STATE OF NEW JERSEY Plaintiff-Appellant, v. SPRINGFIELD URBAN RENEWAL CENTER CORP., Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001876-24T4 DOCKET NO. IN COURT BELOW: UNION COUNTY CRIMINAL DIVISION MA 6292 Sat Below: Hon. Daniel Roberts, J.S.C.

PLAINTIFF-APPELLANT'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

Plaintiff-Appellant Township of Springfield (the "Township") submits this memorandum of law in support of its appeal of the opinion issued by the court below (the "Law Division") reducing the fine assessed against Defendant-Respondent Springfield Urban Renewal Center Corp. (the "Defendant") for violating Township Ordinance 12-1.9(e)(2)(a) requiring the securing of an active construction site.

Following a seven (7) day trial, the Township of Springfield Municipal Court (the "Municipal Court") found the Defendant guilty of violating Township Ordinance 12-1.9(e)(2)(a) and issued a fine of $67,500, plus court costs based upon the undisputed finding that Defendant was in violation of the Township Ordinance for a total of 697 days. This fine was reaffirmed by the Municipal Court after the Law Division remanded the matter for resentencing. In Defendant's second municipal appeal, the Law Division heard oral argument and issued a written decision on February 12, 2025, finding Defendant guilty of violating the Township Ordinance on a de novo basis. The Law Division, however, erroneously reduced the fine to $2,000 plus court costs finding that a "per day" fine was not permissible.

The Law Division's reduction of the fine ignored contrary New Jersey Supreme Court precedent which found that "per day" fines are permissible. Additionally, the "per day" fine does not violate N.J.S.A. 40:49-5. The Law

Division's attempt to analogize this continuing fence violation to a sporadic noise violation was flawed and inapposite. Since the Municipal Court did not fine Defendant the required amount under the Township Ordinances, the fine must be increased to $174,250.

PROCEDURAL HISTORY

The Municipal Court conducted a seven (7) day trial on: (i) December 19, 2022; (ii) January 23, 2023; (iii) March 6, 2023; (iv) April 10, 2023; (v) May 24, 2023; (vi) June 26, 2023; and (vii) August 28, 2023. On October 30, 2023, the Municipal Court found Defendant guilty of violating Township Ordinance 12-1.9(e)(2)(a). Pa84[1]. After considering the undisputed evidence, the Municipal Court assessed fines totaling $67,500 plus court costs. Id. On November 16, 2023, Defendant filed a Notice of Appeal (the "Municipal Appeal"). Pa85-Pa86.

On June 24, 2024, the Honorable Daniel Roberts, J.S.C. issued a letter remanding the Municipal Appeal back to the Municipal Court for resentencing as to the amount of fines assessed in light of the Appellate Division's June 20, 2024, unpublished decision in Township of Deptford v. Malachite Group Ltd. and Deptford Commons, LLC. Pa87-Pa88 (citing and enclosing a copy of Tp. of Deptford v. Malachite Group Ltd. and Deptford Commons, LLC, 2024 WL 3060544 (App. Div. June 20, 2024)). On November 18, 2024[2], a further hearing was held before the Honorable Jonathan Rosenbluth, J.M.C. See 9T[3]. On November 26, 2024,

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[1] Pursuant to New Jersey Court Rule 2:6-8, "Pa___" refers to Plaintiff-Appellant's Appendix in Support of Appeal.

[2] The transcript for the November 18, 2024, hearing erroneously states that the hearing was held on November 11, 2024. It was held on November 18, 2024.

[3] Pursuant to New Jersey Court Rule 2:6-8, there are ten (10) volumes of transcripts. The volumes shall be denoted as follows: December 19, 2022 ("1T"); January 23, 2023 ("2T"); March 6, 2023 ("3T"); April 10, 2023 ("4T"); May 24, 2023 ("5T");

the Municipal Court reaffirmed "its findings of guilt by Defendant Springfield Center Urban Renewal Corp. violating Township Ordinance 12-1.9(e)(2)(a) and imposed a fine of $67,500 plus court costs of $33." Pa148-Pa149.

On February 10, 2025, the Law Division held oral argument on Defendant's Municipal Appeal. See 10T. On February 12, 2025, the Law Division issued an Order (the "Law Division Order") that "Defendant, Springfield Urban Renewal Center Corporation, is found guilty of violating Township Ordinance No. 2018-12" but "that the fine be reduced to $2,000 plus court costs." Pa8. The Law Division Order was accompanied by its opinion (the "Opinion"). Pa9-Pa29. On March 2, 2025, the Township filed a Notice of Appeal appealing the Law Division's reduced fine. Pa1-Pa7.

June 26, 2023 ("6T"); August 28, 2023 ("7T"); October 30, 2023 ("8T"); November 18, 2024 ("9T"); and February 10, 2025 ("10T").

STATEMENT OF FACTS

On December 3, 2021, Township Zoning Official Robert Herbert issued Summons 2017-SC-027618 (the "Summons") citing the Defendant in violation of Springfield Township Ordinance 12-1.6(b) regarding the Defendant's fence. Pa48.

A. Municipal Court Trial

During the trial on May 24, 2023, the Municipal Court determined that the correct ordinance at issue was § 12-1.9(e)(2)(a), which Defendant does not contest. 5T 13:2-18:10; Pa30. Township Ordinance 12-1.9(e)(2)(a) states:

> It shall be the responsibility of the contractor working a construction/renovation site or the owner of a construction/renovation site to secure the construction/renovation site with a lockable fence to protect the health and safety of the public. The Township Engineer or the Construction Official, in the reasonable exercise of their discretion, shall determine the type of fence as to material, height, location, type, fence locking mechanism, and the type of machinery that requires fencing and the size of the hole, cavity or mound that requires fencing so as to protect the health and safety of the public. The fence shall be installed prior to the commencement of work and shall remain and be maintained on the construction/renovation site until there is no longer a hole, cavity or mound, until there is no machinery or until a structure is closed, whichever is later. For subdivisions and new single-family construction, it shall be the responsibility of the contractor/owner to install a fence around the entire perimeter of the construction area. Fencing is to remain closed/locked/secured when no personnel are at the construction site or no construction activities are taking place.

Township Ordinance 12-1.9(e)(2)(a); see also Pa39.

The Municipal Court conducted seven (7) days of trial[4] consisting of testimony from Township Engineer Michael Disko, Township Zoning Official Robert Herbert, and Jacinto Rodrigues (a member of Springfield Center Urban Renewal). Thirty-seven (37) exhibits were moved into evidence. Pa31-Pa83. On October 30, 2023, the Municipal Court found Defendant guilty of violating Township Ordinance 12-1.9(e)(2)(a) beyond a reasonable doubt. 8T 4:21; Pa84.

For first time violations of any provision under § 12-1.9(e), Township Ordinance 12-1.9(e)(5)(a)(1) provides that

> [t]he contractor and owner shall be provided with oral and written notice of the violation(s), which shall include a deadline to correct the violation(s). **If the violation(s) are not cured by the prescribed deadline, a summons shall be issued for $250 per day for every day the violation remains uncured.**

Township Ordinance 12-1.9(e)(5)(a)(1) (emphasis added).

At the conclusion of the lengthy trial, the Municipal Court made substantial findings of fact and determined Defendant guilty beyond a reasonable doubt. 8T 23:1-5. In calculating the fine, the Municipal Court found Defendant was in violation of Township Ordinance 12-1.9(e)(2)(a) from the date the Summons was issued

[4] Trial before the Municipal Court was held on December 19, 2022, January 23, 2023, March 6, 2023, April 10, 2023, May 24, 2023, June 26, 2023, and August 28, 2023.

(December 3, 2021) until the date of the Court's decision, a total of 690 days.[5] 8T 31:19-22; 25 ("By my count and the court of the Township, from 12-3-21 to today, October 30th, it should be noted that it's our position that the fence is still in violation. . . It's 690 days."). At $250 per day, the Municipal Court found that the fine would total $172,500. 8T 31:17-32:6. The Municipal Court then reduced the number of days in violation to be from the date the Summons was issued until the June 15, 2023 Consent Order, which reduced the total fine to $135,000.[6] 8T 34:12-13. The Municipal Court then gave Defendant a 50% credit which brought the fine down to a final amount of $67,500 plus $33 in court costs. 8T 34:17-20. In making this determination, the Municipal Court did note that on appeal it would be possible for the fine to be increased if the court finds on a de novo review that the maximum fine under the ordinance is appropriate. 8T 34:21-35:7.

B. Resentencing Remand

On November 16, 2023, Defendant filed a Notice of Municipal Court Appeal (the "Municipal Appeal"). Pa85-Pa86. On June 24, 2024, following briefing, Judge

[5] Upon calculation though the number of days between December 3, 2021, and October 30, 2023, is 697 days.

[6] The Municipal Court did not specify in its decision how many days are between December 3, 2021, and June 15, 2023, for this calculation; it just provided that the amount would be $135,000. 8T 34:12-13 ("It's $135,000 between December of 2021 and June of 2023."). Upon calculation, the exact number of days between December 3, 2021, and June 15, 2023 is 560 days, therefore the fine at $250 per day would be $140,000.

Roberts issued a letter remanding the Municipal Appeal back to the Municipal Court for resentencing as to the amount of fines being assessed in light of the unpublished Deptford opinion. Pa87-Pa98 (citing and enclosing a copy of Tp. of Deptford, 2024 WL 3060544).

On November 18, 2024, the Municipal Court held a hearing regarding resentencing. See 9T. The hearing focused on the narrow question of what impact, if any, the unpublished decision in Deptford had on the Municipal Court's sentence. 9T 4:9-15.

Following arguments presented by both parties, the Municipal Court opined:

> I do agree more so with the State's argument that [Tp. of Deptford] was **limited to the facts of that case and that it did not intend to strike down longstanding laws in community after community after community that gave the ability for townships and municipalities to enforce laws that had direct impact on the safety and wellbeing of their community** and that the -- that it undermined their ability to do so by taking away any kind of punitive aspect that would dissuade any property owner, any developer, any person that violated local ordinances by saying that you cannot do something once you come back and find time after time that the property remains a danger, has not been repaired or just in complete derogation of any direction of authority. The property owner could say, you have no authority to do anything from a punitive nature.

9T 49:9-24 (emphasis added). The Municipal Court further opined that the court in Deptford properly portrayed the limited facts of the case before it, but he did not see analogous circumstances in this instant matter. 9T 49:25-50:11.

After hearing the arguments presented by Defendant that inspections are required "every day," the Municipal Court opined that if periodic inspections occur and violations have not been cured, the Court or the Township should not be powerless address ongoing violations. 9T 45:14-23. The Court further emphasized discussing the daily inspections posited by Defendant stating:

> we have situations where there are ongoing dangerous conditions and I do not think that the Deptford court meant to obviate the ability for the courts to act in their capacity to reasonably assess what the penalties should be and how you are going to impose such, not only for the penalties that have occurred, but also for deterrents of what could be and completely uncontrolled society if there were no penalties in the future.

9T 53:18-54:1.

On November 26, 2024, the Municipal Court Order reaffirmed "its findings of guilt by Defendant Springfield Center Urban Renewal Corp. to violating Township Ordinance 12-1.9(e)(2)(a) and imposed a fine of $67,5000 plus court costs of $33." Pa48-49.

C. Law Division Opinion

On February 10, 2025, Judge Roberts heard oral argument for the Municipal Appeal. See 10T. On February 12, 2025, the Law Division issued an Order and Opinion (1) finding Defendant guilty of violating Township Ordinance 2018-12; and (2) reducing the fine to a total of $2,000 plus court costs. Pa8.

i. Violation of Township Ordinance 12-1.9(e)(2)(a)

The Law Division found de novo that Defendant was in violation of Township Ordinance 12-1.9(e)(2)(a). Pa23. In the Opinion, the Law Division agreed with the Municipal Court that

> this case comes down to whether a landowner has an ongoing obligation to maintain a property up to code, and safety standards, when the landowner's initial plan for the property was approved but conditions worsened or developed into a safety concern for the public.

Pa22. The Law Division reached the same conclusion as the Municipal Court that "a landowner does have an ongoing obligation to keep his or her property safe and protect the public from hazard even if there was initial complaint with the original plan." Id. The Law Division found that the testimony of Township Engineer Michael Disko established that Defendant had multiple conversations with the Township regarding safety concerns related to the fence and that it needed to be replaced. Pa23. The Law Division concluded that

> based on the evidence admitted at trial, it was established that there was notice given to the Defendants of the danger, the notice was in accordance with the Township's authority to make that determination, and the Defendant knowingly failed to do what was advised and required of them. **Therefore, the Defendant violated Springfield Township Ordinance 12-1.9(e)(2)(a).**

Id. (emphasis added). The Township does not appeal the Law Division's finding of guilt. Defendant did not cross-appeal any aspect of the Law Division Opinion, including the finding of guilt.

ii. Reduction in Fine

The Law Division reduced Defendant's fine from $67,500 to $2,000 plus court costs. Pa8. The Law Division found that the "every day" fine for violation of Township Ordinance 12-1.9(e)(2)(a) was improper pursuant to N.J.S.A. 40:49-5. Pa23. The Law Division went on to find that allowing townships to impose "each day" fines rather than "each offense" fines allow the township to exceed the allowable statutory maximum under N.J.S.A. 40:49-5. Pa24. The Law Division did not accept that the Township Zoning Official's daily inspections as sufficient. Id.

The Law Division also found that the Township's fine provision was akin to the enforcement provisions addressed in Perrine Terrace Land Co. v. Brennan. Id. (citing Perrine Terrace Land Co. v. Brennan, 101 N.J.L. 487 (Sup. Ct. 1925)). In addition, the Law Division rejected the Supreme Court's opinion in Tp. of Pennsauken v. Schad was not applicable because "Springfield Center has not raised any First Amendment speech related claims, not any cruel and unusual punishment claims." Pa25 (citing Tp. of Pennsauken v. Schad, 160 N.J. 156 (1999)). Regarding the fine, the Law Division stated:

> [t]he question here is not whether the fines imposed are cruel and unusual, but rather whether this Court is bound

> by a legislative statute that does not authorize an "each day" enforcement of municipal ordinance fines.

Pa25-Pa26.

Defendant argued that rehabilitative efforts should be taken into account with regards to resentencing. Pa26. The Law Division, however, found that the cases relied upon by Defendant for this proposition were inapposite to the present case. Pa26-Pa27. The Law Division agreed with the Municipal Court and analyzed that "if the Defendant seeks to have rehabilitative efforts be considered, the defense is conceding that there was something to rehabilitate" and that "[t]he Defense may not now concede that because the fence is no longer standing, there is no current issue." Pa27.

Despite the Law Division's finding that the "each day" fine was impermissible, the Law Division agreed with the Municipal Court and stated that:

> [t]his Court is indeed troubled its interpretation of N.J.S.A. 40:49-5 could have a chilling effect on a municipality's ability to enforce ordinances. . . Simply put, a code enforcement official must be allowed to take the steps necessary to provide for a safe and law-abiding community. This Court also recognizes the impracticability of that official issuing a new summons potentially every day for repeated improper behavior.

Pa28. The Law Division analogized this violation to the inapposite situation of a noise ordinance violation.

> To find this acceptable would be akin, for example to a situation where a person habitually in violation of a local

> noise ordinance by having loud parties. That person is then issued a summons for a party on a specific evening, but during the trial testimony is taken that indicates that there has been a party every Saturday for the next six months. Surely, in this example, the Judge could not fine that person for 26 subsequent parties. All that is before the Court is the one party on that one particular evening.

Pa29.

On March 2, 2025, the Township filed a Notice of Appeal with this Court to appeal the Law Division's reduced $2,000 fine. Pa1-Pa7.

STANDARD OF REVIEW

On appeal from the Law Division's decision, this Court's review "focuses on whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." State v. Robertson, 228 N.J. 138, 148 (2017) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). "[A]ppellate courts ordinarily should not undertake to alter concurrent findings of fact and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Robertson, 228 N.J. at 148 (quoting State v. Locurto, 157 N.J. 463, 474 (1999)). Further, the Appellate Division should not "weigh the evidence, assess the credibility of the witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1998).

The legal conclusions of the Law Division are reviewed under a de novo standard. Robertson, 228 N.J. at 148; see also State v. Kuropchak, 221 N.J. 368, 383 (2015) ("Moreover, legal conclusions are subject to de novo review."). In this case, since the findings of fact are not contested, the sole issue is a matter of law which must be considered de novo.

LEGAL ARGUMENT

THE LAW DIVISION ERRED WHEN IT REDUCED AND LIMITED THE FINE TO $2,000 DESPITE FINDINGS OF A CONTINUING VIOLATION

(Pa 9-Pa 29)

The Law Division erred in finding that the penalty provision under Township Ordinance 12-1.9(e)(5)(a)(1) is akin to the "per day" enforcement penalty struck down in the 1925 decision of Perrine Terrace Land Co. v. Brennan. Pa24-Pa25 (citing Perrine, 101 N.J.L. at 491-492). To the contrary, the Supreme Court has expressly ruled that ordinances establishing "per day" penalties for ordinance violations are both allowable and reasonable. Schad, 160 N.J. at 184-85.

A. The Supreme Court Holding in Schad Permitting "Per Day" Fines Governs

In Schad, the Supreme Court ruled in no uncertain terms that:

> It is reasonable for the Township to authorize imposition of finds for **each day** defendant continued to violate the ordinance.

Id. at 184 (emphasis added). The facts in Schad revolve around a defendant found guilty of violating Pennsauken Township's sign ordinance. Id. at 166-67. The defendant was fined a total of $95,920 for two convictions under the sign ordinance. Id. at 184. On appeal, the Law Division reassessed fines lowering their amount to $65,800 by "impos[ing] fines of $350 **per day**, for 47 days, for each violation at both locations, totaling $1400 per day." Id. at 184 (emphasis added). After the

Appellate Division reversed all of the convictions and vacated the fines, the Supreme Court granted petitions for certification. Id. at 167-68. The Supreme Court reversed the ruling of the Appellate Division and re-instated all of the fines. Id. at 184-85. In addressing the challenge to the fine the Supreme Court first recognized that "[a] penalty is presumed valid, and '[u]nless a 'substantial showing' is [ ] made a reviewing court must respect the Legislature's will.'" Id. at 184 (quoting State in Interest of L.M., 229 N.J. Super. 88, 100 (App. Div. 1988) certif. denied, 114 N.J. 485 (1989)). The Supreme Court then explained that:

> [a]lthough the amount of the fine for violation of the sign ordinance is large, it is not unconstitutionally excessive. **It is reasonable for the Township to authorize the imposition of fines for each day defendant continued to violate the ordinance**. Furthermore, the fine ultimately was significantly less than the maximum allowable fine even though defendant may have been the most egregious and persistent violator of the ordinance. The substantial amount of fines is rationally related to the need to deter future violations by defendant and others.

Schad, at 184-85 (emphasis added). Thus, the Supreme Court affirmatively stated that a municipality can deem each day a party violates an ordinance a separate punishable offense. Id.

Consistent with the Supreme Court's holding, numerous statutes and regulations expressly treat each day that a violation exists as a separate offense. See e.g. N.J.S.A. 27:5-16 ("Each day of violation may be deemed to be a separate offense."); N.J.S.A. 34:20-7.1(b) ("Each day of the failure to furnish the time and

wage records to the commissioner or agent shall constitute a separate offense, and each day of refusal to admit, or hindering, or delaying the commissioner or agent shall constitute a separate offense."); N.J.S.A. 48:3-105(b) ("Each violation of this act shall constitute a separate offense, and each day that the violation continues shall constitute a separate offense."); N.J.A.C. 5:23-2.31(b)(3) ("a person shall be guilty of a separate offense for each day that he fails to comply with a stop construction order validly issued by an enforcing agency or the department"); N.J.A.C. 8:62-5.4 ("If the violation is of a continuing nature, each day shall constitute an additional and separate offense."); N.J.A.C. 16:49-3.3(b) ("When the violation is a continuing one, each day of the violation constitutes a separate offense."). Municipal ordinances have also followed this model. See e.g. Thomas Makuch, LLC v. Township of Jackson, 476 N.J. Super. 169, 180 (App. Div. 2023) (quoting the Township of Jackson's towing ordinance penalty provision which provides that "A separate offense shall be deemed committed on each day during or on which a violation occurs or continues.").

Nevertheless, the Law Division's reduction of the penalties imposed on Defendant constitutes a summary rejection of the Supreme Court's holding in Schad, wherein the Law Division instead relied upon the 1925 Supreme Court opinion in Perrine Terrace. Pa24-Pa25 (quoting 101 N.J.L. at 491-492). In Perrine, the facts involved the construction of an appendage to a building that extended onto a public

street. Perrine, 101 N.J.L. at 488. The ordinance provided for a penalty of $200 for each offense and that "each day any such violation shall be continued, shall be deemed and taken to be a separate and distinct offense." Id. at 490. In examining the conviction and penalty, the Supreme Court explained:

> It is apparent that the judgment is radically defective. It adjudges that the prosecutor pay a fine of $10 for each offense, and that each day of such violation shall be deemed and taken to be a separate and distinct offense. The vice of the judgment consists in its being uncertain and speculative. **We have also the startling situation that, though the complaint charges the prosecutor but with a single offense, the magistrate, without any complaint, and without any proof of or hearing on the commission of any other violations of the ordinance by the prosecutor, evidently under ordinance by notion of the meaning of the ordinance, undertook to pronounce a judgment upon the prosecutor which would embrace past, present, and future violations, which, of course, could not be lawfully done**. The judgment in plain sense, however, assumes that there was a separate and distinct violation of the ordinance each day from the time such appendage continued to exist after the alterations were made up to the time of the [hearing] before the magistrate and the rendering of judgment, and that such [offense] would continue in future.

Id. at 491 (emphasis added). Thus, the Supreme Court's rejection of the conviction was based on: (i) the lack of a complaint; (ii) the lack of proof; and (iii) the lack of a hearing. Id. In addition, the Supreme Court took umbrage with the inclusion of future dates as part of the penalty for days which had not yet occurred. Id. In addressing the penalty provision of the ordinance, the Supreme Court stated:

> It is clear that the ordinance does not authorize any such absurdity, but to the contrary, in clear terms, provides that each day that the appendage is permitted to remain shall be a separate and distinct [offense], for which distinct offense there shall be a penalty of $200. To enforce this provision, **a complaint is required of each distinct violation**.

Id. at 491-492 (emphasis added). While the characterization of "absurdity" expresses distain for the treatment of each day a violation exists as a separate offense, it was ultimately the lack of a complaint and other lack of due process that the court's ruling was based upon. Perrine did not actually articulate any formal striking down of the penalty provision or state that treating each day as a separate offense was entirely prohibited. In fact, based on the sheer number of statutes and regulations which, in fact, treat each day as a separate offense, the holding in Perrine was never viewed as such a prohibition.

Furthermore, Perrine also has a non-existent legacy. In fact, the opinion has only been cited a total of four (4) times in any subsequent cases, and three (3) of those cases merely cited to the opinion for the proposition that a penal ordinance must be strictly construed. See e.g. State v. Mundet Cork Corp., 8 N.J. 359, 365 (1952) ("A penal ordinance or statute is to be strictly construed and will not be held to create a liability when the words of the enactment are not clear in fixing it, but where there is no ambiguity it is settled that there is no need to resort to this rule of construction."); City of Newark v. Martin, 19 N.J. Super. 328, 329-330 (Law Div.

1952) ("The ordinance is penal in nature. If there is any ambiguity in the language it must be strictly construed, and no intendment is properly permissible so as to extend its operation to acts not clearly expressed"); Amadio v. Bd. of Com'rs of Town of West New York, 133 N.J.L. 220, 222 (Sup. Ct. 1945) ("Prosecutor invokes the principle that a penal ordinance is to be strictly construed.").

The only other case to cite to Perrine is the unpublished opinion in Deptford which also prompted the Law Division to remand this matter to the Municipal Court for resentencing. Pa87-Pa98 (citing and enclosing a copy of Tp. of Deptford, 2024 WL 3060544). In Deptford, the court struck down the penalty provision in the Township of Deptford's ordinance adopting the International Property Maintenance Code. Tp. of Deptford, 2024 WL 3060544 at *1, *4. In examining the penalty provision against N.J.S.A. 40:49-5, the court determined that Deptford could not issue a penalty any higher than $2,000 and struck down the penalty provision treating each day as a separate offense. Id. at *2 (citing N.J.S.A. 40:49-5), *4.

However, as an unpublished opinion, Deptford does not constitute binding precedent upon this Court. R. 1:36-3; see also State v. Harrell, 475 N.J. Super. 545, 564 (App. Div. 2023) ("we are not bound by our earlier decisions because we do not sit en banc.") (quoting Liberty Mut. Ins. v. Rodriguez, 458 N.J. Super. 515, 521 (App. Div. 2019)). Additionally, since the Deptford opinion, it appears that no other courts have cited to the holding in that case. Even more compelling is that

since June 2024 when Deptford was decided, this Court has upheld penalties under ordinances which deem each day a separate violation. See e.g. State v. Ottilio, 2024 WL 4554208 *1, *4 (N.J. App. Div. Oct. 23, 2024)[7] ("In addressing the penalty, the judge found that the Township's ordinance provided that **each day** defendant was in violation of § 348-11 constituted a **separate violation**. . . Based on our review of the record, defendant was properly sentenced in accordance with the ordinance.") (emphasis added) (internal citation omitted). Thus, there is no basis for one unpublished opinion to take precedent over a more recent unpublished opinion where newer opinions have always been deemed as stronger precedent. See e.g. Bell Atl. Network Servs. v. P.M. Video Corp., 322 N.J. Super. 74, 98-99 (App. Div. 1999) certif. den. 162 N.J. 130 (holding that the only exception to when the Appellate Division is "bound by decisions of the Supreme Court and the Court of Errors and Appeals is where 'more recent decisions of the Supreme Court clearly undermine the authority of a prior decision, although not expressly overruling it.'") (internal citations omitted) (quoting Burrell v. Quananta, 259 N.J. Super. 243, 252 (App. Div. 1992)); State v. Cuiffini, 164 N.J. Super. 145, 152 (App. Div. 1978) ("Where more recent decisions of the Supreme Court plainly undermine the authority of a prior decision although not squarely and explicitly overruling it, we

[7] Pursuant to New Jersey Court Rule 2:6-1(a)(1), a copy of State v. Ottilio, 2024 WL 4554208 (N.J. App. Div. Oct. 23, 2024) is annexed in Plaintiff-Appellant's Appendix in Support of Appeal. See Pa269-Pa272.

are entitled to follow the current doctrine and need not be confined by the prior ruling.").

While the Law Division appeared compelled by the holding in Perrine rather than Schad, this exact "conflict" between the opinions has been addressed. In State v. Mimiamelia, the Honorable Aruther J. Batista, J.S.C. issued a 115-page decision that is directly on point with the issues here. Pa153-Pa267. Specifically, the Law Division in Mimiamelia addressed the issue of whether a court could impose fines for consecutive days of a continuing violation. Pa255. Judge Batistia directly addressed any conflict that might exist between the holdings in Perrine and Schad finding that the holding in Schad overrules the holding in Perrine stating that:

> [t]he differences between Perrine and the case at bar are manifold and readily distinguishable. Also it does not appear that N.J.S.A. 40:49-5 had been enacted at the time Perrine was decided. **Notwithstanding, to the extent that Perrine stands for the proposition that a continuing violation is unlawful, this court finds that subsequent case law, including New Jersey Supreme Court's 1999 decision in S[c]had unequivocally allows for same, and governs.**

Pa261 (emphasis added).

The court in Mimiamelia echoed the analysis of Schad by stating that the

> New Jersey Supreme Court [has] upheld [] monetary penalties imposed for continuous violations from the date on which the ordinance complaints were issued, through the first date of a pretrial event, thus making it legal precedent in our State that a continuing violation penalty in municipal ordinance cases is lawful.

Pa258. The decision in Mimiamelia further noted that

> [s]ince the S[c]had decision was rendered, it has been cited 171 times in New Jersey, California, Ohio, Rhode Island, the 3rd Circuit, and various administrative agencies and has been positively relied upon twenty-nine times. S[c]had has not been overturned and is still good law as it pertains specifically to imposition of continuing fines by a trial court.

Id.

Here, the Law Division erred in rejecting the holding in Schad on the basis that Schad only addressed constitutional claims. Pa25-Pa26. While Schad did include First and Eighth Amendment claims, the Law Division ignored the clear language that found it permissible to fine a defendant for **each day** an ordinance violation continues to occur. Schad, 160 N.J. at 184. Thus, despite the Law Division's focus on the constitutional issues in Schad, the fact that this case does not involve First Amendment claims is wholly irrelevant. As Judge Batista held in Mimiamelia, Schad directly overrules any contrary holding in Perrine Terrace Land. Therefore, treating each day that the fence remained in violation of the Township Ordinance as a separate offense is permissible and necessary.

The Law Division even conceded that it is necessary for a township to be able to issue continuance fines for persistent and consistent violations when it stated:

> Everyone is familiar with the persistent offender, i.e., the person who refuses to upkeep his property despite repeated warnings, or the business owner who continues

> to run his business in direct contradiction to long standing and logical municipal regulations. **Municipalities must have the ability to dissuade the public from engaging in continuous improper activity.** Simply put, a code enforcement official must be allowed to take the steps necessary to provide for a safe and law-abiding community. **This Court also recognizes the impracticability of that official issuing a new summons potentially every day for repeated improper behavior.**

Pa28 (emphasis added). Despite the Law Division's full understanding of the realities and reasoning behind the need for "per day" fines, its decision directly prevents municipalities from being able to protect public safety by ensuring these continuing violations do not occur.

B. Under the Holding of Perrine Terrace Land, Fining Defendant for 404 days is Permissible

As previously articulated, the holding in Perrine was based specifically on the lack of due process. Perrine, 101 N.J.L. at 491. The court explained that the crux of why the fine was unjust in that case was "the magistrate, without any complaint, and **without any proof of or hearing on the commission of any other violations** of the ordinance by the prosecutor . . . undertook to pronounce a judgment upon the prosecutor which would embrace past, present, and future violations . . ." Id. (emphasis added).

Here, even if Perrine is applicable, fining defendant for 404 days the fence was in violation is still permissible based on the facts adjudicated with full due process protections before the Municipal Court. Once the Municipal Trial began,

Mr. Herbert took photographs of the fence over multiple days in a three-month span to evidence that the condition of the fence had not changed since the Summons had been issued on December 3, 2021. During his testimony on March 6, 2023 and April 10, 2023, Mr. Herbert testified regarding sixteen (16) photographs he took on December 19, 2022, approximately a year after the initial summons was written. 3T 11:22-20:22; 4T 16:18-28:17. During his testimony on April 10, 2023, Mr. Herbert confirmed that the fence was in the same condition at the time of his testimony and since the summons was issued on December 3, 2021, as detailed below. Mr. Herbert was asked:

> Q: . . . From the time of the issuance of the summons and the time you took those photographs, is the property substantially in the same condition that it was from December 2021 through the date those photographs were taken?
>
> A: Yes.
>
> Q: Now from the date that those photographs were taken to – what date is shown on there?
> A: 12-19-22.
>
> Q: Okay, from 12-19-22 to today, today is April 10th, do those – are those photographs depict substantially the same condition that the property is in now except for the paint job?
>
> A: Yes.

4T 18:20-19:8. After review of all the photographs taken on December 19, 2022, Mr. Herbert was also asked:

> Q: Now, you had an opportunity to look at all these photographs that were taken on December 19th, 2022. Do these photographs substantially reflect the condition of the property, (a), on December 19th, 2022?
>
> A: Yes.
>
> Q: And do they substantially reflect the condition of the property as you recall it in December of 2021 when you issued the summons?
>
> A: They are the same, yes.

4T 27:19-28:2.

Additionally, the location of this fence is of particular importance in this case. The fence at issue is located at 19 Caldwell Place in Springfield, New Jersey. Pa100. The Township of Springfield Engineering Department, where Mr. Herbert works every day, is located at 100 Mountain Avenue in Springfield, New Jersey, which is .1 mile away from the fence. Id.; Pa106. In his Municipal Court testimony on March 6, 2023, Mr. Herbert was asked:

> Q: Where is the municipal building with regard to [the fence], where this courtroom is?
>
> A: It is on the other end of Caldwell Avenue, on the same side as this wooden fence.

3T 13:15-18. Mr. Herbert actually made visual observations of the fence every day and, therefore, he determined it was not in compliance with Township Ordinance

12-1.9(e)(2)(a) on a continuing, every day basis.[8] Pa100. From December 3, 2021 through October 30, 2023, Mr. Herbert worked a total of 404 days. Pa100-101; Pa115-Pa117. The Law Division minimized these inspections in its decision stating that Mr. Herbert's "walking to work" did not amount to an inspection. Pa24. As Mr. Herbert stated in his certification, each day he went to the Township offices he observed the fence twice a day on his way to and from work and verified that the fence was not in compliance with the Township Ordinance. Pa100. Moreover, the fence is not a moveable object which varied on a daily basis. The Law Division's tortured analogy to a noise violation is completely inapposite. Defendant's principal testified and never asserted any change in the fencing; his sole defense was the stale permit. See 7T 45:22-46:2. This claim was debunked by the Municipal Court and Law Division.

The regular inspection of the fence and confirmation of its unchanging condition also complies with the unpublished decision of Deptford. In Tp. of Deptford, the Appellate Division noted that an ordinance fining a defendant for each day is not per se invalid but rather that enforcement would require "the Township to fine defendants for each complaint, or alternatively **each inspection**, to comply with

[8] During oral argument before Judge Roberts, the court asked about a Super Bowl party noise complaint. 10T 6:17-7:7. Nothing could be further from the undisputed facts of this case. Here, the defense was that the illegal fence was permitted; not that the condition was intermittent or abated.

N.J.S.A. 40:49-5's per offense directive." Deptford, 2024 WL 3060544 at *2 (emphasis added); Pa95. This point was reemphasized in stating that "the Township's failure to impose a fine for each complaint it issued, or at a minimum, **each inspection it conducted**, makes the 811-day fine invalid and unenforceable." Deptford, 2024 WL 3060544 at *3 (emphasis added); Pa96.

As set forth above, it was clearly established that the condition of the fence did not change between the issuance of the Summons and the Municipal Trial. Additionally, the violation at issue here is substantially different from the violation at issue in Deptford. In Deptford, the defendant was fined on a per day basis for failing to remove rubbish or garbage from their property. 2024 WL 3060544, at *1; Pa90. Unlike garbage which could easily vary from day to day, this violation involves a fence which did not change on a daily basis; therefore, the same concerns about due process that might arise from fining someone on a daily basis for garbage does not arise with respect to a fence.

Additionally, for the same reasons, the Law Division's attempted noise ordinance analogy fails. The Law Division, in its Opinion, attempted to analogize this fence violation with someone who repeatedly violates a noise ordinance:

> To find this acceptable would be akin, for example, to a situation where a person habitually in violation of a local noise ordinance by having loud parties. That person is then issued a summons for a party on a specific evening, but during the trial testimony is taken that indicates that there has been a party every Saturday for the next six months.

> Surely, in this example, the Judge could not fine that person for 26 subsequent parties. All that is before the Court is the one party on that one particular evening.

Pa29. The Law Division also attempted to draw out this analogy at oral argument posing this hypothetical to the Township:

> I had a Super Bowl party last night, hypothetically, . . . My neighbors complained. It got out of control. The noise was ridiculous. It caused multiple neighbors to complain. Police came and issued me a citation for violating the local noise ordinance. We go to court, we go to the trial, . . . And during the course of the trial the code enforcement officer says, oh, we received 10 complaints about this in the past. You know, he's always throwing loud parties. Would the Municipal Court Judge in that situation be able to fine me for the 10 prior transgressions.

10T 6:17-7:7. As counsel for Township properly answered at oral argument, the answer is no. See id. at 7:8. This case is entirely inapposite to the hypothetical noise violation because the fence is not moving or changing compared to the subjective noise levels of a party which can fluctuate. The Township presented substantial evidence of the **unchanging nature** of the fence through photographs and Mr. Herbert's testimony. Unlike the hypothetical noise violation, it cannot be legitimately argued that some days the fence was in violation of the Township Ordinance and some days it was not.

Based on the regular inspections by Mr. Herbert, even if the court were to apply Perrine Terrace Land and Tp. of Deptford, a daily fine for 404 days, at a minimum, would be warranted, totaling $101,000.

C. The Fine Imposed on Defendant is Permissible under N.J.S.A. 40:49-5

N.J.S.A. 40:49-5 provides, in relevant part, that:

> The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, by one or more of the following: imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days; or by a fine not exceeding $2,000; or by a period of community service not exceeding 90 days.

N.J.S.A. 40:49-5. Thus, this statute expressly provides the authority to prescribe penalties for violation of ordinances including "a fine not exceeding $2,000." Id. However, this language is silent as to whether each day a violation exists can constitute a separate violation of an ordinance. Thus, there is no express violation for the Township's penalty provision.

In fact, in the context of penalties for violation of various construction codes, the legislature has adopted statutory penalties which expressly provide for the treatment of specified time frames as separate offenses. N.J.S.A. 52:27D-138. In fact, the New Jersey Uniform Construction Code Act provides that:

> a. Any person or corporation, including an officer, director or employee of a corporation, who:
>
> (1) Violates any of the provisions of this act or rules promulgated hereunder;
>
> (2) Constructs a structure or building in violation of a condition of a building permit;

> (3) Fails to comply with any order issued by an enforcing agency or the department;
>
> (4) Makes a false or misleading written statement, or omits any required information or statement in any application or request for approval to an enforcing agency or the department;
>
> (5) Knowingly sells or offers for retail sale any item, device or material, the regular and intended use of which would violate any provision of the State Uniform Construction Code;
>
> Shall be subject to a penalty of not more than $2,000; provided, however, that any penalties in excess of $500.00 per violation may be levied by an enforcing agency only in accordance with subsection e. below.

N.J.S.A. 52:27D-138(a). In addressing certain violations, the statute further explains how to calculate penalties stating:

> With respect to subsection a. (3) of this section, **a person shall be guilty of a separate offense for each day that he fails to comply with a stop construction order validly issued by an enforcing agency or the department** and **for each week that he fails to comply with any other order validly issued by an enforcing agency or the department**. With respect to subsections a. (1) and a. (4) of this section, a person shall be guilty of a separate offense for each violation of any provision of this act or rules promulgated hereunder and for each false or misleading written statement or omission of required information or statement made in any application or request for approval to an enforcing agency or the department. With respect to subsection a. (2) of the section, a person shall be guilty of a separate offense for each violation of the conditions of a construction permit.

N.J.S.A. 52:27D-138 (c); see also N.J.A.C. 5:23-2.31(b)(3). The provision further provides that enforcement of this provision can be performed by a municipality with jurisdiction to adjudicate such violations conferred to the judges of the municipal court. N.J.S.A. 52:27D-138 (d).

The rationale for allowing the treatment of each day as a separate offense is particularly apparent in the context of ordinances governing construction projects. Limiting penalties to $2,000 would have no deterrent effect on construction projects which often exceed millions of dollars. In fact, when applied to the requirement to secure a construction site with a fence, if the fence costs more than $2,000, the builder would be incentivized to violate the ordinance rather than erect the safety fence. This result cannot be countenanced.

Here, Township Ordinance 12-1.9(e)(5) controls the penalties for violations of Township Ordinance 12-1.9(e)(2)(a). Township Ordinance 12-1.9(e)(5) provides

> (a) Any violation of the provisions of this subsection shall result in an oral notification and followed up with written notice of the violation to the owner and contractor of the construction/renovation site.
>
> (1) First violation – The contractor and owner shall be provided with oral and written notice of the violation(s), which shall include a deadline to correct the violation(s). **If the violation(s) are not cured by the prescribed deadline, a summons shall be issued for $250 per day for every day the violation remains uncured.**

Township Ordinance 12-1.9(e)(5)(a)(1) (emphasis added). The $250 fine is well below the $2,000 maximum prescribed in N.J.S.A. 40:49-5.

In Mimiamelia, the Law Division found that a $1,250 daily fine was in compliance with N.J.S.A. 40:49-5 since it was within the statutory $100 minimum and $2,000 maximum. Pa256. The court in Mimiamelia aptly noted that N.J.S.A. 40:49-5 was in effect when the New Jersey Supreme Court decided Schad. Pa259. The court pointed out that

> [i]t is wholly reasonable to believe that our Supreme Court considered the legislative mandate set forth in [N.J.S.A. 40:49-5] when it determined that municipalities were authorized to render "each day" fines for ordinance violations, and the Pennsauken ordinance allowing for same.

Id. The fine prescribed in Township Ordinance 12-1.9(e)(5)(a)(1) is permissible under N.J.S.A. 40:49-5 since it is within the $100 minimum and $2,000 maximum prescribed by the statute.

D. The Court Should Assess a Penalty of $250 per Day for 697 Days Totaling $174,250

For the reasons set forth above, the Law Division improperly reduced the fines to $2,000. There is no dispute that Defendant is guilty of violating Township Ordinance 12-1.9(e)(2)(a). The fine for violation of Township Ordinance 12-1.9(e)(2)(a) is $250 per day. See Township Ordinance 12-1.9(e)(5)(a)(1).

At the conclusion of the Municipal Trial, the Municipal Court found Defendant in violation for 690 days[9] and initially calculated Defendant's fine at $172,500, $250 for each day the violation continued. 8T 31:17-32:6. The fine was then reduced to $135,000, representing the number of days in violation from the date the Summons was issued until the June 15, 2023 Consent Order.[10] 8T 34:12-13. The Municipal Court also went on to give Defendant a 50% credit bringing the fine down to the final amount of $67,500 plus $33 in court costs. 8T 34:17-20. Since the Municipal Court did not assess fines at the maximum amount permitted by the Township's ordinances, the Municipal Court noted that on appeal it would be possible for the fine to be increased if the court finds on a de novo review that the maximum fine under the ordinance was appropriate. 8T 34:21-35:7. At a minimum, the Municipal Court's initial fine should be upheld but adjusted for 560 days between December 3, 2021, and June 15, 2023, meaning the fine would be $140,000. No basis exists for a 50% discount.

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[9] In calculating the number of days of violation, the Court stated "[b]y my count and the court of the Township, from 12-3-21 to today, October 30th, it should be noted that it's our position that the fence is still in violation. . . It's 690 days." 8T 31:19-25. Upon calculation though the number of days between December 3, 2021, and October 30, 2023, is 697 days, not 690 days.

[10] The Court did not specify in its decision how many days are between December 3, 2021, and June 15, 2023, for this calculation; it just provided that the amount would be $135,000. 8T 34:12-13 ("It's $135,000 between December of 2021 and June of 2023). Upon calculation, the exact number of days between December 3, 2021, and June 15, 2023 is 560 days, therefore the fine at $250 per day would be $140,000.

While as a general principle, defendants sentenced in a municipal court may not be subject to greater sentences on appeal, the court has held that in instances where the municipal court imposed a penalty below the statutory minimum or where there are intervening facts, a greater penalty on appeal is permissible. State v. Pomo, 95 N.J. 13, 17 (1983). In State v. McCourt, one of the defendants was fined $25 plus court costs and the other defendant was fined $10 plus court costs in municipal court for failing to have car insurance. State v. McCourt, 131 N.J. Super. 283, 287 (App. Div. 1974). On appeal, the court increased the fine to $50 and suspended the defendants' driving privileges for six months. Id. at 287-88. The defendants argued on appeal before the Appellate Division that it was illegal for the court to increase the municipal court's sentence. Id. at 287. The Appellate Division found, however, that while normally imposition of a harsher sentence on a municipal appeal is not permitted, the statute required the fine be no less than $50 and suspension of driving privileges for at least six months. Id. at 288. The municipal court's lower sentence was illegal and could not stand. Id.

The plain language of Township Ordinance 12-1.9(e)(5)(a)(1) requires that violations should be fined at a rate of $250 per day if the violation is uncured. It does not provide for any discretion or deviation from the $250 per day fine. As in McCourt, the Court's earlier sentence does not comply with the requirements set forth in the Township Ordinances. Therefore, Defendant should not be entitled to

the 50% credit in calculating the fine and should be fined at a minimum rate of $250 for every day the violation remained uncured. As found by Judge Rosenbluth, Defendant was in violation for a total of 697 days from the date the Summons was issued until the Court's decision. 8T 31:19-25. The total fine imposed should be $174,250.

CONCLUSION

For the reasons set forth herein, the Law Division improperly reduced the fine to Defendant for violated Township Ordinance 12-1.9(e)(2)(a) on the flawed premise that "per day" fines are not permitted. Firstly, the Law Division failed to properly apply New Jersey Supreme Court precedent allowing "per day" fines. Additionally, the Law Division misinterpreted N.J.S.A. 40:49-5. Finally, Defendant's fine should be increased since the Municipal Court failed to follow the statutory requirements of fines for violation of Township Ordinance 12-1.9(e)(2)(a).

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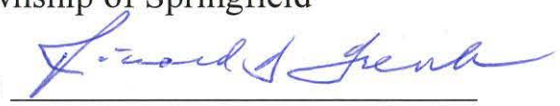
By: 
RICHARD D. TRENK

Dated: May 7, 2025

STATE OF NEW JERSEY **Plaintiff-Appellant,** **v.** **SPRINGFIELD URBAN RENEWAL CENTER CORP.,** **Defendant-Respondent.**	**SUPERIOR COURT OF NEW JERSEY** APPELLATE DIVISION Docket No. A-001876-24T4 Docket No. in Court Below: UNION COUNTY CRIMINAL DIVISION MA 6292 Sat below: Hon. Daniel Roberts, J.S.C.

DEFENDANT-RESPONDENT'S BRIEF IN OPPOSITION TO APPEAL

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Date of Submission: July 17, 2025

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PRELIMINARY STATEMENT

Municipalities are prohibited from instituting penalty ordinances above the permitted threshold mandated by statute. Yet, that is exactly what Plaintiff-Appellant, the Township of Springfield (the "Township") has done against Defendant-Respondent, Springfield Urban Renewal Center Corp. ("Springfield Center"). Thus, Springfield Center respectfully requests this Court affirm the Law Division's decision to reduce the monetary penalty to the amount allowed under N.J.S.A 40:49-5.

PROCEDURAL HISTORY

On December 3, 2021, the Township, acting through its Zoning Official, Robert Herbert, issued a Municipal Court Citation against Springfield Center alleging violation of 12-1.96B. (Da1).[1] Hearings related to the matter were held in Union County Municipal Court, before the Honorable Jonathan Rosenbluth, J.M.C., from December 19, 2022 to October 30, 2023. (1T-8T).[2]

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[1] Pursuant to New Jersey Court Rule 2:6-8, ("Da_") refers to Defendant-Respondent's Appendices.

[2] Pursuant to New Jersey Court Rule 2:6-8, there are ten (10) volumes of trial transcripts as follows: Municipal Court Hearing Transcripts ("1T" to "9T") and Municipal Appeal Oral Argument Transcript ("10T"). December 19, 2022 ("1T"), January 23, 2023 ("2T"), March 6, 2023 ("3T"), April 10, 2023 ("4T"), May 24, 2023 ("5T"), June 26, 2023 ("6T"), August 28, 2023 ("7T"), October 30, 2023 ("8T"), November 18, 2024 ("9T"), and February 10, 2025 ("10T").

On October 30, 2023, Springfield Center was sentenced to pay a fine of $67,500.00 and court costs of $33.00, totaling $67,533.00. (8T26:2-5). Judge Rosenbluth determined that the Springfield Center was in violation of the offense under SC-027619, 12-1.9(e)(2)(a). Id. On November 16, 2023, Springfield Center filed a notice of appeal related to the Municipal Court's decision, to the Superior Court of New Jersey, Union County, Law Division. (Da2-3).

On June 24, 2024, Judge Roberts remanded the matter for resentencing in light of the Appellate Division's decision in Twp. of Deptford v. Malachite Grp., Ltd., 2024 WL 3060544 (App. Div. June 20, 2024). (Da103-106). On November 18, 2024, a hearing related to the resentencing occurred before Judge Rosenbluth. (9T).[3] Judge Rosenbluth reaffirmed the court's finding of guilt by Springfield Center for violating the Township Ordinance 12-1.9(e)(2)(a) and imposed a fine of $67,500.00 and court costs of $33.00, totaling $67,533.00. (Da6-7).

On February 10, 2025, the Law Division held oral argument related to the municipal appeal. (10T). On February 12, 2025, the Law Division, upon de novo review, found that defendant committed the offense beyond a reasonable

[3] The first page of the "9T" is dated November 11, 2024, which is incorrect. The resentencing hearing was held on November 18, 2024.

doubt, but also found the fines imposed by the municipal court to be improper, and reduced the fine to $2,000 plus court costs. (Da8-29). On March 2, 2025, the Township filed a Notice of Appeal regarding the Law Division's decision to reduce the fine to $2,000. (Da30-33).

STATEMENT OF FACTS

A. SPRINGFIELD CENTER'S REDEVELOPMENT PROJECT.

Springfield Center is the owner of a parcel of commercial property that is currently under construction pursuant to a Redevelopment Agreement dated December 15, 2015 ("the Redevelopment Agreement"). (Da34-87). The Redevelopment Agreement calls for the creation of a "Downtown Springfield Development" including affordable housing, a U-shaped 4 ½ story apartment buildings, parking, and retail uses on the property bounded by Morris Avenue, Center Street, and Caldwell Place in downtown Springfield, New Jersey. Id.

On June 27, 2018, the Township adopted an ordinance, Township Ordinance No. 2018-12, pertaining to construction safety fencing. (Da88-92). On August 3, 2018, the Township's Director of Engineering, Sam Mardini, sent a letter to Jose Gomes, regarding the adoption of the new ordinance, stating that the enforcement of the ordinance would be effective starting Monday, August 20, 2018. (Da93-94).

Consistent with Section 10.6 of the Redevelopment Agreement, on December 27, 2018, Springfield Center applied for a permit for the installation of construction fencing on Morris Avenue between Caldwell Place and Center Street and at Caldwell Place and Center Street. (Da95-98). According to the fence permit application, such fencing was approved by the Township's Director of Engineering, Sam Mardini, and the decision approval date is indicated as January 17, 2019. Id. The Township, acting through Director of Engineering, Sam Mardini, issued the permit for the installation of the fence on January 17, 2019. (Da99).

To note, the issued fence permit does not mention the type of fencing to be used, but states "[a]pproved by Sam Mardini[,]" with a checked box next to fence permit "[p]ermitted by [o]rdinance." Id. The specifications for the fence identified that the height would be 8', the length would be 600' linear, and the material would be "wood." Id. The application for the permit included detailed drawings showing the wood fencing materials for the 8’ tall fence, including the 2"x 4" wood framing, plywood sheathing, and 2"x 4" shoe plate. Id.

On March 18, 2020, roughly a year after Springfield Center installed the fence, the Township, issued a memorandum in which he directed the installation of concrete "jersey barriers" against the existing wood fence, together with the replacement of the wood fence with a section of 6' chain link fence in one section

for purposes of creating pedestrian access. (Da100-101). This solution was accomplished with the input of the Chief of Police, the Public Works Director, the Zoning Officer and the Municipal Engineer. Id. Springfield Center complied with the directive of the Township Engineer, Michael Disko. Id.

B. THE MUNICIPAL COURT TRIAL.

On December 3, 2021, the Township, acting through its Zoning Official, Robert Herbert, issued a Municipal Court Citation against Springfield Center alleging violation of 12-1.96B, which governs permits, relating to the fence, giving Township officials discretion to determine the type of fencing used on construction sites. (Da1). "Replace Fencing" is written on the citation. Id. As such, hearings related to the matter were held in Union County Municipal Court, before the Honorable Jonathan Rosenbluth, J.M.C., from December 19, 2022 to October 30, 2023. (1T-8T). During the hearings, Township Engineer, Michael Disko, testified for the State. (1T4:7-29:5, 2T5:4-81:2).

Michael Disko testified that the fencing was not in conformance to the ordinance. (2T13:14-15). He elaborated on meeting with the redevelopers on March 13, 2020, regarding remedial measures related to the fence but that the conditions still remained in the same condition as of his testimony on January 23, 2023. (2T23:2-7). Mr. Disko elaborated on having spoken to Sam Mardini concerning the material for the fence and that "the wood barrier was an effective

and proper . . . during demolition for a multistory building." (2T29:22-24). Mr. Disko explained that the issued fence permit says temporary construction fence and that wood was used to contain debris during demolition, to ensure that the right-of-was with active traffic was protected. (2T30:4-31:9). During cross examination, photos of chain link fence with green meshing at the construction site as well as photos of repairs done by Springfield Center were confirmed by Mr. Disko. (2T70:12-71:20).

Township Zoning Official, Robert Herbert, also testified for the State. (4T9:4-77:20). Mr. Herbert mentioned that he was familiar with the work site and described changes as well as issues he had observed over time. (4T19:4-20:25). Based on Mr. Herbert's observations, the wood fence was not up to code and needed to be replaced again with a chain link fence. (4T41:2-17). When asked for his opinion as to what Springfield's violation was, Mr. Herbert answered that, "[i]t's an unsafe condition to the welfare and benefit of the public." (4T45:25-46:1). On cross examination, Mr. Herbert confirmed that the Township had approved the fence permit that included the construction plan clearing showing the fence extending over the existing sidewalk, which he later deemed to be a violation. (4T59:18-24). Mr. Herbert also admitted that legitimate construction needs dictated where the fence had to be placed and could not be moved, as the Township had proposed. (4T59:25-60:4).

Jacinto Rodrigues testified for Springfield Center. (5T21:18-50:1). Mr. Rodrigues testified that Springfield Center made repairs to the existing fence in accordance with what was agreed by both parties. (5T30:1-21). Mr. Rodrigues discussed the Superior Court's Consent Order, which stipulated certain repairs that Springfield Center adhered to. (5T35:10-36:8). He further testified that the fence was approved by the Township prior to its placement and therefore, Springfield Center would repair instead of replacing a fence which was already approved by the Township. (5T43:25-47:4). Additionally, the Municipal Court discussed Consent Orders by Judge Mega in the ongoing matter before the Superior Court concerning the fence. (6T3:19-5:18).

On October 30, 2023, Springfield Center was sentenced to pay a fine of $67,500.00 and court costs of $33.00, totaling $67,533.00. (8T26:2-5). Judge Rosenbluth determined that the Springfield Center was in violation of the offense under SC-027619, 12-1.9(e)(2)(a), which empowers the Township engineer or construction official to, in their discretion, determine the type of fencing. (8T22:23-24:5). The judge commented that the case comes down to whether a landlord has an ongoing obligation to maintain a property up to code. (8T5:10-15). The judge concluded that a landowner does have an ongoing obligation to keep his or her property safe and protect the public from hazards, even if there was initial compliance with the original plan. (8T6:24-7:11).

Further, the judge found that "the developer did not replace the fence. There [is] no factual issue as to that." (8T13:13-20). The judge stated that he did not believe the collateral proceedings before the Superior Court, had a bearing on the question of whether or not a violation had occurred. (8T18:12-18).

Judge Rosenbluth found that Springfield Center had been in violation of the ordinance for 690 days, from December 2, 2021 to October 30, 2023. (8T31:25). The fine of $250 per day for 690 days would equate to $172,500. (8T32:13-23). However, given the Superior Court's Consent Order dated, June 15, 2023, the judge counted the days from December 3, 2021 to the date of the Consent Order on June 15, 2023. (8T33:20-34:3, 34:12-13). Thus, $250 per day for 540 days equated to $135,000. (8T34:2). Given that the parties worked collaterally to work out the problem, the judge gave a 50% credit to Springfield Center and ultimately rendered a fine of $67,500 plus $33 in court costs to Springfield Center. (8T34:12-19).

On November 16, 2023, Springfield Center filed a notice of appeal related to the Municipal Court's decision, to the Superior Court of New Jersey, Union County, Law Division. (Da2-3). On June 20, 2024, the Appellate Division issued its decision in Twp. of Deptford v. Malachite Grp., Ltd., 2024 WL 3060544 (App. Div. June 20, 2024). (Da103-106).

C. THE LAW DIVISION'S REMAND AND THE MUNICIPAL COURT'S RESENTENCING.

On June 24, 2024, Judge Roberts remanded the matter for resentencing in light of the Appellate Division's decision in Twp. of Deptford. (Da8-29). On November 18, 2024, a hearing related to the resentencing occurred before Judge Rosenbluth. (9T). During the resentencing hearing, Judge Rosenbluth stated that, "the question is whether or not the penalties . . . [of] the daily ongoing violation would be appropriate to assess under the circumstances or whether or not [it] violates the terms of Deptford opinion . . . ." (9T4:9-13). Ultimately, Judge Rosenbluth reaffirmed the municipal court's previous finding of guilt and fine against Springfield Center. (Da6-7). Judge Rosenbluth reasoned that, "maybe the Deptford court did not consider all of the realities of what it covers and why the jurisprudence up till that decision seems to indicate that the daily penalties are appropriate with an initial summons being cited . . . ." (9T25:13-17).

Judge Rosenbluth further elaborated on public health and safety concerns related to the fence. (9T26:7-8, 48:24-25, 49:14-15, 53:4). Moreover, Judge Rosenbluth explained:

> I felt [the previous decision] was fair and reasonable . . . to impose a penalty that not only would be fair given the circumstances, but would also work to send notice out that future violations would not be necessarily tolerated or is they were to occur would have a sanction

> to them. To take that away would undermine the ability for local municipalities to ever engage in not only enforcing the law, but to protect their citizenry, as is their charge.
>
> [(9T52:9-53:2)].

Judge Rosenbluth reaffirmed the court's finding of guilt by Springfield Center for violating the Township Ordinance 12-1.9(e)(2)(a) and imposed a fine of $67,500.00 and court costs of $33.00, totaling $67,533.00. (Da6-7).

D. THE LAW DIVISION'S FINAL DECISION.

On February 10, 2025, the Law Division held oral argument related to the municipal appeal. (10T). On February 12, 2025, the Law Division, upon de novo review, found that defendant committed the offense beyond a reasonable doubt, but also found the fines imposed by the municipal court to be improper, and reduced the fine to $2,000 plus court costs. (Da8-29). On March 2, 2025, the Township filed a Notice of Appeal regarding the Law Division's decision to reduce the fine to $2,000. (Da30-33).

STANDARD OF REVIEW

A municipal court decision is appealed to the Law Division where the judge "may reverse and remand for a new trial or may conduct a trial de novo on the record below." R. 3:23-8(a)(2); see also R. 3:23-1; R. 7:13-1. "At a trial de novo, the [Law Division] makes its own findings of fact and conclusions of law but defers to the municipal court's credibility findings." See State v.

Robertson, 228 N.J. 138, 147 (2017). "It is well-settled that the trial judge 'giv[es] due, although not necessarily controlling, regard to the opportunity of the' municipal court judge to assess 'the credibility of the witnesses.'" Id. at 148 (quoting State v. Johnson, 42 N.J. 146, 157 (1964)).

As such, this court reviews the record through a deferential lens because "the rule of deference is more compelling where . . . two lower courts have entered concurrent judgments on purely factual issues." State v. Locurto, 157 N.J. 463, 474 (1999). "Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Ibid. Where a defendant is convicted in the Law Division and seeks reversal in the Appellate Division, "the State no longer has the burden of proof[,] [and] [a]ppellate review instead focuses on whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." Robertson, 228 N.J. at 148 (quoting Johnson, 42 N.J. at 162). As the Court in Robertson stated:

> The differences between . . . convictions in municipal court and the Law Division matter. After the first conviction, the stage is set for a new trial, where the defendant retains the presumption of innocence; after the second, a defendant loses the cloak of innocence and stands convicted ready to challenge that determination on appeal.

[Ibid.]

Thus, appellate review of a de novo proceeding in the Law Division following an appeal from the municipal court is "exceedingly narrow." Locurto, 157 N.J. at 470. "[A]ppellate review of a municipal appeal to the Law Division is limited to 'the action of the Law Division and not that of the municipal court.'" State v. Hannah, 448 N.J. Super. 78, 94 (App. Div. 2016) (quoting State v. Palma, 219 N.J. 584, 591-92 (2014)). However, the Law Division's legal conclusions are reviewed de novo. Robertson, 228 N.J. at 148.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION SHOULD AFFIRM THE LAW DIVISION'S DECISION TO REDUCE THE MONETARY FINE IN ACCORDANCE WITH N.J.S.A. 40:40-5.

A. The Law Division's Decision Regarding the Monetary Fine Should be Affirmed Due to the Statutory Cap Pursuant to N.J.S.A. 40:40-5.

N.J.S.A 40:49-5 Caps Penalties that a municipality may charge. The Law Division correctly found that the "every day" fine provision in the Township's Ordinance 12-1.9(e)(2)(a) is improper pursuant to N.J.S.A 40:49-5, because imposing an "each day" fine as opposed to an "each offense" fine, effectively allows the municipality to exceed the allowable statutory maximum under the statute. See State v. Laurel Mills Sewerage Corp., 46 N.J. Super. 331, 334 (App.

Div. 1957) (declaring that a municipal ordinance penalty provision's non-compliance with Legislative directives negates the penalty).

N.J.S.A. 40:49-5, Penalties for Violating Ordinances, authorizes municipalities to impose an "additional fine" for "repeated violation of any municipal ordinance." See N.J.S.A. 40:49-5. However, the statute creates a maximum of $2,000. Id. Notwithstanding, the penalty for a violation of any provision under the Township of Springfield Ordinance 12-1.9(e) is:

> The contractor and owner shall be provided with oral and written notice of the violation(s), which shall include a deadline to correct the violation(s). If the violation(s) are not cured by the prescribed deadline, a summons shall be issued for $250 per day for every day the violation remains uncured.
>
> [Township of Springfield Ordinance 12-1.9(e)(5)(a)(1) (emphasis added).]

Given the statutory maximum under N.J.S.A 40:49-5, the Law Division reduced the penalty for Springfield Center to $2000 plus court costs.

The fine provision in the Township's Ordinance 12-1.9(e)(2)(a) is indeed akin to the enforcement penalty addressed by the New Jersey Supreme Court in Perrine Terrace Land Co. v. Brennan, 101 N.J.L. 487, 490 (Sup. Ct. 1925). Contrary to what the Township contends, Twp. of Pennsauken v. Schad, 160 N.J. 156, 166-67 (1999), is wholly irrelevant and unrelated to the matter at hand.

In fact, Twp. of Pennsauken is a First Amendment case entirely immaterial to a case regarding a municipal fine.

In Perrine Terrace Land Co., the Court reviewed an ordinance that prohibited appendages to buildings from projecting onto any part of a public street and also stipulated, "any person violating any of the provisions of the ordinance 'shall, upon conviction, forfeit and pay . . . for each offense, and each day any such violation shall be continued shall be deemed and taken to be a separate and distinct offense.'" 101 N.J.L. at 490) (emphasis added). The Court set aside the conviction and penalty judgment, reasoning that the enforcement of the ordinance's daily penalty provision "assumes that there was a separate and distinct violation of the ordinance each day . . . [i]t is clear that the ordinance does not authorize any such absurdity . . . [t]o enforce this provision, a complaint is required for each distinct violation." Id. at 491-92.

In Twp. of Pennsauken, a business operator was convicted in municipal court for violating town sign ordinances. 160 N.J. at 166-67. Ultimately, the Court held that the municipal sign ordinance applied to illuminated displays installed behind front windows of adult entertainment businesses, and that the municipal sign ordinance did not violate free speech or constituted prior restraint on speech. Id. at 174-79. Moreover, the Court ruled that the municipal fine totaling $65,800 resulting from two convictions were not cruel and unusual

punishment. Id. at 184-85. The Court reasoned that although the amount of the fine for violation of the sign ordinance is large, it is reasonable because it was significantly less than the maximum allowable fine and rationally related to the need to deter future violations by defendant and others. Id.

Here, like in Perrine Terrace Land Co., the penalty provision indicated in the Township's Ordinance stipulates a fine for each day that the violation continues. The penalty for a violation of any provision under the Township of Springfield Ordinance 12-1.9(e) is:

> The contractor and owner shall be provided with oral and written notice of the violation(s), which shall include a deadline to correct the violation(s). If the violation(s) are not cured by the prescribed deadline, a summons shall be issued for $250 per day for every day the violation remains uncured.
>
> [Township of Springfield Ordinance 12-1.9(e)(5)(a)(1) (emphasis added).]

Similar to Perrine Terrace Land Co., where the Court set aside the conviction and penalty judgment because the provision assumes that there was a separate and distinct violation of the ordinance each day, this Court must consider following the principles set by the New Jersey Supreme Court with respect to "per day" penalties.

In contrast, dissimilar to Twp. of Pennsauken, Springfield Center raised no First Amendment speech related claims under the U.S. Constitution.

Regarding the municipal fines, the issue in this instance has no connection to whether the fines levied by the Township constitutes cruel and unusual punishment disproportionate to the offense. While the Court in Twp. of Pennsauken may have found that the imposition of fines for each day defendant continued to violate the ordinance was reasonable, and thus not cruel and unusual punishment, the same rationale is inapposite to Springfield Center. The Court's decision in Twp. of Pennsauken is not a sweeping rule that legitimizes "per day" fines related to municipal violations. The Court merely found that the fines imposed as a result of two convictions at $1,400 per day, for 47 days, totaling $65,800, does not constitute cruel and unusual punishment under the circumstances. Twp. of Pennsauken, 190 N.J. 156 at 184-85.

Perrine Terrace Land Co., never having been overturned, is good law. On the other hand, Twp. of Pennsauken is entirely irrelevant to the matter here. In the initial appeal, the Law Division correctly found that the "every day" fine provision in the Township's Ordinance 12-1.9(e)(2)(a) is improper under N.J.S.A 40:49-5, because the court is bound by a legislative statute that does not authorize an "each day" enforcement of municipal ordinance fines.

Additionally, Perrine Terrace Land Co.'s brief legacy in subsequent cases only points to the uniqueness of the circumstances herein. As such, the Township's questioning of Perrine Terrace Land Co. is illogical and must be

disregarded. Moreover, the New Jersey Supreme Court's decision in Twp. of Pennsauken never expressly overruled Perrine Terrace Land Co., as the cases are separate and distinguishable.

Because the penalty prescribed by the Township's Ordinance exceed in every respect the penalties that municipalities are authorized to prescribe by N.J.S.A 40:49-5, this Court must affirm the Law Division's decision to reduce the fine imposed on Springfield Center.

B. The Appellate Division's Twp. of Deptford Decision is Highly Relevant and Instructive.

The Appellate Division's decision in Twp. of Deptford, albeit unpublished, strongly indicates that the "each day" fine in the Township's Municipal Ordinance 12-1.9(e)(5)(a)(1) exceeds the statutory authority vested by N.J.S.A 40:49-5. In Twp. of Deptford, the Appellate Division confirmed that the Legislature had limited the extent to which a municipality may issue fines when it enacted N.J.S.A. 40:49-5. Id. at 3. The defendants in Twp. of Deptford argued that the continuous nature of the "each day" fine provision rendered it excessive and requested a reduction in penalties based on calculation of hours the Township dedicated to inspecting their property or the number of inspections the Township performed during the violation period. Id. at 3-4.

Ultimately, the Appellate Division determined that N.J.S.A. 40:49-5 contained no authorization for imposing a successive "each day" fine above the

statutory maximum of $2,000 and struck the municipal code as invalid and unenforceable. Id.; See Rumson Ests., Inc. v. Mayor of Fair Haven, 177 N.J. 338, 351 (2003) (finding that a court may declare an ordinance invalid if it is preempted by superior legal authority).

This Court held in Twp. of Deptford that a municipality can "impose an additional fine upon a person for a repeated violation of any municipal ordinance, [but] it does not allow a municipality to repeatedly or continuously fine a person for each day a violation continues." Id. at 5; N.J.S.A. 40:49-5. The court reasoned that imposing an "each day" fine, as opposed to an "each offense" fine, effectively allows the municipality to exceed the allowable statutory maximum directed by the statute. Id.; see also Laurel Mills Sewerage Corp., 46 N.J. Super. at 335 (holding that a penalty provision in the ordinance, being greater than permitted by statute is void because municipalities must comply with statutory authority).

Here, just as in Twp. of Deptford, the Township's ordinance imposes a penalty that exceeds the $2,000 statutory maximum. See N.J.S.A. 40:49-5 (stipulating that an "additional fine" for "repeated violation of any municipal ordinance" may not be less than the statutory minimum of $100 or exceed the statutory maximum of $2,000). At trial, the Municipal Court imposed a fine totaling $67,500 plus $33 in court costs, calculated based on "$250 per day for

every day the violation remains uncured" under Township's Ordinance 12-1.9(e)(5)(a)(1), for 690 days but with a 50% credit, which exceeds the statutory maximum per N.J.S.A. 40:49-5.

In the Law Division's decision to reduce the penalty assessed on Springfield Center to $2,000, Judge Roberts found that the court is bound by N.J.S.A. 40:49-5. Yet, the Township again requests that the Appellate Division assess a penalty above and beyond the threshold allowed under the statutory scope. Defendants sentenced in a municipal court may not be subject to greater sentences on appeal. See State v. Palma, 426 N.J. Super at 514. Hence, this Court cannot assess a penalty greater than the lower court.

As the Twp. of Deptford Court held, a municipality can "impose an additional fine upon a person for a repeated violation of any municipal ordinance," but a municipality cannot repeatedly or continuously fine a person for every day the violation remains uncured. N.J.S.A. 40:49-5 (emphasis added). No statutory basis exists for the imposition of a successive "per day" fine for "every day the violation remains uncured."

Given the Appellate Division's rationale in Twp. of Deptford—because imposing a "per day" fine, as opposed to an "each offense" fine effectively allows the municipality to exceed the allowable statutory maximum of $2,000 for each offense as directed by N.J.S.A. 40:49-5, and also based on the fact that

a "per day" fine is inconsistent with the municipality's statutory authority under N.J.S.A. 40:49-5—this Court must affirm the Law Division's decision to reduce the fine to $2,000, in line with the maximum under the statute.

This Court should reject the Township's effort to re-write history as a means of saving the fines that it levied improperly. The Township erroneously claims a per diem fine for 404 days under the Perrine Terrace Land Co. and Twp. of Deptford standard, based on a preposterous claim that the number of days the Township's Zoning Official, Robert Herbert, worked between December 3, 2021, through October 30, 2023, totaling 404 days, somehow amounted to "each inspection" conducted by the Township. Mr. Herbert allegedly passing by the fence on his way to work is no proof that any inspection occurred. Such a groundless claim is not only wrong, a per diem fine of $250 days for 404 days, totaling $101,000 exceeds the statutory maximum of $2,000 as stipulated in N.J.S.A. 40:49-5. Also, photographs taken by Mr. Herbert on December 19, 2022, do not prove that an inspection occurred or that he investigated the fence on a regular basis. In truth, the Township issued one summons, on one day, for one violation.

Because a per diem fine for 404 days based on "each inspection" that never occurred is unwarranted and beyond the allowable statutory maximum, this

Court must affirm the Law Division's decision to reduce the fine to $2,000, in line with the maximum under N.J.S.A. 40:49-5.

CONCLUSION

For the foregoing reasons, the undersigned, attorneys for Springfield Center, respectfully requests this Court to affirm the Law Division's decision to reduce the monetary penalty to the amount allowed under N.J.S.A 40:49-5.

HILL WALLACK LLP
Attorneys for Defendant-Respondent,
Springfield Urban Renewal Center Corp.

By: *Eric I. Abraham*
Eric I. Abraham

Dated: July 17, 2025

STATE OF NEW JERSEY Plaintiff-Appellant, v. SPRINGFIELD URBAN RENEWAL CENTER CORP., Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001876-24T4 DOCKET NO. IN COURT BELOW: UNION COUNTY CRIMINAL DIVISION MA 6292 Sat Below: Hon. Daniel Roberts, J.S.C.

PLAINTIFF-APPELLANT'S AMENDED REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

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PLAINTIFF-APPELLANT'S REPLY APPENDIX

PRELIMINARY STATEMENT

Plaintiff-Appellant Township of Springfield (the "Township") submits this reply brief in further support of its appeal and in response to the memorandum of law filed by Defendant-Respondent Springfield Urban Renewal Center Corp. (the "Defendant") in opposition to this appeal. In its opposition, the Defendant provides the same arguments articulated in the opinion issued by the court below (the "Law Division") wherein the Law Division reduced the fine assessed against Defendant for violating Township Ordinance 12-1.9(e)(2)(a) (the "Township Ordinance"). Defendant's assertion that the fines imposed by the Springfield Municipal Court (the "Municipal Court") exceeded the maximum allowable penalty under state statute misconstrues the relevant issue at the heart of this appeal. The question is not about comparing the total fine imposed with the $2,000 maximum fine set forth in statute, the question is whether a municipality can designate each day that an ordinance is violated as a separate offense under the ordinance. As a matter of law, the legislative body of the municipality drafting the ordinance is afforded the discretion to define the scope of the violation as well as the "unit of prosecution." In the absence of any constitutional or other express prohibition, a municipality can define: (i) when an offense begins; (ii) when an offense ends; and (iii) when an offense begins anew. Based on the clear language in the Township Ordinance, the unit of prosecution was

to treat each day that a violation existed as a separate offense. Thus, the maximum penalty is not determined by the total fine imposed, but by the amount that is imposed for each day that the violation exists.

In addition, Defendant's continued reliance upon intermediate appellate court opinions and rejection of precedents and holdings from the Supreme Court violates the clear and established rules of precedential authority. The Supreme Court's holdings and determinations constitute binding authority over the holdings issued by panels of the Appellate Division.

Finally, contrary to Defendant's argument, no prohibition exists to bar this Court from reversing the penalties imposed by the Law Division and reinstating the penalties imposed by the Municipal Court. While the Law Division performing a de novo review cannot impose a harsher penalty than imposed by a municipal court, such limitations do not exist for this Court in review of the Law Division's reduction of the penalties imposed on Defendant.

PROCEDURAL HISTORY

The Township references and incorporates the Procedural History set forth in its initial Memorandum of Law in Support of its Appeal. See Pb3[1]-Pb4.

[1] Pursuant to New Jersey Court Rule 2:6-8, "Pb___" refers to Plaintiff-Appellant Township of Springfield's Amended Memorandum of Law in Support of Appeal.

STATEMENT OF FACTS

The Township references and incorporates the Statement of Facts set forth in its initial Memorandum of Law in Support of its Appeal. See Pb5-Pb13.

LEGAL ARGUMENT

EACH DAY THAT DEFENDANT VIOLATED THE MUNICIPAL ORDINANCE WAS A SEPARATE OFFENSE

The keystone of Defendant's opposition is to adopt the same analysis as the Law Division. Specifically, while justifying the Law Division's reliance upon Perrine Terrace Co. v. Brennan, and Township of Deptford v. Malachite Group Ltd. and Deptford Commons, LLC, Defendant also summarily rejects the Supreme Court's holding in State, Tp. of Pennsauken v. Schad. Db13-Db20[2] (citing Perrine Terrace Co. v. Brennan, 101 N.J.L. 487 (Sup. Ct. 1925); Township of Deptford v. Malachite Group Ltd. and Deptford Commons, LLC, 2024 WL 3060544 *1 (N.J. App. Div. Jun. 20, 2024)). Defendant relies on N.J.S.A. 40:49-5 prohibiting fines in excess of $2,000 for violations of a municipal ordinance, but fails to address the appropriate question in this appeal of whether each day that a violation exists constitutes a new violation of the ordinance.

[2] Pursuant to New Jersey Court Rule 2:6-8, "Db___" refers to Defendant-Respondent's Brief in Opposition to Appeal.

A. The Legislative Branch of the Municipality Drafting a Penalty Provision is Afforded Deference to Determine the Unit of Prosecution Including Whether Each Day a Violation Exists Constitutes a Separate Offense

In relying upon Perrine and Tp. of Deptford, Defendant mischaracterizes the proper analysis for calculating Defendant's penalty for multiple violations of the Township Ordinance. The issue is not whether the penalty imposed on Defendant exceeded the maximum penalty allowed for an offense under N.J.S.A. 40:49-5, but instead, the question is what constitutes the unit of prosecution for a particular offense. The issue is whether each day that a violation exists constitutes a separate offense. The starting proposition is that a party cannot receive double punishment for the same offense. State v. Davis, 68 N.J. 69, 77 (1975). However, it is settled law that the legislature defines the "unit of prosecution" and "ordains its punishment." Id. at 77-78; see also State v. Cole, 120 N.J. 321, 326 (1990) (quoting Davis). In fact, deference is afforded the legislative branch because it is the Legislature who is tasked to "devise reasonable means to combat a social evil such as illegal trafficking in drugs and may endeavor to deter the recurrence of the proscribed conduct." Davis, 68 N.J. at 78. And as stated by the Supreme Court:

> [T]here is no question but that the legislature is empowered to split a single, continuous transaction into stages, el[e]vate each stage to a consummated crime, and punish each stage separately.

Id.; see also State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 184 (1999) ("A penalty is presumed valid, and '[u]nless a 'substantial showing' is [ ] made a review court must respect the Legislature's will.'"). Thus, absent any overriding prohibition, the legislature, including a municipal governing body, is empowered and afforded deference to decide what constitutes the scope of a violation. Jackson Holding, LLC v. Jackson Tp. Planning Bd., 414 N.J. Super. 342, 350 (App. Div. 2010) ("A municipality's legislative authority is conferred solely upon its governing body.").

Defendant fails to address the fact that numerous state statutes, regulations and municipal ordinances reflect the legislative intent to treat each day a violation exists as a separate violation. See Pb16-Pb17 (citing N.J.S.A. 27:5-16; N.J.S.A. 34:20-7.1(b); N.J.S.A. 48:3-105(b); N.J.A.C. 5:23-2.31(b)(3); N.J.A.C. 8:62-5.4; Thomas Makuch, LLC v. Township of Jackson, 476 N.J. Super. 169, 180 (App. Div. 2023)). These express penalty provisions reflect clear and plain language that the legislative determination was to treat each day as a separate unit of prosecution consistent with the ability to "split a single, continuous transaction into stages, el[e]vate each stage to a consummated crime, and punish each stage separately." Davis, 68 N.J. at 78.

To explore the limits of this discretion, this Court explained:

> A defendant may not generally be subjected to double or multiple punishment for the same offense . . . But the same conduct may furnish the basis for separate charges for which separate punishments may be imposed. 'To

> determine whether the offenses are the same the test is whether each count requires proof of a fact which the others do not.' . . . For example, if an unlicensed operator of a motor vehicle drove his car at an excessive rate of speed through a red light while intoxicated, this single act might furnish the basis for separate charges against him for which separate punishments might be imposed. Each count would require proof of a fact which the others do not.

State, Borough of East Paterson, Bd. of Health v. Elmwood Terrace, Inc., 85 N.J. Super. 240, 249 (App. Div. 1964) (internal citations omitted). In Borough of East Paterson, this Court examined the penalty imposed on the owner of a 296-unit garden apartment house complex for failing to provide the minimum heating required for seventeen (17) apartments in the complex. Id. at 242. The maximum penalty for the violation was $100. Id. at 248. The apartment owner was fined a total of $1,700 representing the maximum $100 penalty multiplied by the number of apartments which experienced inadequate heat. Id. ("If there were 17 violations, the propriety of the fine must be viewed in the light of the penalty imposed for each separate offense."). In affirming the penalty, this Court concluded that the evidence necessary to establish guilt on any of the separate 17 counts was different from the evidence to prove the violation for the other counts. Id. at 249. Specifically, this Court noted that temperature readings from each separate apartment were necessary to prove all of the counts. Id. Thus, this Court rejected the landlord's argument that his failure to provide sufficient heat was a single violation of the ordinance. Id.

Here, the same analysis applies to treating separate days as separate offenses or separate units of prosecution. To hold otherwise would invalidate each and every statute, regulation, or ordinance treating each day a violation exists as a separate offense. The fact that these statutes, regulations, and ordinances add a temporal element demonstrates the new evidence that would not otherwise exist allowing for treating each day as a separate violation. Within the framework of these offenses, a prosecutor cannot simply show that a violation exists, but the prosecutor must also show how long the violation existed. Thus, the prosecutor is offering evidence that would not otherwise be necessary if the entirety of the timeframe was a single violation.

The most common of life experiences reflect this principle. A driver illegally parks their vehicle, runs into a store for an hour and returns to find a parking ticket. A second driver illegally parks their car, leaves it there for an entire week, and returns to find multiple parking tickets. Both drivers parked their cars illegally, but the second driver did so for a longer period of time. See e.g. Torres v. City of New York through New York City Department, 590 F.Supp.3d 610, 628 (S.D.N.Y. 2022) ("Plaintiffs' culpability increased the longer their cars remained illegally parked."). Thus, the second driver was deemed to have committed multiple offenses. At trial, the prosecutor for the first driver must show only that the car was illegally parked on one occasion. The prosecutor for the second driver must show that the car was

illegally parked and the duration of time for which the car was illegally parked. The testifying officer cannot simply testify that they saw the vehicle illegally parked, the officer must also identify the number of times they saw the vehicle illegally parked.

The record in this case is consistent with the second hypothetical scenario. First of all, the nature and evidence in this case was irrefutable and conceded. The violating fence was never moved during the entire period in question. Defendant somehow mocks the testimony of the Township's Zoning Officer that he made personal observations of Defendant's construction site daily on the way to and from his office which is situated within one block. Db20. Defendant suggests that this testimony could not be deemed as evidence of inspection. Db20. However, Defendant cannot explain what scope of "inspection" is needed. A fence is either erected or it isn't, it does not require a full onsite inspection to see whether a fence is up. Instead, like the officer issuing multiple parking tickets, simply seeing the illegally parked car on multiple occasions for an extended duration is enough of a basis for the issuance of multiple tickets. In fact, the specific requirements within the Municipal Ordinance particularly lend to an interpretation of treating each day as a separate violation. Pa39-Pa40. The requirements in the Township Ordinance include a requirement that:

> (c) the Construction/Renovation Site must be closed, and fence locked, as set forth in this Ordinance **at the end of each work day** and whenever the

> Construction/Renovation Site is not attended to by either the Owner or Contract.

Id. (emphasis added). Thus, the plain language of the Township Ordinance provides for an affirmative duty which occurs on a daily basis further justifying treatment of each day as a separate violation. Id.

Additionally, Defendant erroneously argues that a fine per inspection would also violate N.J.S.A. 40:49-5. Db20. Under Defendant's own logic that Tp. of Deptford should apply, fines per inspection are permissible under N.J.S.A. 40:49-5. Tp. of Deptford, 2024 WL 3060544 at *2 ("With that, the "each day" enforcement manner would, at a minimum, require the Township fine defendants for each complaint, or **alternatively each inspection**, to comply with N.J.S.A. 40:49-5's per offense directive.") (emphasis added).

Similarly, Defendant relies on a misconstrued interpretation of Perrine by hyper fixating on the language of the ordinance at issue and wholly ignoring the fact that the court in Perrine did not find a per day fine was warranted because there was no proof or hearing on whether the violation continued each day. Perrine Terrance Land Co., 101 N.J.L. at 491; see also Pb18-Pb19. Here, there was ample evidence and testimony presented that the fence remained in violation of the Township Ordinance. In fact, Defendant testified as such. See Db7. Defendant's entire defense was predicated on a bogus permit. Id.

Thus, the Township Ordinance requiring securing of a construction site with a fence can legally treat each day that such a fence is missing as a separate violation of the ordinance. The Township's governing body is afforded deference as the legislative branch of the municipal government to frame and identify the unit of violation under the ordinance. In addition, additional evidence which would not otherwise be required allows for treatment of each day as a separate offense. Therefore, the Law Division's rejection of the specific intent to treat each day as a separate offense constitutes an error of law mandating reinstatement of the Municipal Court's penalty.

B. The Supreme Court's Opinion in Schad Has Higher Precedential Authority Than Perrine Terrace Land and Township of Deptford.

Defendant defends its reliance upon Perrine Terrace Land Co. arguing that it was never overturned and that it is "good law." Db16. Defendant goes on to argue that the lack of subsequent cases based upon the holding in Perrine Terrace Land Co. "only points to the uniqueness of the circumstances herein." Id. Defendant's argument, however, is both fundamentally inaccurate and contrary to principles of precedential authority. First, as already articulated, treating each day that violation exists as a separate offense is consistent with existing penalty provisions in statutes, regulations, and municipal ordinances. See Point A, supra. Thus, Defendant's characterization of the Township's ordinance as "unique" is simply inaccurate.

Second, both Perrine Terrace Land Co.[3] and this Court's holding in Tp. of Deptford, are not binding on this Court. David v. Government Employees Ins. Co., 360 N.J. Super. 127, 142 (App. Div. 2003) ("the decisions of one panel of the Appellate Division are not binding upon the remaining panels."). In fact, despite its reliance upon Perrine Terrace Land Co. and Tp. of Deptford, Defendant provides no explanation or justification for this Court's more recent treatment of daily penalties for each day a separate violation. Pb21 (citing State v. Ottilio, 2024 WL 4554208 *1, *4 (N.J. App. Div. Oct. 23, 2024) (upholding fines for each day a violation continued).

Meanwhile, Defendant's attempt to distinguish the Supreme Court's opinion in Tp. of Pennsauken v. Schad lacks any substantive merit. Db15-Db16. Defendant argues that because it did not raise First Amendment speech challenges to the Township Ordinance, the holding in Schad does not apply. Id. Defendant does not, however, explain why that distinction is relevant. Id.

[3] While Defendant notes that the opinion in Perrine Terrace Land Co. was issued by the New Jersey Supeme Court in 1925, Defendant conveniently omits any clarification that before 1948, the Supreme Court was not the state's highest appellate court. See Pra1 (Overview of the Supreme Court, available at: njcourts.gov/public/museum/nj-supreme-court-history#:~:text=New%20Jersey%20has%20had%20a,filing%20conflicting%20Appellate%20Division%20decisions); see also Pra4 (Organizational Chart for Pre 1948 Court System, available at: nj.gov/state/archives/catcourtstructure.html).

In addition, Defendant incorrectly argues that the holding in Schad addressed whether the fines imposed constituted "cruel and unusual punishment." Db16 (citing Schad, 160 N.J. at 184-185). However, Defendant ignores the language of the Supreme Court's opinion wherein it the examined the $65,800 fines at $1,400 per day for 47 days of violations worth of "was significantly less than the maximum allowable fine. . ." Schad, 160 N.J. at 184-185 (emphasis added). These calculations do not simply address whether the penalties were "cruel and unusual," but expressly reiterate a municipality's ability to deem each day that a violation exists as a separate violation of an ordinance. Id. The Supreme Court could only hold that the penalty imposed was "less than the maximum allowable fine" if it approved of the municipality's treatment of each day that the violation existed as a separate offense of the ordinance. Id. In explicitly stating that the penalty imposed was less than the maximum allowable fine, the Supreme Court affirmed the ability for a municipality to treat each day as a separate violation. Therefore, despite Defendant's attempt to distinguish Schad, the Supreme Court's holding applies.

C. The Prohibition on Increasing a Penalty Imposed is Limited to the Context of an Appeal from the Municipal Court to the Law Division

Defendant argues that it "may not be subject to a greater sentence on appeal." Db19 (citing State v. Palma, 426 N.J. Super. 510, 514 (App. Div. 2012)). However, Defendant distorts the caselaw governing this principle, because the prohibition is limited to de novo appeals from a municipal court to the Law Division. Specifically,

the language in Palma states that "[t]he **Law Division** must sentence a guilty defendant anew, and may not increase a custodial term imposed by the **municipal court**." Palma, 426 N.J. Super. at 514 (emphasis added). The Supreme Court imposed this limitation based on its recognition of a distinction between a trial de novo and an appeal based on error. State v. De Bonis, 58 N.J. 182, 188 (1971). As the Supreme Court explained:

> The thought is that where an appeal is a trial De novo, the initial trial is but a 'dry run' if the accused chooses so to treat it, and since the right to and the result of the retrial do not depend upon the existence of error in the trial below, it cannot be said, as it may be with respect to a retrial after a reversal, that the defendant's successful demonstration of reversible error served to give the prosecution a chance to obtain a larger sentence.

Id. Thus, while a defendant in a municipal court appealing to the Law Division is entitled to the protection that he will not face an increased penalty, that protection does not apply on a subsequent appeal based on an error in that sentencing. Id.

Within the context of municipal court appeals examined by the Appellate Division and the Supreme Court, increase to the penalties is allowable when the sentencing was improper. State v. McCourt, 131 N.J. Super. 283, 288 (App. Div. 1974) (increasing a monetary penalty from $25 to $50 by the Appellate Division); See also State v. Pomo, 95 N.J. 13, 17 (1983) (allowing an increased sentence on remand due to a defendant's misrepresentation of his criminal record). In fact, multiple cases have reiterated that resentencing to a greater penalty is allowable

following an appeal and does not run afoul of any constitutional protection. See e.g. State v. Gledhill, 67 N.J. 565, 584 (1975) ("the trial court, invoking the settled rule that 'upon resentencing, the trial court, in the exercise of its discretion, may replace the illegal sentence with a legal sentence of greater severity"); State v. Baker, 270 N.J. Super. 55, 72 (App. Div. 1994) ("Generally, jeopardy attached once a defendant commences serving a term of imprisonment. . . if the original sentence imposed upon a defendant is illegal, the sentence may be corrected at any time, even if it requires an increase in the term of imprisonment."). In fact, the most relevant example is set forth in Schad, where this Court reversed all of the convictions and vacated the fines. Schad, 160 N.J. at 167. In reversing this Court's ruling, the Supreme Court reinstated the fines which were vacated. Id. at 185.

Here, consistent with the governing caselaw, Defendant has paid no fine thus far and as such no jeopardy has yet attached to the penalty imposed. In addition, no legal prohibition exists that would allow for reinstatement of the penalty initially imposed by the Municipal Court. While the caselaw prohibits resentencing that would allow for penalties in excess of what the Municipal Court imposed, on remand no such prohibition exists to imposition of penalties in excess of what the Law Division imposed. In particular, based on the error in the Law Division's analysis of the Township's ability to treat each day of a violation as a separate offense, reinstatement of the Municipal Court's initial penalty does not run afoul of any

constitutional or other protections afforded to Defendant. Therefore, there is no impediment in reinstating the penalty initially imposed by the Municipal Court.

CONCLUSION

For the reasons set forth herein as well as the Township's initial Memorandum of Law in Support of Appeal, the Law Division's rejection of the clear intent of the Municipal Ordinance to treat each day that a violation existed as a separate and unique offense was improper as a matter of law. The clear and unambiguous intent of the Township was to define the unit of prosecution based upon each day that a violation existed and framework expressly deemed allowable by the Supreme Court. The Law Division's reduction of the penalties imposed against Defendant was improper and unsupported by the governing precedential authority. Therefore, reinstatement of the penalty imposed by the Municipal Court is both appropriate and necessary consistent with the express terms of the Township's Ordinance.

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By: _____
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Dated: July 31, 2025