1650 Oak Street, LLC, Plaintiff, vs. Township of Lakewood Zoning Board of Adjustment, KBS Mt. Prospect, LLC, John Does 1-100 (a fictitious name for persons presently unknown) and XYZ, Inc. 1-100 (a fictitious name for a business entity presently unknown). Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO: A-000927-23 ON APPEAL FROM THE FINAL ORDER ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, OCEAN COUNTY (OCN-L-1341-23) CIVIL ACTION SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, 1650 OAK STREET LLC

Robert C. Shea, Esq.
I.D. 021011979
R.C. Shea & Associates
244 Main Street., P.O. Box 2627
Toms River, NJ 08754
732-505-1212

Robert C. Shea, Esq., Of Counsel and on the Brief (Rshea@rcshea.com)
Vincent J. DelRiccio, Esq., On the Brief (Vdelriccio@rcshea.com – ID 302562019
Dated September 16, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

TABLE OF TRANSCRIPTS

TABLE OF JUDGEMENTS

Statement of Facts/Procedural History[1]

On January 8, 2022, the Lakewood Township Zoning Board ("Board") published its Annual Notice for the 2022 ("2022 Annual Notice") term in the Asbury Park Press. (**Pa039**) On June 23, 2022, KBS Mt. Prospect, LLC ("KBS") submitted a second application to the Zoning Board for Use Variance and Major Site Plan Approval, seeking to use the property for conferences, weddings, fundraising dinners, concerts, community events, meetings, and banquets. (**Pa018**)

On November 28, 2022, Plaintiff sent a letter to Board Attorney, John Jackson, Esq. ("Jackson"), and Board Secretary, Francine Siegel ("Siegel"), notifying them that due to violations of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 *et. seq.*, the Board had no jurisdiction to hear the application. (**Pa025**) Specifically, the letter stated that a special meeting must be noticed for via publication in two (2) official newspapers, while the Board had only noticed in one. The application was carried due to this deficiency and re-scheduled for a special meeting on February 1, 2023.

On January 9, 2023, the Board held its annual re-organization meeting pursuant to N.J.S.A. 10:4-18. The meeting was only noticed for as a regular meeting

[1] The Procedural History and Facts are inextricably linked and are therefore presented together.

in the January 8, 2022 Annual Notice. (**Pa039**) The 2023 calendar of regular meetings was published in the Asbury Park Press on January 18, 2023 ("January 18, 2023 Annual Notice"). (**Pa032**)

On January 30, 2023, Plaintiff sent another letter to Siegel, which pointed out yet another violation of OPMA. (**Pa034**) The letter advised that since the 2022 Annual Notice was only published in one newspaper, every meeting noticed thereunder, including the January 9, 2023 re-organization meeting, had to be noticed as a special meeting, in two official newspapers in order to meet the definition of "adequate notice" pursuant to N.J.S.A. 10:4-8. Furthermore, the letter advised that since the January 18, 2023 Annual Notice was only published in the Asbury Park Press, it was similarly deficient.

On January 31, 2023, Board Attorney Jerry Dasti ("Dasti") wrote a letter to the Board advising that the special meeting on February 1, 2023 to hear KBS's application must be cancelled. (**Pa042**) Dasti also advised that the Board must reorganize properly, and re-affirm any actions taken at the January 9, 2023 meeting. Dasti then suggested that such actions be taken at the Board's February 6, 2023 meeting, which he erroneously dubbed a "regular meeting". KBS's hearing was rescheduled for May 1, 2023. The Board did not publish new public notices for the February 6, 2023 meeting, which was discovered by Plaintiff on April 26, 2023,

shortly before the May 1, 2023 hearing during a diligent search of all notices effecting same.

At the February 6, 2023 hearing, the Board appointed both their attorney and engineer, according to the minutes of the meeting. (**Pa215**) The new annual notice was published in the Asbury Park Press and the Star Ledger on February 9 and 10, 2023 respectively. ("Second 2023 Annual Notice") (**Pa045**)

On April 26, 2023, in preparation for the May 1, 2023 hearing, this office performed a diligent search of the "njpublicnotices.com" postings. Shockingly, this office discovered that the February 6, 2023 special meeting was not noticed in any newspaper at all, let alone the two newspapers required by N.J.S.A. 10:4-8. On April 27, 2023, Plaintiff again wrote to Siegel and Jackson to inform them that the Board's re-organization was once again deficient. (**Pa050**) The letter stated that since the February 6, 2023 meeting was not noticed in accordance with OPMA, the action taken at the meeting, including the publication of the Second 2023 Annual Notice, was without authority and void. As such, the Board had no quasi-judicial authority to hear any applications until they undertake a proper reorganization at an OPMA compliant meeting and publish subsequent notice of any meetings via a properly adopted annual notice, or special meeting notice. Furthermore, the letter alerted the Board that since the annual notice was not published in accordance with OPMA, a "regular meeting" is an impossibility. As such, the May 1, 2023 hearing must be

noticed as a special meeting. No response was ever received from the Board or the Applicant. To this date the Board has not produced the notices to the newspapers required by the OPMA.

At the May 1, 2023 meeting, the Board Chairman opened the meeting by saying:

> Good evening, Ladies and Gentlemen. I'd like to call tonight's meeting to order. Tonight's meeting has been advertised as according to the New Jersey Sunshine Law. Madam Secretary, roll call please? (**10T: p 5, ln 1-6**)

Attorney for Plaintiffs, Robert, C. Shea ("Shea"), then placed the facts as contained in Plaintiff's April 27, 2023 correspondence, on the record. Specifically, Shea stated:

> that February 6th date was a regular meeting date from the original annual Notice that was advertised for the January 9th meeting that was inappropriately advertised for the January 9th and then inappropriately advertised pursuant to the Statute thereafter so you can't select a date of February 6th just because it appeared on the prior annual Notice and then decide to reorganize. (10**T: p20, ln 7-24**)

Despite being made aware in both the April 27, 2023 letter, and in person at the May 1, 2023 meeting, the Board disregarded their violations of OPMA. Neither John Jackson, who sat as acting Zoning Board Attorney for the KBS Application, or Jerry Dasti, who sat in the audience, advised the Board to address their violations of OPMA or to produce the required the notices Instead, Jackson advised the Board that he felt the issue could be minor, but that if Plaintiff believed there was a problem,

they can have their remedy in Court. The Board then heard the application (10**T: p 38, ln 12-17**) The Board held further hearings on June 12, 2023, July 10, 2023, and July 24, 2023. At no time did the Board reorganize, ratify its prior actions at a meeting that complies with OPMA, or notice any of the above hearings as special meetings.

Plaintiff filed this Complaint on June 8, 2023 against the Board, as well as the interested party, KBS. The Complaint sought relief pursuant to N.J.S.A. 10:4-15, which provides that any action taken by a public body at a meeting which does not conform to the provisions of the Act shall be voidable. Specifically, the Complaint asked the Court to invalidate the hearings regarding the KBS Application due to the violations of OPMA set forth above.

On July 13, 2024, KBS filed a Motion to Dismiss the Complaint, alleging that the claims were untimely, and that the Complaint failed to state a claim pursuant to R. 4:6-2(e). (**Pa069**) The Board filed its own Motion to Dismiss on the same grounds on July 21, 2024. (**Pa192**) On August 10, 2023 Plaintiff responded to the Motions to Dismiss and filed a Cross-Motion for Summary Judgement. (**Pa200**)

On September 20, 2023, the Plaintiff filed a Motion to Amend their Complaint to add claims relating to the Board's attempted ratification along with the following facts: (**Pa701**)

On August 25, 2023, The Board published a notice ("August 25, 2023 Notice") in the Asbury Park Press which stated the following:

> NOTICE PLEASE TAKE NOTICE that the Zoning Board of Adjustment of the Township of Lakewood, County of Ocean, State of New Jersey will hold a Re-organization/Special/Regular Meeting on September 11, 2023 at 7:00 P.M. The purpose of the meeting will be to formally reapprove actions taken by the Zoning Board of Adjustment throughout 2023. The meeting will be held at the Municipal Building located at 231 Third Street, Lakewood, NJ 08701. Formal action may be taken. Francine Siegel, Administrative Secretary Lakewood Zoning Board of Adjustment ($12.32) (**Pa707**)

The agenda for the September 11, 2023 meeting listed, "Special Meeting," "Resolutions 2023-1, 2023-2, and 2023-3," and "Close of Special Meeting" as items 1-3 respectively. (**Pa707**) The agenda contained no indication of the contents of each Resolution. The agenda was published verbatim in its entirety in both the Asbury Park Press and the Star Ledger on August 25, 2023 ("Published Agendas"). (**Pa707**) The Published Agendas did not contain any details as to the contents of each Resolution, nor did they give a date, time, and place of the hearing.

On September 11, 2023, the Board published a notice in the Star Ledger regarding the September 11, 2023 meeting ("September 11, 2023 Notice"). (**Pa708**) The notice differed substantially from the August 25, 2023 Notice. The September 11, 2023 Notice stated:

> PLEASE TAKE NOTICE that the Zoning Board of Adjustment of the Township of Lakewood, County of Ocean, State of New Jersey will

> hold a Re-organization/Special/ Regular Meeting on September 11, 2023 at 7:00 p.m. The purpose of the meeting will be to formally reapprove actions taken by the Zoning Board of Adjustment throughout 2023. The meeting will be held at the Municipal Building located at 212 Fourth Street, Lakewood, NJ 08701. Formal action may be taken. At the reorganization meeting, the Zoning Board will appoint administrative and Professional staff as well as the chairman, vice chairman and secretary of the Zoning Board for the remainder of 2023. At the special meeting the Zoning Board will reaffirm all actions and votes taken by the Zoning Board throughout 2023 to the present date. At the same meeting the Zoning Board of Adjustment will reaffirm all prior testimony, evidence and statements in conjunction with the application presently before the Zoning Board of Adjustment submitted by KBS Mount Prospect LLC which seeks a use variance and other forms of approval for property known and designated as Block 1160.06 Lot 47, AKA 1650 Oak Street. At the regular meeting of the Zoning Board of Adjustment the Zoning Board will consider all items which will be posted on the agenda for that meeting. The agenda will be posted on the Township website and posted with the Municipal Clerk's Office at least three business days before September 11, 2023. FRANCINE SIEGEL, Administrative Secretary Lakewood Zoning Board of Adjustment 9/11/2023 $62.78

The notice did not contain details as to what the dates of the prior actions sought to be ratified. The notice stated the meeting would take place at "212 Fourth Street," which is the incorrect location. The meeting took place at 231 Third Street. The notice provided the wrong address for KBS as well. KBS's address is 1690 Oak Street, not 1650 Oak Street. Furthermore, KBS is located at Block 1160.05, Lot 47, not at Block 1160.06, as the notice indicates.

Plaintiff discovered the above notices and their deficiencies while preparing for the September 11, 2023 hearing. Upon the publication of the September 11, 2023

Notice, Plaintiff sent a letter to the Board, advising them of their continued violations of OPMA. (**Pa709**)

The letter first notified the Board that written advanced notice of at least 48-hours in two official newspapers is required for any special hearing pursuant to N.J.S.A. 10:4-9. Since the first notice was published on August 25, 2023, and the second was not published until the morning of the hearing, the Board had no authority to proceed with the special meeting. The letter further informed the Board that since no regular calendar was ever published in accordance with N.J.S.A. 10:4-18, there could be no regular meeting. As such, the Board could not move forward with the KBS hearing that night, regardless of the special hearing notice deficiencies. Finally, the letter indicated that the Board's procedure for ratification of their past OPMA violations was deficient under Polillo v. Deane, 47 N.J. 562, 578 (1977). While the letter noted that a full re-hearing is the only sure way to comply with OPMA, the letter set forth the minimum procedure required under law for ratification, if ratification is indeed allowable in this matter.

At the September 11, 2023 hearing, the Board began to open their "reorganization" meeting. When Shea stood up to object, Dasti stated, "I see Mr. Shea is up. I'm ignoring him, because I don't want to involve him and put a statement on the record." Dasti then indicated that the "reorganization" was a direct result of

Plaintiff's filing of this litigation. He further indicated that the "reorganization/special/regular" would take place, "as if we never had a meeting."

The Board then voted to open its reorganization meeting and to adopt Resolution 2023-01, which appointed the Board's chair, vice chair, secretary, and professionals. (**Pa710**) They did so before allowing the public to comment on the Resolution or the process they were following. After adopting Resolution 2023-1, the Board opened the meeting to the public.

Shea objected to the hearing on the grounds that the notice was deficient for all of the above stated reasons, including the date of the September 11, 2023 Notice, the lack of details in the August 25, 2023 Notice, and the incorrect location of the hearing as set forth in the September 11, 2023 Notice. The Board attempted to prevent Shea from voicing his client's objections on the record, disregarded the contents of the September 11, 2023 letter, claiming that any objection was irrelevant, and indicating that Shea should "bring it up to Judge Hodgson." Further, when confronted with the fact that the address for the meeting place was incorrect, the Chairman, unconcerned with obvious defect, stated, "I think everyone in town knows where Lakewood Township is located."

The Board then closed the "reorganization" meeting and voted to open a "special meeting" for the purposes of adopting Resolutions 2023-2 and 2023-3.

Resolution 2023-2's stated purpose was to affirm all of the official action the Board had taken in the 2023 term. (**Pa710**) Shea indicated that the process the Board was following fell short of the requirements of ratification of actions taken in violation of OPMA pursuant to the Polillo case. The Board then adopted Resolution 2022-2.

Resolution 2023-3 specifically pertained to the KBS Application and stated:

> The Township reaffirms and accepts all prior testimony, evidence, statements of Counsel, etc. as if set forth more fully and repeated at length with regard to the aforementioned pending application submitted by KBS Mount Prospect, LLC for use variance and other forms of approval for property known and designated as Block 1160.06, Lot 47 a/k/a 1690 Oak Street, Lakewood, New Jersey (**Pa711**)

Resolution 2023-3 contained the incorrect Block Number for the property. Resolution 2023-3 failed to contain the dates of the prior hearings that were being "reaffirmed". Further, all of the Resolutions, including 2023-3 were prepared by Dasti, who has conflicted himself out of the KBS application, as he is currently representing Greenwald Caterers, Inc., the property's caterer, in a related litigation with KBS.

Despite Resolution 2023-3 being considered at a special meeting, KBS never published notice of the meeting pursuant to N.J.S.A. 40:55D-12. Shea objected, again stating that the notices and process violated Polillo, the MLUL, specifically N.J.S.A. 40:55D-69, and OPMA, specifically N.J.S.A. 10:4-8 and 4-9. The Board

adopted Resolution 2023-3, however, the Board Members who stated they had a conflict with the KBS Application recused themselves from the vote on 2023-3.

The Board then voted to close the "special meeting" and open the "regular meeting." The "regular meeting" was not noticed in an annual notice, published in two official newspapers within 7-days of the reorganization per N.J.S.A. 10:4-8. The Board then continued to hear the KBS application.

On September 13, 2023, Dasti sent Shea a response to 1650's objection letter of September 11, 2023. (**Pa712**) In his e-mail, Dasti posited that the September 11, 2023 Notice satisfied the requirements of OPMA, despite being published on the day of the meeting, because it was sent to the Star Ledger on September 7, 2023.

On September 20, 2023, the Plaintiff filed a Motion to Amend their Complaint to add claims relating to the Board's attempted ratification. (**Pa694**) This was Opposed by KBS and was set for oral argument along with the balance of the Motions.

The trial court heard oral argument on all of the foregoing Motions on October 20, 2023. In its ruling, the trial court indicated that it based its ruling, in part, on the potential negative effects for the Board and other applications that a ruling for Plaintiff could have. Specifically, the Court stated:

> Now, I would just note on the side that this is a very busy board. Mr. Fiorovanti provided the Court a list over a very short period of time of the number of cases that were heard that would have to be addressed. And I -- this was over a couple of months, and it -- my recollection is it was over 20 cases that were heard. So going back all the way to January 8th, I just want to put some flesh on the bones of what we're talking about here. Mr. Shea indicates that what the Court should do is order ratification actions, or reaffirm -- reaffirmance actions by the Board, and these reaffirmance actions have to be specific to every case that was heard by this Board over this two-year period, including identifying the witnesses that the Board is going to rely on, making all those witnesses available for testimony on cross-examination, if needed at that reaffirmation meeting. So, I -- the Herculean task that would require for what the Court views as a relatively -- particularly with regard to February 6th and thereafter, a relatively minor violation; that is the pre-note -- the pre-meeting notices were inappropriate because it wasn't done, (2) especially even though it was advertised once on January 9th. (**1T: p48, ln 3-25**)

The trial court further stated that the Plaintiffs did not allege that the Board violated OPMA subsequent to February 10, 2024. (1**T: p54, ln 15-20**) The trial court then granted the Board's and KBS's Motions and dismissed Counts 1 and 2 of Plaintiff's Complaint with prejudice and denied Plaintiff's Motion to Amend the Complaint. (**Pa001-005**) The Counts related to the Amended Complaint were not substantively addressed by the trial court, and were dismissed due to the dismissal of the initial Complaint. (**Pa005**) The Court further dismissed Count 3 of the Complaint, regarding the Chairman's failure to open the May 1, 2023 meeting in compliance with N.J.S.A. 10:4-10, without prejudice and allowed Plaintiff to revive

that Count during any subsequent appeal, should KBS's application be granted. (**Pa001, 003, 004**)

LEGAL ARGUMENTS

POINT I: The Trial Court Erred by Finding that Plaintiff was not entitled to Summary Judgement (Pa 004)

Rule 4:46-2(c) governs the standard by which a court determines a Motion for Summary Judgment. The question to be decided by the court is whether there is a genuine issue as to any material fact in the proceeding. The rule provides that an issue of fact is only genuine if, "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non- moving party, would require submission of the issue to the trier of fact." Id. The evidence to be considered includes "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, [which] show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Id.

In Brill, the New Jersey Supreme Court stated the purpose of their decision was "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of

America, 142 N.J. 520, 541 (1995). "Where the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Id. at 529. "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)). The analysis is whether, upon review of the pleadings, deposition testimony and other competent evidence presented, viewed in a light most favorable to the non-moving party, a rational fact finder can resolve the disputed issue in favor of the non-moving party. Brill, 142 N.J. at 523. "Summary judgment is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which…clearly shows not to present any genuine issue of material fact requiring disposition at trial." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641–42 (1995) (quoting Judson v. Peoples Bank & Trust of Westfield, 17 N.J. 67, 71 (1954)).

Rule 4:46-5(a) compels a non-moving party on a summary judgment motion to counter the moving party's prima facie showing of entitlement to Summary Judgment by presenting specific facts showing that there is a genuine issue for trial. The Rule further mandates that a defendant cannot rely upon "mere allegations or denials of his pleading," but must furnish affidavits "setting forth specific facts showing that there is a genuine issue for trial." Moreover, a non-moving party

cannot defeat a motion for summary judgment "merely by pointing to any fact in dispute." Brill, 142 N.J. at 529.

The Board is a "public body" as defined by N.J.S.A. 10:4-8 (a) and is not permitted to meet to conduct official business, or take any quasi-judicial actions, without first having provided "adequate notice" to the public, in accordance with the dictates of the Open Public Meetings Act (OPMA), also known as the "Sunshine Law". The Public Policy behind OPMA, as dictated by Governor Byrne was "...the final- version of this legislation contains a clear declaration of public policy favoring transparency in the conduct of public bodies and encouraging citizen participation in the democratic process." Opderbeck v. Midland Park Bd. of Educ., 442 N.J. Super. 40 (App.Div.2015) . The following relevant section of this declaration illustrates the point:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail al1 phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion. The Legislature further declares it to be the public policy of this State to ensure that the aforesaid rights are

> implemented pursuant to the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof. Id. at 120

Further, the Appellate Division described the legislative intent behind OPMA as:

> In keeping with strong present-day policies 'favoring public involvement in almost every aspect of government.' This legislation is to be liberally construed, N. J. S.A. 10: 4-21, and 'strict adherence to the letter of the law is required in considering whether a violation of the act has occurred.' It necessarily follows that any exception from the ful1 public disclosure mandated by the statute is to be strictly construed. Jenkins v. Newark Bd. of Educ., 166 N.J. Super. 357 (Law Div.1979), aff'd, 166 N. J. Super. 300 (App. Div. 1979) .

Since public policy and legislative intent behind the act is one of strict compliance with the dictates of OPMA, we must now view the current circumstances from the perspective of failing to properly Notice the Planning Boards Annual Calendar per both N.J.S.A. 10:4-18 and N.J.S.A. 10:4-8. N.J.S.A. 10: 4-11

"Annual Notice" as per N.J.S.A. 10:4-8 must contain: 1) the time, date, and, to the extent known, the location of each meeting; 2) must be provided within seven days of the annual organization or reorganization meeting of the public body; 3) must comply with Notice requirements of N.J.S.A. 10:4-8; 4) must comply with the N.J.S.A. 40:55D-9; and/or 5) if there is no organization or reorganization meeting, "Annual Notice" must be provided by January 10th.

"Annual Notice" must meet all of the requirements of the "adequate notice" standard under N.J.S.A. 10:4-8(d), which states that Zoning and Planning Boards must: 1) prominently post in at least one public place reserved for such announcements, 2) transmit to two newspapers in time for publication 48-hours in advance of the meeting, 3) file with appropriate Municipal or County Clerk or the Secretary of State if the public body has statewide authority, and 4) mail to any person upon request. The concept of "adequate notice" has been further expanded and refined through case law, and will be explained below.

Notice is jurisdictional, therefore, the "failure to provide notice deprives a municipal planning board of jurisdiction and renders null any subsequent action." Shakoor Supermarkets, Inc v. Old Bridge Twp. Planning Board, 420 N.J. Super. 193, 201 (App.Div.2011). Furthermore, a plain reading of the OPMA reveals that "any government action shall- be declared void" if it was taken to comply with the statutes. Polillo v. Deane, 74 N.J. 562, 578 (1977). In Patterson v. Cooper, 294 N. J. Super. 6 (1994), the plaintiffs maintained that the Mayor did not provide forty-eight hour notice of the July 21, 1994, meeting to two newspapers as required by N.J.S A. 10:4- 8 (d) (2) . On Monday, July 25, I994 the acting City Clerk faxed notice of the Wednesday, July 21 meeting to the Star-Ledger and the East Orange Record. However, it was known that notices received by the Star-Ledger on a Monday would not be published until Thursday, and the East Orange Record only published on

Thursdays. The court ruled that there was a failure to properly notice two newspapers which violated OPMA, and therefore was a voidable offense under the strict legislative intent.

The court in Carley v. Borough of North Plainfield, 380 N.J. Super. 240 (2005) came to the same conclusion. In that case the court found that the requirements of N.J. S.A. 10:4-8 were not satisfied for the failure to timely deliver the notice to two newspapers and post the notice forty-eight hours in advance of the meeting. Strict compliance is required to satisfy OPMA.

More recently in 2015, the court in Opderbeck ruled that a public body failing to properly publish notice for the regular "Annual" meetings in two newspapers, violated the "adequate notice" standard per N. J. S.A. 10:4-18 and N. J. S.A. 10:4-8. In the Opderbeck case, the Board admitted that in October 2013, it discovered the 2012-2013 annual notice of the Board's meetings had been published in only one newspaper.

The concept of strict compliance with the rigors of OPMA is further supported by various other decisions in the past. "Where the OPMA is violated, any action taken by the board at that meeting is void." Polillo N.J. 562, 578 (1911). "Except for an emergency/ a public body may not hold a meeting unless adequate notice has been given to the Public." Witt v. Gloucester County Board of Chosen Freeholders,

94 N.J. 422 (1983). "If formal business is conducted at a meeting other than one clearly designated for such formal business in the annual notice, the action is subject to being voided under the Act." Lakewood Citizens v. Tp. Committee, 306 N.J. Super. 500, 306 N.J (1997).

As can be seen, the case law has established that: 1) public bodies cannot "look back" to prior meetings that have failed to be properly noticed as these meetings would have to be re-conducted and properly re-noticed; 2) the legal defense of "substantial compliance" does not apply to any OPMA violations and cannot save prior testimony or actions taken at these improperly noticed board meetings unless ratification and remedial actions occur at properly noticed meetings; and 3) The commonly referred to "last proviso clause" of N.J.S.A. 10:4-15(a), created to prevent the needless invalidation of public meeting is, when another statute requires notice comparable to that required under the OPMA, is not applicable to N.J.S.A. 10:4-8 (d) violations absent of ratification and remedial actions, as the governing case law requires the earlier meetings to be re-noticed and repeated anyway.

Point I(a): The Board's Annual Notice for the 2022 Period was Invalid Under OPMA (Pa004)

The Board's January 9, 2023 reorganization meeting was noticed as part of their 2022 Annual Notice. Pursuant to N.J.S.A. 10:4-8:

> "Adequate notice" means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) prominently posted in at least one public place reserved for such or similar announcements, (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices because they have the greatest likelihood of informing the public within the area of jurisdiction of the public body of such meetings, one of which shall be the official newspaper, where any such has been designated by the public body or if the public body has failed to so designate, where any has been designated by the governing body of the political subdivision whose geographic boundaries are coextensive with that of the public body and (3) filed with the clerk of the municipality when the public body's geographic boundaries are coextensive with that of a single municipality, with the clerk of the county when the public body's geographic boundaries are coextensive with that of a single county, and with the Secretary of State if the public body has Statewide jurisdiction. For any other public body the filing shall be with the clerk or chief administrative officer of such other public body and each municipal or county clerk of each municipality or county encompassed within the jurisdiction of such public body. Where annual notice or revisions thereof in compliance with section 13 of this act set forth the location of any meeting, no further notice shall be required for such meeting.

A meeting noticed via an Annual Notice requires no further notices, unlike the "special meeting/48-hour notices" discussed above. The Annual Notice must, however, be published in two official newspapers as per N.J.S.A. 10:4-18.

In this case, the 2022 Annual Notice itself, was only published in one newspaper, in violation of N.J.S.A. 10:4-18. As such, all meetings noticed thereunder, including the January 9, 2023 reorganization meeting, were required to be noticed as special meetings with notice in two official newspapers a least 48-

hours before each meeting. Since they were not, all action taken at each meeting, including the January 9, 2023 reorganization was ultra vires and voidable.

Point I(b): The Board's January 18, 2023 Annual Notice Violated OPMA, Rendering All Subsequent Meetings as "Special Meetings" (Pa004)

As set forth in detail above, the January 9, 2023 reorganization meeting was required to be noticed in two official newspapers as a special meeting pursuant to N.J.S.A. 10:4-8. Due to the Board's failure to comply with this provision, all action taken by the Board on January 9, 2023, including the Board's reorganization, appointment of its members and professionals, and the adoption of its calendar were all ultra vires and voidable. As a further result, the January 18, 2023 Annual Notice is similarly void, as the Board had no power to adopt the list of dates contained within it or to take any of the actions that it indicated the Board took.

The Board itself agreed with this assessment. As per the letter from Dasti dated January 31, 2023, Dasti stated:

> I have been in contact with Francine Siegel concerning the issues of the notice of our meeting in January at which time the reorganization was undertaken, and also votes were taken on various applications. I am advised that notice of the hearing is only given to one official newspaper. In order to comply with the "adequate notice" of the New Jersey Open Public Meetings Act, N.J.S.A. 10:4-8 et seq, notice of all meetings must be provided to two official newspapers. Therefore, the

> actions taken at our January meeting are a nullity and must be reaffirmed. (**Pa042**)

As the Court can see, there is no dispute that the Board failed to comply with OPMA regarding the actions taken at the January 9, 2023 meeting. In addition to the above, the January 18, 2023 Annual Notice is also void notwithstanding the Board's failure to reorganize.

The Board published its January 18, 2023 Annual Notice, which set forth the dates of its regular meeting for 2023, in only the Asbury Park Press. (**Pa032**) As explained above, N.J.S.A. 10:4-18 requires that an annual notice be published in **two** official newspapers. Due to this failure to comply with OPMA, the January 18, 2023 Annual Notice is void, even if the Board had reorganized correctly. As such, all of the meetings listed therein are not regular meetings, but rather, must be noticed as a special meeting in two official newspapers at least 48 hours before said meeting.

Point I(c): The Board's February 6, 2023 Meeting and Second 2023 Annual Notice Violated OPMA and are Void (Pa004)

On February 6, 2023, the Board held a hearing to attempt to correct their previous errors. However, the Board never published notice of the February 6, 2023 meeting at all. The date was included in the January 18, 2023 Annual Notice, however, same was itself, null, as explained above. Despite OPMA's requirement

that two notices be published at least 48 hours before the meeting, no notices were ever published.

Since the Board failed to publish notice of the February 6, 2023 meeting in two newspapers, thereby adequately noticing the public as mandated by OPMA, the meeting was held without authority. As such, the Board neither had the power to reorganize and constitute itself as a zoning board, nor did it have the authority to adopt a new annual notice.

The Board published its Second 2023 Annual Notice in both the Asbury Park Press and the Star Ledger on February 9 and 10, 2023 respectively. (**Pa045**) The Second 2023 Annual Notice read as follows:

> PLEASE TAKE NOTICE that at the re-organization and regular meeting of the Township of Lakewood Board of Adjustment held on Monday, February 6, 2023, at 7:00 P.M. in the Municipal Building, 231 Third Street, the following action was taken; Re-Organization meeting elected Chairman, Abe Halberstam elected vice-chairman, Meir Gelley appointed board secretary, Fran Siegel Adopted formal resolutions appointing the following professionals: Board Attorney Jerry Dasti Board Engineer/Planner Terry Vogt Also adopted the calendar of meeting dates for 2023 and January 2024. Scheduled meeting dates will be: January 9, 2023 February 6, 2023 March 13, 2023 April 3, 2023 May 1, 2023 June 12, 2023 July 10, 2023 July 24, 2023 September 11, 2023 October 16, 2023 November 13, 2023 December 4, 2023 January 8, 2024 adopted the Annual Report for the year 2022.

It is worth noting that, as per the minutes of the meeting, only the attorney and engineer were appointed. (**Pa215**) The Board did not appoint a chairman, vice chairman, or secretary, nor did they adopt the calendar. As such, the Board never

constituted itself as a Zoning Board pursuant to N.J.S.A. 40:55D-69 It must be understood however, that even if the Board had done exactly what the Second 2023 Annual Notice claims, same would be irrelevant. The fact that the February 6, 2023 meeting was held in violation of OPMA due to the failure of the Board to provide adequate notice of it renders all action taken thereat ultra vires and voidable. As such, the Second 2023 Annual Notice is, similarly, void.

Point I(d): the May 1, 2023 Hearing on the KBS Application, as well as all Subsequent Hearings Regarding Same, were Ultra Vires and Voidable (Pa004)

Following the discovery that the February 6, 2023 meeting was held in violation of OPMA, Plaintiff placed the Board on notice of same via a letter dated April 27, 2023. The letter informed the Board that the May 1, 2023 would need to be noticed as a special meeting. The Board, however, neither provided a proper 48-hour notice, nor did they even respond to Plaintiff's letter. The May 1, 2023 hearing, proceeded, despite the Board's lack of authority to hold one. The meeting commenced with the Board Chairman saying:

> Good evening, Ladies and Gentlemen. I'd like to call tonight's meeting to order. Tonight's meeting has been advertised as according to the New Jersey Sunshine Law. Madam Secretary, roll call please? (10**T: p 5, ln 1-6**)

As the Court can see, the Board neglected to use the statutory language "that adequate notice of the meeting has been provided, specifying the time, place, and

manner in which such notice was provided," as required by N.J.S.A. 10:4-10. Before the commencement of the KBS Application, Plaintiff's attorney again brought the faulty notices and reorganization to the attention of the Board. Specifically, Shea informed the Board that since the February 6, 2023 hearing was ultra vires for its OPMA violations, then the Second 2023 Annual Notice was also void. As such, this meeting should have been noticed as a special meeting in two official newspapers. Rather than acknowledge their failure to comply with OPMA or produce the required notices, the Board elected to proceed with the hearings. Board attorney Jackson stated, "So if Mr. Shea believes that there was some deficiency in the way the Board was organized or how it picked its calendar, et cetera, he has his remedy in court." (10**T: p38, ln 12-15**)

These Board's actions are completely contrary to the Public Policy behind the OPMA, as dictated by Governor Byrne through N.J.S.A. 10:4–7, and subsequently reaffirmed as being that of Strict Intent with very little deviation for exceptional circumstances through the holding of Jenkins v. Newark Bd. of Educ., 166 N.J. Super. 357 (Law Div. 1979). "Governor Byrne made transparency of governmental affairs a central part of his official statement…, [whereby] the final version of this legislation contains a clear declaration of public policy favoring transparency in the conduct of public bodies and encouraging citizen participation in the democratic

process." Opderbeck v. Midland Park Bd. of Educ., 442 N.J .Super. 40 (App. Div. 2015).

The Board has failed to take the proper remedial action, which needs to occur before the Board Members, staff, and professionals can act in any official capacity. Without such properly conducted remedial and curative measures, the Board lacks all official authority from the State to conduct any business as a fully invested quasi-judicial government body. Therefore, any appearance, testimony, and decisions pertaining to the KBS Application which occurs at the January 31, 2018 hearing will be deemed void under Polillo v. Deane, Witt v. Gloucester, and AQN Assocs., Inc. v. Township of Florence.

As the Court can see, there can be no serious dispute that the Board has violated OPMA on several occasions. Under the above case law, the Board has no authority to continue to hear the KBS Application. The Court should, as such, find that all action taken by the Board with respect to the KBS Application is ultra vires and voidable. As a result of challenge pursuant to N.J.S.A. 10:4-15, the Court must determine that said actions are void, and that the Board may not hold any further hearings on the matter until they have properly re-organized and re-heard or ratified all testimony to date.

Point I (e). The Zoning Board Must Properly Re-organize at an OPMA Compliant Meeting, and Either Re-hear or Ratify All Testimony and Decisions to Date on the KBS Application (Pa004)

As demonstrated above, there is no question that the Board is in violation of OPMA for its failure to reorganize and to adequately notify the public of its meetings to date. As such, under N.J.S.A. 10:4-15, everything that occurred in the KBS Application so far is void. Furthermore, the Board at this time, has no right, whatsoever, to hear further testimony as they have not yet properly reorganized.

A similar situation to this case arose in JSTAR, LLC v. Brick Township Zoning Board of Adjustment, Docket No. A-0858-18T2 (**Pa228**). In JSTAR, the Brick Township Zoning Board also failed to reorganize at an OPMA compliant meeting and to publish their annual notice properly in two newspapers. Further, the Board, despite this failure, did not notice their subsequent meetings as special meetings. The Appellate Court, relying on Polillo, ruled that the Board must:

> Conduct further proceedings on RTS's application at a properly noticed meeting after it remedies its prior noticed failures by conducting de novo proceedings – again, at a properly noticed meeting – at which it shall readopt its appointments. JSTAR at 16 (**Pa244**)

As the Court can see, the Board in this case, has no option but to properly notice and reorganize before they can do anything further on this application. The Board's responsibilities do not end there however. Aside from re-hearing all of the

testimony, the Polillo Court gives the Board one other option to bring itself into compliance. The Polillo Court allowed the public body to "utilize so much of the testimony and evidence which it acquired in the course of its original effort as it deem[ed] necessary and appropriate." Id. at 580. As in Polillo,

> any decision in that regard must be arrived at in a manner in strict conformity with the OPMA so that the public may be fully apprised by adequate notice and a publicized agenda exactly what prior meetings and what aspects of the existing [Board] record are sought to be so utilized.

As such, if the Board intends to rely on any testimony given to date in the KBS application, it must, following its proper reorganization at an OPMA compliant meeting, adequately notice the public via both a notice and the agenda of what prior testimony and decisions will be utilized going forward, and then ratify same at a meeting which either appears on a properly adopted Annual Notice, or a meeting that has been properly noticed as a special meeting.

Based on the above case law, the Board may proceed in whichever manner it deems appropriate. The Court, however, cannot sanction the Board's violations of OPMA, and must mandate that the Board take the proper steps as outlined above, to bring itself into compliance with OPMA before it continues to hear any further testimony on the KBS application. The Board, under OPMA, simply has no power to do so at this time. As such, the Court should reverse the lower Court's decision.

POINT II: The Court Erred in Determining that Plaintiff's Complaint was Untimely (Pa001-003)

As noted above, *N.J.S.A.* 10:4–15, the Act allows a court to void the unsupported action taken in violation of the OPMA. Specifically, N.J.S.A. 10:4-15 indicates:

> a. Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act.
>
> b. Any party, including any member of the public, may institute a proceeding in lieu of prerogative writ in the Superior Court to challenge any action taken by a public body on the grounds that such action is void for the reasons stated in subsection a. of this section, and if the court shall find that the action was taken at a meeting which does not conform to the provisions of this act, the court shall declare such action void.

Relief under this section must be requested within forty-five days of the date the action sought to be voided is made public." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 240 (App. Div. 2009) It should be noted

that subsection (b) does not contain the same 45-day limitation that subsection (a) does. Neither the case law nor the statute itself clearly indicates why this is or if these are separate causes of action.

In Township of Bernards v. State Dept. of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989), the Township appealed from rules promulgated by the New Jersey Council on Affordable Housing ("COAH"). Specifically, the townships challenged two sections of COAH's rules. Specifically, the challengers alleged that the objectionable sections excluded buildings constructed prior to 1981 from the COAH housing calculation, even if those buildings were historically occupied by low to moderate income inhabitants. Furthermore, the challengers alleged that the rules were adopted in violation of OPMA in relevant part due to COAH's holding of a closed meeting on December 9, 1985 without adequate notice of same, which was not given until two days after the meeting. The court found that the meeting was made public on December 16, 1985, with the publication of the meeting minutes. Further, the court found that plaintiffs' complaint, which was filed in September of 1986, was close to a year out of time.

The Bernards court properly viewed the date of the alleged violation as December 9, 1985, as that was the date of the closed meeting that the challengers alleged violated OPMA. The action Plaintiff is seeking to void is the action of the Board commencing testimony on the KBS application, which occurred on May 1,

2023. The Plaintiff makes this challenge because May 1, 2023 was never properly designated as a regular meeting in accordance with the procedures outlines in N.J.S.A. 10:4-8. Furthermore, the Board had not yet successfully constituted itself as a Zoning Board of Adjustment under N.J.S.A. 40:55D-69. As such, since they lacked the jurisdiction to hear any testimony on May 1, 2023, and proceeded to do so anyway despite being placed on notice of this deficiency by the Plaintiff's counsel.

In Jersey City v. State Dep. Of Environmental Protection, 227 N.J. Super. 5 (App. Div. 1988), plaintiffs challenged the DEP's sublease of 50 acres of a park to a private corporation for development of a 599-slip public marina. The court found that plaintiffs challenged the approval of the marina project by the Advisory Commission, which took place on May 8, 1987. The court further found that the approval was made public on May 8, 1987, and that articles were written about the approval on both May 9 and May 10, 1987. The complaint, however, was not filed until July 9, 1987. Once again, the statute of limitations commences from the date of the actual action that violated OPMA.

Finally, Atlantic City v. Atlantic Deauville, Inc., 5 N.J. Tax. 459 (Tax Court 1983), involved a tax appeal, and cross claims based thereon. Following the City's filing of said cross claim, it adopted a resolution on December 30, 1981 permitting the retention of the law firm Skoloff and Wolfe to represent them on said tax appeal.

On November 22, 1982, Deauville filed a summary judgement motion asserting that the December 30, 1981 meeting violated OPMA. Since the allegation came close to a year after the meeting, the court found that the statutory 45-day limitation for challenge had elapsed. In this instance, Plaintiff is trying to void the Board's commencement of the KBC application on May 1, 2023. As such, May 1, 2023 is the proper date to commence the 45-day appeal period.

As noted above in Plaintiff's Summary Judgement-related Legal Arguments, the Board proceeded to hear testimony at the May 1, 2023 hearing, despite having no authority to do so. Adequate Notice of the May 1, 2023 hearing was never given. Plaintiff's Complaint was filed on June 8, 2023, well within the 45-day time frame. Furthermore, as evidenced by Plaintiff's correspondence, the matter of adequate notice of the May 1, 2023 hearing came to Plaintiff's attention on April 26, 2023, during a search of all relevant notices in preparation for the May 1, 2023 hearing. Upon discovery, Plaintiff immediately notified the Board of same.

Plaintiff is interested in only the KBS application and seeks relief relative to said application. The Board made no assertion that they have complied with OPMA or have in any way made an attempt to produce the disputed notices. Rather, it argued, and the trial court agreed that same should not be enforced because a) Plaintiff is time-barred and b) the results of enforcement would be too sweeping. While the latter portion will be addressed below, both Defendants are incorrect with

respect to the time limitation on Plaintiff's Complaint. Plaintiff had no way of knowing that the Board would, despite their violation of OPMA proceed to hear testimony on May 1, 2023 and at two subsequent hearings. It is from that date, that Plaintiff's 45-day time limit commences, not from the date of the Board's attempted reorganization hearing.

Plaintiff is an interested party to KBS's application, not a referee for the procedures of the Lakewood Zoning Board. In failing to reorganize properly, the Board is not constituted as a board of adjustment pursuant to N.J.S.A. 40:55D-69 and has no power to adopt anything. Further, in failing to have the power to adopt an annual notice, or publish same in two newspapers, the Board has failed to provide adequate notice for each of the hearings on the KBS application thus far. The public's interest in adequate notice of open public meetings is completely and utterly trampled by Defendants' positions. The trial court's ruling would stand for the position that a citizen interested in only one application must police the actions of a public body throughout the entire year or else be deprived of the protections under OPMA.

The Board should not now be allowed to disregard their responsibilities to adequately notify the public of their meetings simply because they feel that they were not caught violating OPMA until Plaintiff's letter of April 27, 2023. As noted above, OPMA is a statute of strict intent. "Where the OPMA is violated, any action

taken by the board at that meeting is void." Polillo N.J. 562, 578 (1911)., If formal business is conducted at a meeting other than one clearly designated for such formal business in the annual notice, the action is subject to being voided under the Act." Lakewood Citizens v. Tp Committee, 306 N.J. Super. 500, 306 N.J (1997). The May 1, 2023 hearing, as well as the subsequent hearings on the KBS application, were held in violation of it. As such, the Court must hold that all the May 1, 2023 meeting on the KBS application, is void. Further, under Polillo, the Court must order that no further hearing can be heard until the Board 1) reorganizes at an OPMA-compliant meeting, 2) publishes either a new annual notice, or a special meeting notice, 3) publishes a notice and agenda specifically setting forth what, if any testimony from the prior hearings will be re-used and the dates on which said testimony took place, 4) Ratifies said testimony at an OPMA compliant meeting.

Based upon the above case law and statutes, the trial court should have found that Plaintiff's Complaint, challenging the May 1, 2023 hearing was timely. As such, the Court should reverse the trial court's decision.

Point III: The Trial Court Mischaracterized Plaintiff's arguments and Erred by Considering applications aside from the one challenged by Plaintiff (1T:59-61)

Court Rule 4:28-1(a) reads as follows:

> **Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) **the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest** or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

A party is indispensable if they have an interest involved in the subject matter before the court, and a judgment cannot be justly made without affecting the absentee's rights. Allen B. DuMont Labs, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298. KBS unquestionably falls into this category. The Complaint specifically sought to void all testimony heard to date due to the Board's violation of OPMA, and bar any further testimony on KBS's application until the Board properly reorganizes at an OPMA compliant meeting.

If the Court granted Plaintiff's relief, the KBS's application would not only be stayed until the Board properly reorganizes at an OPMA compliant meeting, but

all testimony to date would either need to be re-heard, or, would need to be ratified at an OPMA compliant meeting pursuant to the procedure set forth in Polillo, following the proper reorganization. Either option would result in a delay to KBS's application. As a result, KBS's interests were directly implicated in this lawsuit. Under Court Rule 4:28-1(a), 1650 had no choice but to join them as a party although no relief was sought directly from them.

Both KBS and the Board argued that Plaintiff should have joined every entity or individual who has had an application approved by the Board this year. According to KBS, the same rationale that applies to them also applies to anyone who received an approval in 2023. This was an intentional mischaracterization of Plaintiff's Complaint. Plaintiff seeks to void the testimony heard on KBS's application to date due to the meetings' lack of compliance with OPMA as set forth above. It is KBS's application that Plaintiff has an interest in, no other. While any other applications were similarly decided without authority and are therefore voidable upon challenge, Plaintiff is not challenging them. As such, they are wholly irrelevant to this litigation.

The Board, argued a ruling for Plaintiff would have a 'domino effect' and impact various applicants. The Board further argued that the other approvals and denials of the Board would be void if Plaintiff was successful. First and foremost, if the Board was so concerned about a "domino effect," they could have corrected the deficiencies by advertising for a special meeting, reorganizing, then ratifying their

prior actions at an OPMA compliant meeting. Second, and more relevant to this matter, the Board is patently incorrect.

All of the decisions that the Board has made are already *ultra vires* and voidable upon challenge due to their failure to comply with OPMA, pursuant to N.J.S.A. 10:4-15(a). However, as already stated, Plaintiff is not challenging every single Board action, only those as pertains to the application in which Plaintiff is an interested party; namely, the KBS application. If other parties wish to challenge other Board actions based upon the Board's failure to adequately notice for, or have jurisdiction over, every meeting this year, then said parties have every right to do so regardless of the outcome of this case. In fact, in the JSTAR case, which was attached to Plaintiff's trial brief (**Pa228**), the Court only voided JSTAR's approval, not every approval that occurred between the Board's violation and the plaintiff's challenge.

In fact, even at the hearing, counsel for Plaintiff indicated:

> I just – one just short correction, Judge, as far as the factual items that you laid on the record. At no point in time and anywhere in our brief did we ever indicate that it was going to be incumbent upon the board to have to re-hear and review every application and take additional testimony from the witnesses… (**1T: p59, ln 20 – p60, ln 1**)

Plaintiff's counsel further indicated that:

> We weren't proposing at all that they should open up the – the intent is certainly a method of ratifying what the did before. But as it relates to KBS…" (1**T: p61, ln 6-10**)

The trial court first ignored Plaintiff's comments, stating, "I'm not getting in a back and forth argument." (**1T: p60, ln 8-9**) The trial court further questioned as to why the rationale that applied to KBS should not apply to other cases. (**1T: p61, ln 16-21**) The answer to this question is simple: because Plaintiff is not challenging those applications, and those applications would be governed by their own respective statutes of limitation, which 1) are irrelevant to this case, and 2) had elapsed by the time of the trial court's hearing on this matter.

The Court should give no weight to the argument posited by both Defendants that Plaintiff is somehow obligated to join applicants whose applications are not being challenged. The trial court specifically noted what a "herculean" effort the "busy board" would need to undertake to re-hear every case in the first half of 2023. The trial court was clearly swayed by the Defendant's mischaracterization of Plaintiff's Complaint as an attempted challenge on every application in Lakewood for the 2023 calendar year. As explained above and before the trial court, this is not now, nor has it ever been the case. Plaintiff's one and only challenge is to KBS's application because that is the one that Plaintiff has engaged with as an interested party. As such, the Court should reverse the trial court's decision.

Point IV: The trial court erred in denying Plaintiff's Motion to Amend their Complaint (Pa005)

The trial court dismissed the Plaintiff's Motion to Amend Complaint due to its dismissal of the initial Complaint. As such, the merits of the request were never reached by the trial court. As the Court can see from the foregoing reasons, Plaintiff's Complaint was not untimely and should not have been dismissed. Furthermore, the Board's own actions indicate that they were well aware of their prior violation.

As noted above, the Board held a "reorganization/special/regular" meeting specifically to try to ratify their prior violations. As argued to the trial court, Plaintiff believes that this action is a clear admission that a ratification was required. The issue remains, however, that the Board committed further violations of OPMA during their attempted ratification. Violations which, were never heard by the trial court due to its dismissal of Plaintiff's Amended Complaint. Since the trial court did not allow the amendment, Plaintiff was deprived of its rights to even make the arguments against the Boards actions. It should further be noted that since the Board's actions took place months after Plaintiff filed their Complaint, there was no way for Plaintiff to bring a challenge to these actions at the time of the initial filing.

As the Court can see, the dismissal of Plaintiff's Motion to Amend their Complaint was improperly dismissed. The claims were never heard nor considered

by the trial court resulting in the deprivation of Plaintiff's right to bring them, even though they were timely filed. As such, the Court should reverse the trial court's decision.

Conclusion

For the foregoing reasons, the Court should find that the trial court erred in granting Defendants' Motions to Dismiss and in denying Plaintiff's Motions for Summary Judgement and to Amend the Complaint. The Court should therefore reverse the trial court's decision.

R.C. SHEA & ASSOCIATES
Attorneys for Plaintiff

BY: 
Robert C. Shea

Dated: September 16, 2024

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-927-23

1650 OAK STREET, LLC, Plaintiff/Appellant, v. TOWNSHIP OF LAKEWOOD ZONING BOARD OF ADJUSTMENT, KBS MT. PROSPECT, LLC, JOHN DOES 1-100 (a fictitious name for persons presently unknown) and XYZ, INC. 1-100 (a fictitious name for a business entity presently unknown), Defendants/Respondents.	Civil Action **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, COUNTY OF OCEAN** **DOCKET NO.: OCN-L-1341-23** **HONORABLE FRANCIS R. HODGSON, Jr., A.J.S.C.**

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT KBS MT. PROSPECT, LLC

Matthew N. Fiorovanti, Esq. - 027332006
GIORDANO, HALLERAN & CIESLA
A Professional Corporation
125 Half Mile Road, Suite 300
Red Bank, N.J. 07701-6777
(732) 741-3900
mfiorovanti@ghclaw.com

MATTHEW N. FIOROVANTI, ESQ.
Of Counsel and On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

This appeal represents just a small part of the seemingly never-ending campaign by plaintiff/appellant 1650 Oak Street, LLC ("*Plaintiff*") to attempt to shut down the popular wedding venue known as "*Lake Terrace*" located across the street from Plaintiff's property at 1690 Oak Street, Lakewood, New Jersey (the "*Property*"). Beginning in November 2020, Plaintiff, which is owned by The Sudler Companies ("*Sudler*"), which owns the majority of the properties located in the Lakewood Industrial Park, has burdened the Superior Court of New Jersey with scorched-earth litigation, filing over a half dozen lawsuits against defendant/respondent KBS Mt. Prospect, LLC ("*KBS*"), the owner of the Property, as well as the Township of Lakewood ("*Lakewood*"), to try to stop its neighbor from operating the wedding and events venue which is extremely popular with the Orthodox Jewish community in Lakewood. Plaintiff's frivolous litigations have failed; indeed, as of the date of the filing of this opposition brief, KBS has obtained use variance relief and final site plan approval from defendant Lakewood Township Zoning Board of Adjustment (the "*Board*") to allow it to continue to operate the wedding facility.

In this instant matter, consistent with its scorched-earth, everything-but-the-kitchen-sink approach, Plaintiff filed an untimely complaint in the Law Division challenging the "reorganization" of the Zoning Board because of misplaced

allegations of minor defects in the notice of meetings that was provided by the Board. According to Plaintiff, because the Board did not properly reorganize in accordance with the Open Public Meetings Act ("*OPMA*"), N.J.S.A. 10:4-1 et seq., at its meeting on February 6, 2023, the Board had no jurisdiction to begin considering KBS's application for a use variance and site plan approval on May 1, 2023. While the Board published notice of its reorganization meeting on February 9 and 10, 2023, Plaintiff did not file its complaint in this action until June 8, 2023, beyond the 45-day limitations period under N.J.S.A. 10:4-15. As such, the trial court properly dismissed Plaintiff's complaint as untimely under the OPMA.

In its appeal, Plaintiff once again attempts to bootstrap a timely challenge to the Board's reorganization on February 6, 2023, by purporting to challenge the Board's subsequent action in considering KBS's application on May 1, 2023. Plaintiff's attempt at an end-run around the 45-day filing requirement must once again fail. Plaintiff maintains that because the Board failed to properly organize on February 6, 2023, every single meeting that has taken place in 2023 is ultra vires—including the Board's meeting on May 1, 2023, when it first began considering KBS's application. In other words, Plaintiff's attempted challenge to the Board's consideration of KBS's application flows directly from Plaintiff's core challenge to the Board's purported failure to comply with the OPMA in connection with its reorganization and publication of its annual calendar on February 6, 2023. As such,

Plaintiff must have filed a timely challenge to the Board's actions on February 6, 2023, and cannot save such untimely challenge by purporting to challenge every subsequent action taken by the Board as improper. To allow Plaintiff to do so would eviscerate the 45-day limitations period set forth in the OPMA.

Additionally, while acknowledging that its requested relief will impact every single applicant who has appeared before the Board in 2023, Plaintiff maintains that it was not required to join each applicant because "Plaintiff is interested in only the KBS application." Pb32. That is not the standard. Whether Plaintiff cares or not, its Complaint had broad implications that affect not just KBS, but every single applicant who has appeared before the Board in 2023. Plaintiff was required to join such applicants as necessary and indispensable parties, regardless of whether Plaintiff cares about those applications or not.

This appeal, like the rest of Plaintiff's scorched-earth campaign, should be viewed by this Court as nothing more than the typical unreasonable, disgruntled neighbor case. The trial court properly found that Plaintiff's complaint was filed more than 45 days after publication of the action which Plaintiff sought to challenge (the Board's reorganization) and properly dismissed the complaint accordingly. This Court should affirm, resulting in one less litigation filed by Plaintiff.

STATEMENT OF FACTS

I. The Lake Terrace Facility

KBS is the owner of the Property on which the "*Lake Terrace*" wedding and event venue has operated, without complaint by any neighbors or Lakewood Township and in accordance with a duly issued Certificate of Occupancy, for more than a decade. There has been no change in the *status quo* for over ten years—the same size weddings, with the same number of patrons and the same amount of traffic and parking, have taken place without complaint. It was not until Plaintiff—a corporate entity owned by Sudler—learned that KBS was negotiating the sale of the Property to a third party when Plaintiff, for the first time, rushed to Court in November 2020 in the matter captioned 1650 Oak Street et al v. Township of Lakewood, et al., Docket No. OCN-L-2822-20 (the "*Injunction Action*"), and absurdly claimed that the wedding and events being held at Lake Terrace—in the evening when Plaintiff or its tenant's business is not operating—were causing Plaintiff immediate, irreparable harm. Pa80.

II. The Use Variance and Site Plan Application

Since November 2020, Plaintiff has aggressively over-litigated the Injunction Action, filing numerous unsuccessful applications to shut down the Lake Terrace venue and numerous motions to enforce certain Orders which imposed several arbitrary conditions upon the continued operation of Lake Terrace, and which has forced KBS to incur substantial expenses.

(Significantly, despite Plaintiff's repeated requests to the Court in the Injunction Action as well as the Appellate Division, the Court found that Plaintiff was not entitled to the complete shutdown of Lake Terrace, since (a) factual issues exist as to the nature of the land use approvals and permits issued by the Township and KBS's reasonable reliance on such approvals and (b) the absence of any irreparable harm.)

In order to clarify and confirm its right to use the Property in the same manner as it has used it for more than a decade, and to bring an end to this expensive, time-consuming litigation, on June 23, 2022, KBS submitted an application for Major Site Plan and Use Variance approval in order to allow the existing banquet hall to continue its operations. Pa113. KBS submitted the Application not as an admission that it was not currently permitted to use the Property to host banquets, weddings, concerts or other events, but rather to bring an end to the lengthy and costly litigations instituted by Plaintiff.

The Application indicated that "Lake Terrace is an event venue that hosts events of every sort, including but not limited to: (1) Conferences; (2) Weddings; (3) Fundraising Dinners; (4) Concerts; (5) Community Events; and (6) Event/Meeting/Banquet facilities." Pa133. The Application continued, "It is assumed that there will be up to 300 events per year accommodating up to 1,500 attendees per event for the event venue facilities proposed. The average size of each

event would be approximately 500 people with the assumption that the maximum size would be up to 1,500 people. Most of the events would be scheduled during the evening periods and would have minimal impact on weekday PM peak hour traffic." Ibid.

III. The Court Stays the Injunction Action Pending the Outcome of KBS's Use Variance and Site Plan Application

Because the outcome of the use variance would render the Injunction Action moot, KBS and its affiliate, Lake Terrace Manager, LLC ("*LTM*"), filed a motion to stay the Injunction Action pending the outcome of the use variance application. The Court granted the motion and entered an order on December 2, 2022, which stayed the Injunction Action for a period of 120 days pending the outcome of KBS's use variance and site plan application currently pending before the Board and pending any legislative actions by the Lakewood Township Committee. Pa120.

IV. Plaintiff Repeatedly Delays the Scheduling of the Public Hearing on KBS's Use Variance and Site Plan Application, Including by Asserting that the Public Meetings Failed to Comply with the Open Public Meetings Act

Recognizing that the Board's resolution of the Application would render the Injunction Action moot, Plaintiff has repeatedly engaged in conduct designed to delay the public hearing on the Application.

On August 22, 2022, Francine Siegal, the Board's Secretary, advised KBS's counsel that a special zoning board meeting has been scheduled for October 24, 2022, to hear the Application. Pa123.

However, on October 20, 2022, Robert C. Shea, Esq., counsel for Plaintiff, wrote to counsel for the Board and raised an issue with the notice of the special meeting received by Plaintiff and requested that the meeting be carried to allow for KBS to cure the purported notice violation. Pa125.

The next day, October 21, 2022, counsel for Plaintiff again wrote to the Board and objected to the timing of the production of updated documentation and plans submitted on behalf of KBS and again requested that the October 24 meeting be carried. Pa129. Counsel for KBS wrote to the Board on October 24 and advised that while he disagreed with the substance of Plaintiff's correspondence, out of an abundance of caution, KBS requested that the meeting be carried. Pa135. As such, the special meeting was cancelled and rescheduled to November 28, 2022. Pa137.

Once again, however, counsel for Plaintiff took issue with the manner in which notice of the special meeting was published by the Board—notwithstanding the fact that Plaintiff was, at all times, fully aware of the date of the special meeting. By letter dated November 28, 2022, counsel for Plaintiff asserted that the Board was required to publish notice of the special meeting in *two* newspapers, which did not

happen. Pa140. As a result, the special meeting scheduled for November 28 was cancelled. Pa145.

On January 18, 2023, the Board published notice in the Asbury Park Press which set forth the schedule of the Board's meetings for 2023 in accordance with N.J.S.A. 10:4-18. Pa148. The notice indicated that the Board would have its regular meetings on January 9, February 6, March 13, April 3, May 1, June 12, July 1, July 24, September 11, October 16, November 13 and December 4, 2023. Ibid.

The special meeting for KBS's application was rescheduled to February 1, 2023. Pa150. Once again, however, Plaintiff's counsel sought to interfere with and delay the public meeting.

First, by letter dated January 27, 2023, Plaintiff's counsel asserted the notice of the special meeting published by the Board misspelled KBS's formal name and failed to advise the public of the full scope of the application. Pa152.

Then, by letter dated January 30, 2023, just two days before the rescheduled meeting, Plaintiff's counsel asserted that the Board's re-organization meeting held on January 9, 2023, failed to comply with N.J.S.A. 10:4-18, and that the Board therefore did not have the quasi-judicial authority or jurisdiction to conduct any future hearings until it properly reorganizes. Pa156.

By letter dated January 31, 2023, Jerry J. Dasti, Esq., counsel for the Board, advised the Board that the actions taken at the Board's meeting on January 9, 2023,

including appointments, must be reaffirmed at the February 6, 2023 meeting. Pa164. Mr. Dasti further recommended that the Board reaffirm the meeting dates, even though the yearly calendar of the Board meetings had been duly published in two official newspapers. Ibid. In addition, Mr. Dasti advised the Board that the special meeting on KBS's application scheduled for February 1, 2023, must be postponed. Pa165.

The Board held a regular meeting on February 6, 2023, during which it voted to elect Abe Halberstam as Chairman, Meir Gellley as Vice-Chairman and Fran Siegel as Secretary. 8T. In addition, the Board approved Mr. Dasti as the Board's attorney and Remington and Vernick as the Board's engineer and planner. Ibid.

The Board published the following notice in the Asbury Park Press on February 9, 2023, and the Star Ledger on February 10, 2023:

> PLEASE TAKE NOTICE that at the reorganization and regulation meeting of the Township of Lakewood Board of Adjustment held on Monday, February 6, 2023, at 7:00 P.M. in the Municipal Building, 231 Third Street, the following action was taken: Re-Organization meeting elected Chairman, Abe Halberstam elected vice-chairman, Meir Gelley appointed board secretary, Fran Siegel Adopted formal resolutions appointing the following professionals: Board Attorney Jerry Dasti Board Engineer/Planner Terry Vogt Also adopted the calendar of meeting dates for 2023 and January 2024. Scheduled meeting dates will be: January 9, 2023 February 6, 2023 March 13, 2023 April 3, 2023 May 1, 2023 June 12, 2023 July 10, 2023 July 24, 2023 September 11, 2023 October 16, 2023 November 13, 2023 December 4, 2023 January 8, 2024 Also adopted the Annual Report for the year 2022. In accordance with Lakewood Township Development Ordinance Chapter 18-307, TAKE NOTICE that the Lakewood Zoning Board of Adjustment

> adopted the following resolutions of memorialization at a meeting February 6, 2023. Appeal # 4261 River Equities, River Avenue, Block 420.01 Lot 8, HD-6 zone. Resolution to deny a minor subdivision approval for the purpose of construct a duplex. Appeal # 4262 Blanch Holdings, LLC, Blanche Street, Block 483 Lot 7, A-1 zone. Resolution to approve the construction of a duplex as per the R-7.5 requirements ($39.60)
>
> [See Pa167-168 and Pa170-171.].

Rather than file an action in lieu of prerogative writs to challenge the Board's actions taken on January 9, 2023 and February 6, 2023, Plaintiff's counsel simply sent yet another letter to the Board on April 27, 2023, and asserted that the Board's reorganization which took place on February 6, 2023, was deficient. Pa173. Plaintiff's counsel further asserted that based upon the Board's purported violations of the OPMA, "it is this office's belief that the Board has no quasi-judicial power/jurisdiction to conduct any future hearings until it properly re-organizes. This would include the meeting scheduled to be heard on May 1, 2023." Pa174.

V. The Court in the Injunction Action Stays the Enforcement of the Prior Orders Pending the Outcome of the Use Variance and Site Plan Application and Classifies Plaintiff's Objection to the Board's Reorganization as "Inventive" and Subject to Ratification

While KBS's application was pending, and while the Injunction Action was stayed, KBS filed a motion for reconsideration of the orders which imposed arbitrary conditions on the continued operation of Lake Terrace. In response, Plaintiff filed a cross-motion to enforce litigant's rights, claiming, yet again, that certain wedding

events held at Lake Terrace violated the terms of the Orders. The Court denied both applications.

However, the Court recognized that the outcome of KBS's pending application would resolve the question of whether Lake Terrace can continue to operate and if so, under what conditions. As such, Judge Hodgson ordered that any enforcement proceedings to be instituted by Plaintiffs be stayed pending the outcome of the Application. In addition, Judge Hodgson observed that Plaintiff had frustrated KBS's efforts to proceed with a public hearing on the Application through its "inventive" objection to the Board's reorganization which is subject to ratification by the Board:

> I note that it appears to me that the defendants have made that application to the Board, and that it is has been frustrated through procedural and technical difficulties in service of the proper notice, and what I referred to as an inventive objection involving the reorganization of the board, which (1) is probably subject to ratification if the Board would have met and simply ratified their prior reorganization. However, under the circumstances, these things resulted in adjournments of the – of the hearing, which has delayed and frustrated the defendant in their attempts to try to get this thing heard and get a determination from Lakewood as to what they view this area as appropriate – as an appropriate business.
>
> [9T 68-6 to 70-11].

The Court entered an order on March 17, 2023 which denied Plaintiffs' motion without prejudice and provided that "this Court is hereby staying

enforcement proceedings until the Board has an opportunity to pass upon the matter." Pa177.

VI. The Court Extends the Stay of the Injunction Action Until Such Time as the Board Decides KBS's Application

Relentless in its efforts to interfere with KBS's pending application as well as its ability to continue to operate the Lake Terrace venue, and despite the plain language of the March 17, 2023 order, Plaintiff filed yet another motion to enforce litigant's rights in the Injunction Action on May 24, 2023, in which Plaintiff once again asked the Court to shut down Lake Terrace. KBS and LTM filed a cross-motion to extend the stay of all enforcement proceedings until such time as the Board finally and conclusively decides the Application.

By order dated July 6, 2023, the Court ordered that all enforcement proceedings in the Injunction Action are stayed until such time as the Board renders a decision concerning the pending Application. Pa181. During oral argument of the applications, the Court observed that Plaintiff's "inventive" objections to the Board's ability to hear KBS's application were continuing.

PROCEDURAL HISTORY

Despite having previously raised concerns about the Board's actions to reorganize taken on February 6, 2023, Plaintiff did not file a complaint in lieu of prerogative writs within 45 days of the publication of the notice of the Board's actions.

Instead, Plaintiff waited until June 8, 2023, to file the Complaint in Lieu of Prerogative Writs. Pa7. In the Complaint, Plaintiff alleged that the January 9, 2023 reorganization meeting was held in violation of the adequate notice provision of N.J.S.A. 10:4-8, since the initial January 8, 2022 annual notice was only published in one newspaper. Pa12, at ¶¶ 39-41. Additionally, Plaintiff alleged that the February 6, 2023 reorganization meeting was held in violation of the adequate notice provision of N.J.S.A. 10:4-8 for the same reason. Pa13, at ¶¶ 42-43. Confusingly, Plaintiff also alleged that "the Board never appointed its own members at the February 6, 2023 meeting," Pa13, at ¶ 44, despite there being no such obligation or ability to "appoint" any members, since the members are appointed by the governing body under § 18-300 of the Lakewood UDO. See Pa184.

Plaintiff maintained that "[b]ecause the Board failed to comply with the adequate notice procedures set forth in the N.J.S.A. 10:4-6 et seq., all decisions, determinations, testimony, submitted exhibits, and all actions taken during the January 9, 2023, February 6, 2023 and May 1, 2023 hearings are null and void."

Pa13, at ¶ 48. In other words, according to Plaintiff, because the Board failed to properly reorganize at its meeting on February 6, 2023, it has no ability to act, and every single action that the Board has taken over the past seven (7) months should be wiped out.

In Count One of the Complaint, Plaintiff asserted that the Board was not permitted to meet to conduct official business pursuant to the OPMA until adequate notice has been provided to the public. Pa12. Plaintiff requested the entry of judgment: (1) finding that the Board failed to provide adequate notice for the January 9, 2023, February 6, 2023, and May 1, 2023 hearings pursuant to N.J.S.A. 10:4-8 and -9, and as such failed to vest itself of the quasi-judicial power to hear testimony, make determinations and take official action, and have the proper jurisdiction over the KBS application; (2) declaring the January 18, 2023 annual notice and the second annual notice void; (3) finding that the January 9, 2023, February 6, 2023, and May 1, 2023 meetings constituted "special meetings" within the meaning of the OPMA; (4) finding that the January 9, 2023, February 6, 2023, and May 1, 2023 meetings were held in violation of the OPMA; (5) finding that the Board has no power to hear applications, and can hear no further testimony with respect to KBS' application until such time as it complies with the OPMA; (6) declaring the May 1, 2023 meeting, and all testimony, decisions, determinations, and actions taken therein *ultra*

vires and void; (7) awarding Plaintiff attorneys fees and costs of suit; and (8) for any other relief that the court deems equitable and just. Pa13-14.

In Count Two of the Complaint, Plaintiff asserted that the January 18, 2023 annual notice violated N.J.S.A. 10:4-18. Pa14. Plaintiff sought the identical relief requested in Count One of the Complaint. Pa15-16.

In Count Three of the Complaint, Plaintiff asserted that the Board failed to recite the statutory language required by N.J.S.A. 10:4-10. Pa16. Plaintiff requested the entry of judgment finding that the Board violated N.J.S.A. 10:4-10, declaring the May 1, 2023 hearing *ultra vires*, awarding attorneys fees and costs, and any other such relief as the Court deems equitable and just. Pa16.

On July 13, 2023, KBS moved to dismiss Plaintiff's complaint as untimely under N.J.S.A. 10:4-15 and for failure to state a claim for the drastic remedy sought under R. 4:6-2(e). Pa69. On July 21, 2023, the Board filed a separate motion to dismiss Plaintiff's complaint. Pa192.

On August 8, 2023, Plaintiff improperly filed a "cross-motion for summary judgment". Pa200.

Before oral argument of the motions to dismiss and Plaintiff's improper "cross-motion for summary judgment" was heard, Plaintiff filed a motion to amend its complaint on September 20, 2023. Pa694.

On October 20, 2023, the motion judge, Honorable Francis R. Hodgson, Jr., A.J.S.C., heard oral argument of the parties' motions. 1T. Counsel for KBS explained to the trial court that Plaintiff's attempt to use May 1, 2023, as the "starting date" for purpose of the accrual of the 45-day limitations period was a "bootstrap" argument:

> The plaintiff is trying to use that May 1st meeting as a hook to challenge the initial reorganization by the Board. The plaintiff says in its lawsuit the Board acted unlawfully on May 1st. Why? Because the Board didn't properly reorganize and therefore did not have the authority to hold anything. Well, that's a bootstrap argument. You can't use a challenge to every single subsequent monthly meeting as a means to then go back in time to challenge the Board's initial reorganization when that reorganization is the sole basis of the challenge in the first place.
>
> Because the plaintiff did not timely challenge [of] that February 6th reorganization, the Board's reorganization was valid. That means every single thing this Board has done in 2023 is valid. That includes proceeding to consider KBS' application. So on that basis, the Court should dismiss the plaintiff's complaint.
>
> [1T 8-17 to 9-9].

Judge Hodgson agreed, finding that "to the extent the plaintiff's challenge to the Board's failure to properly reorganize for 2022 and 2023 term pursuant to N.J.S.A. 10:4-18 because it was the product of violation of the Open Public Meetings Act, their complaint is untimely." 1T 53-18 to 53-23. The motion judge found that "[a] complaint alleging an Open Public Meetings Act violation must be brought within 45 days after the action sought to be voided has been made public in pertinent

part." 1T 54-6 to 54-9. The motion judge further found that "constructive notice is the standard" with respect to the accrual of the limitations period. 1T 54-10 to 54-15. The motion judge stated that "there was sufficient public notice for the plaintiffs to be aware and then challenged the Board's alleged failure to comply with the Open Public Meetings Act in a timely fashion." 1T 54-22 to 54-25. The motion judge therefore dismissed Counts 1 and 2 of the Complaint with prejudice and Count 3 without prejudice. 1T 55-5 to 55-12. The motion judge also denied Plaintiff's motion to amend the Complaint. 1T 55-13 to 57-1.

On October 20, 2023, the trial court entered: (1) an order dismissing Counts 1 and 2 of Plaintiff's Complaint as against KBS with prejudice, and Count 3 of Plaintiff's Complaint as against KBS without prejudice (Pa1); (2) an order dismissing Counts 1 and 2 of Plaintiff's Complaint as against the Board with prejudice, and Count 3 of Plaintiff's Complaint as against the Board without prejudice (Pa3); (3) an order denying Plaintiff's cross-motion for summary judgment (Pa4); and (4) an order denying Plaintiff's motion to amend the complaint (Pa5) (together, the "*Orders*").

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFF'S COMPLAINT WAS UNTIMELY PURSUANT TO N.J.S.A. 10:8-15 (Pa1-3; 1T 45-11 TO 62-25)

This Court should affirm the motion judge's finding that Plaintiff's Complaint, which challenges the Board's ability to consider any application based on the Board's purported failure to properly reorganize during its meeting on February 6, 2023, is untimely under N.J.S.A. 10:8-15.

A. Standard of Review

The Appellate Division gives no deference to a trial court's legal determinations when no issue of fact exists. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Accordingly, this court reviews de novo a trial court's decision to dismiss a complaint as barred by a statute of limitations. Smith v. Datla, 451 N.J. Super. 82, 88 (App. Div. 2017) (finding "when analyzing pure questions of law raised in a dismissal motion, such as the application of a statute of limitations, we undertake a de novo review").

Engaging in a de novo review of the record, this Court should reach the same conclusion reached by Judge Hodgson: Plaintiff's Complaint was filed too late.

B. Plaintiff's Complaint Was Filed More Than 45 Days After the Reorganization Action Sought to be Voided by Plaintiff was Made Public

Under N.J.S.A. 10:4-15(a), "[a]ny action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, **which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public**." (emphasis added). See also Township Committee of Edgewater Park Tp. v. Edgewater Park Housing Auth., 187 N.J. Super. 588 (Law Div. 1982) (finding plaintiff's challenge under the OPMA was untimely under N.J.S.A. 10:4-15(a)); Township of Bernards v. State, Dept. of Community Affairs, 233 N.J. Super. 1 (App. Div. 1989) (petition to void any action taken at meeting of Council on Affordable Housing, which was filed well after 45-day limit under OPMA, was untimely); Jersey City v. State, Dept. of Env. Protection, 227 N.J. Super. 5 (App. Div. 1988) (failure of citizens, challenging lease of portion of state park for development by public marina, to timely file their claim that decision was made in violation of OPMA, precluded consideration of claim); Atlantic City v. Atlantic Deauville, Inc., 5 N.J Tax 459 (1983) (objection alleging violation of OPMA, not raised until 11 months after resolution in question was adopted, was out of time).

The first step in evaluating the untimeliness of Plaintiff's Complaint is to understand the "action" which Plaintiffs sought to have voided through its lawsuit. In its brief, Plaintiff argues that "[t]he action Plaintiff is seeking to void is the action of the Board commencing testimony on the KBS application, which occurred on May 1, 2023." Pb30-31. This is incorrect. It is the Zoning Board's reorganization, and not the Board's subsequent consideration of KBS's application, which Plaintiff sought to void based on an alleged violation of the OPMA.

Plaintiff sought to prevent the Zoning Board from hearing testimony on the KBS application because, according to Plaintiff's Complaint, the Board had failed to properly reorganize at its meeting on February 6, 2023. In other words, Plaintiff's attempt to stop the Zoning Board from hearing KBS's application flows directly from Plaintiff's core challenge to the Zoning Board's alleged failure to reorganize in accordance with the OPMA. Plaintiff's theory is analogous to the "fruit of the poisonous tree" concept; because, according to Plaintiff, the Zoning Board's initial reorganization was improper under the OPMA, everything that the Board did after that date, including the consideration of KBS's application, is invalid. Yet in order for the Board's subsequent actions to be invalid, the Board's reorganization must first be voided. That is the core challenge of Plaintiff's complaint. Thus, the "action" which Plaintiff actually

seeks to void, through its Complaint, was the Board's initial conduct in allegedly failing to properly reorganize in accordance with the OPMA during its meeting on February 6, 2023.

Plaintiff cannot rely on the Board's actions taken at subsequent meetings—including the May 1, 2023 meeting—as a way to bootstrap a challenge to the Board's initial reorganization in the first place. To allow otherwise would authorize an end-run around the 45-day limitations period contained in N.J.S.A. 10:4-15 by re-starting the clock every time a Board takes action after failing to comply with the OPMA at an earlier meeting.

The second step in the untimeliness analysis is to determine the starting point for the running of 45-day limitations period. The OPMA requires that a complaint be filed within 45 days "**after the action sought to be voided has been made public**." As Judge Hodgson correctly noted, "[c]onstructive notice is the standard." Jersey City v. State Dept. of Environmental Protection, 227 N.J. Super. 5, 22 (1988) (citing Edgewater Park v. Edgewater Park Housing Auth., 187 N.J. Super. 588, 603 (Law Div. 1982)).

In this case, the Board's reorganization during its meeting on February 6, 2023 was made public in notices published in the Asbury Park Press and Star Ledger on February 9 and 10, 2023, respectively. See Pa167-168 and Pa170-171. The fact that Plaintiff did not actually see the notices published in these

newspapers until such later time is irrelevant. (Such argument is also non-sensical; clearly Plaintiff was aware of the Board's actions taken on February 6, 2023, since Plaintiff appeared through counsel and vehemently objected on the very same grounds raised in its untimely complaint.) The 45-day clock began to run on February 10, 2023, and expired on March 27, 2023.

Therefore, Plaintiff's Complaint, filed on June 8, 2023, is untimely under N.J.S.A. 10:4-15. The trial court properly dismissed Plaintiff's Complaint accordingly.

POINT II

EVEN IF THIS COURT CONCLUDES THAT PLAINTIFF'S COMPLAINT WAS TIMELY FILED, THIS COURT SHOULD CONCLUDE THAT THE COMPLAINT SHOULD HAVE BEEN DISMISSED ON THE SEPARATE BASIS OF PLAINTIFF'S FAILURE TO JOIN INDISPENSABLE PARTIES

While the motion judge did not address whether Plaintiff's untimely Complaint should also have been dismissed for failure to join indispensable parties, in the event this Court concludes that Plaintiff's complaint was timely filed under the OPMA (it wasn't), this Court should nonetheless affirm its dismissal on such separate basis.

The standard to join all indispensable parties under R. 4:28-1(a) is not whether Plaintiff is "interested" in those applications, as Plaintiff argues. Rather, R. 4:28-1(a) requires the joinder of a person who "claims an interest in

the subject of the action and is so situated that the disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest." Similarly, the Declaratory Judgments Act requires that "all persons having or claiming an interest which would be affected by the declaration shall be made parties to the proceeding." N.J.S.A. 2A:16-56. The fact that Plaintiff simply does not care about these other applicants is immaterial.

Here, Plaintiff alleged in its Complaint that the Board had no authority to act *at all* in 2023, because it failed to properly reorganize on February 6, 2023. According to Plaintiff, every single action that the Board has taken, including voting upon every single application that has come before it in 2023, is void. If the Court were to agree with Plaintiff, the Court would effectively invalidate *all* actions taken by the Board in 2023, and not just the Board's consideration of KBS's application. The fact that Plaintiff does not care about the numerous other applicants that have appeared before the Board in 2023 is immaterial; their interests will be directly impacted as a result of the Court's decision, whether Plaintiff is challenging those applications or not. Plaintiff acknowledges that those applicants' approvals are "voidable upon challenge." Pb37. As such, Plaintiff was required to join those applicants as necessary and indispensable

parties. Its failure to do so is a separate basis justifying the dismissal of Plaintiff's untimely complaint.

POINT III

EVEN IF PLAINTIFF'S COMPLAINT IS CONSIDERED TIMELY UNDER N.J.S.A. 10:4-15, AND EVEN IF THE BOARD FAILED TO TECHNICALLY COMPLY WITH THE OPMA IN SOME MINOR REGARD, THE COURT SHOULD NOT VOID THE BOARD'S ACTIONS BUT RATHER DIRECT THE BOARD TO TAKE REMEDIAL ACTION UNDER N.J.S.A. 10:4-15

Even if Plaintiff's Complaint is considered timely (it isn't), and even accepting as true Plaintiff's allegations that the Board committed a technical violation of the OPMA, and even if Plaintiff is found to not have been required to join all indispensable parties, this Court should nonetheless conclude that Plaintiff is not entitled to the drastic remedy sought in its Complaint as a matter of law. In such event, this Court should order the Zoning Board to take remedial action to formally ratify its reorganization, and not to vacate an entire year's worth of Board proceedings involving numerous applications beyond KBS's application.

In Liebeskind v. Mayor and Mun. Council of Bayonne, 265 N.J. Super. 389, 393 (App. Div. 1993), the plaintiff brought an action in lieu of prerogative writs, contending that the meetings of the Council of Bayonne violated the OPMA because they were "inadequately noticed, inadequately and tardily

documented, or inconveniently timed." The plaintiff demanded the invalidation of an ordinance passed on June 13 which retroactively raised the salaries of certain city officials, including council members, "and of all actions taken at the July 1 reorganization meeting." Ibid. The trial judge ruled that the July 1st meeting failed to comply with the OPMA because there was no 48-hour notice of the reviewed annual meeting schedule, contrary to N.J.S.A. 10:4-8(d), and that the June 13th meeting violated the OPMA because publication of the minutes was delayed by two months, contrary to N.J.S.A. 10:4-14. Id. at 394.

However, the trial court declined to invalidate any council actions based on his finding that there was no bad faith, but only technical noncompliance. Liebeskind, supra, 265 N.J. Super. at 394. The trial judge ordered that the council conform in the future to the 48-hour notice requirement by timely submission of meeting notices to newspapers and that copies of final meeting minutes be made available for inspection within two weeks after each meeting and at least three business days before the next meeting. Ibid.

On appeal, the plaintiff contended that the trial judge erred in not voiding the nonconforming actions complained of. Liebeskind, supra, 265 N.J. Super. at 394. The Appellate Division refused to overturn the trial judge's ruling. Ibid. While the Appellate Division observed that "[w]illful violations of the Act require swift and strong remediation," "invalidation of public action is an

extreme remedy which should be reserved for violations of the basic purposes underlying the Act." Ibid. (citing AQN Assocs., Inc. v. Township of Florence, 248 N.J. Super. 597, 614-15 (App. Div. 1991)). The Appellate Division stated that the Supreme Court's decision in Polillo v. Deane, 74 N.J. 562 (1977), "expressly permits discretion in the fashioning of remedies for technical violations of the Act which do not result from bad faith motives and which do not undermine the fundamental purposes of the OPMA." Id. at 394-95. In Polillo, the Supreme Court explained:

> Consistent with the breadth and elasticity of relief provided in the legislative scheme [N.J.S.A. 10:4-15], it is entirely proper to consider the nature, quality and effect of the noncompliance of the particular offending governmental body in fashioning the corrective measures which must be taken to conform with the statute. Thus, in this context, the "substantial compliance" argument ... carries some weight on the question of remedy and relief.
>
> [Polillo, supra, 74 N.J. at 579].

The Appellate Division in Liebeskind recognized that the trial judge specifically found that the defendants' failure to comply with the Act by inadequate notice and late publication of minute was not a result of "chicanery" but oversight. Liebeskind, supra, 265 N.J. Super. at 395. The Appellate Division concluded that the under the circumstances, the trial judge was empowered under Polillo to formulate a remedy short of invalidation. Ibid. See also Witt v. Borough of Maywood, 328 N.J. Super. 432 (Law Div. 1998)

(holding that the alleged OPMA violations were *de minimus* in nature, did not infect the rezoning or easement exchange process and was effectively erased by the multiple public contacts, participation, input, and oversight).

In this case, the alleged violations are *de minimus* in nature. According to Plaintiff, the Board failed to comply with the OPMA in connection with the February 6, 2023 reorganization meeting because it failed to publish notice of the meeting in *two* newspapers as required under N.J.S.A. 10:4-8. Yet this failure in no way impacted the Board's consideration of any substantive application. The only actions that were taken by the Board on February 6, 2023, were the election of the Chairman and Vice-Chairman, the selection of the Secretary, and the appointment of the Board's attorney and engineer and planner. These actions were taken in accordance with N.J.S.A. 40:55D-69 and Lakewood Township Unified Development Ordinance ("*UDO*") § 18-300D, which require the Board, on an annual basis, to elect a chairman and vice chairman from its regular members and select a secretary, who or may not be a member of the Board or municipal employee. (Significantly, there is no requirement under the OPMA, the Municipal Land Use Law ("*MLUL*"), N.J.S.A. 40:55D-1 et seq., or the Lakewood Township UDO that the Board formally "vote" to re-adopt its regular meeting schedule or to vote to "swear in"

the Board's members, as alleged by Plaintiff. All that the Board must do is simply elect a chairman and vice chairman and select a secretary.)

Moreover, Plaintiff—the only entity or individual to present any opposition to KBS's application or to the Board's reorganization—had actual notice of the Board's actions taken on February 6, 2023. In fact, Plaintiff appeared at the hearing through counsel, and raised the very same objections that Plaintiff raised in its untimely Complaint. This is not a situation where a public body took action in secret, without those interested members of the public having the ability to participate in the proceeding. On the contrary, the only interested member of the public appeared and actively participated at the hearing, and subsequently appeared and participated in every single public hearing held on KBS's application.

At most, even if Plaintiff had filed a timely complaint (it didn't), and even if Plaintiff had joined all indispensable parties (it didn't), Plaintiff would simply be entitled to the entry of judgment directing the Board to ratify its actions at a duly noticed meeting. Indeed, that is precisely what the OPMA allows. Specifically, N.J.S.A. 10:4-15(a) provides:

> Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; **provided, however, that a public body may take corrective or remedial**

> **action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section**; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act. (emphasis added).

Thus, if this Court reverses the outright dismissal of Plaintiff's untimely Complaint, this Court should order the Board to ratify its actions taken on February 6, 2023, at a duly noticed meeting.

POINT IV

THIS COURT SHOULD NOT CONSIDER PLAINTIFF'S PROCEDURALLY IMPROPER "CROSS-MOTION FOR SUMMARY JUDGMENT"

In response to KBS's motion to dismiss its complaint as untimely under the OPMA, Plaintiff purported to file a "cross motion for summary judgment" in which Plaintiff sought the entry of judgment ordering and declaring that all hearings to date regarding the application filed by KBS are void due to the Board's failure to provide adequate notice of same, all testimony taken at the May 1, 2023 hearing on KBS's application is void, and that the Board is prohibited from conducting any further hearings on KBS's application "until the Board has properly reorganized, OPMA violations are remediated, and proper ratification measures taken at a public hearing held in compliance with OPMA." Pa202-203.

The trial court properly refused to consider Plaintiff's putative "cross-motion" for summary judgment, and this Court should do the same.

A. Plaintiff's "Cross-Motion for Summary Judgment" Was Not a Proper Cross-Motion Under Rule 1:6-3(b)

First, Plaintiff's "cross-motion for summary judgment" was not a proper cross-motion under R. 1:6-3(b). That rule provides that "[a] cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion." In this case, Plaintiff's cross-motion did not relate to the original motion filed by KBS. The issues raised in KBS's original motion were: (a) the untimeliness of Plaintiff's complaint under N.J.S.A. 10:4-15; (b) Plaintiff's failure to join all indispensable and necessary parties; and (c) the impropriety of Plaintiff's requested judgment voiding every single action taken by the Board in 2023. On the other hand, the issues raised in Plaintiff's cross-motion were: (a) the actions and inactions of the Board; and (b) the Board's subjective intention with regard to such actions or inactions. Plaintiff's cross-motion goes well beyond the issues raised in KBS's motion, and is therefore an improper cross-motion under R. 1:6-3(b).

B. In the Event the Court Considers Plaintiff's Cross-Motion to be Proper Under Rule 1:6-3, Plaintiff's Application is Untimely Under Rule 4:46-1

Even if the Court considers Plaintiff's cross-motion to relate to the subject matter of KBS's motion, Plaintiff's application is untimely. Rule 4:46-1 states: "a motion for summary judgment shall be served and filed not later than 28 days before the time specified for the return date; opposing affidavits, certifications, briefs and cross-motions for summary judgment, if any, shall be served and filed not later than 10 days before the return date."

Here, Plaintiff filed its putative "cross-motion for summary judgment" eight (8) days before the return date. Under the plain language of R. 4:46-1, such cross-motion is therefore untimely.

C. In the Event the Court Considers Plaintiff's Untimely Cross-Motion to be Proper Under Rule 1:6-3, There Is No Factual Basis to Impose the Drastic Relief of Voiding the Entirety of the Now-Completed KBS Application

In addition to being procedurally improper, Plaintiff's "cross-motion for summary judgment" is factually baseless: there is no evidence to demonstrate that the Board *intended* to violate the OPMA which would justify the drastic relief requested.

In its brief, Plaintiff argues that because the Board violate the OPMA "for its failure to reorganize and to adequately notify the public of its meetings to date," "everything that occurred in the KBS Application so far is void." Pb27.

In other words, Plaintiffs seeks the nuclear option, with the Board and KBS effectively having to re-start the application—*which, after months of hearings, has finally been completed with the adoption of a resolution granting KBS's application*.

At most, and as discussed above, the OPMA does not require such drastic relief. As this court recognized in Liebeskind, where the technical violations of the OPMA through inadequate notice was not a result of "chicanery" but oversight, the court is empowered to formulate a remedy short of invalidation. If this Court is going to consider Plaintiff's procedurally defective motion, the Court should find that the Board can cure such defect by ratifying its reorganization and all actions taken by the Board in 2023—including the consideration of KBS's application—at a duly noticed meeting.

CONCLUSION

For the reasons set forth above, this Court should affirm the dismissal of Plaintiff's Complaint with prejudice.

GIORDANO, HALLERAN & CIESLA
A Professional Corporation
Attorneys for Defendant/Respondent,
KBS Mt. Prospect, LLC

By: */s Matthew N. Fiorovanti*
MATTHEW N. FIOROVANTI

Dated: November 1, 2024

1650 OAK STREET, LLC Plaintiff-Appellant vs. TOWNSHIP OF LAKEWOOD ZONING BOARD OF ADJUSTMENT, KBS MT. PROSPECT, LLC, JOHN DOES 1-100 (a fictious name for persons presently unknown) and XYZ, INC. 1-100 (a fictious name for a business entity presently unknown). Defendant-Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000927-23T4 *CIVIL ACTION* ON APPEAL FROM: LAW DIVISION, OCEAN COUNTY DOCKET NO.: OCN-L-1341-23 SAT BELOW: Hon. Francis J. Hodgson, Jr. J.S.C.

AMENDED BRIEF OF DEFENDANT-RESPONDENT, TOWNSHIP OF LAKEWOOD ZONING BOARD OF ADJUSTMENT

DASTI, McGUCKIN, McNICHOLS, CONNORS, ANTHONY AND BUCKLEY
620 West Lacey Road
Forked River, New Jersey 08731
609-971-1010 Fax 609-971-7093

Of Counsel
Jerry J. Dasti, Esq.

On The Brief:
Jerry J. Dasti, Esq.
Attorney I.D. No. 005441973
E-mail: jdasti@dmmlawfirm.com

On the Brief:
Joseph F. Mackolin, Jr., Esq.
Attorney I.D. No. 395112024
E-mail: jmackolin@dmmlawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

COURT RULES

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

We will reply upon the information provided in the Appellant's brief.

TABLE OF APPENDIX

PRELIMINARY STATEMENT

The Appellant has alleged on numerous occasions that the Zoning Board of Adjustment failed to comply with the Open Public Meetings Act when publishing notices of official meetings at which time formal action was taken. Even assuming but certainly not admitting that inadvertent and innocent violations occurred, in accordance with the provisions set forth in the Open Public Meetings Act, the Zoning Board has cured those alleged deficiencies. The Zoning Board, at a meeting held on September 11, 2023, after appropriate publication in two (2) official newspapers on August 25, 2023 (Da001) and September 11, 2023 (Da003), adopted Resolutions (Da007 through Da011) thereby curing any alleged defect. One of the notices was not published until the date of the hearing by the Star Ledger, on September 11, 2023. However, the evidence is clear that notification of the publication was forwarded by the Administrative Secretary of the Zoning Board to the Star Ledge well more than forty-eight (48) hours in advance of the meeting. See N.J.S.A. 10:4-8.

Based upon the Orders of the Trial Court, the use variance application submitted by Co-Respondent KBS was allowed to continue before the Zoning Board. At its July 22, 2024, meeting, the Zoning Board had approved the formal application, thereby permitting the existing use as a catering hall to continue. (Da013).

Based upon the facts of this case, Appellant simply fails to allege a cause of action for which relief can be granted.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Co-Respondent, KBS, is the owner of Property known as "Lake Terrace." Lake Terrace operates as a banquet facility and has operated as such for over twelve years. In fact, the record is clear that before beginning to occupy the property, the caterer obtained a commercial Certificate of Occupancy to utilize the property as a banquet hall. (Da001 and Da002). Appellant is an adjoining property owner (a corporate entity of the Sudler Companies), and the Sudler Companies own various lots surrounding KBS's Lake Terrace lot.

Previously, Appellant filed an action under Docket No. L-2822-20 (the "Injunction Action") (Pa079), claiming that the events being held at KBS's Lake Terrace property were causing immediate and irreparable harm to the Appellant. Appellant has repeatedly attempted to halt business at Co-Respondent KBS's banquet hall.

As a response to the injunction filed by this same Appellant, KBS made an application with the Lakewood Township Zoning Board of Adjustment for Major Site Plan and Use Variance Approval (Pa112) in order to permit the existing use to

[1] The Procedural History and Statement of Facts are inextricably linked and are therefore presented together.

continue at the Lake Terrace property. Without admitting any wrongdoing, KBS made this application to "clear up" any issues with its use of the property. The Zoning Board has adopted a Resolution granting the application submitted by KBS, so as to allow the catering facility to continue its operation. (Da013).

On December 2, 2022, the Court granted KBS' motion to stay the injunction action (Pa119) to permit KBS to make their application before the Zoning Board. Since the filing of KBS' application with the Zoning Board and the issuance of a stay of the injunction matter, Appellant has repeatedly made efforts to hinder the Board from hearing KBS' application. Counsel for Appellant has sent numerous letters to the Zoning Board, alleged various violations of applicable New Jersey statutes, and has filed the within litigation to further frustrate the efforts and powers of the Lakewood Township Zoning Board of Adjustment.

There has never been an allegation of bad faith exercised on behalf of the Respondent Zoning Board of Adjustment. Certainly, the allegations of the Appellant are that inadvertent and non-intentional mistakes were made by the Zoning Board in its attempt to comply with the New Jersey Open Public Meetings Act (OPMA). As a result of the Appellant's complaints, before the Trial Court entered a decision dismissing Appellant's Complaint, the Zoning Board adopted three (3) Resolutions which are filed herewith. Resolution 2023-1 (Da007) appointed, on September 11, 2023, at its duly advertised Reorganization Meeting, the Chairman, Vice Chair,

Secretary, Administrative Secretary, Attorney, Conflict Attorney, and Consulting Engineering for the Zoning Board of Adjustment. Resolution 2023-2 (Da009), also adopted on September 11, 2023, reaffirmed:

> Any and all votes, appointments, and official actions taken since January 1, 2023, through the present date including but not limited to actions on applications for approvals, appointments of professional staff, appointments of administrative staff, and payment of vouchers as if more fully set forth herein and repeated at length.

Finally, on September 11, 2023, the Zoning Board adopted Resolution 2023-3 (Da011) which:

> Reaffirms and accepts all prior testimony, evidence, statements of Counsel, etc. as if set forth more fully and repeated at length with regard to the aforementioned pending application submitted by KBS Mount Prospect, LLC for use variance and other forms of approval for property known and designated as Block 1160.06, Lot 47 a/k/a 1690 Oak Street, Lakewood, New Jersey.

The Court's Order granting the motion to dismiss Appellant's Complaint, which motions were filed both by KBS and the Zoning Board, were entered on October 20, 2023. (Pa001 and Pa003).

LEGAL ARGUMENT

POINT I

FOLLOWING THE RATIONALE SET FORTH IN POLILLO V. DEANE, 74 N.J. 562 (1977), THE ZONING BOARD PROPERLY REAFFIRMED PRIOR ACTIONS TAKEN DURING THE TIME THAT THE ALLEGATIONS OF VIOLATION OF THE OPMA WERE MADE. THEREFORE, ANY ALLEGED VIOLATION WAS PROPERLY CURED BY THE RESOLUTIONS ADOPTED ON SEPTEMBER 11, 2023.

The Zoning Board vehemently denies that it ever violated OPMA in this matter. There is no question that any "mistake" made by the Zoning Board was inadvertent. There has never been any allegation of bad faith with regard to the alleged violations of the OPMA.

This litigation is similar to the factual situation in Polillo. In that matter, the Atlantic City Charter Study Commission was alleged to have violated OPMA. In fact, the Appellate Division and the Supreme Court found that OPMA was, although not intentionally, violated by the Charter Study Commission.

Nevertheless, at page 580, the New Jersey Supreme Court held:

> Nevertheless, we must invalidate the final governmental action taken by the Commission, namely its actual recommendation as to the form of government to be placed upon the ballot and the antecedent meetings at which the Commissioners deliberated and reached their conclusion. However, we do not find it necessary, in fashioning a remedial solution, to invalidate and repudiate all other

> public meetings, particularly those hearings at which testimony and evidence were received.

Furthermore, the Supreme Court held:

> It may in its sound discretion utilize so much of the testimony and evidence which it acquired in the course of its original effort as it deems necessary and appropriate. However, any decision in that regard must be arrived at in a manner in strict conformity with the Open Public Meetings Law…the Commission may hold additional meetings for the purpose of either supplanting or supplementing its prior efforts, again in strict compliance with the Open Public Meetings Law.

That is exactly what the Zoning Board did in the case at bar. Interestingly, at page 6 of the Appellant's brief, there is not an objection as to the timing of the notices for the September 11, 2023, meeting. The agendas were published in two (2) official newspapers of the Zoning Board. (Da003 and Da005). Therefore, adequate notice was duly published within time for the Resolutions filed herewith to be correctly adopted. Although the publication in the Star Ledger was not made until September 11, 2023, it is uncontroverted that the notice to the Star Ledger was submitted by the Zoning Board more than forty-eight (48) hours before it was published. We have no knowledge as to why the Star Ledger failed to publish the advertisement more quickly.

Appellant now claims that the "agenda" was insufficient because it "did not contain any details as to the contents of each Resolution, nor did they give the date,

time and place of hearing". That is incorrect. We will address those allegations in Point II herein.

POINT II

THE NOTICES PROVIDED BY THE ZONING BOARD IN TWO (2) OFFICIAL NEWSPAPERS OF THE ZONING BOARD WERE PROPER AND COMPLIED WITH OPMA.

In Points VI and VII of Appellant's brief it takes great umbrage with the content of the published agenda. The Appellant complains that it did not "contain details as to what the dates of the prior actions sought to be ratified". Also, it complained that the Published Agendas did not contain any details as to the contents of each Resolution.

The definition of an agenda pursuant to the provisions of OPMA has been addressed and resolved by the decision of the Superior Court of New Jersey, Appellate Division in Opderbeck vs. Midland Park Board of Education, 442 N.J. 40 (App. Div. 2015). That factual situation is exactly on point to the allegations raised by the Appellant. At page 44, the Appellate Division held:

> We hold the term "agenda" as used at N.J.S.A. 10:4-8(d) does not impose a legal obligation on public bodies to provide copies of all appendices, attachments, reports, or other documents referred to in their agendas.

Clearly, adequate notice was provided by the publications in the two (2) official newspapers, for the meeting held on September 11, 2023. The fact that the

"Published Agendas did not contain any details"... is irrelevant and clearly contrary to the holding in Opderbeck, supra.

POINT III

CLEARLY, THE TRIAL COURT HAD DISCRETION IN FASHIONING THE APPROPRIATE REMEDY FOR A MINOR VIOLATION OF THE OPEN PUBLIC MEETINGS ACT, AS IS ALLEGED HERE.

In Liebeskind v. Mayor and Council of Bayonne, 265 N.J. Super. 389, 394 (App. Div. 1993) the Appellate Division heard the appeal of a case in which the trial judge declined to invalidate actions of the governing body based on his findings that there was no bad faith, but only technical noncompliance. Liebeskind v. Mayor & Mun. Council of Bayonne, supra at 394. On appeal, the Appellate Division held:

> To be sure, the mandates of the O.P.M.A. must be followed by governmental bodies engaging in public forums. Willful violations of the Act require swift and strong remediation. However, invalidation of public action is an extreme remedy which should be reserved for violations of the basis purposes of the underlying Act. AQN Assocs., Inc. v. Township of Florence, 248 N.J. Super. 597, 614–15, 591 A.2d 995 (App. Div.), certif. den. 126 N.J. 385, 599 A.2d 162 (1991). Polillo v. Deane, 74 N.J. 562, 379 A.2d 211 (1977), expressly permits discretion in the fashioning of remedies for technical violations of the Act which do not result from bad faith motives, and which do not undermine the fundamental purposes of the O.P.M.A.
>
> Here, the trial judge specifically found that the defendants' failure to comply with the Act by inadequate notice and

> late publication of minutes was not a result of "chicanery" but oversight. Under the circumstances, he was empowered by Polillo to formulate a remedy short of invalidation. The remedy chosen was a thoughtful, carefully crafted response to the problems presented by this record and was calculated to eliminate future O.P.M.A. violations. As such, it is authorized under Polillo and fully supported by the record.
> [Liebeskind v. Mayor and Mun. Council of Bayonne, 265 N.J. Super. 389, 394-395 (App. Div. 1993).]

Any alleged violations of the Open Public Meetings Act in Appellant's Complaint are minor. Specifically, Appellant alleges that the notice for the February 6, 2023, meeting was not specifically noticed as a "special meeting"; that the January 18, 2023; reorganization meeting was noticed in only one newspaper and that the Board's "Sunshine Law" statements at its May 1, 2023, meeting was not specific enough. Appellant takes these extremely alleged minor violations of the Open Public Meetings Act to claim that each and every action taken by the Lakewood Township Zoning Board of Adjustment at those hearings and after the reorganization meeting should be invalidated.

Nothing in the Complaint suggests (nor could it), that these minor alleged violations were willful on behalf of the Lakewood Zoning Board. The Appellant has raised minor, easily remediated issues and then seeks such an extreme remedy. As was stated in Liebeskind, invalidation of public action is an extreme remedy and is to be reserved for more egregious, purposeful violations of the Open Public Meetings Act.

The remedy sought by Appellant is outrageous, creates a dangerous precedent if granted, and has no basis in fact. For these reasons, as well as the fact that Appellant's Complaint was time barred, the Appellant's Complaint should be dismissed.

POINT IV

THE TRIAL COURT PROPERLY FOUND THAT APPELLANT'S COMPLAINT MUST BE DISMISSED BECAUSE APPELLANT FAILED TO ADD INDISPENSABLE PARTIES, NAMELY ALL OTHER APPLICANTS BEFORE THE ZONING BOARD DURING THE TIME THE APPELLANT ALLEGES A VIOLATION OF THE OPMA

Not only does Appellant seek the extraordinary remedy of voiding all of the Lakewood Zoning Board of Adjustment's actions of 2023, but in doing so, Appellant fails to add any other person who may be impacted by such a ruling.

New Jersey Court Rule 4:28-1 governs joinder of persons needed for adjudication. The rule states, in pertinent part:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party if (1) in the person's absence complete relief cannot be accorded among those already parties...
> [R. 4:28-1.]

Our case law has stated that "[w]hether a party is indispensable depends upon the circumstances of the particular case. As a general proposition, it seems accurate to say that a party is not truly indispensable unless he has an interest inevitably

involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Jennings v. M & M Transportation Co., 104 N.J. Super. 265, 272 (Ch. Div. 1969) (quoting Allen B. DuMont Labs, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959)). Indispensability is usually determined from the point of view of the absent party and in consideration of whether or not his rights and interests will be adversely affected. See La Mar-Gate, Inc. v. Spitz, 252 N.J. Super. 303 (App. Div. 1991).

Should Appellant be successful in this litigation, the remedy sought by Appellant would have a "domino effect" and impact all applicants who appeared before the Lakewood Township Zoning Board of Adjustment. Approvals, denials and other decisions of the Board would be voided if Appellant is successful in this litigation.

As stated above, indispensability is viewed in the eyes of the excluded party. It is not hard to imagine that a successful applicant before the Zoning Board of Adjustment has a serious interest in whether the actions of the Zoning Board are deemed void by this Court. Appellant, however, failed to name or give notice to any of those people or entities impacted by the potential outcome of this case.

POINT V

APPELLANT'S COMPLAINT WAS PROPERLY DISMISSED BY THE TRIAL COURT BECAUSE IT WAS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

The Trial Court properly found that the Complaint filed by the Appellant was filed well after many of the alleged acts committed by the Zoning Board which purportedly violated the Open Public Meetings Act. The Appellant has alleged that the Zoning Board violated OPMA by failing to provide the required notice in two (2) newspapers for the February 6, 2023, meeting in failing to take a vote to readopt the calendar or swear in new Board members at the February 6, 2023 meeting.

The applicable statute of the Open Public Meetings Act states, in pertinent part:

> Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided however that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advanced published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to confirm with any notice required in this act.

[N.J.S.A. 10:4-15.]

Further, New Jersey Court Rule 4:69-6(a) expressly states that "[n]o action in Lieu of Prerogative Writs shall be commenced later than 45 days after the accrual of the right to review, hearing or relief claims[. . .]."

Notice of the actions taken by the Lakewood Township Zoning Board of Adjustment were published in the Asbury Park Press and the Star Ledger on February 9 and 10, 2023, respectively. (Pa166 and Pa169). Therefore, the clock on the statute of limitations started running at the latest, on February 10, 2023. The Complaint would have had to have been filed by March 27, 2023, to have met the 45-day statute of limitation requirements under N.J.S.A. 10:4-15 and R. 4:69-6(a). The Complaint in this matter was not filed until June 8, 2023. (Pa007). Rather than filing a timely Complaint, Appellant waited 118 days to file the within Complaint to complain of actions taken by the Zoning Board in February of 2023.

In Township Committee of Edgewater Park Twp. v. Edgewater Park Housing Authority, 187 N.J. Super. 588, 603, 455 A.2d 575, 583 (Law. Div. 1982), the Court found the Complaint was not brought within the 45-day time limit established in N.J.S.A. 10:4-15(a) and that challenge "[came] too late." Further, in Township of Bernards v. State, Department of Community Affairs, 233 N.J. Super. 1, 25 (App. Div. 1989) the Appellate Division held that a Complaint seeking to void actions of COAH filed outside the 45-day time period outlined in N.J.S.A. 10:4-15(a) was out

of time. In Jersey City v. State Department of Environmental Protection, 227 N.J. Super. 5, 22 (1988) (citing Edgewater Park, supra, 187 N.J. Super. at 603.), the Court held that Appellant's allegation that the Open Public Meetings Act was violated were not made within 45 days, and therefore, those claims were not cognizable. Finally, in Atlantic City v. Atlantic Deauville, Inc., 5 N.J. Tax 459, 467 (1983), the Court denied a challenge to a governmental action because the claim was not brought within 45 days of the resolution adoption.

Based on the applicable statute, court rule and case law, Appellant's Complaint is time barred and must be dismissed for failure to comply with the 45-day statute of limitations.

CONCLUSION

There is no allegation that the Zoning Board intentionally and maliciously violated OPMA. At most, the allegation is that the Zoning Board inadvertently and without malice, violated OPMA. Presuming, but not conceding or agreeing that a violation occurred, certainly the violation was cured by the adoption of the Resolutions on September 11, 2023. Those Resolutions were adopted before the Trial Court granted the motions to dismiss Appellant's Complaint on October 20, 2023. (Pa001 and Pa003).

The remedy fashioned by the Zoning Board is in compliance with the Polillo case. Certainly, the notice submitted to the two (2) official newspapers, at which

time the agendas were published, clearly met the requirements mandated by the New Jersey Appellate Court in the Opderbeck decision.

Finally, the remedy demanded by Appellant is not appropriate since dozens of indispensable parties were never joined. For the Appellant to succeed would render a potential violation of every other Zoning Board decision throughout that year, which would affect at least three (3) dozen applications and interested parties.

Therefore, we respectfully request that this appeal be dismissed, with prejudice.

Respectfully Submitted,
DASTI, McGUCKIN, McNICHOLS, CONNORS, ANTHONY & BUCKLEY
Attorneys for Defendant/Respondent,
Township of Lakewood Zoning Board of Adjustment

Dated: November 5, 2024

By: *Jerry J. Dasti*
JERRY J. DASTI, ESQUIRE

Dated: November 5, 2024

By: *Joseph F. Mackolin Jr.*
JOSEPH F. MACKOLIN, JR., ESQUIRE

1650 Oak Street, LLC, Plaintiff, vs. Township of Lakewood Zoning Board of Adjustment, KBS Mt. Prospect, LLC, John Does 1-100 (a fictitious name for persons presently unknown) and XYZ, Inc. 1-100 (a fictitious name for a business entity presently unknown). Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO: A-000927-23 ON APPEAL FROM THE FINAL ORDER ENTERED BY THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, OCEAN COUNTY (OCN-L-1341-23) CIVIL ACTION SAT BELOW: HON. FRANCIS R. HODGSON, JR., A.J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, 1650 OAK STREET LLC

Robert C. Shea, Esq.
I.D. 021011979
R.C. Shea & Associates
244 Main Street., P.O. Box 2627
Toms River, NJ 08754
732-505-1212

Robert C. Shea, Esq., Of Counsel and on the Brief (Rshea@rcshea.com)
Vincent J. DelRiccio, Esq., On the Brief (Vdelriccio@rcshea.com – ID 302562019
Dated November 20, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Reply to Counter Statement of Facts

Zoning Board

As to the Statement of Facts presented by the Zoning Board ("Board"), Plaintiff takes issue with the statement that the caterer of the property obtained a Certificate of Occupancy prior to occupying the property as a banquet hall. This claim is currently being litigated in the Superior Court under Docket Number OCN-L-2822-20 and is disputed by Plaintiff. Furthermore, the caterer is not a party to this case and the issue is unrelated to the litigation at hand.

Plaintiff also takes issue with the Board's inclusion of the events from the September 11, 2023 Board hearing. Specifically, the Board seeks to argue that it cured any violations of OPMA by re-organizing, readopting all of its official action from the prior months of 2023, and ratifying all testimony heard on the KBS application to date. Same took place long after the filing of Plaintiff's Complaint. Plaintiff in fact sought to amend their Complaint to include challenges to the Board's actions, as they too violated OPMA. The claims were not allowed to proceed to the trial court, despite Plaintiff's attempts to amend the Complaint to include them. (Pa005) As such, the issues related to those events are outside of the scope of this appeal.

KBS

Plaintiff takes issue with KBS's statement that Plaintiff "absurdly claimed that the wedding and events being held at Lake Terrace – in the evening when Plaintiff or its tenant's business is not operating – were causing Plaintiff irreparable harm." (Db4) This claim is false for several reasons. Firstly, as KBS is well aware, Plaintiff and other tenants of the industrial park do not operate from 9:00-5:00, but rather, operate in shifts and take deliveries 24 hours a day / 7 days per week. These activities are associated with industrial and commercial uses. Secondly, the trial court in Docket Numbers OCN-L-2822-20 and OCN-L-3148-21 found in Plaintiff's favor regarding on an Order to Show Cause and issued temporary restraints limiting how KBS is to operate the property. (Pa315, Pa421, and PaPa437) Furthermore, the Superior Court in the former case also found in favor of Plaintiff on two separate Motions to Enforce Litigant's Rights (Pa320 and Pa326) and even entered an Order for attorney fees and sanctions against KBS (Pa324).

Plaintiff also disputes the claim that Plaintiff was responsible for the delay in KBS's hearing before the Board. On October 20, 2022, 1650 submitted a letter to the Zoning Board notifying them that KBS, in their public notice (Pa518) had identified the incorrect address for the property they sought to utilize as an overflow parking lot. While under no obligation to do so, counsel for KBS elected to carry the hearing in order to correct his mistake. It should be noted that KBS, in its brief,

suggests that notice does not have to be complied with, since Plaintiff was aware of the date of the hearing. This flies directly in the face of the existing caselaw. "Proper notice is a jurisdictional prerequisite". Perlmart of Lacey, Inc. v. Lacey Township Planning Board, 295 N.J. Super. 234, 236 (App. Div. 1996); Rockaway Shoprite Associates, Inc. v. City of Linden, 424 N.J. Super. 337, 351 (App. Div. 2011)

The application was then rescheduled for a special meeting on November 28, 2022. Once again, however, the meeting was procedurally deficient. See letter from 1650 to Zoning Board dated November 28, 2022 (Pa139). Specifically, the Zoning Board violated the Open Public Meetings Act ("OPMA") N.J.S.A. 10: 4-8 by failing to publish its special hearing notice in two newspapers. As a result, the Zoning Board had no jurisdiction to hear the application and had to carry it once again.

The application was then set for another special meeting on February 1, 2023. However, the Zoning Board once again violated OPMA N.J.S.A. 10:4-18 and N.J.S.A. 10:4-8. Specifically, the Zoning Board failed to reorganize properly and vest itself of the quasi-judicial power necessary to function as a municipal board. See letter from Plaintiff to Zoning Board dated January 30, 2023 (Pa155). As such, the application was once again forced to be carried as the Zoning Board had no jurisdiction to hear it, or any applications for that matter until such time as they reorganize properly. While KBS and the trial court may view this as "inventive," it

is Plaintiff's position that there is nothing "inventive" about following the MLUL and the OPMA.

The following hearing, set for March 20, 2023, was cancelled by KBS themselves as their experts were not available. Finally, the March 29, 2023, meeting was cancelled by the Board due to a lack of quorum. The one and only adjournment request made by Plaintiff during this time period was for the July 24, 2023 meeting, due to the unavailability of Plaintiff's attorney. This request, despite being made well in advance of the meeting, was denied.

I. Plaintiff's Motion was Timely Under N.J.S.A. 10:4-15

"In *N.J.S.A.* 10:4–15, the Act allows a court to void the unsupported action taken in violation of the OPMA. Relief under this section must be requested within forty-five days of the date the action sought to be voided is made public." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 240 (App. Div. 2009)

As noted above in Plaintiff's Summary Judgement Legal Arguments, the Board proceeded to hear testimony at the May 1, 2023 hearing, despite having no authority to do so. Adequate Notice of the May 1, 2023 hearing was never given. Plaintiff's Complaint was filed on June 8, 2023, well within the 45-day time frame for challenges alleging violations of OPMA. Furthermore, as evidenced by

Plaintiff's correspondence, the matter of adequate notice of the May 1, 2023 hearing came to Plaintiff's attention on April 26, 2023, during a search of all relevant notices in preparation for the May 1, 2023 hearing. Upon discovery, Plaintiff immediately notified the Board of same.

Plaintiff is interested in only the KBS application and seeks relief relative to said application. The Board, in its brief, makes no assertion that they have complied with OPMA or have in any way made an attempt to produce the disputed notices. Rather, it argues that same should not be enforced because a) Plaintiff is time-barred and b) the results of enforcement would be too sweeping. While the latter portion will be addressed below, both Defendants are incorrect with respect to the time limitation on Plaintiff's Complaint. Plaintiff had no way of knowing that the Board would, despite their violation of OPMA, proceed to hear testimony on May 1, 2023 and at two subsequent hearings. It is from that date, that Plaintiff's 45-day time limit commences, not from the date of the Board's attempted reorganization hearing.

Plaintiff is an interested party to KBS's application. Plaintiff should not have to police the procedures of the Lakewood Zoning Board to ensure its compliance with MLUL and OPMA. In failing to reorganize properly, the Board has no jurisdiction and has no power to adopt anything. Further, in failing to have the power to adopt an annual notice, or publish same in two newspapers, the Board has failed to provide adequate notice for each of the hearings on the KBS application thus far.

The public's interest in adequate notice of open public meetings is completely and utterly trampled by Defendants' positions. Both Defendants are evidently championing the idea that any citizen interested in an application must monitor every move by the Board, even when said application is not on the agenda, in order to police the Board's actions. It is astonishing that the Board is so brazen about its disregard for whether or not they comply with OPMA that they believe they can escape its requirements simply by hoping that no one notices.

The Board had the opportunity to rectify their violations and refused to do so. The Board should not now be allowed to disregard their responsibilities to adequately notify the public of their meetings simply because they feel that they were not caught violating OPMA until Plaintiff's letter. As noted above, OPMA is a statute of strict intent. "Where the OPMA is violated, any action taken by the board at that meeting is void." Polillo N.J. 562, 578 (1911)., If formal business is conducted at a meeting other than one clearly designated for such formal business in the annual notice, the action is subject to being voided under the Act." Lakewood Citizens v. Tp Committee, 306 N.J. Super. 500, 306 N.J (1997). The May 1, 2023 hearing, as well as the subsequent hearings on the KBS application, were held in violation of it. As such, the Court must hold that all official action, including the testimony heard to date, is void. Further, under Polillo, the Court must order that no further hearing can be heard until the Board 1) reorganizes at an OPMA-compliant meeting, 2)

publishes either a new annual notice, or a special meeting notice, 3) publishes a notice and agenda specifically setting forth what, if any testimony from the prior hearings will be re-used and the dates on which said testimony took place, 4) Ratifies said testimony at an OPMA compliant meeting.

II. Plaintiff Properly Stated a Claim on Which Relief can be Granted

Both the Board and KBS argue that Plaintiffs have failed to state a claim for relief. As set forth in both Plaintiff's Complaint and this brief, "any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court." N.J.S.A. 10:4-15 Furthermore, "failure to provide notice deprives a municipal planning board of jurisdiction and renders null any subsequent action." Shakoor Supermarkets, Inc v. Old Bridge Twp. Planning Board, 420 N.J. Super. 193, 201 (App.Div.2011)

It is clear that compliance with the adequate notice provisions of OPMA is jurisdictional under the case law. Per Shakoor, "failure to provide notice deprives a municipal planning board of jurisdiction and renders null any subsequent action." Shakoor Supermarkets, Inc at 201. The right of the public to be adequately noticed of any public meetings is indisputable. Plaintiff has a cause of action because

N.J.S.A. 10:4-15 explicitly provides one. The Board, however, alleges that Plaintiff has somehow failed to state a claim upon which relief can be granted.

Specifically, the Board suggests that a failure to provide adequate notice to the public are "minor violations of the Open Public Meetings Act." (Board Brief page 15) The Board asserts that as a result, Plaintiff is not entitled to any relief and that the Complaint should be dismissed. The Board cites to Liebeskind v. Mayor & Mun. Council of Bayonne, 265 N.J. Super. 389, 394 (app. Div. 1993) to support this claim.

It should be noted that the Liebeskind case did not involve a motion to dismiss, and as such, is inapplicable to the Board's argument here. The Liebeskind case found:

> that the defendants' failure to comply with the Act by inadequate notice and late publication of minutes was not a result of "chicanery" but oversight…[t]he remedy chosen was a thoughtful, carefully crafted response to the problems presented by this record and was calculated to eliminate future O.P.M.A. violations…it is authorized under *Polillo* and fully supported by the record. Liebeskind v. Mayor & Mun. Council of Bayonne, 265 N.J. Super. 389, 395 (App. Div. 1993).

The Board's actions here go beyond basic noncompliance with a technicality and enter into the realm of wanton disregard for OPMA. As set forth in the Statement of Facts, the Board failed to adequately notice the public pursuant to N.J.S.A. 10:4-8 repeatedly. Plaintiff advised the Board of its failures to comply with OPMA in three separate letters, as well as on the record at the May 1, 2023 hearing. The Board

was fully aware of its failure to adequately notice the public, and specifically chose to proceed with the KBS application anyway, with Jackson specifically stating, "So if Mr. Shea believes that there was some deficiency in the way the Board was organized or how it picked its calendar, et cetera, he has his remedy in court."

KBS further cites to Polillo v. Deane, 74 N.J. 562 (1977). The Court in that case found that , "strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred." Id. at 578. Although the Supreme Court noted that, "N.J.S.A. 10:4-15 provides that any action taken by a public body at a meeting which does not conform to the provisions of the Act shall be voidable," the Court also recognized that , "N.J.S.A. 10:4-16 also states that the court shall issue such orders and provide such remedies as shall be necessary to insure compliance with the provisions of the Act." Id. at 579. Furthermore, the Polillo case, as discussed in detail above, determined that a board may utilize as much of any prior testimony that they deem necessary, but they must first fully appraise the public, "by adequate notice and a publicized agenda exactly what prior meetings and what aspects of the existing record are sought to be so utilized." Id. at 580. Finally, as noted above, said procedure must be preceded by a proper reorganization held at an OPMA compliant meeting.

As the Court can see, neither case provides any evidence that Plaintiff is without a claim upon which relief can be granted. In fact, both set forth methods by

which violations of OPMA should be addressed in light of a challenge. Furthermore, this was not a mere oversight on the Board's part, but rather, a conscious decision to proceed with an application that they had no power to hear. The Board never properly constituted itself at a reorganization hearing, and as such does not even have the power to be a public body until they rectify this glaring deficiency. Notwithstanding this fact, there is nothing whatsoever in the case law cited by the Board would require the Court to dismiss the Plaintiff's timely raised, statutorily authorized claim. The board failed to abide by OPMA and heard the KBS application, despite being fully aware of the violations. As such, the application should be reheard and/or remanded, and the Board should be barred from hearing any of said testimony until such time as it reorganizes properly at an OPMA compliant meeting. Such relief is neither "outrageous," "extreme," nor is it "inventive." It is quite simply the law.

III. Plaintiff Joined all Indispensable Parties to this Litigation

Court Rule 4:28-1(a) reads, in relevant part, as follows:

> **Persons to Be Joined if Feasible.** A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) **the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest**

A party is indispensable if they have an interest involved in the subject matter before the court, and a judgment cannot be justly made without affecting the

absentee's rights. Allen B. DuMont Labs, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298. KBS unquestionably falls into this category. The Complaint specifically seeks to void all testimony heard to date due to the Board's violation of OPMA, and bar any further testimony on KBS's application until the Board properly reorganizes at an OPMA compliant meeting. It is nothing short of ludicrous for KBS to state that there is "no basis" for KBS to be joined into this matter. In fact, KBS sought to intervene in the Declaratory Judgement litigation filed by the Board when same potentially could have stayed their application. The fact that KBS now takes the opposite stance only goes to further show that KBS is far more concerned with trampling their neighbor's rights than abiding by settled law.

If the Court grants Plaintiff's relief, all testimony to date will either need to be re-heard, or, will need to be ratified at an OPMA compliant meeting pursuant to the procedure set forth in Polillo, following the proper reorganization. Either option will result in a delay to KBS's application. As a result, KBS's interests are directly implicated in this lawsuit. Under Court Rule 4:28-1(a), 1650 had no choice but to join them as a party although no relief is sought directly from them.

Both KBS and the Board make one final, meritless argument, in that Plaintiff should have joined every entity or individual who has had an application approved by the Board this year. According to KBS, the same rationale that applies to them also applies to anyone who received an approval in 2023. This is an intentional

mischaracterization of Plaintiff's Complaint. Plaintiff seeks to void the testimony heard on KBS's application to date due to the meetings' lack of compliance with OPMA as set forth above. It is KBS's application that Plaintiff has an interest in, no other. While any other applications were similarly decided without authority and are therefore voidable upon challenge, Plaintiff is not challenging them. As such, they are wholly irrelevant to this litigation.

The Board, on page 17 of its brief, states, "Should Plaintiff be successful in this Complaint, the remedy sought by Plaintiff would have a 'domino effect' and impact various applicants…" The Board further states that, "Approvals, denials, and other decisions of the Board could be void if Plaintiff is successful in this litigation." First and foremost, if the Board is so concerned about a "domino effect," they would do well to take their duties to the public under OPMA far more seriously than their current indifferent and almost contemptuous attitude for the rights of the public. Second, and more relevant to this matter, the Board is patently incorrect.

All of the decisions that the Board has made are already *ultra vires* and voidable upon challenge due to their failure to comply with OPMA, pursuant to N.J.S.A. 10:4-15(a). However, as already stated, Plaintiff is not challenging every single Board action, only those as pertains to the application in which Plaintiff is an interested party; namely, the KBS application. If other parties wish to challenge other Board actions based upon the Board's failure to adequately notice for, or have

jurisdiction over, every meeting this year, then said parties have every right to do so regardless of the outcome of this case.

The Court should give no weight to the argument posited by both Defendants that Plaintiff is somehow obligated to join applicants whose applications are not being challenged. Defendants' position comes from either a clear misunderstanding of OPMA, or from their palpable willingness to misrepresent or flagrantly disregard all aspects of the law if it means silencing Plaintiff.

Finally, it should be noted that despite the Board's and KBS's arguments, this is not the grounds upon which the trial court dismissed the Complaint. Rather, the trial court only dismissed the complaint by reason of the statute of limitations for OPMA claims under N.J.S.A. 10:4-15(a). As such, this issue is not properly before the Court and, as such, the arguments relating to it are meritless and have no place here.

IV. The Arguments Raised by Defendant's as to Curing their Violations of OPMA were not heard by the Trial Court and are not the Subject of this Appeal

In its Legal Argument Point I, the Board argues that it properly cured the violations that are the subject of this Appeal via its adoption of three Resolutions on September 11, 2023. (Da007-011) These Resolutions were adopted months after Plaintiff filed the Complaint at issue in this litigation, and in fact, were the subject

matter of Plaintiff's Amended Complaint, which it sought to leave to file via Motion dated September 20, 2023. (Pa694)

The Amended Complaint, however, was never considered by the trial court. Instead, the trial court denied Plaintiff's Motion to Amend the Complaint via Court Order dated October 20, 2023 (Pa005). Furthermore, the issue of whether or not the Board cured their violations was never reached by the trial court, who dismissed the action solely on the grounds of the Court's interpretation of the 45-day statute of limitations for OPMA claims.

It is well settled that Issues not raised below will not be considered on appeal unless they are jurisdictional in nature or substantially implicate the public interest. State v. Vincenty, 237 N.J. 122, 135 (2019); State v. Jones, 232 N.J. 308, 321-322 (2018). Furthermore, per R. 2:5-4, the contents of the record on appeal consist of:

> All papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court.

The issue of whether or not the Board cured the violations, and the challenges raised thereto by the Plaintiff's Amended Complaint were never heard by the trial court. In fact, none of the substantive issues of the case were reached by the trial court. As such, the issue for appeal is limited to whether or not the Complaint was timely, whether Plaintiff's summary judgement motion should have been addressed

and granted, and whether Plaintiff should have been allowed to amend its Complaint. As set forth in Plaintiff's affirmative brief, the facts and law surrounding each of these issues warrant an overturning of the trial court's decision, and, if necessary, a remand to the trial court for rulings on the substance of the claims.

V. The Arguments Raised by KBS relating to Plaintiff's Cross-Motion were not Heard by the Trial Court and Should be Disregarded by the Appellate Division

As set forth at length above, only the issues heard below can be brought on appeal. The trial court did allow Plaintiff's Cross Motion to be heard, and it denied same. (Pa004) the trial court did not find that Plaintiff's cross motion was improperly filed or that it did not relate to KBS's Motion to Dismiss. KBS has not filed a cross-appeal in this case to challenge the trial court's decision to hear the cross-motion. As such, the issue is not properly before the Appellate Court.

Conversely, as noted above, the Complaint was dismissed on procedural grounds only. If the Appellate Court finds that the trial court erred in this determination but is not inclined to overturn the denial of Plaintiff's cross-motion, then the Appellate Court should remand the matter to the trial court for a trial and subsequent substantive findings and rulings.

R.C. SHEA & ASSOCIATES
Attorneys for Plaintiff

Dated: November 20, 2024

Robert C. Shea