SANDRA LEMA and ABELINO MOROCHO, Plaintiffs, v. THE BOROUGH OF GARWOOD, THE BOROUGH OF GARWOOD PLANNING BOARD, 680 MYRTLE AVENUE, LLC, SITESCAPES LANDSCAPE AND DESIGN, LLC, SITESCAPES CONSTRUCTION MANAGEMENT LLC, and SITESCAPES LANDSCAPE & DESIGN MASON CONTRACTORS Defendants.	ON APPEAL FROM: THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO. UNN-L-3957-20 SAT BELOW: HONORABLE LISA M. WALSH, A.J.S.C. APPELLATE DIVISION DOCKET NO. A-003086-23

BRIEF OF PLAINTIFF/APPELLANT

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PRELIMINARY STATEMENT

Appellants, Sandra Lema and Abelino Morocho ("Appellants"), respectfully submit this Memorandum of Law in support of this appeal of the Trial Court Orders (1) granting the Motions for Summary Judgment on behalf of all respondents, including: the Borough of Garwood (the "Borough"); the Borough of Garwood Planning Board (the "Planning Board" or "Board) (collectively, the "Municipal Respondents"); 680 Myrtle Avenue, LLC ("Owner"); SiteScapes Landscape & Design, LLC, SiteScapes Construction Management LLC, and SiteScapes Landscape & Design LLC DBA SiteScapes Mason Contractors (collectively, "SiteScapes" or the "SiteScapes Respondents", together with the Municipal Respondents, the "Respondents"); and (2) denying Appellants' Motion for Summary Judgment. Appellants' claims arose out of their repeated requests to the Respondents to remediate and/or mitigate the alleged serious and ongoing violations of the Borough's Zoning Ordinance (the "Ordinance") related to the allegations of illegal and improper activities on that certain parcel of property designated as 680 Myrtle Avenue, Garwood, New Jersey (the "Property"); more specifically, SiteScapes Respondents' alleged expansion of a preexisting nonconforming use.

The Municipal Respondents have repeatedly interfered with Appellants' property rights by ignoring Appellants' repeated complaints, and deliberately taking no action as to same, depriving the Appellants of their substantive right to be heard

by the Municipal Respondents on the issues set forth herein. Specifically, it is the Appellants' position that the current use of the Property by the SiteScapes Respondents exceeds that which is permitted as a supposed "preexisting non-conforming use" thereon. At no time has the parameters of the permitted, preexisting non-conforming use of the Property ever been substantively considered and determined by the Municipal Respondents. For the reasons set forth herein, the undisputed material facts and supporting statutory and case law require the reversal of the Trial Court's Orders, remanding same for further finding of facts and conclusions of law.

Statement of Facts and Procedural History[1]

Appellants reside at 313 Myrtle Avenue, Westfield, New Jersey, also known as Block 4005, Lot 5, on the Official Tax Map of the Township of Westfield. Pa0003a. In the neighboring municipality, which is immediately adjacent to Appellants' residence, is the Property commonly known as 680 Myrtle Avenue, Garwood, New Jersey, also known as Block 304, Lot 38 on the Official Tax Map of the Borough of Garwood (the "Property"). Id. All of the individual companies that constitute the SiteScapes Respondents currently conduct their masonry, paving and landscaping business operations at the Property. Id. The Property is currently located

[1] Due to the factual relevance of the procedural history in this matter, both the Statement of Facts and Procedural History have been combined for the purposes of this Memorandum of Law.

in the Borough's single-family residential zone (the "RA Zone"), which is designed primarily for single-family dwelling units.

In or about 1974, M. Hirsch & Sons Inc. purchased the Property and a certificate of occupancy was issued for the continued, pre-existing nonconforming use as a "private garage." Pa0075a. Thereafter, on or about March 5, 1986, the Borough issued to "538 Corporation" a Certificate of Continued Occupancy for the Property for the specific, limited use of "storage of business trucks." Pa0088a.

On or about September 9, 1998, Landover Cooling Tower Service, Inc. ("Landover"), sought a Certificate of Occupancy for the Property, at which time, Landover represented, in writing, that the proposed use of the Property was: parking for four (4) company trucks inside a garage building; parking of two (2) 5' x 16' enclosed trailers; daytime parking on the property for its six (6) employees; and the "normal day time" working hours were limited to 8:00 am to 6:00 pm Monday through Friday. Pa0089a. In response thereto, then Borough Zoning Officer issued a letter on September 14, 1998 which provided that Landover may locate its business at the Property in accordance with the outline of proposed use as provided by Landover, provided that no equipment was to be stored outside of the building and that all commercial vehicles must be kept in the garage. Pa0091a.

Nevertheless, some six (6) years later, on or about May 2004, an application was submitted to the Board by Landover for a "d(2)" variance for the expansion of

the preexisting nonconforming use of the Property, and an appeal of an administrative action pursuant to N.J.S.A. 40:55D-70a (the "2004 Application"). Pa0092a. As part of the 2004 Application, Landover's attorney represented via correspondence dated May 25, 2004 that the then-current use of the Property was as approved by the Zoning Officer in September 1998 (parking for four (4) company trucks inside the building; parking of two (2), 5' x 16' enclosed trailers; daytime parking on the property for its six (6) employees; and the "normal day time" working hours were limited to 8:00 am to 6:00 pm Monday through Friday) and that "the company employs six people, five of whom are generally at the job site and one of whom who works regular office hours at the subject premises." Id. On July 14, 2004, during its hearing on the request for said d(2) variance, testimony was provided by the owner of the Property stating, *inter alia*, he has been there for six (6) years, has six (6) employees, three (3) trucks and the hours of operation are 7:00 a.m. to 5:30 p.m. Pa0102a-Pa0103a. Further, during the pendency of the 2004 Application, the Borough Zoning Officer submitted an Engineering Report to the Board outlining ways in which the Property can become more compliant with the Ordinance through the Site Plan process. Pa000a. The Board ultimately granted the 2004 Application, thereby permitting the demolition and reconstruction of the existing storage facility, subject to certain conditions of approval, including several conditions that directly

stemmed from the testimony of Landover or its representative (the "2004 Resolution"). Pa0104a.

In or about May 2016, SiteScapes became a tenant at the Property for its various masonry and construction businesses. In 2018, the Property was sold to the SiteScapes Respondent owner of the Property, who continues to lease the Property to SiteScapes Respondents. Pa0119a; see also, Pa0151a. Neither SiteScapes nor the Owner ever applied for a certificate pursuant to N.J.S.A. 40:55D-68 certifying that the nature and extent of its intended use of the Property existed before the adoption of the ordinance which rendered the use nonconforming. As such, the only meaningful way to gauge the permitted intensity or character of the nonconforming use of the Property is through the statements and/or testimony provided in 1998 and 2004, and any documents produced immediately prior to the transfer of ownership to the Owner in 2018. Pa0089a through Pa0104a.

On April 19, 2018, based upon a Preliminary Assessment Report performed by Peak Environmental, Inc., dated September 1998 (the "1998 PAR"), the Zoning Officer erroneously issued a Zoning Certificate/Permit for the Property stating that SiteScapes could occupy the site and its proposed use of the Property qualifies as a "pre-existing" non-conforming use, as the Property was (purportedly) historically used for "Industrial fabrication", "Masonry and heavy construction", "Roofing", and "Landscaping" "since at least 1970". Pa0122a – Pa0123a. At that time, SiteScapes

had yet to acquire ownership of the Property, making it difficult to determine if the proposed use of the Property by SiteScapes complied with the Ordinance (either prior to the Ordinance amendment making it a non-permitted use, or the Ordinance provisions regarding changes thereto). Pa0151a.

Regardless, SiteScapes is currently using the Property beyond the scope of the previously determined, preexisting non-conforming use of the Property established in 1998, as amended by the 2004 Resolution. See Pa0089a through Pa0104a. SiteScapes currently has approximately twelve (12) employees at the Property at one time and throughout the day, Pa0217a at 17:23, which is in excess of the amount of employees as set forth in 1998, Pa0089a, with no on-site parking provided for any employees. Pa0220a at 43:24. Nevertheless, there are trucks at the Property in excess of what was ever on-site prior to the Ordinance amendment making the use of the Property "nonconforming", with several of the (visible) trucks parked outdoors, several of which that cannot fit inside the three (3) bays of the existing building at the Property. Pa0222 at 37:9.

Contrary to the outline of proposed use as provided by Landover on September 9, 1998, SiteScapes leaves heavy machinery outdoors and overnight at the Property. Id. Likewise, SiteScapes currently starts its operations as early as 5:00 a.m. and 5:30 a.m., with the outside idling of trucks for up to 30 minutes. Pa0328a at 27:18. Furthermore, SiteScapes has expanded its operations into Saturday and

Sunday operations, which is contrary to the documentary and testimonial evidence previously submitted to the Board in 1998 and 2004. Id. at 27:24.

On or about December 5, 2019, Appellants, through Counsel, sent correspondence to the Borough requesting that the Zoning Officer conduct an investigation into what Appellants believe to be a violation of the Ordinance vis-à-vis the alleged expansion of the nonconforming use of the Property. Pa0170a. The last of these communications, dated January 7, 2020 (the "January Letter"), was addressed directly to the Zoning Officer seeking confirmation, in writing within ten (10) days (by January 17, 2020), that certain commercial operations currently taking place at the Property are not protected nor "grandfathered" as a legally valid, preexisting, nonconforming use. Pa0175a. The January Letter included a specific request that SiteScapes immediately cease its expanded operations as outlined above, and instead conform to the legally permitted limits for any commercial use of the Property as a preexisting, nonconforming use as set forth by the Garwood Zoning Officer in 1998. Id.

The Zoning Officer's "refusal" to respond to the January Letter, or to otherwise enforce the Ordinance, resulted in Appellants filing an appeal with the Board on January 23, 2020 pursuant to N.J.S.A. 40:55D-70(a), seeking to appeal the Zoning Officer's "decision" to not enforce the Ordinance against the SiteScapes Respondents regarding the alleged 2018 expansion of the nonconforming

commercial use of the Property, and -70(b), seeking an interpretation of the Ordinance regarding §§ 106-122(B) and (C), which expressly prohibit the change, enlargement, extension, or substitution of a nonconforming commercial use in a residential zone, and whether the changes of the nonconforming commercial use beginning in 1998 to a more restricted or conforming use constituted an abandonment of any less restrictive or less conforming use that previously occurred at the Property (the "Appellants' Application"). Pa0177a. The Appellants' Application sought confirmation that the nature and intensity of the use of the Property which adjoins Appellants' property, has changed and expanded well beyond what was occurring at the time the Property became nonconforming, relying, in part, on the fact that the use of the Property by SiteScapes is not even remotely "substantially similar" to the use that existed at the Property in 1998. Id.

Subsequent to the commencement of the hearing on the Appellants' Application, on or about July 17, 2020, the Zoning Officers issued a joint letter to Appellants' counsel (the "July 2020 Letter") stating, *inter alia*, that:

a. SiteScapes complies with the provisions as a "construction contractors' yard" and is a pre-existing, non-conforming use, and are operating legally as far as zoning regulations";

b. Limitations of use allegedly "volunteered" by the previous owner of the Property in 1998 cannot be held in perpetuity and are nonbinding on SiteScapes; and

c. The current use of the Property is not substantially different from the previous uses of the site.

[Pa0189a.]

The findings and conclusions contained in the July 2020 Letter entirely derived from the 1998 PAR, notwithstanding the fact that SiteScapes' use of the Property did not commence until 2018, almost 20 years after the issuance of the 1998 PAR. Id. On July 22, 2020, Appellants' Application was amended to include a challenge via appeal and interpretation pursuant to N.J.S.A. 40:55D-70(a) and (b), respectively, to the July 17, 2020 Letter. Pa0202a.

On September 30, 2020, a hearing was scheduled concerning the Appellants' Application (the "Hearing").[2] Pa0205a. However, on or about September 30, 2020, the Board attorney prepared an opinion letter stating, *inter alia*, the Board must first address the question of whether it has jurisdiction to consider the matter, and/or to grant whatever relief may be sought (the "September 2020 Letter"). Pa0205a. The September 2020 Letter also stated, *inter alia*: (a) the proper procedure is for the Zoning Officer to issue a summons and to enforce it in Municipal Court; (b) if the Appellants believe that the Zoning Officer is improperly failing to discharge his duties, the neighbors could file a citizen's complaint in Municipal Court; (c) the Appellants could file in Superior Court, and seek either injunctive relief against the

[2] Transcript of the September 30, 2020 Planning Board hearing ("T1"); Transcript of the October 14, 2020 Planning Board hearing ("T2"); Transcript of the April 19, 2024 hearing on Motion for Summary Judgment.

Owner of 680 Myrtle Avenue, and/or a mandamus compelling the Zoning Officer to act; (d) N.J.S.A. 40:55D-72 provides that appeals are to be taken within 20 days; (e) the Zoning Officer met with Mr. Morocho and his prior attorney in the summer of 2019; (f) N.J.S.A. 40:55D-70(b) relates to interpretation of "the zoning map or ordinance," which is not at issue in this case; (g) My recommendation is that the Board deny the Appellants' Application on procedural grounds; and, (h) a court of law is far more equipped to resolve this matter than is the Board. Id. As such, rather than consider the Appellants' Application on the merits, the Board solely heard arguments regarding the supposed jurisdictional question raised in the September 2020 Letter, and ultimately declined to hear the Appellants' Application claiming that it did not have jurisdiction to hear same. See T2 at 55-56. On October 14, 2020, a resolution memorializing the Board's decision was adopted by the Board (the "Resolution"). Pa0207a.

The Appellants commenced the instant action via filing a complaint in lieu of prerogative writs on or around November 20, 2020 (Amended October 21, 2021 – Pa0001a). Thereafter, on or about February 16, 2024, Appellants and the Municipal Respondents filed respective motions for summary judgment, followed by the SiteScapes Respondents filing a Cross-Motion for Summary Judgment on or about March 14, 2024. *See* LCV2024429171; *see also* LCV2024430997; *see also* LCV2024678759. On April 19, 2024, oral argument was held before the Honorable

Lisa Morales-Walsh, A.J.S.C., who issued three Orders in this matter, one (1) of which denied Appellants' Motion, while the other two (2) granted both the Municipal Respondents and the SiteScapes Respondents respective motions.[3]

LEGAL ARGUMENT

I. APPELLANTS HAVE STANDING TO BRING THIS SUIT (Raised Below: O-3 at 5 to 9).

The Court below dismissed Appellants' Complaint, with prejudice, improperly finding the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. (the "TCA") to be applicable to Counts 6 and 7, related to public and private nuisances, O-3 at 17, as well as Count 2, related to the enforcement of the Ordinance pursuant to the terms of N.J.S.A. 40:55D-18. O-3 at 8. Citing to N.J.S.A. 59:2-3, which states that "[n]othing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial function", the Court referenced New Jersey jurisprudence explaining the distinction "between a planning-level or discretionary decision, which is generally entitled to immunity, and an operational or ministerial action, which is not." O-3 at 6 (*citing* Kolitch v. Lindedahl, 100 N.J. 485, 495, 497 (1985)).

a. **Tort Claims Act: (Raised Below: O-3 at 5)**

[3] Order for Summary Judgement granted in favor of the Municipal Respondents, located at LCV20241033221 ("O-1"); Order for Summary Judgement granted in favor of the SiteScapes Respondents, located at LCV20241033342 ("O-2"); and Order for Summary Judgement denied in favor of Appellants, located at LCV20241033450 ("O-3").

i. Claims pursuant to N.J.S.A. 40:55D-18 (Raised Below: O-3 at 6)

Pursuant to the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163 (the "MLUL"): "[t]he governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder". N.J.S.A. 40:55D-18.

> In case any … structure or land is used in violation of this act or of any ordinance … an interested party … may institute any appropriate action or proceedings to prevent such … use
>
> [Id.]

Pursuant to N.J.S.A. 40:55D-18, the Municipal Respondents were under a ministerial duty to enforce their own ordinances, and an interested party may institute a suit for injunctive relief to prevent any illegal use of a structure or land. See N.J. Zoning & Land Use Administration § 7-2.1 (2023). Notwithstanding the fact that the language of N.J.S.A. 40:55D-18 makes the enforcement of same mandatory, not discretionary, the Court dismissed Appellants' Count 2 as to N.J.S.A. 40:55D-18, relying, in part, on N.J.S.A. 59:2-4, which states that "[a] public entity is not liable for any injury caused by adopting or failing to adopt a law or by failing to enforce any law," noting that "even if the statue was ministerial and the TCA immunities did not apply, plaintiffs still needed to file a notice of tort claim with the Municipal Defendants." O-3 at 7.

Appellants' claims under N.J.S.A. 40:55D-18 are not an action in lieu of prerogative writs tried on the record below. See East Hanover v. Cuva, 156 N.J. Super. 159, 165 (App. Div. 1978). Appellants' claims pursuant to N.J.S.A. 40:55D-18 was an action for an injunction." Id. Pursuant to the terms of N.J.S.A. 59:1-4, "[n]othing in this act shall affect liability based on contract or the right to obtain relief other than damages against a public entity or one of its employees". See also Slocum v. Borough of Belmar, 233 N.J. Super. 437, 440 (Law Div. 1989) (holding that a demand for a rollback in future beach fees to compensate beachgoers for excess fees collected in prior years was not a demand for "damages" under the TCA and therefore not subject to the TCA's procedural requirements). Further, Appellants' claim under N.J.S.A. 40:55D-18 is equitable; it seeks only the enforcement of the Township's own Ordinance. See Gatto Design & Dev. v. Colts Neck, 316 N.J. Super. 110, 120-121 (App Div. 1998). Appellants are not seeking "damages" as defined by or contemplated within the TCA. As such, the Orders of the Trial Court in this matter must be reversed, and the matter remanded for further proceedings notwithstanding the lack of a Notice of Tort Claim.

ii. Nuisance Claims (Raised Below: O-3 at 5-7)

The Court similarly dismissed Appellants' nuisance claims for failing to file a Notice of Tort Claim under the TCA even though the Appellant's private nuisance claim was not against a public entity. O-3 at 7; see N.J.S.A. 59:1-1 et. seq. New

Jersey courts have distinguished between "the subjectively measured damages for pain and suffering," which are not compensable by the TCA, "and those which objectively affect quality of life by causing an interference with the use of one's land through inconvenience and the disruption of daily activities." Ayers v. Jackson, 202 N.J. Super. 106, 118 (App. Div. 1985). Here, much like in Ayers, supra, an award for damages for the "infringement upon plaintiffs' 'quality of life' does not represent compensation for the pain and suffering barred by N.J.S.A. 59:9-2(d); rather, it is compensation for damages characterized by inconvenience and disruption of daily activities, and is sanctioned by established principles of the law of nuisance," Id. at 120. As the Appellants' deposition testimony revealed, Appellants seek injunctive relief, or compensation for damages characterized by inconvenience and disruption of daily activities. *See generally* Pa0321a. As such, the Court's reasoning in which it dismissed Appellants' nuisance claims pursuant to the TCA must be reversed, and the matter must be remanded to the trial court for further proceedings in this matter.

iii. Continuing Tort Doctrine (Raised Below: O-3 at 32)

The "continuing tort doctrine," provides that when an individual is subjected to a "continual, cumulative pattern of tortious conduct," the statute of limitations period begins only when the wrongful action ceases. Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999). When a court finds that a continuing nuisance has been committed, the new tort is an "alleged present failure" to remove the nuisance, and

"[s]ince this failure occurs each day that [Respondent] does not act, the [Respondent's] alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day." Wreden v. Twp. Of Lafayette, 436 N.J. Super. 117, 125 (App. Div. 2014) (citation omitted).

In the present matter, the Court below found that Appellants failed to properly file a Notice of Tort Claim against the Municipal Respondents; thus barring the Appellants' tort claims and, "[a]s a result of [Appellants] being unable to assert a nuisance claim against the municipal [Respondents], this court will not consider [Appellants'] continuing tort doctrine argument. O-3 at 32. In Wreden, supra, the lower court failed to make any determination as to the applicability of the continuing tort doctrine; the lower court mistakenly found that because more than two years had passed since the filing of plaintiffs' notice of tort claim, all of the claims set forth in the notice, including the continuing torts, had expired. 436 N.J. Super at 126-127. The court felt it was constrained to reverse and remand for further proceedings while directing the judge to make detailed findings of fact and conclusions of law concerning the date of accrual of plaintiffs' claims and the applicability of the continuing tort doctrine. The Court therefore erroneously dismissed Appellants' claims "with prejudice" without addressing the date in which the statute of limitations commenced, thereby preventing any further litigation in this matter

related to these ongoing claims. As such, this matter must be remanded to the court below for a determination as to same.

b. Appellants Claims Should Not Have Been Dismissed for the Failure to Comply with the Time Restrictions Under Rule 4:69-6 (Raised Below: O-3 at 8)

i. Rule 4:69-6(a) (Raised Below: O-3 at 8):

Rule 4:69-6(a), provides that:

> no action ... shall be commenced later than [forty-five] days after the accrual of the right to the review, hearing or relief claimed. The [forty-five]-day time frame contained within R. 4:69-6 is designed to give an essential measure of repose to actions taken against public bodies. Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418,423 (App. Div. 2002)(*quoting* Washington Twp. Zoning Bd. v. Washington Twp. Planning Bd., 217 N.J. Super. 215, 225 (App. Div. 1987)).

The Court below found that Appellants are barred from appealing the Zoning Officer's 2018 and/or 2019 determination that the Property is a preexisting, nonconforming use based upon Appellants' alleged failure to bring this action within 45 days of the supposed accrual of its claim. O-3 at 9. Referencing Appellants' argument that the Appellants' Application was for a determination as to whether SiteScapes' current use of the Property was in conformance with the previously determined scope of the preexisting nonconforming use of the Property, the Court disregarded Appellants' arguments, noting that the 2018 Zoning Certificate/Permit was related to SiteScapes' use of the Property if approved. O-3 at 8-9.

Further, the MLUL states, in part, that a prospective purchaser or other person interested in any land with a nonconforming use or structure may apply "in writing for the issuance of a certificate certifying that the use or structure existed before the adoption of the ordinance which rendered the use or structure nonconforming." N.J.S.A. 40:55D-68. No such application was provided in this matter.

Here, the Zoning Officer's determination in 2018 that the use of the Property is a "preexisting nonconforming use" was based almost entirely on the 1998 PAR, which was prepared prior to the Property being used by SiteScapes, Pa0122a, and purchased by the Owner. Nevertheless, the Zoning Officer's determination as to a preexisting nonconforming use is contrary to a finding "in regard to defendant SiteScapes' use of the Property if approved." O-3 at 9. No such approval was sought by the SiteScapes Respondents.

Nevertheless, Appellants do not challenge the fact that the commercial use of the Property was at one point a lawfully existing, preexisting non-conforming use of the Property. Appellants' claims, as set forth in its Amended Complaint, challenge the **present** use of the Property, and whether or not it has been illegally intensified **since the Zoning Officer's issuance of the 2018 Zoning Certificate/Permit**. See Pa0001a. Appellants' claims under N.J.S.A. 40:55D-18 are not an action in lieu of prerogative writs tried on the record below. *See* Cuva, supra, 156 N.J. at 165. This action is a wholly different and distinct cause of action that was created pursuant to

the MLUL. N.J.S.A. 40:55D-18 requires a municipality to enforce its own ordinance, with no time limitation provided nor any criteria set forth to determine when this cause of action commences, nor any time constraints or statute of limitations as to expiration of same. As such, the Orders of the Court in this matter must be reversed and the matter remanded in light of the fact that Rule 4:69-6(a) is inapplicable.

ii. Rule 4:69-6(c) (Raised Below: O-3 at 9):

In the alternative, Rule 4:69-6(c) allows for an enlargement of time where "consideration of substantial constitutional questions warrants relaxation of the time limits of Rule 4:69-6 'in the interest of justice.'" Brunetti v. Borough of New Milford, 68 N.J. 576, 587 (1975). As found below, when considering the timeliness of an action in lieu of prerogative writs under Rule 4:69-6(c), a trial court must consider whether the action involves:

> [1] important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification."
>
> [O-3 at 8 (citing Brunetti, supra, 68 N.J. at 587 (citations omitted).]

Here, Appellants alleged that the Municipal Respondents' failure to enforce its Ordinance deprived them of their constitutional property rights, and the Board's failure to act on the merits of its application violated its substantive due process

rights. Pa0019a. Despite the allegations set forth in the Amended Complaint, as reiterated throughout the Trial Brief and Deposition Testimony, the Court still found that Plaintiffs failed to allege what constitutional rights are being violated. O-3 at 9.

While Appellants did not necessarily rely on Harz v. Borough of Spring Lake, 234 N.J. 317 (2018) for this proposition, it did rely on Harz for its claim made pursuant to the NJCRA. In Harz, the Court found that the Borough of Spring Lake did not violate plaintiffs' constitutional right to be heard by the Planning Board, it stands for the fact that the MLUL clearly conferred on Harz said right to be heard. Id. at 320. Much like in Harz, Appellants allege in their Amended Complaint that they had a right to the quiet enjoyment of their property, that the Borough was required to enforce its own Ordinance, and that Appellants' had a substantive right, derived from the MLUL, to be heard by the Board. As such, a novel constitutional issue remains as to whether or not an applicant before a land use board has a right to have its application substantively heard pursuant to N.J.S.A. 40:55D-70(a) and -70(b) as to the scope of a permitted preexisting nonconforming commercial use of a property in a residential zone based on the previous and current nonconforming uses of the Property, notwithstanding a previous determination being made based on information derived from a source created prior to the current nonconforming commercial use of the Property.

In Catalano v. Pemberton Twp. Bd. of Adjustment, 60 N.J. Super. 82, 96-97 (App. Div. 1960), the court determined that the municipality's "failure to observe the fundamental statutory provisions referable to the enactment of the ordinance in question deprived Appellant of his constitutional rights," and as a result, the limitations period warranted extension. Id. Here, the Ordinance reads, *inter alia*: (1) the duties of the Zoning Officer shall include the enforcement of the code contained in Chapter 106 to investigate complaints regarding and the enforcement of the terms of the Land Use Ordinance and the terms of previously issued land use approvals (§ 5-51.12); (2) the governing body of the Borough shall enforce this act and any ordinance or regulation made and adopted hereunder…(§ 106-18); and, (3) the Zoning Enforcement Officer shall enforce the provisions of this chapter [106] (§ 106-19.1).

The Court below should have granted the Appellants an enlargement of time, to the extent that the limitations period applies, to determine whether there was an incorrect and/or illegal administrative determination of a zoning officer without a proper investigation into the preexisting nonconforming use. Here, the Municipal Respondents did not receive, and the SiteScapes Respondents did not submit, an appropriate application for a certification of preexisting nonconforming use in or around 2018 when the Owner purchased the Property. *Ex parte* communications appear to have been made between the Respondents during the initial 2018

"determination" of a preexisting non-conforming use, which are not legally sufficient to be used as a means to "grandfather" the present use of the Property into what was previously determined to be the scope of the preexisting nonconforming use in 1998. Therefore, the Board's failure to substantively hear the Appellants' Application as to the present use of the Property is a sufficient basis under Rule 4:69-6(c) for an enlargement of time "in the interest of justice." See Brunetti, 68 N.J. at 587 (1975).

c. The time restrictions of Rule 4:69-6 are not violated when the allegations involve an alleged "continuing tort", which the Court failed to address (Not Raised Below: O-3 at 32)

As set forth more thoroughly above, Appellants' Amended Complaint contains claims applicable to the Continuing Tort Doctrine, upon which the lower Court failed to address. O-3 at 32; *see also* Pa0001a. It is likewise nearly impossible to determine the applicability of a statute of limitations when the Court fails to address when an alleged harm commences, ends, and the statute of limitations begins. As such this matter must be remanded to the Court below to determine the applicability of the Continuing Tort Doctrine and the time limitations of Rule 4:69-6 in this matter.

d. Rule 4:69-6 Time Limitations are Inapplicable to the Zoning Officer's Previous Decision when said determination was repeated and reissued (Raised Below – Not Ruled Upon)

Appellants make reference to the findings and conclusions contained in the July 2020 Letter to the Board from the Zoning Officer(s), all of which reflected the Zoning Officer's previous opinions, which were apparently based on research performed by Peak Environmental, Inc. in early September 1998 - notwithstanding the fact that SiteScapes' use of the Property did not commence until 2018, 20 years later after the 1998 PAR, a fact that the Court below acknowledged, see O-3 at 2, yet failed to address when making its Rule 4:69-6 determination. The Appellants' Application was amended to include a request for an appeal and interpretation pursuant to N.J.S.A. 40:55D-70(a) and (b), respectively, based upon the issuance of the Zoning Officer(s)' July 2020 Letter. Much like the "continuing tort doctrine", the need to determine actual dates of the actionable claims renders any decision by the Court as to the applicability of a statute of limitations moot. As a trial court is required to "make an informed decision based upon a full record, and express its reasons for that decision before the case is dismissed," the Court's failure to address the Zoning Officer's July 2020 Letter is a plain error that was "clearly capable of producing an unjust result." See Klajman v. Fair Lawn Estates, 292 N.J. Super. 54, 61 (App. Div. 1996); see also R. 2:10-2. As such, this matter must be remanded to the trial court for further findings as to the applicability of the July 2020 Letter to the time constraints contained in Rule 4:69-6.

e. The Board's Decision and Memorializing Resolution Were Arbitrary, Capricious and Unreasonable (Raised Below: O-3 at 16)

Judicial review is intended to be a determination of the validity of the agency's action, not a substitution of the court's judgment. Courts afford the decisions of municipal boards substantial deference; their determinations "enjoy a presumption of validity, and a court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (*citing* Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 82 (2002)). The actions of a municipal board "will not be overturned unless it is found to be arbitrary and capricious and unreasonable, with the burden of proof placed on the plaintiff challenging the action." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment, 233 N.J. 546, 558 (2018) (quoting Grabowsky v. Twp. of Montclair, 221 N.J. 536, 551 (2015)).

a. The Appellants' Application to the Respondent Board was for a determination as to SiteScapes Respondents' current use of the Property is still a valid preexisting nonconforming use (Raised Below: O-3 at 10)

Appellants' filed an application with the Board pursuant to N.J.S.A. 40:55D-70(a) and -70(b): (1) appealing the Zoning Officer's failure to respond to Appellants' request for a determination as to the parameters of the preexisting nonconforming use of the Property; and, (2) seeking an interpretation of the Ordinance, specifically as it relates to the continuation of a preexisting nonconforming use, and whether the current use of the Property conforms with same. Pa0177a. The Appellants'

Application was filed with the Board in January of 2020; however, the hearing on the Appellants' Application was not heard until the following September. See T1. During the interim, the Zoning Officer filed the July 2020 Letter with the Board189. Based upon the September 2020 Letter from the Board's attorney, see Pa0205a, the Board found that it lacked jurisdiction to hear the Appellants' -Application due to the fact that an excess of 20 days had passed since the Zoning Officer's determination in 2018 to issue the Zoning Certificate/Permit (not the July 2020 Letter).

The Board stated in its resolution of approval that:

- The Board Attorney issued an Opinion Letter on September 30, 2020, which Opinion Letter expressed the view that the Board lacked jurisdiction to consider the Appellants' Application for Interpretation and/or Appeal;

- The Board concurred with the reasoning set forth in the September 30, 2020 Opinion letter;

- The request of Appellants for an Interpretation/Appeal relating to 680 Myrtle Avenue, Garwood, be, and the same hereby is DENIED, for the reasons set forth in the September 30, 2020 Opinion Letter of the Board Counsel.

  [Pa0207a.]

i. The failure to respond to viable claims of a zoning violation is an action that is appealable under the terms of Section -70(a) of the MLUL (Raised Below: O-3 at 2 and 18)

Subsection -70(a) of the MLUL specifically states that a board of adjustment shall have the power 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 base on or made in the enforcement of the zoning ordinance." Appellants' initial application to the Board pursuant to same was for an appeal of the Zoning Officer's refusal to make a determination as to the scope of the permitted commercial activities constituting the preexisting nonconforming use of the Property. Pa0177a. Contrary to the findings of the Court below, Appellants were not challenging the 2018 or 2019 "determinations" of the Zoning Officer. O-3 at 21. In fact, Appellants were challenging the **inaction** of the Zoning Officer – an affirmative decision that is appealable to the Board pursuant to N.J.S.A. 40:55D-70(a). Pa0177a. As such, the determination of the Board that it lacked jurisdiction over the Appellants' Application was improper as the Board failed to grasp what exactly was being appealed by the Appellants.[4]

Likewise, citing the deposition testimony of Abelino Morocho, the Court below found that the "record is clear that plaintiff was appealing the determination that defendant SiteScapes use of the Property was a nonconforming use. O-3 at 20-

[4] Notwithstanding the Board providing Appellants' the opportunity to argue its position to the Board concerning jurisdiction, which included the Appellants' thorough articulation of the circumstances surrounding the appeal, the Board continued to rely on the advice of counsel that the Appellants were appealing the 2018 or 2019 decision of the Zoning Officer.

21. Based upon a clear reading of the deposition transcript, statements confirming: (1) the appeal being based upon the zoning officers failure to respond to Appellants letters; (2) that Appellants were appealing the determination that SiteScapes is operating lawfully; and, (3) that Appellants want the Board to determine SiteScapes' use of the Property and whether they are in compliance with the Ordinances and applicable law – read together, does **not** clearly articulate that Appellants were appealing the 2018-2019 determination that SiteScapes' use of the Property was a permitted, preexisting nonconforming use. O-3 at 21-22.

f. The Court Wrongfully Determined SiteScapes Respondents Did not Illegally Expand the Preexisting Nonconforming Use of the Property (Raised Below: O-3 at 10).

While Appellants do not challenge SiteScapes use of the Property for its nonresidential purpose, Appellants do challenge the current intensity of the commercial use of the Property, which they allege to be beyond the scope of the limited, allowable nonconforming commercial use of the Property in violation of the Ordinance. Pursuant to the terms of N.J.S.A. 40:55D-68, nonconforming structures and uses are "protected" if "existing at the time of the passage of an ordinance" and "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." This protection is limited under the terms of the Ordinance, specifically, § 106-122(B), where "no existing use, structure or premises devoted to a nonconforming use shall

be enlarged, extended, reconstructed, substituted or structurally altered, unless it is changed to a conforming use or structure…"

As nonconforming uses are inconsistent with the current zoning, the nonconformity should be reduced to conform with the zoning ordinance as quickly as possible. Hay v. Board of Adjustment, 37 N.J. Super. 461, 464 (App. Div. 1955). The restrictions, as set forth in Ordinance Section 106-122(B), may relate to a change of use, the enlargement or extension of nonconforming structures, and limitations set on the duration of nonconforming uses when the use is abandoned or discontinued. See Town of Belleville v. Parrillo's. Inc., 83 N.J. 309. 315 (1980). The method generally used to limit nonconforming uses is to prevent any increase or change in the nonconformity. Id. at 316. As such, a prior nonconforming use is restricted to its character and scope **at the time the ordinance making it a nonconforming use was enacted**. Grundlehner v. Dangler, 29 N.J. 256, 263 (1959) (emphasis added). Where there is doubt as to whether or not the enlargement or change is substantial, courts have consistently declared that the dispute is to be resolved against the enlargement or change. See Belleville, supra, 83 N.J. at 316.

The burden of proving the existence of a nonconforming use is upon the party asserting such use. Ferraro v. Zoning Bd., 321 N.J. Super. 288, 291 (App. Div. 1999). It is important that the evidence presented to a board of adjustment establish exactly what the use of the subject property was at the time of adoption of the ordinance, its

character, extent, intensity and incidents." See William M. Cox, New Jersey Zoning and Land Use Administration, Ch. 27 at 405 (2023). Here, no substantive determination has **ever** been made which establishes the "character, extent, intensity and incidents" of the nonconforming commercial use of the Property, nevertheless the current use. See id. If the present use of a property is substantially similar to the use at the time it became nonconforming, it will be permitted to continue. Arkam Mach. & Tool Co. v. Lyndhurst Tp., 73 N.J. Super. 528, 532 (App. Div. 1962). On the other hand, if there has been an illegal extension of use, a variance must be obtained. Weber v. Pieretti, 77 N.J. Super. 423 (App. Div. 1962), *certif. denied*, 39 N.J. 236 (1963). See also Cox, supra, Ch. 11-5 at 261.

a. The Court Erred when Determining Respondents did not illegally expand or intensify the Pre-Existing Non-Conforming Use of the Property (Raised Below: O-3 at 10)

Appellants have repeatedly claimed that the preexisting nonconforming use of the Property has been illegally intensified in terms of, *inter alia*, employees, vehicles, heavy machinery, and hours of operation, to the point that the current use is notmerely a continued use of the Property as a "construction yard", as originally determined by the Zoning Officer in 2018, Pa0122a – Pa0123a, a determination which does not by itself constitute the legal continuation of said use pursuant to N.J.S.A. 40:55D-68.

Preliminary Assessment Report or "any other factors":

In 2018, the Zoning Officer "determined", based solely on the 1998 PAR, that the SitesScapes' Respondents' use of the Property is a preexisting nonconforming use. Pa000a. During depositions, the Zoning Officer claims, and the Court noted, that the Zoning Officer made his determination "off several other factors"; including "you go to the site and you look at their use" and how, while "[he] don't show it here, but normally, I look at historical photographs". O-3 at 12-14. Notwithstanding the fact that the 2018 Letter from the Zoning Officer was issued prior to SiteScapes acquiring the Property, the Court found these statements to be supportive of the Zoning Officer's "decision that defendant SiteScapes' use of the subject property qualified as a pre-existing nonconforming use" without any inquiry into the character of the actual use of the Property at the time that the "decision" was made. Id. A Preliminary Assessment Report offers no information as to the nonconforming nature of the use of the premises nor whether said use has been "enlarged, extended, reconstructed, substituted or structurally altered" from what existed "at the time of the passage of an ordinance". *See* Pa0156a. Nevertheless, the Court accepted the Zoning Officer's undocumented investigation into the Property, which cannot accurately depict SiteScapes proposed, hypothetical and future use of the Property as to the continuation of the legally permitted preexisting nonconforming use. O-3 at 14. As such, Appellants' -70(a) and -70(b) applications should have been heard by the Board as to the Zoning Officer's failure to respond to Appellants' requests.

"Continued" investigation as to the use of one's property:

The Court below erroneously gave weight to the Zoning Officer's testimony wherein he stated that, while making his determination as to the preexisting nonconforming use of the Property, that he made a site visits to the Property and advised SiteScapes Respondents to: remove the large tractor trailers from the front of the property; cited SiteScapes Respondents for the use of a port-a-john in the front yard of the Property; and that he performed a subsequent investigation in which the porta-john was removed and the lights were either toned down or removed. O-3 at 14. While the actions allegedly taken by the Zoning Officer relate to the use of the Property, these minor, single issue zoning or property maintenance related violations do not constitute an ongoing investigation into the nature of the continued preexisting nonconforming use of the Property. If in fact these actions constituted a subsequent investigation into the preexisting nonconforming use of Property, the Court failed to make a factual determination as to whether or not this continued investigation changes or alters the Court's determination as to when a cause of action accrues and a statute of limitations expires. As such, the matter must be remanded for further findings of fact by the Trial Court below.

Prior Resolutions and Land Use Applications:

Appellants' allegations regarding the illegal expansion of the nonconforming commercial use of the Property came from, *inter alia*, the 2004 Resolution, Pa0104a,

minutes of a land use hearing providing sworn testimony, Pa0102a, and land use applications previously filed with the Borough regarding the then use of the Property. *See* Pa0094a. O-3 at 16. Notwithstanding the fact that previous land use approvals and the conditions of approval that came with same were never acted upon, Appellants did not offer those documents for the purpose of proving that the current use of the Property is not in compliance with those land use approvals, but rather, these documents were meant to show the scope of the nonconforming use has been illegally expanded from what existed at the time that the Ordinance was adopted which rendered the use nonconforming. There are sworn statements as to the then existing use of the Property, all of which showed that the current use of the Property would be substantially in excess of the use of the Property when said use became nonconforming. A cross reference of these statements and the statements made by Mr. Morocho in his deposition create issues of fact that would preclude the grant of summary judgment in this matter as to the permissive, preexisting nonconforming use of the Property and the illegal intensification of same. Pa0328 at 27:19; Pa0217a at 17:23; Pa0219a at 24:13 to 18. These documents were submitted to the Board as part of the Appellants' Application to the Board, as these documents would have been useful to the Board had it retained jurisdiction to hear the merits of Appellants' Application. As such, this matter must be remanded for further findings of fact and conclusions of law.

g. Expansion of Intensity of the Pre-Existing Non-Conforming Use (Raised Below: O-3 at 10)

As stated above, the Court below found that the Property is a preexisting nonconforming use, reflecting its opinion that the SiteScapes Respondents did not illegally expand the intensity of the preexisting nonconforming use thereon. O-3 at 15. In Belleville, supra, a question arose as to whether or not the current use of a restaurant was "substantially similar" to the preexisting nonconforming restaurant that had been in operation prior to the date in which it became nonconforming. There, the Court affirmed a board's decision that the change from a restaurant to a "discotheque" was an impermissible expansion of a nonconforming use. 83 N.J. at 317-18. The Court concluded the change was impermissible as the entire character of the business has been altered. Id. at 318. Likewise, in Hantman v. Township of Randolph, 58 N.J. Super. 127 (App. Div. 1959), *certif. denied*, 31 N.J. 550 (1960), the court determined that the conversion of a summer bungalow community to a year round residential community, and the increase in the time period during which it operated, may be an unlawful extension of the nonconformity. Id. at 137. Addressing the specific conversion therein, the Court found that the conversion of a seasonal camp-site to a year-round use fundamentally altered and disrupted the Township's general plan for year-round residential uses and a substantial and unlawful expansion of a nonconforming use. Id. at 137-38; see also Shire Inn, Inc. v. Borough of Avon-by-the-Sea, 321 N.J. Super. 462, 468-69 (App. Div.) (conversion of nonconforming

hotel with one apartment into a rooming house is a material modification of a nonconforming use, which frustrated the reasonable expectations of the municipality and the neighbors), *certif. denied*, 162 N.J. 132 (1999).

As an example of SiteScapes' current operation of the Property, Appellants presented the Court with documentation submitted to the Municipal Respondents in 2004, *see* Pa0092a, Pa0098a, Pa0102a, Pa0104a, wherein the previous owners of the Property applied to the Board and in the sworn testimony provided during the hearings in 2004, stated that the use of the Property was limited to three or four trucks operating during normal business hours. Id. Notwithstanding the availability of evidence establishing the character of the use of the Property, the Zoning Officer relied merely on the 1998 PAR and unspecified "other things" to determine if the 2018 use of the Property remained a pre-existing non-conforming use. Pa0189a. Had a proper investigation as to the current use of the Property been conducted as compared to that at the time the Property allegedly became a preexisting nonconforming use, it would be readily apparent that the current use of the Property exceeds what is actually permitted under the MLUL and the Ordinance. Likewise, had the deposition testimony herein been compared to the documentation submitted to the Court regarding the previous use of the Property, a determination that there is, at the very least, a triable issue of fact, should have precluded the Court granting summary judgment as to same.

As the Court below noted, "[t]he focus in expansion of nonconforming use cases is "the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plan." Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 314 (1980). O-3 at 17. The Court acknowledged that while its construes "the governing ordinance *de novo*, we recognize the [B]oard's knowledge of local circumstances and accord deference to its interpretation." Id. Likewise, the Court noted that, "[b]ecause the board has "peculiar knowledge of local condition as, its factual findings are entitled to substantial deference and are presumed to be valid." Id. (citations omitted). Here, the Board never made such a determination as it declined to hear the Appellants' Application. As such, the Court erred in making its determination that there was not a substantial intensification of the Property without remanding same to obtain the Board's peculiar knowledge of the character of the Borough.

h. The Court Erred when it Determined Appellants' Substantive Rights Have Not Been Violated Pursuant to N.J.S.A. 10:6-1, *et seq*. (Raised Below: O-3 at 23)

One of the core issues in this appeal is whether or not the Borough deprived Appellants of a cognizable substantive right in violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 *et seq.* (the "NJCRA"). The court below recognized:

> [C]ases involving "zoning decisions, building permits, or other governmental permission required for some intended use of land owned by the plaintiff, implicate the fundamental property interest in the ownership of land."

> Cherry Hill Towers. 407 F. Supp. 2d at 654 (quoting DeBlasio, 53 F.3d at 600). "[O]wnership is a property interest worthy of substantive due process protection," and "where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached." DeBlasio, 53 F .3d at 600-01.
>
> [O-3 at 26.]

Nevertheless, the Court found that [Appellants] "have not provided sufficient evidence to show that their substantive rights were violated", as the Appellants did not show that their application was not heard due to race, national origin, age, and disability; the municipal actions did not shock the conscience; Appellants' assertion that the Board incorrectly declined to hear Appellants' Application was based on unsupported legal precedent (which was not identified by the Court); and the idea that the Board did not actually decline to hear Appellants' Application, as the Board gave Appellants' counsel ample time to speak, although limited to jurisdictional issues only. O-3 at 27.

In New Jersey, the NJCRA, specifically, N.J.S.A. 10:6-2(c), provides:

> Any person who has been deprived of . . . any substantive rights, privileges or immunities secured by the Constitution or laws of this State, ... by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [N.J.S.A. 10:6-2(c)].

New Jersey Courts have stated that "our State Civil Rights Act is modeled off of the analogous Federal Civil Rights Act, 42 U.S.C. § 1983, and is intended to provide what Section 1983 does not." Id. 218 N.J. at 474 (citations omitted). In Tumpson v. Farina, the Court set forth a three-step test in which a court must determine: (1) whether, by enacting the statute, the Legislature intended to confer a right on an individual; (2) whether the right "is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) whether the statute "unambiguously impose[s] a binding obligation on the [governmental entity]." 218 N.J. 450, 475 (2014) (quoting Blessing v. Freestone, 520 U.S. 329, 340-41 (1997). In addition to satisfying these three "factors," for purposes of the NJCRA, Appellants must also "show that the right is substantive, not procedural." Id. at 478 (explaining that "'[s]ubstantive' addresses those rights and duties that may give rise to a cause of action, whereas 'procedural' addresses 'the manner and the means' by which those rights and duties are enforced." (citations omitted)). Although the NJCRA does not define substantive rights, New Jersey Courts have recognized that "the term is broad in its conception", Tumpson, 218 N.J. at 473, and courts must look to federal jurisprudence construing 42 U.S.C. § 1983 to formulate a workable standard for identifying a substantive right under the Civil Rights Act. Id. at 474-77.

New Jersey Courts previously adopted this three-step test, id. 218 N.J. at 475, 477, which was refined in Gonzaga University v. Doe, 536 U.S. 273, 283 (2002),

defining when a statute confers an individual substantive right. While Tumpson, supra, held that the first step is determining whether the Legislature "intended the statute" to confer a "benefit" on an individual, 218 N.J. at 475, 477 (citing Blessing, supra, 520 U.S. at 340-341), Gonzaga, supra, emphasized that nothing "short of an unambiguously conferred right" will support a cause of action under the federal civil rights law. 536 U.S. at 283.

Here, the nature of the substantive right at issue - a right to use and enjoy one's property – is clearly identifiable. See O-3 at 26. The right of an interested party to appeal the issuance of a zoning permit and to have said party's concerns "heard" - is rooted in principles of property rights – specifically the right to not be deprived of one's property rights without due process. As an adjacent property owner's rights "may be affected" by construction on neighboring property, Appellants are interested parties with readily recognizable property rights, including, but not limited to, the right to be heard by the Borough and Planning Board.

In Tumpson v. Farina, the Court applied the three-part Blessing test and found that the Faulkner Act conferred on the plaintiffs the substantive right of referendum. 218 N.J. 450, 477-78 (2014). There, the City Clerk violated provisions of the Faulkner Act by refusing to accept the appellants' referendum petition and place the challenged ordinance on the ballot. Id. at 471-72. In applying the three-part test, the Court in Tumpson, supra, held:

> first, the Legislature … clearly intended to confer the right of referendum on the Appellants and voters of Hoboken; second, the right as enunciated in the statute was neither 'vague' nor 'amorphous,' and its application was straightforward; and third, the Clerk was unambiguously required to accept and file the referendum petition.
>
> [Id. at 477-78.]

The Court determined, "by definition, the right of referendum is substantive in nature." Id. at 478. The Court found further that the Clerk's refusal to accept the referendum petition represented a dead end for the Appellants, id. at 486, stating that: "[a]lthough the filing of a referendum petition with the Clerk in Tumpson may at first glance appear to be merely procedural, the filing of the petition was inextricably intertwined with the vindication of the Appellants' right of referendum." Id. at 468-71.

Likewise, the Court in Harz v. Borough of Spring Lake determined that, in violation of the NJCRA, the Borough of Spring Lake violated Appellants' right to be heard by the Planning Board. 234 N.J. 317 (2018).[5] In Harz, supra, the Supreme Court found that the MLUL clearly conferred on Harz a right to be heard before the Planning Board on her appeal from the issuance of the zoning permit to her neighbor; a permit she claimed violated the Borough's land-use ordinance. Id. The Court found

[5] Below, the Court found the Harz decision to be inapplicable due to the timeliness of the appeal in question therein. The Harz decision was presented to the Court below to state the fact that the preclusion from being heard by a Board is a violation of one's substantive due process under the NJCRA.

that: (1) Harz is an "interested party" under the MLUL, as she resides within the Borough and the zoning officer's issuance of the permit to the neighbor "affected" her right to use or enjoy her property; (2) pursuant to N.J.S.A. 40:55D-72(a), an "interested party" has the right to appeal a zoning officer's decision to the land use board, id.; (3) the zoning officer was required to "immediately transmit to the [Planning Board] all the papers constituting the record" id.; (4) pursuant to N.J.S.A. 40:55D-70(a), a board of adjustment is empowered to "[h]ear and decide appeals" taken from an administrative officer, id.; and (5) pursuant to N.J.S.A. 40:55D-73, the planning board was required to render a decision on Harz's appeal within 120 days. Harz, supra. 234 N.J. at 335. As such, the Supreme Court found that the right to a review and a decision by a planning board, under the same statutory scheme as required herein, is not amorphous - but rather self-evident. Id. Additionally, the Court found that the MLUL "unambiguously impose[s] a binding obligation on the [Board]" to provide Harz with the opportunity to be heard. Id. (*citing* Tumpson, supra, 218 N.J. at 475 (quoting Blessing, 520 U.S. at 340-41)). The Court found that "because an interested party's right to be heard is inextricably tied to a party's property rights, we find that the MLUL right to be heard is substantive, not procedural." Id.

The instant action is not a mere zoning dispute; it is a dispute as to the suppression of Appellants' protected property rights. The actions of the Municipal

Respondents in intentionally failing to (1) exercise proper oversight over the Property; (2) enforce its Ordinance; (3) failing to hear Appellants' Application; and, (4) maintaining the improper expansion of the existing nonconforming use to the ongoing detriment of Appellants, constituted a denial of the Appellants property rights under color of state and federal law, contrary to the Constitution New Jersey and the Constitution of the United States. Here, Appellants reasonably expected to have the Borough, the Planning Board, and its officials, employees and agents, as government officials, exercise its duty to properly act to enforce the Ordinances to protect Appellants' substantive due process and property rights. Appellants further expected the Board to, at the very least, hear the merits of their Application. The Municipal Respondents flagrantly violated Appellants' substantive due process rights by acting under color of law to repeatedly and arbitrarily ignore local and state laws so egregiously as to "shock the conscience", entitling Appellants to attorney's fees under the NJCRA, by infringing on their right to use and enjoy their own property. As such, this matter must be remanded to the Trail Court for a determination as to the actions of the Municipal Respondents.

a. The violation of the Appellants' substantive due process rights are NOT immune from liability under either the common law or the Tort Claims Act (Raised Below: O-3 at 7).

In the Court's Statement of Reasons below, the Court stated that "[i]ndeed, even if the Municipal [Respondents] violated plaintiffs' substantive rights, the

Municipal [Respondents] would not be liable as they have municipal immunity." As stated above, no immunity applies to the Municipal Defendants for allegations of a violation of one's Constitutional right to substantive due process.

b. Appellants need not show that their alleged injuries pursuant to the NJCRA arose from an official policy or custom of the Municipal Respondents (Not Raised Below: O-3 at 27)

The NJCRA permits individuals to bring a civil action for damages and for injunctive relief in certain instances where there has been deprivation of any substantive due process or equal protection rights, privileges, or immunities secured by the United States Constitution or Federal laws; immunities secured by the New Jersey Constitution or interference with the exercise or enjoyment of those substantive rights, privileges or immunities, intimidation or coercion by a person acting under color of law. N.J.S.A. 10:6- 2(c). Here, the Court misapplied the Appellants' NJCRA Claim on the grounds that it did not provide any evidence of a custom or policy violative of Appellants' substantive rights. O-3 at 27.

Notwithstanding same, to establish a violation of the NJCRA in the context of a land use decision, a plaintiff must prove: (1) that "the Constitution or laws of this State" conferred on them a substantive right; (2) that a state actor deprived them of that right; and (3) that the state actor was "acting under color of law" when he did so. Tumpson, supra, 218 N.J. at 473; see also N.J.S.A. 10:6-2(c). Simply put, Appellants concerns were as to the deprivation of its substantive rights, *inter alia*, to

the use and enjoyment of their Property, the right to a response from the Zoning Officer, and the right to be heard by the Board despite the concerted efforts maintain its Zoning Officer's erroneous 2018 "decision".

Nevertheless, even if a policy or custom were required in the context of a land use decision, in light of Appellants' allegations in the Amended Complaint, it is clear that Appellants have alleged more than a simple one-time violation of its rights, but a pattern of a lack of enforcement by the Borough, lack of response from the Borough, the necessity to file an application with the Board pursuant to Subsections -70(a) and -70(b0 of the MLUL; the delay of nine (9) months prior to hearing said application, and the dismissal of same based upon the refusal to accept jurisdiction and hear the merits of the Appellants' Application. If Appellants' allegations are accepted as true, the Borough has intentionally allowed the SiteScapes Respondents to use the Property in violation of the MLUL and the Ordinance, has ignored most of Appellants' complaints about the overall use of the Property, and has done so to the benefit of a resident to the detriment of a nonresident. These allegations are more than enough to meet the threshold standard to deny Respondents' Motion for Summary Judgement.

i. The Court below erred dismissing Appellants' Amended Complaint, as a genuine issue of material fact as it relates to Appellants' claim for a Writ of Mandamus (Raised Below: O-3 at 27)

A party seeking mandamus relief by a court must establish the following prerequisites:

> 1. a showing that there has been a clear violation of a zoning ordinance that has especially affected the Appellant;
>
> 2. a failure of appropriate action despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of executing the ordinance; and
>
> 3. the unavailability of other adequate and realistic forms of relief.
>
> [Garrou v. Teaneck Tryon Co., 11 N.J. 294, 302-304 (1953).]

Here, not only did Appellants' complaints go unanswered, the belated response from the Municipal Respondents contained nothing more than a reiteration of the inadequate inquiry into the alleged preexisting nonconforming use that was "conducted" on a prior date based upon a 20-year old environmental remediation report. Pa0189a. Thus, Appellants are entitled to a writ of mandamus since they have a clear right to the relief sought herein, as the Municipal Respondents are under a clear and definite duty to act, and there is no other adequate means of relief available. See Mullen v. Ippolito Corp., 428 N.J. Super. 85 (App. Div. 2012).

a. A genuine issue of material fact exists as to the current use of the Property (Raised Below: O-3 at 10)

Summary judgment is only appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any,

show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), the Court articulated its analysis as follows:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Brill, 142 N .J. at 540].

In the present matter, there is a clear issue of material fact as to whether or not the use of the Property remains permissive as a preexisting, nonconforming use, and Respondents' respective Motions for Summary Judgment should not have been granted. Here, there are clear factual conflicts between what type of investigation was actually conducted into the permissive use of the Property and whether the current use of the Property maintains the character and intensity of the legally valid, preexisting nonconforming use. No substantive determination was ever made by the Municipal Respondents as to the following questions, which were raised by the Appellants' Application: (a) what were the parameters of the preexisting nonconforming use of the Property; (b) what is the intensity of the current use of the Property; (c) is there a difference between the present use and the allowed

preexisting nonconforming use of the Property; (d) what is the character of the neighborhood and how, if at all, has it changed since the Zoning Officer made his 2018 "determination", although flawed, that the Property was a preexisting nonconforming use. A simple comparison of Mr. Morocho's testimony compared to the documentation submitted to the Court regarding the previous use of the Property creates a clear triable issue of material fact precluding the grant of summary judgment in this matter.

b. Appellants established that there was a question of fact as to a Zoning Ordinance Violation and the Borough failed to take action (Not Raised Below)

Appellants' actions in this matter are similar to the letters written by the Appellant's attorney in Garrou, supra, where plaintiffs were either ignored or told, in a summary and dismissive fashion, that enforcement action against the defendant were unwarranted. Applying the standards set forth in Garrou, Appellants have presented sufficient evidence that the current use of the Property is in violation of the Zoning Ordinance, which did not garner any response or formal investigation by the Municipal Respondents. Appellants identified their concerns to the Municipal Respondents after seeing the alleged unlawful activities continue unabated, to the detriment of their Constitutional right to the quiet enjoyment of their home. These allegations describe a history of municipal inaction, rendering Appellants without a realistic alternative form of administrative relief.

The Zoning Officer's lack of proper investigation into the use of the Property, previous to the change in zoning and the present, his lack of response to Appellants' inquiries, the Board's refusal to set a hearing date for nine (9) months, and its ultimate decision to not take jurisdiction on Appellants' Application, reveal a pattern of non-enforcement on the part of the Municipal Respondents. Pa0177a. Absent this mandamus action, property owners are left without recourse to protect their properties in the face of municipal indifference to this vital concern. These actions (or inactions) of the Borough and the Board significantly impacted, and continue to impact, Appellants' legal rights under the Ordinances, the MLUL and the State and Federal Constitutions. As a result of the non-responsiveness, Appellants were required to file this action and incur additional expense, delay and inconvenience.

Appellants have a clear right to require the Municipal Respondents to enforce the MLUL and the Borough Ordinances as to the expansion of the nonconforming use of the Property, yet the Municipal Respondents improperly refused to perform their legal duty as aforesaid, thus requiring a remand to the Trial Court for the issuance of a writ of mandamus.

j. The Court below erred when it failed to find that Genuine Issues of Material Fact Exist related to SiteScapes Alleged Nuisance on the Property (Raised Below: O-3 at 32).

As outlined more thoroughly above, the allegations of the Amended Complaint, along with the evidence presented herein, shows, at the very least, a

genuine issue of material fact exists as to whether or not the use of the Property by the SiteScapes Respondents' is substantially different than that of its predecessors, when the evidence presented to the Court below include the fact that the Property substantial differences between the use of the Property, as contained in the documentation previously filed with the Municipal Respondents and compared to the deposition testimony herein. Contrary to the findings of the Zoning Officer in 2018 and again in 2020, "[i]t is important to consider the evidence showing the location and size of the property on which Respondents' business is operated." *See* Protokowicz v. Lesofski, 69 N.J. Super. 436, 441 (Ch. Div. 1961)(citations omitted). The deposition testimony alone creates a triable issue of material fact that the preexisting nonconforming use of the Property may have intensified since 2018, when the Zoning Officer made his determination as to the preexisting nonconforming use of the Property based upon the 1998 PAR.

As stated in Protokowicz, supra, "[t]he first question presented is whether or not the business operation of the Respondents is a violation of the zoning ordinance in that it is an enlargement or extension of a nonconforming use. Here, Respondents have provided ample evidence as to violation of the Ordinance. 69 N.J. Super at 441. Further:

> It is the rule in this State that insofar as a private litigant is concerned, injunctive relief will not be granted simply by proving a violation of a zoning ordinance. He must still show that the violation of such an ordinance is a nuisance

> which resulted in damage to him. Morris v. Borough of Haledon, 20 N.J. Super. 433 (Ch. Div. 1952).
>
> [Id.]

Much like in Protokowicz, supra, Appellants' residential dwelling and SiteScapes "construction yard" are immediately adjacent each other. The evidence shows that the close proximity of these properties create loud awakening noise. Pa0335a at 17:5-15. Nevertheless, the Court below found Appellants claims to be unsubstantiated due to, *inter alia*, an unsubstantiated decibel reading allegedly conducted by the Board of Health. O-3 at 35. However, the mere compliance with a noise ordinance is not dispositive in determining whether or not a nuisance has been created. Much like Protokowicz, when the truck engines herein are started, they run for a substantial amount of time in the early hours of the morning while idling on the Property. Pa0387a at 27:18-22. Deposition testimony revealed that the noise is such as to make sleep impossible. Id. As testified to by Mr. Morocho, the living conditions in which Appellants are subjected to are clearly intolerable. Pa000a.

In Sans v. Ramsey Golf & Country Club, 29 N.J. 438 (1959) the Court stated:

> The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. * * * The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of conflicting interests. The utility of the Respondent's conduct must be weighed against the quantum of harm to the Appellant. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an

> unreasonable use of the neighbor's land or operation of his business. Prosser, Torts (2d ed. 1955) p. 410.

Here, all inferences must be made in favor of the nonmoving party. Brill, supra, 142 N.J. at 540. Nevertheless, the Trial Court granted summary judgment to Respondents without determining whether the "annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business." Likewise, summary judgment should not have been granted to Respondents without making such a determination, As such, this matter must be remanded to the Trial Court for a factual, objective determination as to the reasonableness of the use of the Property by the SiteScapes Respondents.

Consistent with the decision in Protokowicz, supra, and Sans, supra, the noise of SiteScapes trucks and their backup alarms cause a condition that, in another location, might be harmless - "such as in a closed structure not located adjacent to a residential property", and the operations conducted by the SiteScapes Respondents in the close proximity to Appellants' residential property creates a condition that results in material injury to the health, ordinary comfort and normal living habits of the Appellants", which is clearly an unreasonable use of the Property.[6] Id.

[6] Unreasonableness is judged, "not according to exceptionally refined, uncommon or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people." Sans v. Ramsey Golf & Country Club, Inc., 50 N.J. Super. 127, (App. Div. 1958) (citing Stevens v. Rockport Granite, Co., 216 Mass. 486, 104 N.E. 371 (Sup. Jud. Ct. 1914).

"The next issue for consideration is whether or not the business operations on the Property constitutes a private nuisance [that] can be enjoined." See Id. at 443. In determining whether or not SiteScapes' business operation may be a private nuisance, and thus be enjoined, a court must look to the circumstances of such usage and balance the equities in the situation involved. Id. Here, the Court below failed to make any determination as to the balancing of the equities based upon the facts presented by the parties herein. The current use of the Property has and will give rise to a continual invasion of adjoining property by reason of improper noise and intensity, is palpably unreasonable and continues to interfere with Appellants' use and enjoyment of their adjoining realty, and the use of the Property has and will continue to interfere with the rights of Appellants and create an unreasonable risk of harm to those outside the Property and must be stopped.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Appellate Court reverse the Trial Court's Orders and grant the relief sought in Appellants' Amended Complaint.

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SANDRA LEMA and ABELINO MOROCHO,

Plaintiffs,

v.

THE BOROUGH OF GARWOOD, THE BOROUGH OF GARWOOD PLANNING BOARD, 680 MYRTLE AVENUE, LLC, SITESCAPES LANDSCAPE AND DESIGN, LLC, SITESCAPES CONSTRUCTION MANAGEMENT LLC, and SITESCAPES LANDSCAPE & DESIGN MASON CONTRACTORS,

Defendants.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-003086-23

CIVIL ACTION

On Appeal from the Law Division, Union County

Docket No. UNN-L-3957-20

Sat Below:

Hon. Lisa M. Walsh, J.S.C.

BRIEF OF 680 MYRTLE AVENUE, LLC, SITESCAPES LANDSCAPE AND DESIGN, LLC, SITESCAPES CONSTRUCTION MANAGEMENT LLC, AND SITESCAPES LANDSCAPE & DESIGN MASON CONTRACTORS IN OPPOSITION TO THE APPEAL

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PRELIMINARY STATEMENT

Plaintiffs, Sandra Lema and Abelino Morocho, sought to compel defendants, the Borough of Garwood and the Borough of Garwood Planning Board (collectively the Municipality), to rescind approval for defendants, 680 Myrtle Avenue, LLC, Sitescapes Landscape and Design, LLC, Sitescapes Construction Management LLC, and Sitescapes Landscape & Design, LLC dba Sitescapes Mason Contractors (collectively Sitescapes), to continue a pre-existing, non-conforming use of property located in Garwood and adjacent to property owned by plaintiffs. In a seven-count complaint, only Counts I, VI and VII pertained to Sitescapes. Plaintiffs asserted that Sitescapes' use of the property is an "Improperly Expanded Non-Conforming Use of the Property" and constitutes a public and private nuisance.

Sitescapes uses the property as a construction contractors' yard, which the Municipality has determined is a legal pre-existing, non-conforming use. The property has been used in the same manner for over fifty years, dating back to before the adoption of the relevant Garwood zoning ordinance. It has been consistently and continuously used as a commercial property, i.e., a "private garage," "storage of business trucks," storage of company trucks, trailers and equipment, and storage of construction equipment, materials and trucks. The use

of the property is consistent with the pre-existing, non-conforming use of the property, which is why plaintiffs' complaint was dismissed with prejudice.

More specifically, as found by the court below, plaintiffs acknowledged that the use was pre-existing and non-conforming. Plaintiffs belatedly claimed that the use had "intensified" such that the "character, extent and intensity of any legally protected nonconforming use of the Property has been illegally changed and expanded." Plaintiffs' claims were untimely under the Municipal Land Use Law and Rule 4:69-1 governing actions in lieu of prerogative writs. Plaintiffs, moreover, failed to establish that the use had changed substantially, that the Municipality had acted illegally in approving the current use, that the Municipality's decision was arbitrary, capricious or unreasonable, or that the use constituted a public or private nuisance. Despite years of proceedings and discovery, plaintiffs simply failed to make their case. The decisions below were correct and should be affirmed.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Plaintiffs, Sandra Lema and Abelino Morocho, commenced the underlying action by filing a Complaint in lieu of Prerogative Writs on November 28, 2020. SDa1. Plaintiffs named as defendants the Borough of Garwood and the Borough of Garwood Planning Board (collectively the Municipality), and 680 Myrtle Avenue, LLC, Sitescapes Landscape and Design, LLC, Sitescapes Construction

Management LLC, and Sitescapes Landscape & Design, LLC dba Sitescapes Mason Contractors (collectively Sitescapes). Ibid. On December 30, 2020, the Municipality removed the matter to the United States District Court for the District of New Jersey based on federal question jurisdiction. On January 4, 2021, the matter was dismissed without prejudice as a result of the removal.

Some time after June 21, 2021, the matter was remanded to the Superior Court of New Jersey, Law Division, Union County. On October 19, 2021, plaintiffs filed an amended complaint asserting the same counts against the same defendants as the original complaint. Pa0001a. The Amended Complaint set forth seven counts, ostensibly against all defendants except Count Four, as follows: 1. "Improperly Expanded Non-Conforming Use of the Property." Pa0011a. 2. "The Borough is required to enforce its own ordinances under N.J.S.A. § 40:55D-18." Pa0015a. 3. "The Planning Board Declining to Rule on Plaintiffs' §70(a) Appeal AND §70(b) Application Was Improper." Pa0017a. 4. "Civil Action for Deprivation of Rights: Borough of Garwood." Pa0019a. 5. "Writ of Mandamus." Pa0021a. 6. "Public Nuisance on Land Harming Neighbors." Pa0023a. 7. "Nuisance." Pa0024a. On or about December 20, 2021, the Municipality filed an Answer to the Amended Complaint. Pa0027a. After December 20, 2021, Sitescapes was served with the Amended Complaint. The original Complaint had not been served on Sitescape.

On January 26, 2022, Sitescapes filed an Answer to the Amended Complaint. Pa0049a. The matter proceeded through discovery with four extensions, the final discovery end date being December 31, 2023. During discovery, plaintiffs acknowledged that only Counts One, Six and Seven applied to Sitescapes. Pa0398a. On February 16, 2024, the Municipality moved for summary judgment on all counts. Pa0524a. Also on February 16, 2024, plaintiffs moved for summary judgment on unspecified counts of the Amended Complaint. SDa27. All defendants opposed plaintiffs' motion, and Sitescapes cross-moved for summary judgment dismissing the complaint and all crossclaims with prejudice. SDa29.

The Honorable Lisa M. Walsh, A.J.S.C., held a hearing on the motions on April 19, 2024. 1T. By Orders dated April 23, 2024, accompanied by a Statement of Reasons of the same date, the court denied plaintiffs' motion for summary judgment and granted defendants' motions for summary judgment, dismissing all claims and crossclaims with prejudice. Pa0624a; Pa0662a; Pa0700a; Pa0626a.

COUNTERSTATEMENT OF FACTS

For the sake of brevity, Sitescapes accepts plaintiffs' Statement of Facts to the extent that it consists of facts rather than argument. Sitescapes will address omissions and necessary corrections in the context of the legal argument.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS COULD NOT SATISFY THEIR BURDEN OF PROOF.

A. Standard of Review – Municipal Board Decisions.

In reviewing a judge's decision on an action by a governing body, such as a zoning board of adjustment, the appellate court is bound by the same standard of review as the trial court. CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd., 414 N.J. Super. 563, 577 (App. Div. 2010). Review of decisions by a zoning board is limited. Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd., 407 N.J. Super. 404, 424 (App. Div. 2009).

"[A]n overriding principle governing judicial review of variance decisions by a board of adjustment is that, assuming an adequate basis in the record for a board's conclusions, deference to the judgment of local zoning boards ordinarily is appropriate." Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58 (1999). This Court should reverse a board's decision only if its action was so arbitrary, capricious, or unreasonable, as to amount to an abuse of discretion. Zilinsky v. Zoning Bd. of Adjustment of Verona, 105 N.J. 363, 367 (1987). The burden is on the party challenging the board's decision to demonstrate the decision was arbitrary, capricious, or unreasonable. Cell S. of N.J., Inc. v. Zoning Bd. of

Adjustment of W. Windsor Twp., 172 N.J. 75, 81 (2002). If the record contains sufficient evidence to support the municipal board's determination, the court will defer to the Board's decision. Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965). Further, a board's factual determinations are presumptively valid. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Franklin, 233 N.J. 546, 558 (2018).

Review of a judge's decision on an action in lieu of prerogative writs is de novo based on the record before the municipal board. See N.Y. SMSA, L.P. v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). In a prerogative writs action, review of the Board's decision is limited to whether there was substantial evidence in the record justifying the Board's decision.

B. Standard of Review – Summary Judgment.

In reviewing an order granting summary judgment, an appellate court uses the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court"). The trial court must not decide issues of fact; it must decide only whether any such issues exist. Brill v. Guardian Life. Ins. Co.,

142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5.

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill, supra, 142 N.J. at 538. "Summary Judgment should be granted … 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

C. Discussion.

Plaintiffs concede that "[i]f the present use of a property is substantially similar to the use at the time it became nonconforming, it will be permitted to continue. Arkam Mach. & Tool Co. v. Lyndhurst Tp., 73 N.J. Super. 528, 532 (App. Div. 1962)." Pb28. The Municipality found that Sitescapes' use was

consistent and substantially similar to the use of the property in the past. The trial court found the same. Pa640a-41a. The property had and has been used as a construction yard for various entities – masonry, landscaping, construction – for over forty years. Pa638a-39a. As such, there is no violation and no basis for plaintiffs' demanded relief that Sitescapes be put out of business until it "complies" with plaintiffs' vision of the Garwood zoning ordinance.

To support their claim that the use of the property has been "illegally intensified," plaintiffs cite to two cases that are readily distinguishable and highlight the lack of merit in plaintiffs' claims. In Town of Belleville v. Parrillo's, Inc., 83 N.J. 309 (1980) (Belleville), a restaurant was converted to a discotheque, with different hours, clientele, noise and impact on the general welfare of the neighborhood. Id. at 318. The Court concluded that the change was impermissible because "the entire character of the business has been altered." Pb32 (citing Belleville, 83 N.J. at 318). In Hantman v. Township of Randolph, 58 N.J. Super. 127 (App. Div. 1959), certif. denied, 31 N.J. 550 (1960), the use of the property went from summer season bungalows to year-round residential community. The court found that "the conversion of a seasonal camp-site to a year-round use fundamentally altered and disrupted the Township's general plan." Pb32 (citing Hantman, 58 N.J. Super. at 137-38).

Those cases have virtually nothing in common with this case. First, plaintiffs concede that Sitescapes' use as a nonconforming use is not at issue. Plaintiffs challenge only the intensity of the use. Second, there has been no fundamental alteration of the use of the property, nor has the "entire character of the business" been altered. There is a garage, some trucks, a few employees that come and go. Plaintiffs' focus on the quantitative rather than the qualitative differences is exactly the type of analysis rejected by the Court in Belleville. See Belleville, 83 N.J. at 314 ("The analysis was thus quantitative rather than, as it should have been, qualitative. Put differently, the focus in cases such as this must be on the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plan."). The Municipality and the trial court both applied a proper analysis that concluded based on substantially undisputed evidence that Sitescapes' current use was consistent with the historical use and did not appreciably impact the neighborhood or zoning plan. Plaintiffs' suggestion that the current use is fundamentally and markedly different does not withstand scrutiny.

The ultimate burden of proving the existence of an improper non-conforming use rests on the party asserting such use. Berkeley Square Ass'n, Inc. v. Zoning Bd. of Adjustment of Trenton, 410 N.J. Super. 255, 269 (App. Div. 2009). The legality of a non-conforming use on a property subject to an

application must first be determined before other aspects of the application proceed. Nuckel v. Little Ferry Planning Bd., 208 N.J. 95, 111 n.6 (2011). A non-conforming use is a "use or activity which was lawful prior to adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located, by reasons of such adoption, revision or amendment." N.J.S.A. 40:55D-5.

To establish the existence of a non-conforming use, the party must show that the lawful use existed at the time the zoning ordinance was adopted, and the continuity of such use thereafter. Ferraro v. Zoning Bd. of Keansburg, 321 N.J. Super. 288, 291 (App. Div. 1999). The Board "has the choice of accepting or rejecting the testimony of witnesses" but that choice must be reasonably made. Kramer, 45 N.J. at 288. A prior nonconforming use is generally "restricted to its character and scope at the time the ordinance making it a nonconforming use was enacted." Fred McDowell, Inc. v. Bd. of Adjustment, Twp. of Wall, 334 N.J. Super. 201, 214 (App. Div. 2000), certif. denied, 167 N.J. 631 (2001). The focus in expansion of nonconforming use cases is "the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plan." Belleville, 83 N.J. at 314. "[N]onconforming uses may not be enlarged as of right except where the enlargement is so negligible or insubstantial that it does not fairly warrant judicial or administrative notice or

interference." Grundlehner v. Dangler, 29 N.J. 256, 263 (1959). "[W]here there is doubt as to whether the enlargement is substantial rather than insubstantial it is to be resolved against the enlargement." Id. at 264.

The issue of whether a use constitutes an expansion of a prior nonconforming use is a mixed question of law and fact. Bonaventure Int'l, Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 438 (App. Div. 2002); see Belleville, 83 N.J. at 317. The determination of whether an activity is within the scope of the existing nonconforming use requires an examination of "the particular facts of the case, the terms of the particular ordinance, and the effect which the increased use will have on other property." Hantman, 58 N.J. Super. at 137; accord Belleville, 83 N.J. at 317-18 (adopting the court's reasoning in Hantman as "the proper analysis for examining changes in nonconforming uses").

"The typical cases in which courts have found a prohibited increase or change of a nonconforming use have involved an expansion of the facilities containing the use, or an intensification of the use." Razberry's, Inc. v. Kingwood Twp. Planning Bd., 250 N.J. Super. 324, 327 (App. Div. 1991) (internal citations omitted). In Flantman v. Randolph, 58 N.J. Super. 127 (App. Div. 1959), this Court stated that "the rule forbidding a substantial extension does not prevent an increase in the amount or intensity of use within the area. Neither is an increase in

the volume of business alone ordinarily considered an expansion of a nonconforming use." Id. at 135.

N.J.S.A. 40:55D-5 states:

> "Nonconforming use" means a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment.

Garwood Ordinance 106-122B states:

> Regulation of nonconforming uses and structures. No existing use, structure or premises devoted to a nonconforming use shall be enlarged, extended, reconstructed, substituted or structurally altered, unless it is changed to a nonconforming use.

In the present matter, plaintiffs assert that they are not challenging defendant SiteScapes' use of the property or the use of said property as a pre-existing nonconforming use. Plaintiffs are challenging defendant SiteScapes' use, character, quality, and intensity of the subject property. Plaintiffs argue that within the 2004 application to the Planning Board, there was testimony that provided that the use of the subject property was limited to three to four trucks operating during business hours. Plaintiffs argue that defendant SiteScapes' use of the property is substantially different than that legally permitted use. Plaintiffs argue that notwithstanding the evidence establishing the character of the property, Mr. Vinegra relied solely on the Preliminary Assessment Report ("Report"). Further,

plaintiffs argue that defendant SiteScapes' use of the Property is outside the group classification number of the prior use of the Property.

Mr. Vinegra's decision that defendant SiteScapes' use of the subject property qualified as a pre-existing nonconforming use was based on the Report, but not solely on the Report. The decision considered several other factors. Mr. Vinegra testified that the report did not list anything regarding the intensity of the prior use of the subject property, such as the materials, employees, or trucks. Pa0445a. Additionally, Mr. Vinegra stated that he did not investigate how many trucks, or employees the prior owners had or the number of hours of operation the prior owners worked. Pa0447a. Within the land use records for the subject property it states that the property was used as a construction yard for the past **six** owners dating back to at least 1970. Pa0123a.

Within Mr. Vinegra's April 19, 2018, letter he states he has reviewed the Report dated September 1998, performed by Peak Environmental, Inc. Pa0123a. The uses of the property dating back to at least 1970 included industrial fabrication, masonry and heavy construction, roofing and landscaping. Ibid. According to plaintiffs' complaint, Sitescapes' use is construction, masonry and landscaping. SDa3. Based on the Report, Mr. Vinegra concluded that defendant SiteScapes qualified as a "non-conforming use" and did not have to come before

the Planning Board to seek approval of occupancy. Pa0123a. That conclusion is not just reasonable but also clearly established by the record.

In a July 17, 2020, letter to the zoning board, Mr. Vinegra stated:

> I drafted a letter as Borough Zoning Officer in April of 2018 that the use was consistent with the prior uses which utilized the site in the past. … This letter states that the site has been utilized as a "construction" yard for over 40 years. SiteScapes (current occupant) is a landscaping/mason/general site contractor which is NOT substantially different from the previous uses since 1970.
>
> [Pa190a.]

Plaintiffs assert that Mr. Vinegra's conclusion that defendant SiteScapes' use of the property qualifies as a "non-conforming use" is in violation of the Garwood Ordinance 106-122. Plaintiffs claim that ordinance states "[n]o existing use, structure or premises devoted to a nonconforming use shall be enlarged, extended, reconstructed, substituted or structurally altered, unless it is changed to a conforming use or structure." Pb26-27; Pa0551a. Plaintiffs provide no citation for that claim. Moreover, they fail to establish how Sitescapes changed the structure or premises such as to trigger that uncited language.

Plaintiffs argue that Mr. Vinegra's research was based on a twenty-year old Report. However, Mr. Vinegra testified that he did not just use the Preliminary Assessment Report to conclude that defendant SiteScapes qualified as a non-conforming use.

Mr. Vinegra testified:

> Q. So as a zoning officer writing an opinion as to a preexisting nonconforming use, your job is just to look at the title of the company only?
>
> A. No, I have to — you go out to the site and you look at their use. But as the zoning officer, we don't ask how many LLCs operate out of your facility.
>
> [Pa0451a-52a.]
>
> Q. Outside of the report by Peak Environmental and your follow-up as to dates of ownership with previous owners, did you do any other research into your opinion as to this being a preexisting nonconforming use?
>
> A. I don't show it here, but normally what I do though, I remember doing it, I look at historical photographs from NJDEP's GIS formats, and I look at historical photographs in google Earth to look at what was there prior, and it did do some historical. I don't have the exact dates when I was looking at them. I remember going back into some of like, the databases that are available, seeing that it was a construction yard back into the 1970s.
>
> [Pa450a.]

Mr. Vinegra spoke with the past owners of the Property and confirmed the prior uses of the Property. Pa458a. When asked about the intensity of use of the Property, Mr. Vinegra stated, "[w]e don't look at the intensity of the visitors or the intensity of the vehicles accessing the site to make that determination. It's the type of use that I look at." Pa460a. Further, Mr. Vinegra testified that he has his own discretion in determining whether a property becomes approved or denied for an issuance of a zoning permit. Pa463a.

Although plaintiffs assert that the Municipality did not conduct any investigation into the complaints, the Municipality provided extensive evidence showing that Mr. Vinegra did conduct appropriate investigations. Jeffrey Gabriel, the owner of defendant SiteScapes, testified that Borough of Garwood officials informed him that there were noise complaints against the subject property. Pa219a. Mr. Vinegra testified that he made a site visit to the subject property and advised SiteScapes to remove the large tractor trailers from the front of the property as it was an overutilization of the parking. Pa452a. Mr. Vinegra also cited SiteScapes for the use of a port-a-john in the front yard. Ibid. Mr. Vinegra testified that he performed a subsequent investigation in which the port-a-john was removed and the lights were either toned down or removed. Ibid. On October 20, 2020, the Borough of Garwood Zoning Enforcement Officer issued a Violation Notice to Sitescapes regarding expansion of non-conforming use. Pa211a. On November 2, 2020, the same borough officer issued a Violation Notice Update that the violations had been promptly corrected satisfactorily. Pa212a. Plaintiffs' contention that Sitescapes has been allowed to evade oversight by the Municipality is simply not supported by the record.

As found by the trial court, "SiteScapes use of the Property is not an improper expansion of a non-conforming use." Pa640a. The Municipality did a proper investigation to determine whether SiteScapes use of the Property was

consistent with the pre-existing, non-conforming use. Mr. Vinegra relied on the Report, including historical land use records from the Township of Cranford. Pa0190a. Within the records, it stated that the prior uses of the Property were landscaping/construction yard; construction yard/mason; construction yard/roofing; construction yard/street sweeping; construction yard/iron workers; and construction yard/landscaper. Pa0192a. Additionally, Mr. Vinegra reviewed historical photographs to see what was stored on the Property in the past and how the previous owners used it. He visited the Property to observe SiteScapes' use of the Property. He spoke with the prior owners on the previous use of the Property. Pa0459a. As noted by the trial court, Garwood Ordinance 106-123 states that business hours must be closed between 12:00 a.m. and 5:00 a.m. Pa0641a. Here, plaintiffs argue that SiteScapes starts to use the Property at 5:30 a.m. As such, Sitescapes' use of the Property does not violate the Ordinance.

Plaintiffs argue that the 2004 Resolution and application to the Board provided evidence of the use of the Property. They do not. They indicate only a request to confirm that the proposed use would be permissible within the pre-existing, non-conforming use. Regardless, the 2004 Resolution was abandoned; the proposed changes and use were not pursued. The resolution, therefore, is null and void and immaterial.

Plaintiffs conceded as much within their statement of facts, brief and the record. "Landover Mainsail did not construct the new commercial building referenced in the 2004 Resolution, did not install or maintain all of the improvements identified on its site plan, and otherwise did not pursue its development approval per the 2004 Resolution, including the reconstruction of the driveway, and as such, any approval as memorialized in the 2004 Resolution was abandoned and not effectuated." Pa0544a. Further, within plaintiffs' December 5, 2019, letter, it states, "Mainsail did not construct the new commercial building referenced in the memorialized Resolution and otherwise did not pursue its development approval, allowing it to lapse." Pa0172a. The 2004 Resolution is immaterial to plaintiffs' claims.

Plaintiffs assert that SiteScapes never applied for a "required" use variance, pursuant to N.J.S.A. 40:55D-70(d)(2). That is misleading at best. SiteScapes did apply for a zoning certificate. Pa119a-20a. The Municipality responded that "SiteScapes can occupy the site and qualifies as a 'pre-existing' non-conforming use and does NOT have to come before the Borough's Zoning Board for approval of occupancy." Pa0121a; Pa0195a. Having made the inquiry, Sitescapes cannot be faulted for relying on the Municipality's determination. Additionally, plaintiffs argue that SiteScapes removed a tree buffer in violation of Garwood Ordinance 106-116B and the 2004 Resolution. That contention ignores that the 2004

Resolution lapsed. It had and has no effect. Moreover, Mr. Vinegra testified that the fence did not violate borough ordinances because Sitescapes was permitted to move the buffer up to the property line. Pa0454a.

Plaintiffs assert that SiteScapes currently has fifteen to twenty employees on the Property, several trucks, operates as early as 5:30 a.m., has operated into Saturday and Sunday, engaged in the use of outdoor storage of equipment and materials, and improperly removed a buffer and fence. Plaintiffs argue that SiteScapes' use expands the 1998 and 2004 conditions. Plaintiffs ignore, however, that there has never been a Resolution passed for the restrictions in 1998 and the 2004 Resolution was admittedly abandoned. Mr. Vinegra testified that without a Resolution, Landover Cooling was implementing self-imposed restrictions that have no effect on future owners of the Property, including Sitescapes. Pa0461a.

Plaintiffs assert that there are several trucks and numerous employees on site. As recognized in Belleville and Hantman, the inquiry must be qualitative, not quantitative. See *supra* at 8-10. An increase in business usage does not normally mean that the intensity of a property has changed. Mr. Vinegra testified, "[w]e don't look at the intensity of the visitors or the intensity of the vehicles accessing the site to make that determination. It's the type of use that I look at." Pa0460a. That is the proper inquiry. Mr. Vinegra stated that the outdoor storage that defendant SiteScapes was conducting was the same storage Mr. Vinegra saw when

reviewing historical photographs of the Property. Pa0453a. The record is devoid of any information showing that SiteScapes use of the Property is substantially different than the prior uses of the Property. As such, plaintiffs' request that defendant SiteScapes should be precluded from operating its businesses until it complies with the zoning ordinance was properly denied.

POINT II

PLAINTIFFS ARE NOT ENTITLED TO MANDAMUS RELIEF.

Plaintiffs' claim for a writ of mandamus lacks merit. As set forth by plaintiffs,

> A party seeking mandamus relief by a court must establish the following prerequisites:
>
> 1. a showing that there has been a clear violation of a zoning ordinance that has especially affected the Appellant;
>
> 2. a failure of appropriate action despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of executing the ordinance; and
>
> 3. the unavailability of other adequate and realistic forms of relief.

[Pb43 (citing Garrou v. Teaneck Tryon Co., 11 N.J. 294, 302-04 (1953)).]

Plaintiffs, however, failed to satisfy any of those requirements. First, as correctly found by the court below, and as admitted by plaintiffs, there is no contention of a clear violation of a zoning ordinance. Plaintiffs acknowledge that

the property is properly a nonconforming use and has been for decades. Plaintiffs challenge only the "intensity" of the use. That does not rise to an allegation of a zoning ordinance violation, much less a showing of a clear violation.

Second, "the supervising official" took appropriate action and concluded that the use was consistent with the historical use of the property. There was no material change and no fundamental alteration. The Municipality rendered its decision. Plaintiffs did not like it; nonetheless, the appropriate action was taken.

Third, as both the Board and the lower court concluded, plaintiffs had adequate and realistic relief by way of an action in municipal court, particularly for claims being asserted against Sitescapes. Plaintiffs chose to ignore that avenue of relief. Ignoring a remedy does not satisfy the requirement to show that it is unavailable. See Garrou, 11 N.J. at 302; Beronio v. Pension Comm'n of Hoboken, 130 N.J.L. 620, 624 (E. & A. 1943). Any one of those failures would have been fatal to plaintiffs' mandamus claim. The claim was properly rejected.

POINT III

THERE WERE NO GENUINE ISSUES OF MATERIAL FACT THAT WOULD PRECLUDE THE TRIAL COURT FROM DECIDING THE CROSS-MOTIONS FOR SUMMARY JUDGMENT.

Before this Court, plaintiffs claim that genuine issues of material fact precluded summary judgment. Pb43. Before the trial court, however, plaintiffs claimed just the opposite. Plaintiffs moved for summary judgment. SDa27. To

suggest now that there were genuine issues of material fact to be decided is disingenuous.

Moreover, plaintiffs confuse disputes of fact with disputes of conclusions based on fact. Plaintiffs' argument is not that the facts are in dispute but rather that the Municipality's conclusion is wrong. That is not a material factual dispute. Plaintiffs claim "there are clear factual conflicts between what type of investigation was actually conducted into the permissive use of the Property and whether the current use of the Property maintains the character and intensity of the legally valid, preexisting nonconforming use." Pb44. Those are not factual disputes. There is no dispute regarding the zoning official's investigation. Plaintiffs contend that it was inadequate. The court found that it was not. Similarly, there was no dispute regarding the current use. The Board and court found that it was consistent with the pre-existing non-conforming use. Plaintiffs disagree. But there is no dispute regarding the underlying facts, only regarding the conclusions reached based on those undisputed facts. Plaintiffs' argument in that regard is misplaced.

POINT IV

THERE IS ADEQUATE AND SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S DECISION REGARDING THE LACK OF A PUBLIC OR PRIVATE NUISANCE.

A. Public Nuisance.

Public nuisance claims involve "an unreasonable interference with a right common to the general public." In re Lead Paint Litig., 191 N.J. 405, 425 (2007) (internal quotation marks omitted). "[A]n interference with a right merely enjoyed by a large number of people," is not alone a public nuisance. See id. at 426 (noting polluting a stream is not a public nuisance unless "the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the[ir] right" (internal quotation marks omitted)). Furthermore, a public nuisance must be "related to conduct, performed in a location within the actor's control." Id. at 429.

"In order to maintain a proceeding to enjoin [or] abate a public nuisance," a private individual "must have suffered a harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference." Id. at 426. "Circumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is proscribed by a statute, ordinance or administrative regulation." Id. at 425.

Claims against a public entity for creating a public nuisance are subject to the Tort Claims Act ("TCA"). Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 181 (2002) (citing N.J.S.A. 59:2-1(a)); Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 97-98 (1986); Birchwood Lakes Colony Club, Inc. v. Bor. of Medford

Lakes, 90 N.J. 582, 587, 593-96 (1982). "[A] public entity may be liable for creating a nuisance under the TCA," by maintaining a dangerous condition on public property, N.J.S.A. 59:4-2, or "for creating a hazardous condition on the property of another." Posey, 171 N.J. at 185. For purposes of the TCA, public property is property that is owned or controlled by the public entity. N.J.S.A. 59:4-1(c).

In the present matter, there remains no genuine issue of material fact as to plaintiffs' public nuisance claim. Plaintiffs failed to show that SiteScapes' use of the Property constituted a public nuisance. It was and is a use permitted by law as a pre-existing, non-conforming use. Plaintiffs provided no evidence showing that plaintiffs are suffering a harm different from that suffered by other members of the public from Sitescapes' lawful use of the property.

Plaintiff Morocho testified:

> Q. Now, for a hypothetical number, let's just call it five other property owners who are also complaining about SiteScapes, do you think you're being treated differently than they are?
>
> A. I don't think so. . . . I think all of us are affected by the noise and the number of trucks that are coming into the – the property, but I think I'm the most affected, because I'm right next to it.
>
> [Pa0394a.]

Because plaintiffs failed to establish a distinct harm different from that suffered by other members of the public, plaintiffs' public nuisance claim cannot be sustained. It was properly dismissed as to the Municipality and SiteScapes.

B. Private Nuisance.

Private nuisance claims require an unreasonable interference in a person's private use and enjoyment of their land, either intentionally or negligently. Ross v. Lowitz, 222 N.J. 494, 505 (2015). Private nuisance requires the person's conduct to be the legal cause of the nuisance. See id. at 505-06.

The Restatement (Second) of Torts identifies the elements of a cause of action for private nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.
>
> [Ross, 222 N.J. at 505-06 (citing Restatement (Second) of Torts § 822 (1979).]

In evaluating whether there is a private nuisance, a trial court must weigh "[t]he utility of the defendant's conduct . . . against the quantum of harm to the plaintiff' in order to determine whether the annoyance or disturbance arises from an

unreasonable use of the neighbor's land or operation of his business." Sans v. Ramsey Golf & Country Club, 29 N.J. 438, 449 (1959). "The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business." Ibid. Noise may constitute a nuisance where it presents "(1) injury to the health or comfort of ordinary people to an unreasonable extent, and (2) unreasonableness under all the circumstances, particularly after balancing the needs of the maker to the needs of the listeners." Traetto v. Palazzo, 436 N.J. Super. 6, 12 (App. Div. 2014) (quoting Malhame v. Bor. of Demarest, 162 N.J. Super. 248, 261 (Law Div. 1978)). The evidence required to show a private nuisance must be clear and convincing. Benton v. Kernan, 130 N.J. Eq. 193, 198 (E. & A. 1941).

The alleged unreasonable disturbance must rise above a mere annoyance; occasional noisy disturbances that cause, for example, "[t]he interruption of normal conversation, the drowning out of TV sound, an occasional disturbance during sleeping hours, and like complaints," may not be enough. Traetto, 436 N.J. Super. at 12 (quoting Malhame, 162 N.J. Super. at 261).

In Malhame, neighbors argued that a town's fire alarm siren system, in close proximity to the plaintiffs' residence, was a nuisance due to its frequency and its blaring nature. 162 N.J. Super. at 251-52. The plaintiffs did not seek medical

attention or offer medical evidence showing health effects due to the sirens, nor did the court find any such impairments. Id. at 252. Nonetheless, the court held that the siren system was a private nuisance. It caused temporary ear pain, "apprehensive, jittery, shakey feeling[s]," interrupted sleep, frightened children, and interrupted normal conversation. Id. at 253.

In Rose v. Chaikan, 187 N.J. Super. 210 (Ch. Div. 1982), homeowners sought to enjoin the operation of a windmill. Id. at 214. The plaintiffs complained that the noise produced by the windmill was offensive and resulted in stress and an interference with their ability to enjoy their homes. Ibid. The plaintiffs established that the fairly constant noise exceeded the noise ordinance by six to eleven decibels. Id. at 215. The court found that the windmill was an actionable nuisance. Id. at 218.

In reaching that conclusion, the court reasoned that the sound was quite abnormal in the normally quiet, residential neighborhood. Ibid. The court noted that the sound levels were "well documented and clearly exceed[ed] permissible limits under the zoning ordinance." Ibid. The noise also was relatively constant at all hours of the day and night. Ibid. The court also found that the benefits of the windmill were outweighed by the resulting harm it caused and there were alternative devices available to the defendant. Id. at 219-20.

In the present matter, there are no genuine issues of material fact as to plaintiffs' private nuisance claims. Plaintiffs argue that SiteScapes' operation of the subject property constitutes a nuisance that unreasonably interferes with plaintiffs' use and enjoyment of their property. The Complaint, however, is limited to intensification of use. The general use as a construction yard is long-established and a pre-existing lawful use. Plaintiffs failed to establish that SiteScapes' current use of the Property constitutes a private nuisance. Plaintiffs failed to present any expert testimony, evidence of noise levels now or before Sitescape began operating or violation of noise or hours of operation ordinances.

Instead, plaintiffs presented only their subjective complaints regarding their private nuisance claim. Plaintiff Morocho testified that:

> the dump trucks that they — SiteScapes uses are large, commercial trucks. The noise that they create, the motor — the engine of those trucks are very loud. They're diesel-engine trucks, 40,000-pounds capacity trucks. They are equipped with back-up alarms. The noise that they — that this trucks create. It's like far exceeds like, you know, like normal decibel levels for a residential neighborhood.
>
> And also the use of power washing machines, power washing their equipment all the time. The power — the motor creating a tremendous noise.
>
> Also the — the, you know, the trucks coming into the property fully loaded, and you can actually – how the house shakes when they come in.
>
> [Pa0393a.]
>
> Plaintiff Morocho testified:

> Q. So in terms of your allegations that SiteScapes is a nuisance, what documents, what proofs, what paper, what studies, what reports, [. . .] do you have to support the claims that you allege in articles six and seven of your complaint?
>
> * * * *
>
> A. It was equipment and pictures of Jeff Gabriel himself expanding public area to create a parking spot for his employees, yes. There are photos and trucks being serviced in front of our property.
>
> [Pa398a.]

Here, there is no genuine issue of material fact as to whether defendant SiteScapes' use of the Property is a nuisance. Plaintiffs proffered no evidence of duration or levels of the noise. Plaintiff Morocho acknowledged that his issue is "the noise and the number of trucks," "the activity of the property itself." Pa0393a. That is not a basis to shut down a lawful pre-existing, non-conforming use of property. Plaintiff Morocho stated that the noise bothered him and his kids. That testimony does not supply the clear and convincing evidence necessary to prevail on a private nuisance claim.

Plaintiffs argue that SiteScapes has increased the intensity of the use of the Property with an increase in number of trucks, equipment, employees, work hours, and noise. However, the record is devoid of any information establishing the dates and times when the alleged nuisance would occur or the frequency/magnitude of the alleged nuisance. Plaintiffs have provided photographs of defendant SiteScapes' use of the property, which depict the trucks and storage on the

Property. Those photographs have not been authenticated by plaintiffs nor do they show a violation of a borough ordinance. They also do not show any change in use by Sitescapes from the permissible, historical non-conforming use.

Plaintiffs have complained that the noise of the trucks is loud; however, plaintiffs have provided no decibel reading as to the noise from defendant SiteScapes' use of the Property. Conversely, Sitescapes presented testimony that the Union County Board of Health tested the noise levels on the Property, and defendant SiteScapes passed. Pa0226a. The only evidence presented in support of the private nuisance claim was vague and anecdotal. The evidence required to show a private nuisance based on noisy operations must be clear and convincing. Benton, 130 N.J. Eq. at 198. Plaintiffs failed to come forward with evidence sufficient for a reasonable jury to find it their favor. Summary judgment was properly granted.

CONCLUSION

Plaintiffs had ample time and opportunity to develop their claims and to come forward with evidence to support them. Plaintiffs moved for summary judgment, asserting that there were no genuine issues of material fact that prevented determination by the court as a matter of law. The court agreed and rendered a thoughtful and detailed decision that considered each of plaintiffs' arguments. Because Sitescapes' use of the property is consistent with historical

use, and because the non-conforming use is within the scope of use permitted, plaintiffs' claims were properly dismissed with prejudice. The decision below should be affirmed.

Respectfully submitted,

FOLEY & FOLEY

Dated: January 3, 2025

/s Timothy J. Foley
Timothy J. Foley

Co-counsel for Defendants-Respondents, 680 Myrtle Avenue, LLC, Sitescapes Landscape and Design, LLC, Sitescapes Construction Management LLC, and Sitescapes Landscape & Design, LLC dba Sitescapes Mason Contractors

SANDRA LEMA AND ABELINO MOROCHO, Plaintiffs/Appellants, v. THE BOROUGH OF GARWOOD, THE BOROUGH OF GARWOOD PLANNING BOARD, 680 MYRTLE AVENUE, LLC, SITESCAPES LANDSCAPE AND DESIGN, LLC, SITESCAPES CONSTRUCTION MANAGEMENT LLC AND SITESCAPES LANDSCAPE & DESIGN CONTRACTORS, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO.: A-003086-23 CIVIL ACTION **Appeal of the Judgment and Orders of the Hon. Lisa Miralles Walsh, J.S.C., entered on April 23, 2024.** **Sat Below:** **Hon. Lisa Miralles Walsh, J.S.C.; Trial Court Docket No.: UNN-L-3957-20**

DEFENDANTS'/RESPONDENTS' BOROUGH OF GARWOOD and BOROUGH OF GARWOOD PLANNING BOARD BRIEF IN OPPOSITION OF APPEAL

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Submitted to Clerk of the Appellate Division on: January 3, 2025

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PRELIMINARY STATEMENT

Municipal Respondents, the Borough of Garwood ("the Borough") and the Borough of Garwood Planning Board (the "Planning Board")(collectively, "Municipal Respondents") respectfully submit this Memorandum of Law in opposition of this appeal of the trial Court Orders of April 23, 2024, granting the Motion for Summary Judgment by the Municipal Respondents in its entirety, granting the Co-Defendants' 680 Myrtle Avenue, LLC, SiteScapes Landscape & Design, LLC, SiteScapes Construction Management, LLC, and SiteScapes Mason Contractors, LLC (collectively, the "SiteScapes Respondents") Motion for Summary Judgment in its entirety, and denying Plaintiffs' Motion for Summary Judgment in its entirety. Appellants' claims arose entirely out of their displeasure with SiteScapes Respondents' lawful use of 680 Myrtle Avenue (the "Property") and the Municipal Respondents' numerous findings that the SiteScapes Respondents' use of the Property was not in violation of any Borough Ordinances.

Appellants' claim that "Municipal Respondents have repeatedly interfered with Appellants' property rights by ignoring Appellants' repeated complaints" (Ap. Br. Pg. 1) is in actuality Appellants refusal to accept the Municipal Respondents' repeated position, after numerous investigations and visits to the Property, that no Borough violations were occurring on the Property. Appellants hired their previous attorney to address these claims, and Appellants did not challenge or appeal the

Zoning Officer's determination that the SiteScapes Respondents were operating lawfully. They continued to write letters to the Borough, and after receiving no favorable responses, Appellants hired new counsel to challenge the same use of the Property by SiteScapes Respondents' to both SitesScapes and Municipal Respondents. Appellants clearly attempted to get two bites out of the same apple. After the Zoning Officer did not respond to Appellants' newest request that he find SiteScapes Respondents' use of the Property to be in violation of Borough Ordinances, Appellants counsel filed an appeal before the Planning Board for *the Zoning Officer's refusal to respond to their letters*, despite their admitted clear intent at appealing the Zoning Officers previous decision that SiteScapes Respondents' use of the Property was not in violation of any Borough Ordinances, which was well beyond the statute of limitations to do so. The Trial Court easily saw through Appellants' attempts to circumvent the procedural requirements for appeal and the statute of limitations for same, and this Court should unquestionably affirm the Trial Court's Order granting summary judgment in its entirety to the Municipal Respondents.

Notwithstanding the clear statute of limitations issues in this case, Appellants' entire case rests on their purported description of SiteScapes Respondents' use of the Property, for which there is no admissible evidence in the record to support. The only evidence offered by Appellants to "show" that SiteScapes Respondents' use of

the Property was violative of Borough Ordinances are unlabled, unidentified, and unverified photographs of *a* property. There is no testimony in the record as to what the photographs show, when they were taken, and who took them. Just as Appellants have done since the outset of this conflict, they expect everyone to take their word for it. Unfortunately, the burdens of proof and the rules of evidence require more proof and identification than "trust me." Without these photographs, which are clearly inadmissible, the only evidence in the record as to SiteScapes Respondents' alleged unlawful use of the Property is Appellants' own self-serving testimony regarding the use of the Property. Having lost before the Zoning Officer with their first legal counsel, having lost before the Zoning Officer a second time with their current legal counsel, having lost before the Planning Board, and now having lost before the Trial Court, Appellants are now hoping this Court will take their word for it as it pertains to the alleged excessive non-conforming use of the Property.

For the reasons set forth herein, Appellants appeal should be denied as the undisputed material facts show that there is no admissible evidence of any unlawful use of the Property, and more importantly, that the statute of limitations for challenging the findings of the Municipal Respondents' with regard to SiteScapes Respondents' use of the Property has long lapsed prior to the initiation of this lawsuit.

COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Appellants live at 313 Myrtle Avenue, Westfield, N.J., which he purchased in 2015. (Pa0324a at 13:8-22; Pa0325a at 14:6-8). The Property at issue in this matter is 680 Myrtle Avenue, Garwood, New Jersey, which is owned and operated by the SiteScapes Respondents'. (Pa0215a at 7 and 8). Plaintiff was fully aware when he purchased 313 Myrtle Avenue that the Property was a non-residential property located in a residential zone, and that the Property was used to store trucks for business. (Pa0325a at 14:22-15:11). Appellants did not perform any research into the use of the neighboring properties and what was allowable on the site until after he purchased his property. (Pa0330a at 36:7-15). SiteScapes Respondents purchased the Property in 2018 after renting it for several years previously. (Pa0216a at 12:19-25; 13:13-19; Pa0218a at 21:2-10).

On April 19, 2018, Zoning Officer Victor Vinegra issued a letter to SiteScapes Respondents and the previous owner of the Property stating that SiteScapes Respondents could operate their business as a landscaping/masonry contractor since it was a pre-existing, nonconforming use. (Pa0122a). In his letter, the Zoning Officer advised SiteScapes Respondents of his findings after researching the history of the Property. (Id.) The letter states:

[1] Municipal Respondents are in agreement that due to the factual relevance of the procedural history in this matter, that both the Procedural History and Statement of Facts should be combined for the purposes of each Memorandum of Law.

> *"*I have reviewed the "Preliminary Assessment Report" performed by Peak Environmental, Inc. and dated September 1998. This document was prepared as part of a submittal to NJDEP concerning the uses of the property in reference to environmental concerns. Peak Environmental researched the previous uses at 680 Myrtle Avenue over the last forty plus years."
>
> "The uses on the referenced site since at least 1970 include the following:
>
> 1. Industrial fabrication
> 2. Masonry and heavy construction.
> 3. Roofing.
> 4. Landscaping.
>
> SiteScapes is seeking to continue with the pre-existing non-conforming uses of landscaping/masonry contractor. It is my professional opinion that SiteScapes can occupy the site and qualifies as a "pre-existing" non-conforming use and does NOT have to come before the Borough's Zoning Board for approval of occupancy." [Id.]

SiteScapes Respondents relied on this determination of the Zoning Officer that their use of the property would be a valid pre-existing non-conforming use in deciding to purchase the property, and in fact confirmed that that if the Zoning Officer informed him that his operation would *not* be a valid pre-existing non-conforming use on the Property that he would not have purchased it. (Pa0216a at 13:12 – Pa0217a at 14:1; Pa0226a at 50:7-12).

As far back as 2018, Appellants began complaining to the Municipal Respondents that they believed SiteScapes respondents were not operating their property lawfully. (Pa0108a). In a letter dated November 14, 2018, Appellants' previous attorney, John DeMassi, wrote a letter to the Zoning Officer complaining

about SiteScapes use of the Property. (Id.). This letter complained about the exact same alleged unlawful conduct of SiteScapes Respondents as was alleged in this litigation. Specifically, Appellants' previous attorney stated:

> "My clients [Appellants] have provided me with a Resolution dated September 10, 2004, which grants a company, Landover Mainsail Corp. a use variance. Landover sold the premises in 2018. The new owner leased the premises to Sitescapes Mason Contractor. *My first question is did Sitescape seek a use variance relief and if not by what authority are they operating what is a different non-conforming use?*
>
> The 2004 Resolution is very specific in that the intensity of the use was very limited….. With respect to the use, the [2004] resolution sets forth certain conditions. The former tenant abided by the spirit and letter of the resolution's conditions. However, the new tenant [SiteScapes Respondents] has consistently violated several of the conditions.
>
> If a formal resolution was adopted, I would request same. *If not, please construe this letter as a formal request that you investigate the present tenant's [SiteScapes Respondents] failure to comply with the 2004 resolution.*
>
> Resolution Condition #1, which restricted hours of operation to 7:00am to 7:00 pm. *Trucks have been continuously observed coming to the property at 6:00 am on a daily business and often leaving at 11:00 pm. Operations are occurring on Sunday, contrary to the resolution. During the Winter season, snow plow trucks are continuously operating from the location at night. In addition, there has been a substantial increase in the number and size of the trucks that are parked on the property.*
>
> Resolution Condition #3 of the Resolution is also being violated in that the owner has often been seen using a power washer machine to clean the trucks, even on Sundays.
>
> Resolution Condition #5 prohibits fabrication, manufacturing, and sales conducted from the site. Although there is no fabrication or

> manufacturing, *the applicant is storing large amounts of construction materials on the premises.*
>
> *It is my understanding that Mr. DeStafano* [Zoning Enforcement Officer] *advised my client that the 2004 resolution is a nullity and that the present operation is a pre-existing non conforming use. I do not know if he ever consulted with you* [Zoning Officer] *but both positions are flawed.* [Pa0108a-0112a].

It is undisputed that the November 14, 2018 letter from Appellant's previous attorney echoes the complaints alleged by his current attorneys in this litigation. The violations alleged are identical to the violations alleged in Plaintiff amended complaint, specifically regarding hours of operation, days of operation, number of trucks parked on the property, and maintenance of the trucks on the Property.

In response to this letter, the Zoning Officer met with Appellants and their attorney Mr. Massey numerous times between 2018 and 2019, at which time he advised both Appellants and their attorney Mr. DeMassey that SiteScapes Respondents were operating lawfully as a pre-existing nonconforming use. The Zoning Officer Testified that:

> This office was contacted by Mr. Morocho, the neighbor filing a complaint with his attorney. This is John DeMassi in 2019. So I went out there. Let's see. Mr. Morocho, the owner of residential --- *and I had numerous conversations with John DeMassi to discuss his Client's concern. Yeah. So I had numerous – numerous discussions, and in 2019, I stated in my* [July 17, 2020] *letter I met Mr. Morocho at his home next door."* [Pa0450a at 39:10-18].

In a July 17, 2020 letter to the Planning Board, the Zoning Officer again confirmed that he had had numerous discussions with Appellants' previous attorney regarding

his complaints about SiteScapes Respondents' use of the Property. In that letter, the Zoning Officer stated:

> "This office was in contact with Mr. Abelino Morocho the neighbor filing this complaint and his previous attorney, Mr. John DeMassi back in 2019. Mr. Morocho is the owner of residential structure next door to 680 Myrtle Avenue and resides in Westfield, N.J. In 2019, I had numerous conversations with Mr. John DeMassi [Plaintiff's previous attorney] to discuss his clients' concerns. *Somewhere in the summer of 2019 I met with Mr. Morocho at his home next door to 680 Myrtle Avenue. My determination at the time is that the existing use by SiteScapes was a pre-existing non-conforming use and that the restrictions Mr. Morocho wanted enforced were not applicable. I notified both Mr. DeMassi and Mr. Morocho of my findings.*" [Pa0189a].

The Zoning Officer confirmed that when he and the Zoning Enforcement Officer advised Appellants' and their previous attorney back in 2019 that a) the 2004 Resolution was a nullity, and 2) that SiteScapes use of the property was a lawful pre-existing nonconforming use, Appellants nor their attorney appealed these decisions to the Planning Board or the Superior Court:

> Q: Okay. Now you see here, where it says Mr. Morocho's previous attorney did not pursue any additional determinations after our on-site meeting?
>
> A: Yes.
>
> Q: So just for Clarification, at the on-site meeting, Mr. Morocho, his counsel, were they advised that, what you have here, that SiteScapes is not substantially different from the previous use and that they are operating as a lawful nonconforming preexisting condition. Correct?

> A: That's Correct.
>
> Q: And once they were told that determination, neither Mr. Morocho nor his previous attorney pursued any further action with the Planning Board or the municipal court. Correct?
>
> A: That's correct. [Pa0465a at 101:7-22].

Appellants also admit that the Zoning Officer told them, prior to hiring their second attorneys representing them in this action, that the Zoning Officer at one point told them that based on his professional opinion, SiteScapes Respondents were operating lawfully. (Pa0328a at 27:9-13)("I believe on the – on the email or some type of response he gave us, I think he stated that the—based on his opinion, that they – SiteScapes was operating lawfully.").

It is undisputed that the Zoning Officer has a litany of certifications and licenses in engineering and planning. Mr. Vinegra has a Bachelor's of Science in civil engineering from NJIT, and he is also a licensed engineer for over 30 years, and a licensed professional planner and licensed land surveyor for over 25 years in New Jersey. He also possesses engineering licenses in New York and Pennsylvania. (Pa0200a-0201a; Pa0443a at 12:8-15). Additionally, the Zoning Officer testified that it is his job to approve, issue, or deny applications for zoning permits or certificates. When he receives an application, he reviews the application, performs a site visit, researches historical photographs of the property online, reviews the ordinance, and

makes a professional determination on whether to issue, approve, or deny any applications for zoning permits or certificates. (Pa0462a at 89:16 – Pa0463a at 90:8).

Appellants do not dispute that Victor Vinegra is the Zoning Officer for the Borough of Garwood and agrees that as Zoning Officer he has the authority to issue, approve, and deny zoning certificates and permits, however, they do not believe that Vinegra had the authority to do so in this specific instance because he disagrees with his decision. (Pa0332a at 42:23 – 43:4; 43:16 – 44:1). Additionally, Appellants' allegations that their complaints to the Zoning Officer went ignored is wholly disputed in the record as the Zoning Officer testified that that he has made numerous site visits in response to Plaintiff's complaints, and when asked how many site visits he testified that he has made a site visit in response to Appellants complaints "at least ten" times suggesting it is likely more than that. (Pa0462a at 88:3-9).

It is also abundantly clear that the Zoning Officer investigated Appellants' complaints to the extent that he could as SiteScapes Respondents have been issued Notices of Violation by the Zoning Officer for several issues on the Property that violated Borough Ordinances. (Pa0210a-0211a). Specifically, the Notice of Violation stated:

> "As you know I originally issued a "Continuance of non-conforming use' letter [Exhibit D] for your property located at the referenced address. Since that time, I have witnessed additional large tandem dump trucks at your facility. Originally, I issued a letter permitting the continuance of a landscaping company which I believe you were operating. Since the April 18, 2018 letter, I believe you have expanded

> into the heavy excavating/trucking business which is not landscaping. On a number of occasions including October 2nd I have witnessed five tandem dump trucks where I witnessed only one or two dump trucks in the past. The five dump trucks took over all the available parking on your site and there was no room for the parking of employee vehicles. In the past I have witnessed some off-site employee parking and now I see none.
>
> Secondly, I see a dumpster located in the front yard which is not screened or permitted.
>
> Thirdly I saw a new non-shield high-intensity spotlight located on the front of your building. This light has too much glare going off-site and in not shieled as required by Borough Ordinance.
>
> Please remove these items or the municipalities may have to take further action." [Id.].

The Zoning Officer also confirmed that he made a follow up visit to the Property to ensure that the violations were remedied to the satisfaction of the Borough (Pa0452a at 48:21-23), and that once confirmed, the Zoning Enforcement Officer issued a Violation Notice Update confirming that the violations were corrected. (Pa0212a). SiteScapes Respondents also confirmed the violations and the follow-up visit to make sure the violations were corrected. (Pa0226a at 50:18-51:3; 51:15-52:2).

After the preceding events, Appellants hired new attorneys in hopes of achieving a different result than their previous attorneys. The new attorneys, which have brought this instant litigation, immediately issued a letter to the Zoning Officer echoing the exact same "violations" as their previous attorney which were found to

not be violative of the Borough Ordinances by the Zoning Officer. Specifically, Appellant's renewed complaints restated the restrictions of the 2004 resolution:

> "Mainsails application was granted by the Planning Board to permit the demolition and construction of the current storage facility, subject to seven (7) conditions as memorialized via resolution [2004 Resolution], *including that operation shall only take place between 7 am and 7 pm, Monday through Saturday; no cleaning or maintenance of vehicles at Property; no fabrication, manufacturing, or sales at Property*…." [Pa0172a].

The letter then stated the same proposed violations by SiteScapes Respondents:

- Outdoor storage of construction equipment, construction materials, oil and wood;
- As many as eight (8) trucks parked outdoors;
- Working hours commenced as early as 6:00 am with the outside idling of trucks for up to 30 minutes and loud beeping when those trucks are backing up – and at decibel sound levels exceeding residential standards;
- Hours of operation expanding to all day Saturday and sometimes Sunday;
- Vehicles and heavy machinery being power washed and cleaned outdoors;
- Dump trucks, vans, storage trucks, and pickup trucks being left outside overnight at the Property;
- Dumpsters containing construction materials and debris kept on Property; Excessive debris and construction materials left outdoors. [Pa0172a-0173a].

Having received another letter from Appellants complaining of the same issues that he has investigated and decided on numerous times over the preceding 2-3 years, the Zoning Officer did not respond, as he has the discretion to do. Subsequently, Appellants attorneys filed an appeal with the Planning Board

challenging the Zoning Officer's "failure to respond to the December 5, 2019 and January 7, 2020 letters requesting confirmation that certain commercial operations currently taking place at 680 Myrtle Avenue are not protected nor "grandfathered" as a legally valid, preexisting, nonconforming use as determined in 1998." (Pa0186a). Of course the Zoning officer is not going to confirm that SiteScapes Respondents were not operating as a legally valid preexisting non conforming use because he has confirmed exactly the opposite, numerous times previously, including to Appellants' first attorney who challenged the use of the Property by SiteScapes Respondents.

As an initial matter, failing to respond to a letter is not an Order, Requirement, Decision, or Refusal by an administrative officer based on or made in the enforcement of the Zoning Ordinance (Pa 0181a). More importantly, Appellants admitted that they were not in fact challenging the Zoning Officer's failure to respond, rather they were challenging the Zoning Officers previous determinations that SiteScapes Respondents were operating lawfully at the Property. (Pa0337a at 63:2-6).

> Q: The question is, you're not appealing his [Zoning Officer] failure to respond. You're appealing his determination that SiteScapes is operating lawfully, correct?
>
> A: I – I would say yes. [Id.]

Clearly, Appellant's appeal to the Planning Board, couched as a challenge to the Zoning Officer's failure to respond to the newest letters in their multi-year-long letter writing campaign, was an attempt to backdoor the statute of limitations on challenging the Zoning Officer's earlier determination that SiteScapes Respondents were operating lawfully as a pre-existing nonconforming use. A determination that he made as early as 2019, affirmed by the Zoning Enforcement Officer, and the numerous times he visited the Property in response to Appellants multitude of ongoing complaints about the same conduct on the Property, as set forth above.

Appellants also had a backup plan to get to the Planning Board in order to challenge the Zoning Officer's previous decisions, as they stated they were also appealing to the Planning Board for a "Request for Interpretation of *the zoning map or ordinance* or for Decisions upon other special questions upon which the Board of Adjustment is authorized to pass by *any zoning or offered map or ordinance*." (Pa0181a). However, their request for interpretation is not one for a zoning map or ordinance, it was clearly for an interpretation of the 2004 Resolution and a previous 1998 Resolution as it pertained to the use of the Property. (Pa0187a). Appellants testified:

> Q: So is your appeal to the Planning Board that Mr. Vinegra should not have granted a zoning certificate for a nonconforming use to SitesScapes?
>
> A: Basically, my attorney is asking for an interpretation. Like, you know, how is the property supposed to be used? How is the – *if the*

> *resolution that was approved before applies to SiteScapes, yes or no, because we're trying to clarify if you know, how is this company supposed to be operating from the site*.
>
> Q: So you are – it's clear to you that Mr. Vinegra believes SiteScapes is operating lawfully, correct?
>
> A: That is his belief, yes.
>
> Q: And your goal before the Planning Board is to overturn that decision he made, correct?
>
> A: I believe so, yes. And – we're asking the Board – for you know – for interpretation, yes.
>
> Q: So the two goals you have before the Planning Board is the interpretation of a 2004 resolution and to overturn the decision Victor Vinegra made that SiteScapes is not in violation and is operating lawfully as a nonconforming pre-existing use, correct?
>
> A: Correct. [Pa0337a at 64:1-25].

Just as Appellants' first attorney sought clarification of the conditions of the 2004 Resolution, so too did Appellant's current attorneys. The problem is that Appellants did not challenge the determination that the 2004 Resolution was a nullity within the 20-day statute of limitations for the Planning Board nor the 45-day statute of limitations for the superior court in lieu of prerogative writ. Appellants believe that if they renew their request and complaints made back in 2018 and 2019 that it restarts the statute of limitations, however, as set forth below, not so.

In response to Appellants appeal to the Planning Board, the Zoning Officer issued a letter to the Planning Board with the entire history of the Property, as well

as the entire dispute between Appellants, Municipal Respondents, and SiteScapes Respondents. In the letter dated July 17, 2020, the Zoning Officer advised the Planning Board:

> The applicant's attorney is stating that the Borough of Garwood's Zoning Department has not been exercising its powers in the enforcement of the Municipal Ordinances in relation to activities at 680 Myrtle Avenue. *This office was in contact with Mr. Abelino Morocho the neighbor filing this complaint and his prior attorney, Mr. John DeMassi Esq. back in 2019.* Mr. Morocho is the owner of the residential structure next door to 680 Myrtle Avenue and resides in Westfield, NJ. *In 2019, I had numerous conversations with Mr. John DeMassi to discuss his clients concerns. Somewhere in the summer of 2019 I met with Mr. Morocho at his home next door to 680 Myrtle Avenue. My determination at the time is that the existing use by SiteScapes was a pre-existing non-conforming use and that the restrictions Mr. Morocho wanted enforced were not applicable. I notified both Mr. DeMassi and Mr. Morocho of my findings."* [Pa0189a].
>
> With regard to the history of the Property, the Zoning Officer stated:
>
> The site has been utilized as a "construction" yard for over 40 years. SiteScapes (current occupant) is a landscaping/mason/general site contractor *which is NOT substantially different from the previous uses since 1970. Mr. Morocho's previous attorney did not pursue any additional determinations after our on-site meeting."* [Pa0190a].

The Zoning Officer reiterated that "In 2020 Mr. Morocho has retained a new law firm to pursue this issue and advance his clients claim that the use is *illegal and not consistent with my previous determinations*." (Id.). He went on to state that "Mr. Simon is requesting that the zoning department issue a "cease and desist" order to SiteScapes. I believe we are estopped from performing such, *and this department*

believes that SiteScapes complies with the uses of the pre-existing non-conforming uses." (Pa0191a).

He went on to state that "I disagree with Mr. Simon's findings that the use of the site now is substantially different from the previous uses of the site." (Id.). He stated in the letter to the Planning Board that he based a number of his findings on a historical research environmental report from 1998 regarding the historical uses of the Property. (Pa0192a). He concluded his letter to the Planning Board by summarizing all of his previous findings:

> To summarize, it is my professional opinion as a "Zoning Officer" that SiteScapes complies with the provisions as a "construction contractors' yard" and is a pre-existing non-conforming use. Thus, they are operating legally as far as zoning regulations. This office does not enforce property maintenance, street cleaning, street parking, nor any policing duties." [Id.].

The Zoning officer also testified that he conducted additional research prior to making his previous determinations about the use of the Property that he did not mention in his letter to the Planning Board. He testified that he interviewed several of the previous Property owners since he knew some of them personally, (Pa444a at 16:10-17:8), and that he researched historical photographs of the Property on the New Jersey Department of Environmental Protection's GIS formats to confirm that the Property was being used as a construction yard back as far as the 1970's (Pa0450a at 40:5-18). The Zoning Officer also testified that in his numerous visits

to the Property he observed the storage of construction materials and felt that it was similar to the storage he saw on the Property in the historical photographs he viewed. (Pa0453a at 52:21-23). Further, Mr. Vinegra testified that he has his own discretion in determining whether a property becomes approved or denied for an issuance of a zoning permit. (Pa463a).

Despite Appellants' backdoor attempts to get to the Planning Board well beyond the statute of limitations, the Planning Board's attorney was able to see through these deceitful attempts. In a letter to the Planning Board, dated September 30, 2020, Donald Fraser, Esq., gave his legal opinion on all issues that the Planning Board would be called on to address. With regard to jurisdiction to hear Appellants' appeal, Mr. Fraser stated:

> On the subject of jurisdiction, I have previously expressed the preliminary view that this is a matter for the courts, and not for the Planning Board to decide. Fundamentally, what Mr. Simon seeks, on behalf of the Neighbors [Appellants], is to enforce the zoning ordinance against the Owner of 680 Myrtle Avenue [SiteScapes Respondents], contending that the activities taking place at such address violate the zoning ordinance.
>
> It remains my view that the proper procedure is for the Zoning Officer to issue a summons against the Owner, and to enforce it in Municipal Court. *The Planning Board is not the entity charged with enforcement*. If the Neighbors believe that the Zoning Officer is improperly failing to discharge his duties, the neighbors could either file a citizen's complaint in Municipal Court (and ask the Municipal Prosecutor to prosecute it, or, in the alternative, seek to have a private prosecutor do so.) Alternatively, the Neighbors could file in Superior Court, and seek either injunctive relief against the Owner of 680 Myrtle Avenue, and/or a mandamus compelling the Zoning Officer to act. [Pa0205a-0206a].

Critically, as it relates to this case, Mr. Fraser immediately recognized that Appellants were way beyond the statute of limitations to bring their appeal to the Planning Board:

> Moreover, there is the question of timeliness of the Neighbors' application/appeal to the Board. N.J.S.A. 40:55D-72 provides that, when a party is aggrieved by a decision of an administrative officer, appeals are to be taken within 20 days. This principle has been upheld by the New Jersey courts. See Sitkowski v. Zoning Board of Adjustment of Lavallette, 238 N.J. Super. 255 (App. Div. 1990); White Beeches Golf & Country Club., Inc. v. St. Gabriel 's Syrian Orthodox Church, et al., an unpublished 2013 Appellate Division case (A-2087-12T3). *Clearly, in this case, the Neighbors have far exceeded the 20-day time limit. Thus, the appeal is untimely in any event.*
>
> Without limitation, I would observe that, as referenced in Mr. Vinegra's letter of July 17, 2020, *Mr. Vinegra had met with Mr. Morocho and his prior attorney, Mr. DeMassi, in the summer of 2019. Whether or not the Neighbors were aware of Mr. Vinegra's decision prior to the time of the meeting in the summer of 2019, they clearly were aware of it by then*. Hence, the 20 days expired *long* before the submission of the Neighbors' present appeal/application, which is dated January 23, 2020. [Pa0206a].

Lastly, Mr. Fraser recognized that Appellants' request for interpretation to the Planning Board did not fall within their jurisdiction:

> In addition, I do not see a basis for the Neighbors' request for interpretation under N.J.S.A. 40:55D- 70(b). That subsection of the MLUL relates to interpretation of "the zoning map or ordinance," which is not at issue in this case. [Id.].

Mr. Fraser concluded by summarizing:

> My recommendation is that the Board deny Mr. Simon's application on behalf of the Neighbors on the aforestated procedural grounds. If, on the merits, the Neighbors are entitled to a remedy against the Owner, they are not denied same. Rather, the Neighbors remain free to pursue their remedies against the Owner in a court of law, which is far more equipped to resolve this matter than is the Board. [Id.].

Despite the Zoning Officer's letter, as well as the Planning Board's attorney's legal recommendation, the Planning Board still permitted Appellants' counsel to be heard as to why the Planning Board should take up their appeal, at a special meeting on September 30, 2020. (Pa0522a). The Board heard arguments from Appellants and SiteScapes Respondents as to why Appellants' appeal should or should not be heard, and after deliberation, the Board denied Appellants' appeal application and memorialized the decision in the October 14, 2020 Resolution. (Pa0207a-0208a). The Board held that:

> WHEREAS the Board concurred with the reasoning set forth in the September 30, 2020 Opinion letter [Pa0205a-0206a]; NOW, THEREFORE, BE IT RESOLVED by the Planning Board of the Borough of Garwood that request of Appellants for an Interpretation/ Appeal relating to 680 Myrtle Avenue [misprinted as 6809], Garwood, be, and the same hereby is DENIED, for the reasons set forth in the September 30, 2020 Opinion Letter of the Board Counsel. [Pa0208a].

In response to the Planning Board's denial of their application, Appellant's filed this Complaint in Superior Court on November 28, 2020, and an Amended seven-count Complaint on October 19, 2021 (Pa0001a-0026a). It is undisputed that Appellants never filed a notice of tort claim with Municipal Respondents at any time. (Pa0501a). The First Count in Appellants' Complaint challenged that SiteScapes

Respondents' use of the Property was an improperly expanded non-conforming use. (Pa0011a-0014a). The Second Count challenged that the Municipal Respondents are required to enforce their own ordinances. (Pa0015a-0016a). The Third Count was an Action in Lieu of Prerogative Writs and challenged that the Planning Board's decision to deny Appellants' appeal was arbitrary capricious and unreasonable. (Pa0017-0018a). The Fourth Count challenged that the Municipal Respondent's violated Appellants' constitutional due process, equal protection, and property rights under the New Jersey Civil Rights Act. (Pa0019a-0021a). The Fifth Count challenged that Appellants were entitled to a Writ of Mandamus against the Municipal Respondents. (Pa0021a-0023a). The Sixth Count challenged that the Municipal Respondents were creating a public nuisance (Pa0023a-0024a). And the Seventh Count challenged that the SiteScapes Respondents created a private nuisance. (Pa0024a-0025a).

On December 20, 2021, Municipal Respondents filed their Answer to Appellants' Complaint. (Pa0027a-0048a). On January 26, 2022, SiteScapes Respondents filed their Answer to Appellants' Complaint. (Pa0049a-0070a).

During discovery, Appellants produced numerous photographs allegedly of the Property at various times. (Pa0502a). However, these photographs were never properly identified at any stage of the litigation. As set forth more fully below, there is no deposition testimony as to who took the pictures, when the pictures were taken,

what the pictures were purported to show, or even that the pictures were in fact of the Property. The record is equally devoid of any affidavits or certifications identifying the photographs, making their probative value exactly zero.

Also during discovery, Municipal Respondents elicited testimony that makes it incontrovertible that Appellants have zero evidence of any constitutional due process, equal protection, or property right violations. Indeed, because none exist. Appellant Morocho testified:

> Q: Do you have any evidence of the Borough of Garwood allowing other properties to operate unlawfully?
>
> A: I'm not aware of that, no.
>
> Q: So you have no evidence of the Borough of Garwood treating any other property owners the way that you say you have been ignored?
>
> A: I'm not sure. That could be the case or could not be the case, but I'm not sure.
>
> Q: But you have no evidence?
>
> A: I do not have any evidence. It was everything based on my experience with dealing with – with the town. [Pa0333a at 46:3-15].

With regard to his race, Appellant testified that he has no evidence that the Planning Board declined to hear his application because he is not white, that the Municipal Respondents failed to enforce their own ordinances because he is white, or that SiteScapes certificate of nonconforming use was issued because they are white and he is not. (Id., at 46 and 47). Appellant also testified that he has no

evidence any of the above was due to his religion or national origin. (Id.). He testified he is not disabled and that he is 40 years old (Id.) and it is undisputed that he is a man married to a woman.

Appellant also testified that he does not believe he is being treated differently from other property owners, nor does he believe that any of the Municipal Respondents have a personal issue or vendetta against him. (Pa0335a at 54:2-9; 55:9-13; 56:2-7). He also testified that he does not feel the Municipal Respondents have infringed on his right to own property, rather believes the property rights of his that are being violated are regarding the value of his property and the right to enjoy his property free from nuisances. (Pa0334a at 50:2-51:7). The Zoning Officer also testified that none of the decisions or determinations he made had anything to do with Appellants' membership to any protected class, and that he himself was "100% Latino." (Pa0464a at 95:11-20; Pa0466a at 102:8.

After four extensions of the discovery end date, discovery closed on December 31, 2023. On February 16, 2024, Municipal Respondents and Appellants filed their motions for summary judgment (Transaction IDs LCV2024429171 and LCV2024430997). On March 5, 2024, Municipal Respondents and Appellants filed their opposition briefs and counter-statement of material facts on summary judgement. (Transaction IDs LCV2024582817 and LCV2024585267). On March 14, 2024, SiteScapes Respondents filed a cross-motion for summary judgment

against Appellants (Transaction ID LCV2024678759). After several adjournments of the return date, On April 5, 20242, Municipal Respondents filed their Reply Brief (Transaction ID LCV2024876269) and Appellants filed their Opposition to SiteScapes Respondents' cross-motion for summary judgment and Reply Brief on their motion for summary judgment. (Transaction ID LCV2024876784).

On April 19, 2024, Oral argument was heard on all motions for summary judgment and on April 23, 2024, the lower Court granted Municipal Respondents and SiteScapes Respondents motions for summary judgment and denied Appellants motion for summary judgment. (Pa0624a-0700a).

In granting Municipal Defendants' motion for summary judgment, the lower court found that the Municipal Respondents were entitled to immunity under the Tort Claims Act ("TCA") (with regard to the common law claims) because the statute challenged, N.J.S.A.§ 40:55D-18 "is a discretionary statute as it states that an interested party *may* institute an action, it does not state that a municipality *must* institute an action for an alleged land use violation." (Pa0623a). The Court went on to state "even if the statute was ministerial and the TCA immunities did not apply, Plaintiffs still needed to file a notice of tort claim with Municipal Defendants. As such, Plaintiff's common law claims against municipal Defendants are barred." (Id.).

The lower Court also found Municipal Respondents immune from liability under N.J.S.A. §59:2-4, which states "A public entity is not liable for any injury

caused by adopting or failing to adopt a law or by failing to enforce any law." Id. Clarifying that Appellants' arguments with regard to discretionary versus ministerial duties were moot as it pertained to their claim that Municipal Respondents failed to enforce their own ordinances, because the Appellate Division in Gary v. Payne, 224 N.J. Super. 729, 735 (App. Div. 1988), held that "the distinction between ministerial or discretionary acts *does not enter into the picture when dealing with alleged liability arising out of failure to enforce laws,* failure to make or properly carry out inspections, or improper licensing or failures to license." Id. Finding that only Count Four of Appellants' Complaint alleged constitutional violations, "N.J.S.A. §59:2-4 will not apply to Count Four." (Pa0632a). Additionally, the Lower Court made sure to point out that "the record is devoid of information establishing that Municipal defendants failed to enforce the Ordinance." (Id.).

The Lower Court also addressed Appellants' prerogative writ action and stated "Plaintiff's argue that Mr. Vinegra's April 19, 2018 letter [Pa0122a] and conversations between his previous attorney and Mr. Vinegra are not legal determinations that would be subject to appeal, however, Plaintiffs have not provided any egal support for this position." (Pa0633a). The Lower Court went on that "This Court finds that Plaintiffs failed to file their prerogative writ action within the forty-five-day timeframe to bring the action." (Pa0634a). Additionally, the Lower Court recognized that although "Plaintiffs are alleging that as a result of the

Municipal Defendants' failure to enforce the Ordinance, Plaintiffs were deprived of their constitutional property rights, however, *Plaintiffs failed to allege what constitutional rights are being violated.*" (Id.).

Despite finding that Appellants' Complaint was filed well past the statute of limitations, the Lower Court assumed *arguendo* that it was timely filed, and addressed each claim in turn. First, "The Municipal Defendants have repeatedly put Plaintiffs on notice that it was asserting this [statute of limitations] defense. As such, the Court does not find that Municipal Defendants waived their statute of limitations defense." (Pa0635a). Next the Lower Court found that:

> While Plaintiffs assert that the Planning Board did not conduct any investigation into the complaints, the Municipal Defendants have provided evidence showing that Mr. Vinegra [Zoning Officer] did conduct investigations."
>
> Further, Mr. Vinegra testified that he made a site visit to the subject property and advised defendant SiteScapes to remove the large tractor trailers from the front of the property as it was an overutilization of the parking. Additionally, Mr. Vinegra cited SiteScapes for the use of a port-a-john in the front yard.
>
> Further, Mr. Vinegra testified he performed a subsequent investigation in which the port-a-john was removed and the lights were either tined down or removed. On November 2, 2020 issued a Violation Notice Update in which the conditions under the October 20, 2020 Violation Notice were corrected satisfactorily. [Pa0639a].

In summarizing its determination with regard to the use of the Property and the Zoning Officer's determinations, the Lower Court held:

> In the present matter, SiteScapes use of the Property is not an improper expansion of a non-conforming use. [Pa0640a].
>
> This Court finds that Mr. Vinegra did a proper investigation into determining whether defendant SiteScapes use of the Property was a conforming use. Mr. Vinegra relied on the [1998 Peak Environmental] Report …..Additionally, Mr. Vinegra reviewed historical photographs to see what was stored on the property in the past and how the previous owners used it; visited the property to observe SiteScapes defendants' use of the Property; and spoke with the prior owners on the previous use of the Property.[Pa0641a].
>
> The record is devoid of any information showing that the defendant SiteScapes' use of the property is substantially different than the prior uses of the Property. [Id.]

The Lower Court found that "plaintiffs either knew or should have known of the preexisting non-conforming use issued to Defendant SiteScapes between late 2018 and early 2019. As such, the Court finds that Plaintiff's appeal in January 2020 [to the Planning Board] *was well past the [twenty-day] deadline to appeal pursuant to N.J.S.A. §40:55D-72*. Therefore, under the MLUL, the Municipal Defendants did not act in an arbitrary or capricious manner in denying Plaintiff's application, as Plaintiff's filed the appeal outside of the 20-day window." (Pa0647a). Moreover, the Lower Court found that "Mr. Simon was provided an opportunity to provide an argument as to why the Board should have heard Plaintiff's application." (Id.).

The Lower Court also found that Appellants Writ of Mandamaus claim must fail as "there has been no evidence provided to this Court to show that there has been a clear violation of the zoning ordinance." (Pa0654a). "Plaintiff has failed to

establish that there was a clear violation of the Ordinance and a failure to take action by the Municipal Defendants." (Pa0656a.). Lastly, the Lower Court disposed of Appellants photographs allegedly of the conditions on the property as it stated "said photographs have not been authenticated by Plaintiffs." (Pa0660a).

LEGAL ARGUMENT

STANDARD OF REVIEW

a. Summary Judgment

"In an appeal of an order granting summary judgment, appellate courts 'employ the same standard [of review] that governs the trial court.' " Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (alteration in original) (quoting Busciglio v. DellaFave, 366 N.J.Super. 135, 139, (App.Div.2004)). "[T]he appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Id. (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J.Super. 162, 167 (App.Div.), certif. denied, 154 N.J. 608, 713 (1998)). The reviewing court must view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). The trial court's conclusions of law and application of the law to the facts warrant no deference from a reviewing court. Manalapan Realty, L.P. v. Twp. Comm. of

Manalapan, 140 N.J. 366, 378 (1995). W.J.A. V. D.A., 210 N.J. 229, 237-238 (2012).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill, *supra*, 142 N.J. at 538. "Summary Judgment should be granted … 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

b. Municipal Board Decisions

In reviewing a judge's decision on an action by a municipal governing body, such as a zoning board of adjustment, the appellate court is bound by the same standard of review as the trial court. CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd., 414 N.J. Super. 563, 577 (App. Div. 2010). "[A]n overriding principle governing judicial review of variance decisions by a board of adjustment is that, assuming an

adequate basis is in the record for a board's conclusions, deference to the judgment of local zoning boards ordinarily is appropriate." Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58 (1999). This Court should reverse a board's decision only if its action was so arbitrary, capricious, or unreasonable, as to amount to an abuse of discretion. Zilinsky v. Zoning Bd. of Adjustment of Verona, 105 N.J. 363, 367 (1987). The burden is on the party challenging the board's decision to demonstrate the decision was arbitrary, capricious, or unreasonable. Cell S. of N.J., Inc. v. Zoning Bd. of 6 Adjustment of W. Windsor Twp., 172 N.J. 75, 81 (2002).

If the record contains sufficient evidence to support the municipal board's determination, the court will defer to the Board's decision. Kramer v. Bd. of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965). Further, a board's factual determinations are presumptively valid. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Franklin, 233 N.J. 546, 558 (2018). Review of a judge's decision on an action in lieu of prerogative writs is de novo based on the record before the municipal board. See N.Y. SMSA, L.P. v. Bd. of Adjustment of Weehawken, 370 N.J. Super. 319, 331 (App. Div. 2004). Put simply, in n action in lieu of prerogative writs, review of the Board's decision is limited to whether there was substantial evidence in the record justifying the Board's decision, and if so, the Board’s decision must be affirmed.

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT APPELLANTS' APPEAL TO THE PLANNING BOARD AND THEIR ACTION IN LIEUOF PREROGATIVE WRITS WERE UNTIMELY

Appellants' primary contention on this appeal is that their application to the Planning Board was timely, and thus, it should have been heard. Rule 4:69–6(a) provides that "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed."

As an initial matter, Appellants argument that the Lower Court incorrectly found that the statute of limitations had passed with regard to the Zoning Officer's determination that SiteScapes Respondents were operating as a lawful preexisting nonconforming use because the challenge was not to that decision rather to "the **present** use of the Property and whether or not it has been illegally intensified **since the Zoning Officer's issuance of the 2018 Zoning Certificate/Permit**," PB17, holds no water. It is undisputed that Appellants previous attorney challenged the "current use" of the Property as far back as 2018 and 2019, suggesting SiteScapes Respondents have illegally expanded the non-conforming use of the Property. The use at issue is identical to Appellant's contentions of SiteScapes Respondents'' use now. An issue of land use does not become a new dispute simply by re-stating the same complaints about the use of the Property at a later date, and Appellants have provided no legal authority to the contrary. It is undisputed that Appellants are

challenging the same use of the Property that it challenged in 2018 and 2019, to no avail. This can easily be seen through Appellants' previous attorney's letter to the Zoning Officer that ""The violations are so extensive that the operation is not merely an intensification of the prior use but indeed a completely different use." (Pa0108a-0118a).

There is equally no dispute that Appellants did not take any further action after being told by the Zoning Officer, after a thorough investigation, that the Property is not operating illegally and that its use is not substantially different from previous uses. Appellants did not appeal this decision to either the Planning Board within 20 days or the Superior Court within 45 days. The Lower Court correctly determines that Appellants knew or should have known of the determination that SiteScapes did not unlawfully expand the use of the Property by at least 2019. Here, Appellants are attempting to argue that despite notifying the Zoning Officer of numerous alleged use violations of the Property back in 2018 and 2019, that the statute of limitations restarts once a new complaint is made to the Zoning Officer down the road, regardless of the conduct complained of is identical to the previous complaints. No court has ever so held, and Appellants have provided no legal basis for this outlandish position.

Appellant testified that the true reason behind going to the Planning Board was the challenge the Zoning Officer's determination that the SiteScapes

Respondents use of the property was not an illegal expansion and it was operating lawfully as a preexisting non-conforming use, a determination he made at least as far back as 2019. There can be no question that the statute of limitations for appealing this determination long passed prior to their January 2020 application to the Board and the subsequent November 28, 2020 Complaint. Accordingly, the Lower Court correctly determined that Appellant's application to the Planning Board and Complaint in Lieu of Prerogative Writs were time barred.

a. There are no grounds for an extension of time on the statute of limitations.

R.4:69–6(c) states, "[t]he court **may** enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires." An enlargement of the time for filing a prerogative writ action is recognized to serve "the interest of justice" in cases involving "(1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." As an initial matter, this statutorily permitted enlargement of the 45-day statute of limitations is a permissive statute, and specifically states that the court **may** enlarge the period of time. Here, the Court was not required to enlarge the time because it found that Appellants were not deprived of any constitutional rights. Appellants alleged that the Municipal Respondents failure to enforce its Ordinance deprived them of their constitutional

property rights, and the Board's failure to act on the merits of its application violated its substantive due process rights. PB 18-19. However, the Court properly found that there were no constitutional violations of property rights nor substantive due process rights.

Appellants have presented no evidence to show that they have a property interest "protected by the substantive due process clause." Chainey v Street, 523 F.3d 200, 219 (3d Cir. 2008). "The principle of substantive due process, founded in the federal Constitution, U.S. Const. amend. XIV, § 1, and our State Constitution, N.J. Const. art. I, § 1, protects individuals from the 'arbitrary exercise of the powers of government' and 'governmental power [...] being used for [the] purposes of oppression.'" Felicioni v. Admin. Office of the Courts, 404 N.J.Super. 382, 392 (App.Div.2008) (quoting Daniels v. Williams, 474 U.S. 327, 331, (1986)), certif. denied, 203 N.J. 440 (2010). "However, the constitutional guarantee 'does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law.'" Ibid. (quoting Rivkin, supra, 143 N.J. at 366). "[S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend ... judicial notions of fairness ... [and that are] offensive to human dignity.'" Ibid. (second alteration in original) (quoting Rivkin, supra, 143 N.J. at 366). Accord Chainey v. Street, supra., 523 F.3d at 219 ("To establish a substantive due process

claim, a plaintiff must prove the particular interest at issue is protected by the substantive due process clause and the government's deprivation of that protected interest shocks the conscience.")

Further, A property interest is only constitutionally protected if it is considered "fundamental" under the United States Constitution. Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 140 (3d Cir. 2000). Generally, substantive due process review of a property issue is limited "to cases involving real property ownership." Id. at 141. Courts have been "reluctant to extend substantive due process protection to other, less fundamental property interests." Id. Here, Plaintiff's alleged constitutional property interest affected are the value of their property and their right to use and enjoyment of their land free from nuisances, neither of which are protected constitutional property rights. "One does not have a protected property interest in the use of neighboring property because that use may adversely affect the value of his property." Mehta v. Surles, 905 F.2d 595, 598 (2d Cir.1990)). It is noteworthy that Appellants argue that it was improper for the Lower Court to find that they did not "show sufficient evidence to show that their substantive rights were violated", when even in their brief to this Court Appellants still have failed to state exactly which protected property rights have been violated. Indeed, Appellants simply state that their constitutional substantive due process and property rights have been violated without any further expansion on which Property rights.

Notwithstanding, it is clear that property rights at issue, as testified to by Appellant Morocho, are not the fundamental property rights protected by the Constitution.

In this matter, Appellants' property interests against nuisances or in enforcing ordinances is not sufficient to claim a deprivation of substantive due process. Indeed, Plaintiff testified that the property interests he claims have been violated are the right to be free from nuisances, the right to the quiet use and enjoyment of his property, and the right to not have the value of his property diminished due to the conditions of neighboring properties. Unfortunately for Plaintiff, there is no controlling authority establishing that such property interests are protected by procedural or substantive due process. Indeed, such interests are not constitutionally protected. See Bellocchio v. New Jersey Dep't of Envtl. Prot., 16 F.Supp.3d 367, 378 (D.N.J. 2014), aff'd, 602 F.App'x 876 (3d Cir. 2015) (dismissing due process claims in which claimant asserted that a neighboring Airport had violated the use and enjoyment of property due to noise and pollution).

Moreover, Appellants were not deprived of an opportunity to be heard by the Planning Board. The Planning Board held special session on September 30, 2020 where Appellants were given the opportunity to present all of its arguments on why the Planning Board should hear their application. Their reliance on Harz v. Borough of Spring Lake, 234 N.J. 317 (2018) is easily distinguished as the Plaintiff in Harz filed a timely appeal to the Planning Board, whereas Appellants were well beyond

their permitted time to challenge the SiteScapes Respondents' use of the Property and the Zoning Officer's previous determinations that said use was not an illegal expansion under the Ordinance.

In the context of land-use, the federal courts have cautioned that "not . . . every violation of state law [should be] 'constitutionalized' through the application of the substantive due process clause, and [] District Court[s] [should be] properly concerned with preventing this provision from turning into a broad authorization" to review whether a public entity is in compliance with law. Whittaker v. County of Lawrence, 437 F.App'x 105 (3d Cir. 2011). Thus, to be actionable, the substantive due process claim must do more than just be a disagreement about conventional land use disputes. Eichenlaub, 385 F.3d at 285.

Lastly, Appellants argue that an extension of time is warranted because the Ordinance requires the Zoning Officer to enforce the MLUL, however, the record is patently clear that the Zoning Officer is actively enforcing the ordinances. He made numerous site visits to the Property, performed extensive research into the historical uses of the Property, and personally observed the use of the Property on a multitude of different occasions, and at not time did he ever feel that the use of the Property is substantially different from previous uses. Appellants claim of a constitutional violation for failing to enforce ordinances hinges on the fact that the Zoning Officer did not enforce the ordinance in a manner that Appellants agreed with. This,

however, does not result in a deprivation of substantive due process, which is reserved for those matters which shock the conscience, which clearly this case does not even come close to meeting.

It being clear that no evidence exists in the record to support a substantive due process claim, the Lower Court correctly did not enlarge the statute of limitations as there were no grounds to do so.

b. There is no evidence of a continuous tort violation.

Appellants argument that the continuous tort doctrine should apply to toll the accrual date of the statute of limitations lacks any legal support due to the facts of the case. Put simply, there is no evidence in the record that any torts are occurring beyond Appellants' own self-serving complaints about SiteScapes Respondents' use of the Property, of which there is ample evidence to support the Zoning Officer's determination that no violations were occurring.

As an initial matter, the failure to enforce a law is not an actionable tort as the TCA makes it clear that Municipal Respondents are immune from any failure to enforce any law. N.J.S.A. §59:2-4. However, this Court can easily dispose of this argument as it is clear through the diligent investigation of the Zoning Officer, the numerous site visits from both the Zoning Officer and Zoning Enforcement Officer, and the violations that were issued for an illegal expansion of the use of the property that were issued and corrected, the Zoning Officer is unequivocally taking his duties

seriously, and is actively enforcing the MLUL as it pertains to the Zoning Ordinance of the Borough of Garwood.

Moreover, the record is devoid of any evidence that constitutes a tort, let alone evidence of a continuing tort. The Lower Court correctly found that Appellants provided no evidence of public or private nuisance. Appellants testified that despite their contention that the noises coming from the trucks on the Property violate the noise decibels in the Ordinance, they never had any inspection performed by anyone that tested the decibel levels of the alarms. (Pa0334a).

> Q: Okay. So we've established that its [the trucks] are very loud, but you don't have a specific decibel reading, correct?
>
> A: I do not. [Id.].

Based on the foregoing, there cannot be a continuing tort doctrine application where there is no evidence of any tort to begin with. Accordingly, the Lower Court correctly determined that the continuous tort theory was not an issue.

c. Reissuing a previous determination does not restart the clock on the statute of limitations.

Perhaps Appellants most outlandish argument is that reissuing a prior determination constitutes a new determination such that it restarts the accrual date on the statute of limitations to challenge said decision. As an initial matter, were this the case it would completely defeat the purpose of a statute of limitations if a challenge could be made after a prior decision is repeated down the line. No case

has ever so held, and notably, Appellants did not cite a single legal authority which so holds. It is a frivolous argument designed to distract the Courts from the obvious conclusion that Appellants failed to appeal or otherwise challenge the previous determinations of the Zoning Officer within the applicable statute of limitations. Appellants' argument poses the question, would this Court entertain an appeal that was filed after the 45-day appeal deadline from a final judgment merely because an appellant was able to get the trial court to re-issue its decision? Of course not, that is not how it works, and frankly, it is an insult to the intelligence of this Court and the Lower Court for Appellants to so argue.

POINT II

THE LOWER COURT CORRECTLY DETERMINED THAT THE PLANNING BOARD'S DENIAL OF APPELLANTS' APPLICATION WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

Appellants' once again argue that the Planning Boards decision was arbitrary, capricious, and unreasonable because they were challenging the current use of the Property, not the Zoning Officer's previous determinations, however, Appellants testimony as to the purpose of the application to the Planning Board makes it clear that this is not so.

As an initial matter, SiteScapes Defendants testified that the use of the Property has not changed from the day they purchased it in 2018. (Pa0225a at 47:23-48:8).

The Zoning Officer also testified that currently as of the date of his deposition, December 15, 2023, he feels that SiteScapes use of the Property is a lawful preexisting nonconforming use. (Pa0443a at 13:2-8).

Next, there is no dispute that the conduct complained of as an illegal expansion of a preexisting nonconforming use is the same conduct complained of by Appellants' previous attorney in 2018 and 2019. It is clearly just another attempt at circumventing procedure to have the Zoning Officer's determination that the use of the Property is lawful reviewed by the Planning Board long after 20 days from the determinations were made. Appellants also perplexingly highlight the thoroughness with which the Board based its denial of Appellants appeal on. "Notwithstanding the Board providing Appellants the opportunity to argue it's position to the Board concerning jurisdiction, *which included the Appellants' thorough articulation of the circumstances surrounding the appeal,* the Board continued to rely on the advice of counsel that Appellants were appealing 2018 or 2019 decision of the Zoning Officer. PB 25, n. 4. By their very own argument, the Board undertook a thorough examination of the record and the facts and circumstances surrounding same, and despite Appellants' pleas and arguments, the Board agreed with their counsel. There is simply no argument to be made that this diligent examination of the record and appeal resulted in an arbitrary, capricious, and unreasonable decision because the Board did not agree with Appellants.

Further, Appellants argument that "the Court wrongfully determined SiteScapes Respondents did not illegally expand the use of the Property" is wholly unsupported by the record. Specifically, there is **no evidence** of any use of the Property that constitutes an illegal expansion. Unfortunately for Appellants, their own self serving testimony and opinion that the use of the Property has been illegally expanded does not constitute admissible evidence. The only evidence offered is unauthenticated photographs, and even if the photographs were found to be admissible, they are not, there is nothing in the record to suggest that what the photographs show constitutes an illegal expansion of a preexisting nonconforming use.

N.J.R.E. 801(e) defines a photograph as a "writing." To be admissible, a writing must be authenticated. State v. Mays, 321 N.J. Super. 619, 628 (App.Div.), certif. denied, 162 N.J. 132 (1999). Under N.J.R.E. 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." Id. "A party introducing tangible evidence has the burden of laying a proper foundation for its admission." State v. Brunson, 132 N.J. 377, 393 (1993). The authentication of photographic evidence requires a witness to verify that it accurately reflects its subject, and to identify or state what the photograph shows. State v. Wilson, 135 N.J. 4, 14, (1994).

Thus, being unable to rely on the photographs produced by Appellants, the Lower Court correctly determined that there was no evidence of an illegal expansion of preexisting nonconforming use.

Additionally, even if this Court were to agree with Appellants that SiteScapes Respondents might have illegally expanded their use of the Property, it cannot reverse the Planning Board's decision absent a finding that the decision was arbitrary, capricious, or unreasonable. "A Court will not substitute its judgment for that of a board "even when it is doubtful about the wisdom of the action." Cellular Tel. Co. v. Zoning Bd. of Adj., 90 F. Supp. 2d 557, 563 (D.N.J.2000). Because a board of adjustment's actions *are presumed valid*, the party "attacking such action [has] the burden of proving otherwise." New York SMSA Ltd. P'ship v. Board of Adj., 324 N.J. Super. 149, 163 (App.Div.1999) (citing Kramer v. Board of Adj., 45 N.J. 268, 296 (1965)).

Thus, Plaintiffs must offer proof that relying on the Board's attorney that it lacked jurisdiction, that the application was well out of time, and that the interpretation sought was not regarding the zoning map or ordinance was arbitrary, capricious, or unreasonable. Indeed, they have provided none and instead attempt to improperly shift this burden of proof onto the Municipal Respondents. The only proof offered has been, and continues to be, unproven allegations. Indeed, Appellants brief to this Court simply reiterates these unproven allegations, without any support in the

record, and concludes that based on their allegations the Court should find a dispute of material fact as to whether there was an illegal expansion of the use of the Property.

And lastly, the Lower Court found that the Board heard all arguments, considered all facts, consulted with counsel, and deliberated amongst themselves before coming to the conclusion to side with the Board's attorney. Nothing about their process was arbitrary, capricious or unreasonable, thus the decision cannot be found to be. The record is littered with all of the facts considered by the Planning Board, and Appellants own brief admits that they were given an opportunity to present all of their evidence and arguments to the Board. Thus, there is nothing in the record or the Order of the Lower Court that can be said to prove the Board's decision was arbitrary, capricious or unreasonable, and it is Appellants burden of proof. "Municipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is met. Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998).

POINT III

THE LOWER COURT CORRECTLY DETERMINED THAT APPELLANTS HAVE NO ACTION FOR A WRIT OF MANDAMUS

A writ of mandamus directed to a public officer is "to compel him to do something that he is required by law to do, and has failed or refused to do, rather

than compel him to do in a different way what he has already done." Davison v. Patterson, 94 N.J.L. 338, 340-341 (1920) (citing Newark v. Lewis, 82 N.J.L. 279, 281-282 (1911)). As the Davison Court noted:

> If [the public officer] is vested by law with discretionary power or with the jurisdiction to decide questions of law, or to ascertain matters of fact, the court will not by proceedings by mandamus usurp the power to dictate how the discretion shall be exercised, or to decide what conclusions of law or of fact shall be reached. [Id.]. (citing Benedict v. Howell, 39 N.J.L. 221, 224 (1877); Mooney v. Edwards, 51 N.J.L. 479, 480-481 (1889); Gleistmann v. West New York, 74 N.J.L. 74, 78 (1906); Hansen v. De Vita, 77 N.J.L. 267 (1909).

As the Gleistmann Court noted: The allowance of a writ of mandamus rests in judicial discretion. It is only used when the act to be done is a ministerial one merely, and the duty to be performed in a definite way is clear. Gleistmann at 78. A Court "has no power to interfere" with a public officer's discretion "when that discretion is exercised in accordance with law." Id

> A party seeking a writ of mandamus must establish:
>
> a showing that there has been a clear violation of a zoning ordinance that has especially affected the plaintiff; (2) a failure of appropriate action despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of executing the ordinance; and (3) the unavailability of other adequate and realistic forms of relief.
>
> Mullen v. Ippolito Corp., 428 N.J. Super. 85, 103 (App. Div. 2012).

Plaintiffs acknowledge that a mandatory prerequisite to obtaining a writ of mandamus is that they must make "a showing that there has been **a clear violation**

of a zoning ordinance that has specifically affected the Plaintiff. On this prong alone, Plaintiffs have failed to make the required showing. The only "evidence presented" that SitesScapes use of the Property is excessive and in violation of the Zoning Ordinance is Plaintiff's own subjective unproven complaints, which the Zoning Officer investigated numerous times and does not agree with Plaintiff's position, and a plethora of unauthenticated inadmissible photographs.

The Lower Court correctly determined that "there has been no evidence provided to the Court to show that there has been a clear violation of the zoning ordinance." (Pa0654a). The Lower Court also found that the Zoning Officer did not fail to take action as he performed diligent research, made numerous site visits, and cited SiteScapes Respondents with violations of the Ordinance when violations were noticed. (Pa0655a-0656a). Further, there is no dispute that the Zoning Officer's decision on whether to grant or deny a zoning certificate, and whether to issue or not issue zoning violations, and to determine whether a preexisting nonconforming use had been illegally expanded, are matters within his sound discretion, which Plaintiff does not dispute. Here, Appellants wish the Court to usurp the power to dictate how the discretion shall be exercised by issuing a writ of mandamus for which there are no grounds.

There being no evidence of a clear violation of the zoning ordinance, and ample evidence that the Zoning Officer took action when necessary, the Lower Court correctly granted summary judgment on Appellants' writ of mandamus claims.

POINT IV

APPELLANTS FAILED TO PROVE ANY CONSTITUTIONAL VIOLATIONS UNDER THE NEW JERSEY CIVIL RIGHTS ACT

Municipal Respondents rely on their substantive due process and property rights arguments above, in POINT ONE, subsection a, as if fully set forth herein. Based on said arguments, it is clear that the Lower Court correctly determined that Appellants failed to show any substantive due process violations or property right violations. To the extent that Appellants complaints pled equal protection violations, Appellants did not so argue on summary judgment. However, to the extent that Appellants attempt to so argue here, such an argument is easily disposed of by Appellant Morocho's own testimony that he does not believe he is being treated differently from other property owners whatsoever, let alone due to his membership of a protected class, nor does he believe that the Borough or the Planning Board or the Zoning Officer has a personal issue or vendetta against him. (Pa0335a at 54:2-9; 55:9-13; 56:2-7).

Accordingly, the Lower Court correctly determined that Appellants failed to satisfy their burden of proof on their NJCRA claims and summary judgment was properly granted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the Law Division be affirmed.

Respectfully submitted,
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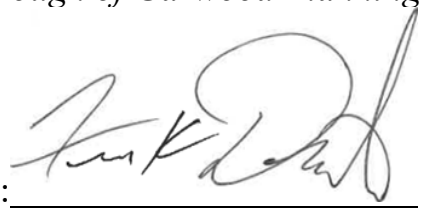

By:_____
Frank J. Dyevoich, Esq.

Dated: January 3, 2025

SANDRA LEMA and ABELINO MOROCHO, Plaintiffs, v. THE BOROUGH OF GARWOOD, THE BOROUGH OF GARWOOD PLANNING BOARD, 680 MYRTLE AVENUE, LLC, SITESCAPES LANDSCAPE AND DESIGN, LLC, SITESCAPES CONSTRUCTION MANAGEMENT LLC, and SITESCAPES LANDSCAPE & DESIGN MASON CONTRACTORS Defendants.	ON APPEAL FROM: THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO. UNN-L-3957-20 SAT BELOW: HONORABLE LISA M. WALSH, A.J.S.C. APPELLATE DIVISION DOCKET NO. A-003086-23

REPLY BRIEF OF PLAINTIFF/APPELLANT TO OPPOSITION BY DEFENDANTS/RESPONDENTS

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This firm represents Appellants, Sandra Lema and Abelino Morocho (collectively, the "Appellants"), in this appeal of the above-captioned matter. Appellants file this brief in response to the opposition briefs filed by the Respondents, Borough of Garwood ("Respondent Borough"), Borough of Garwood Planning Board ("Respondent Board")(Respondent Borough and Respondent Board hereinafter collectively referred to as the "Municipal Respondents"), 680 Myrtle Avenue, LLC, SiteScapes Landscape and Design, LLC, SiteScapes Construction Management LLC and SiteScapes Landscape & Design Contractors (collectively, hereinafter referred to as, the "SiteScapes Respondents"), Opposition to same. The relevant Facts and Procedural History regarding Appellants' allegations as to the use of the subject property located at 680 Myrtle Avenue, Garwood, New Jersey (the "Property"), are set forth in the Appellants' Statement of Material Facts submitted in support of its appeal.

LEGAL ARGUMENT

I. The Trial Court Erred Dismissing Appellants' Complaint Based Upon an Expired Statute of Limitations (Raised Below: O-3 at 8; Pa0709a).

The Court below barred Appellants from appealing the Zoning Officer's determination that the Property is a legally, preexisting nonconforming use based upon Appellants' alleged failure to bring this action within 45 days of the supposed accrual of Appellants' claims. O-3 at 9; Pa0710a. As stated previously, Appellants'

Application to the Respondent Board was for a determination as to whether the SiteScapes Respondents' current use of the Property was legal preexisting nonconforming use pursuant to N.J.S.A. 40:55D-68, and whether the July 2020 Letter of the Zoning Officer was an appealable determination of an administrative officer. See N.J.S.A. 40:55D-70(a); see also N.J.S.A. 40:55D-68.[1] Respondents take the position, *inter alia*, Appellants cannot "renew" the 45-day period in which it may appeal, pursuant to Rule 4:69-6, by submission of a new application to the Respondent Board concerning the Zoning Officer's administrative decision as to the preexisting nonconforming use of the Property.

This position, while not only unsupported by reference, fails to address a new purchaser, as contemplated by N.J.S.A. 40:55D-68, and whether or not the continuation of such a nonconformities continue in the same manner and intensity, as it did prior to the time of passage of the ordinance making said use nonconforming. While an increase in intensity is not necessarily dispositive of the outcome of such a determination, it is contrary to the MLUL to assume that said

[1] It is unclear which "party" the SiteScapes Respondents elude to when stating the "ultimate burden of proving the existence of an improper non-conforming use rests on the party asserting such use." (SiteScapes Brief at 9)(citing Berkeley Square Ass'n, Inc., v. Zoning Bd. of Adjustment of Trenton, 410 N.J. Super. 255, 269 (App. Div. 2009)). The language of Berkeley Square cited by the SiteScapes Respondents, which clearly rests the burden of proof on the property owner claiming the preexisting nonconforming use, deals with the issue of abandonment, which is inapplicable to the present matter.

Property maintains the characterization of a valid preexisting nonconforming use, no matter what changes are made. Here, the Zoning Officer's clear refusal to respond to the Appellants request for such a determination and an admitted increase in business, is clearly an appealable issue to the Respondent Board – and not a mere reference to a determination that was made years earlier by the Zoning Officer – which was not even a previous decision or determination of the Respondent Board. The Court's failure to address the Zoning Officer's July 2020 Letter is plain error that was "clearly capable of producing an unjust result." See Klajman v. Fair Lawn Estates, 292 N.J. Super. 54, 61 (App. Div. 1996); see also R. 2:10-2.

Extension of Time (Raised Below: O-3 at 9; Pa0704a):

In the alternative, Rule 4:69-6(c) allows for an enlargement of time where "consideration of substantial constitutional questions warrants relaxation of the time limits of Rule 4:69-6 'in the interest of justice.'" Brunetti v. Borough of New Milford, 68 N.J. 576, 587 (1975), expressly excepted from this limitation in cases involving "(1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti, supra, 68 N.J. at 586. However, Brunetti was "never intended to limit the categories of exceptions" See Hopewell Valley Citizen's Grp, Inc. v. Berwind Prop. Group Dev. Co., L.P., 204 N.J. 569, 583-584 (2011).

The Continuing Court Doctrine (Raised Below: O-3 at 32; Pa0733a):

While issue of the "continuing tort doctrine" was raised below with regard to the applicability of the Tort Claims Act, N.J.S.A. 59:1-1 et seq. (the "TCA") and how the statute of limitations period begins only when the wrongful action ceases, Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999), the Court below held that the Appellants' did not file their appeal in a timely manner, and no determination was made, or even addressed, as to whether or not a new tort was alleged, or whether Respondents' alleged tortious actions/inaction constitute a continuous tort for which a cause of action accrues anew each day. See Wreden v. Twp. Of Lafayette, 436 N.J. Super. 117, 125 (App. Div. 2014)(court constrained to reverse and remand directing the judge to make detailed findings of fact and conclusions of law concerning the date of accrual of plaintiffs' claims and the applicability of the continuing tort doctrine). In the present matter, the Court below found that Appellants failed to properly file a Notice of Tort Claim; thus barring the Appellants' tort claims and how "this court will not consider [Appellants'] continuing tort doctrine argument." O-3 at 32; Pa0733a. As such, the Court below erroneously dismissed Appellants' claims "with prejudice" without addressing the date in which the statute of limitations commenced.

II. Lower Court Erred Dismissing Appellants' Claims Pursuant to the Tort Claims Act (Raised Below: O-3 at 5; Pa0706a).

Pursuant to the MLUL, "[t]he governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder". N.J.S.A. 40:55D-18. Here, the Municipal Respondents were under a ministerial duty to enforce their own ordinances, and an interested party may institute a suit for injunctive relief as to same. See N.J. Zoning & Land Use Administration § 7-2.1 (2023). Notwithstanding the fact that the language of N.J.S.A. 40:55D-18 makes the enforcement of same mandatory, not discretionary, the Court dismissed Appellants' Count as to N.J.S.A. 40:55D-18, relying, in part, on N.J.S.A. 59:2-4, stating that "even if the statue was ministerial and the TCA immunities did not apply, plaintiffs still needed to file a notice of tort claim with the Municipal Defendants." O-3 at 7; Pa0708a.

Appellants' claims pursuant to N.J.S.A. 40:55D-18 was an action for an injunction," id., seeking only the enforcement of the Township's own Ordinance. See Gatto Design & Dev. v. Colts Neck, 316 N.J. Super. 110, 120-121 (App Div. 1998), NOT "damages" as defined by or contemplated within the TCA.

III. The Board's Decision and Memorializing Resolution Were Arbitrary, Capricious and Unreasonable (Raised Below: O-3 at 16; Pa0717a).

As stated previously, Appellants' filed an application with the Respondent Board pursuant to N.J.S.A. 40:55D-70(a) and -70(b). Pa0177a. During the interim between filing the Application and actually being heard by the Respondent Board

(some nine (9) months), the Zoning Officer filed the July 2020 Letter with the Board, whereupon the Board found that it lacked jurisdiction to hear the Appellants' Application based on the statute of limitation regarding the Zoning Officer's determination in 2018 – NOT the July 2020 Letter. Appellants are challenging the Zoning Officer's initial failure respond to its inquiry, as well as the July 2020 letter – both of which are affirmative decisions that are appealable pursuant to N.J.S.A. 40:55D-70(a). As the Zoning Officer's 2018 alleged decision and the July 2020 Letter were separate and distinct administrative decisions, the determination of the Board that it lacked jurisdiction over the Appellants' Application was improper.

Previous Resolutions:

At no time did Appellants seek an interpretation or the enforcement of any previous resolutions. Previous applications to the Respondent Board and Resolutions memorialized thereto (N.J.S.A. 40:55D-10(g)), present evidence consisting of, *inter alia*, sworn testimony regarding the preexisting nonconforming use of the Property prior to the time of the passage of the ordinance making such use nonconforming.

IV. Appellants are Entitled to a Writ of Mandamus (Raised below: O-3 at 27; Pa0728a).

Appellants' continued unanswered requests to the Zoning Officer and the belated response containing nothing more than a reiteration of an old "investigation" based upon a 20-year old environmental remediation report, Pa0189a, failed to

adhere to the municipal mandate set forth in N.J.S.A. 40:55D-18 – requiring the Municipal Respondents to enforce their Ordinance. Here, the Municipal Respondents refuse to act pursuant to both N.J.S.A. 40:5D-68, as well as N.J.S.A. 40:55D-70(a) and -70(b). Thus, Appellants are entitled to a writ of mandamus since they have a clear right to the relief sought herein, as the Municipal Respondents are under a clear and definite duty to act, and there is no other adequate means of relief available. See Mullen v. Ippolito Corp., 428 N.J. Super. 85 (App. Div. 2012). Absent this Court requiring mandamus relief, property owners are left without recourse to protect their properties in the face of municipal indifference to this vital concern that significantly impacts, and continue to impact, Appellants' legal rights under the Ordinances, the MLUL and the State and Federal Constitutions.

V. A Genuine Issue of Material Fact Exists as to the Current Use of the Property (Raised Below: O-3 at 10; Pa0711a).

Here, genuine issues of material fact exist between the Municipal Respondents' duty to act, the Municipal Defendants' duty to enforce its zoning ordinance, and overall, whether or not the Property is a legal preexisting nonconforming use or not. At the very least, Mr. Morocho's deposition testimony, *inter alia*, compared to the documentation submitted to the Court regarding the previous use of the Property, including sworn statements submitted to and memorialized in previously resolutions, present clear triable issues of material fact, precluding the grant of summary judgment in this matter. These allegations describe

a history of the use of the Property and municipal inaction, rendering Appellants without a realistic alternative form of relief from an incorrect and dubious administrative decision by the Municipal Respondents. Pursuant to N.J.S.A. 40:55D-68, nonconforming structures and uses are "protected" only if "existing at the time of the passage of an ordinance" and "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." This protection is limited under the terms of the Ordinance, specifically, § 106-122(B), where "no existing use, structure or premises devoted to a nonconforming use shall be enlarged, extended, reconstructed, substituted or structurally altered, unless it is changed to a conforming use or structure…" The burden of proving the existence of a nonconforming use is upon the party asserting such use. Ferraro v. Zoning Bd., 321 N.J. Super. 288, 291 (App. Div. 1999). Here, no substantive determination has been made which establishes the "character, extent, intensity and incidents" of the nonconforming commercial use of the Property, nevertheless the current use. See William M. Cox, New Jersey Zoning and Land Use Administration, Ch. 27 at 405 (2023).

Likewise, the Court noted that the Zoning Officer made his determination "off several other factors"; however, no determination was ever made as to the whether the use on the Property was "enlarged, extended, reconstructed, substituted or structurally altered" from what existed "at the time of the passage of an ordinance".

See Pa0156a. Nevertheless, the Court accepted the Zoning Officer's undocumented investigation into the Property, which cannot accurately depict SiteScapes Respondents' continued and future use of the Property.

The "Continued" investigation as to the use of one's property:

The Court below erroneously gave weight to the Zoning Officer's testimony, wherein he stated that he made a site visits to the Property and advised SiteScapes Respondents to: remove the large tractor trailers from the front of the property; cited SiteScapes Respondents for the use of a port-a-john in the front yard of the Property; and that he performed a subsequent investigation in which the porta-john was removed and the lights were either toned down or removed. O-3 at 14; Pa0715a. While the actions allegedly taken by the Zoning Officer relate to the use of the Property, these minor property maintenance related issues in not manner constitute an investigation into the continued preexisting nonconforming use of the Property under N.J.S.A. 40:55D-68.

Prior Resolutions and Land Use Applications:

Appellants' allegations regarding the illegal expansion of the nonconforming commercial use of the Property came from, *inter alia*, the 2004 Resolution, Pa0104a, minutes of a land use hearing providing sworn testimony, Pa0102a, land use applications previously filed with the Borough regarding the then use of the

Property, Pa0094a, and even correspondence from at least one previous zoning officer establishing the limits of the permitted use on the Property. *See* Pa0091a.

Notwithstanding the fact these land use approvals and/or conditions of approval were never acted upon, these documents establish the limits the preexisting nonconforming use, which shows that the Property was less intense at the time that the Ordinance was adopted that rendered the use nonconforming. As the SiteScapes Respondents never made an application to the Respondent Board pursuant to either N.J.S.A. 40:55D-68 or -70(d), the Zoning Officer relied solely on a 1998 environmental remediation report and unspecified "other things" to determine if the 2018 use of the Property was the "same" character of the use of the Property prior to becoming nonconforming, and the Court below found the Property to be a preexisting nonconforming use. O-3 at 15; Pa0716a. The Court below nevertheless also noted, "[t]he focus in expansion of nonconforming use cases is 'the quality, character and intensity of the use, viewed in their totality and with regard to their overall effect on the neighborhood and the zoning plan,'" Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 314 (1980), see O-3 at 17; Pa0718a, yet never established same.

While the Respondent Board is charges with having peculiar knowledge of local condition with factual findings that are entitled to substantial deference and are presumed to be valid, the Respondent Board never made such a determination, and

the Court erred in making said determination without remanding same to elicit operative facts and to obtain the Board's peculiar knowledge of the character as to the use of the Property.

VI. Respondents Created an Actionable Nuisance Requiring Relief Enjoining Same (Raised Below: O-3 at 32; Pa0733a).

Respondents brought this action in part seeking to enjoin a nuisance created by neighboring property owner's commercial use of its property, as Appellants' residence is in close proximity to the Property, when both properties are zoned "residential" by both Westfield and Garwood municipalities respectively. While Respondents appear to contend that an increase in intensity of the use of the property is irrelevant, Appellants contend that the current operation of the SiteScapes business constitutes a nuisance that unreasonably interferes with, and causes injury to, the health, normal private comforts and safety of Appellants, as the SiteScapes Respondents are conducting a commercial enterprise in excess of what is permitted in a residential zone or pursuant to N.J.S.A. 40:55D-68.

The Court below dismissed Appellants' nuisance claims for, *inter alia*, failing to file a Notice of Tort Claim under the TCA, even though "the subjectively measured damages for pain and suffering," which are not compensable by the TCA, "and those which objectively affect quality of life by causing an interference with the use of one's land through inconvenience and the disruption of daily activities."

Ayers v. Jackson, 202 N.J. Super. 106, 118 (App. Div. 1985). Here, an award for damages for the "infringement upon plaintiffs' 'quality of life' does not represent compensation for the pain and suffering barred by N.J.S.A. 59:9-2(d); rather, it is compensation for damages characterized by inconvenience and disruption of daily activities, and is sanctioned by established principles of the law of nuisance." Id. at 120.

Likewise, Appellants' allegations, along with the evidence presented herein, shows that, at the very least, a genuine issue of material fact exists as to whether or not the use of the Property by the SiteScapes Respondents' is substantially different than that of its predecessors, when the evidence presented to the Court below include the fact that the Property substantial differences between the use of the Property, as contained in the documentation previously filed with the Municipal Respondents and compared to the deposition testimony herein. Contrary to the findings of the Zoning Officer in 2004, 2018 and again in 2020, "[i]t is important to consider the evidence showing the location and size of the property on which Respondents' business is operated." *See* Protokowicz v. Lesofski, 69 N.J. Super. 436, 441 (Ch. Div. 1961)(citations omitted). Deposition testimony alone in this matter creates a triable issue of material fact that the preexisting nonconforming use of the Property may have intensified since 2018, evidence as to violation of the Ordinance, and Mr. Morocho's testimony as to the intolerable of the use of the neighboring property, all

create a triable issue of fact. 69 N.J. Super at 441; see also Morris v. Borough of Haledon, 20 N.J. Super. 433 (Ch. Div. 1952).

The Court below found Appellants claims to be unsubstantiated due to, *inter alia*, an unconfirmed decibel reading allegedly conducted by the Union County Board of Health. O-3 at 35; Pa0736a. However, mere compliance with a noise ordinance is not dispositive in determining whether or not a nuisance has been created, which is a genuine issue of material fact. Here, all inferences must be made in favor of the nonmoving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The current use of the Property has and will give rise to a continual invasion of adjoining property by reason of improper noise and intensity, which is palpably unreasonable and continues to interfere with Appellants' use and enjoyment of their adjoining realty, and the use of the Property has and will continue to interfere with the rights of Appellants and create an unreasonable risk of harm to those outside the Property and must be stopped. Nevertheless, the Trial Court granted summary judgment to Respondents without determining whether the "annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business." As such, this matter must be remanded to the Trial Court for a factual, objective determination as to the reasonableness of the use of the Property by the SiteScapes Respondents.

VII. Appellants' Claim Pursuant to the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, *Et Seq*. (the "NJCRA") Must be Sustained (Raised Below: O-3 at 23; Pa0724a).

Respondents incorrectly claim that Appellants have not presented any evidence as to a "property right" so as to determine a violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 *et seq.* (the "NJCRA").[2] Appellants have clearly set forth the substantive due process rights granted to them by challenging the use of one's immediately adjacent property, a specific right conferred upon them by the MLUL. Applying these principles, this Court must follow our Supreme Court's decisions, including that in Harz v. Borough of Spring Lake, where the Court determined that, in violation of the NJCRA, the Borough of Spring Lake violated plaintiffs' right, as an "interested party", to be heard by the Planning Board. 234 N.J. 317 (2018). As such, the Supreme Court found that "interested parties" have the right to a review and a decision by a planning board, under this statutory scheme;

[2] Municipal Respondents cite to Chainey v. Street, 523 F. 3d. 200 (3rd Cir. 2008), to state that Appellants have presented no evidence to show that they have a property interest "protected by the substantive due process clause." Id. at 219. While the Chainey court did state that a litigation must identify a property interest protected by the substantive due process clause, it also went on to state, "[w]e do not address these issues at this time because the trial court did not analyze the substantive due process claim …" Id. at 220. Likewise, the Municipal Defendants cite to Bellochio v. N.J. Dep't of Envtl. Prot., 16 F. Supp. 3d. 367 (D.N.J. 2014), for the proposition that substantive due process claims that a "neighboring Airport had violated the use and enjoyment of property due to noise pollution" as, "not constitutionally protected." Id. at 378. The "neighboring airport" in another State and the District Court did not have jurisdiction over an appeal of an FAA administrative decision.

that the MLUL "unambiguously impose[s] a binding obligation on the [Board]" to provide Harz with the opportunity to be heard, (*citing* Tumpson v. Farina, 218 N.J. 450, 475 (2014) (quoting Blessing, 520 U.S. at 340-41)); and, that, "because an interested party's right to be heard is inextricably tied to a party's property rights, we find that the MLUL right to be heard is substantive, not procedural." Id.

Likewise, this action is not a mere zoning dispute; it is a dispute as to the suppression of Appellants' protected property rights, with actions, or lack thereof, of the Municipal Respondents, in intentionally failing to exercise proper oversight over the SiteScapes Respondents in intentionally failing to enforce the Ordinance, denying to hear the substance of Appellants' appeal, and improperly allowing the SiteScapes Defendants to proceed with its improper use and expansion of the alleged preexisting nonconformity to the ongoing detriment of Appellants.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Trial Court's Orders and to either remand this matter to the Respondent Board for a substantive determination on the merits of Appellants' Application or grant the relief sought in Appellants' Amended Complaint.

Respectfully submitted,

/s/ Robert F. Simon
Robert F. Simon, Esq.

Dated: January 21, 2025