

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Appellate Division Docket No.: A-001496-24T2**

AARON MITCHELL,
Plaintiff-Appellant

v.

TOWNSHIP OF WILLINGBORO
AND TOWNSHIP OF
WILLINGBORO BOARD OF
ADJUSTMENT,
Defendant-Respondent

ON APPEAL FROM:
Superior Court Of New Jersey
Law Division
Burlington County

Civil Action

DOCKET NO.: BUR-L-2063-24

Sat Below:
Hon. Jeanne Covert, A.J.S.C.

BRIEF OF APPELLANT AARON MITCHELL

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PROCEDURAL HISTORY

Plaintiff Aaron Mitchell sued the township of Willingboro and its zoning board of adjustment on October 4, 2024 (Pa-1)¹. He challenged the actions of the board and denying his application, and then so doing and failing to follow New Jersey's zoning laws and its procedures, and in response to the suit, the defendant Township and zoning board filed a motion to dismiss in lieu of answer (Pa. 25).

The motion was heard by the Honorable Jeanne Covert, AJSC, on December 11, 2024. T 1. The following day, the court issued an order and statement of reasons, (Pa-174). In granting the Township's motion, the court noted that under the first filed rule doctrine, the party bringing the case had a duty to show the presence of special equities for the court in the second action to retain jurisdiction. Here, both parties acknowledged at an earlier federal action had been filed in the District of New Jersey, naming the township and zoning board, in addition the two individuals were not named in the state suit. The trial court concluded that no special equities had been shown, so dismissal was warranted. (Pa 180).

¹ Pa – refers to plaintiff's appendix. T refers to the transcript of the oral argument in the trial court on December 11, 2024

The court further ruled that the statute of limitations had expired, since certain of the actions complained of by the plaintiff occurred in October and November 2022 and the matter was filed in the Law Division in October of 2024. Opinion at eight. The court concluded that the 45 day period for bringing an action in lieu of prerogative writs had started running back in the fall of 2022, so it had long since passed when the action was filed on October 4, 2024. (Pa 181-182).

The court further held that the three bases for enlargement of the 45 day window in which to bring a prerogative writs action were not met in this case. Opinion at nine. The court also noted that the default approval sought by the plaintiff did not act as a de facto grant of approval because the “evil of municipal inaction and inattention” was not present here, and thus the standard for upholding a default approval had not been met. (Pa 183).

Plaintiff appealed to this Court on January 24, 2025. (Pa- 185)

STATEMENT OF FACTS

As this matter came before the trial court on a motion to dismiss in lieu of answer, the entire factual record relating to the facts of this case is found within the verified complaint in lieu of prerogative writs (Pa 1-2). At the time of the complaint,

plaintiff was a 37-year-old handicapped veteran living at 28 Thornleigh Pl., in Willingboro New Jersey. He uses a cane, walkers, and occasionally wheelchairs as needed to get around given his disability.

Plaintiff initially had contact with the zoning officials in 2017, exploring the possibility of building an accessory structure that exceeded the township's size for allowable accessory structures, which was 200 square feet (Pa 3). The house where he lives is a relatively small one floor rancher, with no basement and a small garage, which would not accommodate his outdoor lawn equipment, his cars, and a water treadmill that he could use for therapy (Pa 2-3). After applying and then withdrawing his application in 2017, he completed and presented an application for the accessory structure in April of 2022 (Pa 3-4).

The matter was heard by the zoning board on May 4, 2022 (Pa 4). At the hearing, the board's design professionals made certain recommendations, but the board instead simply denied the request (Pa 4). The board then neglected to memorize the decision what the time frames required by the applicable, zoning laws, ultimately memorizing the decision and publishing it well after the time set forth of the statute (Pa 4).

The plaintiff then reapplied to the board in August 2022 (Pa 5). The new application was more detailed, providing more information about his handicap and the need for the particular structure that required two bulk variances (Pa 5-7). Plaintiff published notice of the hearing in the local newspaper and sent the required notices to nearby property owners on September 5, 2022 (Pa 7). On September 29, 2022, a week before the hearing, the board notified plaintiff that the hearing would not be held live, but would be held on Zoom; no notice of this was ever published or disseminated to the local property owners that the plaintiff had previously noticed and accordance with the statute (Pa 8). The board heard the application on October 5, 2022, and again denied the application (Pa 7-8).

Meanwhile, plaintiff learned that the proper steps had never been taken to memorialize and publish the board's resolution of the May 2022 decision, and he sought notice of default approval on October 13, 2022 (Pa 10). Apparently realizing its error,, the board then published its own notice of the decision of May 4, 2022 (Pa 11).

By late November 2022, the plaintiff realized that the Board had not properly adopted a resolution denying his application that was heard on October 5th (Pa 11). On November 26, 2022, defendant's representative sent plaintiff an email that

gave him a copy of the proposed order for publication in the local newspaper, but he never received the actual published public notice to which he was entitled under the statute (Pa 12). It was not until a motion to dismiss was filed in the pending civil action in the United States District of New Jersey, which was sent to plaintiff on August 23, 2024, that he received actual formal notice of the resolution memorializing the October 5, 2022 zoning board decision (Pa 14). Upon receiving the formal notice that had until then due and owing, he brought this suit that is the subject of this appeal (Pa 14).

LEGAL ARGUMENT

1. THE FIRST FILED DOCTRINE DOES NOT BAR THIS ACTION **(Pa 180)**

The trial court ruled that the case should be dismissed do to the pendency of a federal court lawsuit that sought relief similar to that of the law division complaint. It was uncontroverted that the then pro say plaintiff had filed suit in the district of New Jersey on June 20, 2024 and had then amended his complaint on September 10, 2024. (Pa 56; Pa 111). The trial court was apprised of the fact that as of the date of the oral argument in the Law Division, a motion to dismiss was pending in the federal action, to be heard later that month. T6:4–8.

The specific relief sought in the trial court was primarily injunctive in nature, requiring the Board to grant the default approval that should have been provided to plaintiff by virtue of his application for that approval made in December of 2022, or in the alternative, the reversal of the Board's denial of the application at the October 2022 meeting. Conversely, the primary relief sought in the Federal action is compensatory damages for the violations of his civil rights under the federal constitution and the New Jersey Law Against Discrimination, as well as the Fair Housing Act. While the federal action also sought declaratory relief relating to the alleged violations by defendants of the New Jersey land use law by way of pendent jurisdiction, the primary relief sought was the compensatory and punitive damages for the violation of plaintiff's rights under the Constitution, the FHA and LAD.

The trial court relied on *Sentient .Colors v. Allstate Ins. Co.*, 193 N.J. 373, 390 (N.J. 2008). The Sentient Court cited to an earlier Appellate Division case, *Am. Home Products v. Adriatic Ins. Co.*, 286 N.J. Super. 24 (App. Div. 1995), adopting the test set forth in that case; the Court wrote that "to obtain a stay or dismissal of a second-filed action in this state for reasons of comity, a party must establish "(1) that there is a first-filed action in another state, (2) that both cases involve substantially the same parties, the same claims, and the same legal issues, and (3)

that plaintiff [in the second-filed action] will have the opportunity for adequate relief in the prior jurisdiction."

Sensient Colors v. Allstate Ins. Co., 193 N.J. 373, 390 (N.J. 2008), citing *Am. Home Products* at 32.

The action filed in the Law Division focused on the request for injunctive relief, seeking to overcome the procedurally improper decision rendered by the Zoning Board in failing to properly act upon plaintiff's application and in denying it for insufficient reasons. While the Federal action raised a claim seeking injunctive relief, the matter before trial court was brought under the municipal land use law of New Jersey, tangentially raising issues under the Law Against Discrimination and similar statutes, only insofar as the Zoning Board failed to consider plaintiff's handicaps when it denied his application. Conversely, the relief sought in the Federal action was primarily monetary in nature, seeking compensatory and punitive damages for the violations of the plaintiff's rights. The legal theories were fundamentally different in the two actions, as is the relief sought.

Even if this Court were to deem the matters sufficiently similar to justify a stay or dismissal under this doctrine, the matter meets the criteria for granting relief from the presumption of a stay or dismissal based on the special equities presented. A

"clear entitlement to comity-stay relief" is established by proof: "(1) that there is a first-filed action in another state, (2) that both cases involve substantially the same parties, the same claims, and the same legal issues, and (3) that plaintiff will have the opportunity for adequate relief in the prior jurisdiction." *Am. Home Prods. Corp. v. Adriatic Ins. Co.*, 286 N.J. Super. 24, 37 (App. Div. 1995) (footnote omitted). Here, plaintiff acknowledges that there was a similar case pending in federal court when he filed the Law Division action and there were similar, albeit not identical, issues. However, there remains a serious question as to whether plaintiff would have an adequate opportunity for relief in the federal action, which was pending in the form of a pro se, amended complaint at the time the Law Division action was filed. While the plaintiff included a pendent jurisdiction claim under New Jersey land use law seeking injunctive relief, the probability of success on this theory in the federal action, in large part a civil rights case, alleging various constitutional and federal, statutory violations, was minimal. Conversely, the action brought in State court provided a clear path to relief if plaintiff proved his case there. Thus, the first jurisdiction in which plaintiff sought relief was quite unlikely to afford him the relief for this particular theory, while the Law Division action provided him with a reasonable chance of success. To deny plaintiff an opportunity to have his claim against the defendants barred on this procedural basis would subject him to great harm, and at the same

time minimally affect the defendants who were already addressing the federal complaint. Thus, the trial court improperly dismissed the matter in reliance of this doctrine and the decision should be reversed.

2. THE COMPLAINT WAS TIMELY FILED (Pa 181-182)

This application came to the trial court by way of a motion to dismiss in lieu of answer. Notwithstanding the fact that all of the facts alleged by the plaintiff should have been accepted as valid for the purposes of the motion, the trial court appeared to treat some of the alleged facts, namely those relating to the plaintiff's assertion that he first received formal written notice of the denial of the application when defendants moved to dismiss the federal action in August of 2024, with great skepticism. If the trial court had fully accepted the facts as alleged, including those relating to the date of actual, formal written notice of the denial, the defendants' claim that the complaint was untimely should have been rejected.

A complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1513 (2016) (citing Printing Mart, 116 N.J. at 746). This Court must give the non-moving party the benefit of every favorable inference in

evaluating whether to dismiss a Complaint. See *NCP Litigation Trust v. KPMG, LLP*, 187 N.J. 353, 365 (2006); *Banco Popular No. America v. Gandi*, 184 N.J. 161, 165-66 (2005); *Fazilat v. Feldstein*, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." *Printing Mart*, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." *Sickles v. Carbot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005).

Furthermore, a court is limited to reviewing exclusively the pleadings, *Roa v. Roa*, 200 N.J. 555, 562 (2010). "At this preliminary stage of the litigation the [judge] is not concerned with the ability of plaintiff[] to prove the allegation[s] contained in the complaint' and the plaintiff is 'entitled to every reasonable inference of fact.'" *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C.*, 237 N.J. 91 (N.J. 2019) (quoting *Printing Mart-Morristown*, 116 N.J. at 746).

On October 4, 2024, Aaron Mitchell filed his verified complaint challenging the denial of a variance he had sought from the defendants in October 2022. In his complaint, he asserted that on August 21, 2024, the defendant Zoning Board for the first time mailed him a copy of the resolution adopted by the board memorializing the denial of his variance from the zoning board. PA 43. His complaint was filed just before the 45th day following his receipt of this notice, as

the 45th day following his receipt of the notice, the outside date on which to file this action, would have fallen on the weekend that immediately followed the date of his filing. Thus, the time period for filing this action expired on October 7, 2024.

The trial court relied upon an assumption of fact that was contrary to what was alleged by the plaintiff and in fact totally inaccurate. The court noted that plaintiff was sent an advance copy of the advertisement preview that plaintiff later determined was a proof for the newspaper publication that ran on November 20, 2022, and treated that act as a notice that sufficed to begin the 45 day time period to start running. Significantly, the trial court did not even suggest that the notice was mailed to plaintiff as required by Rule 4:69-6(b) for denials; it merely noted that since a proof had been emailed to him, the notice requirement was met. This was inaccurate, in that what was emailed to plaintiff was never actually mailed to him, nor was it the actual resolution that was passed, but rather the minimal notice that was to be published.

Under Rule 4:69-6(b), “ No action in lieu of prerogative writs shall be commenced

(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality, provided, *however*,

that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution (e.g., "Variance-Store in residential zone denied"), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection;

(emphasis added)

The determination as to whether the Board in fact provided the plaintiff with the required notice before August 21st is a purely legal issue, one that is not subject to the deference afforded to a decision of a zoning board. This Court has noted that where there are “purely legal questions affecting the zoning board's decision. a presumption of correctness does not apply, and the court must determine for itself whether the law has been applied correctly. Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). The facts as presented to the trial court in this matter demonstrated that while the plaintiff had been given information from other sources from which he could infer his application for a variance had been denied, he was not provided with the notice mandated by the applicable Court Rule until August of 2024; as the application was denied, only this action by the defendant sufficed to start the running of the 45 day period for filing this action. While the defendant has argued that the fact that plaintiff had actual notice of the denial of his application, from his attendance at the meeting, and from the emailed newspaper proof that was sent to him relating to the resolution, the language of

Rule 4:69–6 b(3) is clear in that it is not actual notice to the applicant, but the latter of either publication of the notice or the mailing of the notice that controls.. As the court rule provides a limitation in the zoning board applicant’s time to seek review, the defendant cannot avoid the clear language of the Rule by imposing additional conditions relating to the applicant’s actual knowledge that limit such rights.

Support for the aggrieved applicant’s right to rely on strict application of the time frames provided was provided by this Court in *Toutphoeus v Joy*, 81 N.J.Super. 526 (App. Div. 1963) In that case, this Court ruled that even where a plaintiff has actual notice of zoning board’s action, it is the provision of formal notice required by the statute that controls the date at which the limitations period begins to run. The importance of the zoning board’s strict adherence to the notice requirements, both to the public and to the aggrieved applicant, was acknowledged in the ruling that the applicant’s actual knowledge was not the controlling factor in starting the 45 day time period for review.

Pursuant to NJSA 40:55D-10(h), a copy of the decision must be “mailed by the municipal agency within 10 days of the date of decision to the applicant or, if represented, then to his attorney...” In emphasizing the necessity for strict

adherence to the notice provisions, this Court has written that failure “to provide proper notice deprives a municipal zoning board of jurisdiction and renders null any subsequent action.” *Shakoor Supermarkets, Inc., v. Old Bridge Planning Board*, 420 N.J. Super. 193, 201 (App. Div. 2011). The plaintiff alleged that this was not done, and he further alleged a myriad of failures on the defendant board’s part that compounded the denial of plaintiff’s right to a proper hearing, with an appropriate right of judicial review after the proceedings had concluded with finality at the local level.

The trial court also gave short shrift to the fact that the plaintiff’s request for default approval of its first application was not honored, made when the defendant’s failure to act in a timely matter was clear and no attempt to rectify its failure appeared likely. The plaintiff only took this extreme action when the defendant’s failure to adhere to any of the notice requirements relating to the denial which had occurred in May of 2022 became clear. The trial court relied upon *Easthampton Ctr. LLC v. Pl. Bd. Of the Twp. of Easthampton*, 354 N.J. Super. 171, 193-194 (App. Div. 2002) for the proposition that only a showing of “purposeful delay” warrants such an extreme remedy; the court concluded that the plaintiff had produced no such evidence, and thus should not prevail on this issue (Pa 183). While the court may deny a request for default approval where the municipal

inaction was inadvertent or the result of a good faith mistake, it is designed to prevent municipal inaction and inattention, see *Allied Realty*, 221 N.J.Super. 407, 418(App. Div. 1987). The purpose of these time limits is to “expedite decision-making on land use applications. *Lizak v. Faria*, 96 N.J. 482, 492, (1984). The court lost sight of the fact that the plaintiff could offer no evidence of the malevolence of the municipal action because the motion was made in lieu of answer at the onset of the case, before the plaintiff could gather or obtain any evidence whatsoever through discovery. The plaintiff alleged all he could without discovery, the fact that there was an abject failure to follow any of the required notice provisions following both the May or October hearings, (Pa 10-11), but the court deemed those allegations insufficient. Allowing plaintiff to develop those issues through discovery may well have yielded the proof necessary to justify default approval, but he was precluded from so doing by the premature dismissal of the case. Plaintiff even alleged that a representative of the defendant admitted, in October of 2022, that the defendant had failed to meet the required deadlines for the various notices (Pa 10), and the yet trial court still failed to acknowledge the severity of the defendant’s omissions. It concluded that the defendant’s omissions lacked any of the bad faith that would justify upholding default approval, yet failed to allow plaintiff any discovery on this issue to attempt to prove the allegation. This was a further error by the trial court warranting reversal.

**3 THE TIME SHOULD BE TOLLED PURSUANT TO RULE 4:69-6
BASED ON DEFENDANTS' CONDUCT (Pa 182)**

The trial court further ruled that plaintiff had not shown cause for the enlargement of the 45 day period to bring an action in lieu of prerogative writs. The court's failure to grant such relief, in the face of the defendant board's multiple procedural violations that thoroughly confounded the plaintiff and hindered his ability to seek judicial review in a manner deemed timely by the court, was improper and a clear abuse of discretion, warranting reversal.

The Rules of Court provide relief where strict application of the 45 day period would cause injustice. Subsection (c) of Rule 4:69-6 permits a trial court to enlarge the forty-five-day filing period "where it is manifest that the interest of justice so requires." That assessment is commonly fact-dependent on the particular circumstances involved, and the explanation proffered for missing the deadline. See *Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., LP*, 204 N.J. 569, 584 (2011); *Cohen v. Thoft*, 368 N.J. Super. 338, 345-47 (App. Div. 2004).

In matters involving zoning boards, the courts have been less stringent in their relaxation of the 45 day time limit provided by the court rules. While the

Supreme Court has stated that the primary reasons for extending the filing period under this Rule typically relate to the issue's public importance or constitutional significance, it has acknowledged "that there may be circumstances that warrant an enlargement of time [under Rule 4:69–6(c)] other than the traditional categories."

Where an action addresses issues that impact both a plaintiffs' private property rights and the important public interest in ensuring that public officials perform their official duties diligently and with reasonable dispatch, leniency in the application of Rule 4:69-6 is often warranted. For instance, the court in *Mullen v. Ippolito Corp.*, 428 N.J. Super. 85 (App. Div. 2012) felt that the lenient application of the Rule was warranted in a case involving issues that included the town's dune protection ordinance, with the court noting that the "the citizens of Point Pleasant Beach are entitled to know if their public officials are doing all that is legally required to protect this vital public resource. *Mullen* at 106-107, citing *Cohen v. Thoft*, 368 N.J. Super. 338, 345–47, (App. Div. 2004).

In this matter, the tortured factual history of plaintiff's misadventures with a board that flaunted the procedural rules throughout his dealings with the board. The facts as alleged portray a board ignoring multiple obligations imposed by law in handling two successive applications, and yet seeking to hide behind the statute of limitations that would dismiss this plaintiff's challenge to those irregularities.

As set forth in his factually detailed complaint, the defendants started missing statutorily mandated time points early in the processing of the first 2022 application, such as failure to timely memorialize and circulate the decision on the May 4, 2022 board decision; the failure to notice the public that the October 2022 meeting was being converted from an in person meeting to a zoom meeting after the in person meeting had been fully noticed by letter and newspaper publication; and the failure to timely memorialize and publicize the outcome of the October 5, 2022 meeting addressing plaintiff's application. This series of missteps, culminating in the failure to follow the proper procedures for formally noticing plaintiff that his application had been denied, justify extending the time for filing.

Sound policy also dictates such an extension. If a party is waiting for the statutorily mandated steps to be completed so they can seek relief in the Law Division, the party needs to know with certainty exactly when that 45 day period has begun to run so they can timely apply. If those formal steps do not happen, clearly starting the time set by Rules of Court to run for a Law Division filing, there can be no certainty for the aggrieved applicant as to when they must seek relief. Thus, tolling this time as permitted by the Rule is sound policy and furthers the ends of justice. The time limit here should have been tolled and the plaintiff's

application should have been allowed to proceed.

CONCLUSION

For the reasons set forth in this brief, the trial court's dismissal of the plaintiff's complaint should be reversed and the matter remanded.

Respectfully submitted,

/s/ Talbot B. Kramer Jr., Esquire

May 12, 2025

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

DOCKET NO: A-001496-24

AARON MITCHELL,

Plaintiff/Appellant,

vs.

TOWNSHIP OF WILLINGBORO AND TOWNSHIP OF WILLINGBORO
BOARD OF ADJUSTMENT,

Defendants/Appellees.

Civil Action

On Appeal from Final Order Entered on December 12, 2024
Law Division - Burlington County, Docket No. BUR-L-2063-24
Sat Below: Jeanne T. Covert, A.J.S.C.

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I. STATEMENT OF FACTS

The within matter essentially involves an appeal from the decision of the Township of Willingboro Zoning Board of Adjustment (“Zoning Board” or “Board”), which on two (2) separate occasions denied Plaintiff’s application for a variance with respect to the property located at Block 113, Lot 18 on the tax map of the Township of Willingboro (“Township”), more commonly known as 28 Thornleigh Place, Willingboro, New Jersey.

On October 4, 2024, Plaintiff filed a Verified Complaint in Lieu of Prerogative Writ seeking to invalidate the Zoning Board’s decision for a myriad of reasons. Pa 1-24. Significantly, Plaintiff filed almost an identical complaint in the United States District Court for the District of New Jersey on June 20, 2024 (Pa 56-109), some three and a half months earlier, and then an amended complaint on September 10, 2024 (Pa 111-171), almost a month before he filed the instant complaint in state court.

Plaintiff’s state court complaint is comprised of the following causes of action: (1) “The Defendant’s Action Constitute Violation of the New Jersey Municipal Land Use Law”; (2) “The Defendant’s Action Constitute a Violation of the Fourteenth Amendment”; (3) “Zoning Board’s Adoption of Resolution Was Arbitrary, Unreasonable, and Capricious, Violation of Law and Without Adequate Basis and Fact”; (4) “The Defendant’s Actions Constitute Intentional Discrimination

in Violation of the FHA Amendments Act of 1998 and the LAD”; (5) “The Defendant’s Actions Constitute Discrimination in Violation of the Americans with Disabilities Act”; (6) “Declaratory Judgment for Injunctive Relief.” Pa 1-24. As a result, Plaintiff seeks the following relief:

- A. Enter a declaratory judgment that the actions of the Defendant(s) are arbitrary, capricious and unreasonable; and
- B. Find that resolution 2022-09 was arbitrary, unreasonable, and capricious, without jurisdiction, basis in law or fact; and
- C. Enter a declaratory judgment that the actions of the Defendant(s) constitute violation of the New Jersey Municipal Land Use Law including the Open Public Meetings Act and vacate and void all actions and determinations of the Board; and
- D. Reverse the approval and void the Resolution; and
- E. Enter a declaratory judgment that the actions of the Defendant(s) constitute discrimination prohibited by the Fair Housing Act as amended in 1988; and
- F. Enter a declaratory judgment that the actions of the Defendant(s) constitute discrimination prohibited by the Americans with Disabilities Act; and
- G. Enter a declaratory judgment that the actions of the of the Defendant(s) constitute discrimination prohibited by the New Jersey Law Against Discrimination; and
- H. Enter a declaratory judgment that the actions of the of the Defendant(s) constitute violation of Plaintiff’s due process prohibited by the Fourteenth Amendment of the United States Constitution; and
- I. Enter a declaratory judgment that the zoning ordinances as applied is invalid insofar as it prevents Plaintiff from the construction and use of an accessory structure in his rear yard that allows him to ambulate inside of the accessory structure, protect his assets, relocate personal property, relocate his outdoor lawn equipment, and install a therapy pool, that would allow him to enter and

exit his dwelling safely, allow to him place heavy grocery items from his vehicle to inside his living space without risk of injury, be able to self-administer therapy, and enjoy his Property and dwelling with respect to his disabilities. Enter preliminary and permanent injunctions directing the issuance of permits to construct an accessory structure in Plaintiff's rear yard and associated zoning and land use approvals; and

- J. Permanently enjoining the Township and its officers, agents, and employees from enforcing or endeavoring to enforce the Zoning Ordinances against the Plaintiff with respect to the Property and the accessory structure in Plaintiff's rear yard, not including the current municipal summons against the plaintiff; and
- K. Award Plaintiff compensatory and punitive damages for all violations of the FHA, ADA, NJLAD, Fourteenth Amendment, all probable damages and injuries, including property damage, emotional distress, suffered as a result of the Defendant(s), jointly or severely, and
- L. Awarding Plaintiff costs and reasonable counsel fees (previously accrued and any future fees when accrued); and
- M. Such other and further relief as the Court may deem equitable and just.

Pa 21-23.

The earlier filed federal court complaint is comprised of the almost identical causes of action: First Count – Intentional Discrimination in Violation of the Fair Housing Amendments Act of 1988 (“FHA Claim”); Second Count – Discrimination in Violation of the Americans with Disabilities Act (“ADA Claim”); Third Count – Discrimination in Violation of the New Jersey Law Against Discrimination (“NJLAD Claim”); Fourth Count – Violation of the New Jersey Municipal Land Use Law (“MLUL Claim”); Fifth Count – Violation of the Fourth Amendment; Sixth Count – Violation of the Fifth Amendment; Seventh Count – Defamation and

Emotional Distress; Eighth Count – Declaratory Judgment; and Ninth Count – Injunction. Pa 56-109. And almost the identical relief is sought in the federal court complaint; to wit: (1) a declaration that Defendants have violated his rights under the FHA, ADA, NJLAD, MLUL, Fourth Amendment and Fifth Amendment, that their actions were “arbitrary, capricious and unreasonable,” and that the “zoning ordinances as applied [are] invalid insofar as it prevents Plaintiff from the construction and use of an accessory structure in his rear yard that allows him to protect his assets, relocate personal property, relocate his outdoor lawn equipment, and install a therapy pool, that would allow him to enter and exit his dwelling safely, allow [him to] place heavy grocery items from his vehicle to inside his living space without risk of injury, be able to self-administer therapy, and enjoy his Property and dwelling with respect to his disabilities”; (2) “preliminary and permanent injunctions directing the issuance of permits to construct an accessory structure in Plaintiff’s rear yard and associated zoning and land use approvals” and “permanently enjoying the Township and its officers, agents, and employees from enforcing or endeavoring to enforce the Zoning Ordinances against the Plaintiff with respect to the Property and the accessory structure in Plaintiffs rear yard”; and (3) awarding compensatory and punitive damages, as well as costs and counsel fees. Pa 107-108.

With the exception of adding the Zoning Officer, Ted Evans, and Construction Official, Steve Buchhofer, as named defendants, and asserting a claim under the 14th

Amendment instead of the 5th Amendment, the amended federal court complaint filed on September 10, 2024 is basically identical to the original complaint filed on June 26, 2024 and seeks the same relief from all defendants named therein. Pa 111-171.

II. PROCEDURAL HISTORY

As noted above, Plaintiff filed the complaint giving rise to the instant appeal on October 4, 2024. Pa 1-24. Defendants moved to dismiss the complaint on November 8, 2024. Pa 25-26. After hearing oral argument, the trial court entered an Order with Statement of Reasons on December 12, 2024 dismissing Plaintiff's complaint with prejudice. Pa 174-184. On January 24, 2025, Plaintiff filed his appeal. Pa 185-187.

III. LEGAL ARGUMENT

A. Standard of Review.

Pursuant to R. 4:6-2(e), a complaint can be dismissed if the facts alleged do not state a viable claim as a matter of law. A complaint is properly dismissed for failure to state a claim when it fails to “articulate a legal basis entitling plaintiff to relief.” Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009) (quoting Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2001)). The Court's inquiry is “confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the” complaint. Rieder v. State Dep't of

Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (quoting P.&J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962)). Dismissal is “mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.” Id.

Conclusory statements without underlying factual allegations will not preclude dismissal. Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012) (citing Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 768 (1989)). Nor can a plaintiff avoid dismissal by suggesting that ““discovery may establish the requisite claim.”” N.J. Sports Prods., Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173, 178-79 (Ch. Div. 2007) (quoting Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003)). Instead, all factual and “legal requisites for plaintiff’s claim must be apparent” from the face of the complaint itself. Id. (quoting Edwards, 357 N.J. Super. at 202).

A plenary standard of review applies to a trial court’s decision to dismiss a complaint pursuant to R. 4:6-2(e), Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011) (citing Sickles, 379 N.J. Super. at 106), including the trial court’s application of a statute of limitations, Barron v. Gersten, 472 N.J. Super. 572, 576 (App. Div. 2022). No deference is owed to the trial court’s legal conclusions. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo,

Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) (citing Rezem, 423 N.J. Super. at 114).

B. The Trial Court Did Not Abuse Its Discretion When It Granted Defendants’ Motion Based on the First Filed Rule.

It is well-settled that “when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted.” Harkrader v. Wadley, 172 U.S. 148, 164, 19 S.Ct. 119 (1898). Only a “high degree of similarity between the first-filed action and the later-filed case” is required. Muhammad v. State Farm Indem. Co., 719 F. Supp.3d 397, 403 (D.N.J. 2024). “[E]xact identity of claims is not required.” Id. (quoting Catanese v. Unilever, 774 F. Supp.2d 684, 689 (D.N.J. 2011)).

“New Jersey has long adhered to ‘the general rule that the court which first acquires jurisdiction has precedence in the absence of special equities.’” Platkin v. Smith & Wesson Sales Co., 474 N.J. Super. 476, 487 (App. Div. 2023) (citing Sensient Colors Inc. v. Allstate Ins. Co., 193 N.J. 373, 386 (2008) (quoting Yancoskie v. Del. River Port Auth., 78 N.J. 321, 324 (1978))). The first-to-file rule is a doctrine of comity, which governs “when a New Jersey court should defer to another jurisdiction’s courts.” Sensient Colors, 193 N.J. at 379. A New Jersey court should not interfere with a similar proceeding filed first in another jurisdiction when that “foreign jurisdiction [is] capable of affording adequate relief and doing

complete justice” O’Loughlin v. O’Loughlin, 6 N.J. 170, 179 (1951); see also Cont’l Ins. Co. v. Honeywell Int’l, Inc., 406 N.J. Super. 156, 197 (App. Div. 2009) (same).

As the Appellate Division explained in Platkin:

Special equities have been found under a variety of circumstances, including when:

[1] one party has engaged in jurisdiction shopping to deny the other party the benefit of its natural forum [2] a party acting in bad faith has filed-first ‘in anticipation of the opposing party’s imminent suit in another, less favorable, forum’ ... [3] significant state interests ... are implicated, and when deferring to a proceeding in another jurisdiction ‘would contravene the public or judicial policy’ of the forum state... [4] it would cause ‘great hardship and inconvenience’ to one party by proceeding in the first-filed action and no unfairness to the opposing party by proceeding in the second-filed action. [Sensient, 193 N.J. at 387-89 (internal citations omitted).]

A “comity analysis should begin with a presumption in favor of the earlier-filed action.” Id. at 387. The analysis should be “a fact-specific inquiry that weighs considerations of fairness and comity” to determine whether “special equities exempt a court from deferring to a first-filed action” Id. at 389-90. Thus, “[t]he question is not whether a state court has the power to exercise jurisdiction over a case filed within its jurisdiction, but whether the court should restrain itself and not exercise that power.” Id. at 386-87 (citing O’Loughlin, 6 N.J. at 179).

Id. at 487-88.

Consequently, “a New Jersey state court ordinarily will stay or dismiss a civil action in deference to an already pending, substantially similar lawsuit in another state, unless compelling reasons dictate that it retain jurisdiction.” Sensient, 193 N.J. at 386 (citing O’Loughlin, 6 N.J. at 179). To obtain a dismissal or stay of a New

Jersey case for comity reasons, the moving party bears the burden to establish two facts: (1) there is an earlier-filed action in another court; and (2) the earlier-filed action “involve[s] substantially the same parties, the same claims, and the same legal issues” as the second-filed action. Id. at 391 (quoting Am. Home Prods. Corp. v. Adriatic Ins. Co., 286 N.J. Super. 24, 37 (App. Div. 1995)). If the party seeking the stay or dismissal satisfies these two prerequisites, then the party advocating the exercise of jurisdiction in the second-filed action bears the burden to “show that it will not have the opportunity for adequate relief in the first-filed jurisdiction.” Id. at 392.

Stated differently, a “clear entitlement to comity-stay relief” is established by proof: “(1) that there is a first-filed action in another state, (2) that both cases involve substantially the same parties, the same claims, and the same legal issues, and (3) that plaintiff will have the opportunity for adequate relief in the prior jurisdiction.” Am. Home Prods., 286 N.J. Super. at 37 (App. Div. 1995) (footnote omitted). Under such circumstances, “the judge should grant the stay unless plaintiff demonstrates ‘special equities.’” Id. “[E]xtenuating circumstances sufficient to qualify as special equities” arise when there are “compelling” reasons “that favor the retention of jurisdiction by the court in the later-filed action.” Sensient, 193 N.J. at 387. Such circumstances are present “if an injustice would be perpetrated on a party in the first-

filed action and no hardship, prejudice or inconvenience would be inflicted on the other by proceeding in the second-filed case.” Id. at 389 (internal citations omitted).

A trial court’s decision to apply the doctrine of comity requires “a fact-specific inquiry that weighs considerations of fairness and comity” Id. at 389-90. Appellate courts evaluate a trial court’s decisions on comity matters under an abuse of discretion standard. Id. at 390. “The determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court.” Id. Against this backdrop, and for the reasons that follow, there can be no doubt that the trial court did not abuse its discretion when it determined that the first filed rule applies.

First, it is undisputed that there was an earlier filed action in another court – the pending federal court action filed back on June 20, 2024. Pa 56-109. Indeed, even the amended complaint filed by Mr. Mitchell on September 10, 2024 in the United States District Court for the District of New Jersey was filed before he filed his state court complaint on October 4, 2024. Pa 111-171. Second, there can be no doubt, as the trial court found, that the earlier filed federal court action involves substantially the same parties, the same claims and the same legal issues as those asserted in the later filed state court action. Compare Pa 1-24 to Pa 56-109 and Pa 111-171. Third, there are no special equities or extenuating circumstances that militate against applying the doctrine. Therefore, the trial court’s decision with respect to this issue was correct and should be affirmed accordingly.

Plaintiff does not dispute that he filed a substantially similar, if not almost identical, complaint in federal court before he filed his state court complaint. Instead, he suggests that the trial court's decision with respect to this issue should be reversed because while the earlier filed federal court complaint "included a pendent jurisdiction claim under New Jersey land use law seeking injunctive, relief, the probability of success on this theory in the federal action, in large part a civil rights case, alleging various constitutional and federal, statutory violations, was minimal." Pb 8. Plaintiff's ability to succeed in the earlier filed action is not the issue and, in any event, there is no way he can predict whether he will be successful or not in the federal court action. Having failed to demonstrate that an "injustice would be perpetrated" if his claims were adjudicated in the first-filed federal court action and failed to sustain the burden imposed upon him by Sensient Colors, the trial court did not abuse its discretion when it granted Defendants' motion. See Cont'l Ins. Co., 406 N.J. Super. at 197.

C. The Trial Court Correctly Found that Plaintiff's Complaint Was Untimely Filed and Properly Denied Plaintiff's Request for an Enlargement of Time.

Challenges to municipal governmental action, including appeals from land use board decisions, must be brought by way of action in lieu of prerogative writ. See Hopewell Valley Citizens' Group, Inc. v. Berwind Prop. Group Development Co., L.P., 204 N.J. 569, 576 (2011); Dolan v. City of East Orange, 287 N.J. Super.

136, 142 (App. Div. 1996). Prerogative writ actions are governed by New Jersey Court Rules 4:69-1 to -7. Pursuant to R. 4:69-6(b)(3), an action to review a planning or zoning board decision must be commenced not later than forty-five days from the publication of a notice of the board's determination. See Casser v. Twp. of Knowlton, 441 N.J. Super. 353, 358 (App. Div. 2015), *certif. denied*, 224 N.J. 123 (2016); Adams v. DelMonte, 309 N.J. Super. 572, 578 (App. Div. 1998). This forty-five-day time limit is rooted in the important policy of repose which is afforded to public bodies and is aimed at those who, like Plaintiff, slumber on their rights. Id.; see Borough of Princeton v. Board of Chosen Freeholders of County of Mercer, 169 N.J. 135, 152-53 (2001); Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div.), *certif. denied*, 174 N.J. 189 (2002).

According to the complaint, the notice of decision with respect to the Zoning Board's May 4, 2022 denial was published on October 23, 2022. Pa 11, ¶47. The notice of decision with respect to the denial that occurred at the ZBA's October 5, 2022 hearing was published on November 20, 2022. Pa 12, ¶54. However, Plaintiff's complaint was not filed until October 4, 2024. Pa 1. Therefore, the trial court correctly dismissed the complaint as untimely filed. See e.g., Washington Tp. Zoning Bd. of Adj., 217 N.J. Super. at 225.

Plaintiff's assertion that the trial court made an "assumption of fact" that was "totally incorrect" is mistaken. Pb 11. To the contrary, Judge Covert correctly found

that notice of the Board’s decision denying Plaintiff’s application “was published in the Burlington County Times on November 20, 2022” and sent via email to the Plaintiff “on November 26, 2022, with a copy of the proposed order for publication showing an ad preview of the drafted public notice.” Pa 181. To this end, Her Honor further noted that “Plaintiff does not deny that the decision was noticed in the Burlington County Times on November 20, 2022, or that he was present with counsel for the meeting when the Board decided his issue.” Pa 181-182. The trial court’s conclusion that this was “sufficient to meet the requirements of R. 4:69-6(b)(3), particularly where, as here, the present action was brought nearly two years after the publication and email to the Plaintiff” (Pa 182) is unassailable. See Milford Mill 128, LLC v. Borough of Milford, 404 N.J. Super. 96, 109 (App. Div. 2008) (noting that where, as here, “plaintiff’s complaint is manifestly untimely ... , the defendant should not be compelled to suffer the burdens of continued litigation”); Southport Dev. Group, Inc. v. Twp. of Wall, 310 N.J. Super. 548, 555 (App. Div. 1998) (recognizing that untimely challenges to local land use decisions are disruptive to sound municipal planning).

Plaintiff’s reliance upon Toutphoeus v. Joy, 81 N.J. Super. 526 (App. Div. 1963), is misplaced. Pb 13. In Toutphoeus, this Court held that an action to set aside a variance by a board of adjustment was commenced within the time limitation of R.R. 4:88-15 when the complaint was filed 42 days after newspaper publication of

the board's decision, even though it was not filed until more than 45 days after plaintiffs had actual knowledge of the board's decision. *Id.* at 532. Here, as noted by the trial court, Plaintiff acknowledged in his own complaint that the Board's notice of decision was published on November 20, 2022 and emailed to him on November 26, 2022. Pa 12, ¶¶52-¶54; Pa 181. Thus, the trial court properly concluded that Plaintiff's complaint, which was not filed until almost two (2) years later, was time barred. Pa 181-182.

Likewise unavailing is Plaintiff's argument that the trial court improperly denied Plaintiff's request to enlarge the forty-five (45) day time limit. Pb 16-18. "Whether to grant or deny an enlargement involves a sound exercise of judicial discretion, with consideration given to both the potential impact upon the public body and upon the plaintiff. The longer a party waits to mount its challenge, the less it may be entitled to an enlargement." Tri-State Ship Repair & Dry Dock Co., 349 N.J. Super. at 423-24. In addition to the length of the delay, "the reason proffered for that delay" should also be considered. *Id.* "Because of the importance of stability and finality to public actions, courts do not routinely grant an enlargement of time to file an action in lieu of prerogative writs." Casser, 441 N.J. Super. at 367 (quoting Tri-State Ship Repair, *supra.*); see County of Ocean v. Zekaria Realty, 271 N.J. Super. 280 (App. Div.), *cert. denied*, 513 U.S. 1000 (1994); DeHart v. Bambrick, 177 N.J. Super. 541 (App. Div. 1981).

The New Jersey Supreme Court has identified three general categories of cases that qualify for the “interest of justice exception” to the forty-five day time limit:

cases involving (1) “important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification.”

Borough of Princeton, 169 N.J. at 152 (quoting Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975)). “Even if a case involves purely private interests, a court may conclude that the ‘interest of justice’ warrants an enlargement of the forty-five day period.” Gregory v. Borough of Avalon, 391 N.J. Super. 181, 189 (App. Div. 2007) (citing Cohen v. Toft, 368 N.J. Super. 338, 346-47 (App. Div. 2004)). “Whenever an application is made for such an enlargement, a court must weigh the public and private interests that favor an enlargement against ‘the important policy of repose expressed in the forty-five day rule.’” Id. (citing Borough of Princeton, 169 N.J. at 152-53 (2001) (quoting Reilly v. Brice, 109 N.J. 555, 559 (1988))).

As the trial court aptly noted, Plaintiff’s appeal from the Zoning Board’s decision does not involve any novel or important constitutional questions, nor does it involve informal or *ex parte* determinations of legal questions by administrative officials. Pa 182. It also does not involve any important public rather than private interests which require adjudication or clarification. Rather, this appeal is motivated by and arises out of Plaintiff’s private interests in attempting to build an extremely

oversized accessory structure on his property. None of these reasons are sufficient to warrant granting an enlargement of time, and the trial court did not abuse its discretion when it denied Plaintiff's request. See Washington Twp. Zoning Bd. of Adjustment, 217 N.J. Super. at 225 (affirming dismissal of prerogative writ complaint where plaintiff failed to provide trial judge with any persuasive reason to relax the 45-day time-bar); Casser, 441 N.J. Super. at 367-68 (noting that "the longer a party waits to mount its challenge, the less it may be entitled to an enlargement").

Plaintiff's default approval argument is a red herring and, in any event, the trial court did not give it "short shrift" as he now claims. Pb 14-15. To the contrary, Judge Covert acknowledged Plaintiff's argument and, rightfully so, cited Eastampton Ctr., LLC v. Plan. Bd. of Twp. of Eastampton, 354 N.J. Super. 171, 193-94 (App. Div. 2002), and Allied Realty v. Borough of Upper Saddle River, 221 N.J. Super. 407, 418-419 (App. Div. 1987), *certif. denied*, 110 N.J. 304 (1988), for the proposition that automatic approvals are reluctantly granted and are only appropriate in limited situations involving intentional delay or inattention to an application. Pa 182-183. Having found that Plaintiff presented no evidence of any intentional wrongdoing on the part of the Board, the trial court correctly found that "[t]he argument that his complaint was timely filed because he is entitled to said default approval is without merit." Pa 183.

Likewise without merit is Plaintiff's argument that the trial court should have granted his request for an enlargement of time due to what he perceives to be are procedural missteps by the Board. Pb 17-18. Even if it were believed that the Zoning Board did not follow certain requirements, it is well-settled that parties with notice and a right to direct review cannot safely resort to collateral attack beyond the 45-day prerogative writ period even where official action is *ultra vires* and void. Marini v. Borough of Wanaque, 37 N.J. Super. 32, 40-41 (App. Div. 1955) (holding that "even where an act of a municipal body may be regarded as so 'utterly void' as to be subject to collateral attack at any time, a direct review thereof must be 'within the time prescribed by law'"); see also County of Ocean v. Zekaria Realty, 271 N.J. Super. 280 (App. Div. 1994); Orloski v. Planning Bd. of Borough of Ship Bottom, 226 N.J. Super. 666, 677-78 (Law Div. 1988), *aff'd o.b.*, 234 N.J. Super. 1 (App. Div. 1989).

IV. CONCLUSION

Based on the foregoing reasons and authority, it is respectfully requested that the trial court's decision be affirmed.

Respectfully submitted,

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By: /s/ Eric J. Riso
ERIC J. RISO, Esquire

DATED: July 23, 2025

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Appellate Division Docket No.: A-1496-24T2**

AARON MITCHELL
Plaintiff-Appellant t

v.

TOWNSHIP OF WILLINGBORO and
TOWNSHIP OF WILLINBGORO
ZONING BOARD OF ADJUSTMENT
Defendant-Respondent

ON APPEAL FROM:
Superior Court Of New Jersey
Law Division
Burlington County

Civil Action

DOCKET NO.: BUR-L-2063-24

Sat Below:
Hon. Jeanne Covert, A.J.S.C.

REPLY BRIEF OF APPELLANT AARON MITCHELL

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Preliminary Statement

The trial court dismissed plaintiff's case for two reasons. It concluded that because the pending federal action also contained the same allegations of violations of the municipal land use law, the first filed doctrine warranted a dismissal. It also concluded that the plaintiff had filed his action too late and that no special circumstances justified expanding that time. The trial court's decision was misguided on both counts, and the conclusion that these determinations were wrong is based upon overlapping and similar reasons.

While the federal action that raised claims under the MUL was filed first, plaintiff was precluded from filing the state court action until certain prerequisites of the MUL and the rules of court were met, a delay caused by the very same actions of the respondent board that form a substantive basis of his claims. Similarly, two notable special circumstances, injustice to the plaintiff and significant state interests involved, warrant allowing this case to proceed notwithstanding the first filed doctrine and also provide the special circumstances that mitigate in favor of extending the statute of limitations to allow this action to proceed.

LEGAL ARGUMENT

Point I.

The trial court abused its discretion in dismissing the matter under the “First Filed” doctrine.

While arguing that the trial court properly exercised its discretion in dismissing this matter, based upon the first filed doctrine, respondent loses sight of the fact that the plaintiff was unable to properly bring the state court action at the time that he chose to first raise claims, including those relating to the municipal land use appeal, in the federal court. As the prerequisite for filing the prerogative writ action in state court had not yet occurred, he cannot be accused of forum shopping by first raising claims about the respondent zoning board’s improper actions in federal court as a defense to this matter. In his complaint, plaintiff noted that he was not appropriately served with the copy of the October 2022 resolution of zoning board decision denying his application until it was provided to him by the respondent’s attorney in its federal court motion to dismiss filed on August 21, 2024. Pa-
14. While plaintiff concedes that a copy of the proof that was being sent to the local newspaper relating to the resolution was given to him in late November of 2022, it is uncontroverted that plaintiff has alleged facts before the trial court, that he was not served properly with the denial as required by law until August 21,

2024. The direct service of the resolution was the municipal action triggering the plaintiff's right to bring this case. R 4:46-6(b)3.

The plaintiff's inability to bring his action in lieu of prerogative writs is a critical factor that should have been addressed and given considerable weight by the trial court in deciding whether to dismiss this action as the second one to be filed. As stated by the Supreme Court in *Sensient Colors v. Allstate insurance company*, 193 NJ 373 (2008), there are numerous ways in which a court can refuse to defer to the first filed jurisdiction when special equities are found. 193 NJ at 387. Findings of "great hardship and inconvenience" to one party or the existence of significant state interests are among the factors that have been found to warrant the finding of special equities. 193 N.J. at 388–389.

In the case, before the court, plaintiff had identified numerous ways in which he asserted that the respondents, as well as individual defendants employed by respondent, had violated his constitutional rights in a way that warranted filing an action in federal court. While it is clear from the pleadings that were before the trial court that the plaintiff believed that the zoning board proceedings were fatally flawed, Rule 4:69–6 b is clear in stating that "no action in lieu of prerogative writs shall be commenced"... until certain conditions have been met, including the

latter of either the publication of the notice or mailing of the notice to the applicant, whichever occurs last. Rule 4:69–6 (b)(3). Thus, the plain language of the court rule makes it clear that the plaintiff was unable to bring this state court action until that notice was properly transmitted to him. As he could not have brought this action in strict conformity with the court rules until after the federal action had already been filed, it would be inequitable to punish him for raising the issue for the first time in the federal court complaint.

Moreover, this case presents a case of significant state interests in light of the wholesale disregard of mandatory procedures by the respondent Board over the course of its dealings with the plaintiff. The New Jersey Municipal Land Use Law is supposed to set out a regulatory scheme that allows procedures that will further “‘public health, safety, morals and general welfare’ using uniform and efficient procedures.” *Rumson Estates, Inc. v. Mayor & Council of Fair Haven*, 177 N.J. 338, 349 (2003). The Supreme Court has noted that it should be interpreted in a manner that furthers the “MLUL’s goal of statewide consistency and uniformity in land use decisions.” See *Amerada Hess Corp. v. Burlington Cty. Planning Bd.*, 195 N.J. 616, 630 (2008). This Court has held that strict conformity with the provisions of the MUL is mandatory, and a Board’s failure to comply with those

provisions will render actions taken to be a nullity. *Rockaway Shoprite Assocs., Inc. v. City of Linden*, 424 N.J.Super. 337 (App.Div. 2011).

Plaintiff's complaint is replete with examples of how the respondent Board failed to follow the requirements of the MUL: failures to properly provide notice, failure to properly publish and provide notice of decisions, failure to act timely, and many other procedural defects that demonstrated its complete disregard of the requirements of the law. These defects as alleged in the complaint were treated as insignificant by the trial court, and the trial court's treatment of these actions and inactions failed to acknowledge the significance of the failures that spanned several years. This type of procedural irregularity is antithetical to the purposes of the MUL and calls for strong state court action, even if the matter was filed in federal court first. If the trial court had stayed or dismissed those issues that were primarily federal in nature, such as the constitutional violations alleged in the prerogative writs action, plaintiff's argument would not be as compelling, but the trial court dismissed the matter in its entirety and in so doing failed to address this significant wrongdoing by the Board. The actions and inactions of the Board were of such magnitude that the matter should have been addressed as a matter of significant state interest. The complaint should not have been dismissed merely because of the pending federal action.

Point II.

The complaint was not time barred.

A. The complaint was timely filed.

As noted in the plaintiff's initial brief, the plain language of Rule 4:69-6(b) state that the action cannot be brought

(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality, provided, *however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later.*

Here, the facts as pled were that the notice was not sent to the plaintiff until August of 2024, and the 45-day period in which to file was satisfied. The fact that the plaintiff had received actual notice by way of the improperly transmitted newspaper proof that he received in late November, or the verbal indication he received at the actual hearing, is of no moment. The court rule is very clear in stating what is needed to allow the action to be brought; actions that did not happen until the filing of a motion to dismiss in federal court, in late August 2024. The court rule is explicit in that the "determination or resolution [resulting] in a denial]" is what starts the clock the time for filing the action; this mailing never

occurred until after the response to federal court filing in 2024, and that this is the legal linchpin for timeliness. While there was a lengthy gap between the actual decision and this notice, that is not something caused by the plaintiff, but rather the defendant Board. The plaintiff provided the facts explaining the reasons for the filing of the action in 2024 in his complaint, and the trial court wrongly refused to consider them. It was error to conclude that the complaint was filed late.

The trial court appeared to conflate plaintiff's actual notice of the denial of his application based on his attendance at the zoning board meeting and his receipt of the written notice required by statute. The case law makes it clear that the written notice is controlling and the actual notice, based on the applicant's participation at the meeting, is irrelevant. The court rule is even more specific in stating that it is the later of the publication of the notice or the mailing to the denied applicant of the notice, which is what occurred here and triggered the plaintiff's right to bring this action in August of 2024. He filed the complaint in compliance with the rule by filing within 45 days of receiving written notice, and the trial court erred in concluding otherwise.

B. Special equities existed warranting the late filing of the complaint.

The court rules provide for relaxing the normal 45-day statute of limitations on such actions when there are special equities. The rule states

Enlargement. The court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires.

N.J. Ct. R. 4:69-6

In this matter, the trial court's failure to find special equities warranting extending the time to file the appeal was inappropriate in light of the full factual picture painted by plaintiff's complaint. The Supreme Court has written that

three general categories of cases that qualify for the "interest of justice" exception: "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification."

Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, (2001).

Citing its earlier opinion of Reilly v. Brice, 109 N.J. 555, 559 (1988), the Borough of Princeton Court noted that the purpose of the "statute of limitations is designed to encourage parties not to rest on their rights." Ibid. That is clearly not the case here, in light of the plaintiff's inability to file earlier due to the lack of a properly mailed resolution of the denial. Even if a court were to determine that he was mistaken in believing he was precluded from filing, his actions were not the result

of “resting on his rights,” but upon the good faith belief that this option was not available to him until his receipt of the mailed resolution. That prerequisite was only satisfied when the respondents moved in Federal court to dismiss, and plaintiff acted promptly upon receiving what he believed was the proper documentation allowing the Law Division matter to be filed. This delay was less than 2 years; conversely, in Borough of Princeton, the Court addressed the claim of timeliness where the conduct complained of had begun nine years before the action was filed in the Law Division.

The plaintiff here alleged a failure to take the actions required for the Board to have jurisdiction, providing the mandated notice. He alleged that the respondent Board failed to provide any notice that it had converted the in-person hearing to a zoom hearing prior to the October 2022 hearing, (Pa 8-9), which harmed him in that no one showed up to provide input from the public, including neighbors and a friend he indicated would have given favorable testimony. There is no such thing as harmless failure to provide the mandatory notice, and here plaintiff alleged both the failure to provide notice and the effect of such a failure on the hearing on his application. As this Court has written,

We have recognized the importance of the public notice requirements of the Municipal Land Use Law (MLUL) and the fact that such notice is jurisdictional. *Brower Dev. Corp. v. Planning Bd.*, 255 N.J.Super. 262, 269,

(App.Div.1992) (such notice requirements evidence "legislative solicitude for the public interest").

Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd., 295 N.J.Super. 234 (App. Div. 1996).

The intent of the respondent Board in failing to follow proper notice procedure may have been inadvertent, but intent is irrelevant—a jurisdictional defect invalidates the hearing regardless of intent or negligence. This gross failure to follow mandatory procedures, on top of the respondent's previously noted failures to adhere to the other aspects of the MUL alleged in plaintiff's complaint, should have required the trial court to find that even if the matter was not timely filed, special equities allowed for the time to be relaxed.

Just as the failure to provide notice violated the notice provisions of the MUL, the defendant's failure also violated the notice provisions of the Open Public Meetings Act, N.J.S.A. 10:4-8(d), which requires meaningful notice to be disseminated no later than 48 hours before the meeting. The Board's abject failure to advise the public that the meeting had shifted to a zoom meeting violated this provision, providing yet another example of the Board's disdain for the required procedure of the MUL and the OPMA that underline the public importance of addressing its failures.

As noted above in point one of plaintiff's argument in this brief, the myriad failures of the respondent board to follow mandatory procedural requirements of the MUL evidence a complete disregard of its obligations and present a compelling public interest in the integrity of the zoning process in the defendant Township. They also raised implications of the denial of his rights under the federal and state constitutions by denying him the process to which he was entitled under the MUL. Another area of public interest that was not addressed by the trial court was that of default approval, a procedure designed to incentivize municipal entities to comply with the procedural requirements of the MUL. The trial court misapplied the Default Approval Standard (N.J.S.A. 40:55D-10.4) as the trial court appears to rely on case law regarding default (automatic) approval that requires a showing of intentional inattention or delay by the Board. The case law, and indeed the case cited by the trial court as justification for denying an application based upon the claim of a default denial, makes it clear that innocent or good faith failures to adhere to proper procedures are the types of failures that do not justify default approval. In *Eastampton Ctr LLC v. Planning Bd. of Eastampton*, 354 N.J. Super. 171 (App. Div. 2002), this Court wrote

the failure to timely act on an application has been excused where a board was operating under an understandable misconception of law, *Manalapan Holding Co.*, 92 N.J. 466, 480 (1986), and *Allied Realty*, 221 N.J. Super. 407, 418-19 (App. Div. 1987); where a decision was defective because of an inadvertent and technical violation of the law, such as holding a meeting in

violation of the Open Public Meetings Act, *Precision Indus. Design Co. v. Beckwith*, 185 N.J.Super. 9, 18, (App.Div.), certif. denied, 91 N.J. 545 (1982); where inaction was the product of inadvertent mistake, such as misplacing the development application, *D'Anna v. Planning Bd. Of Washington Township*, 256 N.J.Super. 78, 83 (App.Div. 1992); or where the applicant appeared to consent to an extension of time, *Star Enter. v. Wilder*, 268 N.J.Super. 371 376-77 (App. Div. 1993).

In this matter, the complaint alleged that multiple opportunities were provided to defendant to correct the procedural errors; on multiple occasions, they were asked for information or documents, and all of these requests were ignored. The Board's egregious conduct in deviating from proper procedure and then ignoring his request for documentation was both deserving of a default approval, and of sufficient public concern as to warrant relaxing the rule for filing. The trial court erred on both the substantive analysis of the Board's conduct in failing to act in the appropriate manner, and on its failure to recognize this as yet another action that elevated this issue to one of public concern.

Compounding those actions was the improper notice that was alleged by the plaintiff, the failure to advise the public in any fashion that the hearing had been moved from an in-person hearing to a zoom hearing for the October 2022 proceeding. This notice is mandatory; the failure to provide it deprived the Board of the jurisdiction to act, and also amounted to yet another failure of the defendants' zoning procedures that needs to be addressed for the benefit of all

Township citizens who would be availing themselves of this system. Plaintiff alleged that his request for the audio and the transcript of the hearing was properly made and yet ignored, which was both a violation of NJSA 40:55D-10(f) and also a serious procedural violation that needs to be addressed as a matter of great public concern (Pa 12-13); his request for proof that the resolution was passed and his request for documents made via OPRA request were both ignored (Pa 13), further deviations from the mandated procedures that need to be addressed for the good of the public. The sum total of the violations of the MUL as alleged by plaintiff painted a clear and compelling picture of a Board with little regard for adherence to mandatory procedures, and the timing of plaintiff's filing in the trial court was appropriate in light of the actions and inactions of the Board.

The complaint was timely filed under the court rules, and matter before the trial court was replete with facts calling for the expansion of time even if it had not been timely filed. The trial court's dismissal should be reversed and remanded.

Conclusion

For the reasons set forth in this brief and in appellant's initial brief, the trial court's decision should be reversed and the matter remanded for trial.

/s/ Talbot B. Kramer Jr., Esquire