plaintiff's response to the revised Addendum that had been sent to Mr. Crane by Mr. Shaheen on April 12, 2021, but which was not forthcoming. [Shaheen Trial Testimony]. Plaintiff mysteriously failed to respond or otherwise react to the revised Addendum circulated by Mr. Shaheen. Ordinarily, where no time limit is set forth for completion, a

reasonable time limit is implied. *Ridge Chevrolet-Oldsmobile, Inc. v. Scarano*, 238 N.J. Super. 149, 155 (App Div 1990) citing *Becker v. Sunrise at ElkrIDGE*, 226 N.J. Super. 119, 129 (App. Div. 1988), *certif. denied*, 113 N.J. 356 (1988).

On May 27, 2021, nearly 7 weeks after the Extended Approval Period had expired and with no response to the Shaheen revised Addendum forthcoming from Plaintiff, the Church declined Plaintiff's request to extend the time to obtain approvals, causing the expiration of the Eddi Contract by its terms after affording more than a reasonable opportunity to Eddi to respond.

Mr. Shaheen issued a notice to Mr. Crane terminating the Eddi Contract. [Ja 404 JT-31 EV]. This litigation ensued with the filing of the initial Complaint on May 28, 2021 and the filing of a lis pendens against the Church's Property on June 7, 2021. **[JT-39 EV]**.

At no time prior to the Shaheen termination notice did Colin Gaines request the Church to terminate the Eddi Contract, nor did Mr. Gaines know that the Church was contemplating termination or that the termination notice had issued when he signed what he believed was a back-up Contract on behalf of 1101 Investor LLC with the Church on June 1, 2021. Mr. Gaines did not become aware of the termination until after June 4, 2021 when he received his copy of the fully executed Contract with the Church followed by a copy of the Complaint as filed on behalf of Eddi. **[Gaines Trial Testimony]**.

LEGAL ARGUMENT AND ANALYSIS

I. STANDARD OF REVIEW

In strict reliance on the language of the cases cited, Respondents contend an appellate court’s review of final determinations made by the trial court sitting in a non-jury case is limited and well-established. *Balducci v. Cige*, 456 N.J. Super. 219, 233 (App. Div. 2018), *certif. granted* 240 N.J. 574 (2020), *citing Seidman v. Clifton Sav. Bank*, 205 N.J. 150, 169 (2011). The [trial] court’s findings of fact are “binding on appeal when supported by adequate, substantial, credible evidence.” *Balducci v. Cige*. at 456 N.J. Super. 233, *citing Cesare v. Cesare*, 154 N.J. 394, 411-412 (1998). [Bracket added]. The appellate court does not “disturb the factual findings and legal conclusions of the trial [court] unless” “they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.” *Balducci v. Cige*. at 456 N.J. Super. 233, *citing In re Forfeiture of Pers. Weapons & Firearms Identification Card Belonging to F.M.*, 255 N.J. 487 (2016), *quoting Rova Farms Resort, Inc. v. Inv’rs Ins. Co.*, 65 N.J. 474, 484 (1974). “Deference is especially appropriate ‘when the evidence is largely testimonial and involves questions of credibility.’” ³*Balducci v. Cige* at 240

³ “That is so because an appellate court’s review of a cold record is no substitute for the trial court’s opportunity to hear and see the witnesses who testified on the

N.J.594-595, quoting *Cesare v. Cesare*. *Supra* at 412, quoting *In re Return of Weapons to J.W.D.*, 149 N.J. 108, 117 (1997). The trial court’s factfindings may not be overturned unless the appellate court concludes “that those findings are ‘manifestly unsupported’ by the ‘reasonably credible evidence’ in the record.” *Balducci v. Cige* at 240 N.J. 595, citing *Seidman v. Clifton Sav. Bank, S.L.A.*, *supra* at 205 N.J. 169, quoting *In re Tr. Created By Agreement Dated Dec. 20, 1961*, 194 N.J. 276, 284.

II. PLAINTIFF CANNOT CLAIM DAMAGES UNDER A THEORY OF BREACH OF CONTRACT OR TORTIOUS INTERFERENCE SINCE HE FAILED TO PROVE THE SUBDIVISION AND BULK VARIANCES, WHICH ARE THE CONDITIONS PRECEDENT OF HIS CONTRACT WITH THE CHURCH, WOULD BE OBTAINED.

Plaintiff is precluded from seeking damages in terms of a purchase under the Contract with the Church in regard to the under-sized proposed subdivided lot, which is contingent upon obtaining subdivision approval and bulk variances.⁴ The variances were required since the proposed lot would be

stand.” *Balducci v. Cige* at 240 N.J. 595, citing *State v. Elders*, 192 N.J. 224, 244 (2007).

⁴ As a practical matter, the Church previously offered Plaintiff both in April, 2021, before the Eddi Contract was terminated, and in October, 2022, following the inception of this litigation, the opportunity to submit an application in his name as Applicant for the subdivision with required variances as specified in the conditions precedent under the Eddi Contract with the Church. *See*, Ja 296 JT-30 EV at Ja 302 and Ja 307, consisting of the e-mail transmittal dated April 12, 2021, from David Shaheen, Esq. to Barry Crane, Esq., and the marked-up Addendum that the

nonconforming concerning multiple bulk requirements of the R-1 Zone in Long Branch as to lot area, frontage and width, depth and potentially maximum coverage as well as side yard setbacks based upon the building plans dated October 31, 2021 produced by Plaintiff in discovery [JT-15 EV] and the

Church was willing to sign, but to which Plaintiff never responded [6T D. Shaheen 205;10 TO 19], and Respondent's Appendix Da 1 D-3 EV(Conditionally) admitted conditionally [T1 59:3-14] for the limited purpose of documenting this October 6, 2022 E-Mail from Defendants' counsel to Barry Crane was in fact sent offering Eddi the opportunity to submit his subdivision and variance application to the Long Branch Planning Board. This latter Exhibit has been approved for use by Defendants in this matter based upon a prior Motion in Limine ruling addressing same. Eddi rejected this latter opportunity unless Colin Gaines and 1101 Investor LLC agreed to refrain from objecting to the application before the Planning Board, a measure to which Plaintiff is clearly not entitled since Mr. Gaines is the beneficial owner of property located within 200 feet of the Church and is deemed a party "immediately concerned" under *N.J.S.A. 40:55D-6* with a statutory right to notice and participation in the public hearing under *N.J.S.A. 40:55D-12*. While a specific performance claim to purchase the subdivided parcel cannot succeed without the predicate subdivision and variance approvals being granted, providing Plaintiff with the opportunity to submit a subdivision and variance application to the Long Branch Planning Board in his own name as applicant would be the most reliable method of determining whether the conditions precedent under Eddi's Contract can or cannot be achieved. Near the conclusion of the trial, however, Plaintiff voluntarily withdrew his specific performance claim over Defendants' strident objection. The Court granted the voluntary withdrawal with prejudice and with the additional condition that Plaintiff was also withdrawing any equitable claim to proceed before the Long Branch Planning Board by application to obtain the subdivision of the undersized lot under his Contract. [Decision at Ja 95, 97, 98-99] Consequently, Plaintiff voluntarily waived any right to the opportunity to definitively prove whether or not the conditions precedent under his Contract would be satisfied.

intentions expressed by Plaintiff in this litigation. [9T E. Eddi at 67:2 to 70:15].⁵

Generally, no liability can arise on a promise subject to a condition precedent until the condition is met. *Allstate Redevelopment Corp. v. Summit Assocs.*, 206 N.J. Super. 318, 324 (App Div. 1985). By its very nature, a conditional promise becomes absolute only upon performance of the prescribed condition. Both futurity and uncertainty are ordinarily the elements of a condition of this class. If to the knowledge of the parties, the event constituting the condition precedent has already happened or cannot possibly happen, the promise, as applicable to the pertinent event or lack thereof, is either absolute or nugatory from the outset, and this is true whether the parties are aware of the facts or not. *Williston on Contracts* (Rev. Ed.) Section 663; *Duff v. Trenton Beverage Co.*, 4 N.J. 595, 605 (1950).

⁵ Plaintiff subsequently substituted the building plans admitted as JT-15 EV at Ja 491 with plans prepared for another residence constructed in Deal, New Jersey for a party unrelated to Plaintiff and entered into evidence as P-4 EV at Ja 471. Since these plans have not been prepared or designated for Plaintiff or the subject site, and would not qualify to obtain building permits for the subject subdivided parcel, even if the required subdivision and variance approvals were granted to create the non-conforming lot, there is no specific evidence in the record as to how this residence would fit or whether additional variances may be needed. At the very least, however, variances for lot frontage/width, lot depth and lot area would be required, and the resulting lot would be undersized and otherwise non-conforming.

Moreover, the inability of Plaintiff to prove that he could perform or achieve the condition precedent, as applicable, renders allegations of contractual breach and tortious interference irrelevant. “If the promisee could not or would not have performed the condition, or it would not have happened whatever had been the promisor’s conduct, the condition [precedent] is not excused.” *Creek Ranch, Inc. v. New Jersey Turnpike Authority*, 75 N.J. 421, 432 (1978) citing 5 Williston, *Contracts*, Section 677 at 231-232 (3d ed. 1957).

In our case, Plaintiff was unwilling and unable to perform under his Contract with the Church and accept title because the conditions precedent to the obligation had neither been met nor waived. The subject intended parcel could not be sold without the grant of a subdivision approval with the necessary bulk variances. Furthermore, whether such conditions would be met constitutes an element of Plaintiff’s claims for which he bears the burden of proof and was unable to satisfy that burden.

Eddi cannot show that the Long Branch Planning Board would have granted the subdivision application presented in accordance with the contract between Eddi and the Church, however, and Eddi has thus failed to prove by a preponderance of the evidence that he has suffered damages – the loss of the profit on the development of the property – as a result of the Church’s failure to pursue the subdivision application. Because Eddi cannot show that he suffered monetary damages – the loss of the profit on the property – his claim of breach of contract

against the Church cannot succeed. Decision at Ja 125.⁶

Where a subdivision approval was an implied condition of the contract and was not fulfilled, remedies under that contract were properly denied. *Popular Refreshments, Inc. v. Fuller's Milk Bar*, 85 N.J. Super. 528, 540 (App Div 1964), *certif. denied* 44 N.J. 409 (1965).

The controlling principle of law in this matter governing Plaintiff's ability or inability to obtain damages against Defendants under the currently asserted claims for breach of contract and/or tortious interference can be stated in the following manner: "If the contracting party's rights are subject to fulfilling a condition precedent, then that contracting party may not complain that the other party to the contract took actions to prevent the contracting party's performance, if the contracting party could not have performed the condition precedent regardless of the other party's actions. *Ross v. Annunziata*, 2012 N.J. Super. Unpub. LEXIS 453 at *15-*17 (App. Div.).⁷ In assessing

⁶ In order to succeed on the fourth element of the breach of contract claim, Eddi must prove a monetary loss. Without proof that the actions of the Church caused him monetary damages, Eddi cannot be awarded money damages on the breach of contract claim....Eddi did not and could not prove at trial in this matter that if the Church had filed a subdivision application in accordance with the contract between Eddi and the Church, the application would have been granted. [Decision at Ja 130-131]

⁷ This is the exact point made by the Trial Court in the Decision Ja85. Eddi failed to prove by a preponderance of the evidence that he could obtain the subdivision and required variances and thereby satisfy the condition precedent of his Contract

these circumstances, actions taken by the other contracting party as a matter of right are not deemed actionable interference.

In *Ross v. Annunziata, supra.*, the adverse parties entered into a written agreement to purchase at a bankruptcy auction ninety-eight unimproved lots. Under the agreement, the parties' actual ownership interests and profit shares would depend on their proportional contributions to the venture, but plaintiff Ross's participation was conditioned upon his funding of at least \$2 million. *Id.* at *2-*3. The parties agreed that the Bid for the purchase of the lots would be submitted in defendant Annunziata's name and that he would supply all financial information to the Seller in order to qualify to bid. *Id.* at *3. Ross deposited \$142,000 and Annunziata deposited \$120,000 with the Title Company so that Annunziata could become a qualified bidder. *Id.* at *3-*4.

Ross and Annunziata attended the bankruptcy auction, and Annunziata was the highest bidder on the lots with a bid of \$8 million. Ross, however never produced or proffered the \$2 million. Thereafter Annunziata formed an LLC and assigned to it his right to purchase. The LLC subsequently closed on the land purchase, and Annunziata refunded to Ross his \$142,000 bid deposit

with the Church. In the wake of that failure, Plaintiff could not prove he had been damaged and his claims must fail on that basis.

and an additional \$60,000 that Ross had previously contributed to the venture.

Id. at *4.

Ross disputed being left out of the transaction, and maintained that Annunziata intentionally prevented him from participating by withholding information regarding preparations to close and assigning the right to purchase to the LLC in which Ross held no interest. Annunziata countered that Ross failed to perform by not providing the \$2 million. This failure, in turn, compelled Annunziata to seek a larger contribution from another venture participant in order to successfully close. The Trial Judge granted summary judgment to Annunziata dismissing Ross's claims reasoning that even if Annunziata had denied Ross information about the closing and excluded him from the transaction, Ross had failed to demonstrate his capacity to obtain the \$2 million that was a condition precedent to his participation. *Ross v. Annunziata, supra* at *11-*12.

Based upon its review of the record evidence, the Appellate Division found "that Ross was incapable of producing the \$2 million, which was a condition precedent to his participation in the venture." *Id.* at *4-*5. Relying upon *Creek Ranch, Inc. v. N.J. Tpke. Auth., supra*. at 432 for its citation of 5 Williston, Contracts, Section 677 at 231-232 (3d ed. 1957) as referred to above, and *Ward v. Merrimack Mut. Fire Ins. Co.*, 332 N.J. Super. 515, 526

(App. Div. 2000) for the principle that “if a promisee lacks the financial wherewithal to perform a condition precedent, then the condition precedent is not excused, regardless of the promisor’s actions to prevent the promisee’s performance,” the Appellate Division upheld the Trial Judge’s grant of summary judgment dismissing Ross’s breach of contract claim. *Ross v. Annunziata, supra.* at *18-*19.

In doing so, the Appellate Division also addressed Ross’s claim of tortious interference against the co-defendants that were not part of the agreement between Ross and Annunziata. In that regard, the Appellate Division found that this claim “suffered from the same affirmity,” i.e.. Ross lacked the capacity to fund his participation in the venture. *Id.* at *23. “To establish the tortious interference claim, Ross had to prove ‘he had a reasonable expectation of advantage from a prospective contractual or economic relationship, that defendant interfered with this advantage *intentionally and without justification or excuse, that the interference caused the loss of the expected advantage, and that the injury caused damage.’” *Id.* at *23 quoting *Patel v. Soriano*, 369 N.J. Super. 192, 242 (App Div) [italics expanded], *certif. denied* 182 N.J. 141 (2004). Moreover, “[c]ausation is demonstrated where there is proof that if there had been no interference there was a *reasonable probability* that the victim of the interference would have*

received the anticipated economic benefit.” [italics added]. *Ross v. Annunziata, supra* at *23-*24 quoting *LaMorte Burns & Co. v. Walters*, 167 N.J. 285, 306 (2001). Since Ross failed to present any cognizable evidence that absent any actions by the defendants targeted on this claim, Ross would have been able to obtain the \$2 million, the Appellate Division upheld the dismissal of Ross’s tortious interference claim as well. *Ross v. Annunziata, supra.* at *24.

In our matter, the satisfaction of the conditions precedent under the Eddi Contract was rendered unlikely to a high degree of probability as a result of the Gaines fair market value offer to purchase the proposed subdivision lot and consolidate it with the adjacent holdings he beneficially owns, thereby removing both the need for the bulk variances and the creation of an undersized lot as well as any hardship basis the Church previously had for variance relief. [16T B. Ehlen 17:19 to 20:3; 52:19 to 53:8 to 55:16].

Furthermore, Colin Gaines and 1101 Investor LLC had the absolute right, both constitutionally and statutorily, to oppose the Eddi application and to submit their fair market value offer to the Church. Once that fair market value offer was received from Gaines, the Church possessed both the right and the duty to verify that offer as binding since the Church was further obligated to provide information regarding that offer to the Planning Board. *Dallmeyer v.*

Lacey Township Board of Adjustment, 219 N.J. Super. 134, 139 (Law Div. 1987). Mr. Gaines at all relevant times believed that through 1101 Investor LLC he was entering into a back-up Contract with the Church subject to the Eddi Contract. [15T C. Gaines at 28:14 to 37:3]. Understanding that Gaines and 1101 Investor possessed the absolute right both constitutionally and statutorily to submit a fair market offer to the Church, entering into a back up contract with the Church subject to Eddi's Contract cannot be deemed to constitute tortious interference with the Eddi Contract. This was a protected activity in which Gaines and 1101 Investor were allowed to engage. *See, Village Supermarket v. Mayfair*, 269 N.J. Super. 224 (Law Div. 1993 and *Jeep Eagle 17, Inc. v. Chrysler Financial Services Ams., LLC*, 2010 Bankr. LEXIS 4230* (Bk'cy NJ 2010), regarding immunity from claims for protected activity that facilitates a legal right discussed directly below.

It is indisputable that Mr. Gaines and his entity 1101 Investor, LLC are "interested parties" as defined under the Municipal Land Use Law at *N.J.S.* 40:55D-4 as a "person ... whose right to use, acquire, or enjoy property is or may be affected by any action taken under this Act..." Moreover, as in the case of Mr. Gaines, property owners located within 200 feet of the property at issue qualify not only as interested parties but as "parties immediately concerned" as well without any further showing as to how their property is affected by the

proposed development, *N.J.S.* 40:55D-6, and by their statutory right to notice under *N.J.S.* 40:55D-12.

As such, Mr. Gaines and his entity, 1101 Investor, LLC, have First Amendment and New Jersey constitutional rights to oppose pending applications and to take such actions to protect their own rights to use, protect and enjoy their property even where they are taking such steps against a business competitor. *Village Supermarket v. Mayfair*, 269 N.J. Super. 224 (Law Div. 1993).

In *Village Supermarket*, the plaintiff brought an action for interference with both contractual and prospective economic advantage against a business competitor trying to block plaintiff's variance application in order to build a supermarket. The defendant had not only opposed the application, but had also financially supported opposition by an objector owning property within 200 feet of the subject property. The court granted the defendant's motion to dismiss the tort action finding that the defendant competitor had standing to participate in the zoning proceedings. Moreover, the court found that where the defendant had standing to participate, its intent to prevent competition would not deprive it of that standing.

The court rested its opinion in part on *Statement in Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.

Ct. 1920, 123 L.Ed. 2d 611, 623 (1993) that “evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.” The court also concluded that allowing a tort suit to stop the competitor’s appearance before the board would chill First Amendment and New Jersey constitutional rights for the competitor and other potential objectors as well. These rights are protected under the Noerr-Pennington Doctrine where participation in advocacy, lobbying and other issues within the public arena including actions taken to influence proceedings before Planning and Zoning Boards are protected unless “objectively baseless, thereby falling within the sham exception to the doctrine. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S. Ct. 1920, 123 L.Ed. 2d 611 (1993), which held that if a party’s participation in litigation is objectively reasonable, its subjective intent is legally irrelevant rendering any allegation of improper motivation or anticompetitive goals also legally irrelevant.

A more recent ruling by the Appellate Division found that a business competitor clearly had standing as an interested person to challenge a Department of Transportation highway access permit because of its proximity to the applicant and the likelihood that traffic problems would negatively impact its business. *In re Issuance of Access Con. Lot*, 417 N.J. Super. 115,

126-127, 130-131 (App. Div. 2010).

The law recognizes the need to protect both contracts and prospective business relationships from tortious interference. *Van Natta Mech. Corp v. DiStaulo*, 277 N.J. Super. 175, 182 (App. Div. 1994). Ultimately, however, whether a cause of action for tortious interference exists turns on whether a legally wrongful act was committed.

In *Jeep Eagle 17, Inc. v. Chrysler Financial Services Ams., LLC*, 2010 Bankr. LEXIS 4230* (Bk'cy NJ 2010), the court dealt with allegations against defendant Chrysler for tortious interference arising out of its opposition at the Planning Board and Motor Vehicle Franchise Committee levels to Jeep's attempt to relocate its business. The court held that Chrysler was entitled to summary judgment dismissing the tortious interference claim because its obvious concern over the relocation of a competitor was reasonable and their subsequent conduct was calculated to achieve a legitimate business purpose.

The Church had both the right and the obligation to negotiate with Mr. Gaines once he reasserted his interest in the subdivision in mid-September, 2020. In *Dallmeyer v. Lacey Tp. Bd. of Adj.*, 219 N.J. Super. 134, 146 (Law Div. 1987), a case that has been widely cited and followed throughout New Jersey, Judge Serpentelli found that where a bulk variance for an undersized lot based upon a (c)(1) hardship is presented, the applicant is obligated to

demonstrate that efforts were made to bring the property into conformity with the zoning ordinance by attempting to acquire adjacent property or by offering to sell the nonconforming property to adjacent owners. Cases dealing with hardship in this context have recognized that hardship may be eliminated by an offer of “fair market value” for the property that eliminates the need to create or improve an undersized vacant lot. *Nash v. Board of Adjustment of Morris Tp.*, 96 N.J. 97, 101, 107, 109 (1984).

Moreover, the rights of the Church to receive an offer on the proposed subdivision from Gaines are reciprocal to him as well. *See, Cox & Koenig, supra.* at Section 30-1.2 pgs. 456-462. As property owners within 200 feet, Mr. Gaines and 1101 Investor LLC also possessed both free speech and statutory rights to oppose the application under the Eddi Contract and to submit their fair market value offer to the Church.

Since there is the high probability the condition precedent could not be satisfied in light of the Gaines’ offer due to the lack of hardship which is an essential qualifying condition for a (c)(1) variance, Eddie failed to prove by a preponderance of evidence that he could obtain the necessary subdivision and variances and was therefore barred from claiming damages under his causes of action for breach of contract and tortious interference. As a result, Plaintiff’s

breach of contract and tortious interference claims were properly dismissed because Plaintiff can claim no damages in the absence of that demonstration.

III. UNDER THE CIRCUMSTANCES OF THIS CASE, THE GAINES OFFER TO PURCHASE THE PROPOSED SUBDIVIDED PARCEL, WHICH RESULTED IN A SUBSEQUENT BACKUP CONTRACT WITH THE CHURCH, CAUSED THE EDDI SUBDIVISION, REQUIRING MULTIPLE BULK VARIANCES, UNLIKELY TO SUCCEED AS A MATTER OF HIGH PROBABILITY.

A. The Gaines Offer Caused the Preclusion of the Positive Criteria for a (c)(1) Hardship Variance And the Eddi Application Flat Out Failed to Qualify for a (c)(2) Flex Variance Since This Was Not an Opportunity for a Better Zoning Alternative to Benefit the Community.

The offer from the adjoining property owner, Colin Gaines through 1101 Investor LLC, to purchase the proposed subdivided lot at the fair market value of \$675,000 caused the loss of the Church's hardship justification for a (c)(1) variance, thereby eliminating the Church from qualifying for such relief. Before Gaines made the offer to purchase that was acceptable to the Church, the Church had no other recourse but to seek the required bulk variances because it could spare no additional land to create the proposed lot and the adjoining property owned by Mr. Gaines through 1101 Investor LLC was not available for a partial sale to enhance the Church's land holdings so that a conforming subdivided lot could be created. Under that scenario, the Church

had a qualifying hardship on which the required (c)(1) bulk variances could be based.⁸ The Church entered the Contract with Plaintiff in good faith and under the belief that the required variances could be granted under a (c)(1) hardship.

The Gaines offer, however, encompassed the consolidation of the proposed subdivided lot into his adjacent property removing any need for bulk variances, and which resulted in a 60,000 square foot contiguous property that met all of the bulk requirements of the R-1 Zone as opposed to the creation of an undersized lot under the Eddi Contract. With that firm offer from Gaines [Ja 237 JT-19 EV], the Church could no longer testify that it had a hardship under which the bulk variance relief required by Plaintiff's contract could be obtained, and the Church certainly could not fail to report the Gaines offer to the Planning Board under penalty of perjury. The (c)(2) flex variance was not available to the Church to obtain bulk relief because the undersized lot did not constitute a better alternative than adhering to the requirements of the zone.⁹

⁸ The (c)(1) variance is justified only upon the finding of hardship arising out of the exceptional narrowness, shallowness, shape or exceptional topographic conditions of a specific piece of property. *N.J.S.A.* 40:55D-70 (c)(1); Cox and Koenig, *New Jersey Zoning and Land Use Administration* (GANN, 2023) at Section 29-1, p. 429. A valid hardship basis constitutes the positive criteria for and is essential to seek one or more bulk variances under (c)(1).

⁹ The flex variance under (c)(2) is allowed where the purposes of the Municipal Land Use Law (MLUL) would be advanced by a deviation from the zoning requirements and the benefits outweigh any detriment to the public good. *N.J.S.A.* 40:55D-70(c)(2). This variance has nothing to do with the hardship or purposes of the owner, but is solely focused on the purposes of planning and zoning, and must

Moreover, even if the Church failed to inform the Planning Board of the Gaines offer, which provided a complete alternative to the creation of an undersized lot while meeting all of the Church’s economic needs, Mr. Gaines would assuredly advise the Board of his offer and its implications, which he would have every right to do as both an objector and a “party immediately concerned” (as defined in *N.J.S.A.* 40:55D-6) since he is an adjacent property owner within 200 feet of the proposed subdivision and a citizen or taxpayer with an interest in preserving the zone plan. Cox and Koenig, *New Jersey Zoning and Land Use Administration* (GANN, 2023) at Section 18-2.2, pp. 252-254. Deprived of its hardship justification for (c)(1) variance relief and unable to qualify under (c)(2), the Church had literally nowhere to turn thereby rendering its chances of a successful performance under the Eddi Contract, within a subdivision and variance application that required bulk variances, unlikely to a high probability. [16T B. Ehlen 18:23 to 20:3].

Once the Church received the Gaines fair market offer, it no longer had any hardship justification for the (c)(1) bulk variances essential to obtaining the variances needed for subdivision approval.

advance the purposes of the MLUL. *Kaufman v. Planning Bd. For Warren Tp.*, 110 N.J. 551, 563 (1988); Cox and Koenig, *New Jersey Zoning and Land Use Administration* (GANN, 2023) at Section 29-3.3, pp. 441-442.

B. The Ehlen Testimony Conclusively Demonstrated That Under the Pertinent Facts the Proposed Eddi Subdivision Was Highly Unlikely To Be Approved.

Defendants presented the Trial Testimony of Barbara Ehlen, PP in which she analyzed the impact of the Gaines offer through 1101 Investor, LLC, and concluded there is an unlikely probability to a high degree of successfully obtaining subdivision approval for the proposed configuration [pursuant to an Eddi application] under Subsection C of the State Statutes (NJS 40:55D-70) pertaining to planning and zoning in that the requested relief would not meet the statutory C-1 Hardship Criteria or the C-2 “Balance Test” Criteria for variance relief.” [16T B. Ehlen at 18:23 to 20:3]. In reaching this conclusion, Ms. Ehlen considered “the characteristics of the site wherein the established development pattern would preclude the creation of a nonconforming residential lot; the established characteristics of the neighborhood and its lot sizes; the presence of an alternate purchaser for the parcel wherein a nonconforming lot would not be created; and the historic pattern of the relief for deviations requested within the same zoning district.” *Id.*

In addressing the development pattern within the R-1 Residential District, Ms. Ehlen noted that the Long Branch Master Plan [Ja 437 D-9 EV] describes this District as “Single-Family Detached – Low Density” which is “meant to recognize and preserve the established character of the City’s single

family residential neighborhoods.”[*Id.*]. In analyzing the R-1 District, Ms. Ehlen found that 347 of the 352 lots in the District are held privately and predominantly improved with single-family homes and several houses of worship. She found a median lot size of 0.55 acres or 23,958 sq. ft. and a mean or average lot size of 0.876 acres or 38,159 sq. ft. or approximately 2.2 times the required minimum. Moreover, seventy-three (73%) percent of the lots within this District or 255 lots have a Lot Area at or above .40 acres (17,500 sq. ft.). [16T B. Ehlen 23:7 to 24:7]. On this basis, Ms. Ehlen found that the R-1 District is typified by conforming or oversized parcels and: “This cohesiveness is important to the character of and is a consideration in weighing variance applications for relief of area and dimension requirements.” [*Id.* at 28:23 to 29:13]. Ms. Ehlen also confirmed through her testimony that the R-1 Zone consists of a singular unified area running from Takanasee Lake on the north, bounded by Norwood Avenue on the west, the border with Deal Borough on the south and the Ocean on the east with the Church’s property located close to the center of this Zone. [*Id.* at 20:14 to 21:20].

Moreover, in reviewing Tax Maps for the City dating back to 1971, the immediate neighborhood of the Property underwent four (4) separate subdivision/lot line adjustments resulting in larger parcels causing Ms. Ehlen to further conclude: “Therefore, the trend, over time, within this portion of the

community is towards creating larger residential lots.” [*Id.* at 24:8 to 29:13].

In reviewing the Long Branch Master Plan [Ja 437 D-9 EV], Ms. Ehlen also noted that Land Use specific Objectives include: “Create land use districts and standards that are clear and concise and leave no doubt as to the intended location and intensity of land use.” The Land Use Plan element in the Master Plan further states: “It is the City’s intention, therefore, to provide for tightly managed growth that is consistent with the City’s goals and objectives by identifying the preferred location and intensity of future land uses. All development should be supportive of the immediate neighborhood and sensitive to its environmental context.” *Id.* at 29:18 to 31:14]. Ms. Ehlen further testified that the effect of the Eddi subdivision and creation of an undersized lot would be an increase to the density of development within this neighborhood. The parcel would be out of character and at a different scale than the established neighborhood pattern. *Id.* at 39:12 to 48:23

Proceeding with her analysis, Ms. Ehlen further stated that the bulk variances required by Eddi would need to qualify for either a C-1 Hardship variance or a C-2 Flex Variance. The C-1 variance requires a hardship to arise to the owner/applicant by reason of “exceptional narrowness, shallowness or shape of a specific piece of property or by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the

structures lawfully existing thereon” so that , “the application of any regulation would result in peculiar and exceptional practical difficulties to, or an exceptional and undue hardship upon the owner.” Ms. Ehlen concluded that in light of the 1101 Investor, LLC offer, the “subdivision, in this instance, would not benefit from a C-1 analysis as no hardship exists and any claim of hardship would be self-imposed.” *Id.* at 39:2 to 48:23; 52:19 to 53:8].

Considering the C-2 flexible variance, Ms. Ehlen testified that under such a variance the purposes of the land use law must be advanced by a deviation from the ordinance requirements and the benefits of the deviation outweigh any detriments.” [*Id.*].

Both variances must be able to be granted without substantial detriment to the public good and must be shown to not substantially impair the intent and purpose of the zone plan and zoning ordinance. [*Id.*] For the C-2 variance to be granted the Eddi application must demonstrate an “opportunity for improved zoning and planning that will benefit the community”, citing *Kaufman v. Planning Bd. For Warren Tp.*, 110 N.J. at 563 and *Cox & Koenig* 2014 Ed. At 6-28, p. 151. In examining the purposes of zoning as identified in NJSA 40:55D-2 regarding the subdivision proposed under Eddi’s Contract, Ms. Ehlen has listed purposes (a) through (q), has not found any applicable purpose that would be advanced, and has identified seven (7) applicable purposes to be

negatively affected. [Id. at 39:12 to 48:23]. .

Turning to the Long Branch Zone Plan and Ordinance, Ms. Ehlen further testified that the zone plan clearly seeks to establish an area of lower density, single-family homes and to preserve this established neighborhood. Both the master plan and local land use recognize the existing development pattern and the City's Planning Board has also worked to preserve this portion of the community. [Id. at 29:18 to 31:14].

In *Dallmeyer v. Lacey Tp. Bd. of Adj.*, 219 NJ Super. 134 (Law Div. 1987), decided by Judge Serpentelli, and a precedent presently applied by Boards throughout New Jersey, the *Dallmeyer* court found that, in order for an applicant to show hardship in obtaining bulk variances to develop a residential lot, the applicant must first: "...demonstrate that efforts were made to bring the property into conformity with the zoning ordinance by attempting to acquire adjacent property or by offering to sell the nonconforming property to adjacent owners."

In this instance, Ms. Ehlen further explained, an owner of adjoining parcels [Colin Gaines through 1101 Investor LLC] has come forth and offered to purchase the parcel at a price acceptable to Elberon Memorial Presbyterian Church. In acquiring the additional land, the adjoining property owner would be able to bring their [subdivided and purchased] lot into conformity with the

lot area requirements of the zone through consolidation with that owner's adjoining properties. This results in the elimination of an existing non-conformity and prevents the creation of an undersized parcel. [*Id.* at 53:23 to 55:16].

Ms. Ehlen rejected the contention that the Eddi proposed subdivision would meet the (c)(1) and/or (c)(2) criteria for bulk variance relief and found that the Eddi application for subdivision as a matter of high probability¹⁰ is unlikely to obtain approval based upon: (1) the characteristics of the site where the Church Property is currently conforming and a non-conforming residential parcel is proposed; (2) the established development characteristics of the zone wherein lots are typically at or oversized for the R-1 District; (3) the historic trend of undersized parcels being combined or lot lines being adjusted to create more conforming parcels; and (4) the existence of an alternate buyer for the parcel wherein the proposed non-conformity would be avoided. [16T B. Ehlen at 19:7-20:3; 55:2-16].

¹⁰ Ms. Ehlen explained that the high probability standard that she has employed in her analysis and conclusions constitutes an increased level of certainty over and above the reasonably certain standard customarily employed by experts.

C. Plaintiff Improperly Interprets the *Davis Enterprises* Case to Conclude That a Conditional Variance Is Not Applicable to the Subject Proposed Subdivided Lot Because It Will Be Derived From the Church’s Developed Property.

In *Davis Enterprises v. Karpf*, 105 N.J. 476, 481 (1987), our Supreme Court addressed the relationship between the offer of an adjoining owner to purchase the property in question for fair market value and the finding by the Planning Board that the “strict application” of the zoning requirements would result in “peculiar and exceptional difficulties to, or exceptional or undue harm upon, the developer of the property.” The facts involved are critical to the proper understanding of this case and the insupportable extent to which Plaintiff seeks to misapply this holding.

The underlying property in *Davis Enterprises*, supra. consisted of a fully developed undersized lot with a residence and a garage acquired by the contract seller in 1939 and occupied throughout the intervening years as the seller’s residence and for various commercial enterprises conducted in the home or garage. Seller contracted with the Karpf brothers, an attorney and a commercial real estate broker, for their purchase of the property for \$45,000 contingent on the Karpfs’ obtaining site plan approval to utilize the property as a law office and a real estate brokerage firm, which also involved the need for

certain bulk variances even though these conditions pre-dated the site plan application.

The property was surrounded by adjacent properties owned by Davis Enterprises, which had a history of opposing earlier variance applications for the subject property while attempting to purchase the property with below fair market value offers. Davis Enterprises ultimately made an offer to purchase the subject property for \$45,000 thereby matching the Karpfs' contract purchase price. The Davis Enterprises offer also entailed razing the existing improvements to construct a new building thereon and, after a lease for an adjoining gas station property expired in 5 years, to raze that improvement as well and consolidate the adjoining lot with the subject property, which "would almost equal" the required minimum lot size. *Id.* at 480.

In the interim, the Planning Board granted the Karpfs' site plan approval with the requested variances based upon its "finding that the property would be subject to exceptional or undue hardship if the variances were not granted (the 'positive criteria') and that the variances would not result in a substantial detriment to the public good or the zoning plan (the 'negative criteria')." *Id.* The Court also noted that the Planning Board expressly found that "...the applicant has the necessary hardship which allows the granting of the requested variances." *Id.*

On appeal of the Planning Board's decision by Davis Enterprises, the Law Division sustained the Planning Board's finding as to the positive and negative criteria, but further held that the variance should have been granted on the condition that Davis Enterprises be permitted to purchase the property at the offering price of \$45,000, which would eliminate the hardship. *Id.*

The Law Division further ruled that "the variances were to become null and void if Davis Enterprises made an unconditional offer to purchase the property for \$45,000 within 30 days." *Id.*

On further appeal by the Karpfs, the Appellate Division found the Davis Enterprises \$45,000 offer to be "fair and reasonable" and "declared the variances to be null and void." *Id.* at 480-481.

Reaffirming its earlier ruling in *Chirichello v. Zoning Bd. of Adjustment of Monmouth Beach*, 78 N.J. 544, 555-556 (1979), the Supreme Court in reversing the Appellate Division noted that:

A conditional variance recognizes that *adjacent owners have a heightened interest in the sale and development of adjoining property* and that the underlying purpose of zoning is to encourage the development of property in accordance with relevant land use requirements. Conditioning the grant of a variance on an adjacent owner's offer to purchase prevents the strict application of an ordinance from zoning property into inutility, *while avoiding the possible intrusion of substandard lots or structures into a neighborhood.* [Italics added for emphasis]

Id.; *Davis Enterprises v. Karpf*, *supra* at 482.

The Supreme Court also recognized that:

A conditional variance is strong medicine. It subordinates an owner's ability to use his or her property to another's desire to purchase it. [citation omitted] *Accordingly, we have limited our recognition of conditional variances to vacant residential land that requires a variance before the property is useable.* *Id.* at 484. [Italics added for emphasis]

In those cases, the Court further explained, “the only alternative to granting an unconditional variance would have been denying the variance(s) and thereby zoning the property into inutility, a result that would amount to taking the property. [citation omitted] *The conditional variances in those cases would not have deprived the owners of the right to use previously developed properties. To date, we have not recognized a conditional variance when the property is a developed commercial lot. Furthermore, we have never required the owner of a developed lot to sell that property to an adjoining owner when the [subject property] owner seeks only to construct an addition to an existing dwelling.*” *Id.* at 484.

In the final analysis, the Supreme Court's reversal of the lower courts in *Davis Enterprises*, supra. was based upon the ruling by the Planning Board that the Karpf application had demonstrated sufficient hardship to justify the grant of the required bulk variances thereby permitting these variances

applicable to pre-existing conditions that were not being newly created, to be approved [Italics added]. In doing so, the Supreme Court recognized that: “The proper scope of judicial review, however, is not to suggest a decision that may be better than the one made by the board of adjustment or planning board, but to determine whether the board could reasonably have reached its decision. *Id.* at 485 citing *Kramer v. Board of Adjustment, Sea Girt*, 45 N.J. 268, 285 (1965); *Kessler v. Bowker*, 174 N.J. Super. 478, 485 (App. Div. 1979), *certif. denied*, 85 N.J. 99 (1980). “Such a decision is presumed valid and should not be set aside unless it is arbitrary, capricious or unreasonable.” *Id.*

The subject property in *Davis Enterprises*, supra. was a fully developed undersized lot that had been in the seller’s ownership and used for various commercial purposes as well as serving as the seller’s residence for nearly 50 years before the *Davis Enterprises* case arose. The underlying contract between the owner and the Karpfs was for the sale of the entire property contingent upon obtaining site plan approval to enable a law office and a real estate brokerage office to operate on the property. *No subdivision was involved and no undersized lot was being created.* The need for bulk variances derived from the existing conditions at the property, and only came into focus because the Karpfs sought site plan approval to establish their respective offices thereon. The undersized lot was not being subdivided to create a non-

conforming vacant lot in violation of the zoning standards, and the Board found sufficient hardship at the property based upon its features to merit the bulk variances under (c)(1), which the Supreme Court upheld because there was sufficient basis in the record for the Board's decision.

Plaintiff's use of the Supreme Court's rulings in *Davis Enterprises* to exempt the subject proposed subdivision in our matter from being recognized as an undersized, vacant residential lot based upon the subdivision of the vacant lot from the Church's developed property, is a tortured misuse. Clearly, what determines the character of a subdivided parcel are its features post-subdivision once created.

Even the Eddi Contract identifies the proposed subdivision as creating a new single family residential lot. [Ja 195 JT-6EV at Paragraph T.(ii)]. This lot will be vacant, undersized and requiring multiple bulk variances before the subdivision can be granted and the lot used. The source of this proposed vacant, undersized residential lot, as being subdivided from an open space within the Church's developed Property, has nothing to do with the character of what it would be. The subject proposed subdivided parcel would be an undersized, non-conforming lot in violation of the bulk requirements of the R-1 District with all of the negative effects to the Master Plan, zone plan,

neighborhood and surrounding properties identified in *Chirichello v. Zoning Bd. of Adjustment of Monmouth Beach*, 78 N.J. 544, 555-556 (1979).

Plaintiff's failure to recognize these readily apparent circumstances coupled with the misuse of controlling authority to accomplish a skewed result exempting the proposed subdivision from the conditional variance procedure is both troubling and an assault on common sense. The subdivision became subject to the conditional variance procedure once the Church accepted Gaines fair market value offer to purchase and consolidate.

Even if we assume, however, for the benefit of the argument that the conditional variance procedure cannot be applied to the proposed subdivision on a mandatory basis, the Church would still be required to disclose the Gaines' offer to the Planning Board, and Mr. Gaines, through his statutory right to participate in the hearing, would also have the opportunity to inform the Board as to his willingness to purchase and consolidate at a fair market value price acceptable to the Church. Once in possession of this information, the Board recognizing the failure of the application under the Eddi Contract to meet the positive criteria under (c)(1) and (c)(2) and to satisfy the negative criteria regarding the impact on the public, zoning ordinance and Master Plan, would have the legal obligation to deny the proposed subdivision and variances as depicted in D-1 EV at Ja 469. The qualifying hardship or better

zoning solution do not exist and the negative impacts of the undersized lot could be wholly avoided by the alternative presented under the Gaines offer to consolidate the proposed subdivided parcel with the result depicted in D-2 EV at Ja 470.

IV. THE TRIAL COURT'S FINDINGS THAT PLAINTIFF'S LOST PROFITS ARE INADEQUATELY SPECIFIED AND FAIL TO SUPPORT THE DAMAGE CLAIM ARE BASED UPON SOLID FACTFINDING WHICH SHOULD NOT BE DISTURBED UNDER THE APPLICABLE STANDARD OF REVIEW.

At trial Plaintiff relied upon the appraisal of Donald Moliver to establish the fair market value of the single family residence Eddie intended to build on the subdivided parcel. Moliver, in turn, relied upon the opinion of Plaintiff's Planner Art Bernard that the subdivision and variance application would have been approved by the Planning Board, and upon the Blue Creek estimate of the cost to build the residence since the fair market value of the constructed residence less the costs to acquire the property and construct the residence constituted Plaintiff's damages. [9T D. Moliver at 188:8 to 189:1]

Moliver, however, recognized that his opinion as to fair market value was subject to an extraordinary assumption for if Plaintiff could not obtain that subdivision and variance approval, Moliver's opinion as to fair market value would be thoroughly undermined since the subdivision would not occur under Plaintiff's Contract and no residence could be built. [*Id.* at 185:23 to 188:4].

In addition, Moliver conceded that as many as 28 construction cost items were omitted from the Blue Creek cost estimate including, but not limited to, the entire kitchen installation from countertops to appliances, to cabinets and hardware as well as low voltage wiring for audio, phone and other systems throughout the residence. [*Id.* at 198:3 to 12; 214:24 to 215:13]. Moliver admitted that he had no numbers for the costs to complete the missing items and further conceded that the buyer of a \$4.3 million home would expect the items omitted from the construction costs to be present and installed within the home. [*Id.* at 208:7 to 209:25; 210:23 to 212:5]. Furthermore, none of Moliver’s comparables regarding his determination of value were undersized lots. [*Id.* at 220:12 to 16].

In light of the foregoing omissions and loose ends, the Trial Court found that “the proofs presented by Eddi as to the amount of damages, that is, the loss of profits that he has suffered because of the Church’s actions, is unconvincing... As is clear from Blue Creek’s estimate, the \$1.2 million estimate provided by Blue Creek did not include, among other items, permit fees, architectural plans, kitchen appliances, cabinets and hardware and kitchen installation, countertops, plumbing fixtures, audio, tv or phone system wiring, lighting fixtures, a front door, flooring, and many other items that are required in a finished home, let alone ‘extras’ such as a pool and landscaping. Blue

Creek's estimate was incomplete as a basis for calculating Eddi's claimed lost profits" [Ja 85 Order and Decision at Ja 135].

These barriers to Eddi's damage claim are secondary to his failure to prove that he would obtain the subdivision and variance approval in the first place. Mr. Moliver recognized this fact as an "extraordinary assumption" that must be fulfilled or Eddi would have nothing that he could claim.

In accordance with the Standard of Review set forth above, these findings by the Trial Court have ample support in the trial record of this matter and should not be disturbed.

CONCLUSION

Plaintiff's case is untenable and should never have been brought since he cannot demonstrate that under his Contract the subdivision with the required variances would be approved under any circumstance in light of the Gaines fair market value offer accepted by the Church. In fact, the goals of the R-1 Zone and the Master Plan, the analysis of the components within this zone constituting predominantly conforming lot size, the historical actions of the Planning Board in only granting subdivision applications in this zone that create larger lots and eliminate or substantially reduce nonconformity, and the direct applicability of the conditional variance procedure in conjunction with the adjoining property owner's fair market value offer fully acceptable to the

Church, which eliminated all non-conformity, mandate with high probability that the subdivision under the Eddi Contract would not succeed. As a result, Plaintiff simply and irrefutably failed to prove by a preponderance of the evidence that his application if presented to the Planning Board would succeed and he would obtain the subdivision and variance approvals needed to satisfy the condition precedents under his Contract. This failure arose from the inherent nature of such application having nothing to do with the Church's failure to perform or the alleged interference by 1101 Investor entering into a backup contract with the Church. In the absence of the subdivision and related variances being granted, Plaintiff can manifest no claim for damages, which in turn mandates dismissal of his claims.

Respectfully submitted,

/s/ Jeffrey A. Donner

JEFFREY A. DONNER, ESQ.

Dated: May 27, 2025

ELY EDDI,

Plaintiff-Appellant,

v.

ELBERON MEMORIAL
PRESBYTERIAN CHURCH, 1101
INVESTOR LLC AND COLIN
GAINES,

Defendants-Respondents.

:
: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
: DOCKET NO. A-00070-24
:
: ON APPEAL FROM THE SUPERIOR
: COURT OF NEW JERSEY,
: LAW DIVISION, MONMOUTH
: COUNTY
:
: Docket No. Below:
: MON-L-1866-21
:
: Sat Below:
: Honorable Linda Grasso Jones, J.S.C.

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT ELY EDDI

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PRELIMINARY STATEMENT

Defendants concede that the trial court found the Church breached the Eddi Contract. They do not even try to address the undisputed fact that Mr. Gaines tortiously interfered with the Eddi Contract, which he had no right to do, even though he had the right to oppose development of the Proposed Subdivision before the Planning Board. Defendants then rely on unfounded assumptions, outdated land use law, and the very uncertainty as to liability and damages their own actions caused. The law rejects such arguments. So should this Court.

On variance relief, defendants assume, without support, that the Gaines offer constitutes a fair-market-value offer. Case law states otherwise: the higher purchase price in the Eddi Contract represents fair-market-value. Using decades-old cases (one from the Law Division) that conflate the concepts of (c)(1) hardship and inutility, defendants claim that the Church had to negotiate with Mr. Gaines and that the Board was bound to deny the variance and subdivision applications because of the Gaines offer. More recent Supreme Court decisions distinguish between (c)(1) hardship and inutility, which defeats their position.

Ultimately, defendants rely on the assertion that it was impossible for Mr. Eddi to have obtained Planning Board approvals. But that impossibility defense was stricken on a pre-trial motion, and defendants have not appealed that ruling.

Defendants’ only argument against (c)(2) variance relief is the conclusory assertion that it does not apply—case law and the record show otherwise. Finally, to try to avoid liability and damages, defendants rest on the very claimed uncertainty that their own wrongful acts created. Black-letter law forecloses such a defense.

For all these reasons, and those stated in Mr. Eddi’s opening brief, this Court should reverse or, alternatively, vacate the Law Division’s July 29, 2024 Order for Judgment.

REPLY ARGUMENT

I. DEFENDANTS FAIL TO SHOW THAT NEITHER (C)(1) NOR (C)(2) VARIANCE IS LEGALLY WARRANTED.

Defendants’ variance-related arguments suffer from several infirmities. First, starting with (c)(1) variances, defendants assume, without support, that the Gaines offer was a fair-market-value offer. E.g., Db13, 26, 31. This is wrong. “[T]he market value of an isolated, undersized lot, under contract of sale on condition that the necessary variances are obtained, is the purchase price contained in that contract” Kogene Bldg. & Dev. Corp. v. Edison Twp. Bd. of Adjustment, 249 N.J. Super. 445, 451 (App. Div. 1991) (citation omitted); see Nash v. Bd. of Adjustment, 96 N.J. 97, 107 (1984) (“[T]he proper standard of valuation . . . assum[es] that all necessary variances have been granted.”). Pursuant to the Eddi Contract, the Proposed Subdivision’s fair market value was

\$725,000. Ja176-89. The Gaines Contract falls short. There is no authority to the contrary. Even the adjacent landowner's offer in Davis Enterprises v. Karpf, 105 N.J. 476, 480 (1987), was one equal to that of the outside purchaser.

This legal deficiency alone resolves Mr. Eddi's breach of contract claim in his favor. Once Mr. Eddi showed that he would have satisfied the positive and negative criteria for (c)(1) variances, he proved that he would have been entitled to that relief. See Nash, 96 N.J. at 106 (“[T]he applicants have satisfied both the positive and negative criteria of N.J.S.A. 40:55D-70(c), thereby establishing their right to a variance.”). Defendants' failure to show an offer equal to or greater than the Eddi Contract's \$725,000 purchase price is dispositive; even under their interpretation of the law, there would have been no grounds to deny (c)(1) variances.

Second, also on (c)(1) variances, defendants misinterpret the law as expounding a mandatory, rather than permissive, procedure regarding offers from adjacent landowners. The Church was not “oblig[ed] to negotiate with Mr. Gaines once he reasserted his interest in the [Proposed Subdivision] in mid-September 2020.” Db30, 39. Applicants “may include attempts to . . . sell the nonconforming lot to adjacent property owners”; there is no requirement. Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 30 (2013) (emphasis added). Nor would the mere presence of the Gaines offer—assuming it were fair-market-value—

eliminate the hardship. See, e.g., Db33-34, 47. “[A] board may recognize” a fair-market-value offer from an adjacent landowner, and the rejection of such an offer “may be viewed as eliminating the hardship” Davis, 105 N.J. at 482 (emphases added); see also id. at 483-84.

Similarly, and contrary to defendants’ erroneous assertions, Mr. Eddi’s position neither “misuse[s]” case law to exempt the Proposed Subdivision from the law on conditional variances, nor “assault[s]” common sense. Db47. The Board would not have been obliged to grant the Church the equitable remedy of a conditional variance. Nash, 96 N.J. at 106.

Third, the language that defendants cite and quote from Dallmeyer v. Lacey Township Bd. of Adjustment, 219 N.J. Super. 134 (Law Div. 1987), and Chirichello v. Zoning Board of Adjustment, 78 N.J. 544 (1979), does not account for more recent precedent. Defendants’ quote from Chirichello is in the middle of a paragraph that begins by considering “the salability of the land” as part of the hardship determination, considers the owner’s personal difficulties if the land is not sold, and ends by mentioning the land’s potential inutility, a discussion it resumes three paragraphs later. 78 N.J. at 555-57. Dallmeyer similarly concerns itself with the subject property’s potential inutility before holding that an applicant should attempt to sell the nonconforming land. 219 N.J. Super. at 141-46. See also Cox & Koenig, N.J. Zoning & Land Use Admin.

§ 30-1.1, at 453 (GANN 2025) (noting Dallmeyer placed “great weight” on confiscation “in deciding whether the positive and negative criteria have been satisfied”).

Yet the Supreme Court has more recently divorced the concept of a (c)(1) hardship from issues of salability or personal hardship, Lang v. Zoning Bd. of Adjustment, 160 N.J. 41, 53 (1999), as well inutility, id. at 54-55; Kaufmann v. Planning Bd. for Warren, 110 N.J. 551, 561-62 (1988). See generally Comm. Realty & Res. Corp. v. First Atl. Props. Co., 122 N.J. 546, 553-56, 560-62 (1993); Bressman v. Gash, 131 N.J. 517, 531 (1993) (Stein, J. concurring). The focus is limited to the property’s “exceptional narrowness, shallowness or shape,” “topographical conditions or physical features,” or “extraordinary and exceptional situation[s] uniquely affecting the . . . property or the structures lawfully existing thereon . . .” N.J.S.A. 40:55D-70(c)(1); Ten Stary Dom, 216 N.J. at 29. Defendants ultimately concede that the “concept of hardship . . . refers to the characteristics and conditions of the subject property . . .” Db11.

A fair-market offer does not address those criteria. See Chirichello, 78 N.J. at 556 (“The owner of the odd lot would suffer no monetary damage having received the fair value of the land.”); Cox & Koenig, 30-1.2, at 452 (“Clearly financial hardship is the issue involved in . . . consideration [of offers by

adjacent landowners].”).¹ Justice Stein’s concurrence in Davis Enters. best reflects the current state of the law:

The only variance cases in which offers to purchase the affected property may be properly considered are those in which the offer is germane to the particular claim of hardship that is advanced to support the variance. As our cases demonstrate, such offers have heretofore been found pertinent only where the claim of hardship is the inability to the property for any purpose. . . . Absent a variance claim based on inutility, evidence of offers to purchase the affected property should be excluded since they are irrelevant to the statutory criteria on which the municipal board is required to base its decision.

[105 N.J. at 494 (emphasis in original).]

See Kaufmann, 105 N.J. at 562 (quoting from Justice Stein’s concurrence approvingly for the distinction between the (c)(1) inquiry and inutility).

Once the Eddi Contract was formed, with Mr. Eddi’s intention to build a single-family residence on the Proposed Subdivision, the hardship the Church would present to the Board would be limited to that circumstance. The Church could not assert that failure to grant the variances would render the Proposed Subdivision inutile. Mr. Gaines’s desire to purchase the Proposed Subdivision,

¹ The majority opinion in Davis Enters. also recognized that the purpose of a conditional variance is to remedy potential, future claims of inutility, not any burden to the land. See 105 N.J. at 484.

at that point, was irrelevant.² Otherwise, the breadth of municipal ordinances collapses any (c)(1) variance inquiry into that of use variances and regulatory takings when faced with an isolated, vacant lot. Such an approach channels applications away from (c)(1) variances—which are supposed to be easier, see Ten Sary Dom, 216 N.J. at 31-32—and toward (c)(2) and (d) variances. Again, resolution of this legal issue favors Mr. Eddi as the Proposed Subdivision’s hardship was not inutility, but dimensional in nature.

Fourth, defendants’ bare recitation of Ms. Ehlen’s findings and opinions, Db35-40, does not address Mr. Eddi’s argument that they are legally erroneous. The trial court could not treat the testimony of Ms. Ehlen and Mr. Bernard as equal as a matter of law. When viewed under the correct legal principles, Mr. Eddi established the requisite criteria for (c)(1) or (c)(2) variance relief. See Pb22-34.

Fifth, on (c)(2) variances, defendants assume, without support, that the Proposed Subdivision would advance only the Church’s interests. E.g., Db7-8, 34. They overlook that the Proposed Subdivision would permit the creation of a

² Even if the Court does not wish to address whether a fair market offer can eliminate a (c)(1) variance hardship, the offer would still be irrelevant because, in this instance, there was no financial hardship. The Church was to receive \$725,000 under the Eddi Contract, Ja176-89—\$25,000 more than what it was seeking for the Proposed Subdivision, Ja175, and \$50,000 more than Mr. Gaines’s offer, Ja423-32.

single-family residence—a permitted use in the R-1 Zone—and allow for the renovation of the historic church building. See Pb31. These represent opportunities for improved zoning consistent with the MLUL, and in line with Kaufmann. Pb35-37; see, e.g., N.J.S.A. 40:55D-2(a), (c), (e), (j) (listing purposes of zoning advanced by the Eddi Contract).

Sixth, and finally, defendants’ position is an argument the Law Division precluded them from making at trial—that it was impossible for Mr. Eddi to obtain variance relief for the Proposed Subdivision. See, e.g., Db2, 11-12, 22, 32-34. Defendants’ use of “highly unlikely,” Db35, and “unlikely to succeed as a matter of high probability,” Db32, does not mask their true contention of impossibility.

If one accepted defendants’ position on (c)(2) variance relief, then Mr. Eddi’s only avenue for relief would be a (c)(1) variance. Both sides agree this requires a showing of hardship. But, if one further agreed with defendants’ position that “the Gaines offer eradicated the Church’s hardship under (c)(1)” and “thereby remov[ed] the positive criteria for relief,” Db2, “eliminated,” Db11, “caused the loss of,” Db32, or “[d]eprived the Church of its hardship,” Db34; if the event “cannot possibly happen,” Db20, because hardship is a necessary condition for (c)(1) variance relief, Db33 n.8, then the event is impossible. No amount of repetition of phrases like “highly unlikely” can

change the reality—that they rely on a defense the trial court dismissed, Ja81-82, an order they have not appealed.

This also undermines defendants’ back-up-contract arguments. If Mr. Gaines’s offer eliminated any chance for the Church to obtain (c)(1) variance relief, then the Gaines Contract did not back up the Eddi Contract, it destroyed and replaced it. Defendants thus acted either knowing or believing that their negotiations and eventual agreement would render the Eddi Contract impossible to perform. In either scenario, the Church acted in bad faith to undermine the Eddi Contract, voiding the condition precedent. See infra, Point II.

As such, this Court should reverse the July 29, 2024 Order for Judgment as to Mr. Eddi’s breach of contract claim. Alternatively, the Court should vacate and remand for a trial on damages.

II. DEFENDANTS’ RELIANCE ON THE UNCERTAINTY THEY CREATED IS CONTRARY TO BLACK-LETTER LAW.

Defendants’ primary argument opposing Points I.B and IV of Mr. Eddi’s opening brief is the mistaken claim that because of the Eddi Contract’s unfulfilled condition precedent of obtaining subdivision and variance approval, defendants cannot be liable under any theory raised in his complaint. Db18-22. This is incorrect, and defendants’ own legal authority shows as much.

Defendants’ own case law states that conditions precedent will be ignored in instances of fraud, bad faith, or when an obligor prevents the condition

precedent in violation of a contractual duty. Allstate Redev. Corp. v. Summit Assocs., 206 N.J. Super. 318, 324-25 (App. Div. 1985); see also Creek Ranch, Inc. v. N.J. Turnpike Auth., 75 N.J. 421, 432 (1979) (“The defendant should not be permitted to escape its obligation because it failed to negotiate promptly in good faith with the plaintiff or because it abandoned the project.”).

Relatedly, in a page-length footnote, defendants attempt to blame the case’s uncertainty on Mr. Eddi for withdrawing his request for specific performance. Db18 n.4. This argument should be ignored because it is limited to a footnote, State v. Williams, 461 N.J. Super. 80, 104 n.11 (App. Div. 2018), or rejected because it is legally incorrect. Mr. Eddi was free to change his requested relief at any point prior to the entry of judgment. See Newark Paraffine Paper Co. v. Dugan, 162 N.J. Super. 575, 577-78 (App. Div. 1978) (quoting 5A Corbin on Contracts, § 1220, at 461-65 (1964)). The only exception is when the defendant “makes a substantial change of position in reliance” on the initial relief sought before the change. Ibid. Defendants failed to make that showing at trial, Ja92-99, and fail here as well.

Ross v. Annunziata, 2012 N.J. Super. Unpub. LEXIS 453 (App. Div. 2012), Pra12-20, fares no better for defendants. There, the plaintiff failed his obligation to raise \$2 million. Id. at *2-4. Ross emphasized that distinct conditions precedent are analyzed separately, and party A’s failure to satisfy a

condition precedent obviates an inquiry into those of party B. See id. at *16 (“[I]f a promisee lacks the financial wherewithal to perform a condition precedent, then [that] condition precedent is not excused, regardless of the promisor’s actions to prevent the promisee’s performance.”); id. at *17 (“[T]he finding is unavoidable that Ross lacked the capacity to fulfill the condition precedent that would have triggered Annunziata’s obligations”). Unlike the Ross plaintiff, Mr. Eddi satisfied his initial obligation (the escrow deposit) under the Eddi Contract. As the Law Division found, “the subdivision plat was the first necessary step [before Mr. Eddi was required to furnish plans], and the Church failed to take any steps to obtain this necessary document.” Ja121.

Defendants’ reliance on Ross or Creek Ranch to assert that under no circumstance could Mr. Eddi satisfy the ultimate condition precedent of receiving Board approval for the variances runs headlong into the same problem discussed supra, Point I. Such an argument is, once again, merely the impossibility defense, which was dismissed before trial and not appealed.

In short, nothing contradicts Mr. Eddi’s position that, under settled contract- and tort-law principles, a defendant cannot benefit from the uncertainty he himself created as to liability or damages. See, e.g., Harris v. Perl, 41 N.J. 455, 464-65 (1964); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66 (1946); Hetzl v. Balt. & Ohio R. Co., 169 U.S. 26, 38-39 (1898); 8 Corbin

on Contracts §§ 40.16, 56.18; Restatement (Second) of Contracts §§ 245, 352 (Am. L. Inst. 1981); Restatement (Second) of Torts §§ 774A cmt. c, 912 cmt. d (Am. L. Inst. 1965). This Court should reject defendants' attempt to do just that.

Defendants' other gambit is to assert, cursorily, that Mr. Eddi did not prove damages with specificity. Db48-50. They provide only an abbreviated recitation of the testimony from Mr. Eddi's experts and fail to rebut the case law stating that Mr. Eddi need not have proven the amount of his damages with specificity, though he did in fact do so. Pb43-48.

The July 29, 2024 Order for Judgment should be reversed or vacated.

III. DEFENDANTS MISCONCEIVE MR. EDDI'S TORTIOUS INTERFERENCE ARGUMENT.

Defendants misunderstand Mr. Eddi's tortious interference theory. Mr. Eddi does not dispute that Mr. Gaines had a right to object to the Proposed Subdivision at the planning board. Mr. Eddi's theory of liability rests instead on Mr. Gaines's acts that induced the Church to breach the Eddi Contract. Pb40-43.

The distinction is crucial. And it renders defendants' case law inapposite. None of those cases involved a defendant's efforts to induce another party to breach a contract. See In re Issuance of Access Conforming Lot Permit No. A-17-N-N040-2007, 417 N.J. Super. 115, 119 (App. Div. 2010) ("The dispositive issue presented by this appeal is whether the Department of Transportation . . . is required, in reviewing an application for a highway access permit . . . to

consider . . . arguments submitted by a party who objects to the issuance of the permit.”); Van Natta Mech. Corp. v. Di Staulo, 277 N.J. Super. 175, 179-80, 182-83 (App. Div. 1994) (no allegations that the defendants interfered with the plaintiff’s contracts between it and a third party); Vill. Supermkt., Inc. v. Mayfair Supermkts., Inc., 269 N.J. Super. 224, 228 (Law Div. 1993) (“Village seeks damages allegedly resulting from [the defendant’s] opposition to Village’s variance applications before the planning boards”); Jeep Eagle 17, Inc. v. Chrysler Fin. Servs., Am., LLC, 2010 Bankr. LEXIS 4230, *2-3 (D.N.J. 2010) (the plaintiffs claimed the defendants’ efforts before the planning boards were “frivolous, motivated by malice[,] . . . objectively and subjectively baseless,” and designed solely to destroy their business), Pra1-11.

Conversely, the factual and legal similarities between this case and Landmark Investment Group, LLC v. CALCO Construction & Development Co., 124 A.3d 847 (Conn. 2015), indicate this Court should, at least, vacate and remand to assess the merits of Mr. Eddi’s tortious interference claim under the correct legal framework. There, as here, the issue was the defendant’s interference with the plaintiff’s pre-existing contracts with a third party, not the defendant’s efforts before the Connecticut’s Department of Environmental Protection. Id. at 852-53. It was the third party’s failure to perform, induced by the defendant, that prevented the grant of regulatory approvals and formed the

basis for the tortious interference liability. Id. at 853, 860. That is Mr. Eddi's tortious interference argument. This Court should thus reverse or vacate the July 29, 2024 Order for Judgment regarding Mr. Eddi's tortious interference claim.

CONCLUSION

This Court should reverse that part of the Law Division's July 29, 2024 Order for Judgment with regard to his breach of contract claim against the Church and tortious interference claim against Mr. Gaines with instructions to enter judgment against defendants in the amount of \$2,152,000. In the alternative, Mr. Eddi respectfully requests that this Court (1) vacate the dismissal of his breach of contract claim against the Church with a limited remand to determine the quantum of damages and (2) vacate the dismissal of Mr. Eddi's tortious interference claim against Mr. Gaines and remand for determinations of liability and damages under proper legal principles.

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