DIANA ALLEGRETTI and CATHERINE FAY, APPELLANTS, v. THE TOWNSHIP OF WANTAGE, WANTAGE TOWNSHIP LAND USE BOARD, MNL FARM LLC, and CLOVE SPRING RANGE, INC., RESPONDENTS.	:SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : Docket No. A-001903-24 : Civil Action : : On Appeal from : Superior Court, Sussex County : Docket No. SSX-L-000126-24 : : Sat Below: : Hon. Stuart A. Minkowitz, A.J.S.C :

APPELLANTS' AMENDED INITIAL BRIEF

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Plaintiffs' Trial Brief cover and tables filed September 29, 2024, included here to show the legal issues raised in the lower court:

The Trial Court decision's Statement of Reasons at Pa30 refers to pages in the Plaintiff's Trial Brief filed in the trial court, which are included herein as follows:

Preliminary Statement

Clove Spring Range, LLC, operates an intolerably noisy commercial gun range, which exceeds permissible noise limits, in a rural residential and agricultural area of Wantage Township, Sussex County, on property owned by MNL Farm, Inc. (MNL Farm.) A commercial gun range has never been a permitted use anywhere in the Township. It also operates a retail shop and events hosting, which are not permitted at this location.

MNL Farm's sole legal basis for operation of these unlawful uses is that it is a nonconforming use. It is not and never has been. No variance has ever been applied for or approved.

This action in lieu of prerogative writs challenges a decision of the Land Use Board of Wantage Township (LUB or Board), denying as "untimely" an appeal and a request for an interpretation. The decision was based on a host of errors including ignoring the burden of proof, a refusal to hear from Objectors to rebut the "untimeliness" claim, and on an egregiously incorrect interpretation of one case. The essence of the LUB decision was that the Objectors had waited too long to bring their applications, and that they offered no reason for the alleged delay. But the LUB ignored detailed evidence submitted to the board, and then specifically denied the request of

the Objectors at the hearing to provide testimony to rebut the spurious claim of "untimely."

With all due respect, the trial court Opinion compounded these errors. It ignored the long-standing, settled and consistent law that a person claiming nonconforming use protection always bears the burden of proof. It ignored the long-standing, settled and consistent law that a permit issued in violation of a zoning ordinance is void ab initio, confers no rights at all on the permit holder and can always be challenged. It never addressed that the operation of the commercial gun range was conclusively abandoned from 2005 to 2015-2016, thus forever terminating any claim to nonconforming use status. It ignored the long-standing, settled and consistent law that a nonconforming use cannot be expanded or intensified without an application to and approval by a land use board for a use variance. The trial court also erred in refusing to allow the record to be supplemented with certifications and evidence from the Objectors detailing their efforts to halt the operations of the commercial gun range to overcome the spurious claim that they were "untimely" in seeking relief from the Land Use Board. We detail other errors below.

There are several distinct periods. The commercial gun range apparently began operation in 1963. By 1968, if not earlier, Wantage

Township had a zoning ordinance and it did not permit the operation of a commercial gun range at this location. In 1979 the Township adopted a comprehensive new zoning ordinance to track the Municipal Land Use Law, which did not permit the operation of a commercial gun range anywhere in the Township. In 2005, the current owner purchased the property, and from 2005 to at least 2015 the operation of a commercial gun range was conclusively abandoned, thus terminating nonconforming use status as a matter of law. In 2015-6 and again in 2020, the operation of the range was significantly expanded and intensified without any semblance of compliance with the zoning ordinance, thus rendering the expansions void ab initio as a matter of law.

Statement Of Procedural History

On March 27, 2023, several neighbors of the commercial gun range, whom we will refer to as the Objectors, filed an application for an appeal pursuant to N.J.S.A. 40:55D-70a, 72, with the Wantage Township Land Use Board. Pa62, and filed the Brief and Exhibits April 3, 2023. Pa79. On June 5, 2023, the Objectors' counsel amended the application to add an application for an interpretation pursuant to N.J.S.A. 40:55D-70b. Pa144. On August 3, 2023, the Objectors' new counsel amended the pleadings to include proof that

the commercial gun range had never been a permitted use and therefore could not qualify for nonconforming use protection. Pa147.

On December 5, the LUB acting on erroneous advice of its counsel decided that the Objectors' applications were "untimely" as "unreasonably" delayed. 2T67:10-13.[1] The LUB also denied the Objectors' request to offer testimony at the hearing to rebut the incorrect conclusion of unreasonable delay. 2T61:21-25, -62:1-10.[2] On February 20, 2025, the LUB issued its resolution of memorialization, Pa45, then voted again and reissued. Pa275.

On March 8, 2024, plaintiffs, who were among the Objectors, filed an action in lieu of prerogative writs, and filed the amended complaint April 22, 2024, challenging the resolution on numerous grounds. Pa321. On October 22, 2024, Pa504, and again on January 7, 2025, Pa54,the trial court denied the plaintiffs' applications to supplement the record to correct errors in the LUB

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[1] The Transcripts in this appeal are cited as follows:
Wantage Township Land Use Board Hearing October 17, 2023, 1Tpage/line;
Wantage Township Land Use Board Hearing December 5, 2023, 2Tpage/line;
Trial Court Hearing on injunction request July 8, 2024, 3Tpage:line;
Trial Court Proceeding Hearing January 10, 2025, 4Tpage:line.

[2] By law the LUB was obligated to issue its resolution of memorialization within 45 days, but it did not. Plaintiffs below were thus compelled to file an action to compel issuance of the resolution, which was voluntarily dismissed when the resolution was issued.

resolution and to include certifications rebutting the LUB conclusion that their applications to the LUB were "untimely." On July 8, 2024, the trial court denied plaintiffs' motion for a preliminary injunction, accepting the LUB's erroneous conclusion that plaintiffs had unreasonably delayed seeking relief. Pa409, and denied reconsideration. Pa413.

The parties, including MNL Farm, filed trial briefs. The trial court heard oral argument on the trial briefs on January 10, 2025. On February 4, 2025, the trial court issued its opinion accompanying the order (Pa28) dismissing the complaint with prejudice with a statement of reasons. (Opinion) Pa30. Plaintiffs filed this appeal on March 3, 2025.

Statement Of Facts

Clove Spring Range, LLC, operates an intolerably noisy commercial gun range in a rural residential and agricultural area of Wantage Township Sussex County, on property owned by MNL Farm, Inc. (MNL Farm). The gun range exceeds ordinance noise limits. Operation of a commercial gun range is not a permitted use anywhere in the Township, and so far as the record shows, never has been.[3] Both Clove Spring and MNL Farm are controlled Mr.

[3] We will refer to both parties as MNL Farm, since nonconforming use status inures to the property. Clove Spring did not participate separately in any of the proceedings below.

Masoud Altirs, who purchased the property (but not the business) in 2005. Pa196.

Some time in the early 1960s the previous owners Edwin and Ruth McGlew began the gun range's then modest commercial operations on their homestead at this site. The entire site is 89 acres. Pa264. The range's website says,

> Established in 1963 and built by the famous Winchester Repeating Arms Company, our exceptional club is located in a bucolic setting surrounded by historical dairy farms, meandering brooks, old forests, and secret fishing holes. [https://clovespringrange.com/pages/about-us (retrieved on April 24, 2024.)]

MNL Farm has contended with no evidence at all that there was no zoning ordinance in the Township before the comprehensive ordinance of 1979. The record proves otherwise. In 1968 the Township prepared a "Zoning Map" which showed that this area was residential, so at least by then, if not earlier, a gun range was not a permitted use. Pa221; 2T11:16-17. As we discuss below, in order to claim nonconforming use privilege, MNL Farm by law must prove that at some point it was a permitted use. It did not and can not. Assertions of counsel are never competent evidence.

Under the MLUL, lawful nonconforming uses or structures on a

property existing at the time a zoning ordinance changes "may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." N.J.S.A. 40:55D-68. If the nonconforming use is abandoned, then its protected status is irretrievably terminated. Here, as we discuss below, the gun range was abandoned during the period 2005 to 2015. The Objectors presented prima facie and persuasive proof that the gun range did not operate during that period, and MNL Farm made no attempt to even offer any evidence to the LUB to meet its burden of proof that the gun range was not abandoned.

In their motion to supplement the record, plaintiffs proffered certifications from several of the gun range's long time neighbors stating that the range was abandoned from 2005, when MNL purchased the property, to 2015. Pa446, 451-452, 456, 469-470, 477, and 489. The court denied the motion to supplement the record. Pa54.

In 2015, MNL Farm applied for permission to greatly expand its operations from the original five stations on approximately ten acres to an entirely new series of stations, including a 16-station clay sport shooting course, on 60 acres. Pa133. It applied again in 2016, and its application plainly said it wanted to “expand,” Pa141, and this time the expansion was

built. In 2020, MNL Farm applied for yet another expansion, to construct a new barn and three sheds. This expansion, too, was built. Both the 2016 and the 2020 expansions were by law "utterly void" and can be challenged at any time.

On March 27, 2023, relying on the (erroneous) advice of the Township attorney, Objectors filed an application to appeal certain administrative decisions by Township officials, pursuant to N.J.S.A. 40:55D-70a, -72. Pa62. By letter dated June 5, 2023, the application was amended to include a request for interpretations of the zoning ordinance pursuant to N.J.S.A. 40:55D-70b. Pa144. The parties submitted various letter briefs and exhibits over the next several months. The LUB held two hearings relevant to this appeal. On October 17, 2023, the LUB met and denied the Objectors' request to issue a subpoena for the noise study commissioned by MNL Farm and shared with Township officials. The reason for the request was that the study would undoubtedly show noise emissions well in excess of those permitted by the Township ordinances and any acceptable measurements of tolerable noise. Pa160; See Certification of Catherine Fay, paragraph 14, Pa448; John F. Fay, paragraph 15, Pa453; Lisa Szalczinger, paragraph 19; Pa474; Steven Szalczinger, paragraph 16, Pa481; 1T14:7-19:8. The study was very relevant

to the issue of whether the Township would ever have permitted such a nuisance anywhere in the Township, let alone at this rural location. The LUB on advice of the Board attorney denied the request. 1T31:6-25, -32:1-4.

On December 5, 2023, the Board met again. The announced purpose of the meeting was to decide if the Board had jurisdiction over the Objectors' applications. The Board attorney had directed the parties to submit brief chronologies of the events relevant to the applications, and both parties did. But without advising the parties in advance, the Board attorney proceeded to advise the Board that pursuant to his manifestly incorrect reading of the case of Sitkowski v. Lavalette, 238 N.J. Super. 255 (App. Div. 1990), the applications had not been brought within a "reasonable" time or in a "timely fashion." 2T67:10-13; voting 2T67:14-25, -68:1-10. In fact, the cases in which the timing of an attempt to halt a nonconforming use are far more concerned with the actions of municipal officials and the property owner claiming nonconforming use status than the actions of Objectors. After some discussion in which Board members expressed concerns about the difficulty of proceedings to decide the applications, and about what might become of other unlawful nonconforming uses, the Board voted to dismiss the applications as untimely. The resolution of memorialization was issued on

February 20, 2024, and again on March 19, 2024, and this appeal followed.

Argument

1. Standard Of Review

In the ordinary course, a land use board's decision will be presumed valid and upheld unless it is arbitrary and capricious or unreasonable or contrary to law. "Arbitrary and capricious means 'willful and unreasoning action, without consideration and in disregard of circumstances." Beattytown Community Council v. Dept. of Environmental Protection, 313 N.J. Super. 236, 248 (App. Div. 1998) citing Worthington v. Fauver, 88 N.J. 183, 204-05 (1982). See also In Re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 386-387 (2013)("arbitrary and capricious" necessarily incorporates a "substantial evidence" requirement).

However, cases of nonconforming uses are entitled to little or no deference. See, e.g. McDowell, Inc. v. Board of Adjustment, 334 N.J. Super. 201, 224-225 (App. Div. 2000), certif. denied, 167 N.J. 88 (2001)(a "board's decision denying prior nonconforming use protection or expansion is entitled to greater deference than a decision finding and protecting a nonconforming use.")

The only contestable "fact" that was applied by the Board was the mere

passage of time between the Objectors' appearance at a Council meeting in 2021 and the filing of the initial application before the LUB in March 2023. Pa62. This finding was not only legally incorrect but not based on any evidence, let alone substantial evidence. The LUB ignored the evidence in the Objectors' chronology of the many steps that the Objectors had taken to halt the operations of the commercial gun range. Pa189. The LUB specifically denied the Objectors' request to testify as to their efforts to halt the commercial gun range operations in that time period. 2T61:21-25, -62:1-10; 2T64:10-14 (LUB attorney Brady); 2T64:7-9, 15-17 (LUB Chair Gill). The trial court denied the plaintiffs' motion to supplement the record with certifications detailing the Objectors' intensive attempts to halt the range. Pa54.

In any event, as we set out in Argument 3, p. 16, the "timeliness" of the Objectors' applications is legally irrelevant. Any permit obtained by MNL Farm was issued in violation of the zoning ordinance and by long-standing and settled law, was void ab initio, could be challenged at any time and conferred no rights whatsoever on MNL Farm.

This court owes no deference to the LUB's or trial court's legal conclusions or interpretations of law, or applications of law to facts. See, e.g.,

Piscitelli v. Garfield ZBA, 237 N.J. 333, 350 (2019); Wyzykowski v. Rivas, 132 N.J. 509, 518-520 (1999); Manaplan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

Thus, no deference is due in this case on any point.

2. The Trial Court Opinion Ignored Or Misapplied The Settled Law Disfavoring Nonconforming Uses. (Argued below as set forth in subsections)

Respectfully, the trial court's rulings consistently ignored or misapplied the law against nonconforming uses.

A. The Trial Court Opinion Ignored And Failed To Apply The Long-standing And Settled Law That Nonconforming Uses Are Disfavored And To Be Reduced To Conforming Status As Soon As Practicable. (Argued below, Trial Brief 1.A, Pa427; 4T6:10-14.)

One overarching principle of our land use law is that nonconforming uses are disfavored because they are offensive to zoning. This is stated again and again in the case law, and plaintiffs vigorously and repeatedly argued this below, but the trial court Opinion never mentioned it. See, e.g., Belleville v. Parrillos, Inc., 83 N.J. 309, 315 (1980). The policy of the law is to restrict, rather than to expand, such uses. Stafford v. Stafford Zoning Board, 154 N.J. 62, 68 (1998); Palatine I v. Planning Board of Tp. of Montville, 133 N.J. 546, 565 (1993). This means that whenever there is any doubt as to a claim of a

lawful nonconforming use, the Board below and this court must resolve all doubts against the claim, and "proceed[] with a caution approaching suspicion." Belleville, supra, 83 N.J. at 316. Accord, Palatine I v. Planning Board, supra, 133 N.J. at 565; McDowell, 334 N.J. Super. at 214; Township of Fairfield v Likanchuk's, Inc., 274 N.J. Super. 320, 328 (App. Div. 1994); Ianieri v. East Brunswick Zoning Bd. of Adjustment, 192 N.J. Super. 15, 21 (Law Div. 1983.). See also Cox & Koenig, New Jersey Zoning and Land Use Administration Sec. 27-1 at 401-402 (2025 Ed.). The trial court's Opinion never acknowledged this and did not apply it.

B. The Trial Court Opinion Erroneously Ruled That Objectors And Plaintiffs Have The Burden Of Proof. (Argued below, Trial Brief 1.B, Pa427, 4T8:6-7, 21-25, -9:1-7, -10:1-14).

During argument at the trial below, the court took the wrong position that the burden of proof was on the Objectors and plaintiffs, simply because they were applicants. 4Tr8:8-11:10. Plaintiffs' counsel informed the court that to plaintiffs' knowledge there was no opinion reported or otherwise in which the burden of proof in a case in which nonconforming status was at issue depended on the procedural posture of the parties. 4Tr8:21-9:7. The court also said it was unfair to place the burden of proof on the party claiming nonconforming use status, to "prove a negative." 4Tr7:10. This is backwards.

A party claiming nonconforming use status doesn't prove a negative, but a positive fact, that it had been a permitted use before a change in zoning. In this case, MNL Farm claimed, with not the slightest scintilla of proof, that there was no zoning ordinance in Wantage prior to 1979.

In its Opinion, the trial court compounded this error. It expressly held that the plaintiffs had the burden of proof, citing to Stafford v. Stafford Zoning Board, 154 N.J. at 69 ("[t]he applicant shall have the burden of proof") (quoting N.J.S.A. 40:55D-68). Pa41-42. This was also a clear error, because Section 68 is the provision allowing certification of a lawful nonconforming use by the property owner claiming that status. The trial court plainly erred in placing the burden of proof on anyone except the property owner.[4]

C. The Trial Court Opinion Ignored That A Person Claiming Nonconforming Use Privilege Must Prove That It Previously Was An Expressly Permitted Use. (Argued below, Trial Brief 1.B, Pa427; 4T8:3-7, 23-25, -9:1-2)

A property owner claiming nonconforming use status always has the burden of proving every element of proof, including in particular the essential

[4] The LUB attorney claimed -- quite incorrectly against the longstanding and consistent holdings of the caselaw – that the Objectors had the burden of proving that the commercial gun range was not a valid nonconforming use. 2Tr23-24. This did not find its way into the Resolution.

predicate proof of previous lawfully permitted use, either by a zoning ordinance, or by a use variance granted by the Zoning Board of Adjustment. There is no other legal basis for finding that a particular use is permitted. N.J.S.A. 40:55D-62, -65, -67; State v. Farmland-Fair Lawn Dairies, 70 N.J. Super. 19, 23 (App. Div. 1961) certif. denied, 38 N.J. 301 (1962). The very definition of a nonconforming use is premised on proof that it was at one time a permitted use. N.J.S.A. 40:55D-5 defines "nonconforming use" as "a use or activity which was lawful prior to adoption, revision, or any amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district" after the change in the zoning code (emphasis added). See also Berkeley Square v. Trenton Zoning Board of Adjustment, 410 N.J. Super. 255, 269 (App. Div. 2009) certif. denied, 202 N.J. 347 (2010); Ferraro v. Zoning Bd. of Keansburg, 321 N.J. Super. 288, 291 (App. Div. 1999); Ianieri, 192 N.J. Super. at 21. In the oft-quoted Ianieri, the opinion by Judge Skillman notes that placing the burden on the owner, even when he faced "difficult proof problems," "comports with the policy of the law not to favor such uses." 192 N.J. Super. at 21. See also Cox & Koenig, New Jersey Zoning and Land Use Administration Sec. 27-2.2, 2.3 at 407-409 (2025 Ed.)("[t]burden of proving the existence of a nonconforming use is, of course, upon the party

seeking such use"); -2.3 (elements of proof). The trial court Opinion never acknowledged this or applied it.

3. The Trial Court Opinion Ignored The Settled And Consistent Law That A Permit Issued In Violation Of A Zoning Ordinance Is Void Ab Initio, Can Be Challenged At Any Time And Confers No Rights On The Permit Holder. (Argued below, Trial Brief 3, Pa427; 4T8:19-22, 4T11:14-22)

A very fundamental error that pervades this case is the error that the Objectors' applications were "untimely," based on an egregious misreading of the long-settled and consistent law.

The LUB Resolution misread Sitkowski v. Lavalette, 238 N.J. Super. 255 (App. Div. 1990). Pa48. The Opinion accepted this misinterpretation. Pa37. The Opinion's error is inexplicable because during oral argument the court did refer to the correct standard, as we discuss below, but the Opinion ignores the settled law.

The Objectors applied to the LUB for both an appeal pursuant to N.J.S.A. 40:55D-72 and interpretation pursuant to N.J.S.A. 40:55D-70b. Pa68. Appeals are normally subject to a 20-day limitation, but the statute does not have any time limit for an interpretation.

The LUB attorney, the LUB resolution and the trial court Opinion all read just one part of Sitkowski and ignored the rest of the case and a long line

of settled authority. All three relied upon that portion of the case that noted the 20 day limitation for an appeal and the lack of any deadline for an interpretation, and held that the that objector failed to bring her appeal within the 20 days, and her request for an interpretation was an unwarranted end run around the appeal deadline. The Objectors' counsel corrected the LUB attorney's misinterpretation, 2Tr31:22-25, -32:1-12 (LUB attorney); 2Tr48:18-23 - 50:14-20 (Objectors' counsel), but the LUB attorney persisted in his error. 2Tr52:16-20. The LUB resolution (prepared by its attorney) repeated its attorney's error: "[t]he Board found that such a delay was not reasonable and the Applicant provided no rationale for the long delay," Pa48, and "[t]he Board found that the Applicant failed to file a timely application to appeal the relevant zoning permits." Pa48. The Board further found that under Sitkowski the "interpretation was not filed in a timely manner." Pa48. The trial court Opinion adopted this misreading. Pa37-38.

This court can read Sitkowski ad nauseam and not find any holding that the objector's delay was "untimely or "unreasonable." The governing law is referenced in the part of Sitkowski ignored by the LUB, its attorney and the trial court.

There are two interests that are considered in the case law: the interests

of the permit holder and the public interest in enforcement of zoning ordinances. The bedrock principle was stated by our Supreme Court:

> Our cases have consistently held that municipal action in the land use control field taken in direct violation of law or without legal authority is void ab initio and has no legal efficacy. So a building permit issued contrary to a zoning ordinance or building code cannot ground any rights in the applicant. [Citations to numerous representative cases omitted.]
> [Hilton Acres v. Klein, 35 N.J. 570, 581 (1961)(emphasis added).]

In all instances, the cases hold that consideration of the zoning ordinance is a key element, if not the most important one. The actions or inactions of the challengers is mostly irrelevant, or only a tangential concern. The focus is on the provisions of the zoning ordinance. The public interest must prevail. This makes the LUB's "timeliness" error, the Opinion's "circumvention" claim and the focus on the Objectors all the more inexplicable. Although plaintiffs brought all these cases to the trial court's attention, its Opinion ignores them and cites only the first part of Sitkowski. Pa35-36.

We begin, as does nearly all of the case law, with the opinion in Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), aff'd, 24 N.J. 327 (1957). The Law Division opinion was by then Judge Joseph Weintraub, who became an Associate Justice of the Supreme Court in 1956 after just six

months in the Superior Court. As is customary, he did not sit on the Supreme Court's consideration of the case.[5]

In Jantausch, a husband and wife obtained a permit from the building inspector to construct and operate a beauty salon in their home, located in a residential district. Neighbors objected. Much of the litigation concerned whether the salon could be considered a "home occupation," as permitted by the ordinance, which is not relevant here. The homeowners claimed to have spent "some $3,000" in reliance on the permit and some of the Objectors were at least aware of the construction. The opinion includes an oft-cited authoritative discussion of the law of estoppel (or laches) to bar a challenge to an unlawful permit. The opinion describes two extremes:

> Our cases clearly settle the controlling principles at the extreme poles of the problem. Where the permit is regularly issued in accordance with the ordinance, it may not be revoked after reliance unless there is fraud. *** On the other hand, where there is no semblance of compliance with or authorization in the ordinance, the deficiency is deemed jurisdictional and reliance will not bar even a collateral attack after the expiration of time limitation applicable to direct review. And reliance in such circumstances has been held not to constitute a special reason within [predecessor to "d" variance statute].
> [Jantausch, 41 N.J. Super. at 94 (emphasis added)(citations omitted).]

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[5] https:///www.njcourts.gov/public/museum/meet-the-justices/chief-justice-joseph-weintraub

The criterion is that there is "no semblance of compliance with or authorization in the ordinance." If the ordinance is plainly violated or ignored, the defect is jurisdictional and that is the end of the inquiry. Such a permit is "void ab initio," Hilton Acres, supra, 35 N.J. at 581, and the property owner's degree of reliance is irrelevant. The opinion then addresses the middle ground:

> But what of the intermediate situation in which the administrative official in good faith and within the ambit of his duty makes an erroneous and debatable interpretation of the ordinance and the property owner in good faith relies thereon?
> [Jantausch, 41 N.J. Super. at 94.]

The criteria are that the official acted "in good faith," that he acted "within the ambit of his duty," that the interpretation of the zoning ordinance, although erroneous was "debatable," and that the property owner relies on the permit "in good faith." Once again, the key is that the ordinance is considered. Thus, in any case in which an administrative action is challenged, the single most important element across all scenarios is that the official must have examined the ordinance.[6]

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[6] The court ordered that the permit be issued because of its ruling on the "home occupation" issues. On appeal, the Supreme Court affirmed on that basis but also approved of the findings on the issues of laches and estoppel. Jantausch, 24 N.J. at 330.

The Jantausch opinion and criteria have been uniformly applied since then. The court will note that Sitkowski contains a full discussion of this decision and Hilton Acres, 238 N.J. Super. at 261-262, and suggests without explicitly holding that the permit fell into the intermediate category, but the LUB and the trial court ignored this.[7]

We discuss a few representative cases. In Hilton Acres, the Court elaborated:

> Nor, a fortiori, may a property owner, by unilateral action, secure a valid nonconforming use based on a violation of the zoning ordinance. Universal Holding Co. v. North Bergen Township, 55 N.J. Super. 103, 111-112 (App. Div. 1959).
> [Hilton Acres, 35 N.J. at 581.]

In Universal Holding, the owner of a large building that had been used for several purposes and was now used for jobbing in one portion and jobbing and manufacturing in the other sued to restrain the municipality from its efforts to halt uses not authorized by the zoning ordinance. The court found

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[7] The narrative of the facts shows that Sitkowski plainly fell within the "intermediate" case. The building's construction complied with building codes and the central zoning issue was whether the lowest floor could have been considered living space and thus could not be considered a "story" within the zoning code's limitation of two and half stories. The permit had therefore been issued "in good faith" by the zoning officer, acting within the ambit of his duty, based on an interpretation of the zoning ordinance which was at least debatable if not actually correct. 238 N.J. Super. at 257-259.

that one portion was not entitled to nonconforming use protection because it had substantially changed from the use employed when the ordinance was adopted. 55 N.J. Super. at 109. As to the other portion, the court held that although the jobbing operations were a nonconforming use, the introduction of manufacturing as well acted to invalidate that status. The court held "[o]ne who is in violation of a zoning ordinance when his use begins may not predicate a protected nonconforming status on such use." Id. at 110. The court also rejected the owner's claim of laches, because of the increase in intensity of use. The court rejected the owner's claim of estoppel, because of the patent violation of a zoning ordinance. "Prior toleration of use in violation of a zoning ordinance, even where a permit has been issued and expenditures have followed, will not estop a municipality from enforcing the ordinance." Id. at 112.

In Howland v. Borough of Freehold, 143 N.J. Super. 484 (App. Div.), certif. denied, 72 N.J. 466 (1976), the court elaborated on what must be shown to conclude that a municipal official was acting in good faith:

> The requirement which we would add (which is suggested by the rationale of Jantausch, …) is the necessity for the appearance of an issue of construction of the zoning ordinance or statute, which although ultimately not too debatable was, when the permit was issued, sufficiently substantial to render doubtful a charge that

> the administrative official acted without any reasonable basis or that the owner proceeded without good faith.
> [Howland, 143 N.J. Super. at 490, emphasis added.]

This holding was quoted and repeated in Township of Fairfield v. Likanchuk's, 274 N.J. Super. at 333. As always, the key determinant is "an issue of construction of the ordinance." The actions of an objector are irrelevant and it is the public interest as expressed in the zoning ordinance that is the preeminent concern.

In Township of Mahwah v. Landscaping Technologies, 230 N.J. Super. 106 (App. Div. 1989), a plaintiff obtained a prepurchase certificate of occupancy from the construction official identifying certain property as being a lawful preexisting, non-conforming use. However, the official later learned that the use had been expanded and required approval from the board of adjustment. The plaintiff filed an action, and on appeal the Appellate Division held that estoppel can not be imposed against a municipality when an individual relies on an official act outside the ambit of his authority. The court held:

> A certificate of occupancy is not a device to assure that use of the property is in conformance with the zoning ordinance of the municipality. We do not perceive how a certificate verifying that a building meets certain construction standards can serve as a reason to believe that the building and land on which it is located

> may be put to a legally permissible use.
> [Township of Mahwah, 230 N.J. Super. at 490.][8]

Estoppel may not be invoked where the municipal official was not acting "within the ambit of his duty" and where the "ordinance clearly prohibits all commercial uses in [the] zone."

In Schulze v. Wilson, 54 N.J. Super. 309 (App. Div. 1959)(opinion by Schettino, J.S.C.), the court applied the "intermediate" test discussed in Jantausch and concluded that the permit should be sustained, because the official had issued the permit in good faith and within the ambit of his responsibilities, and the property owner relied in good faith.

Of particular relevance is the oft-cited Ianieri v, East Brunswick Zoning Board of Adjustment, supra, in which Judge Skillman held that an ordinance which by its terms validated "all existing uses of property" at the time of the ordinance's enactment was unlawful as incompatible with land use law. Specifically, he held that the ordinance was inconsistent with the meaning of a "non-conforming use." Ianieri. 192 N.J. Super at 21. The plaintiff had challenged the zoning board's denial of permission for an antiques business in

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[8] "A certificate of occupancy is not a device to assure that the use of property is in conformance with the zoning ordinance of the municipality." Cox & Koenig, New Jersey Zoning and Land Use Administration, § 12-1.3 at 178 (2025 Ed.).

a residential zone. That business was "not a permitted use under the zoning ordinance then in effect and [the business owner] never applied for a variance." The court held that a municipality could not "grandfather" all existing uses that would become nonconforming when a new zoning ordinance was adopted. The owner claimed that the "grandfathering" was "designed to avoid the difficult proof problems presented in establishing nonconforming uses." Id. at 23. The court held that placing the burden of proof on an owner, even when he faced "difficult proof problems," "comports with the policy of the law not to favor such a use." Ibid. (citation omitted). It would "in effect, result in impermissible spot zoning based upon a landowner's unilateral action in commencing an illegal use." Ibid. (citation omitted).

The owner also claimed that estoppel applied because the plaintiff could have brought the suit earlier. Apart from procedural defects in preserving this defense, Judge Skillman held that "[i]n any event, the enforcement of a zoning ordinance ordinarily may not be prevented on grounds of estoppel merely because a suit to terminated the illegal use could have been commenced earlier." Id. at 25-25, citing Hilton Acres, supra, and Universal Holding, supra.

To sum up, then, the law requires the following:

1. The burden of proof of nonconforming privilege is always on the property owner claiming such privilege.

2. The long-standing and consistent definition of a lawful nonconforming use is a use that was at one time lawful and permitted but by adoption of a subsequent ordinance does not now conform to the ordinance.

3. A permit which purports to grant or recognize nonconforming use status in plain violation of a zoning ordinance is "utterly void" ab initio and grants the owner no rights and may be challenged at any time.

4. A permit which purports to grant or recognize nonconforming use status can not be upheld unless there is at least a debatable issue of construction of the zoning ordinance which can avoid the charge that the official acted without reasonable basis or that the owner proceeded without good faith.

The trial court's Opinion silence on this applicable law is puzzling, because during the trial argument the court extensively referred to the "void ab initio" rule. Addressing the LUB attorney, the court said,

> [h]owever, there is an out in Sitkowski. And I'm trying to see whether, for example, in Sitkowski there were different context [sic] in which it could be revisited notwithstanding the 20-day

> limitation. And that is, where there's special damages over and above the public injury, where the permit is - I'm sorry - where there is no semblance of compliance with the authorization of the ordinance that's deemed jurisdictional and does not bar collateral attack even after the 20 day period.
> [4Tr42:1-12, emphasis added.]

This is plainly a reference to the line of cases such as Hilton Acres .[9] The court also provided this succinct summary: "[w]ell, in Sitkowski it says the timeframe is irrelevant if there's been blatant violation of the ordinance." 4Tr44:21-23. See also 4Tr45:9-13; 46:21-47:7. The court understood the law and persisted in asking these questions, so this omission from the Opinion can not be explained.

Applying these consistent principles to this case proves that operation of a commercial gun range at this location is not and never was a permitted or nonconforming use. The Objectors and plaintiffs have made a timely challenge and the Resolution must be vacated.

4. The Commercial Gun Range Has Not Met Its Burden Of Proof That It Was Ever A Permitted Use: 1963-1968. (Argued below, 4T12:3-4, 4T23:17-21; Trial Brief 1.A., Pa427)

As we have shown, a party claiming the privilege of nonconforming use

[9] The reference to "special damages" is not relevant to the nonconforming status issues, but to claims of private noise nuisance, as the Opinion later clarified. Pa38.

has the burden of proving that it was at one time a permitted use. MNL Farm has not met this burden.

We are concerned here only with the period from 1963, when the gun range apparently began its modest operations on the owners' homestead, until 1968, when a zoning map in the Township Zoning Office shows that this location was zoned Residential. Pa221. No one has been able to produce any zoning ordinance in effect prior to the 1979 comprehensive re-write. Pa220.

MNL Farm has claimed that there was no zoning ordinance at all in 1963. Its only proof is three documents, not one of which proves that there was no zoning ordinance.

There are two statements by the Township Clerk– not a zoning officer – in 1963 and 1967, each carefully worded. Each document purports to say that as of November 30, 1963, Pa171, or June 6, 1967, Pa172, there were no ordinances, etc., "prohibiting, restricting, regulating or in any way pertaining specifically to the establishment, operation or conduct of [a] shooting range as such." (Emphasis added.) If as of those dates, there were no provisions of the Wantage "ordinances" (including zoning or land use ordinances) "pertaining to" shooting ranges, then the Ordinances did not even mention and thus did not permit such uses.

It is important to note what the documents do not say. They do not say "there is no zoning ordinance" or "a commercial gun range is a permitted use."

To best appreciate this, it is also true that as of the dates of Pa171 and Pa172, there were no ordinances, etc., "prohibiting, restricting, regulating or in any way pertaining specifically to the establishment, operation or conduct of" a petrochemical plant or nuclear waste dump "as such." That does not support any inference, let alone prove, that these were ever permitted uses.

Finally, the two statements omit that if there was a zoning ordinance, it would have contained the standard language to the effect that any use not specifically permitted is prohibited. See, e.g., Wantage Zoning Ordinance § 13-4, Pa547; § 13-13.2, Pa548 (both prohibiting any use not specifically permitted by the zoning code); see also N.J.S.A. 40:55D-65a; see also, e.g., Financial Services, L.L.C. v. Zoning Board of Adjustment of Little Ferry, 326 N.J. Super. 265, 274-275 (App. Div. 1999)(prohibiting uses not explicitly permitted). The LUB attorney alluded to this in the trial oral arguments. 4T39:6-20.

Another way of appreciating how these two documents prove nothing is that these statements are equally true today. There is no Wantage Township

ordinance "prohibiting, restricting, regulating or in any way pertaining to the establishment, operation or conduct of a commercial gun range as such." There is as we note above the standard provision that any use that is not expressly permitted is prohibited. Pa547 and Pa548.

We can take this further. A zoning ordinance that did not contain a provision to the effect that any use not permitted is prohibited would be an absurdity. It is absurd to argue or infer that a New Jersey rural municipality would have been capable in 1963 of listing every single use that would be prohibited in each of its zoning districts. That ordinance would have consumed hundreds of pages.

This is affirmed by a 1961 decision of the Appellate Division, State v. Farmland-Fair Law Dairies, 70 N.J. Super. 19 (App. Div. 1961):

> [i]t is apparent that the draftsmen of these zoning regulations, by listing the permitted uses in a residential area, were seeking to regulate and restrict the construction of buildings within that district only to the uses specifically permitted. The statute empowers the borough to so act. N.J.S. 40:55-3 and 40:55-31. [State v. Farmland-Fair, 70 N.J. Super. at 23.][10]

The third document proffered by MNL Farm is just as ineffective. On September 29, 1995, a code enforcement officer and a construction officer

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[10] The text of these since repealed statutes can be found at Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 171 (1952).

stated, “TO WHOM IT MAY CONCERN: Please be advised that Fox Ridge Range, Inc. [the name of the gun range business operated by the McGlews] has been in operation since 1967. They are permitted to continue doing business, including retail sale of Firearms and Ammunition, at their present location.” Pa173. These officials have no authority to opine as to zoning compliance, and in any event, there was a zoning ordinance prohibiting these uses in effect since at least 1968, and so this statement is demonstrably incorrect.

5. The Commercial Gun Range Has Not Met Its Burden Of Proof That It Was Ever A Permitted Use: 1968-1979. (Argued below, 4T12:3-9, 4T23:17-21; Trial Brief 1.A, Pa427)

As Objectors' counsel pointed out to the LUB at the December 5, 2023 hearing, there is a map dated 1968 in the Township Land Use Office which shows the Township's “Zoning Districts.” 2T11:5-15. The map's legend shows “Zoning Districts” with shading markings for “Industrial,” “Multiple Residential,” “Neighborhood Commercial” and “Highway Commercial,” and the notation “Residential - All unmarked areas.” Pa221. The gun range is located in an area that has no markings and is therefore in a “Residential” district. There can be no "zoning districts" without a zoning ordinance. It is therefore conclusively established that as of 1968 the Township had a zoning

ordinance and that ordinance did not permit operation of a commercial gun range or retail shop at this location.

The significance of this cannot be understated. If there was in fact no zoning ordinance in effect until 1968, which as we proved above is incorrect, then this map demonstrates the moment that the commercial gun range became a nonconforming use. No nonconforming use can be expanded or intensified from the scope of operations in 1968 without a variance from the land use board as we discuss below. No variance has ever been applied for or approved. No expansion or intensification of the commercial gun range after 1968 is lawful.

Finally, no one disputes that in 1979 the Township adopted a comprehensive rewrite of its zoning ordinance which largely continues in effect today. No one disputes that under that ordinance operation of a commercial gun range is not a permitted use anywhere in the Township, or that operation of a retail sales shop or events venue are not permitted uses in this district.

6. The Trial Court Never Considered That The Commercial Gun Range Was Conclusively Abandoned From 2005 To 2015. (Argued below, 4T51:2-5, Trial Brief 5, Pa427)

In 2005, the McGlews sold the property (but not the discontinued Fox

Ridge Range business), Pa196-203, to Mr. Altirs, who has never lived at the property and so does not suffer the consequences of the excessive and constant noise. Mr. McGlew swore in 2005 he used his property exclusively as a residence, so his gun range operations had been discontinued. Pa201. From 2005 to at least 2015 operation of the commercial gun range was abandoned.

If a nonconforming use is abandoned, it irretrievably loses its nonconforming status. N.J.S.A. 40:55D-68. By settled law, MNL Farm has the burden of proof that the nonconforming activities were not abandoned. In S&S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford, 373 N.J. Super. 603, 613-614 (App. Div. 2004), the court explained the concept of abandonment of a nonconforming use:

> Abandonment of a nonconforming use terminates the right to its further use. The traditional test of abandonment requires the concurrence of two factors: (1) an intention to abandon, and (2) some overt act or failure to act which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment . . . .
> . . . Temporary non-use does not constitute abandonment. A change in ownership or tenancy does not terminate a nonconforming use . . ..
> . . . [T]he owner must demonstrate that the intention to continue the use is a continuing and definite intention, which must be substantiated by all of the circumstances surrounding the cessation. The owner bears the burden of proof by a

preponderance of the evidence.
[S&S, 373 N.J. Super. at 613-614 (citations omitted; emphasis added.)]

In Villari v. Zoning Bd. of Adjustment of Deptford, 277 N.J. Super. 130, 137 (App. Div. 1994) (opinion, Skillman, J.S.C.), the landowners had abandoned the use of their land as a pig farm for up to fifteen years. The primary basis of this finding of non-use was testimony of neighbors, as is the case here. In that interim, the landowners used the land to grow corn and alfalfa and failed to maintain the fence or enclosed area "in any manner related to the raising of hogs or pigs." Ibid. The landowners argued they always intended to resume pig farming on the property. But the court held that "even if plaintiffs did not have an actual subjective intention to abandon the raising of pigs, we would sustain the [Land Use] Board's decision based on plaintiffs' prolonged cessation of that use." Ibid., emphasis added.

Thus, Villari holds that an extended period of non-use alone can ground a holding of abandonment. Ibid. S&S Auto Sales holds that the landowner must prove a "continuing and definite intention" to resume the nonconforming use. 373 N.J. Super. at 613-614.

Objectors submitted two forms of proof of abandonment to the LUB. First, they submitted two statements from longtime residents whose homes are

adjacent to the commercial gun range. Pa102 and Pa103. Both statements attested that the gun range ceased operations, and that from 2005 to 2016 "[t[here was [sic] no shooting activities I could either hear or see during that period."

The proffered Certifications of Lisa Szalczinger, Pa469-470, §§ 4-6; Scott Paladino, Pa489, §§ 6-7; Todd Turrant, Pa456, § 5; Steven Szalczinger, Pa477, §§ 4-5; John F. Fay, Pa451-2, §§ 6-7 reinforce this testimony, although the court did not allow them when it denied the motion to supplement the record.

The other proofs were the relevant pages from the authoritative directory of the National Skeet Shooting Association. Pa104-132. The entries for this range in these annual publications are summarized as follows:

Year	Name of range	Location	Owner	Hours of operation
2004	Fox Ridge	Wantage	McGlew	[Specified]
2005	Fox Ridge	Wantage	McGlew	[Specified]
2006	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2007	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2008	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2009	Clove Spring	Secaucus	Altirs	"Not Available Yet"

2010	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2011	---------- No Listing ----------			
2012	Clove Spring	Secaucus	Altirs	[Blank]
2013	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2014	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2015	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2016	Clove Spring	Secaucus	Altirs	"Not Available Yet"
2017	Clove Spring	Secaucus	Altirs	"Not Available Yet"

Ten plus years is certainly a "prolonged cessation of [the] use," more than enough to satisfy proof of subjective intent to abandon. Villari, supra, 277 N.J. Super. at 137. For the years 2003-5, the address is given as 44 Clove Road, Wantage, the current address. The McGlews then sold the property to MNL Farm but not the commercial gun range, which had been discontinued. Pa201. MNL Farm did not resume any operation of the commercial gun range. For the years 2005-8, the address is given as "245 Secaucus Road, Secaucus NJ." For 2009 and after, the address is given as "3 Empire Boulevard, South Hackensack NJ," which is the current address of the current registered agent for service of process for both MNL Farm and Clove Spring. This is no gun range at all.

MNL Farm did not even attempt to overcome these proofs, even though by law it has the burden of proof. It submitted just one document to the LUB. Pa204. This is merely a certificate of occupancy for "House Addition - Rear Porch: 2nd Floor Study Addition New Bedroom Dormer." This has nothing to do with any commercial gun range. In any event, "[a] certificate of occupancy is not a device to assure that the use of property is in conformance with the zoning ordinance of the municipality." Cox & Koenig, New Jersey Zoning and Land Use Administration, § 12-1.4 at 178. (2025 Ed.). Accord, Twp. of Mahwah v. Landscaping Techs., Inc., 230 N.J. Super. at 109.

The trial court never addressed this issue at all. This crucial because abandonment means no commercial gun range operations of any kind were permitted thereafter.

7. There Is No Valid Certification Of Nonconforming Use For A Commercial Gun Range, But There Are Two Admonitions In Writing That No Expansion Is Permitted Without A Variance. (Argued below, Trial Brief 1.C. and D., Pa427)

N.J.S.A. 40:55D-68 of the MLUL allows a party claiming nonconforming use status to obtain a certificate of that status. The provisions are straightforward. If the application is made within one year of the passage of the law in 1975 (or within one year of the creation of the status), the

application can be made to the municipal zoning officer. After that, no exceptions, the application must be made to the zoning board. It also provides that "[t]he applicant shall have the burden of proof." Two applications were made for such certifications for this commercial gun range. The first was never approved and the second was made after the passage of a year to the zoning officer and so was void ab initio. Pa97.

However, in each instance, the commercial gun range's owner was admonished in writing that no expansion would be permitted without a variance.

In 1979, Edwin McGlew applied for a "registration" of nonconforming use, using a manifestly deficient Township form. Pa97. Of relevance to the law concerning nonconforming uses, this application did not request, nor did Mr. McGlew provide, any information as to whether the commercial gun range was ever a lawfully permitted use, an essential element of proof for lawful nonconforming use protection. Instead, the application only asked the applicant to state that the "property has been continuously as stated [above] up to the present without interruption." But in Ianieri, supra, 192 N.J. Super. 15, the court held that a municipality may not validate nonconforming use protection based merely on prior use, so the application is legally invalid.

In any event, so far as the record is concerned, no certificate or permit was ever in fact issued as a result of this application. Finally the application also contains the first of two specific admonitions that were flagrantly violated. It states, "I understand that the uses set forth above are not in conformance with the Zoning Ordinance and that I cannot expand the uses stated unless I have first applied for and received a variance from the Wantage Township Zoning Board of Adjustment." Pa97.

The record contains a second defective application, this time for a zoning permit, in October 2005, shortly after Mr. Altirs purchased the property. Pa100. But this application was not made to the zoning board and so is legally ineffective. But the true relevance for this document, addressed directly to MNL Farm's principal, Mr. Altirs, is that it clearly states, "Conditions of Use are: EXPANSION OR INTENSIFICATION NOT PERMITTED WITHOUT BOARD APPROVAL." Pa100. This condition was blatantly violated. The trial court Opinion does not mention these admonitions.

8. MNL Farm Unlawfully Expanded And Intensified The Operation Of A Commercial Gun Range In 2015-16 And Again In 2020, And No Jurisdictional Notice Was Given. (Argued below, 4T50:17-25, -51:1-2; 4T25:2-6; Trial Brief 6 and 7, Pa427)

The law is clear and consistent, and the cases are legion, that a lawful nonconforming use can not be expanded or intensified without application for and grant of a "d" use variance, no exceptions. See the extensive discussion and cases cited in Cox and Koenig, New Jersey Zoning and Land Use Administration, Ch. 33, concerning unlawful expansion of nonconforming uses (2025 Ed.).

In the case of Stafford v. Stafford Zoning Board, 154 N.J. at 73, the Supreme Court held that proper notice is required for any application for certification of nonconforming use protection; that the requirement for such notice is jurisdictional, which voids ab initio any permit or proceeding, and the holding is retroactive. The Court also held that the MLUL requires jurisdictional notice for expansion of a nonconforming use.

There is simply no disputing that MNL Farm undertook two substantial expansions of its commercial gun range operations in 2015-2016 and again in 2020. It made no attempt to deny this at the LUB and indeed, MNL Farm presented some of the proofs.

The architect's 2015 application for a zoning permit is for "New outdoor Pavilion 3 new storage sheds (10' x 10') & Sporting Clays Course (see attached)." Pa139. Those drawings show that the operations of the commercial gun range are being expanded well beyond the original ten acres or so to encompass the entire property. Pa136. One of the drawings that accompanied the application is entitled, "ALTIRS NEW 60+ ACRES EXPANSION AREA FOR 16 STATION CLAY SPORT SHOOTING COURSE." Pa134. That's a 500% increase in range size, and a 220% increase in shooting stations. In 2016, the architect applied for a further unlawful expansion, to "[e]xpand the use of the clubhouse and a new pavilion for carts (Outdoor-open.)" (Emphasis added.) Pa141. This application was denied. Pa142.

In 2020 MNL Farm applied for a further expansion consisting of construction of a pole barn, specifically identified on the second page of MNL Farm Exhibit J as "[x] New Building." Pa189. MNL Farm obtained a construction permit for this Pa213 and 214.

Whatever else one may say about these and other permit applications proffered by MNL Farm for these expansions, not a single jurisdictional notice was ever given, no use variance was applied for or approved, they were

all in blatant violation of the zoning ordinance, and they were all in blatant violation of the two written admonitions that no expansion would be permitted without a variance from the zoning board. They are all utterly "void ab initio," subject to challenge at any time and conferred no rights on the property owner. E.g., Stafford v. Stafford Zoning Board; Hilton Acres v. Klein. That is the end of the inquiry. The public interest in proper zoning prevails.

9. The Land Use Board And The Trial Court Erroneously Prohibited Objectors From Offering Evidence To Rebut The LUB's Conclusion That Their Applications Were "Untimely." (Argued below, 2T62:11-14, 2T61:21-25; Trial Brief 1.B. at p. 22-23, Pa427)

A truly Kafkaesque aspect of the errors below is the central rationale for the LUB's decision and the trial court's affirmance: that the parties seeking to halt the commercial gun range had "unreasonably" delayed seeking relief at the LUB. As we have proven in this brief, this is in fact utterly irrelevant to the permits issued to MNL Farm in blatant violation of the zoning ordinance and without jurisdictional notice.

During the LUB hearing on December 5, 2023, after the discussion about the Objectors' "unreasonable delay," the Objectors' counsel specifically requested that some of the Objectors who were present be permitted to testify

about their efforts during the period between their first appearance at the Township Council to the filing of the first application. 2T59:2-5, -8-11, 2T62:11-14. The LUB on specific advice of its attorney refused. 2T62:15-23.

To add insult to injury, the board resolution claimed in paragraph 8 that "the Applicant provided no rationale for the long delay." Pa48. The Board refused to permit the Applicant to provide a rationale for the delay.

The trial court Opinion followed this path of circular reasoning. It said, "the Board did not entertain testimony from anyone because the December 5, 2023 hearing was solely to determine the Board's lawful jurisdiction." Pa41. But the Board claimed it lacked jurisdiction precisely because the Objectors "provided no rationale" for the delay. The Opinion said that the plaintiffs offered "no reasonable explanation for the delay, except that they were attempting other means to stop the development." Pa38. The Opinion does not explain why pursuing other means short of litigation is not reasonable. The Opinion approved the Board's action that essentially said "we are denying your request for reasons we don't care to hear about." That is the essence of arbitrary and capricious decisionmaking and denial of due process. As the trial court Opinion acknowledges (and cases too numerous to cite hold), due process requires adequate notice and an opportunity to be heard. The

Objectors had tried in earnest to exhaust all the available local informal remedies first before litigation.

The message of the Board and Opinion decision is unhelpful. It sends a strong signal that if others find themselves trying to stop an unlawful zoning violation, they had better skip any negotiations, or any requests to the municipality to take action, and just hasten into court, needlessly requiring fees and costs and adding to the courts' caseloads.

The plaintiffs requested that the trial court permit the supplementation of the record in order to provide the proof of active efforts to halt the range. Certification of Catherine Fay, Pa448, §§ 13-16; Allegretti Certification, Pa441-442, § 17; Certification of Mary Passaro, Pa486-487, §§ 8-9; Certification of Lisa Szalczinger, Pa474-475, §§ 19-20; Certification of Scott Paladino, Pa490-491, §§ 10-11, and Pa495-497, §§ 21-25; Certification of Lawrence Nelson, Pa462-465, §§ 11-15, and Pa466-467, §19; Certification of Steven Szalczinger, Pa480-482, §§ 15-16, 18; Certification of John F. Fay, Pa453-454, §§ 15-16. The court denied the motion, simply holding that in the normal course a prerogative writ action is tried on the record before the

municipal agency. Pa58.[11] That is an abuse of discretion given the LUB's actions and especially the Opinion's conclusion.

10. The Court Should Enjoin The Operations Of The Commercial Gun Range Unless And Until A Use Variance And Other Permissions Are Obtained. (Argued below, Trial Brief at 8, Pa428)

We have proven in this brief that from its inception no commercial gun range was permitted to operate at this location, or, indeed, anywhere in the Township. We have proven that the commercial gun range was abandoned from 2005 to at least 2015. We have also proven that as of no later than 1968, operation of a commercial gun range was a nonconforming use and so could not be expanded. We have proven that any and all permissions obtained for the substantial expansions in 2015-2016 and again in 2020 were all obtained in blatant violation of the zoning ordinance and no jurisdictional notice was given, and so all are void ab initio and can be challenged at any time and confer no rights on the owner.

In all instances, for any issue, the law squarely places the burden of proof on MNL Farm and it has not met that burden.

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[11] The trial court Opinion erred when it states that “Exhibit 3" was not part of the record before the LUB. Pa58. In fact, LUB counsel included the photo of the LUB’s 1968 Zoning Map, Pa221, in Exhibit L, its compilation of the record at the LUB. Pa220.

Our proofs should compel this court to enjoin the operations of the commercial gun range unless and until a use variance and other necessary permissions are obtained.

The trial court denied our request for a preliminary injunction based on the erroneous finding that the Objectors had delayed bringing their applications and therefore had not suffered irreparable harm. As this brief proves, that is a due process violation.

When this court considers a request for permanent injunctive relief, it is

> guided by the precepts discussed in Sheppard v. Township of Frankford, 261 N.J. Super. 5, 10 (App. Div. 1992), in which we adopted the guidelines for permanent injunctive relief, as set forth in the Restatement (Second) of Torts 936 (1977). Sheppard, 261 N.J. Super. at 10. This non-exclusive list of factors includes: (1) the character of the interest to be protected; (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies; (3) the unreasonable delay in bringing suit; (4) any related misconduct by plaintiff; (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted; (6) the interests of others, including the public; and (7) the practicality of framing the order or judgment. [Ibid. (citing Restatement (Second) of Torts 936).]
> [Paternoster v. Shuster, 296 N.J. Super. 544, 556 (App. Div. 1997)(citations omitted).

(1) As to the first interest, being compelled to put up with a constant barrage of noise from the commercial gun range is certainly harmful. See, e.g., Township of Hanover v. Town of Morristown, 108 N.J. Super. 461 (Ch.

Div. 1969), a case involving airport noise. That court said,

> [n]oise, including aircraft sound, is no less an environmental pollution than the smog and smoke that pollutes the air or the debris which poisons our lakes and rivers. It is the most difficult form of pollution to control. No one would expect that man should continually live inside his home with all doors and windows tightly shut or walk the streets or the fields with fingers in his ears or wear acoustical ear muffs, such as those employed on the flight line at an airport. * * *Each of the residents was most annoyed that complaints, when registered with the Airport Management or F.A.A., seemed to fall on deaf ears. They wanted action and received none, although it was apparent to them that violations of Airport rules and F.A.A. regulations had been committed on numerous occasions.
> [Id. at 469- 470.]

In their certifications to this court, the plaintiffs and other neighbors have described the unbearable burden of the constant noise and all the various efforts they made to halt or at least mitigate the excessive noise. When they tried to negotiate with the gun range's owner, they were met with hostility. Pa484 (Passaro); Pa468 (Lisa Szalczinger); Pa488 (Paladino); Pa459 (Nelson); Pa455 (Turrant). And the right to enjoy and defend property is enshrined in our Constitution. N.J. Const. art. 1, § 1.

The other Sheppard factors all support issuance of a permanent injunction unless a use variance and other relevant permissions are lawfully approved.

(2) The relative adequacy of the injunction to the plaintiff as compared with other remedies. Monetary damages are plainly inadequate to compensate for such continuous unlawful and unconstitutional destruction of the enjoyment of one's own home. The Objectors' other attempts to remedy the obnoxious noise were unsuccessful.

(3) Unreasonable delay in bringing suit. The emphasis is on the word "unreasonable." Plaintiffs were not in fact "delaying" at all, but persisted in seeking any remedy short of expensive, time-consuming and burdensome litigation. A long and consistent line of cases holds that a zoning or building permit issued in violation of the zoning code may be challenged at any time. See section 4 of our argument above.

(4) Related misconduct by plaintiff. There is none.

(5) The comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted, and the interests of others, including the public. Here is the heart of the matter, and the Supreme Court has conclusively settled it in Hilton Acres, supra, and succeeding cases. A permit issued in violation of the zoning ordinance "cannot ground any rights in the applicant." 35 N.J. at 581. As against the substantial rights of the adjacent property owners to quiet enjoyment of their homes, MNL Farm has no rights

from the unlawful permits. As against MNL Farm's unlawful operation of a commercial gun range, the public interest of the residents of Wantage in the enforcement of their entirely reasonable zoning ordinance "completely predominates."

Indeed, MNL Farm comes to this court with unclean hands, having flouted the law in all the respects set out in this brief. A court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." Faustin v. Lewis, 85 N.J. 507, 511 (1981). See also 2 Pomeroy, Equity Jurisprudence, § 397 (5th ed. 1941); quoted in Hageman v. 28 Glen Park Associates, 402 N.J. Super. 43 (Ch. Div 2008).

MNL Farm's unlawful behavior with respect to its claim of nonconforming use permeates this case, and in particular its unlawful expansions, thus justifying the application of the unclean hands doctrine and weighing the equities strongly against it.

Conclusion

For the reasons set forth in this brief, plaintiffs respectfully request that this court reverse the opinion of the Law Division and vacate the resolution of the Wantage Township Land Use Board denying the applications for an appeal and interpretation; adjudge and declare that the operation of a

commercial gun range at the location of MNL Farm is not and has not ever been a valid nonconforming or permitted use; adjudge and declare that operation of a commercial gun range was abandoned as a matter of law in 2005 to 2016; adjudge and declare that any and all expansions and intensifications are void ab initio as a matter of law; and permanently enjoin all operations of Clove Spring Range unless and until a variance and other permissions are obtained.

Respectfully submitted

/s/ Peter Dickson

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DIANA ALLEGRETTI and CATHERINE FAY, Appellants, v. THE TOWNSHIP OF WANTAGE, WANTAGE TOWNSHIP LAND USE BOARD, MNL FARM LLC, and CLOVE SPRING RANGE, INC. Respondents.	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** Docket No. A-001903-24 Civil Action On Appeal from Superior Court, Sussex County Docket No. SSX-L-000126-24 Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.

BRIEF OF RESPONDENTS MNL FARM LLC AND CLOVE SPRING RANGE, INC.

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PRELIMINARY STATEMENT

This is an action in lieu of prerogative writs initiated by Plaintiffs/Appellants to challenge a denial by the Wantage Township Land Use Board (the "Board") of an "application" that they attempted to pursue. They applied to the Board in March, 2023 in an attempt to effectively shut down a gun range that has been operated by Respondents MNL Farm LLC ("MNL") and Clove Spring Range, Inc. ("Clove Spring") (collectively, "MNL/Clove Spring") and their predecessors in title since at least the early 1960s. The gun range use pre-dated the enactment of a zoning ordinance in the Township of Wantage, and has continually been recognized by the Township as a valid, pre-existing, non-conforming use. Appellants did not agree that the use met the qualifications of a valid, pre-existing, non-conforming use. They sought a determination to that effect from the Board, and they also sought, among other things, to challenge several permits issued by the Township for facilities located on the property, with the last such permit having been issued in 2020.

Appellants purported to file their application with the Board pursuant to N.J.S.A. 40:55D-70a and b. Section (a) gives a board of adjustment the power to decide an appeal alleging that an error was made in any order, decision, or refusal made by an administrative officer based on or made in enforcement of a zoning ordinance. N.J.S.A. 40:55D-72a requires that such an appeal be filed within 20 days of the date of the decision being appealed. Section (b) allows the board of

adjustment to "[h]ear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance…." (Pursuant to the authority granted by N.J.S.A. 40:55D-25, there is no separate board of adjustment in the Township, and all applications that would typically be within the jurisdiction of either a planning board or board of adjustment are heard by the Land Use Board.)

The Board dismissed the application made by Appellants, on the sole basis that the application was not cognizable under either N.J.S.A. 40:55D-70a or b, and that it therefore lacked jurisdiction. Although Appellants submitted various documents to the Board in support of their claims, no hearings or testimony were conducted by the Board relating to them.

Appellants challenged the Board's determination by filing an Amended Complaint in Lieu of Prerogative Writs pursuant to R. 469-1 *et seq.* In an Order and accompanying Statement of Reasons issued by the trial judge, Honorable Stuart A. Minkowitz, A.J.S.C. dated February 4, 2025, the trial court upheld the determination by the Board, agreeing that it lacked jurisdiction. As in the case of the Board, no hearing or testimony was conducted by the trial court relating to the claims of Appellants which prompted them to file their action in the first place.

The sole issue before this Court is whether the Board and the trial court correctly ruled that the Board lacked jurisdiction over the Appellants' claims. While

the underlying arguments and claims made by Appellants may have some relevance as to whether the Board had jurisdiction, no determination was ever made by either the Board or the trial court on the merits of those claims, and they are accordingly not before this Court. (Because the Appellants do attempt to raise them as separate issues as part of this appeal, MNL/Clove Spring may necessarily have to address them, at least briefly, as discussed in the Legal Argument section of this brief.) It is respectfully submitted that this Court should affirm the findings by the Board and the trial court that the Board lacked jurisdiction. If it does so, the case will not meet the criteria for an action in lieu of prerogative writs, with no other issues left for this Court or the trial court to decide, and it should simply dismiss the appeal and the Amended Complaint.

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

MNL is a limited liability company organized under the laws of the State of New Jersey that owns the subject Property. The Property is approximately 89.50 acres in area and surrounded by woods and open space, with residential properties generally located adjacent thereto, which were mostly developed and used residentially well after the Property began to be lawfully used as a shooting range and firearms and ammunition-sales facility and business (the "Lawful, Certified, Pre-Existing, Non-Conforming Use or "Lawful Use") and after this use of the Property as a shooting range and sales facility was certified and confirmed as a legal one by the Township. Clove Spring is a corporation organized under the laws of the State of New Jersey operating the Use. The Lawful Use of the Property utilizes approximately 29 acres. Mr. Masoud Altirs ("Altirs") is the principal and controlling member and shareholder of MNL and Clove Spring.

MNL purchased the Property from Edwin N. McGlew and Ruth A. McGlew (the "McGlews" or the "Prior Owners") by Deed dated July 8, 2005, recorded at Page 00204 of Book No. 02954 in the Sussex County Clerk's Office Book of Deeds (P197a). The Property was conveyed by the McGlews to MNL pursuant to a Contract for Sale and Rider to Contract executed between Altirs and the McGlews dated April 20, 2005 (the "Contract"). Pursuant to the Contract, Altirs also acquired the right, title, and interest in the name "Fox Ridge Range" from the McGlews, as

Fox Ridge Range, Inc. was the entity owned/controlled by the McGlews that operated the Lawful Use of the Property prior to Clove Spring. In May and September of 2005, Altirs created the Clove Spring entity (with Fox Ridge Range registered as an alternate name) to continue the operation of the Lawful Use (P195a). The Lawful Use dates back at least to 1963 and has continued to the present. It was never destroyed, abandoned or intended to be abandoned.

The Township has certified the legality of the Lawful Use of the Property, and approved all work performed by MNL/Clove Spring at the Property. As set forth in documentation filed with the Board, all of which is part of the record, and also with the trial court in this litigation, the Township has issued the following documents certifying as to the legality of the Lawful Use of the Property and work performed by MNL/Clove Spring in furtherance of same:

(1) Exhibit PR-101 submitted by MNL/Clove Spring to the Board (P171a)[1] is a Township Clerk certification that states:

> "**THIS IS TO CERTIFY**, that there are, as of this date No ordinances in force in the Township of Wantage, County of Sussex, State of New Jersey, prohibiting; restricting; regulating; or in any way pertaining specifically to the establishment, operation or conduct of shooting ranges as such.
>
> **CERTIFIED** by me this 30th day of November, 1963. Signed by Nelson J. Struck, Wantage Twp. Clerk (emphasis added)."

[1] "PR" references are to submissions made to the Board. Those cited herein were included in Exhibit G that was submitted by MNL, and they are included in Appellants' Appendix at P171a through P176a and P97a, P101a, and P133a.

(2) PR-102 (P172a) is another Township Clerk certification certifying the legality of the Lawful Use. It states and certifies:

> "**THIS IS TO CERTIFY**, that there are as of this date NO ordinances or parts of ordinances in force in the Township of Wantage, County of Sussex and State of New Jersey, prohibiting; restricting; regulating; or in any way pertaining specifically to the establishment, operation, or conduct of shooting ranges as such. **CERTIFIED** by me this 6th day of June, 1967." Signed by Nelson J. Struck, Wantage Twp. Clerk. (emphasis added)."

(3) PR-103 (P173a) certifies and authorizes continuation of the Lawful Use, stating,

> "TO WHOM IT MAY CONCERN:
>
> Please be advised that Fox Ridge Range, Inc. has been in operation since 1967.
>
> *They are **permitted** to continue doing business, including the retail sale of Firearms and Ammunition, at their present location*." (emphasis added).

It is signed Nicholas Frasche, Code Enforcement Officer – 9/29/95 and signed Victor J. Dai, Construction Official.

(4) PR-104 (P97a) is yet another Township registration and approval documenting and confirming that the Lawful Use of the Property is legal and permitted that was issued to the Prior Owners. It contains a note at the top of the document, stating "OK," i.e. confirming the legality of the Use.

(5) PR-105 through PR-109 (P101a; P133a; P174a through P176a) are other Township records that memorialize and confirm that the Township recognizes the Lawful Use as a legal one, and constitute *prima facie* evidence of its legality.[2] These documents were issued to MNL/Clove Spring, after they diligently sought Township confirmation and approval regarding certain structures and areas on the Property utilized in connection with the Lawful Use. For example, the Township zoning permit dated October 6, 2005 (P101a), confirms, memorializes and certifies that the trap, skeet, rifle shooting range and sale of associated items at the Property are a legal and valid pre-existing non-conforming use. In fact, Altirs purchased trap and skeet equipment from the Prior Owners when he purchased the Property from them. P1331, P174a, P175a and P176a confirm the approval of permitting for new storage sheds and a sporting clay stations course as set forth on two maps submitted to the Township Zoning Officer, and referencing plans showing the three sheds or pavilions and the location of this shooting clay course on the farm. Note that P175a contains the signature block for the Zoning Officer and the Construction Code Official and includes their initials confirming the approval. The plain meaning of

[2] N.J.S.A. 40:55D-68 authorizes application to a municipal zoning board of adjustment for certification that a use existed before the adoption of a municipal ordinance that rendered it nonconforming. While MNL/Clove Spring have not made such an application, it is of no consequence in the context of this litigation. A form of certification had already been obtained multiple times from an appropriate Township official before the 1975 adoption of N.J.S.A. 40:55D-68 and its creation of a procedure for obtaining certification. Moreover, Appellants presented no evidence that meaningfully rebuts the lawful pre-existing use documentation that was issued by the Township numerous times as cited herein and as filed with the Board and the trial court. It is also clear based on the record below that the Township has not challenged or even questioned the legality of the Lawful Use.

the language of these documents authorize and confirm the legality of the Lawful Use. As addressed in Point II below, the existence of a written zoning ordinance that at one time specifically permitted the Lawful Use that was subsequently zoned into nonconformity is not required. The Lawful Use did not become nonconforming until 1979 when the Township adopted a Zoning Ordinance so providing. In addition, the Township Construction Official issued UCC Certificate of Occupancy No. 06-684 for rear porch (deck) and second story building additions to the house at the Property (the "2007 CO") (P205a), and in December 15, 2015, the Township Construction Official issued Construction Permit Notice No. 20154354 (P140a and P212a) confirming approved permitting for the outdoor pavilion and storage sheds (the "Outdoor Pavilion and Storage Shed Permit Approval Notice"). On May 11, 2020, the Township Construction Official issued Construction Permit No. 20204220 (P214a) for the erection of a 40' x 60' pole barn at the Property (the "Pole Barn Permit").

All of these documents are official Township records that memorialize the Lawful Use of the Property as one that has been operating legally and continuously since 1963. Contrary to Appellants' assertions, the Township seems to have adopted its first written municipal zoning ordinance in 1979, sixteen (16) years after the issuance of the first Township document approving, permitting and certifying the legality of the Lawful Use of the Property. P171a. This is not uncommon in Sussex

County, and is not a basis for invalidating the Lawful Use which was, on multiple occasions, approved and certified as a legal use in written documents such as those cited above. Unlike many municipalities that do not possess records related to the legal status of certain uses of property that commenced long ago and prior to the adoption of a written municipal zoning ordinance or other codified land use regulations, Wantage possesses and maintains comprehensive records certifying the Lawful Use of the Property as legal and permitted, and since 1963 has always certified, recognized and treated the Lawful Use accordingly. Its local authority should be respected, and it should be given the appropriate deference as it relates to its certifying of the Lawful Use. It is clear that the Lawful Use pre-exists and is exempt from use provisions of the Township's current R-5 Residential Environs Zone District ordinance, where the Property is now located (the "Current Ordinance"). MNL/Clove Spring agree that under the Current Ordinance, a new shooting range or associated gun and ammunition sales facility is not a permitted use. However, the Lawful Use is not a new one, and as currently operated and constituted does not require "use" variance relief pursuant to Section 70d of the MLUL. The Lawful Use is exempt from the Current Ordinance pursuant to N.J.S.A. 40:55D-68, as described in further detail below. It is also clear that all permits and approvals for work performed at the Property in connection with the Lawful Use

were duly sought by MNL/Clove Spring and then approved and issued by the Township, as reflected in the record below and summarized above.[3]

While Appellants may have previously complained to the Township about the Lawful Use of the Property, they failed to file any formal appeal or application until their untimely "application" to the Board in 2023, which was filed on or about March 27, 2023 (P64a) essentially *three years* after the last permit / approval for work at the Property was issued to MNL/Clove Spring. This "application" for an "appeal and request for interpretation" was initially characterized as an "appeal" to the Board purportedly brought pursuant to Section 72 of the MLUL.[4] However, it is clear that Appellants failed to follow applicable Municipal Land Use Law ("MLUL") processes and are attempting to create their own process to challenge the Lawful Use of the Property, where there is not any municipal application or enforcement action pending by or against MNL/Clove Spring. Appellants' 2023 "application" to the Board sought to challenge the permits and approvals issued to MNL/Clove Spring for the Property in 2015-2020, and also purported to seek an "interpretation" under Section 70 of the MLUL, which permits the Board to hear and decide requests for interpretation of the Zoning Map or Ordinance. This is not what

[3] MNL/Clove Spring's "timeline" correspondence dated November 1, 2023 (P190a) is a timeline of pertinent dates associated with the Lawful Use of the Property (the "MNL/Clove Spring Timeline").

[4] This challenge was brought by Appellants and other "objectors" to the Lawful Use at the Property. These objectors, inclusive of Appellants, may at times be collectively referred to herein as the "Objectors."

Appellants actually sought, however. Rather, they sought a determination as to whether the Lawful Use of the Property is legal from a threshold perspective without asking for any substantive interpretation regarding the current ordinance, other Township ordinances, or Township Map.

A noticed public hearing was held before the Board on Appellants' "application" on October 17, 2023 and December 5, 2023. The Board dismissed the "application" on December 5, 2023, as memorialized in the Resolution dated March 19, 2024 (the "Board Resolution" or the "Resolution"), finding that the "Applicant failed to file a timely application to appeal the relevant zoning permits pursuant to N.J.S.A. 40:55D-72a (P275a). The Board further found that "under the Sitkowski case the interpretation was not filed in a timely manner."[5] See Board Resolution, Page 4, Paragraph 9 at P278a. The Board's determination was affirmed by the trial court in its Order and Statement of Reasons dated February 4, 2025, which has now been appealed to this Court. The Board's Resolution is entitled to a presumption of validity, is supported by the record created before the Board and applicable law, and is not arbitrary, capricious, or unreasonable. It should be fully affirmed by the Court and Plaintiffs' Amended Complaint should be dismissed in its entirety, with prejudice.

[5] The full citation to this case is Sitkowski v. Zoning Board of Adjustment of Lavalette, 238 N.J. Super. 255, 569 A.2d 837 (App. Div. 1990).

LEGAL ARGUMENT

POINT I

THE BOARD LACKED JURISDICTION TO HEAR APPELLANTS' CLAIMS.

In order for the Board to have jurisdiction over Appellants' so-called application, the application would have to meet the criteria for an appeal pursuant to N.J.S.A. 40:55D-70a, which confers jurisdiction on a board of adjustment to hear appeals from any alleged error in any determination made by an administrative officer based upon or made in enforcement of a zoning ordinance. Appellants were seeking to challenge certain permits and approvals previously granted relating to the Lawful Use. Appellants failed, however, to file within the time required by N.J.S.A. 40:55D-72a, which states, in pertinent part, (that an) "…appeal shall be taken within 20 days by filing a notice of appeal from the officer from whom the appeal is taken…". Appellants clearly did not properly avail themselves of this appeal process under N.J.S.A. 40:55D-70a and 72a in their extremely belated challenge to all of the MNL/Clove Spring permits and approvals for the Lawful Use of the Property. Appellants filed their "application" with the Board purporting to appeal all permitting and approvals issued for work done at the Property, and seeking to invalidate the Lawful Use, well after the expiration of the Section 72a twenty-day appeal period and nearly three years after the last permit/approval was issued for the

pole barn. Appellants/Objectors were well aware of the Lawful Use of the Property, and of the work that was the subject of the permits, as evidenced by their previous complaints to Township officials and the governing body. Their ignorance of process and venue cannot be excused, as ignorance of a cause of action will not prevent running of a statute of limitations or postponement of a period of limitations. See Trenkamp v. Township of Burlington, 170 N.J. Super. 251, 260 (Law Div. 1979) (citation omitted). The Board accordingly concluded that the timing of the filing of Appellants' appeal was unreasonably late and time barred.

Appellants offered no justification for any relaxation of this time period. Appellants attempted, however, to avoid the time bar of NJ.S.A. 40:55D-72a by framing their application in the alternative as a request, pursuant to N.J.S.A. 40:55D-70b for interpretation of the zoning ordinance. The Board disagreed that it had jurisdiction under this section of the statute, as did the trial court. In support of their refusal to allow the Appellants to circumvent the time requirement for filing, both the Board and the trial court relied upon Sitkowski v. Zoning Bd. of Adjustment of Lavalette, 238 NJ. Super. 255 (App. Div. 1990). Sitkowski held that:

> To permit an interested party to challenge the issuance of a building permit by denominating his appeal as a request for an interpretation would render nugatory the time constraint provided by N.J.S.A. 40:55D-72a. The 20 day limit was clearly designed to insulate the recipient of a building permit or other favorable disposition from the threat of unrestrained future challenge. It was intended to provide a degree of assurance that the recipient could rely on the decision of the administrative officer. That this is so is perhaps best evidenced by the

> action of our Legislature amending N.J.S.A. 40:55D-72a in 1979 to require that an appeal be filed within 20 days rather than 65 days, which was the prior limitations period.
>
> Since the time for an appeal runs from the date an interested party knows or should know of the action of an administrative officer, a person to whom a permit is issued may protect his right by providing reasonable notice to all those who might wish to challenge the undertaking. Ibid. By providing notice to all interested parties, i.e., persons "whose rights to use, acquire or enjoy property is or may be affected by any action taken under [the Municipal Land Use Law]," see N.J.S.A. 40:55D-4, the holder of a permit may obtain some measure of protection against direct and collateral attacks upon his rights.
>
> 238 N.J. Super. at 260-61 (citations omitted).

The Board found that Appellants waited far too long after they had knowledge of the activities on the Property before filing their application with the Board. The Board Resolution states:

> 8. In determining the timeliness of the application, the Board found that the Applicant failed to file the application within a reasonable time after knowledge of the expansion of the gun range. Specifically, the Board found that not all improvements made prior to the construction of the sport clay shooting course would necessarily alert the Applicant regarding any expansion of the use of the Property. However, the majority of the Board did find that the Applicant would have been aware of the construction of the sport clay shooting course due to the sheer amount of disturbance and activity of the Property for the course to be completed. The Board also found that if the Applicant did not have reasonable knowledge of the construction activities relating to the clay shooting course, the Applicant would have clear knowledge of its operation given the increased presence of customers on the Property and increase of gunshots emanating from the Property beginning in 2020 or 2021. The Board also found that more than one of the Applicants appeared before the Township Governing Body in 2021 complaining of the noise from gunshots and alleging the same was a nuisance to neighboring property owners. Thus, the Board found that the Applicant waited

> approximately two years after having knowledge of the alleged illegal expansion prior to filing the instant application. The Board found that such a delay was not reasonable and the Applicant provided no rationale for the long delay. (P48a)

Appellants argue that their challenge should be cognizable at any time because, according to them, the building permits that they belatedly challenge were all improperly issued, were void *ab initio*, and accordingly are not subject to any period of limitations. The cases continually cited by Appellants to support this argument involve *municipal enforcement* or recission action regarding pre-existing, non-conforming uses. Here, the Township has *never* made any such attempt to challenge, let alone revoke, the Lawful Use of the Property, and Appellants did not even try to keep the Township in this litigation. The Township is not a party to this litigation, and is not seeking any remedies against the MNL-Clove Spring Defendants, including seeking recission of the Lawful Use of the Property.

Moreover, in those cases where a period of limitations was deemed to be inapplicable, either fraud or the commencement of a use that was unlawful at the time of its inception was involved. See, Hilton Acres v. Klein, 35 N.J. 570 (1961), and Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), *aff'd*. 24 N.J. 327 (1957). Here, as discussed in Point II below, it is indisputable that the shooting range use was lawful at its inception since it predated the enactment of a zoning ordinance, and it cannot be concluded that the municipality acted in bad faith when it subsequently granted permits for structures on the property in furtherance of that

use. Accordingly, it can hardly be said that there was no semblance of compliance with the ordinance or applicable law so as to make the permits void because there was no jurisdiction to issue them in the first place.

It is axiomatic that in prerogative writ actions such as this that involve a challenge to a municipal planning or zoning board decision regarding a land use-related application, the reviewing court must determine whether the board below acted within the statutory requirement that its determination be founded on adequate evidence. Burbridge v. Mine Hill Tp., 117 N.J. 376, 385 (1990). The Court's review of the Board's decision must be based on the agency record created below, to determine whether the Board's factual findings are based on "substantial evidence" and whether its discretionary decisions are arbitrary, capricious and unreasonable. Willoughby v. Planning Bd. of Tp. of Deptford, 306 N.J. Super. 266, 273-274 (App. Div. 1997), citing Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 289 (1965). Appellants have not satisfied their burden of demonstrating that the decisions of the Board and the trial court failed to meet these requirements.[6] Rather, the MLUL, the record below including the documentation memorializing the legality of the Lawful Use of the Property and confirming, approving, and permitting all MNL/Clove

[6]Appellants attempt in various contexts to place the burden of proof on MNL/Clove Spring. This is a red herring. It was Appellants and not MNL that filed the application with the Board, to which MNL was not technically made a party, so it is disingenuous at best to argue that MNL should have the burden of disproving allegations made by MNL. Moreover, to the extent it could be argued that a burden was placed on MNL at any time to demonstrate its lawful use status, the Township documentation produced by MNL would have more than satisfied any initial burden. Finally and most importantly, no factual hearing was ever held on Appellants' allegations, and the ultimate issue in this case, which is whether the Board even had jurisdiction, is hardly an issue to which the burden of proof is relevant.

Spring work done at the Property, and the Board's Resolution all demonstrate that the Lawful Use of the Property and all permitting received by MNL/Clove Spring for the Lawful Use cannot be rescinded and undone by and through Appellants' time-barred, application to a board that lacks jurisdiction and authorization to grant the relief they request. The Township is not party to this litigation and is not challenging the Lawful Use of the Property.

Moreover, as additional support for the Board and the trial court's determination that the Board lacked jurisdiction, it is evident based on the plain language of N.J.S.A. 40:55D-70b that Appellants' appeal was not cognizable under that statute. The statute confers jurisdiction on a board of adjustment to "[h]ear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions on which such board is authorized to pass by any zoning or official map ordinance…."

The application did not require any interpretation of the zoning ordinance. The Lawful Use is not permitted under the current ordinance, and MNL does not dispute that. Nor was there any other provision of the ordinance or zoning map that requires determination in order to decide Appellants' appeal. Given that uncontested fact, Appellants had no basis to bring an application under that section of the statute, and their attempt to do an end run around the time requirements applicable to appeals by recharacterizing their application as one for interpretation was clearly unavailing.

The Board's jurisdiction is specified by and strictly limited to that which is granted by statute, and cannot be altered or extended. See, Apple Chevrolet v. Fair Lawn Borough, 231 N.J. Super. 91, 96 (App. Div. 1989), and cases cited therein.

Finally, once it is confirmed that the Board never had jurisdiction in the first place, there is nothing else for this Court to decide. Neither the Board nor the trial court rendered any substantive determinations on the other issues argued by Appellants, and no testimony was taken or hearing conducted on those claims. While MNL will at least in part address their substance as necessary to clarify procedural and jurisdictional issues (and, in some instances, simply to correct egregious errors in Appellants' argument), the fact that MNL does so should not in any way be taken as a concession that anything beyond the threshold jurisdictional issue is appropriate for determination by this Court.

The trial court's ruling should be fully affirmed by the Court, and the Amended Complaint should be dismissed with prejudice.

POINT II

N.J.S.A. 40:55D-68 AND OFFICIAL TOWNSHIP RECORDS CERTIFYING THE LAWFUL USE OF THE PROPERTY THAT ARE PART OF THE RECORD BELOW SUPPORT MNL/CLOVE SPRING'S RIGHT TO CONTINUE THE LAWFUL USE.

(a) N.J.S.A. 40:55D-68 Protects the Lawful Use and Authorizes its Continuation and Appellants Have Engaged in an Unauthorized Process Disingenuously Brought Under N.J.S.A. 40:55D-70b.

N.J.S.A. 40:55D-68 exempts lawful, pre-existing nonconforming uses of property, such as the Lawful Use of the Property in this matter, from zoning ordinances prohibiting such a use that are enacted after a pre-existing, non-conforming use commenced and has continued. It states, in pertinent part,

> "Any nonconforming use or structure existing at the time of the passage of the ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction."

Typically, the burden of proving the existence of a non-conforming use is upon the party asserting such use. See Berkeley Square v. Trenton Zoning Board of Adjustment, 410 N.J. Super. 255, 269 (App. Div. 2009) certif. den. 202 N.J. 347 (2010); Bonaventure Int'l v. Spring Lake, 350 N.J. Super. 420, 432-433 (App. Div. 2002); Ferraro v. Zoning Bd. of Keansburg, 321 N.J. Super. 288, 291 (App. Div. 1999). The Lawful Use of the Property has already been certified as legal by the Township and is not, and never has been, the subject of municipal enforcement

action seeking termination of the Use. This is clearly reflected in the record, and Appellants' challenge to the Lawful Use at this point in time must be dismissed.

Appellants sought a determination from the Board that the Lawful Use of the Property was illegal from a threshold perspective, maintaining that the documentation in the record was insufficient and not authentic and that the Use needed to be specifically enumerated as a permitted one in a Township zoning ordinance. There is no authority for such a requirement, and where, as here, the use predates the enactment of any zoning ordinance, it is entitled to continue. It is well settled that "[a] nonconforming use is one which existed on property prior to the adoption of a zoning ordinance but which the ordinance does not now permit in the particular zone." Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN, 2025), Section 27.1.2 at p. 402. "[W]here a particular business has been operated prior to passage of a zoning ordinance, during which time the premises had no off-street parking facilities, it has been held that after the passage of an ordinance regarding such facilities, the business has the right to continue to operate." Id. See Cox at page 404 citing Dresner v. Carrara, 69 N.J. 237 (1976). The Court should accept the plain language and meaning of documents such as PR-101 (P171a), which stated that at the time of issue, there were no ordinances in effect prohibiting the Lawful Use of the Property, and defer to same. In contradiction of the plain language of N.J.S.A. 40:55A-68, and in defiance of common sense, Appellants seek to create

a process that is not authorized in the MLUL or elsewhere, that would enable any private, third party objector to a legal and continuing pre-existing, non-conforming use already certified and treated as such by a municipality, to compel the operator of that use, at any time and repeatedly, to continue to have to prove its legality to third party "objectors," regardless of whether the owner/operator of the use is seeking zoning and/or other municipally-issued approvals and permits related to the use and regardless of whether the municipality, *in its sole discretion and authority,* considers the use legal.

The Use was lawful at its inception, and continued to be lawful notwithstanding the subsequent enactment of an ordinance that did not permit it in the zone.

(b) The Township Documents in the Record Below Certify the Legality of the Lawful Use of the Property and Demonstrate That MNL/Clove Spring Continued the Use, Never Abandoned it, and is Entitled to Continue the Use as Currently Constituted and Operated.

As detailed above, notwithstanding the untimely, unauthorized and *ultra vires* process Appellants have attempted to create, the record below clearly reflects that the Township has already certified the legality of the Lawful Use, and is uncontroverted evidence that the Lawful Use of the Property as a shooting range and firearms and ammunition sales facility has existed lawfully in the Township since at least 1963. These records contain explicit certifications of the legality of the Lawful Use status of the Property, which is exempt from zoning ordinances prohibiting such

a use. The plain language of these public record documents speaks for itself and approves, memorializes and certifies the legality of the Lawful Use of the Property and its lawful pre-existing, non-conforming status.

Appellants wrongfully argue that the Lawful Use was abandoned and destroyed. MNL asserts that this is incorrect, as it has been consistently continuing for a very long time without any legal cessation, abandonment, or destruction. As stated in the Cox treatise on New Jersey Zoning & Land Use Administration, abandonment of a non-conforming use requires the concurrence of two factors: (1) some overt act or some failure to act which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment; and (2) an intention to abandon. See New Jersey Zoning & Land Use Administration, 2025 Ed, Section 27-3, Page 410, citing Berkeley Square v. Trenton Zoning Board of Adjustment, 410 N.J. Super. 255, 268-269 (App.Div. 2009) certif. den. 202 N.J. 347 (2010); S & S v. Zoning Bd. for Stratford, 373 N.J. Super. 603, 613-614 (App.Div. 2004); Poulathas v. Zoning Bd. of Adj., 282 N.J. Super. 310, 313-314 (App.Div. 1995); other citations omitted. Appellants attempt to paper over the requirement that there must be demonstrated an intention to abandon by misleadingly citing to Villari v. Bd. of Adjustment of Deptford, 277 N.J. Super. 130 (App. Div. 1994). While the Court there may have downplayed the alleged subjective intent of the property owner, it did so based upon other evidence that

clearly reflected an intention to abandon, including a 15 year period of abandonment and the utilization of the farm property and its structures in a manner inconsistent with any claimed future intention to return it to a pig farming use. 277 N.J. Super. at 137. The Villari case can hardly be cited as authority that an intention to abandon need not be shown to demonstrate abandonment, a rule that was reiterated in the subsequent Berkeley Square and S & S v. Zoning Bd. of Stratford Appellate Division decisions cited above.

Moreover, as discussed above, the case law makes clear that in order to make a finding of abandonment, it must be demonstrated that there was an intention to abandon the use. Intention is obviously subjective, and as a practical matter, since there was never any hearing conducted on this claim, it is clear that it would be inappropriate to attempt to make a substantive finding on this issue as part of this appeal. MNL purchased the Property in 2005 with the express intent to continue the Lawful Use of the Property, not abandon it or destroy it, and it therefore continues to this day, in accordance with all applicable laws, having never been abandoned or destroyed. Finally, the claimed abandonment raised by Appellants is alleged to have occurred during the years 2005 to 2015, which is eight years or more before the 2023 attempt by the Appellants to invoke Board jurisdiction on this claim (which it would not have in any event). This would be far beyond any applicable statute of limitations.

Plaintiffs' Amended Complaint should be dismissed with prejudice, and the Board's Resolution should be fully affirmed by the Court.

POINT III

THE ADDITIONAL, EXTRANEOUS AND IRRELEVANT CERTIFICATIONS AND EXHIBITS FILED BY APPELLANTS ARE NOT PART OF THE RECORD BELOW AND CANNOT BE CONSIDERED BY THE COURT IN ITS ADJUDICATION OF THIS LITIGATION.

Actions in lieu of prerogative writs are to be heard by way of a non-jury plenary trial on the record below, supplemented, *if necessary*, in respect of constitutional issues by trial testimony. See Odabash v. Mayor and Coun. Dumont, 65 N.J. 115, 121, fn. 4 (1974); Willoughby v. Planning Bd., 306 N.J. Super. 266, 274-275 (App. Div. 1997). Appellants have improperly attempted to supplement the record before the Board here by filing many voluminous and irrelevant certifications and exhibits that were not presented to the Board when they filed their "application." Appellants *could* have done so, but failed to, and cannot now file them for consideration by the Appellate Division. The MNL/Clove Spring Respondents respectfully submit that the *official* record created before the Board is comprised solely of the exhibits submitted by MNL to the Board and appended to the Board's Trial Brief.

This documentation is a *sufficient* and full record created before the Board, and does not require supplementation. Furthermore, Appellants did not seek discovery on this matter notwithstanding the trial court's limited authorization per the July 8, 2024 Scheduling Order, and should not be unilaterally empowered to supplement the official record with all of the impermissible certifications and exhibits that they filed. More importantly, no hearing was held or testimony taken regarding these matters, and no determination was made by either the Board of the trial court. To the extent applicable, the MNL/Clove Spring Respondents assert that Appellants' citations to these barred exhibits and certifications are of no consequence, and any arguments advanced pursuant to and in reliance upon these exhibits and certifications should be disregarded and rejected by the Appellate Division. Appellants' appeal should be dismissed with prejudice, and the Board's Resolution and the trial court's decision should be fully affirmed.

POINT IV

THE JANTAUSCH CASE CITED BY APPELLANTS SUPPORTS RESPONDENTS' POSITIONS

The Jantausch case cited by Appellants actually supports the Respondents' positions much more strongly than Appellants' positions. See Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), aff'd 24 N.J. 327 (1957). This is an "intermediate" case under Jantausch, where the permits were issued in good faith

within the ambit of the official's duty in reliance upon the ordinances and applicable law, and where the appeal was filed within the time deadline. Appellants argue that there was no good faith reliance upon the ordinance and that it was a prohibited use, but the Municipal Land Use Law and the prevailing case law conferred rights upon MNL Farm and Clove Spring Range as a valid lawful preexisting nonconforming use, which predated the Township's ordinances and prohibitions against the use. This was certified by the Township Clerk. In addition, MNL and Clove Spring reasonably relied upon the granting of the permits. Appellants' position is unsupported by the case law and by the Municipal Land Use Law in that at the time of the commencement of the range operations, there was clearly no ordinance prohibiting the use as certified by the Township Clerk on two occasions. This is precisely what the Municipal Land Use Law protects by protecting valid lawful preexisting nonconforming uses.

Moreover, this case is a prerogative writ challenging a Board decision declining jurisdiction, and the record before the Board and before the Court does not in any way support Appellants' position and cannot be expanded unilaterally by Appellants. For the above reasons, the Court is respectfully urged to reject the Appellants' arguments and affirm the trial court's dismissal of the Amended Complaint.

POINT V

APPELLANTS' ARGUMENTS IN ITS POINTS 4 AND 5 ARE INCORRECT AND INCONSISTENT WITH THE MLUL AND THE CASE LAW; THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANTS' COMPLAINT

As set forth in detail above, the record before the Board and the trial court demonstrates that the MNL Farms/Clove Spring Range use is a valid lawful preexisting nonconforming use, which predated any ordinance prohibiting the gun range use. In fact, the Township Clerk certified that the use was not prohibited on two occasions, and these certifications are consistent with the MLUL protections afforded to lawful preexisting nonconforming uses.

As discussed in Point II above, Appellants' argument that a use has to be specifically permitted by ordinance before it can become a preexisting nonconforming use is wrong as a matter of law. The case law does not support the Appellants' position. Indeed, Appellants rely on a distorted misreading of Ianieri v. East Brunswick Zoning Bd. of Adj., 192 N.J. Super. 15 (Law Div. 1983). The use in Ianieri was not permitted when commenced unlike the use in this case. A new ordinance was adopted in Ianieri which did not permit the use, but there was language in the ordinance which was interpreted by the Board there to grandfather every single nonconforming use in the Township. Other language in the ordinance contradicted that provision. In the Law Division, Judge Skillman held that this was

not sufficient to, in effect, make it a permitted use. The Ianieri decision did not hold that it had to be explicitly permitted by ordinance to achieve preexisting status. In addition, see Cox, supra, at Section 33-1.3 and Bonaventure Int'l. v. Spring Lake, 350 N.J. Super. 420 (App. Div. 2002), cited therein.

It is clear that any number of uses and structures in the State predate enactment of zoning ordinance prohibitions. The fact that the Municipal Land Use Law, which had not even been enacted when the use at issue here commenced, created a mechanism to certify preexisting uses after an ordinance change prohibits the use does not mean that the property loses that status if the mechanism provided for in the Municipal Land Use Law is not utilized. The limited record before the Board, the trial court and the Appellate Division shows that the gun range and retail sales of guns is a valid lawful preexisting nonconforming use. There is no basis to make a determination that the use was not a valid lawful preexisting nonconforming use.

POINT VI

APPELLANTS' ARGUMENTS IN POINT 6 OF APPELLANTS' BRIEF THAT THE SHOOTING RANGE USE WAS ABANDONED ARE WITHOUT MERIT AND SHOULD BE REJECTED

The trial court did not err in dismissing Appellants' complaint. The record before the Board and the Court do not support Appellants' claim of abandonment of a lawful preexisting nonconforming use. Indeed, it was never necessary for the trial

court to even reach this issue, because the Board determined that the preexisting nonconforming use was demonstrated by the public records and that the Board lacked jurisdiction to hear Appellants' appeal and interpretation claims.

Moreover, as discussed in Point II (b) above, there is an insufficient record before the Board and the trial court to reach any such conclusion that a lawful preexisting nonconforming use had been intentionally abandoned in accordance with the case law. There was never a period of nonuse of the range in this case. In addition, the case law requires a showing of intention to abandon, and there was never any intention to do so here. See Cox, supra, at Section 27-3 p. 409-412 and Berkeley Square v. Trenton Zoning Board of Adjustment, 410 N.J. Super. 255, 268-269 (App. Div. 2009), certif. den. 202 N.J. 347 (2010); S & S v. Zoning Bd of Stratford, 373 N.J. Super. 603, 613-614 (App. Div. 2004). For the above reasons, we respectfully urge the Appellate Division to reject Appellants' appeal and affirm the trial court and Board below.

POINT VII

POINTS 7 AND 8 OF APPELLANTS' BRIEF DO NOT SUPPORT APPELLANTS' POSITION AND DO NOT SUPPORT THE FINDING THAT THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' APPEAL AND INTERPRETATION APPLICATION; THE RECORD BEFORE THE BOARD AND THE TRIAL COURT IS INSUFFICIENT FOR THE COURT TO MAKE A DETERMINATION THAT THE USE WAS EXPANDED

Appellants argue in Points 7 and 8 of their Brief that the preexisting nonconforming use was expanded. The mere fact that permits were granted for changes at the site does not prove that the lawful preexisting nonconforming use was enlarged. Indeed, it was reasonable for the Zoning Officer and Construction Code Official to grant the permits, which had been properly applied for and which were properly granted. As discussed above, Appellants' time barred claim that the permits should be voided or were invalid is not supported by the case law or by the Municipal Land Use Law, which requires such appeals to be brought within 20 days of the date of the permit or, at most, some reasonable extension thereafter, as explained by the Board's Resolution. Moreover, the record does not support the Appellants' arguments with regard to expansion or enlargement. Neither the trial court nor the Board needed to reach the issue, because the Board properly determined that it lacked jurisdiction to hear Appellants' late appeal and interpretation application.

For the above reasons and as explained by the trial court and the Board in their determinations, the Appellate Division is urged to reject Appellants' positions and their Points 7 and 8.

POINT VIII

APPELLANTS' ARGUMENTS IN POINT 9 OF APPELLANTS' BRIEF SHOULD BE REJECTED AND ARE INSUFFICIENT TO JUSTIFY APPELLANTS' LENGTHY TOLLING OF THE 20 DAY LIMITATION PERIOD. APPELLANTS HAVE NOT DEMONSTRATED THAT THE BOARD OR TRIAL COURT ERRED IN REJECTING THEIR APPEAL FOR LACK OF JURISDICTION.

The "evidence" Appellants contend they wanted to offer to the Board in the hearings related to their efforts that they allegedly made to shut MNL down long after MNL had been granted permits by the Township of Wantage. Appellants' efforts to shut down MNL actually demonstrate that they had notice of their claims of violation by MNL and that they could have proceeded more expeditiously with any appeal. The "evidence" they claim does not support or justify their failure to apply to the Board and does not justify an extensive tolling of the 20 day limitation period authorized by the Municipal Land Use Law for appeals.

The record before the Board actually demonstrates that the Respondents have a lawful preexisting nonconforming use and that Appellants' efforts to stop that lawful use were inconsistent with the Municipal Land Use Law, the case law and the

facts demonstrating that the Township had certified the preexisting nonconforming gun range and retail sales use and that the operations were lawful operation. The public records demonstrate that Respondent's use is a lawful preexisting nonconforming use which preceded any zoning prohibition in Wantage Township.

Based upon the record before the Board and the trial court, it was reasonable for the Board to refuse to allow testimony and factual claims years after permits were granted and years after certification of preexisting nonconforming use.

For the above reasons and for the reasons set forth in the trial court and Board's decisions, we respectfully urge the Appellate Division to reject Appellants' claims in Point 9 and to affirm the trial court and Board below.

POINT IX

THIS IS A PREROGATIVE WRIT APPEAL OF A BOARD DECISION BELOW; THE ZONING BOARD HAS NO AUTHORITY OR POWER TO SHUT DOWN A USE AND NO HEARING TOOK PLACE ON THIS ISSUE.

Appellants contend that the Board should have somehow prohibited MNL and Clove Spring Range from operating. It is clear in the case law and the Municipal Land Use Law that the Zoning Board has no enforcement authority and no authority to shut down or enjoin uses.

Appellants' claims in this regard are unsupported by the record in that no hearing was held as to the authority of the Applicant to continue the use and there is no legal basis to justify Appellants' arguments in their Point 10. Moreover, the record before the Board is focused on the jurisdictional issues, and there is insufficient record to justify the arguments that Appellants make in Point 10.

For the above reasons and for the reasons set forth in the decisions of the Board and the trial court below, the Court is respectfully urged to find that the trial court did not err and to affirm the Board and the trial court below.

CONCLUSION

This is an appeal from a Land Use Board (sitting as a board of adjustment) decision. The Appellants attempted to assert multiple claims before it, but the Board's jurisdiction is limited to the authority granted to it by the Municipal Land Use Law. There was no application made by MNL, and the proceedings before the Board were unilaterally commenced by the Appellants.

The Board's jurisdiction is defined and limited by N.J.S.A. 40:55D-70a (and 72) and 70b. The Board determined that Appellants purported application did not qualify under the requirements of those statutory sections, and accordingly determined that it had no jurisdiction. The Board is not a court or adjudicatory body before which the Appellants can bring any claims they think they may have, and it has no enforcement power. The Board's determination that it had no jurisdiction, which was affirmed by the trial court, was correct and should not be disturbed.

Once it is confirmed that the Board had no jurisdiction, all of the other issues raised by the Appellants are extraneous, and they could not be determined here in any event because no evidentiary hearing was conducted and a full and proper record were not created.

For the reasons set forth herein, for those set forth in the Board's Resolution and in the trial court decision, the MNL/Clove Spring Respondents respectfully request that the trial court's decision and the Board's Resolution be fully affirmed.

Respectfully Submitted,

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A Professional Corporation
Attorneys for Respondents MNL Farm LLC
and Clove Spring Range, Inc.

/s/ Thomas F. Collins, Jr.

Thomas F. Collins, Jr., Esq.

DATED: September 18, 2025

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DIANA ALLEGRETTI and CATHERINE FAY, Plaintiff-Appellant, vs. THE TOWNSHIP OF WANTAGE, WANTAGE TOWNSHIP LAND USE BOARD, MNL FARM LLC and CLOVE SPRING RANGE, INC., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001903-24 Civil Action On Appeal From: Superior Court of New Jersey Law Division – Sussex County Docket NO. SSX-L-126-24 Sat Below: Hon. Stuart A. Minkowitz, A.J.S.C.

BRIEF OF DEFENDANT/RESPONDENT WANTAGE TOWNSHIP LAND USE BOARD

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STATEMENT OF FACTS

This appeal relates to property owned by Defendant/Respondent MNL Farm (MNL). The property is designated as Block 33, Lot 21 on the Township Tax Map ("The Property"). The Property is approximately 89 acres. It is in the R-5 Residential Zone.

Defendant/Respondent, Clove Spring Range Inc. (Clove Spring) operates a commercial gun range on the Property. A commercial gun range is not a permitted use in the Residential Zone.

Masoud Altirs (Altirs) is a principal in MNL and Clove Spring.

The Property is surrounded by residential and agricultural uses. Plaintiffs/Appellants, Diana Allegretti and Catherine Fay are property owners in the vicinity of the Property.

A request for a zoning permit was submitted by Altirs in 2015. The activity for which the permit was requested was described as adding another sixteen (16) shooting stations to facilitate a new concept: Golf with a shot gun. The zoning permit covers an outdoor pavilion, three storage sheds and a sporting clay course. A diagram of the course was attached. (See P133a

through P138a.) On December 15, 2025, a building permit was issued for those improvements. (See P139a and P114a.)

After construction occurred, a Certificate of Occupancy was eventually issued for a "outdoor open-air pavilion, 3 storage sheds and a "Sporting Clay Course" for Clove Spring on August 12, 2020. (See P143a.)

PROCEDURAL HISTORY

In April 2023, an application was filed with the Wantage Township Land Use Board by 7 (seven) neighbors (hereinafter referred to jointly as Applicants) including the Plaintiffs/Appellants Allegretti and Fay (hereinafter referred to jointly as Allegretti). (See P64a through P70a.) The Applicants were represented by Raymond Barto, Esq.

The front page of the application does not indicate that it is an "'A' Administrative Appeal" which is one of the pre-printed options. Instead, it indicates the application is "Other - Motion to Rescind Approvals". (See P64a.) That is inconsistent with the remainder of the application. For example, on page 6, the relief listed includes "'A' Administrative Appeal" and "'B' Interpretation." (See P69a.) The cover letter to the application describes the application as a "motion before the Wantage Township Land Use Board for a ruling that certain zoning and occupancy certificates granted to the owner of the property were improvident and void at issuance." (See P72a.)

Other documents submitted by the Applicants with the application, including the draft public notice and the draft Affidavit of Service, clarify what relief is sought. The latter is entitled "Application Moving To Rescind Various Use Approvals As A Skeet Shooting Range With 16 Shooting Stations And A

'Golf with Shotguns Range.'" (See P77a.) The draft notice references "zoning and occupancy permits" for "use as a skeet shooting range with sixteen (16) shooting stations." (See P74a.)

Applicants' attorney also submitted with the application a Supplement entitled "Application to Rescind Zoning Permits, Etc." with eleven exhibits. (See P79a – P138a.) The challenged permits appear to be those issued in December, 2015. (See P133a, P134a, P138a.)

In June 2023, the application was amended by letter to include an interpretation under N.J.S.A. 40:55D-70(b) that "the zoning officer erred in granting zoning and building permits to the shooting range after October 2005…" Specifically, interpretation is sought of zoning permit 2005-36… which states "expansion or Intensification Not Permitted Without Board Approval." (See P144a, P145a and P101a.)

Peter Dickson, Esq. succeeded Mr. Barto as the attorney for the Applicants. Thomas Molica, Esq. represented MNL/Clove Spring. Two public hearings were held on the application, one on October 17, 2023 and one on December 5, 2023.

The October 17, 2023 hearing related not to substance of the application, but the process/procedure to be followed as the application was unusual. The

first procedural issue was a request by the Applicants that a subpoena be issued requiring MNL to produce a purported noise study conducted from 2022 or 2023. The Board declined to do so as noise in 2022 or 2023 was not relevant to a challenge to permits allowing the installation of the clay course and erection of a pavilion and sheds in 2015 – 2016. (See 10/17/2023 Transcript, pages 24 – 32) The second issue was the sufficiency of the public notice was addressed, with a requirement that a new notice was required. (See 10/17 Transcript, Pages 32-33.) Lastly, the process to address the jurisdictional issue of timeliness of the application was discussed. This resulted in a schedule for submission prior to the hearing of the timeline/chronology of the activities on site and the issuance of permits. (See 10/17/2023 Transcript, pages 34 – 36, page 48.)

The timeline submitted by Mr. Dickson on behalf of the Applicants is at P188a through P189a. The timeline submitted on behalf of MNL by Mr. Molica is at P190a through P203a.

On December 5, 2023, the Board discussed the predicate issue of whether or not the application was timely filed under the MLUL. The Board concluded that the application was properly considered as an appeal under N.J.S.A. 40:55D-70(a) and not a request for interpretation under N.J.S.A.

40:55D-70(b). The Board concluded that the application was filed beyond the 20-day deadline and therefore denied the appeal as the Board was without jurisdiction. (See 12/5/23 Transcript, pages 61-68 and P275a through P279a.)

After the Board's dismissal of the appeal for lack of jurisdiction, Allegretti filed a Complaint in Lieu of Prerogative Writs followed by an Amended Complaint. While the Amended Complaint was 18 pages long with 73 paragraphs, the only issue relating to the Board was whether it properly dismissed the appeal filed under N.J.S.A. 40:55D-70(a), as the Board took no testimony on any other matter, and the Resolution denied the appeal solely on the basis that the Board lacked jurisdiction because the appeal was not untimely filed either under the 20-day deadline in N.J.S.A. 40:55 D-72(a) or a more relaxed period under applicable case law. (See P275a through P279a.)

A trial was conducted before the Honorable Stuart A. Minkowitz on January 10, 2025. As a Prerogative Writ matter, the trial was based on the record before the Board with no new testimony received. After trial, Judge Minkowitz entered an Order and accompanying Statement of Reasons on January 7, 2025. (See P54a through P62a.) That ruling upheld that the Board's decision that it lacked jurisdiction to hear the appeal. As jurisdiction was absent, no other claims of Allegretti were addressed.

Thus, despite the lengthy arguments about matters other than the timeliness of the filing of the application in Points 1-8 of the Appellants' Brief, the sole issue before this Court is whether the Trial Court was correct in finding that the Board lacked jurisdiction over Allegretti's Appeal.

LEGAL ARGUMENT

POINT I

THE APPLICATION WAS FILED BEYOND THE 20-DAY DEADLINE ESTABLISHED BY THE MUNICIPAL LAND USE LAW.

In N.J.S.A. 40:55D-70(a), the Municipal Land Use Law (MLUL, N.J.S.A. 40:55D-1 et seq.) grants to the Board of Adjustment jurisdiction to "hear and decide appeals where it is alleged by the Appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance." In subsection (b) of the same Statue, the Board is granted jurisdiction to "hear and decide requests for interpretations of the zoning map or ordinance or for decisions upon other special question upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act."

The MLUL sets a 20-day limit for filing an appeal of an administrative officer's decision (N.J.S.A. 40:55D-72(a)). However, the MLUL imposes no time limit on an application for an interpretation or a special question. The application in this case was originally characterized "a Motion to Rescind Approvals." Jurisdiction to hear such a motion is not conferred on the Board by the MLUL. However, it was then conferred to be an appeal of the issuance of certain permits and also to include a request for interpretation. Thus, the Board was faced with the initial question as to whether the application was an appeal or request for interpretation. If it was an appeal, the Board had to decide whether the deadline for filing had expired. These jurisdictional

questions required a decision before considering the substantive allegations of the Applicants.

There are two cases that address the timeframe for filing with the Board in this sort of situation. The more recent of the two is *Sitkowski v. Zoning Board of Adjustment of Lavallette 238 N.J. Super. 255* (App. Div 1990). The older of the cases to which the *Sitkowski* Court referred for the principles underlying its ruling, is *Trenkamp v. Township of Burlington 170 N.J. Super. 251* (Law Div. 1979).

The *Sitkowski* case involved a situation where a building permit was issued to a property owner on July 9, 1985. Construction began shortly thereafter with footing inspections occurring on September 24, 1985 and October 4, 1985, a framing inspection on May 27, 1986 and a sheathing inspection on August 6, 1986. On September 4, 1986 the attorney for a neighbor corresponded with the building inspector challenging the grant of the permit with an allegation that the lowest level of the building should be considered a story, thereby causing the building to exceed the story limit in the zone. On November 5, 1986 the building inspector responded to that communication and disagreed with the analysis. Five months later the neighbor made an application to the board of adjustment challenging the issuance of the building permit.

That application in *Sitkowski* was termed as being one "to appeal the decision of the borough zoning officer" that the structure complied with the height limitation in the code. The Zoning Board acknowledged that an appeal under N.J.S.A. 40:55D-70(a) must be taken within 20 days of the officer's decision under N.J.S.A. 40:55D–72(a). Nonetheless, the Board heard the case under the approach that the application was a request for an interpretation of

the zoning ordinance provision concerning stories under N.J.S.A. 40:55D–70(b). A request for an interpretation is not constrained by the 20-day time limit for an appeal. The board then concluded that the building exceeded the story limit and directed the zoning officer to issue a stop-work order. The permit holder then appealed to the Superior Court, arguing that the neighbor's appeal was untimely and, thus, the Board was without jurisdiction to have heard the application.

The Superior Court first addressed whether the application to the board constituted an appeal of the officer's decision or a request for an interpretation. The court noted the statutory 20-day time limit for filing an appeal from a zoning officer's decision and stated that it was "clearly designed to insulate the recipient of a building permit or other favorable disposition from the threat of unrestrained future challenge." *Sitkowski v. Zoning Board of Adjustment, 238 N.J. Super. 255, 260* (App. Div 1990). It also noted that the MLUL imposed no explicit time limit on filing a request for an interpretation. The Court indicated it was inclined, although it did not explicitly rule as such, that no such time should be imposed. (Ibid.)

Turning to the facts of the case before it, the *Sitkowski* Court went on to hold that the neighbor "should not be permitted to subvert the time constraints our legislature has imposed upon administrative appeals by belatedly asserting that he sought only an interpretation of a zoning ordinance." (Ibid.) It stated that to "permit an interested party to challenge the issuance of a building permit by denominating his appeal as a request for an interpretation would render nugatory the time constraint provided by N.J.S.A 40:55D–72(a)." (Ibid.) The Court then cited to the case of *Trenkamp v. Township of Burlington 170 N.J. Super. 251* (Law Div. 1979).

Thus, the *Sitkowski* Court treated the application as an appeal under N.J.S.A. 40:55D-70(a) because the neighbor's objective was to have "the Board reverse the action of the zoning officer." (Ibid.) As to the timeframe for such an appeal, the Court, again citing *Trenkamp*, stated that **"the time for an appeal runs from the date an interested party knows or should know of the action of the administrative officer."** (Ibid.) (Emphasis added.)

Under the facts in *Sitkowski*, where the building permit was issued in July 1985, construction began that year, the attorney for the Applicants challenged the permit in September 1986, and the appeal to the board was not filed until February 1987, the Court found that the appeal was beyond the 20-day time limit for such an appeal and affirmed the Trial Court's dismissal of the case.

As noted above, the prior decision that the *Sitkowski* Court referenced is the case of *Trenkamp v. Township of Burlington 170 N.J. Super 251* (Law Div. 1979). That case specifically addressed the equitable argument that the 20-day deadline to file an appeal from the decision of an administrative officer should not necessarily run from the date of the action of the officer where the interested party is a neighbor who is unaware of the officer having made a decision or taken an action.

In the *Trenkamp* case, the administrative officer issued a building permit on July 2, 1977. Construction began on August 7, 1977, and a certificate of occupancy was issued on September 3, 1977. Approximately two months later, on November 2, 1987, a neighbor filed a prerogative writ case challenging the issuance of the permits. In a lengthy decision, the Court addressed the equitable argument both in the context of the deadline to file a prerogative writ

action and the deadline to file an appeal to the board of adjustment from the administrative officer's decision.

The Court began by noting that "as a general rule," ignorance of a cause of action will not "prevent running of a statute of limitations or postpone commencement of a period of limitation." (Id at 260.) Next it reviewed several reported cases that dealt with issues raised because of lack of actual knowledge of the issuance of a decision by an administrative officer. After doing so, the Court stated that, while the accrual of the right to appeal was not affected by actual or constructive knowledge, an enlargement of the time limit to file an appeal can be considered where there is a lack of knowledge. Thus, it concluded, "mere ignorance of a cause of action will not automatically lead to a waiver of the limitation rule. Instead, the Court must balance the equities of the case … and in no circumstance enlarge the time beyond 45 days from the time which plaintiff knew or should have known of the cause of action." (Id at 265.)

The 45-day period referred to by the Court was the deadline by which the Plaintiff had to file a prerogative writ case rather than the 20-day limit to file an appeal to the Board under N.J.S.A. 40:55D-70(a). However, the Court did not end the analysis there. It then turned to the specific time frame for an appeal as contained an N.J.S.A. 40:55D–72(a). The Court began by noting that the statute is silent as to what triggers the deadline to file the appeal. (Id at 267.) It also noted that while the recipient of a permit has notice of the decision of the administrative officer when the permit is issued, other interested parties do not. Thus, the Court found "**a proper regard for the interests of such persons mandates the time for such an appeal begins to run from the date an interested person knew or should have known of the**

permit's issuance." (Id at 268.) (Emphasis added.) Further, in such an instance, the Board's "**function is to make the factual determination as to when the appellant knew or should have known of a building permit issuance and then calculate the time elapsed before an appeal was taken.**" (Id at 270.) (Emphasis added.) In the *Trenkamp* case, the Court found that the constructive knowledge occurred when the neighbor observed the construction of the building.

In the *Sitkowski* case, the objecting neighbor attempted to convert an appeal under N.J.S.A. 40:55D-70(a) into an interpretation under N.J.S.A. 40:55D-70(b) by alleging he sought some interpretation of the Ordinance. The Court did not allow that attempt to avoid the statutory deadline. In like manner, the Appellants sought to "morph" this appeal into an interpretation of a prior permit issued in 2005 so as to avoid the 20-day deadline. The Wantage Board acted properly in deciding that the application was actually an appeal of the administrative officer's decision approving the site plan and issuing building permits in 2015 and 2016. Therefore, a 20-day period to file the appeal began to run when the Applicants knew or should have known of the administrative decisions to issue such permits. Per the *Sitkowski* and *Trenkamp* decisions, the initial responsibility of the Board was to determine the date from which the 20-day period would begin.

The testimony and documents before the Board depict an issuance of a zoning permit on December 2, 2015. (See P133a through 138a.) The issuance of a construction permit for the items on the site plan occurred on December 15, 2015. (See P139a and P114a.) The issuance of a Certificate of Occupancy for the then-constructed site plan items occurred in August 2020. (See P143a.)

The testimony did not establish by direct testimony from the Applicants an exact date upon which the Applicants became aware of the construction of the items on the site plan. Clearly the improvements were constructed between the time the construction permit was issued in mid-December 2015 and the Certificate of Occupancy was issued in August 2020. The actual construction involved the installation of 16 sporting clay throwing locations, the construction of pathways connecting those locations, the construction of three sheds, and a pavilion. Presumably, the construction would have been observable to the Applicants, all of whom live on property near or even adjacent to the MNL site. But establishing an exact date for knowledge of the construction is not critical in this case because, without a doubt, the sporting clay course began operating after it was constructed and certainly by the time of the issuance of the Certificate of Occupancy in August 2020. The Applicants were clearly aware of that use because more than one of the Applicants appeared before the Township Committee in 2021 and 2022 to complain about the sporting clay course. (See timeline from Mr. Dickson, P188a-189a.) Without any doubt, at the time they appeared before the Township Committee in 2021 and 2022, the Applicants were aware not only of the installation of the course and the structures relating thereto, but its operation and use. In fact, the Township attorney apparently recommended that the Applicant file an appeal with the Board. (See P89a.)

Thus, by the time the application was filed with the Board in April 2023, somewhere between one and three years had elapsed from the time that the Applicants became aware, or should have been aware, of the apparent approval of the construction and operation. Therefore, it is indisputable that the appeal

was filed well beyond the 20-day period in N.J.S.A. 40:55D-72(a) even if that period is equitably extended per *Sitkowski*.

Once it was determined that the appeal was filed beyond the 20-day limit, the Board was left without any jurisdiction to hear the matter and the dismissal, per the Resolution, and was therefore proper.

POINT II

THE WANTAGE BOARD WAS WITHOUT JURISDICTION TO CONSIDER ALLEGATIONS OTHER THAN THE TIMELINESS OF THE APPEAL.

The presentation to the Board, the Prerogative Writ Complaint and Amended Complaint filed in this matter and the instant Appeal contain many allegations beyond a challenge to the Board decision that it lacked jurisdiction to hear the Appeal due to the lapse of time. For example, allegations are made with regard to the validity of the MNL operation as a pre-existing nonconforming use, the MNL use being a nuisance due to alleged noise, and the abandonment of the operation by MNL. However, no evidence was taken or considered regarding the merits of those claims because the Applicant's failure to file a timely appeal deprived the Board of jurisdiction over those claims. The Board can only exercise jurisdiction as granted by the MLUL. Having found that the appeal was not timely filed, it lacked authority to continue.

However, even if the Board found that the appeal was timely filed, those extraneous issues would not be proper subjects for the Board to consider. The Board does not have plenary jurisdiction. It only has such jurisdiction as is conferred by the MLUL. The authority of the Board is limited to that granted by Statute (*Apple Chevrolet v. Franklin Borough 231 N.J. Super. 91, 96* (App. Div. 1989)). The Board is not empowered to rule on whether permits fall within the gambit of those that are facially void or presumptively valid or on whether uses have been abandoned or whether gunshots constitute a nuisance

in the neighborhood. Those issues may be valid issues to be decided by the Superior Court, but they are not issues that can be considered by the Board. The only application properly before the Board was the appeal of the administrative officer's decisions to issue permits in 2015, 2016 and 2020.

Allegretti seeks to avoid the consequences of waiting years to file an appeal of the administrative officer's decision by arguing that the issuance of the permits was so clearly outside the scope of the officer's authority that it shall be deemed void ab initio. Thus, it is argued, an attack on the validity of the permits can be mounted at any time. First, it is far from clear that the permits were so far outside the scope of the officer's authority that they are facially invalid. The types of permits are exactly the type issued by the officer in the normal course of business. There is no evidence of bad faith or fraud.

Second, and more importantly, nowhere in the MLUL is the Board granted plenary jurisdiction to hear attacks on the issuance of permits. Such attacks belong before the Superior Court, not before a Board that is ill-equipped for the type of testimony, and the equitable arguments to be considered in such a case is without pause to revoke permits. Under the MLUL, the Board has no enforcement authority and no authority to order that a use be shut down or an owner/operator be issued summonses.

In a challenge to a municipal board decision, the reviewing court must determine whether the board below acted within the statutory requirement that its determination be founded on adequate evidence. *Burbridge v. Mine Hill Tp., 117 N N.J. 376, 385* (1990). Any Court review is based on the record created below, not upon evidence submitted after the Board hearing as Allegretti has tried to do. Provided the Board's factual findings are based on "substantial evidence" and are not arbitrary, capricious and unreasonable, they

are not to be disturbed. *Willoughby v. Planning Bd. of Tp. of Deptford, 306 N.J. Super. 266, 273-274* (App. Div. 1997).

The Board's findings that Applicants had notice of the issuance of permits years before the appeal to the Board was filed cannot be refuted.

CONCLUSION

The Appellants have failed to carry their burden of proof regarding the decision of the Wantage Township Land Use Board that the appeal of the administrative officer's decision was outside the MLUL deadline of 20 days.

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Attorneys For Defendant/Respondent,
Wantage Township Land Use Board

By: /s/ *David Burton Brady*
David Burton Brady, Esq.

Dated: September 26, 2025

DIANA ALLEGRETTI and CATHERINE FAY, APPELLANTS, v. THE TOWNSHIP OF WANTAGE, WANTAGE TOWNSHIP LAND USE BOARD, MNL FARM LLC, and CLOVE SPRING RANGE, INC., RESPONDENTS.	:SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : Docket No. A-001903-24 : Civil Action : : On Appeal from : Superior Court, Sussex County : Docket No. SSX-L-000126-24 : : Sat Below: : Hon. Stuart A. Minkowitz, A.J.S.C :

APPELLANTS' AMENDED REPLY BRIEF

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Dated: October 22, 2025

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STATUTES

RULES

Plaintiffs Diana Allegretti and Catherine Fay file this consolidated reply pursuant to the court's Order dated October 14, 2025, permitting the filing of a 20-page reply brief due no later than October 20, 2025. This Amended Reply Brief replies to the briefs of defendants Township of Wantage Land Use Board (LUB Brief, LUBbx) and MNL Farm LLC (MNL Farm Brief, MNLbx).

PRELIMINARY STATEMENT

We respectfully assume that the court is well familiar with our initial brief, and we will not repeat or paraphrase at length our arguments before discussing how the defendants fail to offer any persuasive rebuttal, or, in many instances, any rebuttal at all. We will mostly address the MNL Farm brief, as the LUB brief is devoid of any meaningful argument. We have already disproved nearly all of the defendants' arguments in our initial brief. In reply, we will simply note the pages in our initial brief and add a few comments.

In a case such as this, courts repeatedly emphasize that the public interest in sound planning and zoning must always take precedence over the private interest of a property owner who has obtained a permit in violation of the zoning ordinances. The law is clear, consistent and long-standing that any party claiming the status of nonconforming use always has the burden of proof on any issue, no exceptions. Discussion of

and application of this bedrock principle is barely waved at in passing in the MNL Farm Brief and absent from the LUB Brief, and was never acknowledged or applied in the lower court Opinion. In the event that the court perceives a close question about any aspect of this case, and it shouldn't given the clarity and uncontested nature of the facts and the law, application of the burden of proof will decisively settle any question in favor of the plaintiffs. The remedy is that the court must enjoin the gun range operations unless and until it receives the required permissions including a use variance.

ARGUMENT

I. The Factual Errors In The MNL Farm Brief Are Rebutted

The court must be particularly skeptical of factual assertions in the MNL Farm Brief, because many of them are either manifestly incorrect or lack any basis in the record. These are the most egregious:

* Referring throughout to the commercial gun range as "the Lawful Use." It was never lawful. Excessively repeating a falsification does not make it come true.

* Claiming that the Township has "certified the legality of the Lawful Use." MNLb4, 5, 19, 20, 26, 32. That never happened. The only legal method of certification is set forth in N.J.S.A. 40:55D-68 (second paragraph); accord Wantage Zoning Ordinance, Sec. 13-15.6,

Registration and Certification of Nonconforming Uses. Pa98-99. Hidden away in a footnote is MNL Farm's assertion that no such certification has ever been sought. MNLb7, n. 2., 28. In fact, though, such Section 68 certification was sought twice, the first time unsuccessfully and the second time, unlawfully. In each instance, the gun range was admonished that no expansion would be permitted without a variance, which was manifestly violated. Our discussion of the lack of a valid "certification" and the warnings against expansion is at Pb37-39. MNL Farm is probably referring to the various building permits and certificates of occupancy, every one of which was issued in violation of the zoning ordinances. See our discussion at Pb40-42. There is no claim that a variance was ever applied for, let alone granted.

In addition, the MNL Farm brief incorrectly claims that the Township Clerk "certified that the use was not prohibited on two occasions," which we take to be a reference to Pa171 and Pa172. MNLb27. Neither of these misleadingly worded documents "certifies" that operation of a commercial gun range is a permitted use. They prove nothing, as we show in our brief. Pb27-31.

* Claiming that Wantage did not have a zoning ordinance until 1979. MNLb8 (twice). There is no proof whatsoever for this claim, and compelling proof against. Our discussion in our initial brief is at Pb31-32.

MNL Farm never mentions, let alone disputes, that there is a map dated December 1968 in the Wantage Township Land Use Office entitled "Zoning Map" with delineated "Zoning Districts." Pa221. There is no "zoning map" and no "zoning districts" without a zoning ordinance. No one disputes that the map shows this location to be a "residential" area. Pa221; 2Tr11\16-17; Pb31. An assertion of counsel does not meet any definition of a burden of proof.

* Claiming that the commercial gun range utilizes "approximately 29 acres." MNLb4. The gun range operates on approximately 89 acres after unlawful and very substantial expansions in 2015, 2016 and 2020. Pa134, Pa206, Pa213; see also LUBb3 (statement of facts). Our discussion is at Pb40-42.

* Claiming that the commercial gun range "has been operating legally and continuously since 1963" and "without cessation." MNLb8, 22, 29. The record contains not a scintilla of support for this, and to the contrary, proves that the operation of the commercial gun range was discontinued by the previous owners and conclusively abandoned from 2005 to 2015. Pb32-37. An assertion of counsel does not meet any definition of a burden of proof.

* Claiming that MNL Farm purchased the property in 2005 "with the express intent to continue" the commercial gun range." MNLb23, 29. The

record contains no such "express intent" or anything like it.

* Claiming that the current owner "purchased the trap, skeet, rifle shooting range and sale of associated items at the "property." MNLb7. There is no support in the record for this.

* Claiming that the 2015-2016 and 2020 "changes at the site" were not expansions requiring use variances. MNLb30. Our discussion is at Pb40-42. To note here just one conspicuous example, one architect's drawing that accompanied the 2015 application is entitled "ALTIRS NEW 60+ ACRES EXPANSION AREA FOR 16 STATION CLAY SPORT SHOOTING COURSE," a 500% increase in range size, and a 220% increase in shooting stations. Pa134 (capitalization on original map; Mr. Masoud Altirs is the owner of MNL Farm and the gun range).

As our Supreme Court put it succinctly, in deciding if a nonconforming use has been expanded, "[t]he criterion of determination is the use of the property at the time the zoning ordinance was enacted. It must be the same both before and after the passage of the ordinance." Ranney v. Instituto Pontificio Delle Maestre Fillipini, 20 N.J. 189, 197 (1955)(emphasis added; citations omitted).

II. Foundational Law Missing From The MNL Farm And LUB Briefs

The law is long-standing and consistent that nonconforming uses

are disfavored, because they are offensive to proper zoning, and are to be reduced to conformity as soon as practicable. Pb12-13. Neither the MNL Farm brief nor the LUB brief nor the Opinion mentions or applies this.

The law is long-standing and consistent that a party claiming nonconforming use privileges always, no exceptions, has the burden of proof of any issue. Pb13-14. The Opinion never mentions or applies this, and thus commits a serious error. PB14. The LUB brief never mentions or applies this. The MNL Farm brief once states that "[t]ypically" a party claiming nonconforming use has the burden of proof. MNLb19. It's not "typically," but always, no exceptions. But MNL Farm also denies that it had the burden of proof. MNLb16, n. 6. The MNL Farm brief never again refers to its burden of proof or applies it.

A party claiming nonconforming use status must prove that at one point it was a permitted use. Pb14-15. MNL Farm claims, without any proof or citation at all, that Wantage did not have a zoning ordinance before 1979, which as we noted above is factually untrue. MNLb8, 15, 20, 21. MNL Farm also claims that three documents support its claim that it was a permitted use in 1963 and 1967 and 1995. MNLb5-6. They do not, as we discussed in our brief at Pb27-31, and MNL Farm makes no attempt to

rebut our arguments.[1]

> Hilton Acres v. Klein, 35 N.J. 570 (1961) holds that a permit issued
>
> in direct violation of law or without legal authority is void ab initio and has no legal efficacy. So a building permit issued contrary to a zoning ordinance or building code cannot ground any rights in the applicant. *** These authorities expressly hold that no estoppel may arise against the municipality in such situations by reason of reliance on the part of the property owner or of acquiescence and laches by the municipality. This result derives from recognition of estoppel as a vehicle for a just solution, involving a weighing of the particular interests and equities.
> [Hilton Acres, 35 N.J. at 581-582, emphasis added; citations omitted.]

To sum up, a permit issued in violation of the zoning ordinance is void ab initio, confers no rights on the property owner, and can be challenged at any time; the public interest in enforcement of its zoning code "predominates completely." Ibid. This bedrock case and bedrock principle are mentioned once in passing (and inaccurately described) in the MNL Farm Brief, MNLb15, and absent from the Opinion and the LUB Brief. Our discussion of this and numerous cases in accord is Pb16-27.

The MNL Farm Brief never mentions that so far as the record shows, and bearing in mind the burden of proof, operation of a

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[1] Our courts have also emphasized that in instances in which there are difficulties of proof, such as the passage of many years, it is nonetheless consistent with the disfavored status of nonconforming uses that the burden of proof remains with the claimant. Ranney, supra, 20 N.J. at 197; Ianieri v. East Brunswick Zoning Board, 192 N.J. Super. 15 (Law Div. 1983).

commercial gun range has never been a permitted use anywhere in Wantage Township. Operation of a retail shop has never been a permitted use at this location. Operation of a venue for hosting events has never been a permitted use at this location. See our brief at Pb31-32.

Every single permit relied upon by MNL Farm to justify its operation and significant expansions was issued "without legal warrant" and "contrary to [the Wantage] zoning ordinance." Our discussion of this and cases in accord is at Pb18-26.

In Stafford Township v. Stafford Zoning Board, 154 N.J. 62 (1998), our Supreme Court held that proper public notice is required for any application for certification of nonconforming use protection; that the requirement for such public notice is jurisdictional, which voids ab initio any permit or proceeding, and the holding is retroactive. The Court also held that the MLUL requires jurisdictional public notice for expansion of a nonconforming use. None of the Opinion, MNL Farm Brief and LUB Brief ever mentions, let alone applies, these important principles. No public notice of any kind was given for any permission applied for or received by MNL Farm. Pb40-42.

We turn to the specific arguments of MNL Farm that merit a few words. The MNL Farm arguments not specifically addressed below are rebutted in other sections of this brief and do not need any further

discussion.

III. The Objectors' Requests For An Appeal And Interpretation Were Timely Filed; Every "Permit" Issued To MNL Farm Was In Manifest Violation Of The Zoning Ordinances

As set forth in our brief at Pb16-27, a long line of consistent cases holds that this court must apply one of three standards in judging the timeliness of an appeal pursuant to N.J.S.A. 40:55D-70a or a request for an interpretation pursuant to N.J.S.A. 40:55D-72a. The burden of proof is always on the permit holder. If a permit is issued in conformity with the ordinance, it will stand absent fraud. If, as Hilton Acres, 35 N.J. at 581, holds, a permit is issued without any basis in the zoning ordinance, it is void ab initio, confers no rights on the permit holder and can be challenged at any time. There is the "intermediate" test, as articulated in Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), aff'd, 24 N.J. 327 (1957), as elaborated in Howland v. Borough of Freehold, 143 N.J. Super. 484 (App. Div.), certif. denied, 72 N.J. 466 (1976): "the necessity for the appearance of an issue of construction of the zoning ordinance or statute, which although ultimately not too debatable was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted without any reasonable basis or that the owner proceeded without good faith." Howland, 143 N.J. Super. at 490 (emphasis added).

MNL Farm largely ignores this authority, but for a claim that Jantausch actually supports MNL Farm's permits. It misstates the "intermediate" test, MNLb26, but then erroneously rests this claim entirely on its unsuccessful claim of nonconforming use, which conflates two different issues and authorities. A nonconforming use claimant would still need a zoning variance to commence operations conclusively abandoned, or to expand or intensify operations. MNL Farm does not claim, and can not claim, that its permits were issued in compliance with any zoning ordinances, or that there is any "debatable" interpretation of those ordinances that would support any of its municipal permits.

The LUB brief never acknowledges that its sole authority for its decision, Sitkowski v. Board of Adjustment of Lavalette, 238 N.J. Super. (Law Div. 1956), aff'd 24 N.J. 326 (1957), contains an extensive discussion of this line of authority, as our brief notes, and that case is obviously an "intermediate" case. Pb21 and n.7.[2]

MNL Farm wrongly claims that the cases we cited to show that the applications here were timely were all municipal enforcement actions. (It otherwise makes no attempt to rebut these cases.) The foundational case

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[2] Both the LUB brief and MNL Farm brief also refer to Trenkamp v. Town of Burlington, 170 N.J. Super. 251 (Law Div. 1979), but that permit was explicitly found to be a permissible “intermediate” case, id. at 278-79, so all else is dicta.

of Jantausch, supra, and the cases of Hill v. Eatontown, 122 N.J. Super. 156 (App. Div. 1972); Schultze v. Wilson, 54 N.J. Super. 309 (App. Div. 1959); Heagen v. Borough of Allentown, 42 N.J. Super. 472 (App. Div. 1956); Ianieri v. East Brunswick Zoning Board, 192 N.J. Super. 15 (Law Div. 1983), among others, involved private enforcement action. As the court noted in Heagen, supra,

> Legal action at best involves expense and [plaintiff] is hardly to be criticized for withholding action until there was no alternative. If, as his showing indicates, there was a clear violation of the zoning ordinance, his proceeding to eliminate the unlawful use serves not only his private interests but those of the entire community as well ....
> [Heagen, 42 N.J. Super. at 487.]

And in Ianieri, Judge Skillman held that "[i]n any event, the enforcement of a zoning ordinance ordinarily may not be prevented on grounds of estoppel merely because a suit to terminate the illegal use could have been commenced earlier." Ianieri, 192 N.J. Super. at 25-25, citing Hilton Acres, supra, and Universal Holding v. North Bergen Township, 55 N.J. Super. 103 (App. Div. 1959).

IV. The Operation Of The Commercial Gun Range Was Conclusively Abandoned From 2005 To 2015-6; MNL Farm Did Not And Can Not Meet Its Burden Of Proving That The Range Was Not Abandoned

Consistent with all other cases dealing with claims of nonconforming uses, the property owner bears the burden of proof that its use has not

been abandoned. Objectors presented two statements from neighbors and a series of pages from the authoritative skeet shoot directory to prove that the operation of any commercial gun range was abandoned from at least 2005 to 2015. Pa84, 104-132. Before the LUB, MNL Farm only presented one document, a certificate of occupancy for an addition to a residence. Pa205. MNL Farm thus recognized, but failed to meet, its burden of proof of nonabandonment, and the range must as a matter of law be deemed to have been abandoned, and therefore lost any legitimate claim to nonconforming status. N.J.S.A. 40:55D-68.

MNL Farm argues that one prong of the two-part test of abandonment is "proof of intent" to abandon, but incorrectly claims this test is "subjective." MNLb23. It is not, and S & S v. Zoning Board of Stratford, 373 N.J. Super. 603 (App. Div. 2004), cited by MNL Farm itself in its discussion, so holds:

> In cases such as this, where cessation of active use is the circumstance that creates the issue of entitlement to resume active use, the owner will invariably state that his or her intention was to continue the use. Otherwise, there would be no dispute. That statement is the beginning, not the end, of the inquiry. The clear policy of this State is to eliminate nonconforming uses as quickly as is compatible with justice. An unsubstantiated assertion of intention cannot carry the day, for that would substantially impair, if not defeat, advancement of the elimination policy. Rather, the owner must demonstrate that the intention to continue the use is a continuing and definite intention, which must be substantiated by all of the circumstances surrounding the cessation.
> [S & S, 373 N.J. Super. at 614, citations omitted.]

MNL Farm submitted no evidence that its owner intended to resume operation of the commercial gun range. Our discussion is at Pb31-37.

V. All Issues Are Ripe For This Court's Decision

Both MNL Farm and the LUB argue that since the LUB decided only tha t it lacked jurisdiction to hear the appeal and request for an interpretation, that is the only issue for this court to decide. They are wrong.

As the court is well aware, an appellate court is authorized to decide issues on appeal that were not directly decided below, and this case is an ideal candidate for exercise of this authority. All issues here are issues of law, or application of law to settled facts. No fact-finding is needed to dispose of the issues, and no credibility determinations are needed. The objectors below first began sustained efforts to end or mitigate the noise from the substantially expanded commercial gun range operations in 2021, continued those efforts until applying to the Land Use Board in April 2023, all the while burdened by the intolerable gunshot noise, which continues today.

Just as important, MNL Farm had ample opportunity to offer evidence and arguments before the LUB, and did. Pa166-173; 190-219; 2T14-17; 2T18/14-25, 2T19/1-3, 2T2/3-11. It had the burden of proof on all issues, no exception, and did not meet that burden. It makes no claim that

given another proceeding at the LUB, it would introduce new or different evidence and gives no reason to believe that it could. It did not notify the LUB that it intended to offer testimony, and does not identify any such testimony now. Its brief states without qualification that "[t]his documentation [submitted to the Board] is a sufficient and full record before the Board, and does not require supplementation." MNLb25.

N.J. Const. art. VI, § 5, ¶ 3 provides "[t]he Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review." Accord, R. 2:10-5. Original jurisdiction is particularly appropriate when the issue is a question of law, as all issues here are. Henebema v. Raddi, 452 N.J. Super. 438, 452 (App. Div. 2017) certif. denied, 233 N.J. 215 (2018).

This court has said:

> The exercise of original jurisdiction is appropriate when there is "public interest in an expeditious disposition of the significant issues raised." Price v. Himeji, LLC, 214 N.J. 263, 294 (2013) (quoting Karins v. City of Atlantic City, 152 N.J. 532, 540-41 (1998)). In determining whether to exercise original jurisdiction, we "must weigh considerations of efficiency and the public interest that militate in favor of bringing a dispute to a conclusion, [and] also must evaluate whether the record is adequate to permit the court to conduct its review." Id. at 295. It is particularly appropriate to exercise original jurisdiction "to avoid unnecessary further litigation, as where the record is adequate . . . and . . . the issue to be decided is one of law and implicates the public interest." Vas, supra, 418 N.J. Super. at 523-24 (citations omitted). The issue here is purely

> one of law, with no further need to develop the record." [New Jersey Election Law Enforcement Commission v. DeVincenzo, 451 N.J. Super. 554, 570 (App. Div. 2017).

This court can and should decide all issues and thus terminate this lengthy and burdensome litigation, and the public interest strongly favors the proper enforcement of zoning ordinances, and terminating an intolerably noisy unlawful use.

Application of the foundational law of nonconforming uses will indeed terminate this litigation. MNL Farm operates a disfavored use, unlawfully expanded it, and bears the burden of proof on all issues, no exceptions. It had ample opportunity to offer evidence to meet that burden of proof and it did not. The parties have fully briefed the legal issues both in the Law Division and in this court.

VI. The Court Can Ignore The Land Use Board's Brief.

First, the LUB brief does not accurately describe or discuss what the Board's resolution of memorialization actually said – and with good reason, for the resolution got the law very wrong, based on its counsel's very wrong discussion of the law. Our discussion in our initial brief is Pb16-27. It is the resolution, not the transcript or anything else, that is the basis for judicial review. See, e.g., New York SMSA v. Bd. Of Adjustment, 370 N.J. Super. 319, 334 (App. Div. 2004). The LUB brief in this court is no

more accurate.[3] In fact, the LUB brief does not even cite to or quote the resolution. But this need not detain the court. The resolution, the trial court Opinion and the LUB brief all ignore the long-standing and consistent case law of this state on when an appeal or an interpretation is timely, as we discussed in Section III above.[4]

Second, the LUB argues that the only issue before this court is the jurisdictional one. We have rebutted this argument in Section V above. But the LUB also argues that it has no jurisdiction to ever "hear attacks on the issuance of permits" or consider "whether permits fall within the gambit [sic] of those are facially void or presumptively valid or on whether uses have been abandoned or whether gunshots constitute a nuisance…." LUBb28. The Resolution says nothing of the sort, but in all events, it is strikingly wrong. The validity of various building or zoning permits and

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[3] Post hoc arguments of counsel are not valid. See, e.g., In re Petition of Elizabethtown Water Co., 107 N.J. 440, 460 (1987) ("grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based"); In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 139 (App. Div. 2013) ("[a]n appellate brief is no place for an agency to try and rehabilitate [the agency's] actions".)

[4] The gist of the LUB resolution was that the objectors had not filed their applications to the LUB in a “timely fashion” and “in a reasonable time.” Pa47, Pa48. On appeal, however, the LUB argues instead that the appeal was filed beyond the 20-day deadline and the objectors’ request for an interpretation was a device to evade the 20 day deadline. LUBb15-17.

the issue of abandonment have all been repeatedly and often ruled on in the first instance by land use boards, as the many cases cited in our briefs prove.

VII. This Court Must Enjoin The Operation Of The Commercial Gun Range

Neither the MNL Farm brief nor the LUB brief offers any argument against the law and facts that support the issuance of a permanent injunction to halt the commercial gun range's operations. The LUB brief is silent on this issue. MNL Farm argues that a court in a prerogative writ action can not issue an injunction, which is manifestly incorrect, see, e.g., R. 4:69-3; see also Heagen, 42 N.J. Super. at 488 (request to compel Borough to enforce regulations unnecessary because injunction granted against unlawful expansion of nonconforming use). Neither brief cites a single authority. Our discussion is at Pb46-49.

The issue of enjoining the commercial gun range has always been before the Law Division and this court. Our amended complaint in the Law Division plainly pleaded for a preliminary and permanent injunction against the commercial gun range's operations and expansions. Pa337. Plaintiffs did seek a preliminary injunction in the Law Division, 3Tr12-55, which was denied, Pa408, and unsuccessfully sought reconsideration on the preliminary injunction. Pa413.

CONCLUSION

In conclusion, we note a remarkable absence from both the Land Use Board brief and the MNL Farm brief. There is nowhere the slightest suggestion of sympathy or apology for those who suffer the impacts of this intolerably noisy commercial gun range, day after day with no letup. These victims live in the same community as the Land Use Board members and deserve their understanding; MNL Farm's wealthy owner does not live here or suffer these impacts. MNL Farm has not only not undertaken a single measure to mitigate the harms it inflicts on those who live in this rural residential community, but to the contrary, it exponentially expanded the operations and unwanted noise in 2015-16 and 2020. This is a serious quality of life impact. It is again worth noting the Chancery Division opinion in Hanover Tp. v. Town of Morristown, 108 N.J. Super. 461 (Ch. Div. 1969); motion denied 118 N.J. Super. 136 (App. Div. 1972); aff'd 121 N.J. Super. 536 (App. Div. 1972); certif. denied 62 N.J. 427 (1973); on subsequent appeal 135 N.J. Super. 529 (App. Div. 1975):

> Noise, including aircraft sound, is no less an environmental pollution than the smog and smoke that pollutes the air or the debris which poisons our lakes and rivers. It is the most difficult form of pollution to control. No one would expect that man should continually live inside his home with all doors and windows tightly shut or walk the streets or the fields with fingers in his ears or wear acoustical ear muffs, such as those employed on the flight line at an airport. . . . Each of the residents was most annoyed that complaints, when registered with the Airport Management or F.A.A. seemed to fall on

> deaf ears. They wanted action and received none, although it was apparent to them that violations of Airport rules and F.A.A. regulations had been committed on numerous occasions. [Hanover Tp., 108 N.J. Super. at 469- 470.]

For the reasons set forth in this brief and our initial brief and appendices, plaintiffs respectfully request that this court reverse the opinion of the Law Division and vacate the resolution of the Wantage Township Land Use Board denying the applications for an appeal and interpretation; adjudge and declare that the operation of a commercial gun range at this location is not and has not ever been a valid nonconforming or permitted use; adjudge and declare that operation of a commercial gun range was abandoned as a matter of law in 2005 to 2016; adjudge and declare that any and all expansions and intensifications are void ab initio as a matter of law; and permanently enjoin all operations of Clove Spring Range unless and until a variance and other permissions are obtained.

Respectfully submitted:

/s/ Peter Dickson
Peter Dickson