SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000234-24

LOKAL STOCKTON LLC, Plaintiff-Appellant, v. CITY OF CAPE MAY, CITY OF CAPE MAY HISTORIC PRESERVATION COMMISSION, and CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT, Defendants-Respondents.	**On Appeal from:** Superior Court of New Jersey Law Division, Cape May County Docket No. CPM-L-120-22 **Sat Below:** Hon. Michael J. Blee, A.J.S.C.

BRIEF OF PLAINTIFF-APPELLANT, LOKAL STOCKTON LLC

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I. PRELIMINARY STATEMENT

Plaintiff-Appellant, Lokal Stockton LLC ("Lokal"), appeals from the conditions granted on a stay issued by the trial court, along with an appeal of affirmative relief improperly granted to the Defendants-Respondents in response to a motion in aid of litigants' rights, where the Defendants-Respondents had previously asserted no affirmative claims and the trial court had not previously entered any order requiring any action to be taken by Lokal. Lokal has also sought leave to file an emergent Motion to this Court for a stay to maintain the *status quo* with regard to operations of its hotel in Cape May City, pending adjudication of this appeal as well as a related appeal pending under Docket No. A-3372-23. Absent a stay, the City of Cape May ("**City**") and the City's Historic Preservation Commission ("**HPC**") are poised to shut down the hotel solely due to a dispute over a design issue that is the subject of this appeal.

After construction of the hotel was completed in December 2019, Lokal was unable to obtain a final certificate of occupancy because the hotel allegedly failed to comply with the terms of a Certificate of Appropriateness issued by the HPC in August 2018. A temporary certificate of occupancy was issued allowing Lokal to open while the alleged HPC noncompliance issues became the subject of further review and litigation. The Lokal hotel has been

operating under that TCO for several years, during COVID and while this dispute has been ongoing; however, the current TCO expires on December 3, 2024, and the conditional stay entered by the trial court expires as of the same date. That conditional stay is the subject of this appeal.

The trial court improperly conditioned its stay of any further enforcement action by the City and HPC upon full compliance with the design elements of the COA issued by the HPC in 2018, notwithstanding that those terms are the subject of Lokal's pending appeal in Docket No. A-3372-23. Those conditions as well as the time limitation placed upon the stay granted to Lokal should be removed, and the stay should remain in effect until the conclusion of Lokal's appeals.

The trial court also erroneously granted Cross-Motions by the City and HPC seeking to impose an affirmative obligation upon Lokal to conform with the conditions of the 2018 COA in order to obtain a Certificate of Occupancy from the City, despite the fact that neither the City nor HPC had ever previously sought nor been granted any such relief by way of any pleadings or orders entered in the trial court matter. There was simply no order entered by the trial court that the City and HPC were entitled to enforce pursuant to R. 1:10-3. Resultantly, the trial court's order granting the Cross-Motions filed by the City and HPC was improper and should be vacated.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

By way of background relevant to this appeal, the following facts have been adduced as per the record below, evidencing that the City issued construction permits for the subject hotel, inspected the work as it progressed, and then claimed after construction was completed that the finished hotel did not comply with HPC design standards, a contention that has since become the subject of litigation and two pending appeals.

On February 20, 2018, Lokal purchased the property located at 5-9 Stockton Place in the City of Cape May, also known as Block 1064, Lot 17 ("**Property**"). (Aa247-Aa251).[2] When Lokal purchased the Property, it was run-down, but through extensive and costly renovations, all of which were effectuated by way of permits issued by the City, Lokal created a boutique micro-hotel and resort known as the Lokal Hotel (the "**Hotel**") with eight (8) apartment-style hotel rooms, a heated salt-water pool, outdoor cooking options, private outdoor areas, and mobile beach kits. (Aa19, Aa37).

The City oversaw these renovations. (Aa88-Aa109). Invoices from Craig Hurless, the City's Engineer, indicate that his office reviewed the building plans submitted by Lokal specifically "for compliance" for over sixteen (16) hours

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[1] The Procedural History and Facts of this matter are closely intertwined and have been combined to avoid repetition.

2 "Aa__" references the Appendix filed concurrently herewith.

between the months of February and March of 2019, and inspected the Property while the Hotel was being constructed at least twenty-two (22) times between the months of April through December of 2019. Id. During all that time, however, neither Hurless nor any other City officials or employees ever indicated to Lokal that the Hotel purportedly did not comply with the approvals for the renovation. (Aa205-Aa206). Neither the City nor the HPC took any action to halt construction of the allegedly noncompliant Hotel. Id. It was only after completion of the work, by letter dated December 11, 2019, that the City claimed the design of the Hotel did not comply with a Certificate of Appropriateness (the "**COA**") issued by the HPC in August of 2018. (Aa110).

At that point, Lokal was issued a Temporary Certificate of Occupancy ("**TCO**") so that it could open and host guests pending issuance of a final Certificate of Occupancy ("**CO**"). (Aa111-Aa114). The City refused to issue a CO, however, due to the alleged HPC compliance issue, so Lokal filed an application to the HPC seeking as-built approval, requesting that the HPC allow Lokal to maintain the Hotel as constructed (the "**2020 HPC Application**"). (Aa75-Aa76). In the process of preparing the 2020 HPC Application, Lokal learned that on August 20, 2018, a hearing was held by the HPC in connection with the original COA. (Aa76). Lokal was not represented by counsel during that hearing, nor was any member of Lokal present or even aware that the August 20, 2018 hearing was

taking place. (Aa76, Aa194-Aa195). The only person who attended that hearing on behalf of Lokal was Adam Crossland, Lokal's former project manager. (Aa194-Aa195). Crossland later admitted at his deposition that he agreed to several conditions of the COA without consulting Lokal or ever discussing them with Lokal beforehand, stating that Lokal "wanted [him] to walk away from that hearing with an approval," and he believed that gave him *carte blanche* to agree to anything. (Aa199, Aa135-Aa136).

Subsequently, at a public hearing on the 2020 HPC Application conducted on January 6, 2020, Lokal presented testimony from Chad Ludeman, co-owner of Lokal, and Peter Primavera, an expert in history, archaeology, and cultural resources, that the design elements at issue and the overall design of the Hotel, as completed, are appropriate in the City's Historic District. (Aa76). The HPC ignored whether the completed Hotel satisfied the City's design standards, and focused instead on the completed Hotel's alleged noncompliance with the 2018 COA. (Aa77). The HPC voted to deny the 2020 HPC Application, which decision was then memorialized in Resolution No. 2020-02, adopted April 20, 2020. (Aa75-Aa78).

On May 8, 2020, Lokal timely appealed the 2020 HPC Resolution ("**Appeal Application**") to the City's Zoning Board of Adjustment ("**Zoning Board**"). (Aa81). The Appeal Application was deemed incomplete pending submission of

additional requested information. During this time, while COVID caused disruption of the tourism industry, Lokal was shut down for extended periods of time and suffered adverse economic impacts. Once COVID restrictions were lifted, Lokal resumed operations and hosted guests at the Hotel. Throughout that time, the City renewed and reissued the TCO to Lokal several times. (Aa115-Aa118).

On February 17, 2022, almost two (2) years after Lokal filed the Appeal Application, it received a letter from the newly-created HPC Compliance Officer advising that the HPC "cannot support any further TCOs" until the Hotel's alleged noncompliance with the COA is resolved. (Aa79-Aa80). Under threat of having its TCO expire, Lokal filed a six-count Verified Complaint in Lieu of Prerogative Writs and Order to Show Cause on April 8, 2022, seeking to: (i) ensure that the City continued to renew and reissue Lokal's TCO so that it could remain open and continue hosting guests pending final adjudication of the matter; and (ii) obtain a declaratory judgment ordering the final CO for the completed Hotel, as is.

The trial court granted injunctive relief on May 26, 2022, ordering that, "to maintain the status quo pending final adjudication of this matter, the City is directed to continue issuing a [TCO] for the [Hotel], or alternatively, to extend the current TCO … upon application by [Lokal.]" (Aa55-Aa57). The Order also restrained the City and the HPC "from ordering [Lokal] to pay any fines in

connection with its continued operation of the Hotel and/or to vacate the Property[.]" Id. The trial court then remanded the matter back to the Zoning Board for the Appeal Application to be heard, and the Zoning Board denied the Appeal on October 27, 2022, after refusing to allow Lokal to present any further testimony outside of the record before the HPC in support of the appeal. (Aa81-Aa85). The denial was memorialized in Resolution No. 11-17-2022:1, adopted November 17, 2022. Id.

Lokal then filed an eleven-count Amended Verified Complaint in Lieu of Prerogative Writs on February 7, 2023. Lokal's claims were bifurcated, and the prerogative writ claims – Counts One, Two, Five, Seven, Nine, Ten, and Eleven – were addressed first. (Aa61). On August 25, 2023, the Court denied and dismissed each of Lokal's prerogative writ claims. (Aa240-Aa241, Aa61). Discovery on the remaining claims for equitable estoppel, laches, and seeking a declaratory judgment mandating the issuance of the final CO – Counts Three, Four, and Eight, respectively – was then conducted. A jury trial was scheduled to commence in June; however, the City and the HPC filed an untimely, joint motion for summary judgment (the "**MSJ**") on May 8, 2024. (Aa96). On May 10, 2024, the trial court permitted the MSJ to proceed and rescheduled the trial date. (Aa60).

Lokal filed its opposition on June 3, 2024, (Aa60), on grounds that summary judgment was inappropriate because there were disputed facts and credibility

determinations which needed to be made, including testimony from expert witnesses, and such determinations should not be made on the papers, but by the trier of fact. Oral argument was conducted on June 12, 2024. (Aa60). On June 26, 2024, the trial court entered an order granting the MSJ; dismissing all remaining counts of Lokal's pleadings with prejudice; and rescinding the Court's May 26, 2022 order imposing preliminary restraints. (Aa58-Aa72).

On or about July 1, 2024, Lokal filed an appeal from the trial court's decision to grant summary judgment, as well as the court's August 25, 2023 order dismissing Lokal's prerogative writ claims, and the court's December 18, 2023 order denying Lokal's motion to quash the subpoena served upon Lokal's former project manager, or in the alternative, for a protective order. (Aa242-Aa246). A Notice of Docketing was issued by the Appellate Division on July 2nd under Docket No. A-3372-23 (the "**Summary Judgment Appeal**"). (Aa73-Aa74).

As the Summary Judgment Appeal was pending, Lokal received another letter from the HPC Compliance Officer dated June 28, 2024, alleging that certain of the Hotel's design "items" are "in violation of HPC Resolution 2018-24." (Aa238). The letter continued:

> [Y]our complaint to void the City's action to enforce these issues was dismissed … and the interim order imposing preliminary restraints on enforcement and requiring issuance of a TCO was extinguished. … Accordingly, the above items must be addressed to correct your noncompliance and for the HPC to

> ultimately sign off on issuance of a Final Certificate of Occupancy. … Please contact me within ten (10) calendar days with a plan to abate these violations so that the property will be brought into compliance. PLEASE TAKE FURTHER NOTICE that if this project remains in violation after 10 days and without a plan for compliance, the Compliance Officer shall take all lawful measures to ensure that construction is brought into conformance with HPC terms and conditions and proceed with issuance of a summons to appear in Municipal Court and with each day that these violations continue to constitute a separate offense.

(Aa239).

Since the lack of a TCO or CO would put Lokal at risk of having to close down the Hotel, and subject Lokal to daily fines of up to $1,250 per day while concurrently eliminating Lokal's sole source of income, Lokal filed a motion to stay any enforcement proceedings pending disposition of its appeals. (Aa16-Aa23). The Respondents filed cross motions to enforce their rights as litigants (the "**Cross Motions**"), (Aa24-Aa54), which Lokal opposed because none of the court's orders provided the City or the HPC with any affirmative relief, nor imposed any affirmative obligations upon Lokal.

Oral argument was conducted on August 2, 2024 on Lokal's Motion for a Stay and the Cross Motions. (Aa8).[3] On August 9, 2024, the trial court entered an

[3] "T1/__" refers to the Transcript of Oral Argument on Plaintiff's Motion to Stay Pending Appeal and Defendants' two (2) Cross-Motions to Enforce Litigants' Rights (August 2, 2024).

order (the "**Order**") granting Lokal's Motion, but subject to a limited time duration based on specific conditions that are required to be fulfilled no later than December 3, 2024 – the date Lokal's current TCO expires. (Aa8). Those conditions provided for Lokal to either comply with the COA or enter into an agreement with the City to address all of the conditions for compliance, which is the subject of the Summary Judgment Appeal, and no agreement has been reached on these issues. The City is also no longer under any obligation to renew the TCO pursuant to the trial court's June 26, 2024 order. (Aa8). The Order also granted the Cross Motions, but stayed enforcement until December 3, 2024. Id. Lokal filed this appeal from entry of the Order, appealing the conditions imposed on the stay, and appealing the granting of the cross-motions to enforce litigants' rights.

Lokal has also sought permission to file an Emergent Motion for a Stay (the "**Motion**") pursuant to R. 2:9-5, which was filed in the Appeal currently pending under Docket No. A-3372-23. That permission was denied on December 2, 2024. (Aa252). A Motion to Consolidate these matters is also being filed.

The Hobson's choice faced by Lokal is to either take apart and reconstruct their boutique hotel in Cape May while an appeal is pending which would, if successful, allow Lokal to keep the hotel exactly as it is; or, keep the hotel as is and face closure of the hotel for failure to comply with the 2018

COA that is the subject of the Summary Judgment Appeal. Because these circumstances create the potential for irreparable harm, Lokal has sought to file the Motion on an emergent basis to maintain the *status quo* pending disposition of this appeal as well as the Appeal of the trial court's Orders regarding the prerogative writ claims and summary judgment motion.

III. ARGUMENT

A. Standard of Review (T1/5:12-7:8; T2/9:9-9:16).

Pursuant to New Jersey Court Rule 2:9-5(b):

> A motion for a stay in a civil action ... prior to the date of oral argument in the appellate court or of submission to the appellate court for consideration without argument shall be made first to the court which entered the judgment or order. ... If the motion is denied below, it may be made again to the appellate court; if granted below, the appellate court may entertain a motion to dissolve the stay.

The purpose of a stay is to preserve the *status quo* pending appeal. Landy v. Lesavoy, 20 N.J. 170, 175 (1955). The standard for staying a judgment pending appeal is "discretionary and dependent upon the equities of a given case." Avila v. Retailers & Mfrs. Distribution, 355 N.J. Super. 350, 354 (App. Div. 2002); Gosschalk v. Gosschalk, 48 N.J. Super. 566, 579 (App Div.), aff'd 28 N.J. 73 (1958). This standard is analogous to review of an application for a preliminary injunction, in that the court is required to examine: "(1) whether irreparable harm will result from enforcement of a judgment pending appeal;

(2) whether a meritorious issue is presented; and (3) the likelihood of success on appeal." Avila, supra, 355 N.J. Super. at 354, citing Crowe v. DeGioia, 90 N.J. 126, 133 (1982). Although an applicant for emergent relief must typically make a preliminary showing of a reasonable likelihood of success on the merits of the issue, the focus of the court's analysis is "primarily upon the need for a stay...." Glassboro v. Gloucester County Board of Chosen Freeholders, 98 N.J. 186, 191 (1984). The Court may consider, but is not called upon to decide, the merits of the applicant's claims and possibility of a decision in the applicant's favor.

This point was discussed extensively in Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Utils. Auth., 433 N.J. Super. 445, 452-453 (App. Div. 2013), in which the trial court found that "plaintiffs had not clearly and convincingly shown they were likely to succeed," and for that reason, denied the plaintiffs' request for an interlocutory injunction. The Appellate Division, while assuming "the accuracy of the judge's prediction about plaintiffs' likelihood of success," stated conclusively that "[s]uch an observation, however, does not end the matter." The Court continued:

> As Judge Clapp explained many years ago, the reason we consider whether a movant's right to injunctive relief is clear doubtless lies in the fact that an interlocutory injunction is so drastic a remedy. But our courts have also long recognized there are exceptions, as where the subject matter of the litigation would be

> destroyed or substantially impaired if a preliminary injunction did not issue. That is, a court may take a less rigid view of the Crowe factors and the general rule that all factors favor injunctive relief when the … injunction is merely designed to preserve the status quo. The power to impose restraints pending the disposition of a claim on its merits is flexible; it should be exercised whenever necessary to subserve the ends of justice, and justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit.
>
> This less rigid approach, for example, permits injunctive relief preserving the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.

Id. at 453-454 (*emphasis in original*) (*internal quotation marks and citations omitted*).

B. The Trial Court Erred When It Found That Lokal Had Failed to Meet the *Waste Management* Standard (T1/5:19-6:12; T2/9:9-12:1).

Where the need exists to preserve the *status quo* pending appeal, stay relief has been granted because in such circumstances, like here, the "subject matter of the suit would be impaired or destroyed" if the injunctive relief were not granted. See Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Utils. Auth., 433 N.J. Super. 445, 452-454 (App. Div. 2013) (*emphasis added*).

Here, the trial court erroneously determined that Lokal had failed to show that the hotel "would be destroyed or substantially impaired" if a stay did not issue; however, Lokal indisputably demonstrated that it would be compelled to rebuild substantial portions of the hotel if the stay was not issued. Despite this clear showing, the trial court mistakenly decided that the hotel would not be "destroyed" or "impaired" if Lokal was required to do this work pending appeal, which ignores the fact that the **subject matter** of this appeal would be destroyed if Lokal was compelled to implement all of the design elements that have been contested, which will not be required if Lokal prevails on appeal.

In its August 9, 2024 decision, the trial court stated as follows:

> The Waste Management standard permits the Court to preserve property and maintain a status quo [if] the subject property would be impaired or destroyed. Here the Court must determine if requiring plaintiff to comply with the HPC Board approvals would impair or destroy the Lokal Hotel property.
>
> The eight outstanding non-compliant items are as follows, (1) The foundation was approved to be brick. No brick is present. The foundation is stucco over block. (2) Roofing was approved to be standing seam metal roof. The roof is asphalt fiberglass shingles. (3) The applicant agreed to redesign a railing in a Chippendale style. This was not done. (4) The applicant agreed to retain the original front stair bridge design. This was not completed. (5) Wood fencing was approved to follow the HPC design standards. The fencing should be vertical. It was

> installed horizontally. This does not meet the design standard. (6) A block wall was installed around a seating area in the pool area, and this was never approved and does not conform to design standards in Historic District. (7) Parking area was approved for brick pavers. The clamshells were installed, not brick pavers. And (8) HPC design standards require that HVAC equipment be covered with a wooden lattice screen. This has not been completed and the equipment is visible.
>
> This Court finds executing these alterations would not impair or destroy the subject property. Destruction as defined in Black's Law Dictionary is the act of destroying or demolishing, the ruining of something, harm that substantially detracts from the value of the property, especially personal property, the state of having it destroyed. Impairs is defined as to diminish the value of property or property right. Here, the Court finds no evidence that compliance with these eight items would ruin, harm, destroy, or diminish the value of the Lokal Hotel. Therefore, plaintiff has not met the standard…

(T2/10:9-11:24).[4]

In essence, the trial court determined that Lokal was required to demonstrate that failure to grant the stay would result in the destruction of the Hotel. In this regard, the trial court's assessment misses the mark, incorrectly applying the Waste Management standard. The subject matter of the litigation involves the eight (8) items that the trial court described in coming to its

[4] "T2/__" refers to Transcript of Decision on Motion Hearing on Plaintiff's Motion to Stay Pending Appeal and Defendants' two (2) Cross-Motions to Enforce Litigants' Rights (August 9, 2024).

erroneous conclusion. Contrary to the trial court's ruling, Lokal was not required to demonstrate that the Hotel was subject to destruction if the stay were not granted, but rather, that the subject matter of the appeal is destroyed if the items that are the actual subject of this litigation are all replaced before the appeal is decided.

Indeed, those eight (8) items were made subject to the time limitation placed upon the stay by the trial court, which is a time constraint that is expiring long before Lokal's appeals will be decided. Pursuant to the Court's order, Lokal's stay was granted "for a limited time duration based on specific conditions that must be fulfilled by no later than December 3, 2024," (Aa8), which is the date on which the current TCO expires. The "specific conditions" upon which the stay was premised requires complete capitulation by Lokal.

As per the trial court: "By December 3, 2024, plaintiff must bring the eight items into compliance, or with the defendants' consent and approval, have a detailed plan for compliance." (T2/17:9-12). Bringing the eight (8) items into compliance means: (1) replacing or otherwise refacing the current foundation so as to be brick rather than stucco; (2) replacing the entire asphalt shingle roof with a standing seam metal roof; (3) redesigning all of the railings in the Chippendale style; (4) replacing the existing staircase – the entire front entrance/lower level of the front of the building – with a front stair bridge

design; (5) replacing the current horizontal wood fence with a vertical wood fence; (6) removing the existing block wall that was installed around the pool area, which will also require replacement of the pool because the rock wall is structurally connected to the underground pool (T1/35:10-16); (7) replacing the existing clamshells in the parking lot with brick pavers; and (8) covering the existing HVAC equipment with a wooden lattice screen,

According to the trial court, it would not "destroy" the Hotel if Lokal had to redesign and reconstruct it; however, this fails to recognize that compliance with all of these requirements would lead to the destruction of the subject matter of this litigation because this litigation is centered entirely on the Hotel's exterior appearance, and those eight (8) items. The integrity or structural soundness of the building is not an issue, nor is the use of the building as a hotel. Requiring Lokal to reconstruct the entire exterior of the Hotel, prior to adjudication of the pending appeals, would render Lokal's appeals moot. See Aa239 ("…the above items must be addressed to correct your noncompliance and for the HPC to ultimately sign off on issuance of a Final Certificate of Occupancy.") The cost of reconstructing the hotel and the risk of operating the hotel subject to penalties are also both unsustainable damages that would decimate Lokal.

Respondents are no longer required to renew the TCO, which expires on December 3, 2024, or to issue a new TCO to Lokal. In addition, the City may and likely will refuse to renew or reissue the TCO, which would lead to the closure of the Hotel, as neither Lokal nor its customers would be permitted to occupy the building without a valid TCO. *See* N.J.A.C. 5:23-2.1 *et seq.* Thus, without the stay, Lokal is facing closure of its Hotel in addition to daily penalties, all of which would be catastrophic to Lokal's business, and would likely lead to the Hotel's permanent closure if Lokal is forced to remain closed while this Appeal is pending.

The only alternative available to Lokal, as made clear by the trial court's August 9, 2024 decision and the HPC Compliance Officer's June 28th letter, is nothing short of full compliance with the very terms of the 2018 COA that Lokal has appealed, including through the 2020 Zoning Board Appeal. (T1/17:9-12). According to the trial court, Lokal must "bring the eight items into compliance" before the expiration of its current TCO on December 3, 2024. Id. In order to avoid closure and decimation of its business, absent a stay, Lokal would be required to capitulate and redesign the exterior of the Hotel in accordance with the 2018 COA prior to the conclusion of this Appeal. This would render these proceedings moot. Lokal respectfully submits that the Court should reverse the conditions imposed on the stay by the trial court, and

enter a stay to maintain the *status quo* pending disposition of the pending appeals.

In the meantime, the City will not issue any further TCOs following the expiration of the current TCO on December 3, 2024 unless Lokal capitulates and redesigns the entire exterior of the Hotel to be in accordance with the COA. (Aa238-Aa239). Without a TCO, Lokal will not be permitted to stay open, leaving it with no choice but to cancel its bookings for the foreseeable future, thereby destroying its reputation and likely leading to closure of the Hotel and the dismantling of Lokal's business. If Lokal were to remain open without a TCO or CO, it would subject Lokal to an order to vacate and fines of up to $1,250 per day. See Cape May City Code Sections §525-42(B); §525-84(A)-(B); and §1-17; see also, Aa238-Aa239. Were the Court to uphold the trial court's conditions and time limitation for the stay, destruction will be visited upon the exterior of the Hotel along with Lokal's reputation and business operations. As such, the trial court's decision to place conditions on the stay without regard to the pending appeals should be reversed.

C. Lokal Is Likely to Succeed on the Merits of Its Summary Judgment Appeal (T1/6:11-7:8; T2/6:9-6:10).

In reviewing matters involving a request for a stay, the Court will also examine the likelihood of success on appeal. Avila, supra, 355 N.J. Super. at

354, citing Crowe v. DeGioia, 90 N.J. 126, 133 (1982). Lokal is likely to succeed on the merits of the Summary Judgment Appeal, justifying a stay without the time limitation implemented by the trial court, because the trial court's decision to grant summary judgment was improvidently made, where the case rests on credibility determinations that need to be made – particularly that of Crossland, Lokal's former project manager, whose testimony was in contradiction to that of Mr. Chad Ludeman, a member of Lokal.

Under the Brill standard:

> [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 dispute issued 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 a genuine issue of material fact for trial." **Credibility determinations will continue to be made by a jury and not the judge.**

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (*emphasis added*)). In making its determination, the Court is required to accept as true "all the evidence which supports the position of the party defending against the motion and accord him the benefit of all inferences which can reasonably and

legitimately be deduced therefrom." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 415 (1997) (*citation omitted*).

It is black letter law in New Jersey that a motion for summary judgment must be denied when the determination of material disputed facts depends upon the credibility of witnesses. *See* Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13 (App. Div. 2007) ("In the context of a summary judgment motion, the judge does not weigh the evidence, or resolve credibility disputes. These functions are uniquely and exclusively performed by a jury"). Put another way, "Any issues of credibility must be left to the finder of fact." Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015). This is so "even where a witness's testimony is uncontradicted … as long as, when considering testimony in the context of the record, persons of reason and fairness may entertain differing views as to [its] truth[.]" Id. (*internal quotation marks and citations omitted*); *see also* D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Indeed, credibility issues require "resolution by a trier of fact even though a party's allegations are uncontradicted." Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 494 (1956). The Court in that matter observed:

> where men of reason and fairness may entertain differing views as to the truth of testimony, whether it

> be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury. Thus, a trier of fact is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it … contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.

Id. (*Internal quotation marks and citations omitted.*)

As will be addressed more fully in the prerogative writ and Summary Judgment Appeal, this case rests on the credibility of witnesses whose testimony directly contradicts one another. In Respondents' "Statement of Undisputed Material Facts" in support of their MSJ, at least twelve (12) of the alleged "undisputed" facts rely **solely** on the deposition testimony and recollections of Lokal's former project manager, Crossland. (Aa119-Aa187). In addition, at least seven (7) of the alleged "undisputed" facts rely **solely** on the deposition testimony and recollections of Hurless, the Cape May City Planning and Zoning Board Engineer. Thus, nineteen (19) of the alleged "undisputed" material facts leading the trial court to grant summary judgment required a credibility evaluation of Crossland and Hurless. These "undisputed" facts were contradicted by testimony from Chad Ludeman, offered during the January 6, 2020 hearing before the HPC and during Ludeman's deposition. (Aa188-Aa236).

New Jersey case law is clear that it is not for the judge, on a motion for summary judgment, to assess the credibility of witnesses. Such action is an "overstep" that "usurps the jury's task." Sons of Thunder, supra, 148 N.J. at 415. Weighing the credibility of Ludeman, Crossland and Hurless is a function for the trier of fact. This alone should have precluded a finding of summary judgment in this case. Thus, Lokal has demonstrated that it is likely to be successful in its Summary Judgment Appeal that the grant of the motion ("**MSJ**") should be reversed. Accordingly, the trial court's decision should be reversed to the extent that it placed conditions and a time limitation upon the stay.

D. The Balancing of Equities Weighs in Favor of Lokal (T1/9:19-25; T2/12:2-15:12).

As noted by the trial court in its August 9, 2024 decision, "in balancing the equities, the court [is] require[d] to weigh the harms of the parties and the public interest." (T2/12:2-4). Here, the only alleged "harm" to the Respondents would be that a Hotel that has been in operation for approximately five (5) years continues to be in operation. However, the Hotel's continued operation has absolutely no effect on the City's Historic District or the authority of the HPC: "the City's Historic District is still standing, the HPC still exercises tremendous jurisdiction over the Historic District." (T1/9:11-18). Weighed against the reality of a small business

enduring $1,250 in fines **per day**, potential jail time, and the closure of its business for failure to obtain a TCO unless it overhauls the entire exterior of its Hotel (all while appeals are pending to preserve the Hotel as built), the equities clearly weigh in favor of Lokal.

Yet, the trial court decided that it cannot conclude "that any … harm inflicted upon plaintiff five years after HPC approval was given outweighs defendants and the public's interest in preserving the historic conditions of Cape May. Further, plaintiff's speculative reputational harm lacks evidentiary support and does not persuade this Court." (T2/15:6-12). Respectfully, it is the alleged "harms" faced by the Respondents which are speculative, if not entirely non-existent, as evidenced by the fact that in the last five (5) years, since the Hotel has been operating, absolutely no actual harm as come to the City, its Historic District, or the HPC. For this reason, Lokal is entitled to a stay pending disposition of its Appeals.

E. The Trial Court Erred When It Granted Respondents' Respective Motions to Enforce Their Rights as Litigants, as There Was Nothing to Enforce (T1/34:11-36:18; T2/16:16-16:20).

Rule 1:10-3 allows a court to enter an order to enforce litigant's rights, compelling a disobedient party to comply with a prior order. Saltzman v. Saltzman, 290 N.J. Super. 117, 125 (App. Div.1996); see also Asbury Park Bd. of Educ. v. N.J. Dep't of Envtl. Prot., 369 N.J. Super. 481, 486 (App. Div.

2004) (*quoting* Abbott v. Burke, 206 N.J. 332, 371 (2011), aff'd in part, 180 N.J. 109, 849 (2004) ("explaining that motion in aid of litigants' rights is intended to allow court that issued an order to rectify violation of that order"); see also Abbott by Abbott v. Burke, 163 N.J 95 (2000) at 100-01 (explaining that motion in aid of litigants' rights allows court to order relief where party fails to comply with mandate set out by that court).

Here, there was nothing for the trial court to enforce, as there was no prior order which placed any affirmative obligations upon Lokal to do anything, let alone any order requiring Lokal to bring the Hotel "into compliance," prior to the Cross-Motions. Lokal is not in violation of any court order, including the court's June 26, 2024 order granting summary judgment, in which the trial court ordered as follows: (1) "[Respondents]' Motion for Summary Judgment is hereby GRANTED in its entirety. Plaintiff's Verified Amended Complaint is dismissed with prejudice." (Aa58); and (2) "The Court's May 26, 2022 Order imposing preliminary restraints is hereby rescinded[.]" Id. Neither this Order, nor any other, provided Respondents with any affirmative relief to enforce precisely because Respondents never filed any counterclaims or requested any form of affirmative relief throughout this litigation.

This is further demonstrated by the HPC's own correspondence dated just two (2) days after the trial court granted summary judgment, in which the HPC Compliance Officer indicates that he will "proceed with issuance of a summons to appear in Municipal Court," where any alleged violations have yet to be adjudicated, and would require an establishment of culpability beyond a reasonable doubt. (Aa238-Aa239). Unless and until that happens, Lokal has not failed to comply with any court order, and Respondents are not, and were never, entitled to any relief by way of a motion to enforce litigants rights. Thus, the portion of the trial court's order granting Respondents' "two (2) Cross-Motions to Enforce Litigants' Rights" should be reversed and vacated.

IV. CONCLUSION

For the reasons set forth above, the trial court erred when it placed conditions on Lokal's request for a stay, and when it granted Respondents' Cross-Motions to enforce rights as litigants. As a result, the trial court's order should be reversed as to these issues, and a stay maintaining the *status quo* in this matter should be entered, and no enforcement of any trial court Orders

should be allowed until such time as Lokal's appeals in all pending matters have been decided.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: December 3, 2024

By: _____
Robert S. Baranowski

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3372-23

LOKAL STOCKTON LLC, Plaintiff-Appellant, v. CITY OF CAPE MAY, CITY OF CAPE MAY HISTORIC PRESERVATION COMMISSION, and CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT, Defendants-Respondents.	**On Appeal From:** Superior Court of New Jersey Law Division, Cape May County Docket No. CPM-L-120-22 **Sat Below:** Hon. Michael J. Blee, A.J.S.C.

BRIEF OF PLAINTIFF-APPELLANT, LOKAL STOCKTON LLC

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I. PRELIMINARY STATEMENT

This matter involves a tragically unfortunate situation in which a small business owner spent nearly two years and millions of dollars renovating a run-down property in the City of Cape May ("**City**"), turning it into a beautiful boutique micro-resort, all with permits issued by the City and under the watchful eye of its inspectors, only to be told after completion of the work that the finished hotel did not match a design approved by the Historic Preservation Commission ("**HPC**") in 2018, and that the work would need to be revamped. Shocked and dismayed, the hotel owner implored the City and HPC to approve the finished design, but those requests were rejected.

Adding insult to injury, the City and HPC have placed all of the blame on the hotel owner for the circumstances, despite the fact that the City reviewed and approved the construction permits and all of the work up through completion, without ever confirming that the plans submitted for the renovation matched the plans approved by the HPC in 2018, which is the process that is supposed to be followed prior to issuance of permits. The trial court was unsympathetic to the hotel owner's plight. That owner, Plaintiff-Appellant, Lokal Stockton, LLC ("**Lokal**"), is now seeking relief from this Court to save its hotel and its business from devastation.

Specifically, the City and HPC refuse to issue a final Certificate of Occupancy ("CO") to Lokal for the fully renovated hotel that was completed in December 2019, in full conformance with construction permits issued by the City, not because the hotel suffers from any defect in workmanship, but because the HPC takes issue with the aesthetics of the finished work. Unknown to Lokal as the hotel underwent renovation, HPC had issued an approval based upon specific design elements as listed in a Certificate of Appropriateness ("**COA**") in 2018 following a hearing during which Lokal was neither present, nor represented by counsel. Rather, a project manager from their architect's firm "represented" Lokal at the meeting, and without authorization, agreed to numerous items that he never told Lokal about, indicating only afterward that he had secured project approval from HPC.

Lokal learned of this discrepancy only after construction was completed, even though multiple inspections had been conducted by the City's engineer during construction. Lokal sought approval from the HPC in 2020 to maintain the hotel as-built, upon presentation of evidence that the design of the building is suitable. The HPC refused to consider the aesthetics of the rebuilt hotel, and insisted that the design elements required by the COA in 2018 were the only acceptable architectural features for the hotel reconstruction.

Because the HPC would not consider any change in the design elements, and denied Lokal's application for a COA for the completed hotel, Lokal appealed to the Zoning Board of Adjustment ("**Zoning Board**") seeking review of the HPC's 2020 decision. That appeal was essentially tabled during the pandemic. In 2022, Lokal received notice from a new HPC Compliance Officer that further temporary certificates of occupancy ("**TCO**") would not be issued absent compliance with the COA.

Lokal sought relief in court, seeking review of the City's actions. At first, the trial court required the City to continue issuing TCOs until the matter was adjudicated. In October 2022, the Zoning Board heard and denied the appeal from the HPC 2020 decision. Lokal filed an Amended Verified Complaint appealing that decision as well. Lokal's prerogative writ claims were denied in August 2023, after which discovery was conducted on the remaining claims. A month before the trial date on Lokal's estoppel and damages claims, the City and the HPC filed an untimely, joint motion for summary judgment, which Lokal opposed. That motion was granted by the trial court in June 2024, despite a plethora of disputed facts, issues of credibility and the need to evaluate expert opinion.

This appeal followed.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On February 20, 2018, Lokal purchased the property located at 5-9 Stockton Place in the City of Cape May, also known as Block 1064, Lot 17 ("**Property**"). (Aa24-Aa28).[2] When Lokal purchased the Property, it was home to a run-down apartment building, but through extensive and costly renovations, all of which were effectuated by way of permits issued by the City, Lokal created a boutique micro-hotel and resort known as the Lokal Hotel (the "**Hotel**") with eight (8) apartment-style hotel rooms, a heated salt-water pool, outdoor cooking options, private outdoor areas, and mobile beach kits. (Aa136 at ¶ 12; Aa174 at ¶ 12). The Property is located within Cape May's C-2 Beach Business District (the "**C-2 District**"), as set forth on the Cape May City Zoning Map. In the C-2 District, "land, buildings or premises may be used by right for the following purposes: … (h) Hotels and motels." Cape May City Code § 525-23(A)(1). The Property, therefore, is zoned to permit the Hotel. Id.

During the renovations, the City inspected the Property and the work on the hotel numerous times. Between the months of February-December of 2019,

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[1] The Procedural History and Facts of this matter are closely intertwined and have been combined to avoid repetition.

[2] ("Aa__") refers to the Appendix filed herewith by Appellant.

Craig Hurless ("**Hurless**"), engineer for the City's Planning Board and Zoning Board, reviewed the Hotel's building plans "for compliance" for over sixteen (16) hours. (Aa309-314). Furthermore, Hurless' invoices demonstrate that his office inspected the Property at least twenty-two (22) times, a total of almost twenty-four (24) hours, on the following dates in 2019, **all while the Hotel was being constructed**. (Aa315-330). Indeed, discovery demonstrated that, on March 26, 2019, Hurless indicated that "**the architectural plans have been revised to reflect the HPC conditions of approval.**" (Aa33). Hurless then flip-flopped nine months later and stated that the design of the Hotel did not comply with the COA issued by the HPC in August 2018. (Aa101).

Further evidencing that the City and HPC did not follow their own processes here, Warren Coupland, Chairman of the HPC, testified at his deposition that the responsibility of confirming compliance with the HPC's conditions of approval, as found in the COA, lies with the construction office. (Aa239 at 60:1-7). However, the City construction official, Lou Vito ("**Vito**"), testified at his deposition that the construction office did **not** verify compliance in this case, and, in fact, before the current HPC Compliance Officer was hired (after construction of the Hotel was already completed), Vito said "there was no one to do that." (Aa343 at 49:11-15). Thus, it was left to Hurless to confirm compliance. Yet, he did just that in his March 26, 2019

letter, Aa32-34, upon receipt of plans from Adam Crossland ("**Crossland**"), Lokal's former project manager. (Aa865-Aa866).

After Hurless originally stated that the plans complied, and only **after** completion of the Hotel, the City "advised" Lokal by letter dated December 11, 2019, that that the design of the completed Hotel did **not** comply with the COA issued by the HPC in August 2018. (Aa101). Prior to that, neither Hurless nor any other City officials or employees ever raised any noncompliance issues with Lokal. (Aa497-Aa498 at 67:14-70:19); see also, 1T:15:6-17.

The City's own ordinance requires: "When a certificate of appropriateness has been issued, the administrative officer or his appointee shall … inspect the work approved by such certificate and shall regularly report to the Commission the results of such inspections, listing all work inspected and reporting any work not in accordance with such certificate." Cape May City Code § 525-37(E)(8). Cape May City Code § 525-34 defines the term "administrative officer" to mean "[t]he City Construction Code Official." However, as the Construction Official testified at his deposition, he did **not** verify whether the plans submitted by Crossland complied with the COA, stating "They weren't looked at by us." (Aa343 at 48:24-49:6).

Lokal's expert witness, Steven N. Kline, AIA, opines that the City failed to follow the requirements of its own ordinance, and did not inform Lokal at any time during construction, after multiple inspections had taken place, that there was any noncompliance with the COA. (Aa529-539).

In light of this error, the City Construction Official issued a Temporary Certificate of Occupancy ("**TCO**") so that Lokal could open and host guests pending issuance of a final Certificate of Occupancy ("**CO**"). (Aa848-851). The City refused to issue a final CO pending satisfaction of the HPC demand for design compliance. Lokal then filed an application to the HPC requesting that the HPC approve the Hotel as constructed (the "**2020 HPC Application**"). (Aa35-100).

In the process of preparing that Application, Lokal learned that on August 20, 2018, a hearing was held by the HPC in connection with the original COA. (Aa29a). Lokal was not represented by counsel during that hearing, nor was any member of Lokal present or aware that the August 20, 2018 hearing was taking place. 1T/11:15-22; Aa137 at ¶ 28; Aa174 at ¶ 28. The only person who attended the hearing was Crossland, who had no authorization to act on behalf of Lokal or to present any plans or testimony to the HPC (Aa137 at ¶ 29; Aa174 at ¶ 29) and later admitted during his deposition that he agreed to several conditions of the COA without consulting

Lokal or ever discussing them with Lokal beforehand. (Aa427-Aa428). Meanwhile, Lokal's impression of the HPC approval process, as communicated by Crossland, was as follows: "[Crossland] represented to us that he was getting the final approval through more of an administrative review rather than a hearing. So we didn't know that the hearing actually happened until all this lawsuit stuff started." (Aa486 at 25:13-17).

At the conclusion of the hearing on August 20, 2018, the HPC issued the COA for renovation of the Hotel, setting forth the following conditions which Crossland agreed to without Lokal's knowledge or authorization:

> The applicant previously received conceptual approval. The final application has made two changes: 1) rail detail; 2) stairs; (b) the subject property has been much modified over the years. The proposed renovations are an improvement; (c) the proposed railing system is too contemporary for this building. The applicant has agreed to redesign the railing system in the Chippendale style; (d) the applicant has agreed to retain the original front stair bridge design; (e) other materials to be used will be a standing seam metal roof, less than one-half inch; Anderson Woodwright 400 Series windows; wood doors; brick foundation; wood fences; IPC decking; (f) applicant has agreed to use all cedar clapboard siding. No Azec will be utilized, rather wood materials; (g) applicant will submit lighting plan, foundation, pavers, and sealed architectural plans to Review Committee for final approval; and (h) all applicable design standards will be met.

(Aa29-Aa31). While Crossland testified that he advised Lokal of the COA and the conditions sometime after the hearing, he could not at all remember the circumstances during which he allegedly did so. (Aa428 at 67:24-69:12). He could not point to any specific time or instance where he advised Lokal of what happened at the August 20, 2018 hearing or the conditions of the COA. During his deposition, Crossland could not recall that Lokal ever agreed to the installation of Chippendale railings, and admitted that he agreed to keep the front bridge stair **without** consulting Lokal. Id.

Subsequently, Lokal's 2020 HPC Application sought approval for the following as-built design elements: the railing, front stairs, breeze block partitions, clamshells in the parking lot, horizontal wood fencing, shingles roofing material, and a stucco over block foundation. (Aa35-Aa36). The HPC conducted a hearing on the 2020 HPC Application on January 6, 2020. (Aa102). At that time, Lokal demonstrated through the testimony of Chad Ludeman, co-owner and operator of Lokal, and Peter Primavera, an expert in history, archaeology, and cultural resources, that the design elements at issue are "appropriate … in mass, scale, rhythm, materials and detailing for the

setting", 1T/56:10-12,[3] and the design of the building is appropriate in the context of its environment.

Ludeman testified that while Lokal received conceptual approval for the Hotel in November of 2017, Aa30, Lokal had no knowledge of the COA or the hearing which led to its adoption on August 20, 2018. 1T/11:15-22; see also, Id. at 22:7-18. Ludeman testified about the approvals and permits that Lokal did obtain relative to the Hotel's construction:

> MR. LUDEMAN: [W]hen we first started, our GC [General Contractor] got some piecemeal permits to move the property – you know, to raise up the property, move it. We needed to reconstruct the foundation, so we got a permit for a foundation. We needed to come up … three or four feet for the new flood height elevation … And then he got a partial demo permit. …
>
> MR. BARANOWSKI: Okay. And as each phase moved forward, did you have permits from the City as needed and their approval and their inspections go from one phase to the next?
>
> MR. LUDEMAN: Yes.
>
> MR. BARANOWSKI: Okay. And were they coming out looking at the work as it was taking place?

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[3] "1T/__" refers to the Transcript of the Proceedings before the HPC on January 6, 2020. "2T/__" refers to the Transcript of Oral Argument dated August 15, 2023. "3T/__" refers to the Transcript of Oral Argument dated December 18, 2023. "4T/__" refers the Transcript of Oral Argument dated June 12, 2024.

> MR. LUDEMAN: Yes.
>
> MR. BARANOWSKI: Were you ever at any time stopped from doing any work based on what was transpiring, or asked to do things any differently?
>
> MR. LUDEMAN: No.

Id. at 14:19-15:17. Ludeman later noted that "[w]e have a TCO. So the – everything in the building has been approved, the building itself, all the mechanicals. The only thing[s] outstanding [are] site issues with" the HPC. Id. at 17:1-4. Ludeman concluded that, prior to Hurless' December 11, 2019 letter, Aa101, Lokal was under the impression that it had taken the project "from beginning to end with all appropriate approvals in place, including all the HPC approvals[.]" 1T/23:6-10.

From the very beginning of his testimony, Ludeman was met with hostility from the HPC. The HPC Chair, Warren Coupland, asked if Lokal had anything in writing from Crossland explaining why he appeared on behalf of Lokal during the August 2018 hearing when he had no authority to do so. Id. at 12:1-3. He brought it up again, stating "we don't have a statement from the architect stating why he came here or whether he had authority – we have nothing." Id. at 24:18-21. Lokal's counsel responded: [What] you have … is the applicant and owners' statement … under oath … saying he wasn't aware of why Mr. Crossland came here and made these changes, and was not aware

of the changes being made as construction went forward." Id. at 24:25-25:5. Coupland responded, saying if that were the case, Lokal "wouldn't have been able to get a building permit." Id. at 25:7-8. In response, Lokal's counsel noted this was the crux of the issue; that in spite of the Chair's conclusion that Lokal "wouldn't have been able to get a permit," building permits had, in fact, been issued. Id. at 24:5-17; see also, 28:13-29:7.

Primavera was then called to testify as Lokal's expert in the field of historic preservation and architecture. Like Ludeman, Primavera was met with hostility, beginning with the HPC's *voir dire* of his credentials, which were described extensively by Primavera. Id. at 30:24-32:6. Coupland even pressed Primavera on his familiarity with literally every member of the State's Historic Preservation Office. Id. at 33:24-34:9.

Primavera also testified as to his familiarity with the City of Cape May. Id. at 34:12-36:17; see also, 37:25-38:25. He was then asked whether he had ever been accepted as an expert in the field of historic preservation by other historic preservation commissions, to which he replied, "Hundreds", and that he had also been accepted as an expert in the field by courts at both the state and federal level. Id. 36:21-37:21. Ultimately, the HPC accepted Primavera as an expert in the field of historic preservation and architecture. Id. at 39:11-12; see also, 35:12-15.

Primavera then testified regarding the old building on the Property:

> I do not deny that the previous building … was identified in the Historic Site Survey of Cape May as a contributing building[.] … It's a colonial revival building vernacularized with massive amounts of changes in the 20th century. And so it would be my position that that building is not a contributing building. So the fact that something gets listed as a contributing building doesn't necessarily mean its true.

Id. at 41:17-42:1. The HPC Chair objected to Primavera's testimony, claiming "it's not helpful to talk about whether this is contributing or non-contributing. It is contributing." Id. at 43:23-25. Primavera replied:

> I do not believe it's contributing. I believe it has been through a process … [and] the process is in error. I believe the final conclusion does not substantiate that this should have been listed as a contributing building. I fully respect and understand the process you just described … and how you've come to the conclusion that you did. But it doesn't make it true. … Doesn't make it contributing.

Id. at 44:3-19. Primavera then noted that there are "projects that are … erroneously designated every day." Id. at 46:9-14. Coupland acknowledged, "[i]t happens," without admitting that it happened here. Id. at 46:15.

Primavera then advised the HPC why it matters that the Property's old building was not "contributing":

> [T]he standard that should have been used for the project is the standard for new construction, not for

> rehabilitation because what was … approved in concept was by far not a rehabilitation. This building ha[d] to be picked up and moved. It had to be partially demolished. Foundations had to be redone. Ceiling heights were raised. All the finish … was changed. All the siding was changed. All that was left was the basic rectangular form of the building and the fact that it has two full-length front porches. Other than that, this is a new building. And … the [HPC] would have been better served to have reviewed this project under the Secretary of Interior standards for new construction, not rehabilitation. …
>
> [T]hat allows for a certain amount of contemporary design to be done that's not trying to falsify history, that's not trying to create a Victorian period building out of a building that no longer represents that style or has that integrity in its architectural design[.]

Id. at 46:16-49:25. Ergo, the erroneous designation of the former building as "contributing" resulted in the use of the rehabilitation standard, when the new construction standard would have been more appropriate and allowed for different design elements, like those currently existing at the Hotel.

Primavera was then asked whether "the building as constructed is an appropriately aesthetically pleasing and fitting … style for the area of the view shed where it's looking?" Id. 55:19-23. Primavera affirmed, "[t]his is certainly an appropriate building in mass, scale, rhythm, materials, and detailing for the setting." Id. at 56:10-12. A discussion was then had regarding

what was allegedly agreed to or approved during the August 20, 2018 hearing, eventually summed up as follows by Coupland:

> [T]he stair doesn't – doesn't meet our agreement. And the railing doesn't meet. The wall wasn't presented. The fence wasn't presented. And now you come before us and you want us to just approve everything that was done regardless of the expertise and the opinion and the discussion around this table.

Id. at 69:3-9. Counsel for both Lokal **and** the HPC advised that what may have been agreed to previously was **not** the issue. Id. at 69:10-70:2.

Primavera testified about each item of the Hotel, noting first that "clam shells are a traditional way of paving in historic districts all up and down the New Jersey shore and Eastern Seaboard of the United States." Id. at 73:3-6. The HPC responded that "clam shells are not approved in the historic district", which was incorrect, as Cape May's guidelines "specifically recommend crushed clam shells and oyster shells." Id. at 73:12-22. Primavera then discussed regarding the remaining elements: specifically: (i) the railing (Id. at 79:20-80:7); the front steps (Id. at 80:8-81:5)[4]; and the block wall (Id. at 84:1-85:14; 86:3-5). Ludeman described how the block wall and existing fencing

[4] Once again, Mr. Coupland had little concern about whether or not the front staircase was appropriate, but instead, entirely focused on "there was an agreement to do a bridge stair…"

were approved by the City and then constructed. Id. at 88:2-89:14. He also discussed the positive reaction that the Hotel has received. Id. at 90:21-25.

Notwithstanding the testimony presented by Ludeman and Primavera, the HPC voted to deny the 2020 HPC Application. Id. at 104:1-24. The denial was memorialized in Resolution No. 2020-02, adopted April 20, 2020 (the "**2020 HPC Resolution**"). (Aa102-Aa105).

On May 8, 2020, Lokal timely appealed the 2020 HPC Resolution ("**Appeal Application**") to the City's Zoning Board of Adjustment ("**Zoning Board**"). (Aa106-Aa125). The Appeal Application was deemed incomplete pending submission of additional requested information even though Lokal submitted all of the required documentation and fees, in complete compliance with the City's Ordinance. (Aa126). Subsequently in 2020, Lokal, like many other businesses, was shut down for extended periods of time and suffered adverse economic impacts from the COVID-19 public health emergency. Once permitted to re-open, however, Lokal conducted operations and hosted guests at the Hotel, growing its business and solidifying its reputation as a one-of-a-kind micro beach resort, earning accolades from patrons, and establishing itself as a vital new element of Cape May's vibrant tourist industry. During that time, the City renewed and reissued Lokal's TCO several times, with no further mention of the alleged noncompliance with the COA. (Aa852-Aa855).

On February 17, 2022, almost two (2) years after Lokal filed the Appeal Application, it received a letter from the newly-created HPC Compliance Officer advising that the "current [TCO] expires on February 28, 2022. The HPC Compliance Office **cannot support any further TCOs** until this is resolved." (Aa127-Aa128). (*Emphasis added.*) Lokal, through counsel, responded to the Compliance Officer's letter on February 24, 2022, reiterating the history of this matter and stating:

> The City's refusal to issue any further TCOs, and more importantly, a Certificate of Occupancy ("CO"), is unacceptable to Lokal. Since construction was completed in accordance with the permits that were issued, and TCO(s) have been issued, Lokal has continued to host guests at the hotel and should be permitted to continue doing so. Any decision by the City not to issue a TCO or a CO due to alleged violations of the Certificate of Appropriateness resulting from the 2018 HPC Application, of which Lokal had no knowledge, would cause irreparable harm to Lokal's business and reputation.

(Aa129-Aa133). Lokal continued: "the City's demand for Lokal to essentially tear apart and reconstruct the Lokal Hotel in accordance with the requirements of" the COA is impractical, and "would result in unduly burdensome and unsustainable costs beyond the already significant costs incurred to renovate the Property in the first place." Id. However, "in … effort to avoid the cost

and uncertainty of litigation", Lokal proposed resolutions to each of the eight (8) items. Id.

In addition, because the TCO was set to expire on February 28, 2022, Lokal applied for renewal and reissuance of the TCO. Specifically, Courtney Ludeman, president of Lokal and operator of the Hotel, completed the TCO application, paid the appropriate fees, and requested that the application be decided as soon as possible. Lokal's application was granted and the new TCO was issued on March 1, 2022. (Aa856). However, the TCO was set to expire on June 1, 2022, and included a condition that unless certain conditions are met by that date, "the owner will be subject to fine[s] or [an] order to vacate" the Property. Id. The conditions to be met were as follows: "Final Board Engineer Approval and **Final Historic Preservation Commission Compliance**." Id. (*emphasis added*).

On March 11, 2022, the Compliance Officer advised Lokal that the HPC was not willing to agree to **any** of Lokal's proposed resolutions to the eight (8) items at issue. (Aa134). Under threat of having its TCO expire, Lokal filed a six-count Verified Complaint in Lieu of Prerogative Writs and Order to Show Cause on April 8, 2022, seeking to: (i) ensure that the City continued to renew and reissue Lokal's TCO so that it could remain open and continue hosting guests pending

final adjudication of the matter; and (ii) obtain a declaratory judgment ordering the final CO for the completed Hotel, as is. (Aa135-Aa162).

The trial court granted injunctive relief on May 26, 2022, ordering that, "to maintain the status quo pending final adjudication of this matter, the City is directed to continue issuing a [TCO] for the [Hotel], or alternatively, to extend the current TCO … upon application by [Lokal.]" (Aa163-Aa165). The Order also restrained the City and the HPC "from ordering [Lokal] to pay any fines in connection with its continued operation of the Hotel and/or to vacate the Property[.]" Id. The trial court then remanded the matter back to the Zoning Board for the Appeal Application to be heard, and the Zoning Board denied the Appeal on October 27, 2022, after refusing to allow Lokal to present any further testimony outside of the record before the HPC in support of the appeal. (Aa166-Aa172). The denial was memorialized in Resolution No. 11-17-2022:1, adopted November 17, 2022. Id.

Lokal then filed an eleven-count Amended Verified Complaint in Lieu of Prerogative Writs on February 7, 2023. (Aa173-Aa217). Lokal's claims were bifurcated, and the prerogative writ claims – Counts One, Two, Five, Seven, Nine, Ten, and Eleven – were addressed first. (Aa12). On August 25, 2023, the Court denied and dismissed each of Lokal's prerogative writ claims, Aa6-Aa7, finding that Lokal had purportedly ratified the COA, and the

conditions therein, when it submitted the COA in support of its application before the Cape May City Planning Board on November 27, 2018, and when representatives of Lokal testified alongside Crossland at the hearing which took place on January 8, 2019. (Aa875-Aa877). Discovery on the remaining claims for equitable estoppel, laches, and declaratory judgment – Counts Three, Four, and Eight, respectively – was then conducted.

On or about November 27, 2023, the City served a *Subpoena Duces Tecum* upon Crossland (the "**Subpoena**"), demanding that he produce:

> 1. Your complete file … from 2018 to the present.
>
> 2. Copies or any and all communications and/or correspondence, whether verbal, written or electronic (including letters, emails, test messages, voicemail messages etc) related to the property and including Lokal Stockton LLC principals Courtney Ludeman and/or Chad Ludeman as parties to the communication from 2018 to the present. …

(Aa218-Aa220). In response, Lokal sent a letter to Crossland on November 28, 2023, advising that Lokal would be filing a motion to quash and directing him "to withhold the production of such documents and/or communications until further notice, pending adjudication of the motion." (Aa221). Lokal then filed its motion to quash or, alternatively, for a protective order ("**Quash Motion**") on November 29, 2023. (Aa222). The trial court denied Lokal's motion "in its

entirety" on December 18, 2023, thereby ordering Crossland "to produce all documents requested in" the Subpoena by December 31, 2023. (Aa8).

A jury trial was scheduled to commence in June; however, the City and the HPC filed an untimely, joint motion for summary judgment (the "**MSJ**") on May 8, 2024. (Aa540-Aa819a). Lokal wrote to the court objecting that the MSJ should have been filed a month earlier, on April 8, 2024, in order to comply with the timing requirements of R. 4:46-1. (Aa820-Aa822). In response, the trial court issued a case management order on May 10, 2024, stating that the "trial dates scheduled for June 3-7, 2024 are hereby adjourned" and setting new firm trial dates for September. (Aa823). The order concluded, "[Lokal] shall timely respond to the [MSJ] as prescribed by the court rules." Id.

Lokal filed opposition on June 3, 2024, arguing that summary judgment was inappropriate because there were disputed facts and credibility determinations which needed to be made, including testimony from expert witnesses, which should be evaluated by the trier of fact. (Aa824-Aa840). Oral argument was conducted on June 12, 2024. (Aa11). On June 26, 2024, the trial court entered an order granting the MSJ; dismissing all remaining counts of Lokal's pleadings with prejudice; and rescinding the Court's May 26, 2022 order imposing preliminary restraints. (Aa9-Aa10).

On July 1, 2024, Lokal filed this appeal from the trial court's decision to grant summary judgment, as well as the court's August 25, 2023 order dismissing Lokal's prerogative writ claims, and the court's December 18, 2023 order denying Lokal's motion to quash the subpoena served upon Lokal's former project manager, or in the alternative, for a protective order. (Aa1-Aa5).

III. ARGUMENT

As a threshold issue, the actions of the HPC in 2018 should be deemed *ultra vires*, and void, as Lokal was neither represented by counsel during the hearing which led to the COA's adoption, nor was any member of Lokal present. As such, the proceedings were invalid and the 2018 COA should be vacated. The HPC in 2020 refused to stray from the invalid COA, and gave short shrift to the presentation of evidence demonstrating that the as-built design would satisfy the applicable aesthetic standards.

The actions of the HPC here are arbitrary, capricious and unreasonable, as are the Zoning Board's decision to affirm the HPC's actions, and the City's determination that it will not issue a permanent CO unless and until Lokal complies with the unreasonable demands of the HPC. The City's position that the hotel should be reconstructed as demanded by the HPC, after the City issued construction permits and the City Engineer inspected the work multiple

times while it was in progress for compliance with the approved plans, is the epitome of arbitrary and capricious action. The Lokal Hotel should be allowed to remain as-built and be granted a permanent CO.

The decisions of the trial court affirming the actions of the HPC, the City and the Zoning Board likewise, should be overturned, as both the trial court's decision to dismiss Lokal's prerogative writ claims and to grant summary judgment are premised on credibility determinations that should be made by the trier of fact, and not by the trial judge. Accordingly, the decisions of the trial court should be reversed, and Lokal should have its day in court to have its estoppel and damages claims heard by a jury.

A. The Trial Court Erred When It Ruled that Lokal Had Ratified the COA through Its Conduct (2T/12:13-20:3; 63:13-64:2).

The trial court expressly stated, in its August 25, 2023 decision dismissing Lokal's prerogative writs claims, that it "need not address the circumstances of [Crossland's] appearance before the HPC or whether counsel should be required in HPC proceedings as it is in Zoning Board hearings" because, per the trial court, "[t]hese questions are rendered moot through Plaintiff's ratification." (Aa875). In so deciding, the trial court erred, and its decision should be reversed, based on the illegitimacy of the COA.

The COA with which Lokal is expected to comply in order to obtain a final CO, was adopted as a result of the August 20, 2018 hearing at the HPC, attended only by Crossland. During that hearing, the HPC considered a certificate of appropriateness application that was purportedly filed on behalf of Lokal seeking approval to raise the building and conduct certain exterior renovations to the Hotel. However, Lokal had no knowledge of the 2018 COA application and was not present at the hearing which led to the COA's adoption, nor was Lokal even aware that that hearing was taking place, as testified to by Ludeman under oath several times. 1T/11:15-22; 22:7-18; Aa137 at ¶ 28; Aa174 at ¶ 28.

Lokal, a corporate entity, was not represented by counsel during the August 20, 2018 hearing. Rather, Lokal was "represented" by Crossland, who is not an attorney. (Aa137 at ¶ 29; Aa174 at ¶ 29). Crossland himself openly admitted during his deposition that he acted without Lokal's authorization in agreeing to the conditions of the COA at issue, stating that he believed he had *carte blanche* to agree to whatever the HPC might want. (Aa427 at 65:18-19). Crossland could not recall when he ever allegedly advised Lokal what happened during the hearing, or of the COA's existence. (Aa428 at 67:24-69:12).

The trial court, however, decided that regardless of what may have happened regarding the 2018 meeting, Lokal allegedly ratified the COA when the Ludemans "testified alongside" Crossland "in a Planning Board hearing several months after the 2018 HPC hearing." (Aa876). The trial court continued:

> In this subsequent Planning Board hearing, [Lokal]'s counsel submitted the [COA] for the Planning Board's consideration. … It is apparent to the court that even if [Lokal] was not aware of the 2018 HPC hearing and [COA] at the time it occurred, Plaintiff was certainly aware of these acts when they appeared before the Planning Board. Plaintiff expressly ratified this conduct through relying on the … approval it received through the [COA] as a means to attain further approval from the Planning Board.

Id. In rendering this decision, the trial court either overlooked Ludeman's testimony that Lokal was **never** aware of the August 20, 2018 hearing or the COA, or perhaps improperly determined this testimony lacked credibility. In doing so, the trial court also ignored two (2) fundamental tenets of the doctrine of ratification.

First, missing from the trial court's recitation of the law on ratification (which had not been briefed) is that "ratification requires intent to ratify **plus full knowledge of all the material facts**." Thermo Contracting Corp. v. Bank of N.J., 69 N.J. 352, 361 (1976) (*emphasis added*). Ludeman testified time

and time again, under oath, that Lokal was not aware of the COA, the conditions therein, or the hearing which led to its adoption. Whether Ludeman was credible in making these assertions was not a decision to be made by the trial court on the papers, and it cannot be determined based on the record presented that Lokal had any intent or full knowledge of the material facts sufficient to deem Crossland's actions or the COA "ratified."

In addition, "[t]he concept of ratification is well understood" in New Jersey, in that it makes a careful and deliberate distinction between "an *ultra vires* act, **which cannot be ratified**, and an *intra vires* act, which can be ratified." Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urban Renewal Co., LLC, 435 N.J. Super. 51, 65 (App. Div. 2014) (*emphasis added*).

As discussed in Grimes v. City of East Orange, 288 N.J. Super. 275 (App. Div. 1996):

> **Acts that are *ultra vires* are void and may not be ratified**, while *intra vires* acts may be. **An act is *ultra vires* if the "municipality [was] utterly without capacity" to perform the act.** On the other hand, an *intra vires* act is one that is merely "voidable for want of authority." Thus, where, for example, a contract is entered into by "an unauthorized agency" but the municipality has the power to enter into such contracts, the contract may be later ratified by the municipal body having the power in the first instance to make the contract. … This is the general rule recognized throughout the country.

Id. at 279-280 (*emphasis added*). Here, the very act of granting final HPC approval and adopting the COA was *ultra vires*, as Lokal was not represented by counsel at the August 20, 2018, and as such, the hearing never should have taken place.

The Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* ("**MLUL**") permits municipalities such as the City of Cape May to, "by ordinance[,] provide for a historic preservation commission." N.J.S.A. 40:55D-107. This statute is the basis for the establishment of the HPC in Cape May, which constitutes a quasi-judicial body subject to the requirements of the MLUL (N.J.S.A. 40:55D-1 *et seq.*). One of those requirements, made clear by the New Jersey Supreme Court's Committee on the Unauthorized Practice of Law and New Jersey courts, is that corporate applicants like Lokal **must** be represented by counsel when presenting applications for development within meaning of the MLUL before quasi-judicial entities such as planning boards, boards of adjustment, or in this case, the HPC. See N.J.S.A. 40:55D-3; Committee Opinion No. 13, 98 N.J.L.J. 17 (January 9, 1975); see also, Committee Opinion No. 16, 98 N.J.L.J. 553 (June 26, 1975); Slimm v. Yates, 236 N.J. Super. 558 (Ch. Div. 1989).[5]

[5] Endorsed by the Appellate Division in Del Tufo v. J.N., 268 N.J. Super. 291, 299 (App. Div. 1993).

In fact, what has transpired in the matter at bar is a clear example of **why** corporate applicants are required to be represented by counsel. As the New Jersey Supreme Court has said:

> There is no sound reason why the doing of a single act calling for the skills and learning of an attorney does not constitute the practice of law just as most certainly the performance of a single operation by a surgeon constitutes the practice of medicine. The amateur at law is as dangerous to the community as an amateur surgeon would be.

In re Baker, 8 N.J. 321, 338 (1951). Consistent with the foregoing, the Supreme Court's Committee on the Unauthorized Practice of Law, in considering whether a corporation could appear before a board of adjustment without representation by an attorney, said:

> [A]n appearance before a Board of Adjustment, a quasi-judicial body … constitutes the practice of law. … Representation of corporations by architects, engineers, or its representative officials constitutes the unauthorized practice of law.
>
> It is to be noted that despite certain expertise and proficiency in presenting a case before a Zoning Board of Adjustment [o]n behalf of their corporate client, the legal knowledge and skill required in presenting evidence, examination and cross-examination of witnesses, qualifying expert witnesses, understanding the admission and exclusion of evidence, construction and application of statutes, ordinances and court decisions -- all of which are involved in such proceeding and where the legal rights of the parties are determined just as effectively as in

> the trial court and whose decisions are subject to review on appeal on the record made before the Board of Adjustment at the hearing -- is usually lacking in such otherwise qualified professionals.
>
> The public interest requires that representation before a Board of Adjustment, unless pro se by an individual, be by attorneys skilled in these arts.

See Committee Opinion No. 13, 98 N.J.L.J. 17 (January 9, 1975); see also, Committee Opinion No. 16, 98 N.J.L.J. 553 (June 26, 1975) (wherein the Committee reached the same conclusion with respect to appearances before planning boards); Slimm, 236 N.J. Super. 558 (Ch. Div. 1989).[6]

This case is illustrative of the exact danger the Supreme Court warned against in In re Baker, supra. Crossland engaged in the unauthorized practice of law when he "represented" Lokal during the August 20, 2018 hearing, agreeing to certain conditions without Lokal's authorization and leading to the adoption of a resolution and COA about which Lokal had no knowledge. This directly led to the construction of the Hotel which allegedly does not comply with the requirements of the COA. However, because Lokal was not represented by counsel during the August 20, 2018 proceeding, that hearing should never have taken place. It follows, then, that the resolution which was adopted as a result of that hearing and accompanying COA should never have

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[6] Id.

been adopted; it is void, and Lokal cannot be bound by its requirements. The trial court did not address any of these issues in its analysis of ratification, and thus, the trial court's decision must be reversed.

B. The Trial Court Erred When It Found that the HPC's Decision to Deny the 2020 HPC Application Was Not Arbitrary, Capricious or Unreasonable (2T/19:18-20:3; 21:9-23:18).

The 2020 HPC Application, pursuant to which Lokal sought design approval for the completed Hotel as built, should have been decided upon its own merits, irrespective of whether the completed construction complied with the 2018 COA. The HPC's failure to fairly consider the evidence presented at the 2020 hearing warrants a finding of arbitrary and capricious action. The trial court was similarly fixated on the Hotel's alleged lack of compliance with the COA, rather than evaluating whether the completed Hotel was consistent with the City's historic guidelines. These determinations should be reversed.

The "scope of review of an administrative decision 'is the same as that [for] an appeal in any non-jury case, i.e., 'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record.'" In re Taylor, 158 N.J. 644, 656 (1999) (*citations omitted*). "It is well established that when a reviewing court is considering an appeal from an action taken by a planning board, the standard employed is whether the …

denial was arbitrary, capricious, or unreasonable." Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 560 (App. Div. 2004).

The term "arbitrary and capricious" embraces a concept which emerges from the due process clause of the fifth and fourteenth amendments of the United States Constitution and operates to guarantee that acts of government will be grounded on established legal principles. Bayshore Sewage Co. v. DEP, 122 N.J. Super. 184, 189 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Arbitrary and capricious means "willful and unreasoning action, without consideration and in disregard of circumstances." Id. While the factual determinations of the local board or agency are presumed by the Court to be valid, the Court will not "rubber-stamp" findings that are not reasonably supported by the evidence. Chou v. Rutgers, 283 NJ Super. 524, 539 (App. Div. 1995), certif. denied 145 NJ 374 (1996). Rather, it is essential that the board's findings be grounded in evidence in the record. Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd., 369 N.J. Super. 552, 562, citing Tomko v. Vissers, 21 N.J. 226, 239-240 (1956), and Smith v. Fair Haven Zoning Bd. of Adjustment, 335 N.J. Super. 111, 120 (App. Div. 2000).

At the January 6, 2020 hearing, Lokal demonstrated through the presentation and testimony of Mr. Ludeman and Mr. Primavera, an expert in

historic preservation and architecture[7], that the completed Hotel and its design, including the railing, breeze block partitions, clamshells, horizontal wood fencing, shingles roofing material, and stucco over block foundation, are appropriate in mass, scale, rhythm, materials and detailing for the setting, and that the overall design of the building is appropriate for its environment. 1T/56:10-12; 73:3-6; 79:20-80:7; 80:8-81:5; 84:1-85:14; 86:3-5.

The HPC ignored whether the completed Hotel satisfied the City's design standards and instead focused entirely whether the completed Hotel complied with the 2018 COA. Even the HPC's own counsel advised that "what's happened to get us to this point really isn't the concern of the HPC. Whatever the problem was that led to approval of un-HPC-approved items is really not the concern. … [T]he HPC is not jurisdictionally permitted to deal with those sorts of things. **We can only deal with what's before the Commission now.**" 1T/69:24-70:12. (*Emphasis added*). What was before the HPC that night was the completed Hotel, as built, and whether or not that met with the design standards. Yet, the HPC ignored the advice of its counsel, and considered only that the completed hotel did not satisfy the 2018 COA.

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[7] Primavera was accepted by the HPC as an expert in the field of historic preservation and architecture. 1T/39:11-12; 35:12-15.

No matter what Ludeman and Primavera said with respect to the Hotel, as built, and its appropriateness, the HPC believed strict adherence was required to the 2018 COA notwithstanding any evidence demonstrating that the completed Hotel was consistent with HPC design guidelines. The record is rife with examples of this. *See*, e.g., 1T/51:22-24 ("Whether … it's new construction or rehabilitation … **does an agreement to put a Chippendale railing change**?") (*Emphasis added*); Id. at 60:10-16; ("[T]he stair doesn't – **doesn't meet our agreement**. And the railing **doesn't meet**. The wall wasn't presented. The fence wasn't presented. And now you come before us and you want us to just approve everything that was done regardless of the expertise and the opinion and the discussion around this table") (*Emphasis added*).

For example, as Primavera testified about the clam shells, he stated that "clam shells are a traditional way of paving in historic districts all up and down the New Jersey shore and Eastern Seaboard of the United States." Id. at 73:3-6. The HPC responded that "clam shells are not approved in the historic district." This was incorrect, as noted by Ludeman, who pointed out that Cape May's guidelines "specifically recommend crushed clam shells and oyster shells." Id. at 73:12-22. The HPC responded, "We have not approved clam shells in the last 15 years, that I'm aware of, for pavers." Id. at 73:23-25. Whether clam shells had been approved in the last 15 years or not, however,

was not the issue. Rather, the HPC members were not even aware that clam shells are expressly approved of in the City's design guidelines; just as they were unaware that a Chippendale railing is not reflective of Victorian / Second Empire architecture. Id. at 51:1-53:9.

In fact, the HPC's snarky responses to Lokal's testimony convey an ignorance of the design guidelines, making clear that HPC was not at all concerned with the design guidelines, or whether the Hotel, as built, was consistent with them. Rather, the HPC was outraged that somehow, the Hotel was built inconsistent with the COA, which the HPC blames entirely on Lokal, without justification. The HPC was simply not interested in Primavera's opinions regarding the design elements of the Hotel, as built, and the record reflects that the HPC ignored the advice of its own counsel and based its decision to deny the 2020 HPC Application on nothing more than its clear indignance and perception that Lokal had somehow ignored the 2018 COA.

The trial court later improperly sustained the HPC's decision to focus entirely on compliance, or lack thereof, with the COA. The trial court stated: "Because the HPC 2018 Resolution granting [Lokal's] conditional approval was valid, it was not arbitrary of the HOC to look at the hotel 'as built' and determine it deviated from the specifications or conditions set forth in the" COA. (Aa877). Thus, the trial court's decision is premised on the validity of

the *ultra vires* COA. Further, the trial court improperly reacted to the apparent *quid pro quo* posited by the HPC Chair, asking if Lokal was "willing to offer this City… consideration for approval," 1T/94:22-24, by finding that "Plaintiff was not interested in a compromise." (Aa878).

However, Lokal did express willingness to work with the City on a compromise:

> MR. BARANOWSKI: So is it fair to say you may be willing to make modifications to – that will be acceptable to the HPC as part of the application, but it's not really clear whether any modification you might be willing to make would also be acceptable to the planning board or the City that would similarly address their concerns?
>
> MR. LUDEMAN: Correct.

1T/96:13-20. After Ludeman expressed some frustration with the process, it was the HPC that shut down any further discussion and made the decision to deny the 2020 HPC Application in its entirety. Id. at 96:20-96:24. Contrary to the trial court's decision, Lokal expressed willingness to make modifications to the Hotel, only expressing that the process could be more streamlined.

The depositions of the City and HPC witnesses illustrates the reasons for the frustration expressed by Ludeman. For example, Coupland testified that in the event an applicant such as Lokal is required to receive approval from the Planning Board or Zoning Board of Adjustment, "they're not going to get final

approval" from the HPC, because "what happens at planning or zoning could, in fact, impact on what we're approving." (Aa230 at 22:21-25:20). However, Lokal received both conceptual and final approval from the HPC **before** it received site plan approval, having received HPC approval in August of 2018, Aa29-Aa31, and Planning Board approval in early 2019. Thus, Ludeman expressed frustration with the City's "process," a process with which Respondents failed to abide at almost every turn.

The HPC's decision to deny the 2020 HPC Application, and the trial court's decision upholding that denial, should therefore be overturned.

C. The Trial Court Erred When It Denied Lokal's Motion to Quash the Subpoena or, Alternatively, for a Protective Order, as Communications Between an Applicant and Its Consultants in Preparation for a Quasi-Judicial Proceeding Are Protected Pursuant to the Work Product Privilege. (3T/5:9-11:3).

In its Subpoena to Crossland, the City demanded Crossland's "complete file",[8] claiming that nothing which Crossland did – no plans or drawings he or

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[8] "…including copies of all memoranda, notes, drafts, plans, pictures, and/or drawings or renderings, communications and/correspondence, whether verbal, written, or electronic" regarding the Lokal Hotel, along with "any and all communications and/or correspondence, whether verbal, written or electronic… related to the property and including Lokal Stockton LLC principals Courtney Ludeman and/or Chad Ludeman as parties to the communication from 2018 to the present." (Aa218-Aa219).

his office prepared on behalf of Lokal; no communications had with Lokal or its representatives – was done in anticipation of litigation, and thus, not protected under the work product privilege. The trial court agreed, denying Lokal's Quash Motion "in its entirety," and ordering that Crossland "produce all documents requested in" the Subpoena, which was his "complete file," including any and all communications with Lokal. In so deciding, the trial court ignored that any appeal of a board decision is limited to the record made before the board. Thus, the hearing before the board **is** akin to trial, and applicants like Lokal should be able to communicate with their experts and counsel freely, without fear that such communications, and any drafts of plans, drawings or opinions, will be subject to discovery in the event litigation ensues. This is especially applicable and pertinent given the fact that the HPC and the Board are quasi-judicial in nature.

In prerogative writ matters, the record before the trial court is limited to that which was made below before the quasi-judicial body. Rivkin v. Dover Tp. Rent Leveling Bd., 277 N.J. Super. 559, 569 (App. Div. 1994) ("The trial court's review of the agency action is based on the record below"); see also, Pressler & Verniero, Current N.J. Court Rules, Comment 5.2 on R. 4:69-4 (GANN 2023); Cox & Koenig, New Jersey Zoning and Land Use Administration, 40-3.1, at p. 562 (GANN 2024). When parties to a prerogative

writ action are before the trial court, the record has already been made, and the court will not overturn the action of the municipal body or board, such as the HPC, unless the evidence **in the record** demonstrates it be arbitrary, capricious or unreasonable. Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin, 233 N.J. 546, 558 (2018); Cell South of New Jersey v. Zoning Bd. of Adjustment of West Windsor, 172 N.J. 75, 81-82 (2002); Wyzykowski v. Rizas, 132 N.J. 509, 518 (1993). The same is true in Cape May for appeals of the HPC made to the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(a). See Cape May City Code § 525-37(E)(5). ("The appeal shall be heard on the record made before the Historic Preservation Commission.")

For this reason, developers like Lokal must prepare their applications, plans, and testimony before quasi-judicial boards **in anticipation of litigation**, because in the event litigation is necessary, the record before the court is limited to the contents of those same applications, plans, and testimony. The hearing, for all intents and purposes, **is** the trial. Documents leading up to submission to the board, including those demanded in the City's Subpoena, are made in anticipation of litigation, and are protected from disclosure under the work product privilege. Therefore, the trial court's decision to deny Lokal's Quash Motion "in its entirety" should be reversed.

D. Summary Judgment Was Inappropriate in This Case Because the Parties' Respective Positions Depended on the Credibility of Witnesses (4T/16:17-30:7).

Under the Brill standard:

> [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 dispute issued 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 a genuine issue of material fact for trial." **Credibility determinations will continue to be made by a jury and not the judge.**

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (*emphasis added*)). In making its determination, the Court is required to accept as true "all the evidence which supports the position of the party defending against the motion and accord him the benefit of all inferences which can reasonably and legitimately be deduced therefrom." Sons of Thunder v. Borden, Inc., 148 N.J. 396, 415 (1997) (*citation omitted*). Furthermore:

> [T]he issue of material fact required … to be present to entitle a party to proceed to trial is **not** required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that

> sufficient evidence supporting the claimed dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Liberty Lobby, supra, 477 U.S. at 248-249 (*emphasis added*). "The **slightest doubt as to an issue of material fact must be reserved for the factfinder,** and precludes a grant of judgment as a matter of law." Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015) (*emphasis added*).

A motion for summary judgment must be denied when the determination of material disputed facts depends upon the credibility of witnesses. *See* Conrad v. Michelle & John, Inc., 394 N.J. Super. 1, 13 (App. Div. 2007) ("In the context of a summary judgment motion, the judge does not weigh the evidence, or resolve credibility disputes. These functions are uniquely and exclusively performed by a jury"). "Any issues of credibility must be left to the finder of fact." Akhtar v. JDN Props. at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015). This is so "even where a witness's testimony is uncontradicted … as long as, when considering testimony in the context of the record, persons of reason and fairness may entertain differing views as to [its] truth[.]" Id. (*internal quotation marks and citations omitted.*)

Indeed, "[a] case may present credibility issues requiring resolution by a trier of fact even though a party's allegations are uncontradicted." D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

> As Chief Justice Vanderbilt observed in Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 494 (1956), where men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury. Thus, a trier of fact is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it … contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. (*Internal quotation marks and citations omitted.*)

Id.

This case rests on the credibility of witnesses whose testimony directly contradicts one another in many respects. A determination as to the credibility of these witnesses must be left to the jury, thereby precluding summary judgment. In Respondents' "Statement of Undisputed Material Facts" alone, at least twelve (12) of the alleged "undisputed" facts rely solely on the deposition testimony and recollections of Crossland. (Aa542-Aa555 at ¶¶ 5-7, 11, 15-17, 28, 31-33 and 40). And not only was his testimony directly contradicted by Ludeman several times (all under oath), including during the January 6, 2020 hearing before the HPC and during Ludeman's deposition – Aa824-Aa840 at

¶¶ 9-11, 15-17, 31 and 40 – but Crossland's testimony was called into serious question by Lokal during his deposition. Id. at ¶¶ 7, 10-11, 15-17, 32, 33 and 40.

In addition to the twelve (12) alleged undisputed facts relying solely on Crossland's credibility, seven (7) of them rely solely on the deposition testimony and recollections of Hurless. (Aa542-Aa555 at ¶¶ 29, 36-39, 41-42). And once again, Hurless' testimony was directly contradicted by Ludeman in several instances. (Aa824-Aa840 at ¶¶ 36-39). Thus, at least nineteen (19) of the alleged "undisputed" material facts in the MSJ required a credibility evaluation of Crossland, Ludeman, and/or Hurless. New Jersey case law is clear that it is not for the judge, on motion for summary judgment, to assess the credibility of witness. Such action would constitute an "overstep" that "usurps the jury's task." Sons of Thunder, supra, 148 N.J. at 415. This alone should have precluded a finding of summary judgment in this case.

Yet, the trial court, both in deciding that Lokal had ratified the COA in its August 25, 2023 decision and in granting summary judgment, usurped the jury's task and seemingly decided that Ludeman was not credible, as the court relied heavily on items that would tend to undermine Ludeman's credibility, while ignoring those items that undermine Crossland, Hurless, Vito, and Coupland, finding that Lokal "cannot prove it reasonably relied on the

issuance of building permits as *de facto* HPC approval." As per the trial court, and contrary to Ludeman's testimony, "[i]t is undisputed that [Lokal's] representative was aware of the required HPC approval for the final design of the … Hotel." (Aa18). This "undisputed" conclusion flies in the face of Ludeman's very consistent, sworn testimony that Lokal was not at all aware of the 2018 COA until after that hearing, and the full extent of the details of the COA were not even known until after the hotel was built. Thus, what Lokal was aware of, or not aware of, was far from undisputed.

Furthermore, the trial court disregarded the plethora of evidence, including expert testimony, indicating that it was the City's failure to adhere to its own construction permit review process which led to the hotel being constructed to completion in (alleged) violation of the COA.

New Jersey courts are clear that when a case may rest upon expert testimony, "justice is best served by a plenary trial on the merits. A court should be particularly slow in granting summary judgment when a determination rests upon the opinion of an expert witness." Lee v. Travelers Ins. Companies, 241 N.J. Super. 293, 295 (Law Div. 1990) (citing Ruvolo v. American Cas. Co., 39 N.J. 490, 500 (1963)). In the case at bar, Lokal's expert, Steven N. Kline, AIA ("**Kline**"), rendered an opinion that Lokal reasonably relied upon the construction permits that were issued by the City in

proceeding with renovation of the Hotel. That opinion, like the credibility of Ludeman, Crossland, and Hurless, should have been considered by the finder of fact in determining Lokal's estoppel claim. It should not have been decided on summary judgment by the trial court.

A reasonable factfinder could certainly conclude that the City is equitably estopped from refusing to issue a Certificate of Occupancy ("CO") for the completed hotel. Lokal recognizes that equitable estoppel is rarely invoked against a governmental entity, particularly when estoppel would "interfere with essential governmental functions." Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954). Nonetheless, equitable considerations are relevant to assessing governmental conduct, Skulski v. Nolan, 68 N.J. 179, 198 (1975), and may be invoked to prevent manifest injustice, Vogt, supra, 14 N.J. at 205; see also Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 20 (2006). "Equitable estoppel may be invoked against a municipality where interests of justice, morality and common fairness clearly dictate that course ... [and] will be applied in the appropriate circumstances unless the application would prejudice essential governmental functions." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000).

The crux of the trial court's decision is that Lokal could not demonstrate "good faith" reliance on the issuance of the building permits. A reasonable factfinder could certainly conclude that Lokal reasonably relied on the building permits it received for the construction of the hotel under the circumstances presented.

There is an abundance of evidence here which points to the conclusion that the City's failure to abide by its own ordinance, and failure to halt construction before the errors here and noncompliance with the COA were identified, are the principal culprits behind the construction of the (allegedly) noncompliant Hotel; not, as the City contends, Lokal's alleged indifference to the existence of the COA. (Aa529-Aa539). Furthermore, the City's own employees and professionals consistently demonstrated an alarming lack of knowledge as to the requirements of the City's ordinance preceding issuance of a permit, yet the City has blamed Lokal at every turn.

The City's own regulations charge the City officials with the duty to properly review and ascertain compliance with the approved plans before issuing construction permits. Cape May City Code § 525-37(E)(8) explicitly states that once a Certificate of Appropriateness has been issued, the City's "administrative officer or his appointee **shall** … inspect the work approved by such certificate and shall regularly report to the Commission the results of

such inspections, listing all work inspected and reporting any work not in accordance with such certificate." (*Emphasis added*). Code § 525-34 defines the term "administrative officer" to mean "[t]he City Construction Code Official." However, per the Construction Official's own deposition testimony, he did **not** verify whether the plans submitted by Crossland complied with COA, stating "They weren't looked at by us." (Aa343 at 48:24-49:6). In fact, he testified later that prior to the creation of the Compliance Officer position in Cape May, "there was no one to do that." Id. at 49:11-15. According to Cape May's own ordinance, however, there was indeed someone to do that: the Construction Official. He simply failed to do so, in violation of Cape May's Zoning Ordinance. And as stated by Mr. Kline, in his report:

> If the inspections had been conducted properly, in accordance with Section 525-37(E)(8) of the Cape May Zoning Ordinance, the City, the contractor, and Lokal would have realized that the City had issued the building permits based on construction drawings that were not in compliance with [the] conditions of the [Certificate of Appropriateness].

(Aa532-Aa533). If the burden falls upon an applicant/developer like Lokal to ensure that the City approves the correct plans, as the trial court suggested, it begs the question as to why the Construction Official or Compliance Officer exist.

In addition, a number of factors indicated to Lokal, and a reasonable factfinder could reasonably infer, that it was Hurless who was responsible for ensuring the construction's compliance with the COA, and that he failed to do so. Despite claiming that it is not his responsibility due to his lack of expertise in matters of historic preservation, it was **Hurless** who, following Lokal's site plan approval in January of 2019, conducted periodic inspections of the property during construction. (Aa315-Aa330). It was **Hurless** who prepared several status reports indicating that "[t]he architectural plans must be revised to reflect HPC conditions of approval" until March 26, 2019, when **Hurless** indicated that "the architectural plans have been revised to reflect the HPC conditions of approval." (Aa33). Finally, in his letter dated December 11, 2019, it was **Hurless** who indicated that the portions of hotel, as built, allegedly did not comply with HPC Resolution No. 2018-24. (Aa101). In fact, during his deposition, Crossland (whose credibility Respondents relied on in support of their MSJ) testified that it was his understanding that, prior to the creation of the Compliance Officer position, "I think it was … on **Mr. Hurless** to do everything." (Aa423 at 47:17-20). (*Emphasis added.*) When Crossland submitted the "updated architectural plans for the Lokal Hotel Project" to the City for review and approval on or about March 20, 2019, he sent them to

Hurless, who failed to verify the plans' compliance with HPC Resolution No, 2018-24. (Aa865-Aa866).

In fact, there is evidence to suggest that what happened in this case (i.e., the construction of a building that [allegedly] does not comply with HPC approval) has happened a few times in Cape May, not just to Lokal, contrary to what Coupland testified to during his deposition. (Aa249 at 100:18-19). Specifically, on November 13, 2019, a month before Hurless' December 11, 2019 letter, an article came out in the Cape May Star and Wave stating that the HPC specifically requested that the compliance officer position be created because "projects approved by the HPC don't always end up following the regulations and conditions of the [HPC]." (Aa864). Apparently, enforcement had been an issue for "**a number of the construction projects throughout town**, as far as compliance, and being able to enforce HPC compliance." Id. (*Emphasis added.*) It was for this reason that the compliance officer position was created.

Once the City realized the error here, it then failed to prevent the work from continuing to completion, by failing to issue any stop work order. Vito testified that he is not legally permitted to halt construction under the UCC unless that is the case. (Aa359-Aa360 at 113:13-117:24). However, as noted in Kline's report, the City had the authority to issue a stop construction order,

and to seek injunctive relief in order to prevent further deviations, pursuant to Cape May City Code § 525-42 and N.J.A.C. 5:23-2.30. (Aa533-Aa534). The Compliance Officer also now has this authority. Coupland testified during his deposition that: "If [the compliance officer] visits a job site and its being built in nonconformance to an approved plan, he has the authority to stop, to red tag the project and stop [construction] until its remedied." (Aa242 at 70:22-71:18).

There is ample evidence, including the opinion of an expert witness, from which a factfinder could infer that Lokal reasonably relied upon the building permits issued in the construction of the hotel, and that the City is equitably estopped from refusing to issue a CO for the completed hotel as it stands today. This is especially true when viewed through the lens of summary judgment, which required the trial court to decide the MSJ based upon all the evidence which **supports** Lokal's position, and accord to Lokal the benefit of all inferences which can be deduced from that evidence. Had the trial court done this, the inevitable conclusion would have been to deny the MSJ, as a factfinder could absolutely conclude that Lokal reasonably and in good faith relied on the building permits it received for the construction of the Hotel. Accordingly, the trial court's decision to grant summary judgment should be reversed, and the matter remanded and relisted for trial.

IV. CONCLUSION

For the reasons set forth above, the decisions of the trial court: (i) denying and dismissing Lokal's prerogative writ claims; (ii) denying Lokal's Quash Motion; and (iii) granting the City and HPC's joint MSJ, should be reversed, and the matter should be remanded for trial.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: December 11, 2024

By: _____
Robert S. Baranowski

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
CONSOLIDATED APPEAL
DOCKET NO. A-003372-23
DOCKET NO. A-000234-24

LOKAL STOCKTON LLC, Plaintiff-Appellant, v. CITY OF CAPE MAY, CITY OF CAPE MAY HISTORIC PRESERVATION COMMISSION, and CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT, Defendants-Respondents.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY/LAW DIVISION DOCKET NO. CPM-L-120-22 Sat below: Honorable Michael J. Blee, A.J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT

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I. Preliminary Statement

Plaintiff Lokal Stockton LLC ("Lokal") raises two issues related to the Cape May Zoning Board of Adjustment (the "Zoning Board" or "Board").

First, in 2019, Lokal requested and received a variance for "back-out parking," which is when cars reverse out of a parking lot, over the sidewalk, and into the street. This is rarely permitted at commercial properties in Cape May, and is generally eliminated if at all possible. While it was permitted in this instance, the Planning Board required the parking surface to be constructed with pavers or asphalt. Lokal wanted clamshells. The Board and its professionals said "no." The local members and professionals, knowledgeable of local conditions, knew clamshells would inevitably spread onto the sidewalk, posing a significant hazard for pedestrians and creating an eyesore that would negatively impact the aesthetics of the community. Lokal never appealed the Planning Board's decision, but installed clamshells anyway.

This issue resurfaced in 2022 before the Cape May Historic Preservation Commission ("HPC"), when Lokal hoped another board might disregard or forget the Planning Board's clear rejection of its first clamshell request. The HPC again told Lokal "no clamshells" (as if the previous ruling was a mere suggestion). Only this time, when the HPC said "no," Lokal appealed to the Zoning Board, which affirmed the HPC. This later application is now on appeal,

but Lokal failed to appeal the first two instances where it was told "no clamshells" in 2019.

From the perspective of the Zoning Board, the clamshells should be removed, and pavers installed, immediately. The clamshells are a hazard and a violation of a condition under which Lokal has utilized back-out parking for five years, and it is offensive and inequitable that the Board must address this issue on appeal five years after its initial determination. There is no law or equitable principal which supports a stay with regard to the clamshell parking lot, and in fact, the law, facts and public safety demand that Lokal install the pavers they were required to install, and said they would install, FIVE years ago. For these reasons, the trial court correctly determined a further stay of enforcement in this respect was not warranted.

Second, Lokal challenges the Zoning Board's decision affirming the HPC's denial of a Certificate of Appropriateness ("COA") for Lokal's hotel "as built" rather than as it was approved to be built.

Zoning Boards have no particular expertise in historic architecture. Absent historic site designations and the adoption of a Historic Preservation Commission in accordance with the Cape May Zoning Ordinance, the Cape May Zoning Board and Zoning Code would not regulate the style of houses, or features such as railing style, constructed within the municipality. Therefore, it

cannot come as a surprise, and cannot violate the law, for the Zoning Board to (1) refer expert testimony related to appropriate design in the Cape May historic district to the HPC for review; and, (2) defer to the HPC's statutorily recognized expertise in determining whether it committed an "error" on a determination of historic architecture and design.

The trial court correctly affirmed the Board's process and decision in this respect, because both conformed with and represented precisely what the MLUL contemplates and what the Cape May Ordinance requires.

II. Counterstatement of Facts and Procedural History

Plaintiff Lokal owns the property located at 5 Stockton Place, within Cape May's historic district. (25a)[1]. In October 2022, Lokal's application came before the Cape May Zoning Board on appeal from the HPC's denial of a Certificate of Appropriateness ("COA") for Lokal's newly remodeled hotel. (106a).

In the preceding years, Lokal had transformed a former apartment house in Cape May's historic district into a modern hotel. (51a-58a). Lokal appeared before the HPC in May 2018 for "conceptual" approval, in August 2018 for "final" approval, and in January 2020 for "as built" approval (166a). The HPC

[1] Citations to the record utilizing a single "a" refer to the page numbers of Plaintiff's appendix volumes 1 through 6 filed under Appellate Docket Number A-3372-23.

engaged in "conceptual" and "final" approval with Lokal's owners and professionals, but denied "as built" approval, finding the final project, which varied from the "final" approval in several aspects, did not meet the standards and criteria required for the historic district. (102a-104a; Compare).

One of the variations from "final approval" was Lokal's clamshell parking lot. In February 2019, the Planning Board approved the parties' consensus to install semi-permeable pavers in front of the hotel and pavers in its parking lot. (621a-622a). Instead, Lokal installed a clamshell parking lot. (31aa-35aa)[2]. When Lokal returned to the Planning Board in August 2019 for a variance for the clamshells, its application was denied in an 8-1 vote. (628a-632a). The Planning Board Resolution provides Board Engineer Craig Hurless' explanation of why clamshells are not safe or appropriate:

> [Mr. Hurless] indicated the prior Resolution was very clear, as was his position in the first hearing that asphalt is required, that if asphalt was not to be installed it was to be semipermeable pavers, and this was specifically referenced in the Resolution as a condition. He said stone and clamshells are only permitted for two-family units. Backup parking in this instance the clamshells and the commercial establishment are viewed more critically because there is backout parking directly onto the sidewalk so that you have turning motions immediately adjacent to the sidewalk that brings shells onto the sidewalk and the track from the effectiveness

[2] Citations to the record utilizing "aa" refer to the page numbers of Plaintiff's appendix volumes 1 and 2 filed under Appellate Docket Number A-234-24.

> to any precautions pertaining to clamshells. He believes it does not promote public health and safety, but rather creates a potential safety hazard in this instance. Clamshells are sometimes permitted, but this generally involves a driveway where there is an apron and a tracking pad to reduce the shells of entering the sidewalk. Although there was some discussion regarding a tracking pad mitigating this issue, Mr. Hurless responded that there is not enough room for the tracking pad to work effectively and that it is not an appropriate solution to this problem. There was then a Motion to grant the variance as requested to allow the clamshells instead of the pavers. (631a).

Lokal did not appeal this decision to the Zoning Board. Of course, Lokal disregarded the Planning Board's ruling and Resolution, left the clamshells in place and hoped the HPC would approve them, or that the Zoning Board would somehow "overrule" the Planning Board and HPC, which did not work.

In January 2020, Lokal applied to the HPC for a COA "as built," which was denied. (102a-106a). On October 27, 2022, Lokal appeared before the Zoning Board to appeal the HPC's denial of "as built" approval. (106a). The only issues before the Board were (1) whether the HPC could provide supplemental expert testimony at the Zoning Board hearing, and (2) whether the HPC's denial of Lokal's 2020 application was arbitrary, capricious or unreasonable. (167a-168a). Following Cape May's Ordinance, the Board first determined it would base its review on the HPC's record, without supplemental expert testimony that was neither presented to nor considered by the HPC

members who have expertise in historic architecture and design standards. (167a). The Board ultimately found the HPC rejection of Lokal's January 2020 application was not arbitrary, capricious or unreasonable. (168a-169a). The Board noted its deference to the HPC on issues raised in the January 2020 hearing, such as the style of railings and steps, construction methods and historical periods Cape May aims to preserve. (168a). The Board concluded the HPC was within its discretion to reject Lokal's expert testimony on those issues. (169a).

Lokal had previously filed a Complaint in Lieu of Prerogative Writs to compel the City to reissue a temporary Certificate of Occupancy ("TCO") and issue a final Certificate of Occupancy ("CO") so it could continue operating despite denial of as built approval by the HPC. (135a). Following the Board's denial of its HPC appeal, Lokal filed an Amended Complaint in Lieu of Prerogative Writs joining the Zoning Board as a defendant. (173a). The Amended Complaint challenges (1) the HPC's 2020 denial of its request for as-built approval; (2) the validity of Cape May City Code § 525-37E governing appeals from official determinations following referral to the HPC; (3) the Board's review process; and (4) the Board's decision. (189a-214a).

The trial court bifurcated Lokal's prerogative writ and legal claims. (868a). Following briefing and argument, on August 25, 2023, the trial court

denied Lokal's prerogative writ claims in their entirety. (875a-882a). Lokal's first appeal of this consolidated appeal followed.

Following discovery, the City and HPC moved for summary judgment on Lokal's remaining claims and release of preliminary restraints against enforcement, which the trial court granted on June 26, 2024. (9a-10a). Lokal then filed its second appeal and moved for a stay of enforcement. (16aa). The City and HPC filed a cross-motion to enforce the trial court's order (24aa), and the Zoning Board filed a cross-motion to enforce conditions specific to the parking lot (26aa). The trial court granted Lokal's stay for a limited duration through December 3, 2024, and granted the City, HPC and Board's cross-motions, effective the same date. (8aa).

The following sections address Lokal's arguments that trial court erred in granting the Board's cross-motion to Enforce Litigant's Rights and erred in upholding the Board's decision to affirm the HPC's determination as to final approval on appeal, which are the only issues raised in Lokal's appeal with respect to the Zoning Board.

III. Legal Argument

A. Standard of Review for Injunctive Relief (T2, 8:25-10:2)[3]

Applications for stays in civil matters are governed by the standard set out in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).

> When seeking the equitable relief of a stay pending appeal of a judgment, a movant must demonstrate that: (1) irreparable harm will result from enforcement of the judgment pending appeal; (2) the appeal presents a meritorious issue, and movant has a likelihood of success on the merits; and (3) assessment of the relative hardship to the parties reveals that greater harm would occur if a stay is not granted than if it were.
>
> [McNeil v. Legislative Apportionment Comm'n of N.J., 176 N.J. 484, 486 (2003) (citing Crowe, 90 N.J. at 132-34).]

The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). In evaluating an application for a stay, the reviewing court, "in essence considers the soundness of the trial court's ruling and the effect of a stay on the parties and the public." Ibid. (citing Crowe, 90 N.J. at 126).

[3] T1 refers to the Transcript of Oral Argument dated August 2, 2024; T2 refers to the Decision on Motion Hearing dated August 9, 2024.

B. The Trial Court Correctly Applied the Crowe Standard in Declining to Grant Injunctive Relief (T2, 10:9-15:20)

As for the first Crowe factors, the trial court correctly determined Lokal's claim of monetary damages and reputational harm was speculative and did not meet the definition of irreparable harm. See McNeil, 176 N.J. at 486 (finding harm is not irreparable if it can be remedied with monetary relief). (T2, 15:6-12). The Board also pointed out, any irreparable harm related to the clamshells would actually be inflicted upon the hundreds or thousands of people who pass by Lokal's location, often barefoot, on their way to the beach. (31aa-35aa).

Second, the trial court correctly decided Lokal could not prove a likelihood of success on the merits in light of its finding that Lokal knew or should have known of the HPC approvals. (T2:7:17-20). With respect to the clamshells in particular, Lokal should have no likelihood of success because it failed to appeal the Planning Board's 2019 decision requiring installation of pavers. (628a-632a).

Finally, the trial court correctly found that balancing the equities favored enforcement where Lokal was essentially asking the court to allow it to benefit from its own wrongdoing at the expense of the City and its historic district. (T2, 7:21-24). The equities also favor removing the clamshells, in light of two prior Resolutions requiring pavers which were not appealed, and Lokal's continued use of a parking variance for which the pavers were a condition. (621a-632a).

C. Standard of Review for Prerogative Writ Claims (873a-875a)

General principles of reviewing land use decisions are well-settled. The court must review the record to determine whether a land use board's findings are based on "substantial evidence" or whether its discretionary decisions are "arbitrary, capricious and unreasonable." Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296-97 (1965); see also Ferraro v. Zoning Bd. of Keansburg, 321 N.J. Super. 288 (App. Div. 1999). Reviewing courts generally defer to the judgment of the local board members, "who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people [and] are undoubtedly best equipped to pass initially on such applications." Lang v. Zoning Bd. of Adj. of North Caldwell, 160 N.J. 41, 58 (1999) (quoting Kramer, 45 N.J. at 296).

Local zoning boards "must be allowed wide latitude in the exercise of delegated discretion." Ibid. (citing Kramer, 45 N.J. at 296-97). Thus, "there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." Kramer, 45 N.J. at 297 (citing Ward v. Scott, 11 N.J. 117 (1952)); see also Simeone v. Zoning Bd. of Adj. of East Hanover, 377 N.J. Super. 417, 426 (App. Div. 2005). Courts presume that local land use agencies properly followed the law, investing their decisions with an imprimatur of validity, Toll Bros., Inc. v. Bd. of Chosen Freeholders of

Burlington, 194 N.J. 223, 256 (2008), and will overturn their findings only in the clearest of cases. Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 597 (2005).

Applying these standards, this Court should affirm the trial court's decision upholding the decision and process of the Board.

D. The Zoning Board's Decision to Uphold the HPC's Determination Was Rational and Record Based (878a-881a)

To the extent Lokal argues, in one sentence of its brief, that the Zoning Board's denial of Lokal's HPC appeal should be overturned, its position is wrong both as a matter of law and a matter of fact. The Board did not act in an arbitrary, capricious or unreasonable manner in denying Lokal's appeal where its decision was based upon the record, within the applicable legal standard and process, and made with appropriate discretion to the HPC's determination.

1. Role of the Historic Preservation Commission (878a-880a)

"A zoning ordinance must conform to MLUL requirements and further MLUL goals." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 253 (2015). Promotion and conservation of historic sites and districts is an express purpose of the MLUL. N.J.S.A. § 40:55D-2. The MLUL therefore provides mechanisms for a zoning ordinance to designate and regulate historic sites or historic districts and provide design criteria therefor. N.J.S.A. § 40:55D-65.1. The MLUL also

authorizes establishment of an historic preservation commission with recommendatory, advisory and reporting powers. N.J.S.A. § 40:55D-107-112.

The City of Cape May has established a "strong commission" pursuant to N.J.S.A. § 40:55D-111, which provides, in part:

> If the zoning ordinance designates and regulates historic sites or districts pursuant to subsection i. of section 52 of P.L.1975, c.291 (C.40:55D-65), the governing body **shall** by ordinance provide for referral of applications for issuance of permits pertaining to historic sites or property in historic districts **to the historic preservation commission** for a written report on the application of the zoning ordinance provisions concerning historic preservation to any of those aspects of the change proposed, **which aspects were not determined by approval of an application for development by a municipal agency pursuant to the "Municipal Land Use Law,"** P.L.1975, c.291 (C.40:55D-1 et seq.).
>
> (emphasis added).

Applications for exterior construction within Cape May's historic district are referred to the HPC, which issues a COA if it "finds the permit application appropriate to the historic district or site and in conformity with the design guidelines." Cape May City Code § 525-37.E(2)-(3). The Cape May Zoning Ordinance provides the standards and criteria used by the HPC to evaluate elements such as site, design, details, shape, material, finish, color, streetscape and compatibility with the historic district, which are outside the Zoning Board's expertise and purview. Cape May City Code § 525-39.B.

Consistent with the MLUL, the Cape May Ordinance provides the HPC, not the Board, must first consider historical preservation and design issues. Applications flow through the HPC, and the Board's role on appeal is to determine if an "error" was made by the HPC. Cape May City Code § 525-37.E(5). Absent this statutory framework, alteration of the appearance of a structure's exterior would not involve zoning at all. The type of railings used, materials installed, shape of steps, or even overall style of a home is not an independently regulated zoning activity (but of course could be considered a factor in a variance application, as historic preservation is a general purpose of zoning).

Unlike the Board, HPC members must have a combination of knowledge of building design and construction, architectural history and a demonstrated interest in local history. Cape May City Code § 525-35.B(1); N.J.S.A. § 40:55D-107. HPC determinations are considered "expert" recommendations, and the Board treats them as such. See Cox & Koenig, New Jersey Zoning & Land Use Administration § 4-1.4; 4-1.6 (2024).

Because of its expertise, Cape May's Ordinance requires the HPC to hear applications before they come before the Board, and in the case of an appeal, the HPC record transfers to the Board. The HPC was designed to understand specific issues of local historic significance, so it only makes sense for an

applicant to make their entire argument before the HPC, rather than the Board, and for the Board to review appeals on the record before the HPC.

2. Role and Decision of the Zoning Board (880a-881a)

Lokal's application first came before the Zoning Board in October 2022 following the HPC's denial of "as built" approval of Lokal's newly constructed hotel. (166a). Appeals from HPC determinations are heard by the Zoning Board, and the question for the Board is not whether it disagrees with the HPC, but whether the HPC committed an error. The City Code section governing this process seeks to give meaning and import to the HPC's role, and clearly defines an "error" in the context of HPC appeals:

> Appeals from determinations of the Construction Official pursuant to referral to the Historic Preservation Commission may be made by the applicant to the Zoning Board of Adjustment, according to N.J.S.A. 40:5D-70(a). Nothing herein shall be deemed to limit the right of judicial review of the action after an appeal is concluded by the Zoning Board of Adjustment. The appellant shall pay all costs for copies of any transcript(s), which shall be a certified court reporter. **The appeal shall be heard on the record made before the Historic Preservation Commission**. **A determination by the Historic Preservation Commission on issues within its authority shall be entitled to due deference.** If, in the case of an appeal made pursuant to this subsection, the Zoning Board of Adjustment determines there is an error in any order, requirement, decision or refusal made by the Construction Official pursuant to a certificate or denial of a certificate submitted by the Historic Preservation Commission in accordance with N.J.S.A. 40:55D-111, the Zoning Board of Adjustment shall, in writing, include the reasons for its determination in the findings of its decision thereon. **The determination of the Historic Preservation Commission may be overturned only if the Zoning Board of Adjustment finds that**

> **the Historic Preservation Commission determination was arbitrary, capricious, unreasonable, or contrary to law.**
>
> [Cape May City Code § 525-37.E(5) (emphasis added).]

This language directs the Board to defer to the HPC's expertise on issues of design, style, materials and historic periods, which the Board is not otherwise authorized to decide.

The purpose and intent of the Ordinance is "to recognize the expertise and qualifications of the HPC, and to make sure testimony and information pertaining to historical matters is first vetted and considered by the HPC so that it may apply its expertise." (167a). The Board therefore decided it was inappropriate to hear new expert testimony on appeal because, the "purpose of the entire structure of the Ordinance, and of the processes related to historical preservation in Cape May, will be thwarted and usurped if an applicant can present new testimony on appeal that has not previously been considered by the HPC[,]" which is uniquely designed to understand and evaluate such information. (167a).

Based on the language of the MLUL, which specifically requires HPC members to have historical expertise, it would be fair to argue that the Board's failure to grant substantial deference to HPC determinations would contravene the MLUL. N.J.S.A. § 40:55D-107. If a Board could simply disregard HPC expertise and make its own decision about railings, siding materials and shapes

of windows, then the entire MLUL scheme would be defeated, the experts on the HPC would be wasting their time and the requirement that they be on the HPC would be a total farce.

Nevertheless, in this case, the Board ultimately agreed with the HPC that Lokal's proposal was not consistent with HPC guidelines or the character and intent of the historical preservation efforts of the City. The Board also believed the HPC acted within its discretion in rejecting aspects of Lokal's expert testimony and relying on its members' expertise, especially as to features the Board does not generally decide, such as the style of railings, similarity of steps to prior construction methods and the historical periods Cape May aims to preserve and reflect in its architecture. (168a). This was not a cursory, "rubber stamp" process, but a process designed and implemented to achieve a proper legislative goal, undertaken in a manner reasonably related to that goal.

For these reasons, the Cape May Ordinance does not contravene the intent of the MLUL, the Zoning Board applied the correct standard and process, and the trial court correctly affirmed the HPC and the Board in denying Lokal's request for "as built" approval.

IV. Conclusion

For these reasons, Defendant-Respondent Cape May Zoning Board of Adjustment respectfully requests that the Court deny Lokal's appeal and affirm the trial court, HPC and the Board's decisions in this matter.

Respectfully submitted,
KINGBARNES
Attorneys for Defendant-Respondent,
City of Cape May Zoning Board of Adjustment

By: *s/ Richard M. King, Jr.*
Richard M. King, Jr., Esquire

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-003372-23 & DOCKET NO. A-000234-24

ON APPEAL FROM ORDER AND FINAL DECISION SIGNED AND SERVED TO PARTIES ON JUNE 26, 2024 IN DOCKET NO. CPM-L-120-22 SUPERIOR COURT OF NEW JERSEY, CAPE MAY COUNTY, LAW DIVISION

SAT BELOW:
THE HONORABLE MICHAEL J. BLEE, A.J.S.C.

LOKAL STOCKTON, LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF CAPE MAY, CITY OF CAPE MAY HISTORIC PRESERVATION COMMISSION, AND CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENTS.

BRIEF OF DEFENDANT-RESPONDENTS, CITY OF CAPE MAY & CITY OF CAPE MAY HISTORIC PRESERVATION COMMISSION

SUBMITTED FEBRUARY 10, 2025

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I. PRELIMINARY STATEMENT

This is a case where the developer and operator of a hotel (Lokal) in the Historic District of the City of Cape May received local land use approvals in 2018 containing various conditions for the protection of the local historic district and public safety, and then constructed a building that does not comply with those requirements.

In 2020, the City of Cape May Historic Preservation Commission (HPC) considered the appropriateness of the as-built conditions deviating from these approvals and properly rejected them as being inconsistent with the standards for a contributing structure in the historic district. The City's Zoning Board of Adjustment (ZB) ultimately reviewed the HPC's decision and affirmed.

Lokal filed an action disputing the validity of various conditions on their development set forth in City approvals and designed for the protection of the Historic District. Lokal filed an action (1) challenging the decisions by the Historic Preservation Commission (HPC) regarding its proposed development; (2) challenging the decision by the Zoning Board affirming the HPC's decisions; (3) challenging the validity of the City's ordinances setting forth the process for HPC review; and (4) asserting that the City was estopped from enforcing these decisions and ordinances.

On August 25, 2023 the trial court entered an order dismissing Lokal's claims and affirmed the validity of the land use board decisions and the City ordinances. The trial court bifurcated consideration of the remaining Counts pertaining to Lokal's claims for estoppel, laches, declaratory judgment, and the continuation of Lokal's preliminary relief requiring the continued issuance of TCOs while the litigation and discovery continued to proceed (the City consented to the continued issuance of TCOs while the balance of the case was ordered to play out and without prejudice to its arguments on the merits).

Discovery proceeded on the remaining claims. In support of the equitable claims, Lokal claimed that the 2018 HPC approval was the result of their architect going "rogue" and that he agreed to various conditions without Lokal's consent or awareness. Lokal continued to pursue this argument, despite the undisputed fact that this same architect appeared alongside Lokal's principals at the Planning Board hearing shortly after the HPC approval, was presented as a witness to explain the prior HPC approval, and the 2018 HPC Resolution was incorporated as part of the record of the Planning Board decision. *But for* the 2018 HPC approval and the Planning Board approval that followed, Lokal would not have been able to obtain a construction permit to proceed with reconstruction of the site. Accordingly, the City sought discovery relevant to Lokal's claim of the architect going "rogue" and information relating to Lokal's awareness and consent to

approvals from the former architect. Lokal moved to quash those efforts. The trial court rejected the motion and order discovery be produced.

The City obtained documents and deposed the architect who confirmed under oath that Lokal was consulted both before and after the HPC approval. However, it was Lokal themselves who ultimately eliminated any genuine issue of material fact as to the remaining equitable claims when they admitted they were advised of the HPC approval before construction. Lokal explained that they had no knowledge of the *specific* conditions because they did not bother to look through the resolution before proceeding with construction.

Discovery concluded and the City and HPC moved for summary judgment. The Court correctly found there was no genuine issue that Lokal knew about the HPC approval prior to construction and at the very least should have known of its conditions and could not have reasonably relied on any conduct by the City in pursuing its as-built conditions which are noncompliant.

On June 26, 2024, the trial court granted the City and HPC's joint motion for summary judgment, dismissing all remaining counts of Lokal's Amended Verified Complaint with prejudice. As part of that dismissal, the trial court dissolved the requirement that the City continue to renew Lokal's TCO. For the reasons stated in detail by the Trial Court, and those that follow, the Court should affirm the orders and decisions made by the Trial Court in this matter.

II. PROCEDURAL HISTORY.

On April 8, 2022, Lokal filed a Verified Complaint and request for an Order to Show Cause to grant a preliminary injunction compelling reissuance of TCOs and restraining the City from enforcement during the TCO issuance period. (135a). On April 26, 2022, both the City of Cape May and the Historic Preservation Commission filed Answers with Affirmative Defenses. (163a).

On May 26, 2022, the Trial Court issued an Order granting injunctive relief *pendente lite* requested by Lokal but requiring that they exhaust administrative remedies by pursuing an appeal of the 2020 HPC denial of as-built conditions to the Zoning Board of Adjustment. (163a). On October 27, 2022, the Zoning Board heard Lokal's appeal and denied for record-based reasons. (166a).

On February 3, 2023, the Court issued an Order granting Lokal's motion to amend their complaint to add the Zoning Board as a party to the litigation following their denial of Lokal's appeal. (173a). On February 7, 2023, Lokal filed an amended complaint. Id. On February 21, 2023, the HPC filed an answer to the amended complaint. (11a). On February 24, 2023, the City filed an answer to the amended complaint. Id. On April 17, 2023, the Zoning Board filed an answer to the amended complaint. Id.

On August 25, 2023, the Trial Court entered an order denying Counts One, Two, Five, Seven, Nine, Ten, and Eleven of Lokal's complaint. (12a). The Court

found that Lokal had ratified the 2018 HPC approval by their conduct, that the decision making by both the HPC and Zoning Board was lawful and record based, and that the City's ordinance setting forth the procedure for review of HPC decisions by the Zoning Board was lawful and consistent with the Municipal Land Use Law. Id. The Court bifurcated Counts Three (Estoppel), Four (Laches), Six (Preliminary Injunction) and Eight (Declaratory Judgment) and set forth case management dates for discovery on the remaining counts. Id.

Thereafter, on November 27, 2023, the City subpoenaed records of Lokal's former project architect who Lokal asserted went "rogue". (218a). On November 29, 2023, Lokal filed a Motion to Quash the Subpoena Duces Tecum. (222a). On December 19, 2023, the Court denied the Motion to Quash and ordered production. (8a).

On May 7, 2024, the City and HPC filed a Motion for Summary Judgment following the end of discovery. (9a). On June 26, 2024, the Court granted the City and HPC's motion for summary judgment as to Lokal's remaining counts and rescinded the prior order imposing preliminary restraints. Id. On July 1, 2024, Lokal filed a notice of appeal. (1a).

III. STATEMENT OF FACTS

In early 2018, plaintiff Lokal acquired property in the City of Cape May known as 5-9 Stockton Place, Cape May, New Jersey 08204 (the property) and commenced plans to renovate the property and convert it to a boutique hotel. (485a).

The City of Cape May is designated as a National Historic Landmark. (127a). The City also has a local historic district which requires development projects to be reviewed and approved by the Historic Preservation Commission (HPC). (75a). Lokal's property is situated near Beach Avenue in Cape May in a prominent location within the City's Historic District. (485a).

Prior to purchasing, Lokal asserts they reviewed and read every code in the City and including the requirements of the HPC. (194a). Lokal understood they needed separate approvals from the HPC and planning board before they could start construction. (486a). Lokal understood the property was rated as "contributing" to the historic district. (490a).

On August 20, 2018, the Cape May City Historic Preservation Commission (HPC) considered Lokal's application for the property. (29a). Lokal's project architect appeared in support of the application to raise and renovate an existing apartment building. (29a). The application was verbally approved after the applicant addressed concerns from the HPC and including conditions for issuance

of Certificate of Appropriateness. Id. On September 17, 2018, the HPC memorialized a Resolution (Resolution No. 2018-24) incorporating reasons for their decision which included various conditions including the rail detail, stair design, metal roof, foundation materials, pavers, and wood fencing. Id.

On November 28, 2018, Lokal submitted their application for preliminary and final site plan approval to the Planning Board with associated variances. (562a). On January 8, 2019, Lokal's application was heard by the Planning Board at its regular meeting. Id. Lokal was represented by counsel at the hearing. (616a). The Planning Board reviewed HPC Resolution No. 2018-24 as part of the application. Id. Lokal's project architect appeared at the Planning Board hearing and testified as an expert architect project designer on behalf of the plaintiff. Id. He described the renovations and indicated the HPC approved the revised design. Id. Both Chad Ludeman and Courtney Ludeman (the principals of Lokal) appeared and testified at the Planning Board hearing alongside their project architect. Id. Lokal obtained planning board approval which incorporated the 2018 HPC Resolution as part of the record.

On February 26, 2019, the Planning Board adopted Resolution No. 02-26-2019:1, which included the following conditions: "All swimming pools shall be enclosed by a fence required by state law and shall comply with the requirements of the Historic Preservation Commission, as applicable, and the guidelines adopted

pursuant to Article VIII of this chapter" and "This project is located within the Historic District. Historic Preservation Commission approval will be required". Id.

Following the Planning Board approval, Lokal communicated with the Planning Board Engineer Craig Hurless regarding the conditions of Planning Board approval. (423a). Lokal understood that Hurless oversees Planning and Zoning Board applications and does not work for the HPC and "has nothing to do with the HPC". (423a).

On March 21, 2019 Hurless emailed Lokal following Planning Board approval asking Lokal to confirm whether the final plans submitted are consistent with HPC approval. (423a). Lokal received and acknowledged this communication in March of 2019 before they broke ground on the project. Id.

During construction, and in addition to the UCC building inspections, Hurless conducted periodic inspections of the site in relation to the site plan approval and retained notes from his inspections. (775a). From April to July of 2019, Hurless noted various site conditions that were potentially out of compliance. Id. On July 19, 2019, Hurless conducted a follow up inspection and met with Lokal's general contractor at the site. (760a). Hurless advised of non-compliant site plan issues and the contractor advised "he was doing what owner wanted." Id. Hurless specifically noted the clamshells as noncompliant material based on the site plan approval

requiring pavers for safety reasons and the applicant indicated they would seek a variance and an amended site plan approval. Id.

Notwithstanding outstanding compliance items, Hurless indicated he would compile a punch list for safety items for purposes of pursuing the TCO and allowing Lokal to obtain some use of the building during the summer season. Id. On July 24, 2019, Hurless wrote to the Construction Official noting various unresolved compliance issues but indicating he saw no problem with the issuance of a temporary certificate of occupancy. (806a). On July 26, 2019, the Construction Official issued a Temporary Certificate of Occupancy (TCO). (848a).

On August 13, 2019, Lokal returned to the Planning Board for an application to amend their site plan indicating that the property is open and operating with several deviations from what was approved including the clam shell driveway instead of approved pavers. (628a). On September 10, 2019, the Planning Board memorialized their decision to deny plaintiff's application to amend their site plan in Resolution No. 09-10-2019:1 citing safety considerations and Lokal did not appeal the Planning Board's decision to deny the as-built clamshell driveway surface. Id.

On January 6, 2020, Lokal returned to the HPC with an application to approve certain as-built conditions including railing detail, front steps, breeze block partitions, parking lot pavers, wooden fences and roofing material that did not

conform to their 2018 approval. (102a). Lokal asserted that their project architect went "rogue" and they were unaware of the approval. Id. The HPC considered the appropriateness of the as-built conditions under their standards and denied the application after hearing. Id.

Later at deposition, Lokal admitted they were advised of the HPC approval, but asserted they had no knowledge of the specific conditions because they did not bother to look through the resolution before proceeding with construction. (497a).

Lokal continued to operate under a TCO without any plan or proposal to resolve outstanding compliance issues. (848a-856a). On February 17, 2022, the City's HPC Compliance Officer wrote to plaintiff detailing their efforts to meet and discuss outstanding compliance issues and including an itemization of items to be addressed. (127a). On April 8, 2022, Lokal filed their Verified Complaint. (135a).

IV. ARGUMENT

A. The Trial Court correctly found that Lokal ratified the 2018 HPC approval by their conduct and relied on its existence to advance the project. (6a; (August 25, 2023)).

The standard of review of a trial court's grant or denial of a motion for summary judgment is de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk.

Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

To defeat a motion for summary judgment, the opponent must come forward with evidence that creates a genuine issue of material fact. Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014). Conclusory and self-serving assertions by one of the parties are insufficient to overcome the motion. Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

Ratification is the "affirmance by a person or a prior act which did not bind him but which was done or professedly done on his request, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 361 (1976). Ratification may be express or implied, the intent may be inferred from conduct on the part of the of the principal which is inconsistent with any other position than intent to adopt the act. Id. Ratification may be demonstrated by "acts, words, or conduct on the part of the principal, which reasonably tend to show an intention to ratify the unauthorized acts…" Ratajczak v. Bd. of Educ., 114 N.J.L. 577, 581 (E.& A. 1935). Ratification is equivalent to an original grant of power and relates back to the date of the original action. Grimes v. City of East Orange, 288 N.J. Super. 275, 281 (App. Div. 1996).

Here, Lokal claims their architect went "rogue" and were blindsided by the HPC approval. The trial court correctly considered the undisputed facts in the record including that shortly after receiving the 2018 HPC approval, Lokal prepared and presented an application to the Planning Board that included the 2018 HPC Resolution as an exhibit in the record and the "rogue" architect appearing in person as a witness alongside Lokal to testify as to the nature and existence of the HPC approval. (616a).

The trial court also correctly found that Lokal's *subjective* claim that they were unaware of the 2018 HPC approval conflicts with the fact that it was used to their benefit in the subsequent Planning Board application - where they personally appeared with their "rogue" architect in tow. In other words, even if they were arguably unaware of the HPC approval in September of 2018 at the time it was granted, Lokal's ability to deny awareness ends *at the latest* when they offered that same approval as evidence to the Planning Board only a few months later, and this sequence of events all took place before Lokal was able to commence reconstruction of the new building.

Because Lokal cannot refute these material facts and offered only self-serving assertions in response, the trial court correctly found that Lokal ratified the approval by their conduct.

In addition to ratification, the Court may also apply judicial estoppel to these facts. The doctrine of judicial estoppel prevents a party from arguing contradictory positions in different actions. See Kimball Intern., Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div. 2000). Its purpose is to protect the integrity of the judicial process by preventing a party from abusing it through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment. Id. (quoting Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996); See also, Levin v. Robinson, Wayne & La Sala, 246 N.J. Super. 167, 195 (Law Div. 1990). In other words, this doctrine recognizes the basic principle that a party cannot "have its cake and eat it too." See Levin, 246 N.J. Super at 179 (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1975).

The doctrine extends not just to sworn statements but to attorney representations in documents submitted to advance a particular position. See Levin, 246 N.J. Super at 179; Lewandowski v. National R.R. Passenger Corp., 882 F.2d 815, 818-19 (3d Cir.1989). New Jersey courts have adopted and consistently applied the principle of judicial estoppel. See Tabloid Lithographers, Inc. v. Israel, 87 N.J. Super. 358, 365 (Law Div. 1965) (plaintiff could not present evidence contradicting his prior affidavit: "If one

statement is true, the other cannot be"); In re Perrone, 5 N.J. 514, 527 (1950) (husband's representation to court that deposits in account belonged originally to him rather than to wife worked a judicial estoppel to new claim as to survivorship interest in deposits: a party "cannot be heard ... to contend for two diametrically opposed" positions); See also, Stretch v. Watson, 6 N.J. Super. 456, 469, (Ch. Div. 1949), aff'd in part, rev'd in part on other grounds, 5 N.J. 268 (1950).

A party will not be permitted to play fast and loose with the judicial process nor to assume a position in one setting entirely different or inconsistent with that taken by him in another proceeding with reference to the same subject matter. Koppel v. Olaf Realty Corp., 56 N.J. Super. 109, 121, 151 A.2d 577 (Ch. Div. 1959), aff'd. 62 N.J. Super. 103 (App. Div. 1960).

Here, for the same reasons the trial court found ratification, Lokal should be judicially estopped from both using the 2018 HPC Resolution as evidence in support of its Planning Board application and later disavowing its contents and validity because it chose to forge ahead and build beyond its limits. Lokal continues to fail to provide any rational explanation for the above undisputed facts that would have allowed the trial court to make a different finding. Accordingly, the Court should affirm the trial court’s decision on this issue.

B. The Trial Court correctly affirmed the rational and record-based decisions of the HPC denying Lokal's non-compliant as-built conditions and Cape May City Zoning Board of Adjustment's refusal to overturn that decision. (6a; (August 25, 2023)).

The City and HPC hereby adopts and incorporates the Zoning Board's arguments and conclusions for affirming the denial of Lokal's 2020 application as set forth in their Brief. The City and HPC offer the following additional support for the trial court's decision affirming these decisions.

Lokal's premise for invalidating the HPC's 2020 denial is the HPC's supposed inability to look beyond the 2018 approval and evaluate alternatives that may satisfy the standards of the historic district. The record of the 2020 HPC proceeding reflects the opposite: Lokal was unable to envision or propose anything other than their as-built conditions which did not conform to the standards for the historic district and *despite being invited to do so by the HPC prior to the vote*. See 1T 94:13-24.

The HPC Chairmen went as far as to illustrate an example indicating "the original building was to have a metal roof, and now it doesn't have a metal roof. So is that something you would consider putting on as opposed to getting approval for a Chippendale fence or something?" Id. The applicant's

response (essentially decrying an elected official's *non*-interference with land use board procedures) speaks for itself:

> MR. LUDEMAN: I would say that given that we're only meeting with the HPC tonight and we're not meeting with the planning department, the zoning department, the construction office, we're not prepared to say anything to that nature. It's too premature. That's why we just -- that's why we tried to meet with the mayor who controls all of these different departments, and he was unwilling to help us. So we're here. In my opinion, we shouldn't be talking to you guys, the HPC, first. We should be talking to everybody in the same room. But that was denied. I think it's very frustrating for us all to be sitting here talking about HPC when we have bigger issues with the construction office and planning department and Craig Hurless's office. But we requested to address those before this meeting and we were denied, and we were put pressure on to come to this meeting sooner than later, and we were, you know, told to
>
> MR. BARANOWSKI: So -- so –
>
> MR. LUDEMAN: -- (indiscernible).
>
> MR. BARANOWSKI: So is it fair to say you may be willing to make modifications to -- that will be acceptable to the HPC as part of the application, but it's not really clear whether any modification you might be willing to make would also be acceptable to the planning board or the City that would similarly address their concerns?
>
> MR. LUDEMAN: Correct. I'm frustrated that this process is going to linger on for months and every time we get past one committee or department, we're going to get stonewalled at the next, because that's what happened to date. Why should I believe anything else is going to happen?
>
> MR. COUPLAND: You're dealing with separate and discrete organizations.

> MR. LUDEMAN: I agree. It's frustrating. We went to the one person who can unite them and manage them all, and he's refused to help. So we're here.

See 1T 95:16 – 97:6.

Based on Lokal's refusal to engage in any discussion regarding alternatives, the HPC proceeded to outline the elements proposed in the 2020 application as presented, proceeded to a vote, and indicated that the decision to the deny application rested in the failure to meet the standards and criteria for the historic district and specifically for "contributing" structures which applied to Lokal. See 1T 98-99. The board referenced as-built architectural elements that do not reflect the styles and periods of significance recognized by the historic district. See 1T 101-102.

The HPC standards provide guard rails for the protection of the historic district and within those standards there is room for creative design and development. However, in this case rather than find a way to work *within the standards*, Lokal simply seeks to exempt itself altogether from that process and without regard for the impact on the historic district to what *was* a contributing structure. The HPC denied this proposal and provided rational record-based reasons for doing so. There being no evidence that the HPC and Zoning Board's actions were arbitrary and capricious, the trial court affirmed. The City and HPC respectfully request the Appellate Division affirm the trial

court on the same basis and for the reasons set forth in the trial court's well-reasoned decision.

C. The Trial Court correctly denied Lokal's Motion to Quash a subpoena seeking information directly relevant to their claim that their non-compliant as-built conditions were the result of their architect going "rogue" rather than a knowing disregard for the requirements of their approval. (8a; (December 18, 2023)).

A trial court's decision on a discovery matter, including a motion to quash a subpoena, will be upheld unless there is an abuse of discretion. See In re Subpoena Duces Tecum on Custodian of Recs., 214 N.J. 147, 162 (2013); See also, Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371, (2011). Thus, a reviewing court "generally defers to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Pomerantz, 207 N.J. at 371.

Here, the City and HPC sought documents and information from Lokal's project architect to obtain discovery on the claim that they had no knowledge of the HPC approval prior to proceeding with construction and that he went "rogue". The trial court correctly found that the information sought was not prepared in anticipation of litigation, but rather for the repair and

reconstruction of the property. 3T 20:8-16; See Medford v. Duggan, 323 N.J. Super. 127 (App. Div. 1999).

Simply put, the work-product doctrine is designed to protect from disclosure "an attorney's mental impressions, conclusions, opinions, or legal theories" and those matters prepared in anticipation of litigation. See R. 4:10-2(c); See *Pressler & Verniero, Current New Jersey Rules Governing the Courts*, comment 4 on R. 4:10-2 (2019). It is *not* designed to thwart production of relevant documents that are directly relevant to Lokal's allegations and were prepared in the ordinary course of business. Files and emails of a project manager are not covered by this rule simply because a land use application *may* at some future point become a prerogative writ action – in this case almost four (4) years later. The Court should affirm the trial court's decision on the motion to quash.

In addition, even assuming for the sake of argument the Court could find some error with the trial court's reasoning, any error would be harmless since the material undisputed facts serving as a basis for summary judgment were *Lokal's own admissions* – and in that case would require no remedy. See R. 2:10-2.

D. The Trial Court correctly granted summary judgment because no rational decisionmaker could find in favor of Lokal on their remaining equitable claims. (9a; (June 26, 2024)).

The standard of review of a trial court's grant or denial of a motion for summary judgment is de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

To defeat a motion for summary judgment, the opponent must come forward with evidence that creates a genuine issue of material fact. Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014). Conclusory and self-serving assertions by one of the parties are insufficient to overcome the motion. Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

As a starting point, equitable estoppel is "rarely invoked against a governmental entity." Middletown Twp. Policemen's Benevolent Ass'n 21 Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000) (quoting Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999)). Equitable estoppel may be invoked against a municipality only where interests of justice, morality and common fairness clearly dictate that course. Middletown Twp., 162 N.J. at 367. The courts "have applied equitable

estoppel to prevent municipalities from revoking valid permits or approvals from builders who had justifiably relied on those permits or approvals to their substantial detriment." Palatine I v. Planning Bd. of Montville, 133 N.J. 546, 560 (1993). However, the party seeking to invoke equitable estoppel must act in good faith and demonstrate *reasonable* reliance. See Grasso v. Bor. Of Spring Lake Heights, 375 N.J. Super. 187 (Law Div. 2003), aff'd, 375 N.J. Super. 41, 47-48 (App. Div. 2004); Jantausch v. Borough of Verona, 41 N.J. Super. 89 (Law Div. 1956).

New Jersey Courts have consistently held that municipal action in the land use control field taken in direct violation of law or without legal authority is void *ab initio* and has no legal efficacy. A building permit issued contrary to a zoning ordinance or building code cannot ground any rights in the applicant. See Hilton Acres v. Klein, 35 N.J. 570, 581-82 (N.J. 1961) (citing Giordano v. Dumont, 137 N.J.L. 740, 742-743 (E. A. 1948); Saddle River Country DaySchool v. Saddle River, 51 N.J. Super. 589 , 605-607 (App. Div. 1958), affirmed on opinion below, 29 N.J. 468 (1959); and Esso Standard Oil Co. v. North Bergen Township, 50 N.J. Super. 90, 95-96 (App. Div. 1958). Nor may a property owner, by unilateral action, secure a valid nonconforming use based on a violation of the zoning ordinance. Universal Holding Co. v. North Bergen Township, 55 N.J. Super. 103, 111-112 (App. Div. 1959). These authorities

expressly hold that no estoppel may arise against the municipality in such situations by reason of reliance on the part of the property owner or of acquiescence by the municipality. This result derives from a recognition of estoppel as a vehicle for a just solution, involving a weighing of the particular interests and equities.

Where the action is without any legal warrant, there is a lack of equity in the owner and the public interest completely predominates. Hilton Acres, supra, 35 N.J. at 582; See Motley v. Seaside Parking Zoning Bd., 430 N.J. Super. 132, 152-155 (App. Div.), certif. den. 215 N.J. 485 (2013)(rejecting equitable estoppel and "relative hardship" arguments on behalf of the homeowner when the homeowner ignored physical limitations of zoning permit and sought to reconstruct his entire structure in contravention of N.J.S.A. 40:55D-68); See also Lehen v. Atlantic Highlands, 252 N.J. Super. 392 (App. Div. 1991)(finding that the municipality was not estopped from preventing completion of work which went beyond the scope of the permit issued).

Furthermore, New Jersey Courts have determined that a certificate of occupancy is not the proper vehicle for determining status of non-conforming condition. See Rockleigh Bor., v Astral Industries, 29 N.J. Super. 154 (App. Div. 1953)(building inspector cannot by permit authorize extension of

nonconforming use); See also Klotz v. Englewood Cliffs Bd. of Adj., 90 N.J. Super. 295 (Law Div. 1966)(building inspector cannot by permit authorize a forbidden use).

In other words, building inspections and Temporary Certificates of Occupancy allowed plaintiffs to begin their operations with certain compliance items remaining outstanding, but they do not function as *de facto* zoning and HPC approval. An applicant who proceeds beyond permit limitations cannot fairly complain about municipal action enforcing those limitations**.** See Motley, supra, 430 N.J. Super. at 151-152.

In the specific context of the issuance of building permits, the application of estoppel requires proof of each of the four elements by a preponderance of the evidence: (1) the building permit was issued in good faith, (2) the building inspector acted "'within the ambit of [his] duty'" in issuing the permit, (3) a sufficient question of interpretation of the relevant statutes or zoning ordinances as to "render doubtful a charge that the . . . official acted without any reasonable basis" for issuing the permit, and (4) there was "'proper good faith reliance'" on the issuance of the permit. Hill v. Bd. of Adjustment, 122 N.J. Super. 156, 162 (App. Div. 1972), certif. denied, 72 N.J. 466 (1976).

Here, the trial court correctly noted in its decision Lokal's admission that they were aware of the HPC approval but did not bother to look through the resolution before proceeding with construction. (18a-19a); (497a). As a result, the trial court correctly concluded that after giving the benefit of all *reasonable* inferences, there is no version of this story can result in reasonable reliance on any representations by the City - an essential element of estoppel. Instead, Lokal knew or should have known better and the City did nothing to lead them on.

The trial court did not rely on credibility assessments or disputed material facts. Instead, the trial court reviewed the uncontested history of conduct and took Lokal at their word that they were, at the very least, aware of the HPC approval but did not care to look into it further. Accordingly, the Court dismissed Lokal's remaining claims.

The fact that Lokal was permitted to proceed with this project and obtain a TCO to operate is not evidence of reasonable reliance. The City never once indicated waiver of approvals, nor did the Construction Official possess the authority to waive compliance with the HPC by issuance of a permit to begin construction. The type of work that the HPC reviews and approves is exterior "finish" work which typically is installed toward the end of a project – not at the beginning. As the construction proceeded toward the finish and HPC

related items began to take shape, compliance issues were noted by the City. See City Engineer inspection reports dated July 9, 2019 (776a) and July 19, 2019 (760a) noting various non-compliance issues.

At Lokal's urging (see 760a), the City worked with Lokal to permit the issuance of a TCO in July of 2019 and begin operating in a state of noncompliance but with the understanding that they were to address outstanding items for the issuance of a final CO. Accordingly, the initial TCO issued on July 26, 2019 referenced outstanding conditions (848a). Each subsequent TCO contained reference to outstanding compliance issues. (See 849a-863a). Lokal continued their refusal to address these conditions and accept the outcome that their as-built conditions do not reflect their approvals. Lokal has used their temporary certificate of occupancy as a vehicle for profit while historic district and safety concerns continue to go unaddressed.

Here, there is no genuine issue of material fact or credibility determination that would allow Lokal to sustain a claim for estoppel. Lokal's admissions on essential elements of their claim could not be ignored by the trial court. These same facts also serve as a basis to defeat any claim of laches, an equitable defense interposed in the absence of the statute of limitations and which requires a showing of "inexcusable delay in asserting a right" and for "an unreasonable and unexplained length of time". See Lavin v. Board of

Education, 90 N.J. 145 (1982) (citing Atlantic City v. Civil Service Commission, 3 N.J. Super. 57, 60 (App. Div. 1949)). Lokal knew or should have known of the conditions of their approval and were advised of outstanding compliance issues before the issuance of the initial TCO and reminded of them upon each renewal. There is no combination of facts in the record that could form the basis for the equitable claims asserted. Accordingly, the Court should affirm the trial court's decisions in this case on all counts.

IV. CONCLUSION

Based on the foregoing, the City and the HPC respectfully request the Court enter judgment affirming the judgment of the trial court in its entirety. Furthermore, any restraints imposed by this Court while the matter remained under appeal should be lifted immediately.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By:_____
CHRISTOPHER GILLIN-SCHWARTZ, ESQ.

Dated: 02/10/2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3372-23 & DOCKET NO. A-234-24

LOKAL STOCKTON LLC, Plaintiff-Appellant, v. CITY OF CAPE MAY, CITY OF CAPE MAY HISTORIC PRESERVATION COMMISSION, and CITY OF CAPE MAY ZONING BOARD OF ADJUSTMENT, Defendants-Respondents.	On Appeal From: Superior Court of New Jersey Law Division, Cape May County Docket No. CPM-L-120-22 Sat Below: Hon. Michael J. Blee, A.J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT, LOKAL STOCKTON LLC

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[1] "Aa___" references the Appendices annexed to Lokal's merits brief, filed on December 12, 2024, under docket no. A-3372-23.

[2] "2A__a" references the Appendices annexed to Lokal's brief in support of its Motion for a Stay, filed December 3, 2024, under Docket no. A-234-24.

TABLE OF AUTHORITIES

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I. PRELIMINARY STATEMENT

In their respective briefs, Respondents, City Of Cape May, City Of Cape May Historic Preservation Commission, and City Of Cape May Zoning Board Of Adjustment (collectively, "Respondents") ignore and attempt to obfuscate rather than rebut the arguments presented by Appellant, Lokal Stockton LLC ("Lokal") in its merits brief regarding the trial court's improper grant of summary judgment to Respondents. It is clear that they did so because there is no denying that the trial court wrongly made credibility assessments in rendering summary judgment in favor of Respondents, and failed to allow such an evaluation to be made as needed by a jury. Such action is proscribed in the context of a summary judgment motion.

Respondents would also have the Appellate Court disregard the lower court's failure to recognize that Lokal had expert testimony to present at trial opining that Respondents had failed to follow their own ordinances in issuing construction permits to Lokal, which resulted in Lokal building what was approved by those permits in reasonable reliance thereon, despite the fact that the City failed to confirm compliance with plans that had been approved by the HPC, all of which Lokal was unaware of when permits were issued. Again, these factors require submission of these questions to a jury.

Lastly, the trial court inaptly awarded Respondents with the grant of motions to enforce litigants rights, where Respondents had neither sought nor received any

affirmative relief in their pleadings prior to filing such motions.

Based on the above, the grant of summary judgment in favor of Respondents should be reversed and the matter remanded for a trial by jury. The Orders dismissing Plaintiff's prerogative writ claims, and granting Respondents relief in aid of litigants rights should also be reversed and vacated.

II. COUNTER-STATEMENT OF FACTS

Lokal incorporates the "Procedural History and Statement of Facts" provided in its merits briefs, in support of the consolidated appeals, as if set forth herein.

III. ARGUMENT

A. The City Defendants' Argument and the Trial Court's Decision Improperly Rely on Credibility Determinations that are Inappropriate on a Motion for Summary Judgment.

The trial court overlooked that Lokal could not have ratified the Certificate of Appropriateness ("COA"), because ultra vires acts of a municipal entity cannot ever be ratified and adoption of the COA was an ultra vires act, because Lokal, a corporate applicant, was not represented by counsel at the hearing which led to adoption of the COA. Respondents City of Cape May ("City") and the Cape May Historic Preservation Commission ("HPC") (collectively, "City Defendants"), unable to challenge this point, instead attempt to divert the Court's attention to the doctrine of judicial estoppel, an argument that was disregarded by the trial court when it was first made.

The trial court's reliance on the "ratification" argument, which was not even briefed, is premised on the improper determination of credibility, being that the trial court made a decision that no one could believe that Lokal could not have known about the illegally issued COA. However, this is the epitome of a dispute in which the factfinder must be given the opportunity to evaluate the credibility of the witnesses in deciding the outcome of the case.

Lokal's claim of estoppel against Respondents seeks to maintain the Lokal Hotel (the "Hotel") in Cape May as built based upon reasonable and good faith reliance on building permits issued by the City after multiple reviews of the plans and work for compliance by the Zoning Board of Adjustment's ("Board") engineer. Respondents attempt to hide their failure to comply with their own ordinance by claiming that Lokal's reliance on the permits could not have been in good faith because Lokal purportedly knew about the COA, and the failure of the construction plans to meet the conditions of the COA, when Lokal has consistently testified to the contrary. It is axiomatic that such credibility determinations must be made by way of a trial in the courtroom and not on the papers, yet the trial court erroneously made a decision based on credibility and granted summary judgment to Respondents.

In their joint brief, the City Defendants dwell on the fact that when Lokal appeared before the City's Planning Board seeking site plan approval for the Hotel

on January 8, 2019, (Aa617[3]), Crossland was present "alongside Lokal." (Db at p. 16[4].) Based on that alone, the City Defendants argued, and the trial court mistakenly agreed, Lokal must have known about the COA and its conditions, thereby discrediting Ludeman, whose testimony regarding Lokal's lack of knowledge of the COA has remained consistent.

Ludeman testified under oath before the HPC in January 2020, after completion of construction, stating that Lokal had no knowledge of the COA or the hearing which led to its adoption on August 20, 2018. (1T/11:15-22; See also, Id. at 22:7-18.) He continued that prior to Hurless' letter dated December 11, 2019, Aa101, Lokal believed it had taken the project "from beginning to end with all appropriate approvals in place, including all the HPC approvals[.]" 1T/23:6-10. Ludeman repeated this testimony during his deposition. (Aa486 at 24:20-25:12; see also, Aa487 at 26:2-3; Aa488 at 31:18-19.) The trial court's conclusion that "[Lokal's] representative was aware of the required HPC approval for the final design of the … Hotel," (Aa18), directly conflicts with Ludeman's testimony, demonstrating that the trial court decided not to believe Ludeman, based on Crossland's mere presence at the Planning Board hearing in January 2019. That is an improper assessment of credibility, which is not for the trial court to consider on

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[3] "Aa___" references the Appendices annexed to Lokal's merits brief, amended on December 12, 2024, under docket no. A-3372-23.

[4] Db references the City Defendants' Brief.

a motion for summary judgment.

Moreover, the fact that Crossland was present with Lokal when it appeared before the Planning Board in January 2019 does not inevitably lead to the conclusion that Lokal knew about the COA and its terms. As Ludeman testified at his deposition, once Lokal received conceptual approval in 2017, (Aa30), Crossland advised that final approval would be obtained through administrative means. (Aa486 at 25:13-17.) Ludeman continued:

> Our architect, [Crossland], represented … that he had gone to the HPC in informal meetings and gotten an … administrative approval. He said that hearings aren't always needed for the final approval and sometimes he just does it informally. So that's what we were led to believe. We did not know that a hearing occurred in 2018 until much later.

(Aa486-487 at 25:18-26:3.)

When Crossland appeared alongside Lokal at the Planning Board hearing in January 2019, Lokal believed it had final HPC approval via administrative means, as opposed to a formal hearing, which reflected what was discussed when Lokal received conceptual approval in 2017. Without Lokal's knowledge, the COA was conditioned upon changes to the entire exterior of the Hotel, including the roof, front façade, railings, foundation, and fencing, which Crossland agreed to without ever consulting Lokal. (Aa427-Aa428; see also, Aa491 at 42:17-43:19; Aa496 at 62:25-63:10.) Nor could Crossland ever identify when he ever advised Lokal of these conditions after the hearing. (Aa428 at 67:24-69:12.)

This sequence of events is entirely consistent with Ludeman's testimony; however, the trial court reached the opposite conclusion, inappropriately assessing Ludeman's credibility, pointing to the following exchange:

> Q: When you began construction on this project, what did you think you had?
> A: We had a building permit.
> Q: You understood going into this process you needed HPC approval, right?
> A: Correct, which I was told we got.
> Q: I thought you said you didn't know about it?
> A: I didn't know about the resolution. Crossland told me that we had final HPC approval … or else we couldn't submit to get the building permit. …
> Q: And you're testifying today that you didn't speak to anybody about those conditions either?
> A: Correct. …

Aa18-19 (*emphasis added*).

The trial court somehow decided this discredited Ludeman, stating "[i]t is undisputed that [Lokal's] representative was aware of the required HPC approval for the final design of the … Hotel." (Aa18.) Nothing in Ludeman's testimony above indicates any awareness of what design requirements were approved. He consistently said he was aware of the need to obtain final HPC approval and that fact that it was eventually obtained, but "I didn't know about the [COA]." (Aa497 at 66:5-6) (emphasis added).

The trial court did the opposite of what courts are required to do when deciding summary judgment. Rather than accept all the evidence which supports

Lokal's position, the trial court searched for and relied upon evidence which is alleged to have undermined Lokal's position, such as Ludeman's reliance on the review of the project by Mr. Hurless. The trial court sought to impose knowledge on Ludeman that Hurless did not work for HPC, which led the trial court to find that Ludeman could not have relied upon his review of the permits for consistency with the HPC approvals, yet this knowledge was developed after the permits were issued, and not before. (Aa19.) More importantly, it ignores a plethora of evidence indicating that Hurless did in fact act as the overseer for compliance with the COA. (Aa315-Aa330; Aa33; Aa101; Aa423 at 47:17-20; and Aa865-Aa866.) These issues should have been presented to the jury for a determination, and not decided on the papers by the trial court.

B. Respondents Failed to Address a Key Element of Ratification in Their Opposition, Implicitly Conceding that Lokal Could Not Ratify the COA.

"Acts that are *ultra vires* are void and may not be ratified." Grimes v. City of East Orange, 288 N.J. Super. 275, 279 (App. Div. 1996). See also, Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urban Renewal Co., LLC, 435 N.J. Super. 51, 65 (App. Div. 2014) (*ultra vires* act "cannot be ratified"). An *ultra vires* act refers is one which a "municipality is utterly without capacity to perform." Grimes, *supra*. A prime example is a quasi-judicial body exercising jurisdiction over an application by a corporate applicant that is *not* represented by counsel. None

of the Respondents contest that corporate applicants like Lokal are required to be represented by counsel when presenting applications before quasi-judicial entities such as the HPC. There is no dispute that Lokal was not represented by counsel at the August 2018 hearing, or that the HPC is indeed a quasi-judicial body.

Irrelevantly, the Board argues that the HPC is a "strong commission" exercising broad authority independent of both the City's Zoning and Planning Boards. See (Bb, at pp. 12-14[5].) According to Coupland, the HPC Chair, when an applicant like Lokal is required to receive board approval, "they're not going to get final approval" from the HPC until after because "what happens at planning or zoning could impact what we're approving." (Aa230 at 22:21-25:20.) See also, (Aa203 at 23:7-18.) Respondents obviously cannot argue as to the sweeping authority of the HPC and, in the same breath, claim it is not a quasi-judicial body. This line of argument is an implicit if not overt concession that Lokal should have been represented by counsel at the August 2018 hearing before the HPC, and because it was not, the hearing should not have taken place. As such, Lokal could not have ratified the COA because it was the result of an ultra vires act by the HPC, which cannot be ratified. The City Defendants attempt to gloss over this significant legal issue by claiming that Lokal should be judicially estopped from making the argument that it cannot be beholden to an ultra vires act by the HPC; one which

[5] Bb references the Board's brief.

Lokal was not even aware of until after completion of the Hotel. This argument is no more than a futile attempt to shield the City Defendants from any responsibility here when they should bear the brunt of it.

Had the City Defendants complied with their own Ordinance, this situation would have been avoided. Construction permits would not have been issued if the HPC had not unlawfully exercised jurisdiction over Lokal's application at the August 2018 meeting, when Lokal was not represented by counsel. Permits would not have been issued had the Construction Official followed the requirements of the City's Ordinance[6] and actually verified that the building plans, and eventual construction of the Hotel, complied with the COA. Construction of the Hotel would not have proceeded to completion if Hurless, who regularly inspected the Hotel during construction, or any of the City Defendants, upon recognizing the Hotel's alleged lack of compliance with the COA, had taken any actions in order to prevent further deviations, as they could have done while construction was still ongoing pursuant to Cape May City Code § 525-42 and N.J.A.C. 5:23-2.30. (Aa533-534.) However, Respondents abdicated their responsibilities at every turn, and now attempt to lay blame entirely upon Lokal. A jury should determine whose position is more credible here.

[6] City Code § 525-37(E)(8).

C. The City Defendants' Assertion that the HPC was Willing to Look Beyond the COA When Evaluating the As-Built Conditions of the Hotel is False.

Per the City Defendants, "Lokal's premise for invalidating the HPC's 2020 denial is the HPC's supposed inability to look beyond the 2018 approval and evaluate alternatives that may satisfy the standards of the historic district. The record of the 2020 HPC proceeding reflects the opposite[.]" The latter assertion is patently inaccurate, and rather than address Lokal's substantive argument, the City Defendants attempt to carve out a single instance where the HPC allegedly "invited" Lokal to look beyond the as-built conditions when the actual record is besieged with examples that the HPC's primary focus in reviewing the 2020 HPC Application was the Hotel's alleged noncompliance with the COA. See, *e.g.*, (1T/51:22-24; 60:10-16; 82:25-83:1.)

Furthermore, the one citation to the record made by the City Defendants in support of their erroneous contention regarding the HPC's alleged "reasonableness" fails even to demonstrate what the City Defendants claim. In that very citation, Ludeman testified that Lokal would "be willing to make modifications … that will be acceptable to the HPC," and merely expressed frustration with the fact that "it's not really clear whether any modification [Lokal] might be willing to make would also be acceptable to the planning board or the City[.]" (Id. at 96:13-20.) Coupland acknowledged this ping-pong aspect of the Cape May's inefficient approval process

during his deposition, admitting that applicants like Lokal sometimes have to go "back and forth" with the City's Zoning and Planning Boards. (Aa230 at 23:7-23.) To point to this frustration as evidence that Lokal was allegedly unwilling to compromise is disingenuous. The Court should not be persuaded by the City Defendants' mischaracterization of the record and Ludeman's testimony.

D. The Board's Argument Relative to Lokal's Application for a Stay is Moot, as this Court has Granted a Stay to Lokal.

This Court has granted a stay to Lokal by Order dated December 16, 2024, pending disposition of these appeals by the Appellate Court. Thus, any arguments relative to a stay are moot. Moreover, the Board never appealed the trial court's decision regarding the clamshells, and that issue was again rendered moot following this Court's imposition of a stay on December 16th, without any of the conditions imposed by the trial court's June 26, 2024 Order, which was appealed by Lokal. (Aa9-23.)

The Board fails to address Lokal's appeal of the trial court's decision to grant the City Defendants' Motion to Enforce their Rights as Litigants, (2A89a[7]), in any substantive manner. The Order dismissing Lokal's remaining claims and rescinding the prior order imposing preliminary restraints provided no affirmative relief to

[7] "2A__a" references the Appendices annexed to Lokal's brief in support of its Motion for a Stay, filed December 3, 2024, under Docket no. A-234-24.

Respondents because they have never requested any form of affirmative relief throughout this litigation. Lokal has not violated or otherwise failed to comply with any court order. Respondents, therefore, are not entitled to any affirmative relief.

Finally, regarding the Board's absurd claim that the mere presence of clamshells poses a danger to "hundreds or thousands of people who pass by Lokal's location," there is not a shred of evidence in the record of any harm to anyone, ever, resulting from the presence of the clamshells at the Hotel.

E. The Board Mischaracterizes What It Means for the HPC to be a "Strong Commission," Abdicating its Duties as a Zoning Board in Violation of the Municipal Land Use Law.

According to the Board, when it reviews decisions of the HPC, it is little more than a rubber stamp, not daring to question the HPC's alleged "expertise on issues of design, style, materials and historic periods[.]" See (Bb at p. 15.) It would appear from the Board's argument that any appeal of an HPC decision pursuant to N.J.S.A. 40:55D-70(a), in effort to exhaust administrative means, would be futile. See Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN, 2025), at 40-2.2; U, 68 N.J. 576, 589 (1975).

The Board further mischaracterizes what it means for the HPC to be considered a "strong commission." The phrase "strong commission" has nothing to do with the amount of power that the HPC has when compared to that of the Board. Rather, the designations of "strong" or "weak" depend upon to whom the historic

preservation is required to submit "its report on the application of the zoning ordinance provisions concerning historic preservation…." The statute gives the HPC two (2) options: "[t]he historic preservation commission shall submit its report either to the administrative officer or the planning board[.]" N.J.S.A. 40:55D-111. Thus, whether the local ordinance requires referral to the planning board or directly to the administrative officer dictates whether the historic preservation commission is considered "strong" or "weak." When referral is to the planning board, the commission is "weak", and when it is directly to the administrative officer, the commission is "strong."

> The "weak" versus "strong" commission distinction … becomes important because it dictates how an appeal from a permit application is reviewed by the board of adjustment. Under a "weak commission," where the recommendation of the Commission is first directed to the planning board, it is that board's decision that is being appealed[.] … Thus, the presumption of validity should be accorded to the decision of the planning board[.] … However, under a "strong commission," where the Commission's … report and recommendation is made directly to the administrative official, any conditions imposed are considered de novo by the bord of adjustment. This is because the Commission lacks decision-making power and may only make recommendations, which are not entitled to the same presumption of validity as is action of the planning board.

See Cox & Koenig, New Jersey Zoning and Land Use Administration (GANN, 2025), at 4-1.6.

The conclusion drawn in Cox is consistent with the Municipal Land Use Law. "[A] municipal ordinance cannot limit the authority conferred on zoning boards of

adjustment by statute[.]" Price v. Strategic Capital Partners, LLC, 404 N.J. Super. 295, 302 (App. Div. 2008); Duffcon Concrete Prods., Inc. v. Cresskill, 1 N.J. 509, 515-16 (1949). N.J.S.A. 40:55D-70(a) gives the Board the authority to "[h]ear and decide appeals where it is alleged by the appellant that there is error in any ... decision or refusal made by an administrative officer." Respondents, by and through the adoption of City Code § 535-37.E(5), have unlawfully limited the Board's power to hear and decide appeals of HPC decisions through the implementation of an "abuse of discretion" standard, and further elevated the HPC's status and authority above that of an advisory board, in violation of the Municipal Land Use Law.

IV. CONCLUSION

For the reasons set forth above and in Lokal's brief filed on December 12, 2024, the decisions of the trial court: (i) denying and dismissing Lokal's prerogative writ claims; (ii) denying Lokal's Quash Motion; (iii) granting Respondents affirmative relief by way of an order in aid of litigants rights; (iv) placing conditions on the grant of a stay to Lokal; and (v) granting the City and HPC's joint Motion for Summary Judgment, should all be reversed, and the matter remanded for trial.

Respectfully submitted,
HYLAND LEVIN SHAPIRO LLP

Dated: February 24, 2025

BY: _____