NEWPORT ASSOCIATES DEVELOPMENT COMPANY, Plaintiff/Appellant, v. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Defendant/Respondent. -and- PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Third-Party Plaintiff, v. CONSOLIDATED RAIL CORPORATION Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001588-24 T4 CIVIL ACTION ON APPEAL FROM CHANCERY DIVISION HUDSON COUNTY DOCKET NO. HUD-C-81-21 JUDGMENT ENTERED: January 6, 2025 SAT BELOW: HON. JEFFREY R. JABLONSKI

PLAINTIFF/APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Plaintiff/Appellant, Newport Associates Development Company ("NADC"), respectfully submits this Brief in support of its appeal in this action between Plaintiff and Defendant/Respondent Public Service Electric and Gas Company ("PSEG").

This real property dispute results from PSEG's encumbrance of NADC's property with high-power electric transmission lines. Back in 1980, the property's previous owner, Conrail, gave PSEG a license to install and maintain the transmission lines. This license was unknown to anyone other than Conrail and PSEG, however, because it was unrecorded in the title record and buried in Conrail's stored files.

Conrail subsequently conveyed the property to NADC's predecessor-in-title in 1982, without the predecessor assuming the license or even having any notice of the existence of the license. NADC did not become aware of the transmission lines on the property until 25 years later, in 2017. When NADC discovered the lines, it requested PSEG's legal basis for the encumbrance, because NADC's title searches did not disclose any license or easement that would allow PSEG to have the lines on the property. PSEG initially told NADC that PSEG had an easement agreement, dating to 1983, which allegedly gave PSEG the right to have the lines on the

property. NADC then brought the claims in this case, contesting PSEG's alleged right to encumber NADC's property.

During discovery, it was revealed that the easement relied on by PSEG did not encumber the property at all. It was not until 2022, when NADC subpoenaed Conrail, that Conrail then produced the unrecorded 1980 license agreement that purported to give PSEG rights in the property. NADC thus was unaware of the 1980 license between Conrail and PSEG until 2022, a fact that has never been disputed by PSEG.

Nevertheless, PSEG argues that the 1980 license between Conrail and PSEG is binding on NADC, is in fact "irrevocable," and therefore still encumbers the property. Although the 1980 license, as a personal property contract between Conrail and PSEG, clearly terminated as a matter of law when Conrail conveyed the property in 1982, the trial court ruled that the 1980 license was either "irrevocable" or "became irrevocable." The trial court's decision is erroneous as a matter of law and must be reversed. In reaching the decision, the trial court also erroneously imposed the burden of proof on NADC to disprove PSEG's affirmative defense that the 1980 license is, or became, irrevocable.

Due to these errors of law, NADC respectfully requests that this Court reverse the trial court's Order and remand the case for a determination of NADC's damages.

PROCEDURAL HISTORY

NADC filed its initial Complaint in this action on June 8, 2021. Pa1. PSEG filed an Answer to NADC's Complaint on November 19, 2021. Pa10.

NADC filed an Amended Complaint on February 10, 2023. Pa16. PSEG filed an Answer to NADC's Amended Complaint on March 10, 2023. Pa67.

This matter proceeded to trial on July 15 (1T), July 16 (2T), July 17 (3T), July 29 (4T) and July 30 (5T), 2024. After trial, at the trial court's direction, NADC and PSEG each respectively filed Proposed Findings of Fact and Conclusions of Law on September 20, 2024.

On January 6, 2025, the trial court issued an Order ruling that: (i) NADC's "requested relief in its complaint is denied and the complaint is dismissed"; and (ii) PSEG's "counterclaim is denied." Pa169. Also on January 6, 2025, the trial court issued an Opinion giving its statement of reasons for the January 6 Order. Pa170.

NADC filed its Notice of Appeal on January 31, 2025. Pa194.

FACTS RELEVANT TO APPEAL[1]

In or about 1971, PSEG installed the first (the "B Line") of two transmission lines along certain properties, including but not limited to a transmission line under the real property located at 535 Monmouth Street a/k/a 354 10th Street, Block 6902,

[1] NADC includes here the facts most pertinent to this appeal. The full factual background of this matter is contained in NADC's Proposed Findings of Fact and Conclusions of Law, filed with the trial court.

Lot 27, Jersey City, New Jersey (the "Premises"), which at the time was owned by the Erie Lackawanna Company ("Erie"). 1T21:17-24. The Premises is 134,295 square feet of land area, which is 3.083 acres. 1T127:22-23.

On or about March 31, 1976, the Trustees of Erie conveyed the Premises to Consolidated Rail Corporation ("Conrail"). 1T21:25-22:1.

Prior to November 1982, PSEG installed a second transmission line (the "C Line" and collectively with the C Line, the "Transmission Lines") on the Premises. 1T22:2-5; 2T61:9 – 2T63:20.

By way of Deed dated November 18, 1982 (the "1982 Deed"), Conrail conveyed the Premises to Harbour City Development Company ("HCDC"). Pa304; 1T22:6-11. Also on November 18, 1982, HCDC and Conrail entered into a License Agreement (the "1982 Conrail License"), which granted Conrail rights to certain rail transportation over the Premises. Pa192; 1T22:12-18.

On or about January 31, 1984 (the "1984 Deed"), HCDC conveyed the Premises to Newport City Development Company ("NCDC"). Pa236; 1T22:23-25; 1T27:11-14. In or about December 1986, NCDC changed its name to Newport Associates Development Company (NADC). 1T23:3-5.

NADC is the current owner of the Premises. 1T23:21-22; 1T27:7-10. NADC became aware of the Transmission Lines occupying a portion of the Premises in February 2017. 1T29:12-15. NADC became aware of the Transmission Lines

occupying a portion of the Premises as a result of obtaining a survey in February 2017 from 50 States Engineering in preparation for a planned development of the Premises. 1T29:16 – 1T30:4; Pa298. The 50 States Engineering survey shows a general and vague location of the Transmission Lines. 1T30:5-18; Pa298.

After NADC discovered the Transmission Lines, it reached out to PSEG to ask if there was justification for the Transmission Lines' presence on the Premises. 1T31:22 – 1T32:1. In response to NADC's communications, PSEG stated that it had a license agreement dated March 24, 1971 (the "March 1971 License"), and a Deed of Easement dated December 29, 1983 (the "1983 Easement"), which allegedly gave PSEG rights to maintain the Transmission Lines on the Premises. 1T32:2-5; Pa47; Pa56. PSEG subsequently admitted that neither the March 1971 License nor the 1983 Easement conveyed PSEG rights in the Premises. 1T32:6-11. There are no recorded license or easement agreements granting PSEG rights to maintain the Transmission Lines on the Premises. 1T36:12-21; Pa115-120 (unrecorded License Agreement).

When HCDC took the 1982 Deed from Conrail, HCDC at the same time entered into the 1982 Conrail License with Conrail. Pa192; 1T37:14-23. The purpose of the 1982 Conrail License was to allow Conrail, for a limited period of time, to maintain railroad facilities on the Premises. Pa192; 1T37:24 – 1T38:4.

Since the time that NADC acquired the Premises, it has not been developed and is currently vacant land and a proposed site for development. 1T43:8-11. NADC requested that PSEG remove the Transmission Lines from the Premises. 1T44:23-25. PSEG has refused to move the Transmission Lines from the Premises and subsequently suggested that PSEG would move the Lines, at NADC's expense, within the boundaries of the Premises. 1T45:1-4.

PSEG contends that it has rights to maintain the Transmission Lines on the Premises based on a certain License Agreement allegedly entered into by PSEG and Conrail, dated June 5, 1980 (the "1980 License"). 1T83:12-21; Pa115. The 1980 License, however, was unrecorded and it is undisputed that NADC had no knowledge of the 1980 License's existence until this litigation. In fact, PSEG apparently also had no knowledge of the 1980 License's existence until Conrail produced the 1980 License pursuant to a Subpoena served by NADC in this litigation. Thus, it was undisputed at trial that NADC acquired the Premises without notice of the 1980 License, which is why PSEG had to have the 1980 License admitted into evidence through Conrail's witness. 2T5-11 – 2T32-7. The 1980 License is solely a contract between PSEG and Conrail and does not convey rights in real property and therefore it is revocable and was revoked when Conrail conveyed the Premises to HCDC because a license by its nature is a temporary use of property. 1T45:11 – 1T46:1; 1T84:4 – 85:16.

Although PSEG argued that the 1980 License was somehow "irrevocable," that argument is contradicted by applicable law.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY CONCLUDING AS A MATTER OF LAW THAT THE SUBJECT LICENSE WAS 'IRREVOCABLE' AS TO NADC (Pa96)

PSEG relies on the 1980 License between Conrail and PSEG for its alleged rights to maintain the Transmission Lines on the Premises. 1T83:12-21; Pa115. The 1980 License, however, was revoked as a matter of law when Conrail sold the Premises, and the License cannot be enforced against NADC, as a party that purchased the Premises without any notice of the License.

A license is a contractual interest with "less than an exclusivity of possession." Kearny v. Mun. Sanitary Landfill Auth., 143 N.J. Super. 449, 456 (Law Div. 1976). "A license confers authority to go upon the land of another and do an act or series of acts there, but it does not give rise to an estate in land." Ibid. "[A] license is an agreement that only gives permission to use the land at the owner's discretion." Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 341 (App. Div. 2015). "A license is simply a personal privilege to use the land of another in some specific way or for some particular purpose or act." Twp. of Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975). A license is "usually freely revocable at the

owner's pleasure," is limited in scope by the granting agreement, and terminates at the death of either party. Van Horn, supra, 442 N.J. Super. at 341; Moore v. Schultz, 22 N.J. Super. 24, 31 (App. Div. 1952), aff'd o.b., 12 N.J. 329 (1953); 25 Am. Jur. 2d Easements and Licenses § 117 (2004).

It has long been held that a license is revoked "by a conveyance of the land upon which it was intended to operate." Kiernan v. Kara, 7 N.J. Super. 600, 603 (Ch. Div. 1950); see also Kruvant v. 12-22 Woodland Ave. Corp., 138 N.J. Super. 1, 11 (collecting cases) (Law Div. 1975), aff'd, 150 N.J. Super. 503 (App. Div. 1977); Conley v. Windston, 23 N.J. Super. 234, 237-38 (Ch. Div. 1952). This is "black letter law" in New Jersey as well as many other jurisdictions. See, e.g., De Haro v. United States, 72 U.S. 599, 627, 5 Wall. 599, 18 L. Ed. 681 (1867); Fletcher v. Delaware, L. & WR Co., 79 F.2d 306, 309 (2nd Cir. 1935) (applying New York law); Boyle v. City of Portsmouth, 172 N.H. 781, 235 A.3d 985, 991-92 (N.H. 2020); Zimmerman v. Summers, 24 Md. App. 100, 124, 330 A.2d 722 (Md. App. 1975); Anchor Stone & Materials Co. v. Carlin, 436 P.2d 650, 653 (Okla. 1967); Radke v. Union Pac. R. Co., 334 P.2d 1077, 1087, 138 Colo. 189 (Colo. 1959).

Under this well-established precedent, when Conrail conveyed the Premises, the 1980 License was revoked as a matter of law. Although the trial court cited the correct legal precedent, such as Van Horn, supra, 442 N.J. Super. at 341 and Kiernan, supra, 7 N.J. Super. at 603 (Pa96), the court erroneously set aside the legal principle

that a license is revoked upon conveyance of the subject property and instead looked to the 1980 License for evidence that it was "revocable." Pa97-98. The trial court appears to have mistakenly conflated the standard for finding that a license "became irrevocable" with the basic legal principle that licenses such as the 1980 License are automatically revoked when the encumbered property is conveyed, because they are personal to the contacting parties and do not "run with the land." The only factual findings that the trial court needed to make in order to find that the 1980 License was revoked when Conrail conveyed the Premises were: (i) there was a valid license between Conrail and PSEG that encumbered the Premises; and (ii) Conrail conveyed the Premises to HCDC – both of which the trial court specifically found. Pa83-86. Because Conrail conveyed the Premises to HCDC without HCDC assuming the 1980 License, the License was revoked as a matter of law.

Even PSEG did not contest the law mandating that licenses are ordinarily revocable. Rather, during opening statements, PSEG took the position that the 1980 License "became irrevocable," which is a wholly different issue:

> And in 1980 PSE&G negotiated and entered into a license agreement with Conrail for the second transmission line. That license agreement is at the heart of this case. And to believe plaintiff is to believe that that license agreement was revoked, but plaintiff is not able to establish when, where or how that license agreement is revoked. In listening to plaintiff's counsel this morning, and in reading their brief, they agree on a couple of critical points that the law says that a license agreement is ordinarily revocable, however it is irrevocable in the event of... And that in the event of is what we have here.

[1T16-10 to -22 PSEG's Opening Statement (emphasis added).]

PSEG incorrectly stated that NADC was "not able to establish when, where or how" the 1980 License was revoked. NADC stated repeatedly that the License was revoked as a matter of law when Conrail conveyed the Premises to HCDC. See, e.g., 1T11-4 to -8 ("PSE&G asserts that the conveyance from Conrail to Harbor City did not cut off its license rights, which is contrary to settled and generally accepted common law, which holds that when a property is conveyed, a property that is subject to license rights, the license is revoked."). Nevertheless, PSEG fully acknowledged that, aside from its arguments that the 1980 License "became irrevocable" and/or that PSEG had a prescriptive easement,[2] the License would otherwise be revocable under applicable law.

The Deed from Conrail to HCDC does not mention the 1980 License. Pa303-315. Nor was there ever any agreement by which HCDC assumed the 1980 License's obligations. Nor did PSEG ever argue that either HCDC or NADC assumed the 1980 License. Rather, PSEG's focus was on attempting to prove that NADC had constructive knowledge of the Transmission Lines on the Premises – not that NADC had knowledge of, or assumed, the 1980 License.

[2] PSEG claimed that it has a prescriptive easement that would justify the Lines' encumbrance of the Premises, but the trial court correctly found that PSEG did not sustain its burden of proving that claim, and PSEG has not appealed the trial court's Order in that regard.

In purchasing the Premises without notice of the unrecorded 1980 License, HCDC (and subsequently NADC) was a bona fide purchaser entitled to the protections of the New Jersey recording statute. Specifically, under the current law, a "conveyance of an interest in real property shall be of no effect … against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded." N.J.S.A. § 46:26A-12(c). As noted by the Supreme Court, the "principal purpose of enactment of the New Jersey recording act ... 'was to protect subsequent judgment creditors, bona fide purchasers, and bona fide mortgagees against the assertion of prior claims to the land based upon any recordable but unrecorded instrument.'" Cox v. RKA Corp., 164 N.J. 487, 507 (2000) (quoting 29 New Jersey Practice, Law of Mortgages § 102, at 386 (Roger A. Cunningham & Saul Tischler (1975)).[3] Therefore, even if the 1980 License between Conrail and PSEG was "irrevocable" as between those parties, the unrecorded 1980 License was void and of no effect as against NADC, which was a subsequent purchaser for value without notice of the License.

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[3] The Court in Cox was analyzing the prior New Jersey recording act, N.J.S.A. 46:22-1, which was repealed and replaced by the current statute, N.J.S.A. § 46:26A-12(c), in or about 2012, but the two applicable statutory provisions are substantively identical. N.J.S.A. 46:22-1 provided, in pertinent part: "[e]very deed or instrument ... shall, until duly recorded … be void and of no effect … against all subsequent bona fide purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed shall have been first duly recorded."

Accordingly, the trial court should have found that the 1980 License was revoked as a matter of law on November 15, 1982, when Conrail conveyed the Premises to HCDC. Pa215.

Whether the 1980 License 'became irrevocable' is a separate issue that is addressed below. Before addressing whether the 1980 License could have "become irrevocable," however, the trial court should not have relied on the terms of the 1980 License to rule that the 1980 License is "irrevocable." The 1980 License is a personal property contract between Conrail and PSEG (not between NADC and PSEG). There is simply no type of license that exists under applicable law that could be applied to a bona fide purchaser for value that had no notice of the License. N.J.S.A. § 46:26A-12(c). The 1980 License may have been "irrevocable" as between Conrail and PSEG, but it could not have been "irrevocable" as between PSEG and NADC after the Premises were conveyed from Conrail to HCDC.

Even if Conrail and/or PSEG may have intended the 1980 License to be "not temporary" (there was no evidence admitted that supported such a proposition in any event) by purportedly striking the verbiage "as a temporary license" from the document (Pa115), their intent is not relevant because it is insufficient to overcome the law. The 1980 License was between Conrail and PSEG only. The only way for the 1980 License to 'become irrevocable' as between PSEG and NADC is if NADC assumed the 1980 License. The trial court should not have looked to the terms of the

1980 License to determine if it was "irrevocable" as between PSEG and NADC. The analysis was flawed as a matter of law and the trial court's ruling in that regard should be reversed on the law.

POINT II

THE TRIAL COURT ERRED IN IMPOSING THE BURDEN OF PROOF ON NADC WITH RESPECT TO PSEG'S AFFIRMATIVE DEFENSE THAT THE LICENSE WAS 'IRREVOCABLE' AS TO NADC (Pa89-100)

The trial court ruled that NADC "assumes the entire burden of proving its cause of action by the requisite burden of proof" and that NADC's "evidential burden as it pertains to the irrevocability of the license agreement is proof by a preponderance of the evidence." Pa89. Although NADC had the burden of proof for its claim that PSEG has no legal right to encumber the Premises, the trial court erroneously assigned NADC the burden of disproving PSEG's defense that the 1980 License had "become irrevocable." Contrary to the trial court's ruling, PSEG clearly had the burden of proving its defense.

It has long been established that a defendant relying on an affirmative defense has the burden of persuasion by a preponderance of the evidence standard. F.K. v. Integrity House, Inc., 460 N.J. Super. 105, 116 (App. Div. 2019); Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp., 318 N.J. Super. 385, 395 (App. Div. 1999); Citibank, N.A. v. Estate of Simpson, 290 N.J.

Super. 519, 533 (App. Div. 1996); Pagano v. United Jersey Bank, 276 N.J. Super. 489, 500 (App. Div. 1994), aff'd 143 N.J. 220 (1996) Rendine v. Pantzer, 276 N.J. Super. 398, 435 (App. Div. 1994), aff'd 141 N.J. 292 (1995); Italian Fisherman, Inc. v. Commercial Union Assur. Co., 215 N.J. Super. 278, 282 (App. Div.), certif. denied, 107 N.J. 152 (1987); Shapiro v. Solomon, 42 N.J. Super. 377, 387 (App. Div. 1956).

While a license is generally revocable at will, under certain circumstances it can become irrevocable. Van Horn, supra, 442 N.J. Super. at 341 (citing Moore v. Schultz, 22 N.J. Super. 24, 29 (App. Div. 1952)). A license becomes irrevocable if the licensee expends substantial sums of money pursuing the privilege while the licensor acquiesces to the expenditures, or if permitting revocation would permit the licensor to practice a fraud on the licensee, such as revoking a license to cut timber after the licensee has already cut the timber and prepared it for removal. Ibid. Notably, even under the circumstances allowing a license to "become irrevocable," the irrevocable nature of the rights is as between the licensee and the licensor – not between the licensee and a third-party bona fide purchaser.

In any event, the argument that the 1980 License "became irrevocable" was obviously not a part of NADC's claims against PSEG. Rather, PSEG asserted that the 1980 License had "become irrevocable." Therefore, this is an affirmative defense

for which PSEG has the burden of proof. Integrity House, supra, 460 N.J. Super. at 116; Italian Fisherman, supra, 215 N.J. Super. at 282.

In addressing this argument and legal precedent by NADC, the trial court stated:

> In summation NCDC asserts that "the argument that the 1980 license became irrevocable is an affirmative defense for which PSE&G has the burden of proof." To substantiate this point, it cites to two cases, one only generally and one slightly more specifically. However, neither precedent establishes the proposition asserted that the irrevocability of a license is an affirmative defense that would otherwise shift the burden of proof from the party required to possess it. However, even if the burden were to shift to PSE&G, PSE&G provides sufficient credible evidence to counter the NCDC's unsupported arguments as to the irrevocability of the license agreement and, consequently create the state of general evidential uncertainty that is fatal to the Plaintiff's cause of action.
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> [Pa96 at n. 2.]

The trial court further stated that "this court does not agree that the burden of proof to prove that the license is revoked, or could be irrevocable, shifts from NADC to PSE&G." Pa98.

First, NADC solely had the burden of proving its claim that PSEG had no legal right to encumber the Premises – not the burden of disproving PSEG's defense. NADC had more than sufficient proof that the 1980 License was revoked – it is an unrecorded license agreement that NADC indisputably had no notice of when it purchased the Premises. Therefore, the 1980 License was never an effective contract as between NADC and PSEG.

Second, the trial court was incorrect that the argument that the 1980 License "became irrevocable" is not an affirmative defense. It is clearly not an argument that NADC would want or need to make, because the unrecorded 1980 License is a contract between Conrail and PSEG and, as a bona fide purchaser of the Premises without notice of the contract, the 1980 License is not enforceable as against NADC. Therefore, the purported "irrevocability" of the 1980 License is PSEG's defense to prove, not NADC's claim to disprove. The trial court misperceived NADC's claim and PSEG's defense.

Third, the trial court's doubt of NADC's authority for the prospect that the proponent of a defense has the burden of proving that defense is unfounded. Italian Fisherman, which NADC cited repeatedly, is valid authority for this legal concept. That the burden of persuasion rests on the party relying on the defense has been repeatedly recognized by the Supreme Court and the Appellate Division. See, e.g., So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 222 (1983); Kam-Tech Systems Ltd. v. Yardeni, 340 N.J. Super. 414, 424 (App. Div. 2001); Pagano, supra, 276 N.J. Super. at 500. There is no doubt that PSEG had the burden of persuasion that the 1980 License was "irrevocable" or "became irrevocable."

Fourth, the trial court was incorrect that, had it shifted the burden to PSEG, "PSE&G provide[d] sufficient credible evidence to counter the NCDC's unsupported arguments as to the irrevocability of the license agreement and,

consequently create the state of general evidential uncertainty that is fatal to the Plaintiff's cause of action." Pa96 at n. 2. To the contrary, if PSEG had been properly charged with the burden of proof on its defense, then the alleged "state of general evidential uncertainty," which the trial court specifically found, would have been fatal to PSEG's defense, not to NADC's affirmative claim. NADC's claim is that, as a bona fide purchaser of the Premises without notice of the 1980 License (all of which was undisputed), PSEG has no license rights that encumber the Premises. There is no legal basis to assign NADC the burden of disproving PSEG's defense that the 1980 License was "irrevocable" or "became irrevocable." Had the trial court properly allocated the burden of proof, then any "evidential uncertainty" would have inured to NADC's favor, not to PSEG's.

The trial court committed reversible error by shifting the burden of proof that the 1980 License is "irrevocable" or "became irrevocable" from PSEG to NADC.

POINT III

THE TRIAL COURT ERRED BY CONCLUDING THAT THE LICENSE 'BECAME IRREVOCABLE' (Pa96-99)

The trial court found that PSEG "has an irrevocable license to maintain the transmission lines on the premises and that the Plaintiff has not provided sufficient evidence to satisfy its burden of proof." Pa96. This ruling was erroneous, because

there is no statutory or common law theory under which the 1980 License could be "irrevocable" or could "become irrevocable" as between NADC and PSEG.

As the trial court recognized (Pa96), while a license is generally revocable at will, under certain circumstances it can become irrevocable. Van Horn, supra, 442 N.J. Super. at 341 (citing Moore v. Schultz, 22 N.J. Super. 24, 29 (App. Div. 1952)). A license becomes irrevocable if the licensee expends substantial sums of money pursuing the privilege while the licensor acquiesces to the expenditures, or if permitting revocation would permit the licensor to practice a fraud on the licensee, such as revoking a license to cut timber after the licensee has already cut the timber and prepared it for removal. Ibid. (emphasis added).

There is no authority whatsoever to support a proposition that a license can "become irrevocable" as to a purchaser of real property subject to a license, without the purchaser assuming the obligations of the license (i.e., voluntarily becoming the licensor) – nor did PSEG ever even attempt to make this argument. Rather, PSEG's primary arguments were that: (i) despite acknowledging the applicable law regarding the revocability of licenses (1T16), the 1980 License is simply "irrevocable" and enforceable against NADC under its own terms; and (ii) the 1980 License "became irrevocable." PSEG's arguments, however, ignore the applicable law that PSEG has relied upon itself. There is no such thing as an "irrevocable license" as between a licensee and a non-licensor. A license by its very nature is revocable – the only

proper question is whether a license can "become irrevocable" as between the licensee (PSEG) and a purchaser of the subject Premises which is not the licensor (NADC). There is no legal support for such a proposition, however, and it makes no logical sense.

A license is a contract between the licensor and the licensee. "A license confers authority to go upon the land of another and do an act or series of acts there, but it does not give rise to an estate in land." Kearny, supra, 143 N.J. Super. at 456. "A license is simply a personal privilege to use the land of another in some specific way or for some particular purpose or act." Twp. of Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975); Malone v. Midlantic Bank, N.A., 334 N.J. Super. 238, 245 (Ch. Div. 1999) (license is "a personal but revocable privilege to utilize the premises"). Again, a license is "usually freely revocable at the owner's pleasure," is limited in scope by the granting agreement, and terminates at the death of either party or by a conveyance of the land upon which it was intended to operate." Van Horn, supra, 442 N.J. Super. at 341; Kiernan, supra, 7 N.J. Super. at 603.

In short, a license is subject to revocation by: (1) will of the licensor; (2) death of either of the parties, or (3) conveyance of the land upon which it was intended to operate, unless coupled with an interest or creation of an equity. Plaza v. Flak, 7 N.J. 215, 223 (1951); Kiernan, supra, 7 N.J. Super. at 603. In order for a party to succeed on a theory of some "special equity," it "must allege and prove that a

revocation would work a fraud, actual or constructive, upon him." Conley v. Windston, 23 N.J. Super. 234, 237-38 (Ch. Div. 1952) (citing Raritan Water Power Co. v. Veghte, 21 N.J. Eq. 463 (E. & A. 1869); Morton Brewing Co. v. Morton, 47 N.J. Eq. 158, (Ch. 1890); Polakoff v. Halphen, 83 N.J. Eq. 126 (Ch. 1914)).

Here, NADC is not a party to the 1980 License and never agreed to assume any of its obligations. PSEG is nevertheless seeking to enforce the 1980 License against a third-party to the contract, after Conrail conveyed the Premises to HCDC, thus revoking the License. Both before and during trial, PSEG argued at length that NADC allegedly had notice of the Transmission Lines being on the Premises – but PSEG never argued, nor could it have, that NADC had any notice of the 1980 License or that either HCDC or NADC had assumed the License's obligations. PSEG admitted that it had no knowledge of the 1980 License until it received it from Conrail in this litigation. PSEG did not even have a copy of the 1980 License in its files, which is why PSEG had to have the 1980 License admitted into evidence through Conrail's witness. 2T5-11 – 2T32-7. There was never any evidence that NADC or its predecessor-in-interest, HCDC, had any knowledge of, or assumed the obligations of, the 1980 License. Therefore, the trial court committed a reversible error of law by even entertaining the argument that the 1980 License was "irrevocable" or "became irrevocable" as between PSEG and NADC.

PSEG has argued that the 1980 License is generally "irrevocable" for various reasons based on the various provisions of the agreement, and the trial court accepted some of those arguments in its decision. Pa97. For example, PSEG argued, and the trial court noted, that the "the specific language making the license revokable was affirmatively deleted with a strike through." Pa97-98. The trial court also noted that the 1980 License "does not include the term 'revocable'" and provides "a strict, arguably exclusive, mechanism for the license to be revoked, that is, but the consent of both Conrail and PSE&G, or a violation of the license by PSE&G." Ibid.

Neither of these provisions, however, make the 1980 License enforceable against NADC. Again, the 1980 License was between Conrail and PSEG – NADC was not a party. PSEG is essentially attempting to foist a contractual agreement on a third-party, NADC. The trial court seemed to recognize this fact, by acknowledging that PSEG "remains bound to its continuing obligations to subsequent owners unless there is a lease, sale, or disposal of the premises." Pa97-98 (emphasis added); bizarrely holding that NADC inherits the burdens of the contract but not the benefits. Nevertheless, the trial court ruled that the language of the 1980 License "does not indicate, however, that the license agreement would, under those circumstances, be terminated" (Pa98) – which is a clear contradiction to both the law of licenses and the trial court's other statements in the decision.

In short, the 1980 License is not "irrevocable" as against NADC and could not have "become irrevocable" as against NADC. Rather, the 1980 License was revoked when Conrail conveyed the Premises to HCDC without HCDC assuming the contractual obligation to PSEG.

The trial court committed substantial reversible error by ruling that the 1980 License was "irrevocable" or "became irrevocable" as against NADC. This Court should therefore reverse the trial court's Order, hold that the 1980 License terminated upon conveyance of the Premises in 1982, and remand for a determination of the amount of NADC's damages incurred by PSEG's unlawful encumbrance on the Premises.

CONCLUSION

For these reasons and any that NADC may submit in further briefing and/or oral argument, NADC respectfully requests that the Court reverse the trial court's Order, enter judgment in NADC's favor as a matter of law, and remand for a determination of NADC's damages.

Respectfully submitted,

McANDREW VUOTTO, LLC
Attorneys for NADC

By: */s/Jonathan P. Vuotto*
Jonathan P. Vuotto

Dated: April 18, 2025

NEWPORT ASSOCIATES DEVELOPMENT COMPANY, Plaintiff, v. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Third-Party Plaintiff/Defendant, v. CONSOLIDATED RAIL CORPORATION, Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001588-24 T4 CIVIL ACTION ON APPEAL FROM CHANCERY DIVISION HUDSON COUNTY DOCKET NO.: HUD-C-000081-21 JUDGMENT ENTERED: January 6, 2025 SAT BELOW: HON. JEFFREY R. JABLONSKI

DEFENDANT/RESPONDENT'S SECOND AMENDED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPEAL

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Defendant/Respondent Public Service Gas and Electric Company ("PSE&G") respectfully submits this memorandum of law in opposition to Plaintiff/Appellant Newport Associates Development Company's ("NADC" or "Newport") appeal.

PRELIMINARY STATEMENT

Plaintiff Newport initiated this real property dispute against Defendant PSE&G in 2021, seeking to challenge PSE&G's authority to maintain a set of underground transmission lines on property owned by Newport located at 535 Monmouth Street, a/k/a 354 10th Street, Block 6902, Lot 27, Jersey City, New Jersey (the "Premises").

PSE&G installs and maintains high power electric transmission lines throughout New Jersey to ensure the reliable delivery of electricity to its 2.4 million customers in the state. In furtherance of this critical function, in 1971, PSE&G installed a transmission line that runs from the Hudson River through Jersey City to a substation. To effectuate that installation, PSE&G negotiated rights to install and maintain the transmission line on many properties throughout Hudson County, including at the Premises.

In or around 1980, PSE&G negotiated with the then-owner of the Premises, Conrail, to install a portion of a second transmission line on the Premises. On June 5, 1980, Conrail and PSE&G entered into a license agreement (the "1980 License

Agreement") that provided for the installation of this second transmission line on the Premises and the continued maintenance of the original transmission line installed in 1971 (collectively, the "Transmission Lines"). Under the terms of the 1980 License Agreement, PSE&G paid Conrail $300,000 for the irrevocable right to maintain the Transmission Lines on the Premises unless: (1) both parties mutually agreed to terminate the 1980 License Agreement; or (2) PSE&G breached the terms of the 1980 License.

After a five-day bench trial completed in July 2024, the trial court held that the 1980 License Agreement was irrevocable and remained in effect today, and that Conrail's conveyance of the Premises to Harbor City Development Company – which then transferred the Premises to Plaintiff – in 1982 had no effect on PSE&G's irrevocable rights. In its well-reasoned written opinion, the trial court held, among other things, that: (1) a plain reading of the 1980 License Agreement did not indicate that the license was intended to be revocable; (2) Newport had not met its burden through extrinsic evidence to show that the 1980 License Agreement was intended to be revocable; (3) Newport had not met its burden through extrinsic evidence to show that PSE&G had not paid valuable consideration for the irrevocable 1980 License Agreement; and (4) the evidence was, at best, in equipoise as to the

revocability of the 1980 License Agreement and, as a result, Newport had failed to meet its burden of proof as to its affirmative claims.

On appeal, Newport now argues that the trial court erred in holding that the 1980 License Agreement was or became irrevocable, and further erred in failing to shift the burden of proof to PSE&G to establish that the license was irrevocable.

First, Newport's arguments with respect to the revocability of the 1980 License Agreement are little more than a rehash of its positions at trial, all of which were fully considered – and rejected – by the trial court in its written opinion. Given the trial record and this Court's exceedingly limited review on appeal of a bench trial verdict, these contentions should once again be disregarded.

Second, Newport fails to cite a single case that supports the claim that PSE&G bore the burden of proof to establish that the license is irrevocable. This contention, too, was considered by the trial court below – which properly ruled that the burden rested with Newport to prove its claim that the 1980 License Agreement had been revoked and was unenforceable.

Against this backdrop, Newport has not – and cannot – establish that the trial court's order and opinion should be overturned. Its appeal should be denied in full, and the trial court's decision should be affirmed.

PROCEDURAL HISTORY

On June 8, 2021, Newport filed a Complaint against PSE&G in the Superior Court of New Jersey, Hudson County, Docket No. C-000081-21, challenging the presence of the Transmission Lines on the Premises. (Pa1).

On February 10, 2023, Newport filed an Amended Complaint (Pa16) asserting the following causes of action:

a. Count One: Declaratory Judgment that the Easement Does Not Encumber The Premises Because Conrail Had No Rights in the Premises to Convey;

b. Count Two: Declaratory Judgment that the Easement Violates the Statute of Frauds and Does Not Encumber the Premises;

c. Count Three: Declaratory Judgment that PSE&G Has Violated the Easement (In the Alternative);

d. Count Four: Specific Performance (In the Alternative).

e. Count Five: Declaratory Judgment Violating Easement Due to PSE&G's Material Breaches (In the Alternative);

f. Count Six: Declaratory Judgment Voiding License Agreement (In the Alternative);

f. Count Seven: Breach of Contract (In the Alternative); and

g. Count Eight: Trespass (In the Alternative).

On March 3, 2023, PSE&G filed a Third-Party Complaint against Conrail. On January 30, 2024, Conrail filed an Amended Answer to PSE&G's Third-Party

Complaint and a counterclaim against PSE&G based on the 1980 License Agreement.

At the commencement of trial, and prior to opening statements, PSE&G and Third-Party Defendant Conrail resolved their respective claims against each other with prejudice. As a result, Conrail did not participate as a party at trial. (1T6:17-7:23).

A bench trial was held on July 15 (1T), 16 (2T), 17 (3T), 29 (4T) and 30 (5T), 2024. On January 6, 2025, the trial court issued an Order ruling that: (i) NADC's "requested relief in its complaint is denied and the complaint is dismissed"; and (ii) PSEG's "counterclaim is denied." (Pa80). Also, on January 6, 2025, the trial court issued an Opinion giving its statement of reasons for the January 6 Order. (Pa81). NADC filed its Notice of Appeal on January 31, 2025. (Pa105).

STATEMENT OF FACTS

A. PSE&G's Installation of the B and C Transmission Lines

In or around 1971, PSE&G installed the first ("B Line") of two Transmission Lines along certain properties, including but not limited to a transmission line under the Premises, which at the time was owned by the Erie Lackawanna Company ("Erie"). (Pa137). On or about March 31, 1976, the Trustees of Erie conveyed the Premises to Conrail. (1T21:25-22:1). Prior to November 1982, PSE&G installed a

second transmission line ("C Line") on the Premises. (1T22:2-5).

The Transmission Lines currently run from the Hudson Generation Yard through Jersey City, including through the Premises, extend through the Newport Marina, and cross into New York State through the Hudson River, and terminate at the Farragut Switching Yard. (2T64:3-65:1; Da6 at 19:7-16). Since their installation, PSE&G has regularly maintained the Transmission Lines on the Premises, and surrounding properties. (Da6 at 21:24-23:7). PSE&G does not permit permanent structures to be built over underground transmission lines, but paving for access and parking is permitted. (2T57:10-24).

B. PSE&G's Contractual Rights to Install the Transmission Lines

On or about June 5, 1980, Conrail and PSE&G entered into the 1980 License Agreement for, among other things: (a) the continued maintenance of the B Line; and (b) the construction of the C Line, which collectively, form the Transmission Lines at issue on the Premises. (Pa115).

PSE&G paid Conrail $300,000 for the rights set forth in the 1980 License Agreement, (Pa115), which included a $35,000 preparation fee and $265,000 lump sum in "full consideration for the license agreement." (2T38:1-6; 2T36:20-37:14). The 1980 License Agreement was a form license agreement utilized by Conrail. (Pa115; 2T41:3-18). As a practice, Conrail typically entered into license agreements,

and not easements. (2T8:5-8). The 1980 License Agreement superseded and canceled an April 29, 1971 License Agreement with Erie that permitted PSE&G to install and maintain the B Line in 1971. (Pa119).

The 1980 License Agreement permits PSE&G to, inter alia, "construct, maintain, repair, alter, renew, relocate and ultimately remove one (1) 345,000 volt pipe type cable" and continue to maintain, repair, alter, renew, relocate and ultimately remove "an existing 345,000 volt pipe cable, in Jersey City, Hudson, County, New Jersey in accordance with construction plans DU-24C-10750, Sheets 3 thru 12B." (Pa115-16). Relying on the 1980 License Agreement, PSE&G expended considerable resources installing the C Line.

The 1980 License Agreement contains several provisions that make clear it is irrevocable and binding on successors. First, the 1980 License Agreement strikes a reference to the agreement being temporary:

> WITNESSETH, that the said Railroad (which when used herein shall include any lessor, successor or assignee of or operator over its railroad) insofar as it has the legal right and its present title permits, and in consideration of the covenants and conditions hereinafter stated on the part of the Licensee to be kept and performed, hereby permits, ~~**as a temporary license**~~, the Licensee to construct, maintain, repair, alter, renew, relocate and ultimately remove one (1) 345,000 volt pipe ….

(Pa115) (emphasis added).

Second, absent any violation of its terms on the part of PSE&G, the 1980

License Agreement is only "terminable upon mutual consent of [PSE&G and Conrail]." (Pa118). Third, the 1980 License Agreement is binding on the parties and their successors and assigns. (Pa120). Fourth, the 1980 License Agreement does not contain the word revocable. (See generally Pa11).

In addition to the plain reading of the 1980 License Agreement, Conrail's witness, Mr. Scullin, testified that CE-66, the form of the 1980 License Agreement, is a common Conrail template for a license agreement. (2T40:18-41:18). Mr. Scullin further testified that this form of license agreement is the typical agreement used by Conrail for underground transmission pipes and lines and confirmed that Conrail rarely agrees to easement agreements. (2T7:17-8:8).

Conrail's typical practices related to underground transmission line occupancies further demonstrate the parties' intention for the 1980 License Agreement to be irrevocable. For instance, on March 24, 1971, Conrail's predecessor, Penn Central Transportation Company, using the same form CE-66, entered into the same template "License Agreement for Wire, Pipe and Cable Transverse Crossings and Longitudinal Occupations." (Pa387-91).

On the same day that Conrail conveyed the Premises to HCDC, Conrail and HCDC entered into a license agreement dated November 18, 1982 ("1982 Conrail License") that twice expressly indicated it is a "revocable license." (Pa193). HCDC

and Conrail state in a second section of the 1982 Conrail License that: "It is understood and agreed that this is a revocable license . . . ." This language is not found in the 1980 License Agreement. (Pa193).

C. The 1980 As-Built Plans of the Transmission Lines

Prior to the C Line being fully installed, but with the piping already in place on the Premises, PSE&G prepared As-Built Construction Plans, which depicted the existing conditions on the Premises as of February 5, 1980, including the location of the Transmission Lines. (Pa277).

i. The As-Built Plans Depict the Presence of the Transmission Lines

These construction plans, identified as DU-24C-10750, are also noted in the 1980 License Agreement (C-4, Conrail_0078), and are referenced in other real estate documents that PSE&G would utilize when discussing the Transmission Lines. (Da23 at 23:22-24:1).

An "as-built" of the C Line was prepared on February 5, 1980, and denotated as Construction Plans DU-24C-10750. (Compare Pa277 with Pa116); Da179). On the "as built" plans marked DU-24C-10750, there is a map of the B Line traversing Jersey City, with a notation of certain sheets, including Sheet 12 (Pa277). Sheet 12 includes the Premises and the identification of the B Line entering the Premises at the intersection of Brunswick Street and Tenth Street. (Pa277; Da180-81).

The parties do not dispute that the 1980 License Agreement, which superseded a license agreement between Erie and PSE&G dated April 29, 1971, governs the installation and maintenance of the Transmission Lines. (Da26 at 35:18-36:10, 36:17-21, 37:9-12; Da31 at 55:19-21).

ii. The As-Builts Show Physical Line Markers on the Surface of the Premises

The As-Builts denote the existence of physical line markers on the surface of the Premises, as of February 5, 1980, at the access point to the Premises on Tenth Street, just above the retaining wall with a solid black triangle. (Pa277; 2T72:19-73:24). The physical markers used by PSE&G for underground transmission lines are tall, red poles, used to inform third parties and property owners of the existence of the lines. (2T67:12-68:6; Pa293).

There is no evidence that the physical markers that were present in 1980 were ever removed. Instead, the evidence reveals that red physical markers were in the exact same location in 2018, when Newport sent photographs of them to PSE&G. (2T66:21-74:14; Pa277, Pa277 at PSEG_000697; Pa293). If physical red markers were removed by PSE&G between 1980 and 2018, there would have been a revised As-Built prepared noting the change in condition on the Premises. (2T69:18-70:15). No such revision of an As-Built exists. (2T74:9-13).

D. The 1980 License Agreement Does Not Require PSE&G to Relocate the Lines Off of the Premises

Paragraph 9 of the 1980 License Agreement provides that "in the event of lease, sale or disposal of the premises or any part thereof encumbered by this license," PSE&G shall relocate the Transmission Lines to another location on the Premises, as requested, or Conrail (or its grantee) shall be permitted to relocate the Transmission Lines. (Pa118). This follows Conrail's typical practice. (2T83:9-21).

Indeed, Mr. Erway, who began working at PSE&G in 1986, testified that he has been involved in the relocation of underground transmission lines at the request of Conrail, and in those instances, the relocation of the transmission lines was always to Conrail property or Conrail owned rights-of-way. (2T82:17-83:21).

Mr. Erway explained the complicated relocation process that would be required if the Transmission Lines needed to be moved to a third-party's property, including, but not limited to: (1) identifying a route to run the transmission lines without too significant of a turn; (2) identifying available properties along that route; and (3) negotiating a private agreement with all applicable third-party property owners for an occupation of their properties. (2T80:25-83:21).

E. Newport Purchased the Premises from Conrail with Knowledge of the Transmission Lines

i. HCDC Purchased the Premises from Conrail with Knowledge of the Transmission Lines

By way of deed dated November 18, 1982 (the "1982 Deed"), Conrail conveyed the Premises to HCDC. (Pa215). On the same day, HCDC issued the 1982 Conrail License to Conrail. (Pa193). The 1982 Conrail License was executed by Herbert Simon of HCDC on November 18, 1982, and the 1982 Conrail License was recorded in the Register of the County of Hudson, Office Book 3363 of Deed on Pages 640 through 661. (Pa195). Of note, the deed contains the following clause:

> ***SUBJECT, however, to (1) any easements or agreements of record or otherwise affecting the land hereby conveyed; and (2) the state of facts disclosed by a survey made by Geod Surveying & Ariel Mapping Corporation dated August 1982 and revised October 19, 1982, and November 15, 1982.***
>
> [Pa224 (emphasis added)].

The 1982 Conrail License attached, as exhibits, portions of a survey prepared by GEOD Engineering & Aerial Mapping Corporation in August 1982 ("GEOD Survey"). (Pa197-214). As of the date of the GEOD Survey in August 1982, the only evidence of the Transmission Lines, beyond the 1980 License Agreement, that would have existed to allow the surveyor to physically identify them were the physical markers identified in the As-Builts. (Pa277.)

The GEOD Survey page record in Book 3363, Page 649 shows the location of the Transmission Lines on the Premises (formerly Parcel 145, Block 395.1, now Lot 27, Block 6902) as "underground cable". (Pa202; Da182). For reference, the pertinent page from the GEOD survey is found at Pa277 and Da183 (Pa277; Da23 at 22:15-23:1; Da183).

ii. Newport is the Same Entity as HCDC

Newport was originally formed as Newport City Development Company. Newport City Development Company was majority owned and controlled, directly and indirectly, by the Simon and LeFrak Families. (Pa285-86; Da65 at 25:20-23; Da145 at 18:5-6). Newport admits that HCDC was also an entity indirectly owned and controlled by the Simon Family. (1T52:25-53:3; Da145 at 18:25-19:15; Da 148 at 33:18-21).

Following the acquisition of the Premises by HCDC in 1982, representatives of the Simon Family approached representatives of the LeFrak Family about jointly owning the Premises for future development. (Da65 at 25:20-23, Da67-68 at 27:20-28:20).

On January 31, 1984, HCDC and Newport City Development Company publicly filed a deed in the Hudson County Register that was recorded in Office Book 3404 of Deed on Page 921 to 953 ("1984 Deed"). (Pa237). The 1984 Deed

references the "Survey for Harbourside Development Company, Lawyers Title Insurance Corporation" prepared by GEOD Surveying. (Pa249). When it acquired the Premises, Newport City Development Company conducted additional surveys and a title search for the Premises. (Da173 at 132:4-5).

The conveyance by way of the 1984 Deed was the result of an order entered in a Chancery Matter entitled Harbourside Terminal Co., Inc. v. The Glimcher Company, Docket No. C-1626-84. (Pa265). According to the 1984 Deed, the order permanently restrained HCDC from using the name Harbourside or any similar variation of it. (Ibid.) Notably, as a result of this order, HCDC amended its Articles of Partnership and changed its name to Newport City Development Company according to the 1984 Deed. (Ibid.)

In or about December 1986, Newport City Development Company changed its name to Newport. (1T23:3-5). Mr. Lehman, Newport's only fact witness, testified that Newport is the same entity as HCDC:

> Q: And as you've testified, Newport City Development Company changed its name to NADC, it's logical that Harbor [sic] City Development Company and Newport are not separate entities and are the same entity, correct?
>
> A: Assuming that set of facts, yes.
>
> [2T99:8-100:14].

Newport and HCDC are thus the same entity. (1T100:2-7).

F. Newport's Proposed Development and Filing of this Action

Since HCDC (now known as Newport) purchased the Premises in 1982, the Transmission Lines have been installed and maintained by PSE&G and the physical red markers have remained on the Premises uninterrupted for over 30 years. (2T66:15-74:14; Da37 at 81:11-17; Da6-7 at 21:24-22:2; Pa277, Pa277 at PSEG_000697).

Newport eventually decided on a plan to develop the Premises with a multi-family apartment building called the "Rampart House." (Da83 at 43:3-13; Da155-56 at 61:23-62:1). The development site for the Rampart House consists of 3.08 acres of vacant land on the Premises. (Pa300-06). In 2018, Newport sent PSE&G photographs of the physical red markers on the Premises in the same location they are noted in the As-Builts. (Pa293-98).

Despite claims that the Transmission Lines have limited Newport's development rights, on August 23, 2022, Newport received approval from the Jersey City Planning Board for a 246-unit residential development. (Pa300-06). The 246-unit approval is the maximum number of units permitted, as of right, by the Jersey Avenue 10th Street Redevelopment Plan. (1T103:2-8, 107:23-108:2). The approved plan provided for access from Brunswick Street and the paving over the area of the

Premises where the Transmission Lines are located, including an area in undevelopable setbacks. (Pa307, 1T193:6-12). It is undisputed that the Transmission Lines had no effect on Newport's ability to obtain the maximum units permitted under current law. (1T171:12-17).

Newport's only fact witness who testified at trial was Arnold Lehman, General Counsel to Newport and Vice President of Newport's general partner, Newport Real Estate Dev. Corp. (1T26:14-16; Da58 at 18:9-23). Mr. Lehman never visited the Premises, yet he provided speculative testimony with no personal knowledge, including the following inaccurate and unsupported statement:

> Q: Was there any evidence of the transmission lines on the property, physical evidence?
>
> A: No.
>
> [1T32:16-18.]

Mr. Lehman also did not review critical documents, including the As-Builts or GEOD Survey, which clearly show the lines and physical markers. (1T81:14-16). Mr. Lehman's only basis for purported knowledge related to the dispute is conversations he had with "certain colleagues" at Newport. (1T81:24-82:3).

G. The Trial Court's Order and Opinion

The parties took part in a five-day in-person trial before the Honorable Jeffrey R. Jablonski, J.A.D. (then Assignment Judge, Hudson County). On January 6, 2025, following submission of post-trial findings of fact and conclusion of law, the trial court filed an order and opinion dismissing Newport's Complaint and denying its requested relief. The court also dismissed PSE&G's counterclaims.

In support of its conclusion that the 1980 License Agreement is irrevocable, the trial court made the following findings of fact:

- The document itself reveals that the specific language making the license revokable was affirmatively deleted with a strike through. Although NADC disagrees with the intent of this affirmative action, it only relies on unsubstantiated argument to explain the existence of it.

- A searching review of the agreement does not include the term "revocable" when other documents that were negotiated among the interested parties to this matter previously have. The parties have consistently been represented by counsel and the lack of this operative word is conspicuous and at least raises a question as to why it was not included if the intent of the license agreement were to ensure that it was irrevocable.

- The document itself provides a strict, and arguably exclusive, mechanism for the license to be revoked, that is, [by] the consent of both Conrail and PSE&G, or a violation of the license by PSE&G. PSE&G remains bound to its continuing obligations to subsequent owners unless there is a lease, sale, or disposal of the premises. Additionally, and read in conjunction with section 9 of the same agreement, PSE&G would have affirmative

> responsibilities to any successor owner. The language does not indicate, however, that the license agreement would, under those circumstances, be terminated.
>
> [Pa97-98].

The trial court further noted that, "although attempted by NADC, no credible extrinsic evidence exists that is sufficient to enable N[A]DC to satisfy its proof burden." (Pa98). Specifically, the trial court noted that Newport's argument that Conrail would have granted an easement, rather than a license, if it intended for it to be irrevocable "was reasonably countered by affirmative proof by PSE&G that Conrail's customary business practice was to grant licenses rather than encumber property with easements." (Ibid). The court also found that PSE&G had proffered sufficient evidence to show that it had paid $300,000 in consideration for the license. (Pa98-99. Finally, the trial court held that Newport had not adequately proven that PSE&G breached the 1980 License Agreement. (Pa99).

In its decision, the trial court made significant findings that, after weighing all of the evidence, Newport failed to meet its burden of proof. Specifically, the trial court held that "PSE&G has an irrevocable license to maintain the transmission lines on the premises and that the Plaintiff has not provided sufficient evidence to satisfy its burden of proof." (Pa96). The trial court found that the testimony of Newport's only fact witness – Arnold Lehman – regarding Newport's knowledge of the

existence of the transmission lines was inconsistent. (Pa94-95). Moreover, the trial court emphasized that Lehman's testimony – in conjunction with that of Newport's valuation expert - who conceded that Newport would still be able to construct the project as permitted and/or increase the number of unit sizes in the building despite the presence of the lines – "deprecates the credibility of NADC's overall litigation position as to all its causes of action presented and is detrimental to NADC's ability to meet its burden of proof." (Pa95).

The trial court also expressly addressed Newport's contention in its post-trial briefing that the irrevocability of the license was an affirmative defense as to which PSE&G bore the burden of proof, stating:

> To substantiate this point, [Newport] cites to two cases, one only generally and one slightly more specifically. However, neither precedent establishes the proposition asserted that the irrevocability of a license is an affirmative defense that would otherwise shift the burden of proof from the party required to possess it. However, even if the burden were to shift to PSE&G, PSE&G provides sufficient credible evidence to counter the NCDC's unsupported arguments as to the irrevocability of the license agreement and, consequently create the state of general evidential uncertainty that is fatal to the Plaintiff's cause of action.
>
> [Pa96 n.2].

Thus, the court concluded that "the parties' direct evidence is, as best, in

equipoise that the license that was negotiated between Conrail and PSE&G was irrevocable and that the conveyance of the property resulted in a lease termination", (Pa97), and that this was insufficient for Newport to meet its evidentiary burden.

APPLICABLE STANDARD OF REVIEW

The Appellate Division's scope of review of a judgment entered in a non-jury trial is exceedingly limited. "Our courts have held that the findings on which it is based should not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice,' and that the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter." Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 483–84 (1974) (quoting Greenfield v. Dusseault, 60 N.J. Super. 436, 444, (App. Div.), aff'd o.b., 33 N.J. 78 (1960)). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Id. at 484 (citing New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div.), certif. den., 54 N.J. 565 (1969)).

Thus, the "'appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported or inconsistent with the competent, relevant, and reasonably credible evidence as to offend the interests of justice.'" Id. (quoting

Fagliarone v. Twp. of No. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). Against this backdrop, this Court's sole function on appeal is to "'ponder[] whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions.'" Id. (quoting Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351, 357 (App. Div. 1961)); see also Llewelyn v. Shewchuk, 440 N.J. Super. 207, 214 (App. Div. 2015) ("Reversal is reserved only for those circumstances when we determine the factual findings and legal conclusions of the trial judge went 'so wide of the mark that a mistake must have been made") (citations omitted); Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015) ("when a reviewing court concludes there is satisfactory evidentiary support for the trial court's findings, 'its task is complete and it should not disturb the result[.]'") (quoting Beck v. Beck, 86 N.J. 480, 496, (1981)).

Here, Newport's appeal – which simply rehashes the same arguments heard and considered by the trial court during the bench trial and analyzed in the court's well-reasoned opinion – falls far short of establishing "a denial of justice." Accordingly, Newport's appeal should be denied in full.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE 1980 LICENSE AGREEMENT IS AND/OR BECAME IRREVOCABLE (PA81)

A. The 1980 License Agreement is Irrevocable On its Face

PSE&G does not contest Newport's contention that licenses are generally revocable. Here, however, Newport takes this generic premise a step too far, asking the trial court and now this court, to ignore well-settled law and the plain language of the document. As evidenced at trial, Newport's basis for contending the 1980 License Agreement is revocable is that title contains the word "License." This position is untenable and should be rejected.

The 1980 License Agreement contains specific words and provisions that evidence Conrail and PSE&G's intention that it be irrevocable. Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 342 (App. Div. 2015) (noting when ascertaining the nature of the rights granted by an agreement, "courts must evaluate the agreement itself to determine its legal effect rather than rely on what the parties choose to call it") (citations omitted); Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975) (explaining the nature of an agreement depends not on what the parties choose to name it but upon the legal effect of its provisions).

When the language of an agreement is unambiguous and the intent of the parties is evident on the face of the agreement the terms of the instrument must govern. Rosen v. Keeler, 411 N.J. Super. 439, 451 (App. Div. 2010) (quoting Hyland v. Fonda, 44 N.J. Super. 180, 187 (App. Div. 1957) ("Questions concerning the extent of the rights conveyed by an easement require a determination of the intent of the parties as expressed through the instrument creating the easement, read as a whole and in light of the surrounding circumstances"); Tide-Water Pipe Co. v. Blair Holding Co., 42 N.J. 591, 605 (1964).

Here, the contracting parties to the 1980 License Agreement, Conrail and PSE&G, clearly intended for the 1980 License Agreement to be irrevocable as evidenced by the terms of the agreement. First, the 1980 License Agreement states that PSE&G is permitted to "construct" and "maintain" the Transmission Lines with no time limitation. (Pa115). To that end, PSE&G paid Conrail $300,000 in 1980 for this irrevocable right and expended significant resources to install and maintain the Transmission Lines, which span Jersey City. (Pa113).

Second, the 1980 License Agreement does not contain the term "revocable license." Instead, the 1980 License Agreement specifically strikes a reference to the agreement being a "temporary license." (Pa115) There can be no explanation for this

other than to memorialize Conrail and PSE&G's agreement that the 1980 License Agreement was not temporary - otherwise known as irrevocable.

Third, pursuant to Paragraph 15, the 1980 License Agreement can only be terminated on: (1) "**mutual consent**" by **both Conrail and PSE&G**; or (2) PSE&G's violation of the 1980 License Agreement. (Pa118) (emphasis added). Even in the face of this unambiguous term, Newport merely argues, with no support, that there is a third, unwritten way to terminate the 1980 License Agreement – the sale of the Premises.

Fourth, Paragraph 9 of the 1980 License Agreement clearly contemplates that PSE&G will have continuing obligations to a subsequent owner following a "lease, sale or disposal" of the Premises. This is the very term that Newport, a subsequent owner, is wrongfully attempting to rely upon to compel PSE&G to move the Transmission Lines off the Premises.

Fifth, there is nothing in the 1980 License Agreement to support Newport's claim that the 1980 License Agreement terminated when Conrail transferred title of the Premises to HCDC. To the contrary, the 1980 License Agreement expressly states that its terms are "binding and effective" on Conrail, PSE&G, and their "successors and assigns" unless terminated. (Pa120).

The trial court considered – and addressed – all of this evidence in its written opinion holding that the 1980 License Agreement was irrevocable. Thus, Newport cannot possibly seek to argue on appeal that there is no credible evidence to support the trial court's decision, as would be required to overturn it. See Rova Farms Resort, Inc., 65 N.J. at 484.

In response – at both the trial and Appellate levels – Newport has not, because it cannot, point to any term in the 1980 License Agreement that would render it a revocable license. See Van Horn, 442 N.J. Super. at 342-43. Therefore, to adopt Newport's baseless interpretation is not only unsupported by the 1980 License Agreement's plain terms, but also would render these provisions meaningless. For its part, Newport has not offered a plausible reading of the 1980 License Agreement to support its claim that it was revoked in 1982. Cumberland Cty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 497 (App. Div. 2003) (noting a contract "should not be interpreted to render one of its terms meaningless"). As evidenced by its express terms, the 1980 License Agreement is irrevocable on its face, and the trial court did not err in so holding.

B. All Extrinsic Evidence Supports the Plain Meaning of the 1980 License Agreement – It is Irrevocable

In addition to the plain reading of the 1980 License Agreement, all other evidence presented at trial supports PSE&G's position that it is irrevocable. Conrail's witness, Mr. Scullin, testified that CE-66, the form of the 1980 License Agreement, is the common Conrail template for a license agreement. (2T40:18-41:18). Mr. Scullin further testified that this form of license agreement is the typical agreement used by Conrail for underground transmission pipes and lines and confirmed that Conrail rarely agrees to "easement agreements." (2T7:17-8:8).

As set forth during trial, Conrail's typical practice was to enter into a license agreement related to underground transmission line occupancies. For example, on March 24, 1971, Conrail's predecessor, Penn Central Transportation Company, using the same form CE-66, entered into the same template "License Agreement for Wire, Pipe and Cable Transverse Crossings and Longitudinal Occupations." (Pa387-92). This 1971 license agreement reflects a truly revocable license agreement. First, it does not strike the term "temporary license," thus highlighting the importance of Conrail and PSE&G striking this term in the 1980 License Agreement. Second, the consideration to be paid in Paragraph 1 is an annual rental payment of $5,642, thus contemplating revocation and termination of annual rents, as differentiated from

PSE&G's $300,000 lump sum payment. Third, Paragraph 15 provides that the rights granted may be terminated "at any time by either party hereto upon not less than thirty (30) days' written notice to the other . . . ." (Pa390). Again, this provision contemplates an agreement of limited duration, unlike Paragraph 15 of the 1980 License Agreement, which only allows termination on mutual consent.

Another example in the record that is inapposite to the 1980 License Agreement is the November 18, 1982 license agreement between Conrail and HCDC ("1982 License Agreement"). (Pa193). This license agreement expressly provides that it is a "revocable license." (Ibid). To be absolutely clear, HCDC and Conrail state in another section of the 1982 License Agreement that: "It is understood and agreed that this is a revocable license . . . ." (Ibid.) If there was any doubt, the 1971 license agreement also allowed its grantor, HCDC, to terminate the license on 30 days' written notice. (Pa195). To that end, Newport terminated the 1971 revocable license in a written notice dated September 13, 2000. (Pa271).

This evidence was also considered by the trial court in holding that the 1980 License Agreement was irrevocable. As the trial court noted in its opinion:

> [A]lthough attempted by NADC, no credible extrinsic evidence exists that is sufficient to enable NCDC to satisfy its proof burden.

> N[A]DC argues that if the parties intended the agreement to be irrevocable, Conrail would have granted an easement rather than permitting a license. This testimony, however, was reasonably countered by affirmative proof by PSE&G that Conrail's customary business practice was to grant licenses rather than encumber property with easements.
>
> [Pa98].

Based on this evidence, there is nothing in the historical practices of Conrail, PSE&G, or Newport that would permit a reading of the 1980 License Agreement to be anything other than irrevocable. Conrail, PSE&G, and Newport all knew how to enter into revocable licenses and when they did so, they used the term "revocable," charged installment rent (not a lump sum), and permitted termination by the grantor on written notice at any time. The 1980 License Agreement is dramatically different and unequivocally demonstrates the contracting parties' intention for PSE&G's rights to be irrevocable. This is supported by the admitted purpose of the agreement - to lay transmission lines throughout the length of Jersey City into New York to supply power to thousands of residents into perpetuity. Therefore, in addition to its express terms, all extrinsic evidence in the record demonstrates the 1980 License Agreement is irrevocable, and Newport's appeal should be denied.

C. PSE&G Expended Substantial Sums to Acquire the 1980 License Agreement and Install the Transmission Lines

A license is irrevocable if a licensee "expends substantial sums of money pursuing the privilege [granted by the license] while the licensor acquiesces to the expenditures." Van Horn, 331 N.J. Super. at 342; 120 Minue St., LLC v. 110 Minue St., LLC, A-3033-16T4, 2018 WL 6205084, at *4 (App. Div. Nov. 20, 2018) (affirming trial court's opinion that licensee's expenditures of "several hundred thousand dollars" with "acquiescence of the licensor" constitute "substantial sums of money" that make license "irrevocable" and "[w]here a license is irrevocable, it is essentially an easement where the use is of that type") (emphasis added)) (Da175).

At trial, PSE&G established that it spent considerable sums in 1980 to purchase the irrevocable rights under the 1980 License Agreement and millions more to install the Transmission Lines. The contemporaneous documents presented by Conrail's witness, Mr. Scullin, demonstrate that PSE&G paid $300,000 to Conrail at the time of the 1980 License. (Pa113). Moreover, Mr. Scullin confirmed the document at Conrail_75 in C-4 (Pa113) was a receipt of payment and further testified that the $35,000 preparation fee and $265,000 lump sum identified in the Conrail records represent "the full consideration for the license agreement." (2T38:1-6; 2T36:20-37:14). Further, Mr. Scullin confirmed that Conrail, to this day, handles

consideration for irrevocable licenses the same way, with a lump sum amount and a preparation or review fee. (2T37:15-21).

Here, once again, the trial court noted that Newport had not presented sufficient evidence to counter PSE&G's assertion that it had paid the $300,000 in consideration for the 1980 License Agreement:

> N[A]DC also argues that PSE&G presented insufficient evidence that the assertion that PSE&G actually paid the $300,000.00 consideration and that the installation of the underground electric transmission lines cost approximately $12 million per mile. However, NADC only supports this assertion with an argument that PSE&G did not satisfy the evidential burden that NADC believed PSE&G has. As noted previously, this court does not agree that the burden of proof to prove that the license is revoked, or could be irrevocable, shifts from NADC to PSE&G. This conclusion notwithstanding, PSE&G provided sufficient evidence through Conrail's witness, Steven Scullin, that the license agreement and attachments confirmed the receipt of the agreed-upon payment for the permission. This proof was not credibly countered by [NADC].
>
> [Pa98-99].

In short, Newport failed at every opportunity to present sufficient evidence in support of its claim that the 1980 License Agreement was revocable. To adopt Newport's claim, the trial court would have needed to ignore the document's plain meaning, the extrinsic evidence in the record, the clear intent of the parties (Conrail

and PSE&G), and common sense, all of which demonstrate that PSE&G and Conrail intended for the Transmission Lines to remain on the Premises until both parties mutually agreed otherwise. To be sure, the evidence presented demonstrates that PSE&G's irrevocable rights did not automatically terminate in 1982 when Newport purchased the Premises. Accordingly, Newport cannot establish that the trial court's ruling amounted to a "denial of justice," and the trial court's order and opinion should be affirmed in full.

POINT II

THE TRIAL COURT DID NOT ERR IN ITS BURDEN OF PROOF ANALYSIS (Pa81)

On appeal, Newport argues that the trial court erred in failing to shift the burden of proof to PSE&G to show by a preponderance of the evidence that the license was irrevocable. (Pb13). In support of this contention, Newport cites to a string of cases for the general proposition that the party advancing an affirmative defense bears the burden of proof by a preponderance of the evidence. (Pb13-14).

However, not a single case relied upon by Newport addresses the underlying issue of whether the argument that a license is irrevocable constitutes an affirmative defense under New Jersey law. See F.K. v. Integrity House, Inc., 460 N.J. Super. 105 (App. Div. 2019) ("Charitable immunity is an affirmative defense, as to which, like

all affirmative defenses, defendants bear the burden of persuasion."); Vill. of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp., 318 N.J. Super. 385, 395–96, (App. Div. 1999) ("The railroad raises preemption as an affirmative defense and has the burden of persuasion to demonstrate the Village's claims are indeed preempted."); Pagano v. United Jersey Bank, 276 N.J. Super. 489, 496 (App. Div. 1994), aff'd, 143 N.J. 220 (1996) ("It is also well-settled that the creditor's possession of an uncancelled instrument of obligation shifts the burden of going forward as well as the burden of persuasion to the debtor to prove the affirmative defense of payment."); Rendine v. Pantzer, 276 N.J. Super. 398, 435 (App. Div. 1994), aff'd as modified, 141 N.J. 292 (1995) ("Defendant's allegation that it had mixed motives, 'that it would have made the same decision even if it had not allowed gender to play [a motivating] role,' is an affirmative defense, and the burden of proof shifts to defendant to prove this contention."); Italian Fisherman, Inc. v. Com. Union Assur. Co., 215 N.J. Super. 278, 282 (App. Div.), certif. denied, 107 N.J. 152 (1987) ("The affirmative defense of arson and that of fraud and false swearing may be proven by a preponderance of the evidence."); Shapiro v. Solomon, 42 N.J. Super. 377, 387 (App. Div. 1956) (stating generally that defendant's "position is in the nature of an affirmative defense and he bears the burden of proof."). Nor can PSE&G locate any case in New Jersey – state or federal – that addresses this issue.

The trial court correctly held that Newport carried the burden of prevailing on its affirmative claims, which sought, among other things, a declaratory ruling that the license agreement was revocable. See Concord Ins. Co. v. Miles, 118 N.J. Super. 551, 555 (App. Div. 1972) ("there is ample authority that the burden of proof is the same as in ordinary actions at law or in equity: the person seeking the declaratory relief must prove his case, as must any plaintiff, and the burden of proof lies with him."). Newport simply failed to do so and there are not facts or law that shift that burden to PSE&G.

Moreover, even assuming that the Appellate Division were to decide this was reversible error – which, PSE&G submits, it was not – that error was harmless because, as the trial court rightly held:

> even if the burden were to shift to PSE&G, PSE&G provides sufficient credible evidence to counter the N[A]DC's unsupported arguments as to the irrevocability of the license agreement and, consequently create the state of general evidential uncertainty that is fatal to the Plaintiff's cause of action.
>
> [Pa96 n.2].

CONCLUSION

For the foregoing reasons, Defendant PSE&G respectfully requests that Newport's appeal be denied, and that the trial court's January 6, 2025 order and opinion be affirmed in full.

Respectfully submitted,

/s/ Paige Nestel
Paige Nestel, Esq.
Attorney for Defendant/Respondent PSE&G

Dated: July 10, 2025

NEWPORT ASSOCIATES DEVELOPMENT COMPANY, Plaintiff/Appellant, v. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Defendant/Respondent. -and- PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Third-Party Plaintiff, v. CONSOLIDATED RAIL CORPORATION Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001588-24 T4 CIVIL ACTION ON APPEAL FROM CHANCERY DIVISION HUDSON COUNTY DOCKET NO. HUD-C-81-21 JUDGMENT ENTERED: January 6, 2025 SAT BELOW: HON. JEFFREY R. JABLONSKI

PLAINTIFF/APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiff/Appellant, Newport Associates Development Company ("NADC"), respectfully submits this Reply Brief in further support of its appeal in this action, and specifically in response to the opposition submitted by Defendant/Respondent Public Service Electric and Gas Company ("PSEG").

PSEG mischaracterizes this appeal as a challenge to factual findings, whereas it actually concerns pure questions of law regarding the legal status of the 1980 License Agreement and the allocation of the burden of proof. These issues are subject to *de novo* review by this Court, with no deference owed to the trial court's conclusions.

The trial court committed three critical legal errors: (1) concluding that the 1980 License Agreement was irrevocable as to NADC, a bona fide purchaser without notice of the License; (2) incorrectly placing the burden of proof on NADC to disprove PSEG's affirmative defense of "irrevocability"; and (3) erroneously finding that the license "became irrevocable" under circumstances inapplicable to a third-party purchaser like NADC. PSEG's arguments ignore foundational precedent establishing that licenses are generally revocable, particularly upon property conveyance, and that unrecorded licenses do not bind bona fide purchasers without notice. This Court should reverse the trial court's order and grant NADC's requested relief.

ARGUMENT

I. *De Novo* Review Is Required Here

PSEG argues that this Court's "scope of review of a judgment entered in a non-jury trial is exceedingly limited." Brief, at 23. In its misplaced effort to have the Court believe that NADC is challenging the trial court's fact findings, PSEG provides a list of purported "findings of fact" that the trial court allegedly made about the 1980 License Agreement. Brief, at 20. Contrary to PSEG's statements, all of the "findings of fact" noted by PSEG, and all of the errors complained of here by NADC, were legal conclusions – the legal status of the 1980 License Agreement and the allocation of the burden of proof.

The factual findings of a trial court are reviewed with substantial deference on appeal, and are not overturned if they are supported by adequate, substantial and credible evidence. See, e.g., Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). However, a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to deference. Ibid. (citing Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). When a trial court's decision turns on its construction of a contract, appellate review of that determination is *de novo*. Kieffer v. Best Buy, 205 N.J. 213, 222 (2011) (citing Jennings v. Pinto, 5 N.J. 562, 569-70 (1950)). Appellate courts give no special deference to the trial court's

interpretation and instead look at the contract with "fresh eyes." Id. at 223 (citing Manalapan Realty, supra, 140 N.J. at 378).

PSEG's reliance on Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474 (1974) is misplaced, as that case governs the review of factual findings, not legal questions like contract interpretation or burden allocation. The trial court's interpretation of the 1980 License Agreement as irrevocable, particularly as applied to NADC, is a legal conclusion that this Court must review independently and without deference to the trial court.

Contrary to PSEG's assertion, this appeal involves no witness credibility issues or factual disputes requiring deference. PSEG's attempt to cloak these legal errors as factual findings is unavailing. The trial court's errors were legal in nature, stemming from its misinterpretation of the real property law, and its incorrect allocation of the burden of proof. The proper review of these errors is *de novo*.

II. The Trial Court Committed Error In Interpreting The 1980 License

PSEG agrees with NADC (and the irrefutable legal precedent) that "licenses are generally revocable." Brief, at 25. PSEG argues, however, that "Newport's basis for contending the 1980 License Agreement is revocable is that title contains the word 'License.'" Ibid. PSEG's arguments all presume that the 1980 License Agreement, whether or not irrevocable as between Conrail and PSEG, could be irrevocable as to a third-party who purchased the subject Premises without notice of

the 1980 License Agreement and without affirmatively assuming the rights and obligations of that License. PSEG's position is contrary to well-established law.

First, PSEG argues that the 1980 License Agreement contains provisions that evidence Conrail and PSEG's intention that it be irrevocable. PSEG fails to explain, however, how that is relevant to NADC. Neither of the cases cited by PSEG (Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333 (App. Div. 2015) and Sandyston v. Angerman, 134 N.J. Super. 448 (App. Div. 1975)) involved a license imposed on a third-party purchaser without notice of the license.

Conrail and PSEG's respective intent with the 1980 License cannot be bootstrapped to make the License "irrevocable" as against a third-party like NADC. Two parties to a contract can intend to bind a third party as much as they like, but it does not bind the third party unless that party receives consideration for the contract and agrees to be bound. Here, NADC had no knowledge of the License from which to be bound nor received any consideration for the encumbrance. In accordance with the settled law of licenses, the 1980 License Agreement terminated when Conrail conveyed the Premises, notwithstanding whatever intent Conrail and PSEG may have had among themselves. It did not run with the land.

Relatedly, PSEG attempts to make the striking of "temporary license" meaningful, but that handwritten alteration of the document is not any more relevant than Conrail and PSEG's alleged unexpressed intent to make the 1980 License

irrevocable against the world. Because they did not record the License, even if Conrail and PSEG agreed to make the 1980 License irrevocable as between themselves, it was not binding on NADC. The Recording Act protects bona fide purchasers from such instruments. N.J.S.A. § 46:26A-12(c).

PSEG asserts that the explanation for the striking of "as a temporary license" from the License Agreement can be nothing other than to memorialize the agreement's alleged "irrevocable" status. Yet regardless of the parties' intent, the unrecorded contract cannot bind a bona fide purchaser for value.

PSEG argues that there is "no support" for NADC's argument that "there is a third, unwritten way to terminate the 1980 License Agreement – the sale of the Premises." Brief, at 26. PSEG's argument again ignores that licenses terminate by operation of law when the burdened property is conveyed. A provision for termination of the license by conveyance of the Premises did not need to be written into the 1980 License. It is set forth in N.J.S.A. § 46:26A-12(c) ("an interest in real property shall be of no effect against … subsequent bona fide purchasers … for valuable consideration without notice and whose conveyance … is recorded, unless that [interest in real property] is evidenced by a document that is first recorded"). The 1980 License was of no effect against NADC, because NADC was a subsequent purchaser for value and the License was not first recorded.

PSEG also asserts that the 1980 License Agreement expressly states that its terms are "binding and effective" on Conrail, PSE&G, and their "successors and assigns" unless terminated. Brief, at 27. PSEG does not explain how this is relevant, however, because there is no argument that NADC agreed to assume the rights and obligations of the 1980 License. Nor did Conrail assign the 1980 License to NADC, so NADC is not an "assignee" of Conrail. NADC cannot be bound by the License without notice thereof.

Contrary to PSEG's faulty legal and factual arguments, NADC does not need to "point to any term in the 1980 License Agreement that would render it a revocable license." Brief, at 28. The terms of the 1980 License between Conrail and PSEG are not what renders the license revocable. Rather, it is the 1980 License's legal status as a license that was neither known to nor assumed by NADC that requires the License to have been revoked when Conrail conveyed the Premises.

The "extrinsic evidence" that PSEG notes in its Brief is equally non-relevant. None of the "extrinsic evidence" cited by PSEG establishes that NADC had notice of the 1980 License when it purchased the Premises, or that NADC assumed the 1980 License, or that Conrail or PSEG recorded the License so that it would be evidence to the world of PSEG's alleged rights. Conrail's "regular practice" of granting license rights rather than easements does not enhance the 1980 License's

legal status – it is still an unrecorded contract between Conrail and PSEG and therefore not "irrevocable" as against NADC.

PSEG also argues that the alleged $300,000 owed to Conrail for the License (for which, contrary to PSEG's false statements to the contrary, there is no evidence of actual payment[1]) and infrastructure investments render the license irrevocable, essentially transforming it into an easement. Even assuming that PSEG made the $300,000 payment, however, New Jersey law has consistently rejected PSEG's theory. See Den Ex Dem. Richman v. Baldwin, 21 N.J.L. 395 (1848) (holding licenses remain revocable unless coupled with property interest); River Dev. Corp. v. Liberty Corp., 51 N.J. Super. 447 (App. Div. 1958) (reaffirmed that consideration alone does not make a license irrevocable).

Similarly, Kiernan v. Kara, 7 N.J. Super. 600 (Ch. Div. 1950), explicitly provides that a license is revocable by the conveyance of the land unless coupled with an interest, or an equity has been created, such as through fraud by the licensor. This principle is further reinforced in Conley v. Windston, 23 N.J. Super. 234 (Ch. Div. 1952), which cites Kiernan to confirm that a license terminates upon conveyance absent such exceptions.

[1] Conrail's witness specifically testified that he saw no evidence of payment in Conrail's files (Q. "you did not see any evidence of payment in the file, correct?" A. "Correct."). See 2T39:21 – 2T40:8.

PSEG's reliance on its alleged expenditures, which are more relevant to PSEG's defense that the License "became irrevocable," as discussed below, does not alter the legal principle that a license remains revocable despite having been supported by consideration when the property is conveyed to a third party without notice of the license, such as NADC in this case.

As a subsequent purchaser without notice of the unrecorded 1980 License Agreement, NADC is protected by New Jersey's Recording Act (N.J.S.A. § 46:26A-12(c)). New Jersey law protects purchasers who rely on record title and are bound only by discoverable instruments. Island Venture Associates v. New Jersey Dept. of Environmental Protection, 359 N.J. Super. 391 (App. Div. 2003); Palamarg Realty Co. v. Rehac, 80 N.J. 446 (1979). Also, Kiernan, supra, supports this principle by providing that a license is revoked by the conveyance of the land, reinforcing that an unrecorded license cannot bind a bona fide purchaser like NADC. PSEG's claim that NADC had 'constructive notice' through physical markers or surveys is insufficient, as these do not constitute legal notice of an unrecorded license. Even if NADC had constructive notice of the Lines through physical markers or a survey, which the evidence at trial does not support and NADC does not concede – it would not constitute actual notice of the 1980 License. The Recording Act protects NADC from PSEG's unrecorded interest.

In short, PSEG is incorrect that the trial court's "fact finding" about the 1980 License is entitled to deference. There is no legal authority that supports PSEG's position that either the language of the 1980 License Agreement or the private intentions of Conrail and PSEG makes the 1980 License "irrevocable" as to a third-party purchaser for value without notice of the License. The License was revoked as a matter of law upon conveyance of the Premises.

III. The Trial Court Erred In Allocating The Burden Of Proof

Because applicable law requires the 1980 License to have been revoked upon conveyance of the Premises, PSEG's only potentially valid defense to NADC's claim was that the License "became irrevocable" (as opposed to the legally-invalid proposition that it was "irrevocable" because Conrail and PSEG intended it to be). PSEG had the burden of proving this defense, which is essentially identical to its defense that it had a "prescriptive easement" in the Premises. The trial court, however, paradoxically found that NADC had the burden of proving that the 1980 License did not become irrevocable. The trial court found the evidence to be in "equipoise" and therefore ruled in PSEG's favor. The trial court's misallocation of the burden of proof was a legal error resulting in an unsupportable result.

PSEG argues that NADC "carried the burden of prevailing on its affirmative claims, which sought, among other things, a declaratory ruling that the license agreement was revocable." Brief, at 35. PSEG argues that NADC "simply failed to

do so and there are no facts or law that shift that burden to PSE&G." Ibid. PSEG's argument is without merit, because the law dictates that licenses are revocable. PSEG has a license, not an easement, and that License was revoked upon Conrail's conveyance of the Premises. Since the License is revocable as a matter of law, the assertion that it "became irrevocable" is PSEG's defense, as an exception to the general rule that licenses are revocable. This was not NADC's claim to disprove.

An "affirmative defense" is defined as a "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary (12th ed. 2024). NADC's primary claim in this action seeks a declaration that PSEG has no legal right to encumber the Premises with the Transmission Lines. NADC's position with respect to both Licenses is that, to the extent that they ever previously encumbered the Premises, then they were revoked when Conrail conveyed the Premises to HCDC, in accordance with the law governing licenses.

PSEG's assertion that the 1980 License "became irrevocable" is a 'textbook' affirmative defense, because it introduces additional facts that, if proven, would constitute a legal justification for PSEG maintaining the Lines on the Premises after Conrail conveyed the Premises – i.e., that PSEG allegedly paid substantial funds for the 1980 License and to install the Lines, such that permitting revocation would be

inequitable to PSEG. Accordingly, PSEG had the burden of proving this defense. The trial court erroneously allocated the burden to NADC.

The trial court's allocation was reversible error. PSEG asserts that the "error was harmless" because the trial court found that PSEG provided "sufficient credible evidence to counter the N[A]DC's unsupported arguments as to the irrevocability of the license agreement and, consequently create the state of general evidential uncertainty that is fatal" to NADC's claim. Brief, at 34 (citing Pa96 n.2). If there was a "general evidential uncertainty," and PSEG had the burden of proving its defense, then NADC should have prevailed. Based on the trial court's ruling that the evidence was in "equipoise," the erroneous burden allocation changed the outcome of the case and was therefore not "harmless."

Furthermore, in evaluating PSEG's defense, the trial court incorrectly applied the Van Horn test, which provides that a license "becomes irrevocable" only if: (1) the licensee expends substantial sums while (2) the licensor acquiesces to expenditures, and (3) only as between original parties. Van Horn, supra, 442 N.J. Super. at 341. Courts have long emphasized that contractual conditions are enforceable primarily between the original parties, and controversies involving third-party purchasers require separate consideration, as their rights are not automatically bound unless explicitly stated. See, e.g., Hirsch v. C. W. Leatherbee Lumber Co., 69 N.J.L. 509 (1903). Similarly, N.J.S.A. § 12A:2A-407 clarifies that

irrevocability extends to third parties only with specific statutory language, which is absent here, limiting enforceability to the original parties (Conrail and PSEG). NADC was not the licensor and did not acquiesce to PSEG's expenditures, as it did not own the Premises at the time. The trial court's extension of the Van Horn exception to bind a third-party purchaser like NADC lacks legal support.

Nor did PSEG introduce any evidence to suggest that somehow NADC defrauded PSEG with respect to the 1980 License or the Transmission Lines. In sum, there is no reasonable way that PSEG could have sustained the burden of proving its defense that the 1980 License "became irrevocable."

The trial court's finding that PSEG failed to prove a prescriptive easement further undermines PSEG's "became irrevocable" defense. Both theories require identical factual elements, specifically, substantial expenditures with the property owner's acquiescence. Having failed to meet its burden on these elements for prescriptive easement, a finding that PSEG did not appeal, PSEG necessarily failed to prove the same elements for its "became irrevocable" defense.

The trial court's erroneous allocation of the burden to NADC impermissibly changed the result of the case. This Court should reverse the trial court's decision.

CONCLUSION

The trial court's decision errs in contract interpretation, burden of proof, and application of New Jersey law on licenses and the Recording Act. PSEG's Brief fails

to address these errors and contradicts precedent. NADC respectfully requests that this Court reverse the trial court's Order holding that the 1980 License Agreement was not revoked upon the 1982 conveyance, and remand for damages due to PSEG's unlawful encumbrance of the Premises.

Respectfully submitted,

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