
STEVEN SCHULZ

Plaintiff-Appellant,

v.

THE BOROUGH OF WEST LONG BRANCH,
JAMES MILLER, IN HIS OFFICIAL
CAPACITY AS ZONING OFFICIAL AND
ANDREW FRANK, INDIVIDUALLY,

Defendant-Respondents.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

Docket No.: A-3736-23

Civil Action

ON APPEAL FROM
SUPERIOR COURT, LAW
DIVISION MONMOUTH
COUNTY

Sat Below:

Honorable Andrea I.
Marshall, J.S.C.

PLAINTIFF-APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The Municipal Land Use Law has evolved over the last 75 years. The overarching goal is to encourage our elected officials to zone by planning not variance. In turn we seek to eliminate any use or structure not consistent with their plan. Nonconforming uses and structures are viewed as weeds, which we hope will wither and die. Laches is not applied in land use matters because it will impair the public policy of eliminating all nonconforming uses and structures. In turn, any proposed expansion must be heard by the Zoning Board of Adjustment.

Zoning Officers are the guardians of the local zoning ordinance. They are trained that it must be clear that the requested zoning permit complies with the ordinance. When they have any doubt, they must deny the request and direct the applicant to the Zoning Board.

In this case we discovered 5 times since 2010 where the Zoning Officer issued permits to Mr. Frank that should have been denied. The most recent permit issued was in 2023 just months before the Plaintiff filed his Complaint. The reality is that any interested party may seek enforcement of the zoning ordinance at any time.

The Court saw this matter as a nuisance suit and was eager to dismiss it. Unfortunately, dismissing this matter at such an early juncture deprives the public's right to learn why the Zoning Officer issued these permits or whether the Defendant,

Mr. Frank reasonably relied on the issuance of any of these permits. No facts were offered regarding the Defendant's reliance in their motion, so any ruling on that basis must fail.

The Plaintiff filed this action to enforce the zoning code on the authority provided in N.J.S.A. 40:55D-18. This law is evergreen because nonconforming uses and structures that were not valid when created have no right to exist. N.J.S.A. 40:55D-18 is the font of all zoning enforcement. The legislature found enforcement of such great importance that it allows interested parties to act, when the municipality does not. The Defendants argued that there are time limits that apply and that we failed to act. In reviewing the many cases in zoning enforcement it appears that even good lawyers and Judges overlooked N.J.S.A. 40:55D-18. Nonetheless the Plaintiff correctly relied on this statute and was not untimely.

There are two recent Appellate Division cases that solidly agree with our application of this law. Sadly, neither was published. We suggest that the outcome of this case be published to assist the land use and local government bars.

Finally we submit that the dismissal of our Complaint is not only against a clear legal standard but it compromises important public policy in the area of zoning.

PROCEDURAL HISTORY

This matter arises as an enforcement action under the authority of N.J.S.A. 40:55D-18. The Plaintiff, Steven Schulz, who lives one door away from the

Defendant, Andrew Frank, is an interested party. For more than a decade, Mr. Schulz has raised concerns with Defendant, West Long Branch that Mr. Frank's property has been expanding without obtaining variance relief.

On April 18, 2023, the West Long Branch Zoning Officer issued Mr. Frank permit number 2023-164 attached to the Plaintiff's Complaint as Exhibit H. **(Pa064)**

On May 25 2023, the Plaintiff requested that Michael Cole, P.P., P.E., a municipal Board Engineer/Planner, evaluate all permits issued on Mr. Frank's lot since 2010. His report revealed more than 5 instances starting in 2010 where the Zoning Official issued permits that should have been denied. See the Cole report attached as Exhibit "A" to Plaintiff's Complaint. **(Pa025)**

The Cole report, having been carefully studied, was forwarded to the West Long Branch Administrator on August 8, 2023. On August 14, 2023, the Township through Counsel, refused to follow up on the numerous violations of the Township code identified in the Cole Report. **(Pa94)** Each one of these instances where a permit was issued required a variance. The Township did issue a notice of violation in one instance where the Defendant exceeded the limits of one of his permits, but otherwise the Township refused to take any action.

In response to the Township's refusal to cure the existing nonconformities on the Frank property, we filed a Complaint asking the Court to compel Mr. Frank to comply with the West Long Branch Zoning Ordinance. **(Pa3)** The Complaint had

four counts. The First Count sought a writ of mandamus. **(Pa13)** The Plaintiff acknowledges that the relief sought failed to clearly articulate what was sought. We expected the Court to order West Long Branch to enforce its zoning ordinance but failed to say with specificity. However, section “B” of Count Two sought compliance with the zoning ordinance. **(Pa016)** The Second Count was on the mark and relied upon N.J.S.A. 40:55D-18. In subparagraph (B) we asked the Court to compel the Defendant to comply with the zoning ordinance which is the true reason for filing the Complaint. **(Pa016)**.

In the Third Count the Plaintiff sought relief for the violation of his substantive due process rights. **(Pa016)** The issuance of permits in this case, where variances were required, deprived the public and Mr. Shulz of their right to be heard and possibly object to the relief obtained. The Fourth Count listed the violation of the West Long Branch Zoning Ordinance and once again asked that Mr. Frank be compelled to comply with the Ordinance. **(Pa018)**

Defendants Frank and West Long Branch made a Motion to Dismiss for failure to state a claim on December 27, 2023. **(Pa112; Pa215)** Due to timing conflicts, it took five (5) months to schedule the hearing of this motion. The motion was finally heard on May 24, 2024 in a zoom proceeding by the Honorable Andrea Marshall.¹

¹ 1T is the transcript of the Motions to Dismiss dated May 24, 2024.

At the conclusion of oral argument, the Judge read a prepared statement into the record which dismissed our case for equitable reasons. **(1T34)** The Judge accepted the contention of the Defendants that the Plaintiff failed to act in the timely fashion required under N.J.S.A. 40:55D-70(a) and R. 4:69-6. We contended that those provisions are inapplicable and the enforcement of a nonconforming property has no time limit under the enforcement provision of the Municipal Land Use Law N.J.S.A. 40:55D-18. Further the Court's ruling on equitable estoppel failed to test the reasonableness of Defendant Frank's reliance as absolutely no facts were introduced on the topic of reliance. We do not know how or why any of these permits were issued.

We responded to the Court's ruling by filing a Motion for Reconsideration. **(Pa234)** In that motion, we provided the Judge with the unpublished decision in Oliveira v. Twp. of Mahwah, A-3630-20, 2023 WL 2781312, **(Pa97)** which confirms that N.J.S.A. 40:55D-18 does not provide a time limit and makes clear that the time limits of N.J.S.A. 40:55D-70(a) or R. 4:69-6 are inapplicable in zoning enforcement matters. The Court was unwilling to reverse itself.

Defendant Frank requested counsel fees for the filing of a frivolous lawsuit and now appeals his denial. Ironically, we see that request in the nature of a SLAPP suit.

Once the Judge rejected our request for reconsideration the within appeal was filed. **(Pa245)** Subsequently, a CASP meeting was held, and the parties were unable to compromise.

STATEMENT OF FACTS

The Plaintiff lives one door away from the Defendant Mr. Frank, but his property is “L” shaped and touches the Frank lot on its rear property line. Mr. Frank’s lot is notable because it is 15,000 square feet where 22,500 square feet is required. The width of his lot is 100 feet where 150 feet is required. This single-family home is a nonconforming property. West Long Branch’s zoning code section 18-8.1 prohibits the expansion of nonconforming properties. **(Pa233)**

The Plaintiff has complained to the Township since 2010 about Mr. Frank’s property. Mr. Frank has repeatedly obtained permits for this undersized property without ever obtaining a variance. By May 2023 the Plaintiff sought legal assistance and at the direction of his attorney, he retained Michael Cole, a licensed Municipal Planner and Engineer. The Cole report was attached to the Complaint and confirmed the Plaintiff’s concerns. **(Pa025)** The following outlines the instances where variances were required but permits were issued instead.

2010

The Plaintiff’s initial concern was triggered in November 2010 when on the 18th of that month, Frank was granted a permit to cover 38%, or 2,538 sf, of his rear

yard with accessory structures. Ordinance 18-6.3(f)(3) limits accessory buildings and structures to 25% of the rear yard or 1,825 sf. In addition, Ordinance 18-5.1 sets a firm coverage limit of 30%. The Frank lot is 15,000 sf, and therefore coverage may not exceed 4,500 sf. Mr. Cole, in his report at page 8, confirmed that the coverage was 5,407 sf. **(Pa032)**

Notably, the lot was already nonconforming due its failure to meet the required lot size and width and the home's encroachment into the side yard setback. Ordinance 18-8.1 prohibits the expansion of a nonconforming building in any way that increases the nonconformity. The permit granted work which expanded the nonconformity. Clearly the Zoning Official should have denied this permit. The Plaintiff raised concerns, but the Zoning Official ignored them.

2011

Frank sought the replacement of an existing patio, front porch and driveway, all of which he told the Zoning Official were to remain the same size. As part of the project, two wooden decks were replaced with pavers. The problem with this act was that the wooden decks are pervious, and the pavers are impervious. Thus, the replacement increased the impervious area by 238 sf., which should have triggered the requirement under Ordinance 18-8.1 to apply for a variance as the coverage already exceeded the maximum permitted and was nonconforming. The Zoning

Officer issued permit 2011-097, obviously failed to verify compliance, and never issued a notice of violation.

2020

On or about August 10, 2020, the Defendant Frank was permitted to construct a four-foot-high fence in the front yard. Ordinance 18-6.2(f)(2) limits fences in the front yard to three feet high. This action required a variance to be valid.

2022

In 2022, the Defendant Frank sought to add a second floor to the home. The addition followed the footprint of the existing first floor and so encroaches 15.8 feet into the side yard on the second floor, which required variance relief. The Cole report found that another variance was triggered because the combined side yard post-construction was only 34.2 feet, where 50 feet is required by Ordinance. He also identified that Mr. Frank added Bilko doors to the home that are only 12 feet from the side yard, which also required a new side yard setback variance and also impacted the combined side yard in a way that needed a variance. Finally, at the conclusion of this work, 38% of the rear yard was covered, where 25% is the maximum permitted.

2023

On or about April 18, 2023, the Zoning Official issued permit #2023-164 which permitted Mr. Frank to remove the existing pool coping, patio, house patio

and steps as well as a wooden deck and replace them with new pool coping, a pool patio, garden walls with pillars, a built-in kitchen barbeque area and a gas fire pit. The total impervious coverage rose to 6,226 sq. ft., where only 4500 sq. ft. is permitted by Ordinance. Clearly, the requested permit should have been denied and Mr. Frank should have applied for a variance.

Next Steps

The Plaintiff was deeply concerned that no enforcement had occurred regarding Mr. Frank's use of his property and that he never had to make a case before the Zoning Board. In late May the undersigned was retained and recommended that Mr. Cole be engaged. The Cole report was finalized and immediately delivered to the Defendant Township on August 8, 2023. The Cole Report outlined all of the permits issued and why variance relief was required. **(Pa032)**

The concluding paragraph of the letter sent to the Township Administrator stated:

**We urge the borough to review this matter and require this property owner to seek relief before the Zoning Board of Adjustment. If the Borough fails to act, we will be forced to seek relief in the Superior Court as is our right under N.J.S.A. 40:55-18.
(Pa82)**

While the Defendant West Long Branch did issue a notice of violation for one instance where Mr. Frank exceeded the limits of a single permit², they refused to take any other action to bring this property into conformity. As a result, this Complaint was filed on October 17, 2023. **(Pa3)** As a direct result of this Complaint the town issued a notice of violation for the patio on November 16, 2023.

The Court below dismissed the Complaint for failure to state a cause of action. The Court never:

1. Addressed the many nonconforming conditions on the Frank property;
2. Heard testimony from Mr. Frank on his reasonable reliance;
3. Granted equitable estoppel and so the variance conditions on the Frank property continued to be invalid.

N.J.S.A. 40:55D-18

This statute is the font of all zoning enforcement for municipalities and interested parties. Many published cases in zoning enforcement have failed to cite to this provision. In two recent unpublished decisions, Oliveira v. Twp. of Mahwah, A-3630-20, 2023 WL 2781312 **(Pa97)** and Matthews v. Ehrmann, A-1868-17, 2019

² The Defendant Mr. Frank filed an appeal of the notice of violation. That notice was stayed pending the outcome of this suit. It should be noted that the Zoning Board when hearing an appeal under N.J.S.A. 40:55D-70(a) is limited to the question under consideration and does not have jurisdiction to address the existing nonconformities on this property and as such, does not address the Plaintiff's concerns.

WL 692127 (**Pa102**) the Appellate Division expresses the nature of N.J.S.A. 40:55D-18 and reminds us that no statute of limitation applies. The Court was only supplied Oliveira in our Motion for Reconsideration, but rejected it.

POINT I

**THE COURT WAS IN ERROR BY DISMISSING THE PLAINTIFF'S
COMPLAINT AS UNTIMELY (1T50-2 to 7)**

N.J.S.A. 40:55D-18 is an evergreen law.

The Court erred by dismissing this matter. The Court accepted several erroneous positions offered by the Defendants. The Defendants suggested that the Plaintiff was limited to file an appeal within 20 days of discovering any permit had been issued to Defendant Frank under N.J.S.A. 40:55D-70(a). They also argued that the Plaintiff was limited to file within 45 days of the municipality's failure to respond to our letter under R. 4:69-6. Finally, they argued that the Plaintiff slept on its rights so even if the permits were improperly issued, the Defendant was entitled to rely on them. As a result, the Court dismissed the Complaint. The Plaintiff's Complaint did not rely on either of those provisions but solely on the enforcement powers of N.J.S.A. 40:55D-18. It is our contention that the imposition of a time limitation is wrong as a matter of law.

N.J.S.A. 40:55D-18 is an evergreen law as a matter of essential public policy. N.J.S.A. 40:55D-18 is the sole source of authority for all zoning enforcement. N.J.S.A. 40:55D-18 allows interested parties to assume all of the enforcement

powers of the municipality in order to bring nonconforming properties into conformity. The court did not give due consideration to the important public policy of eliminating nonconforming properties. The Court found that this was just a neighbor dispute. The thing is that most zoning matters are neighbor disputes, and this neighbor had a right to appear at a Zoning Board hearing and object to whatever zoning relief the Defendant might have sought. But all had the right to bring this matter under the authority of N.J.S.A. 40:55D-18.

Faced with the Court's rejection of our reliance on N.J.S.A. 40:55D-18 we made a Motion for Reconsideration in which we included the unreported case Oliveira v. Township of Mahwah, No. A-3630-20, 2023 WL 2781312. **(Pa97)** The Defendants in that unpublished case made similar arguments. Judge Accurso affirmed the Judge below and clarified:

That “most direct course” is the path plaintiffs chose here, which the statute makes clear they are free to do without having to appeal the zoning permit issued to defendants to the Board of Adjustment. See N.J.S.A. 40:55D-18. Thus, defendants' claims of plaintiffs having “improperly” employed N.J.S.A. 40:55D-18 “to air their grievances,” thereby disregarding “their mandatory obligation to exhaust administrative remedies” by appealing the zoning permit issued by the Township Engineer to the Board of Adjustment, are completely off the mark. **The trial court was correct to find plaintiffs were under no obligation to “exhaust their administrative remedies” before pursuing their direct claim** against defendants under the statute to enjoin defendants' violation of the Township's fence ordinance. Oliveira v. Twp. of Mahwah, No. A-3630-20, 2023 WL 2781312, at *4 (N.J. Super. Ct. App. Div. Apr. 5, 2023)(emphasis added)

POINT II

THE COURT’S OPINION WAS FLAWED BECAUSE IT ACCEPTED THE FALSE PREMISES OF THE DEFENDANTS (1T39-8 to 14)

The Court below accepted the argument of the Defendants that the Plaintiff failed to exhaust administrative remedies and slept on its rights. These holdings as it relates to nonconforming structures are contrary to long standing principles of the municipal land use law. In Bonaventure Int'l, Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 432, 795 A.2d 895, 901–02 (App. Div. 2002) the Appellate Division restated the law:

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

The statutory protection is not without limitations. Because nonconforming uses are inconsistent with the current zoning, the nonconformity should be reduced to conformity as quickly as possible. *Hay v. Board of Adjustment*, 37 N.J. Super. 461, 464, 117 A.2d 650 (App.Div.1955). Municipalities may also impose limitations on nonconforming uses. Such restrictions may relate to change of use, the enlargement or extension of nonconforming structures, and limitations on the duration of nonconforming uses when the use is abandoned or discontinued. *Town of Belleville v. Parrillo's, Inc.*, 83 N.J. 309, 315, 416 A.2d 388 (1980). The method generally used to limit nonconforming uses is to prevent any increase or change in the nonconformity.

West Long Branch has just such an ordinance. Section 18-8.1 prohibits the expansion of a nonconforming structure. None of the permits given to Mr. Frank should have been issued and he has no right to rely on them.

The Plaintiff expected that West Long Branch would take action when it learned that a series of illegal permits were issued. West Long Branch had the right and obligation to do so, but failed to meet its duty.

In Twp. of Fairfield v. Likanchuk's, Inc., 274 N.J. Super. 320, 335, 644 A.2d 120, 127–28 (App. Div. 1994) the Appellate Division explained:

A municipality's “[p]rior tolerance of a use in violation of a zoning ordinance ... will not estop the municipality from later enforcing the ordinance.” *Universal Holding Company v. Township of North Bergen*, 55 N.J. Super. 103, 112, 150 A.2d 44 (App. Div. 1959). Thus, a municipality's enforcement of its ordinance ordinarily “may not be prevented on grounds of estoppel merely because a suit to terminate the illegal use could have been commenced earlier.” *Ianieri v. East Brunswick Zoning Board of Adjust.*, 192 N.J. Super. 15, 24-25, 468 A.2d 1072 (Law Div. 1983). Further, the application of laches as a defense to a municipality's attempt to enforce its ordinance does not “comport with salutary public policy,” and the doctrine should not be permitted to frustrate the enforcement of a valid zoning regulation “except in the clearest and most compelling circumstances.” *Universal Holding Company*, 55 N.J. Super. at 111, 150 A.2d 44. This is because the municipality represents “all the people of the municipality and the zoning ordinance is presumably for the benefit of the community as a whole.” *Ibid.*

Twp. of Fairfield v. Likanchuk's, Inc., makes clear that enforcement can occur even when the municipal actors sleep on their rights, because the zoning ordinance

is supposed to benefit the entire community. So, in any case where a property has nonconforming conditions enforcement can and should occur once discovered.

The Plaintiff put the Township on notice in the letter dated August 8, 2023 and once they failed to take action to bring the property into full conformance, the Plaintiff filed this action. As an interested party his authority arises from N.J.S.A. 40:55D-18:

Enforcement. The governing body of a municipality shall enforce this act and any ordinance or regulation made and adopted hereunder. To that end, the governing body may require the issuance of specified permits, certificates or authorizations as a condition precedent to (1) the erection, construction, alteration, repair, remodeling, conversion, removal or destruction of any building or structure, (2) the use or occupancy of any building, structure or land, and (3) the subdivision or resubdivision of any land; and shall establish an administrative officer and offices for the purpose of issuing such permits, certificates or authorizations; and may condition the issuance of such permits, certificates and authorizations upon the submission of such data, materials, plans, plats and information as is authorized hereunder and upon the express approval of the appropriate State, county or municipal agencies; and may establish reasonable fees to cover administrative costs for the issuance of such permits, certificates and authorizations. The administrative officer shall issue or deny a zoning permit within 10 business days of receipt of a request therefor. If the administrative officer fails to grant or deny a zoning permit within this period, the failure shall be deemed to be an approval of the application for the zoning permit. *In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings*

to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.(emphasis added)

All zoning enforcement in the State of New Jersey flows from N.J.S.A. 40:55D-18. But this section also grants the right to enforce to interested parties. This right has always existed in zoning. The Appellate Division in Borough of Bay Head v. MacFarlan, 209 N.J. Super. 134, 139, 506 A.2d 1299, 1302 (App. Div. 1986) found that N.J.S.A. 40:55D-18 “extended enforcement of zoning power beyond the zoning officer for all municipalities”. Mostly recently our Supreme Court in Harz v. Borough of Spring Lake, 234 N.J. 317, 336, 191 A.3d 547, 558 (2018) commented “Harz did not proceed with an appeal to the Planning Board pursuant to N.J.S.A. 40:55D–72(a) but instead filed a prerogative-writs action and Order to Show Cause in Superior Court aimed at enjoining the permit. That was her right, and one contemplated by N.J.S.A. 40:55D–18.”

POINT III

THE COURT’S OPINION ANALYZED BY PAGE (1T)

Page 39 (1T39)

The Court below at page 39 of the Motions to Dismiss transcript states “Plaintiff, nevertheless, failed to exhaust the administrative remedies available to him”. **(1T39-9 to 10)**The Court erred by accepting the position of the Defendants

that the time limits in N.J.S.A. 40:55D-70(a) and 72 applied. The Supreme Court in Harz in dicta makes clear that either path is available to an interested party.

If an interested party desires, it could file an appeal within 20 days from the discovery of an improvidently granted permit. See Harz supra. However, the municipal land use provides multiple means to achieve its objectives. While the Plaintiff could have filed an appeal, he choose to use N.J.S.A. 40:55D-18, a provision that is evergreen and has no time limits, which is consistent with the goal of bringing all properties in a municipality into zoning compliance as soon as practicable.

The Court failed to appreciate that variances may only be granted by a land use board upon notice and a public hearing. The Plaintiff presented the Court with 5 instances between 2010 and 2023 where the Zoning Official gave Mr. Frank a permit that should have been denied. If Frank wanted the relief sought, he would have had to file an application with the Zoning Board. The Frank lot is only 100 feet wide where 150 feet is required; and does not meet the minimum lot size. This means that virtually any improvement on this site required a variance. Ordinance section 18-8.1 requires variance relief for any expansion of a nonconforming property. The Zoning Officer lacked authority to issue these permits.

The Court at page 46 of the Motions to Dismiss transcript found the Plaintiff's reliance on Harz was "taken out of context and does not relieve plaintiff of his obligations to exhaust his administrative remedies." (1T46-8 to 10) After ignoring the Supreme Court, the Court concluded the language of the statute is "proactive and the mechanism for enforcement by interested parties must be made to prevent the alleged unlawful construction before it ever occurs." (1T47-5 to 7) The Court declares that because the improvements are already constructed, the property owner gets to keep them. This finding is profoundly incorrect and against public policy.

The Court never considered the impact such a holding could have on land use law. The permits issued were never tested by the Court below as to their validity. The permits issued are invalid because the Zoning Official cannot grant variance relief. The only way forward for Mr. Frank is to prove he reasonably relied on these permits. In Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 152–53, 62 A.3d 908, 920 (App. Div. 2013) the Appellate Division restated the law:

In the specific context of the issuance of building permits, the application of estoppel requires proof of four elements: (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. *Jesse A. Howland & Sons, Inc. v. Borough of Freehold*, 143 N.J. Super. 484, 489, 363 A.2d 913

(App.Div.) (quoting *153 *Hill v. Bd. of Adjustment*, 122 N.J.Super. 156, 162, 299 A.2d 737 (App.Div.1972)), *certif. denied*, 72 N.J. 466, 371 A.2d 70 (1976)

The Court in dismissing this case without ever hearing any testimony, could not have properly determined that the permits were valid and definitely could not rule on reasonable reliance of Defendant Frank. The Court in its decision assumes that the permits are valid. In Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 48, 866 A.2d 988, 991–92 (App. Div. 2004) the Court made clear that a “building permit issued contrary to a zoning ordinance or building code cannot ground any rights in the applicant.”

Page 48-49 (1T48-49)

The Court dismissed count three for the violation of the Plaintiff’s substantive due process rights because the Plaintiff failed to appeal in accordance with N.J.S.A. 40:55D-70(a) and 72(a). **(1T48-22 to 1T49-2)** The Court failed to appreciate that the Zoning Officer by issuing variances, deprives the public and this Plaintiff the right to be heard before the Zoning Board of Adjustment. In August of 2023, the Plaintiff expected the municipality would take action to bring the Frank property into conformity. Their lack of attention to this oversight constituted a violation of the Plaintiff’s substantive due process rights as the Supreme Court confirmed in Harz.

The Court erred when it relied on section 18-9.2(c)(4) of the West Long Branch code to renew its failure to exhaust administrative remedies holding. This section does not support the Court's analysis and reads as follows at page 49 of the Motions to Dismiss transcript:

The Board of Adjustment shall act in strict accordance with the procedures specified in Revised Statutes 40:55D-10 et seq. and 40:55D-72 and by this Chapter. **(1T49-22 to 25)**

However, the ordinance goes on to say:

All appeals and applications to the Board shall be in writing. Every appeal or application shall refer to the specific provision of the ordinance involved and shall exactly set forth the interpretation that is claimed or the details of the variance that is applied for and the grounds on which it is claimed that the variance should be granted. Every decision of the Board of Adjustment shall be made by resolution, each of which shall contain full record of the findings of the Board in the particular case. Each such resolution shall be filed in the Office of the Borough Clerk by case number under the heading of interpretation or variance, together with all documents pertaining thereto.

This provision instructs the Zoning Board and does not touch on zoning enforcement in any way.

Page 50 (1T50)

The Court erred by finding that the accrual of the Plaintiff's rights occurred at the issuance of the April 18, 2023 permit at the latest, so the Plaintiff was required to file within 45 days. N.J. Ct. R. R. 4:69-6 **(a) General Limitation.** Provides "No

action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.” Section (b) of the rule lists actions that trigger accrual. The issuance of a building permit is not among them. The Court proceeds to launch into its reasoning why time should not be expanded in the interest of justice without ever explaining its conclusion that accrual began in April 2023. The municipality took no action. It passed no Resolution that the Plaintiff could challenge. To be sure, this matter was necessitated as a direct result of the municipality’s failure to act. R. 4:69-6 does not define by its terms when rights “accrue” to trigger the forty-five day period, but instead leaves the question of accrual to substantive law. Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 401, (App. Div. 2008).

The Court failed to appreciate the importance of zoning enforcement and that zoning seeks to eliminate all nonconforming structures as soon as practical. “Nonconforming uses are inconsistent with the objectives of uniform zoning, the courts have required that consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice.” Conselice v. Borough of Seaside Park, 358 N.J. Super. 327, 333, 817 A.2d 988, 992 (App. Div. 2003) This view allows a Zoning Official using the authority of N.J.S.A. 40:55D-18 to bring an enforcement action whenever it discovers a nonconforming condition on a property. This is the law.

To be fair to the Judge, we cited Mullen v. Ippolito Corp., 428 N.J. Super. 85, 105, 50 A.3d 673, 685 (App. Div. 2012) for the following proposition: “Here, plaintiffs' cause of action is grounded on the municipal defendants' failure to respond to or act upon their numerous complaints of alleged zoning violations by the Driftwood. If true, these allegations describe an amorphous history of municipal inaction, rendering plaintiffs without a realistic alternative form of administrative relief.” Similarly, the Plaintiff herein, like Mullen, was complaining about the expansion of a nonconforming structure for over a decade and the municipality’s turning a blind eye. We offered Mullen in support of our outrage over the municipality’s inaction. We were not seeking relief as to the time to file..

Unfortunately, although the litigant in Mullen could have relied on N.J.S.A. 40:55D-18, it did not. For some reason, many good practitioners have failed to use the authority of this statute when seeking zoning enforcement.

Page 53 (1T53)

The Court erred by applying equity and laches to a zoning matter. **(1T53-7 to 10)** N.J.S.A. 40:55D-18 imposes no time limit because invalid nonconforming conditions have no right to exist. It has been recognized for decades 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.” Hilton Acres v. Klein, 35 N.J. 570, 581, 174 A.2d 465, 470 (1961). All of Frank’s permits are invalid. The

Appellate Division in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 47, 866 A.2d 988, 991 (App. Div. 2004) held:

While the equitable estoppel doctrine is rarely invoked against a municipality because it could impair essential governmental functions. *Ibid.* However, a municipality may be estopped from enforcing its zoning ordinance if a landowner makes substantial expenditures in good faith reliance on a permit that was issued because of a municipal official's erroneous, but at least debatable, interpretation of the zoning ordinance.

In the case at bar, the Court cannot apply equitable estoppel without testimony and evidence. “Without plaintiffs' good faith reliance on defendant's approvals, the doctrine of equitable estoppel will not be employed.” *Id.* In this case Frank provided no evidence of reasonable reliance.

The Court also found that laches applied. The courts have long ago silenced the notion that nonconforming properties could seek the protection of equity on the basis of laches. “Where there is a clear violation of a zoning ordinance, a neighboring taxpayer's action ‘to eliminate the unlawful use serves not only his private interests but those of the entire community as well and, under such circumstances, the equitable doctrine of laches should be hesitatingly invoked.’” Garrou v. Teaneck Tryon Co., 11 N.J. 294, 307, 94 A.2d 332, 339, 35 A.L.R.2d 1125 (1953). See Thornton v. Ridgewood, 17 N.J. 499, 511, 111 A.2d 899 (1955). Weber v. Pieretti, 72 N.J. Super. 184, 203, 178 A.2d 92, 103 (Ch. Div.), aff'd, 77 N.J. Super. 423, 186

A.2d 702 (App. Div. 1962). Unless a nonconforming structure is validly created, it cannot rely on equity. The permits issued here are invalid.

Page 58-59 (1T58 to 1T59)

The Court is correct that the Plaintiff cannot seek mandamus against Mr. Frank. **(1T58-24 to 1T59-1)** This was plain error on our part. But the Court misunderstood our request for mandamus. Enforcing the zoning ordinance is a ministerial act. But the Court at page 59 of the Motions to Dismiss transcript explains that a “referral to the Board is ministerial. However, the means of enforcement of the zoning permits are. . .discretionary.” **(1T59-5 to 6)** The Court goes on to state “The Board has no “certain and imperative duty to enforce the zoning permits in a manner that the plaintiff wishes.” **(1T59-11 to 13)** The Zoning Officer and the Governing Body have a duty to enforce the zoning ordinance. If the Governing Body does not agree with its ordinance, it can amend it otherwise it must enforce it.

Page 61 (1T61)

The Court rejected the violation of the Plaintiff’s substantive due process. It concludes at page 61: “The plaintiff’s conclusory argument that he will show that the conduct shocks the conscience is an impermissible fishing expedition” **(1T61-6 to 8)** The Plaintiff provided a planner/engineer report identifying numerous instances that required variances over 13 years. The reality is that without discovery

we will never learn the rationale for how or why any of these variances were issued by the Zoning Officer. The Judge accepted the contentions of the Defendants without any supporting facts.

Questions remain. Is the Zoning Official incompetent? Did Mr. Frank reasonably rely on the permits issued? Why were permits issued when variances are required? We may learn that there is a good reason for the issuance of these permits. But if not, the Plaintiff has been deprived of the right to be heard by the Zoning Board as to the issuance of these variances. Harz v. Borough of Spring Lake, 234 N.J. 317 (2018).

Page 62 (1T62)

The Court concludes at page 62 of the Motions to Dismiss transcript that the Plaintiff failed to show that the Zoning Official knowingly violated the law or acted plainly incompetently correctly citing to Morillo v. Torres, 222 N.J. 104, 118, 117 A.3d 1206, 1215 (2015). **(1T62-8 to 10)** However, the Court ignored the Cole report which explained the extent of the deviations from the zoning ordinance. This is not a simple one time error. This is a disturbing pattern over 13 years and the Plaintiff deserves to be heard. It was unreasonable to place the burden to prove our case without discovery. Moreover, no evidence was offered by the Defendant as to the Zoning Officer's reasons or Mr. Frank's reliance.

POINT IV

THE COURT ERRED WHEN IT DISMISSED THE WITHIN ACTION WITH PREJUDICE (Pa1)

In determining the adequacy of the pleadings to sustain the motion, the court must determine “whether a cause of action is ‘suggested’ by the facts.” Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192, 536 A.2d 237 (1988)); See also Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124-25, 92 A.3d 681 (App. Div. 2014) (“in determining whether dismissal under Rule 4:6-2(e) is warranted, the court should not concern itself with plaintiffs' ability to prove their allegations”).

“Dismissals under Rule 4:6-2(e) are ordinarily without prejudice.” Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17, 278 A.3d 272 (App. Div. 2022). However, there are times when a dismissal with prejudice is mandated, such as when the facts are “palpably insufficient to support a claim upon which relief can be granted” and when “discovery will not give rise to” a successful claim. Big Smoke LLC v. Twp. of W. Milford, 478 N.J. Super. 203, 225–26, 313 A.3d 77, 91 (App. Div. 2024).

The Court below erred when it not only dismissed this matter, it did so with prejudice. The Court foreclosed the possibility of a refreshed complaint. The Court's view was that time prohibited the filing of this action. We contend elsewhere in this

brief that this is not correct. But to the extent the Court dismissed this matter for equitable reasons and laches, the Court was mistaken.

In order to gain the benefit of equitable estoppel the Appellate Division in Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 152, 62 A.3d 908, 920 (App. Div. 2013) explains:

In the specific context of the issuance of building permits, the application of estoppel requires proof of four elements: (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.

In the case at Bar none of these elements have been proven. The Court found that permits were issued and were not timely challenged, so its opinion was that the Defendant homeowner won a footrace and was entitled to keep them. The Courts have been clear that equitable estoppel upholding a variance is rarely granted and only when the Defendant can demonstrate good faith reliance. As no evidence has been deduced, no discovery taken and the Defendant failed to provide any proof as to its reliance, the Court should not have dismissed this pleading.

It is rare that a court will dismiss a complaint for failure to state a claim. In this case the Court made findings based solely on the pleadings. According to the Appellate Division in Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 67, 746 A.2d

1034, 1040 (App. Div. 2000) “The burden of proof of a claim based on principles of equitable estoppel is on the party asserting estoppel. *Miller v. Miller*, 97 N.J. 154, 163, 478 A.2d 351 (1984).” More importantly in this case “To establish equitable estoppel, parties must prove that an opposing party ‘engaged in conduct, either intentionally or under circumstances that induced reliance, and that [they] acted or changed their position to their detriment.’ ” Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 189, 71 A.3d 849, 858 (2013).

In the case at bar, all we know is that permits were issued, and structures were constructed. We know nothing about the reasoning for their issuance or the extent of the respondent homeowner’s reliance. So, the Court fell short in prematurely ending this litigation.

The Court had a duty as explained in Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250, 791 A.2d 1068 (App. Div. 2002) “To determine whether a plaintiff’s **complaint** states a claim, the court searches the **complaint** ‘in depth and with liberality to ascertain whether the fundament of a **cause of action** can be gleaned even from an obscure statement of claim.’ ”

In order to find reliance, a hearing would have had to be conducted and the Court should have permitted discovery on that issue. The Complaint was adequate for its purpose and did not deserve to be dismissed.

The Court's dismissal of the Complaint was wrong on the passage of time and premature on the issue of estoppel. While we expect to prove that there is no reliance and perhaps unclean hands, we need the framework of litigation to prove those allegations. The Court has violated our rights by dismissing our matter at this foundational stage.

POINT V

THIS CASE PRESENTS A QUESTION OF GENERAL PUBLIC IMPORTANCE REGARDING THE APPLICATION OF N.J.S.A. 40:55D-18 (Not Raised Below)

This matter presents an opportunity to publish a case on the evergreen nature of N.J.S.A. 40:55D-18. We contend that the unpublished holdings in Oliveira and Matthews correctly explain that an interested party does not have to exhaust administrative remedies or file an appeal within 20 days under N.J.S.A. 40:55D-70(a) when it seeks enforcement of a zoning violation. As to R. 4:69-6(a), the Court in Matthews says:

That rule, however, applies to actions in lieu of prerogative writs. *R. 4:69; N.J. Const. art. VI, §5, para. 4; see also In re LiVolsi*, 85 N.J. 576, 593 (1981). As already noted, plaintiffs here did not file an action in lieu of prerogative writs; rather they filed an action under section 18 of the MLUL. N.J.S.A. 40:55D-18. Thus, the time limitation in *Rule 4:69-6(a)* is not applicable.

Matthews v. Ehrmann, No. A-1868-17T4, 2019 WL 692127, (N.J. Super. Ct. App. Div. Feb. 20, 2019)

As explained in this brief, only valid nonconforming conditions may continue indefinitely; all other properties are subject to enforcement. Motley v. Seaside Park, 430 N.J. Super. 132 (App. Div. 2013)

The local government and land use bars would benefit from a published case verifying that there are no prerequisites to file for enforcement under N.J.S.A. 40:55D-18. While the Harz case touches on the topic, the Court in this matter found it unclear or merely dicta.

The Bar and the Law Division need a published case explaining clearly the right of interested parties to bring a zoning enforcement action in accordance with N.J.S.A. 40:55D-18 without the need to file an appeal or exhausting administrative remedies.

By way of clarification, a neighbor has a right to file an appeal within 20 days of discovering the issuance of a permit. This is a method available to a neighbor which could present a less expensive action to correct what they perceive as an error.

As for the concept that a party must exhaust administrative remedies, that arises when a developer seeks to challenge an ordinance and requires them to apply for a variance first. See Gripenburg v. Twp. of Ocean, 220 N.J. 239, 261, 105 A.3d 1082, 1095–96 (2015) However, the Supreme Court points out that “the requirement of exhaustion is not absolute and “[e]xceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of

the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision.”

The litigation arising from N.J.S.A. 40:55D-18 assumes the zoning ordinance is valid. The interested party has nothing to appeal to a Zoning Board because they are not a developer. An interested party is generally acting because the municipality took no action and issued no Resolutions or Ordinances. As such R. 4:69 does not apply and there is no administrative remedy to exhaust per R. 4:69-5. Said differently, zoning enforcement litigation is not an action in lieu of prerogative writs. It must be remembered that the interested party stands in the shoes of the Zoning Officer. The Zoning Officer has no obligation to appeal or exhaust administrative remedies and neither should the interested party.

It is respectfully submitted that the application and procedures surrounding N.J.S.A. 40:55D-18 are of general public importance and the Bar would benefit from a published opinion.

CONCLUSION

For all the reasons set forth herein the Plaintiff respectfully requests that the Appellate Division remand this matter to the Law Division with instructions to allow this matter to proceed in the regular course. In addition, permitting the Plaintiff to amend its writ of mandamus count to exclude Mr. Frank and allowing the Plaintiff to perform discovery including the right to depose Mr. Frank and municipal

employees as needed including Mr. Miller regarding the issuances of permits to Mr. Frank since 2010.

Respectfully submitted,

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STEVEN SCHULZ,

Plaintiff/Appellant,

v.

THE BOROUGH OF WEST LONG
BRANCH, JAMES MILLER, IN HIS
OFFICIAL CAPACITY AS ZONING
OFFICIAL, AND ANDREW FRANK,
INDIVIDUALLY,

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-0003736-23

On Appeal from:

SUPERIOR COURT OF NEW JERSEY,
MONMOUTH COUNTY, LAW
DIVISION

Docket No: MON-L-3272-23

Sat below:

Honorable Andrea I. Marshall, J.S.C.

ANDREW FRANK,

Defendant/Cross-Appellant,

v.

STEVEN SCHULZ,

Plaintiff/Cross-Respondent.

AMENDED BRIEF IN SUPPORT OF RESPONDENT/CROSS-APPELLANT
ANDREW FRANK'S CROSS-APPEAL OF THE TRIAL COURT'S JULY 9, 2024
ORDER AND IN RESPONSE TO APPELLANT/CROSS-RESPONDENT'S
APPEAL OF THE TRIAL COURT'S MAY 24, 2024 ORDER

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PRELIMINARY STATEMENT

This matter arises from Plaintiff, Appellant, and Cross-Respondent Steven Schulz's ("Plaintiff") relentless harassment of Defendant, Respondent and Cross-Appellant Andrew Frank ("Frank"). Escalating a neighbor dispute, Plaintiff brought a frivolous complaint against Frank seeking to appeal permits that were issued up to 13 years ago (the "Complaint"). The trial court properly dismissed all four claims in the complaint finding that the Complaint collectively represented an out-of-time appeal of Frank's permits *and* that each claim is deficient as a matter of law for a host of reasons.

This Court should uphold the trial court's dismissal of Plaintiff's Complaint in its entirety with prejudice. The trial court's reasoning exhaustively addressed every argument and counter argument over *34 transcript pages* wherein it properly applied the record to well-settled law. Despite counsel for Plaintiff's condescending remarks on the record directing the trial judge to not "worry about it" and he would "deal with it" followed by a baseless reconsideration motion -- notably wherein Plaintiff's counsel admitted to failing to raise a host of legal arguments in opposition to the Motion to Dismiss -- the decision to dismiss the Complaint is well grounded in the law and represents the only correct legal conclusion available to the trial court.

Critically, the Complaint was dismissed for a multitude of reasons – any one of which would be sufficient to dismiss the Complaint and its individual claims.

First, the Complaint is holistically an appeal of the four permits obtained by Frank between 13 years and 182 days from when the Complaint was filed. As *Plaintiff's counsel* wrote about at length in a published article, a neighbor has “20 days to file an appeal of the zoning officer’s decision” pursuant to the Municipal Land Use Law. In a desperate attempt to circumvent this requirement, Plaintiff claims that the Complaint is not actually an appeal of Frank’s permits notwithstanding that the relief sought is *precisely* the type of relief reserved for a permit appeal. Thus, the Complaint itself reveals its actual purpose is to appeal Frank’s permits for which he is inarguably time barred.

Second, Plaintiff’s first cause of action for a writ of mandamus is also out of time pursuant to the separate legal authority governing such claims. Additionally, Plaintiff’s writ of mandamus claim is fatally deficient as it failed to exhaust administrative remedies, names Frank where writs of mandamus only apply to government entities and fails to establish a ministerial action to enforce. Indeed, any of these defects would individually compel dismissal of the claim and, in the aggregate, compel it.

Third, Plaintiff spills much ink arguing that the Complaint relies on an enforcement theory and is not an appeal of Frank’s permits. Although a false statement, Plaintiff’s enforcement claims are also barred by laches as Plaintiff slept on his rights, waiting until construction was completed and then months and in some

cases a *decade* to seek enforcement of the ordinance. Withholding legal fire until Frank's improvements were completed is expressly barred by laches.

Fourth, Plaintiff's final cause of action asserting a substantive due process violation is equally misguided and also fails to meet well-settled threshold requirements, any one of which renders this claim ripe for dismissal. Plaintiff did not exhaust his administrative remedies and was required to appeal the Zoning Official's actions, which he did not. Further, Plaintiff does not because he cannot show that the Zoning Official "knowingly violate[d] the law." In fact, the Zoning Official responded to Plaintiff stating that Frank's property "is in compliance with the Borough's Ordinance and all necessary Permits obtained" conclusively demonstrating that the Zoning Official did not knowingly violate the law, if at all.

The countless fatal deficiencies of the Complaint, which the trial court confirmed, show that the Complaint was brought without any legal support. Further, the context of the Plaintiff's unceasing, years of harassment of Frank through police reports and complaints to the Borough demonstrates Plaintiff's unhinged vendetta for Frank. It is clear that the Complaint was brought for the sole purpose of continuing a campaign of harassment against Frank, who had no choice but to defend himself at great personal cost. As such, the trial court's denial of Frank's frivolous litigation motion should be overturned, and Plaintiff should be required to pay Frank's reasonable attorneys' fees and costs.

PROCEDURAL HISTORY

Frank submits this brief in opposition to Plaintiff's appeal of the Order entered by the Honorable Andrea I. Marshall, J.S.C. dismissing Plaintiff's Complaint, and in support of his cross-appeal of the Order entered denying Frank's motion for sanctions. Da1-5, 6-10.

On October 17, 2023, Plaintiff filed a Complaint against Defendants Frank, the Borough of West Long Branch (the "Borough") and James Miller in his capacity as zoning official (the "Zoning Official" and together with Frank and the Borough, the "Defendants"), which amounted to an appeal of permits obtained by Frank from 2010 to 2023. Pa3-20. The claims asserted in the Complaint were fashioned as (i) writ of mandamus against the Borough and Frank, (ii) enforcement pursuant to N.J.S.A. 10:6-2(c) against Frank, (iii) substantive due process against the Borough and Miller, and (iv) enforcement pursuant to the Borough's ordinance against the Borough and Frank. Pa13-19.

On December 27, 2023, Frank filed a Motion to Dismiss Plaintiff's Complaint. Pa112. On January 8, 2024, the Borough and Zoning Official filed a Motion to Dismiss essentially joining in Frank's Motion to Dismiss. Pa218-219. On May 24, 2024, the trial court heard extensive oral argument and granted Defendants' Motions to Dismiss the Complaint in their entirety relying on an exhaustive analysis of all arguments made by the parties. Pa1; T34:10-63:12.

On June 13, 2024, Frank filed a Motion for Sanctions against Plaintiff and Plaintiff's attorney pursuant to Rule 1:4-8 seeking attorney's fees for defending against Plaintiff's deficient, frivolous and improper Complaint. Da11-12. Also on June 13, 2024, Plaintiff filed a Motion for Reconsideration of the trial court's May 24, 2024 Order. Pa234. On July 5, 2024, the trial court denied Frank's Motion for Sanctions reasoning that it would not consider the circumstances surrounding the Complaint, and concluding, without support, that the Complaint was not brought in bad faith. Da1-5. The trial court denied Plaintiff's Motion for Reconsideration memorializing its reasoning in an extensive Rider that Plaintiff tellingly omits from its appendix. Da13-18.

On July 30, 2024, Plaintiff filed a Notice of Appeal as to the Court's May 24, 2024 Order dismissing the Complaint pursuant to Rule 4:6-2(e). Pa 258. On August 6, 2024, Frank filed a Notice of Cross-Appeal as to the trial court's July 5, 2024 Order denying Franks's Motion for Sanctions pursuant to Rule 1:4-8. Da1.

STATEMENT OF RELEVANT FACTS

This matter is a neighbor dispute and represents Plaintiff's latest attempt in his incessant efforts to harass Frank -- this time weaponizing the judicial system. Frank is the owner of real property located as Block 72, Lot 8, commonly known as 48 Summer Avenue, West Long Branch, New Jersey (the "Property"). Pa3-20. The Property is located in an R-22 zone, which is for Low Density Residential, and

contains a single-family residential house. Pa4. Plaintiff is the owner of real property that is one lot away from the Property and is commonly known as 52 Summers Avenue, West Long Branch, New Jersey. Pa4.

I. Plaintiff's Municipal Level Complaints

Notably, Frank has been subjected to unceasing harassment from Plaintiff in the form of complaints to the Zoning/Code Enforcement Office and police reports. Pa118-152, 153-201. The Complaint is the latest of Plaintiff's numerous, obsessive, and well-documented efforts to harass Frank. *Id.*

The complaints with the Zoning/Code Enforcement Office of West Long Branch range from complaints about Frank's permitted patio improvements to Frank's placement of grass clippings. Pa118-152. Specifically, on April 17, 2023, Plaintiff messaged the Zoning Official, "Andrew Frank of 48 Summers [A]ve. is expanding his patio. About ten years ago he increased it to approximately 43% and I advised your office. It now appears he is expanding it further and possibly preparing a footing for a pool house." Pa121-122. Additionally, Plaintiff states "[i]f the patio expansion was approved by the zoning department ***I would like to appeal***" clearly showing Plaintiff's awareness of improvements made to the Property and awareness that he would have to appeal any permits -- yet he inexplicably failed to timely do so. *Id.* (emphasis added). Other complaints include a five-paragraph narrative of various complaints including a "garbage can and boat issue," a

prohibited fence, a purported fire hazard in the form of *grass clippings*, and purported bamboo on the street. Pa124, 127, 146. Altogether the complaints and responses thereto comprise dozens of pages of Plaintiff's obsessive tracking of Frank's property and activities. Pa118-152.

The police reports involving Plaintiff and Frank further demonstrate Plaintiff's unhinged behavior towards Frank, confirming that the claims brought in the Complaint are simply Plaintiff's latest ploy to harass Frank. Pa153-201.¹ By way of example, Plaintiff called the police because Frank was using his leaf blower. Pa154-156. Frank, with video evidence, reported Plaintiff trespassing on the Property and placed logs under his vehicle that was parked in the street. Pa187-189. Plaintiff even called the police over apparently threatening grass clippings referenced in the Zoning/Enforcement complaints. Pa192-194. The police officer concluded what everyone knew that the grass clippings were not a safety hazard noting that after "two to three years and [Plaintiff] was now suddenly worried that it was a fire hazard." Pa194. Ultimately the neighbor abutting the Property "quickly explained that the grass clippings had been there for over three years and that when they were initially dumped there was a question about the property line; however,

¹ Frank's counsel obtained the police reports by way of an OPRA request and thus requests that the Court take judicial notice of the facts therein. *See* N.J.R.E. 201(b)(3).

they had no issue with Frank what so ever *adding that Schulz is just attempting to get them involved with their dispute.*” *Id.* (emphasis added).

II. The Permits.

Frank has acquired various permits to make improvements to the Property over the past 13 years. Pa3-73. On November 18, 2010, Frank received approval for Permit 2010-028 to “[r]emove old wooden wall inground pool and install new steel wall pool and steps in the same location and the same size as the old pool.” Pa57-61. Plaintiff did not appeal Permit 2010-02. Pa3-20. The Complaint was filed 12 years and 10 months after the issuance of Permit 2010-02. *Id.*

On June 21, 2011, Frank received approval for Permit 2011-097 to “replace an existing rear patio, front porch and driveway all the same size and in the same location as the existing.” Pa45-49. Plaintiff did not appeal Permit 2011-097. Pa3-20. The Complaint was filed 12 years and 3 months after the issuance of Permit 2011-097. *Id.*

On May 3, 2022, Frank received approval for Permit 2022-141 for a “2nd story addition to single family home, expand paver patio, relocate bilco door, demo chimney, interior renovations.” Pa50-55. Plaintiff did not appeal Permit 2022-41. Pa3-20. The Complaint was filed 1 year and 5 months after the issuance of Permit 2022-41. Pa50-55.

On April 18, 2023, Frank received approval for Permit 2023-164 for “[r]emoval of existing pool coping patio and house patio/steps and wooden deck. Installation of revised pool coping, pool patio, small garden walls with pillars. Installation of a built kitchen BBQ area. Installation of a gas fire pit.” Pa64-73. Plaintiff did not appeal Permit 2023-164. Pa3-20. The Complaint was filed 182 days after the issuance of Permit 2023-164. Pa64-73.

III. The Law Division Complaint.

On October 17, 2022, Plaintiff filed a Complaint making various claims that amount to challenges of the permits obtained by Frank up to 13 years ago. Pa3-20. Indeed, the heart of the Complaint is dedicated to a description of the four permits that Plaintiff is effectively appealing. *See* Pa5-13. Moreover, Plaintiff seeks relief in the form of “[c]ompelling Defendant to submit to the Zoning Board of Adjustment for the Borough of West Long Branch for a review of the Property and Permits #2010-028, #2011-097, and #2023-164,” which is merely a roundabout way to describe an appeal of those permits. Pa14, 16 and 19.

Moreover, the Complaint’s individual causes of action sounding in (i) writ of mandamus, (ii) enforcement pursuant to N.J.S.A. 40:55D-18, (iii) violation of Plaintiff’s substantive due process rights, and (iv) enforcement pursuant to the Borough ordinance are all separately deficient for a number of reasons. *See id.*

Evidently, the trial court agreed and dismissed the Complaint for failing to meet the procedural requirements adopting. Pa1; *see also* T34:10-68:5.

IV. Motions to Dismiss and Rule 1:4-8 Letter.

Accordingly, Frank filed a Motion to Dismiss Plaintiff's Complaint on December 27, 2023 ("Frank's MTD"), which was later joined by the other Defendants on January 8, 2024 ("Borough's MTD" and together with Frank's MTD, the "Motions to Dismiss"). Pa112-113, 215-217. Frank's MTD argued that the Complaint was procedurally deficient for numerous reasons. T34:10-68:5. First, although couched in terms of "enforcement", the Complaint amounted to an appeal of Frank's permits, which was woefully out of time pursuant to N.J.S.A. 40:55D-72. T43:8-17. Second, Plaintiff's enforcement claims pursuant to N.J.S.A. 40:55-18 listed as counts two and four were barred by laches. T53:7-55:12. Third, Plaintiff's writ of mandamus claim listed as count one did not meet its threshold requirements of naming a non-government actor, Plaintiff did not exhaust administrative remedies, the writ of mandamus was out of time pursuant to Rule 4:69-6, and Plaintiff did not assert a ministerial act. T55:8-59:17. Fourth, Plaintiff's substantive due process claim listed as count three was fatally deficient because it failed to state a claim that "shocked the conscience", Plaintiff failed to exhaust administrative remedies, and the Zoning Official was named who is immune from such a substantive due process claim. T59:18-63:4. Additionally, Frank issued a letter to

Plaintiff's counsel, Dennis M. Galvin, Esq., on January 4, 2024 (the "Rule 1:4-8 Letter") urging that Plaintiff withdraw the Complaint and explaining the procedural and substantive deficiencies as to each of Plaintiff's claims. Pa19-22. The Rule 1:4-8 Letter demanded "that [Plaintiff] dismiss the Complaint within 28 days", or Frank would seek attorneys' fees and costs pursuant to the Rules of Court. Pa21-22

Plaintiff did not withdraw its Complaint and filed an opposition to the Motions to Dismiss. Da23-35. Plaintiff's opposition included arguments that its enforcement claims were distinct from an appeal of the Permits, and a convoluted argument that a writ of mandamus claim applied. *Id.* Critically, Plaintiff declined to oppose the vast majority of Frank's arguments. *Id.* Indeed, "laches" was not referenced once in the entirety of Plaintiff's opposition. *Id.*

On May 24, 2024, following oral argument, the Court granted the Motions to Dismiss in their entirety with prejudice. Pa1. The Court provided a lengthy analysis on the record addressing both Plaintiff's and Defendants' arguments, examining the relevant binding law, culminating in an adoption of each of Frank's arguments stated in the Frank MTD and Rule 1:4-8 Letter (other than qualified immunity which is irrelevant to this application). T34:10-68:5. Significantly, the trial court found that Plaintiff had the opportunity to appeal the Frank permits through the appeal process afforded by the Borough, but failed to do so therein failing to exhaust his administrative remedies. T39:9-14 ("Even taking these assertions as true, plaintiff,

nevertheless, failed to exhaust the administrative remedies available to him as required under factor three. Plaintiff had the opportunity to file an appeal within the time period provided by N.J.S.A. 40:55D-70(a) and N.J.S.A. 40:55D-72(a) and failed to do so”). Even after dismissing the Complaint for failing to appeal Frank’s permits in the prescribed time and through the requisite process, the trial court engaged in a discussion of the deficiencies in each cause of action. *See e.g.* T55:8-12 (“Writ of Mandamus, count one, Even though the Court has already determined that count one is dismissed for failure to exhaust administrative remedies, the Court will nevertheless analyze defendants’ other arguments regarding count one”); *see also e.g.* T59:18-24 (“Substantive due process rights, separate arguments, count three ... Regarding the first element, nowhere in the complaint can it be gleaned that defendants’ alleged actions ‘shock the conscience,’ as required”).

The trial court’s decisive dismissal of the Complaint for all the reasons stated by Frank should have made it clear to Plaintiff and his counsel² that the Complaint was meritless. Accordingly, Frank is entitled to counsel fees for being forced to defend against the frivolous Complaint that was filed for the sole purpose of harassing Frank.

V. Frank’s Motion for Sanctions.

² In fact, Plaintiff’s counsel wrote an article explaining that his client’s appeal of the Permits are plainly out of time pursuant to the MLUL. Pa202-204.

On June 13, 2024, Plaintiff filed a Motion for Sanctions Pursuant To Rule 1:4-8 And N.J.S.A. § 2A:15-59.1 (the “Sanctions Motion”). Da11-12. The Sanctions Motion showed that the Complaint was filed for the improper purpose of harassing Frank as it clearly had no legal merit, which was evident from the trial court’s dismissal of all its counts for numerous different reasons. *Id.* After the Sanctions Motion was fully briefed, this Court denied the Sanctions Motion wrongly concluding that “[e]ven considering the extensive history of the parties and this litigation, the Court does not find that Plaintiff’s actions in bringing this Complaint and filing the motion for reconsideration were in bad faith sufficient to warrant an award of sanctions.” Da1-5.

VI. Plaintiff’s Motion for Reconsideration.

Simultaneously with Frank’s Sanctions Motion, Plaintiff filed a Motion for Reconsideration on June 13, 2024 (the “Reconsideration Motion”). Pa234-236. The Reconsideration Motion was a clear attempt to raise new arguments that Plaintiff did not make (but could have) during the briefing of Frank’s MTD. Da 36-53. In Plaintiff’s words “[t]he most important issue I failed to articulate is that a zoning officer can never issue a variance; to do so, is an ultra vires act which is void ab initio.” Da36. Thus, Plaintiff admitted that he did not make any arguments opposing Frank’s laches arguments when opposing Frank’s MTD. *Id.* The trial court denied the Reconsideration Motion, finding no reason to reconsider its decisions that

administrative remedies were not exhausted, nor that laches applied. *See id.* As to Plaintiff's failure to exhaust administrative remedies, the trial court correctly discarded Plaintiff's argument that *Oliviera v. Mahwah* should be applied reasoning that it is unpublished and not binding on the trial court. Da35. Additionally, the trial court held that it was improper for Plaintiff to rely on this case in a motion for reconsideration because "Plaintiff's new argument is not presented to identify a new, controlling decision, and is therefore impermissible as a matter of law. *Id.* The trial court finished its analysis by reasoning that it "extensively reviewed" binding decisions including *Harz v. Borough of Spring Lake. Id.*

The trial court then rejected Plaintiff's argument that laches did not apply:

Importantly, Plaintiff made no arguments whatsoever on the issue of laches in either his opposition brief nor at oral argument for the previous Motion to Dismiss. Plaintiff asserted in his Reply brief for this Motion that "[p]laintiff properly provided additional law for the Court to consider that was not properly considered in its underlying decision." The Court disagrees, and the reason any contravening case law was not considered was because Defendant's motions were unopposed on the issue.... All of Plaintiff's arguments on the issue are made improperly for the first time on a motion for reconsideration and the Court finds that this is not a proper basis to reconsider its opinion.

Pa36. The trial court left no doubt that Plaintiff's arguments regarding laches were improperly brought for the first time in the Reconsideration Motion and were substantively unavailing. *See id.*

STANDARDS OF REVIEW

I. Motion for Sanctions

This Court reviews “the trial judge’s decision on a motion for frivolous lawsuit sanctions under an abuse of discretion standard.” *Bove v. AkPharma Inc.*, 460 N.J. Super. 123, 146 (App. Div. 2019). Reversal is warranted if the decision “was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.” *Id.*

There are two legal sources aimed at regulating frivolous litigation in New Jersey. First, Rule 1:4-8 sets the standards for when a party may move for sanctions against an opposing attorney. Indeed, when an attorney signs or files a pleading, he certifies, to the best of his knowledge, information, and belief formed after a reasonable inquiry, that:

- (1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and
- (4) the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.

See Rule 1:4-8(a).

Accordingly, any adverse party may seek sanctions when a pleading is filed which violates the Rule, including all reasonable expenses and attorneys' fees. *Id.* Such an application for sanctions "shall describe the specific conduct alleged to have violated this rule" and include a certification that the applicant served written notice and demand to the attorney or who signed or filed the offending paper identifying which:

(i) state[d] that the paper is believed to violate the provisions of this rule, (ii) set forth the basis for that belief with specificity, (iii) include[d] a demand that the paper be withdrawn, and (iv) [gave] notice, except as otherwise provided herein, that an application for sanctions will be made within a reasonable time thereafter if the offending paper is not withdrawn within 28 days of service of the written demand.

See Rule 1:4-8(b)(1). "The certification shall also certify that the paper objected to has not been withdrawn or corrected." *Id.*

Further reflecting our State's disdain for needless litigation, New Jersey's "frivolous litigation statute," provides that a party who prevails in a civil action "may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous." *See* N.J.S.A. § 2A:15-59.1(a)(1). The purpose of the statute is:

to allow a party who prevails in a civil suit to recover reasonable attorney fees and litigation costs from the nonprevailing person if the judge finds that the legal position of the nonprevailing person was not justified and was commenced in bad faith solely for the purpose of delay or malicious injury, or that the nonprevailing party knew or should have known that the action was without any reasonable basis in law or equity.

Iannone v. McHale, 245 N.J. Super. 17, 25 (App. Div. 1990) (noting that the statute was patterned after the 1983 amendment of Fed. R. Civ. P. 11, the analogue to and source of Rule 1:4-8, whose purpose was “detering groundless suits”). Further, “continued prosecution of a claim or defense may, based on facts coming to be known to the party after the filing of the initial pleading, be sanctionable as baseless or frivolous even if the initial assertion of the claim or defense was not.” *Id.* at 31. Indeed, the “requisite bad faith or knowledge of lack of well-groundedness may arise during the conduct of the litigation.” *Id.*

Similarly, “Rule 1:4-8 has a punitive purpose in seeking to deter frivolous litigation, [and] it also seeks to compensate a party that has been victimized by another party bringing frivolous litigation.” *Deutch & Shur, P.C. v. Roth*, 284 N.J. Super. 133, 141 (Law Div. 1995) *abrogated in part on other grds.*, *Segal v. Lynch*, 211 N.J. 230, 260 (2012). Thus, “[i]n approaching the issue of deterring baseless litigation, while not discouraging honest and creative advocacy, the focus is upon the objective reasonableness of the action of a party under the circumstances.” *Id.* at 29.

II. Motion to Dismiss Standard

The Appellate Division reviews “a trial judge’s order on a Rule 4:6-2(e) motion to dismiss a complaint is de novo...” *Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Cas. Ins. Co.*, 473 N.J. Super. 1, 16 (App. Div. 2022). The standard of review for the dismissal of a complaint under Rule 4:6-2(e), for failure to state a claim on which relief can be granted, is whether the pleadings state a basis for the requested relief. *See Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989). The reviewing court must assess the legal sufficiency of the claim as a matter of law to determine whether it is cognizable as plead or suffers fatal deficiencies. *See Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div.), *certif. denied*, 185 N.J. 297 (2005). Legal sufficiency requires allegation of all the facts that the cause of action requires. *Id.* at 106. Without such allegations, the claim must be dismissed. *Id.*; *see also Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009) (“Indeed, a complaint may be dismissed for failure to state a claim if it fails to articulate a legal basis entitling plaintiff to relief.”), *certif. denied*, 185 N.J. 297 (2005) (quotation omitted).

Although the standard is “generous” and “the [court’s] inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint”, the standard is not toothless. *Nostrame v. Santiago*, 213 N.J. 109, 126-27 (2013) (quoting *Printing Mart, supra*, 116 N.J. at 746). In circumstances where the court

cannot ascertain a viable cause of action from a pleading, that cause of action must be dismissed. *See, e.g., Island Mortg. of New Jersey & Perennial Lawn Care, Inc. v. 3M*, 373 N.J. Super. 172, 175 (Law. Div. 2004) (“[A] court must dismiss a plaintiff’s complaint if it has failed to articulate a legal basis entitling plaintiff to relief.”); *Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dep’t of Env’tl. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999) (“[N]o party has articulated, either to the trial court or to us, a legal basis entitling it to relief against the State. Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.”).

III. Review of Municipal Action

“[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as was in the trial court.” *Fallone Properties, L.L.C. v. Bethlehem Tp. Planning Bd.*, 369 N.J. Super. 552, 562 (App. Div. 2004). “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 grant or denial was arbitrary capricious or unreasonable.” *Id.* at 560. The high arbitrary, capricious or unreasonable standard is to allow government actors latitude due to their “peculiar knowledge of local conditions.” *See Medici v. BPR Co.*, 10 N.J. 1, 23 (1987).

“On the other hand, however, a board’s decision regarding a question of law ... is subject to a de novo review by the courts, and is entitled to no deference since a zoning board has no peculiar skill superior to the courts regarding purely legal matters.” *Dunbar Homers, Inc. v. Zoning Bd. of Adjustment of Tp. of Franklin*, 233 N.J. 546, 559 (2018) (emphasis added) (internal citations omitted); *see also Piscitelli v. City of Garfield Zoning Bd. of Adjustment*, 237 N.J. 333, 350 (2019). Neither the Board nor the trial court are owed any deference as legal issues are subject to *de novo* review. *See Piscitelli v. Garfield ZBA*, 237 N.J. 333, 350 (2019).

IV. Reconsideration

The Appellate Court’s standard of review for a motion for reconsideration is deferential. *See Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582 (2021). “Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court.” *Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 N.J. Super. 378, 382 (App. Div. 2015). Rule 4:49-2 states as follows:

Except as otherwise provided by R. 1:13-1 (clerical errors), a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or

as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Reconsideration should only be granted in those cases in which the Court had based its decision “upon a palpably incorrect or irrational basis,” or did not “consider, or failed to appreciate the significance of probative, competent evidence.” *D’Atria v. D’Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Essentially, a party seeking to change a Court order on a motion for reconsideration must show the Court acted “in an arbitrary, capricious, or unreasonable manner” in order to obtain the sought after relief. *Id.*

A motion for “[r]econsideration cannot be used to expand the record and reargue a decision.” *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi*, 398 N.J. Super. 299, 310 (App. Div. 2008). It “is designed to seek review of an order based on the evidence before the court, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy on the record.” *Id.* (citation omitted); *Palombi v. Palombi*, 414 N.J. Super. 274, 288 (App. Div. 2010) (finding that a motion for reconsideration “is not appropriate merely because a litigant is dissatisfied with the decision of the court or wishes to reargue”). A court may “in the interest of justice” consider new evidence on a motion for reconsideration but only when the evidence was not available prior to the decision by the court on the order that is the subject of the reconsideration motion. *D’Atria*, 242 N.J. Super. at 401; see also *Palombi*, 414

N.J. Super. at 289 (finding that facts known to a party prior to entry of an original order did not provide an appropriate basis for reconsideration); *Fusco*, 349 N.J. Super. at 462 (finding the party not entitled to reconsideration where evidence was available but not submitted to the court). A motion based on new arguments which were not presented to the Court in the underlying motion is also properly denied. *See Medina v. Pitta*, 442 N.J. Super. 1, 19 (App. Div. 2015).

Motions for reconsideration are often filed by “unhappy litigants [to] attempt once more to air their positions and relitigate issues already decided” where “the sole basis for the motion is apparent disagreement with the substantive result reached by the [c]ourt.” *Michel v. Michel*, 210 N.J. Super. 218, 223-24 (Ch. Div. 1985). This practice is indisputably “improper and inappropriate.” *Id.* at 224.

LEGAL ARGUMENT

I. Plaintiff’s Complaint Is Fatally Deficient (Pa1).

The Complaint features a scattershot approach to harass Frank by way of attempting to find some legal authority to justify tearing up improvements that Frank has made to his residence. Critically, each of the three mechanisms Plaintiff pleads to cure zoning violations are fatally deficient despite Plaintiff’s attempts to combine elements of each mechanism in a desperate attempt to “Frankenstein” together a viable claim. Cox and Koenig provide a helpful explanation of the interplay between methods that an interested party may cure

alleged zoning violations that is helpful in keeping Plaintiff's jumbled legal arguments straight:³

- (i) They may seek enforcement by the appropriate administrative officer or, ... may appeal that inaction or determination to the zoning board of adjustment pursuant to N.J.S. 40:55D-72a
- (ii) Alternatively they may, pursuant to N.J.S. 40:55D-18, directly seek an order to show cause to enjoin the violation and/or damages against the owner of the property....

See Cox & Koenig, New Jersey Zoning and Land Use Administration at 90-91 (Gann 2023) ("N.J. Zoning and Land Use"). Cox and Koenig go on to explain a third method that "any citizen with an interest in maintaining the zone plan, [citation omitted], seek relief in an action in lieu of prerogative writs to compel the municipality to enforce its zoning ordinance." *Id.* ***"Regardless of the path pursued in seeking enforcement of a zoning ordinance, "interested parties" cannot sit on their rights."*** *Id.* (emphasis added). For a nearby property owner, "the time for appeal begins to run from the date an interested person knew or should have known of the permit's issuance." *Harz v. Borough of Spring Lake*, 234 N.J. 317, 322 (2018).

Here, each of the mechanisms to correct alleged zoning violations pled by Plaintiff are either fatally deficient, untimely, improperly pled, or all of the above, rendering all causes of action in Plaintiff's Complaint properly dismissed. First, the

³ The New Jersey Zoning & Land Use Administration Treatise by William M. Cox & Stuart R. Koenig is regularly relied on by all levels of New Jersey Courts for their interpretations of land use and zoning law. The pages of this Treatise referenced in Defendant's brief are annexed to Defendant's appendix as Da54-57.

whole of Plaintiff's Complaint represents an appeal of Frank's permits, which is time barred by N.J.S.A. 40:55D-72, thus confirming dismissal was warranted. Second, Plaintiff attempted to plead (but failed for the reasons set forth below) a viable enforcement action in his second and fourth causes of action. Indeed, the Supreme Court has explicitly found that an enforcement action does not excuse a citizen from filing an appeal through the administrative process:

When the Third Permit issued, at first, Harz did not proceed with an appeal to the Planning Board pursuant to *N.J.S.A.* 40:55D-72(a) but instead filed a prerogative-writs action and Order to Show Cause in Superior Court aimed at enjoining the permit. That was her right, and one contemplated by *N.J.S.A.* 40:55D-18. Her success in obtaining a restraining order, however, did not signify that the Borough denied her the right to be heard. Indeed, after filing the prerogative-writs action, she filed an appeal with the zoning officer in the ordinary course. Nothing in the record suggests that had Harz not filed her action in Superior Court, the Planning Board would have denied her a hearing or that the prerogative-writs action was the catalyst for the hearing. For purposes of the Civil Rights Act, Harz did not exhaust the statutory process for securing her right to be heard under the MLUL.

Harz, 234 N.J. at 336-37. Additionally, Plaintiff did not properly bring this matter by way of an Order to Show Cause as required by *Harz* and Rule 4:69 rendering the enforcement claims improperly pled. Further, Plaintiff's enforcement claims are time barred by laches as Plaintiff is not permitted to raise an enforcement action challenging an old permit in perpetuity.

Third, Plaintiff sought a prerogative writ via his writ of mandamus cause of action, which is fatally deficient for a number of different reasons, including being

time barred, failing to assert a ministerial act and failing to exhaust administrative remedies, any of which makes Plaintiff's writ of mandamus claim dismissible on its own.

Critically, each of Plaintiff's causes of action to allegedly correct zoning errors are fatally deficient for a number of reasons, all of which the trial court independently analyzed in depth and confirmed. Accordingly, to overturn the trial court's exhaustive analysis featuring binding precedent, this Court must overturn all of the rulings made as to each deficiency in the Complaint. As the trial court's reasoning is supported by well-settled law, this cannot be done, and the Complaint's dismissal must be upheld.

II. Plaintiff's Complaint Amounts To An Appeal Of Permits And Are Time Barred (Counts One, Two, Three And Four) (Pa1; T34:10-48:13).

The Complaint in its totality represented an appeal of the permits granted to Frank although fashioned in a way to sidestep this unavoidable fact. Indeed, if it looks like a duck, walks like a duck, and talks like a duck, it is a duck – the same applies to Plaintiff's "duck" – an appeal of Frank's permits.

The Municipal Land Use Law is clear:

Appeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map. Such appeal shall be taken within 20 days by filing a notice of appeal with the officer from whom the appeal is taken specifying the grounds of such appeal. The officer from whom

the appeal is taken shall immediately transmit to the board all the papers constituting the record upon the action appealed from was taken.

N.J.S.A. 40:55D-72 (emphasis added). Notice must include “a notice of appeal with the officer from whom the appeal was taken, together with three copies of the notice with the Secretary of the Board of Adjustment. The notice of appeal shall specify the grounds of the appeal.” *See West Long Branch, N.J. Ordinance No. 16-2.7*. An applicant challenging a decision of an administrative official, such as a zoning official, may not bypass the local land use board and must first avail itself of the proper administrative channels to challenge the actions of the administrative official. *See Cox & Koenig* at 559 (citing N.J.S.A. 40:55D-72). The principles of local governance “require exhaustion of remedies so that the board of adjustment, as a policy-making body, may be called upon to exercise its statutory authority to review and pass upon the challenged decisions of local land use officers.” *21st Century Amusements, Inc. v. D’Alessandro*, 257 N.J. Super. 320, 323 (App. Div. 1992). For a nearby property owner, “the time for appeal begins to run from the date an interested person knew or should have known of the permit’s issuance.” *Harz v. Borough of Spring Lake*, 234 N.J. 317, 322 (2018).

Although Plaintiff fashions certain of his claims as “enforcement” in an attempt to sidestep the clear temporal bar to the claims, this assertion is meritless. At the heart of the issue, Plaintiff is challenging the issuance of Frank’s permits through the Courts and to compel review by the Borough of

West Long Branch Zoning Board of Adjustment (the “Board”) without first timely seeking administrative review as required by law. Indeed, Counts One, Two, and Four seek no enforcement but a review of the permits by the Board – *in other words an appeal of the permits*. Pa14, 16, and 17 (“Compelling Defendant to submit to the Zoning Board of Adjustment for the Borough of West Long Branch for a review of the Property and Permits #2010-028, #2011-097, and #2023-164”). Additionally, the Complaint expresses disapproval of the permits throughout evidencing that this is in actuality an appeal of the permits. *See e.g.* Pa6 (“On or about November 18, 2010, the Zoning Official exceeded his authority when he granted permit #2010-028”); *see also e.g.* Pa7 (“On or about June 21, 2011, the Zoning Official exceeded his authority by issuing permit #2011-097 to Defendant Frank”). Accordingly, these claims are not enforcement actions but seek to compel Frank to file an appeal of *his own permits* in a desperate, transparent attempt to work around the clear time bar to these claims.

Specifically, not only did Plaintiff never appeal Frank’s permits, and the Complaint was filed 182 days after the latest permit, Permit 2023-164, and almost 13 years after the earliest permit, Permit 2010-02. There is no doubt that Plaintiff was aware of the improvements made to the Property, and thus the Permits, as he makes specific references to not only the work done in

conjunction with Permit 2023-164, but also specifically referenced work done “[a]bout ten years ago.” See Pa125-26 (On April 17, 2023 Plaintiff issued a complaint stating “I e-mailed you [Zoning Official James Miller] directly Friday about Andrew Frank and you have not responded so I’ll try again through the borough site. Andrew Frank of 48 Summers [A]ve. Is expanding his patio. When he bought the property, impervious coverage was 30%. About ten years ago he increased it to approximately 43% and I advised your office. It now appears he is expanding it further and possibly preparing a footing for a pool house”); see also Pa119 (On April 18, 2023, Plaintiff issued a complaint stating “[h]ave you addressed the expanded patio way past the allowed impervious coverage at 48 Summers Ave?? The workmen are unloading the pavers and are preparing to install”). In addition to the specific references to the permits cited in the Complaint, the numerous complaints and police reports demonstrates that Plaintiff is hyper aware of all happenings on the Property -- indeed, nothing in the Complaint would establish that any appeals were timely filed. As such, the undisputed record is clear that all of the activity in conjunction with the Permits was known by Plaintiff, thus triggering the 20-day time period to appeal which has long since expired for *all of the claims in the Complaint*.

The trial court saw the Complaint for what it was and agreed with Frank’s arguments. Indeed, the trial court comprehensively considered Plaintiff’s

arguments as well as Defendants’ arguments and rightfully concluded “it was plaintiff’s responsibility to timely appeal the permit and he failed to do so.” T48:9-10; *see also* T55:16-21 (“As previously discussed, the Court has already determined that plaintiff was aware of the permits and construction in his neighbor’s backyard. The Court has discussed at length the opportunities plaintiff had to properly dispute the zoning permits in question, yet he repeatedly failed to do so”). The language in the Complaint plainly represents an appeal of Frank’s permits, which is far out of time as was apparent to the trial court and remains true now. Plaintiff’s only argument is that they are not subject to any time limitations because they are solely relying on N.J.S.A. 40:55D-18. Pb11. However, the Complaint itself says differently as it is focused on the issuance of Frank’s permits and an appeal of those permits to the Board, which dominates the balance of the Complaint. Pa5-11. For this reason alone, the Complaint was properly dismissed.

III. Plaintiff’s Writ of Mandamus Cause of Action Is Fatally Deficient And Must Be Dismissed (Count One) (Pa1).

Plaintiff’s writ of mandamus claim does not meet the basic threshold requirements because (A) it is directed at Frank, a non-governmental actor,⁴ (B)

⁴ Plaintiffs concede in their appellate brief that their writ of mandamus claim was wrongfully brought against Frank obviating the need for further argument on this issue from Frank. Pb31. However, bringing such a claim against Frank in the first instance was frivolous and justifies sanctions for the reasons set forth below.

Plaintiff did not exhaust his administrative remedies, (C) the writ of mandamus was brought out of time, and (D) it does not seek to compel a ministerial act. Tellingly, Plaintiff does not dispute that it meets any of these requirements of a writ of mandamus cause of action anywhere in his brief. Remarkably, Plaintiff asserts that he solely relies “on the enforcement powers of N.J.S.A. 40:55D-18”, which is contravened by the plain language of Plaintiff’s first cause of action for a writ of mandamus. Pb11; Pa13. For all these reasons, the trial court correctly dismissed Plaintiff’s writ of mandamus cause of action in the Complaint.

A. Plaintiff Failed To Exhaust His Administrative Remedies.

Plaintiff’s writ of mandamus claim fails as a matter of law because Plaintiff failed to exhaust his administrative remedies. “Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.” Rule 4:69-5. Mandamus “must be denied where ... other adequate relief [is] available” and that relief must be “realistically adequate.” *Garrou v. Teaneck Tryon Co.*, 11 N.J. 294, 302 (1953). “The exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform

Frank never should have been required to expend attorneys fees and costs seeking dismissal of a claim against him personally which only may be directed at a government actor.

their statutory functions in an orderly manner without preliminary interference from the courts.” *Brunetti v. Borough of New Milford*, 68 N.J. 576, 588 (1975).

As established *supra* in Point II, Plaintiff did not appeal the actions or decisions of the Zoning Official -- and, having failed to do so, now improperly seeks an end around through mandamus to compel the Zoning Official to submit permits to the Zoning Board for review, effectively requesting the Zoning Official Board conduct an appeal which Plaintiff failed to pursue. Accordingly, Plaintiff did not exhaust his administrative remedies, which is grounds to dismiss Plaintiff’s writ of mandamus claim. *See Asarnow v. City of Long Branch*, 2013 N.J. Super. Unpub. LEXIS 1051, 15-16 (App. Div. 2013)⁵ (the Appellate Division affirmed the dismissal of plaintiff’s complaint challenging the zoning officer’s issuance of a zoning permit because, in part, plaintiff did not exhaust its administrative remedies).

Here too, the trial court’s reasoning is directly consistent with and adopts this argument. The trial court reviewed arguments made by the parties and relevant precedent. T36:10-40:22. After the trial court’s thorough analysis, it concluded that an appeal’s process does exist, which plaintiff should have exhausted prior to filing this complaint. T38:21-39:14 (“Based upon a review of the four corners of the complaint, the Court determines that count one is barred for failure to exhaust

⁵ A copy of the unpublished decision is annexed to Plaintiff’s Appendix as Pa205-10.

administrative remedies”). Plaintiff inexplicably argues that he is solely seeking an enforcement action pursuant to N.J.S.A. 40:55D-18, which makes little sense considering the Complaint’s first cause of action is for a writ of mandamus which is subject to Rule 4:69 and requires an exhaustion of administrative remedies.” Pa13-14; Rule 4:69-5 (“Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted”).

B. Plaintiff’s Writ Of Mandamus Claim Is Time Barred.

“No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed...” Rule 4:69-6(a). The accrual of the right to review occurs when the interested party knew or should have known of the issuance of the permit. *See Cox & Koenig* at 567 (citing *Trenkamp v. Township of Burlington*, 170 N.J. Super. 251, 259-268 (Law Div. 1979)).

Here, it cannot be disputed that the Complaint was filed far more than 45 days after the accrual of the right to the review. As set forth in Point II, *supra*, the Complaint was filed on October 17, 2023, which was 184 days from when the last permit was issued on April 18, 2023. It also cannot be disputed that Plaintiff knew about the permits as the Zoning Official informed him of them on April 17, 2023.

See Pa121-122 (On April 17, 2023, Plaintiff messaged Defendant James Miller, the Zoning Official for West Long Branch, stating “Andrew Frank of 48 Summers [A]ve. is expanding his patio.... About ten years ago he increased it to approximately 43% and I advised your office. It now appears he is expanding it further and possibly preparing a footing for a pool house”). This conclusively shows that Plaintiff knew what was occurring on Frank’s property as of April 17, 2023, *at the latest*, which is further evidenced by the numerous complaints to the Zoning Board and the voluminous police reports in the preceding years. *See* Pa118-201. Accordingly, Plaintiff is not only out of time pursuant to N.J.S.A. 40:55D-70 and -72, but also pursuant to Rule 4:69-6(a) compelling dismissal of his mandamus claim.

The trial court agreed with Frank’s argument as to this issue as well and aptly summed it up:

In short, Rule 4:69-6(c) does not protect those who slumber on their rights. Based upon even a generous reading of the complaint, plaintiff did just that. As such, defendants’ motion to dismiss the complaint as time barred, in accordance with Rule 4:69-[6](c)(6) (sic) is granted.

T53:1-6. The trial court’s analysis and conclusion are directly consistent with the relevant binding precedent and correctly discounts Plaintiff’s efforts to improperly avoid the requirements of Rule 4:69. Pb16-17. Thus, dismissing Plaintiff’s writ of mandamus claim must be upheld for this reason too.

C. Plaintiff Does Not Assert A Ministerial Act.

Finally, the Court should dismiss the writ of mandamus claim because it seeks to compel an inappropriate remedy which is not a ministerial act. “Mandamus is an appropriate remedy ‘(1) to compel specific action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but not in a specific manner.’” *Vas*, 418 N.J. Super. at 522 (quoting *Loigman v. Twp. Comm. Of Middletown*, 297 N.J. Super. 287, 299 (App. Div. 1997)). A duty is ministerial when “it is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion.” *Ivy Hill Park Apartments v. N.J. Property Liab. Ins. Guar. Assoc.*, 221 N.J. Super. 131, 140 (App. Div. 1987). The ministerial duty must be “so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of performance...” *Switz v. Middletown*, 23 N.J. 580, 588 (1957).

The Complaint fails to specify the performance it seeks to compel the Zoning Official to take -- indeed, it in actuality only demands that Frank take an action which Plaintiff already concedes is an improper mandamus claim. The Complaint asserts that Plaintiff “brings this action asking the Court to order Frank to either fully comply with the ordinance or seek the appropriate variance relief from the zoning board.” Pa14. Not even Plaintiff can decide what act it wants compelled with

certainty such that nothing remains for judgment or discretion, which is required for a writ of mandamus claim. *See Ivy Hill Park Apartments*, 221 N.J. Super. at 140. Accordingly, the enforcement of the ordinance, means by which the ordinance is enforced, and the determination of whether the ordinance was violated all requires discretion. Plaintiff does not identify a ministerial action it seeks to compel, foreclosing mandamus as a matter of law.

Again, the trial court engaged in an exhaustive analysis of relevant precedent and again the trial court dismissed Plaintiff's writ of mandamus claim for this reason as well. *See* T56:9-59:17. The trial court rightfully concluded that "[t]he board has no 'certain and imperative duty' to enforce the zoning permits in a manner that plaintiff wishes. As such, defendants' motion to dismiss count one for failure to assert a ministerial act is granted." T59:11-17.

In sum, Plaintiff's writ of mandamus claim was found fatally deficient for *three distinct reasons*. Plaintiff's count one could be dismissed for any one of these reasons that are supported by well-settled law, but the numerous thresholds that have not been met highlight that it is wholly without *any* legal support.

IV. Plaintiff's Enforcement Claim Pursuant To N.J.S.A. 40:55-18 Are Fatally Deficient (Counts Two And Four) (54:10-55:7).

In addition to being out of time pursuant to N.J.S.A. 40:55D-72 and Rule 4:69-6, Plaintiff's enforcement claims under counts two and four are also time barred by laches. "Laches is an equitable doctrine, operating as an affirmative defense that

precludes relief when there is ‘an unexplained and inexcusable delay’ in exercising a right, which results in prejudice to another party.” *Fox v. Millman*, 210 N.J. 401, 417-418 (2012). “[A] cause of action is deemed to accrue when facts exist which authorize one party to maintain an action against another.” *Marini v. Borough of Wanaque*, 37 N.J. Super. 32, 38 (App. Div. 1955). In the alternative to seeking enforcement by a zoning officer or appeal to the zoning board, a private citizen “may, pursuant to N.J.S.A. 40:55D-18, directly seek an order to show cause to enjoin the violation against the owner of the property.” *Oliviera v. Twp. of Mahwah*, A-3630-20, 2023 WL 2781312, *2 (App. Div. Apr. 5, 2023)⁶

Initially, Plaintiff is precluded from making any argument that pertain to laches as none were made during the Frank MTD briefing. “It is a well settled principle that our appellate courts will decline to consider... issues not properly presented to the trial court ... unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of greater public interest.” *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973).⁷ The record is clear that Plaintiff first made its arguments in opposition to laches in the Reconsideration Motion.

⁶ This unpublished decision is annexed to Plaintiff’s appendix as Pa97-101.

⁷ Insofar as Plaintiff is arguing that this case is of greater public interest permitting the consideration of arguments not in the record below, this notion must be disregarded. Not only did Plaintiff fail to properly argue it, but, certainly, the construction of a residences pool patio is not of “greater public interest.” Indeed, Plaintiff who has an unhealthy fascination with Frank is the only individual that has filed suit against Frank for the improvements to his home.

Da18 (“Importantly, Plaintiff made no arguments whatsoever on the issue of laches in either his opposition brief or oral argument for the previous Motion to Dismiss”). Indeed, Plaintiff himself conceded that he did not make any such arguments in his Reconsideration Motion brief. Da36 (“The most important issue I failed to articulate... The doctrine of laches does not apply to an act that is void ab initio and is rarely applied against a government action”). Thus, the arguments posited by Plaintiff in his appellate brief were not part of the trial court’s record in considering Frank’s MTD and cannot be considered at this stage.

Although Plaintiff’s appeal of the trial court’s ruling on laches must be discarded solely because it was not brought at the trial court level, it also fails substantively. It is well established that Plaintiff knew about Frank’s permits as shown by the complaints and police reports filed by Plaintiff. *See* Pa118-201. Plaintiff chose to withhold his legal fire power until after construction was completed at the time of filing the Complaint, even though he was at all times aware of Frank’s activities, including, but not limited to, construction in conjunction with Permit 2023-164, which bars Plaintiff’s enforcement claims. *See Marini*, 37 N.J. Super. at 41 (The court held that plaintiff was barred by laches because “he knew what was going on ... and withheld his legal fire during a period in which he knew or had reason to know that a substantial sum of money was being invested in the improvement of this property); *see also* Pa125-26 (On April 17, 2023 Plaintiff issued

a complaint stating “I e-mailed you [Zoning Official James Miller] directly Friday about Andrew Frank and you have not responded so I’ll try again through the borough site. *Andrew Frank of 48 Summers [A]ve. is expanding his patio.* When he bought the property, impervious coverage was 30%. About ten years ago he increased it to approximately 43% and I advised your office. *It now appears he is expanding it further and possibly preparing a footing for a pool house*”) (emphasis added). Plaintiff is barred from bringing his enforcement claims not only by the Court Rules and the Municipal Land Use Law, but also by laches by plainly sleeping on his rights until long after the prescribed time to appeal a permit approval.

Plaintiff makes much to do about how he is seeking relief under enforcement pursuant to N.J.S.A. 40:55-18, notwithstanding that the Complaint plainly reflects otherwise. In any event, the enforcement causes of action are independently time-barred. Indeed, Plaintiff cites no precedent releasing Plaintiff from the requirement to bring a timely enforcement action. *See Cox & Koenig* at 91 (“Regardless of the path pursued in seeking enforcement of a zoning ordinance, “interested parties” cannot sit on their rights”); *see also Fox*, 210 N.J. at 417-418 (“Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is ‘an unexplained and inexcusable delay’ in exercising a right, which results in prejudice to another party”). Further, Plaintiff failed to properly bring a proper action for injunctive relief solely against Frank – a private citizen. Instead, Plaintiff sought

intervention from the Borough rendering its enforcement claims out of time and improperly pled.

Plaintiff's conclusory statements that the Permits are invalid is seemingly the only defense to its untimeliness. Pb22. Unfortunately for Plaintiff, it is undisputed that the Permits were issued by the Borough after Frank underwent the municipal process to obtain them rendering the litany of case law cited by Plaintiff for that purpose irrelevant. *See* Pb23. Indeed, the record is clear that the Zoning Official exercised his analysis and discretion in consideration of the Ordinance to issue the permits. Plaintiff's own Complaint concedes that the Permits were issued through applications properly made by Frank to the Borough and Zoning Official. Pa6-11. Thus, the Permits are legal and Plaintiff's case law is woefully misguided and Plaintiff cannot escape the unavoidable fact that he sat on his rights for up to 13 years rendering its enforcement cause of action out of time. *Fox v. Millman*, 210 N.J. 401, 417-418 (2012) (“[l]aches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is ‘an unexplained and inexcusable delay’ in exercising a right, which results in prejudice to another party”).

V. Plaintiff's Substantive Due Right Cause Of Action Was Properly Dismissed (Count Three) (59:18-63:10).

Plaintiff's substantive due process claim fails as a matter of law because (A) Plaintiff failed to adequately plead his claim, (B) failed exhaust his administrative remedies, and (C) the Borough and Zoning Official are immune from suit.⁸

A. Plaintiff Failed To Plead A Substantive Due Process Claim.

Pursuant to N.J.S.A. 10:6-2(c):

Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

With respect to the New Jersey Civil Rights Act, N.J.S.A. 10:6-2, the elements of a substantive due process claim are the same as under 42 U.S.C. § 1983. *Rezem Family Associates, LP v. Borough of Millstone*, 423 N.J. Super. 103, 115 (App. Div. 2011). “To allege civil rights violations in a land use context ... a substantive due process claim requires evidence of governmental action that “shocks the

⁸ Although this Count is directed at the Borough and Zoning Official and seeks attorneys' fees and costs, it also seeks unspecified “equitable relief” which necessarily could impact Frank and his property. Therefore, while Frank disputes that Plaintiff could seek any relief effective against Frank through a cause of action not directed at him, in an abundance of caution, Frank address this point for the appeal as well.

conscience.” *Id.* “It is only the ‘most egregious’ official action which will satisfy that rigorous standard.” *See Cortese v. Strothers*, 2010 N.J. Super. Unpub. LEXIS 1918, 7 (App. Div. 2010) (citing *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004)).⁹ Examples of such conduct include an improper eminent domain taking resulting in the destruction of a business to the benefit of the favored parties, and actions suppressing constitutionally-protected activities. *See Eichenlaub*, 385 F.3d 274 at 285 (citing *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337 (5th Cir. 2001) and *Assocs. In Obstetrics & Gynecology v. Upper Merion Twp.*, 270 F. Supp. 2d (E.D. Pa. 2003)).

Here, Plaintiff utterly fails to set forth any allegations that “shock the conscience” or otherwise rise to the “egregious” standard necessary to sustain a claim. Specifically, Plaintiff merely alleges that the Borough and Zoning Official allegedly failed to enforce the Borough Code ***against Frank*** -- without alleging what Constitutional or fundamental right of Plaintiff was affected by the alleged omissions. *See* Pa16-17. Indeed, even if Plaintiff had alleged some protected right, the commonplace occurrence of a local government allegedly failing to enforce every Borough Code to the letter simply does not rise to the level of egregious or “shocking the conscience” to sustain a due process claim. Thus, Plaintiff failed to

⁹ A copy of the unpublished decision is annexed Plaintiff’s Appendix as Pa211-14.

plead the necessary fundamentals of the cause of action compelling dismissal of the substantive due process claim as a matter of law.

The trial court agreed that Plaintiff did not plead a viable substantive due process claim as “nowhere in the complaint can it be gleaned that defendants’ alleged actions ‘shock the conscience’, as required.” T60:17-24. The trial court’s reasoning echoed Frank’s as it stated “[t]he Court does not find that any of these allegations rise to the level that ‘shocks the conscience.’” T61:4-6. Moreover, Plaintiff’s only argument “that without discovery we will never learn the rationale for how or why any of these variances were issued by the Zoning Officer” shows that Plaintiff *still* cannot even muster an allegation that the Zoning Official’s conduct shocks the conscience. Pb24-25. Thus, the trial court’s analysis that Plaintiff is relying on impermissible fishing expedition to find any support is accurate and should be upheld. T61:5-10.

B. Plaintiff Failed To Exhaust His Administrative Remedies.

Even if Plaintiff had pled a viable substantive due process claim -- which he indisputably failed to do -- he did not exhaust his administrative remedies nor plead futility, foreclosing the claim as a matter of law. “Substantive due process claims in a land use case require a showing either that plaintiff has obtained a final decision under available state procedures or that such an attempt would have been futile.” *Id.* at 118 (Appellate Division dismissed plaintiff’s § 1983 and state civil right claims

under N.J.S.A. 10:6-2(c) because plaintiff did not make any “attempt to make use of available procedures and remedies”).

Here, Plaintiff did not exhaust his administrative remedies because he did not appeal Frank’s permits with the Board. *See* N.J.S.A. 40:55D-72 (“[a]ppeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer of the municipality based on or made in the enforcement of the zoning ordinance or official map”).¹⁰ Further, Plaintiff did not appeal the Zoning Official’s decision to not enforce the purported violations with the Board. Accordingly, Plaintiff is precluded from bringing its substantive due process claim and it must be dismissed. Again, the trial court adopted its previous reasoning with regard to Plaintiff’s failure to exhaust administrative remedies. T48:9-13 (“As mentioned previously in this section, the complaint fails to asset that plaintiff timely appealed the zoning board’s decision and therefore failed to exhaust[] his administrative remedies”).

VI. The Trial Court Properly Dismissed The Complaint With Prejudice (Pa1; 64:15-66:8).

¹⁰ Insofar as it is claimed that Plaintiff’s complaints constitute a notice of appeal, the complaints do not constitute a notice of appeal pursuant to Ordinance No. 16-2.7(a), which requires a notice of appeal to be submitted to the Zoning Official, specific the grounds for the appeal, and provide three copies to the Secretary of Board of Adjustment. As none of these requirements are met, the complaints do not constitute a notice of appeal. Notwithstanding, the complaints are out of time even if they are considered notices of appeal as addressed in Point II, *supra*.

Plaintiff's briefing in connection with Frank's MTD never made the request to have the opportunity to amend the Complaint, thus it cannot be brought now for the first time. "It is a well settled principle that our appellate courts will decline to consider... issues not properly presented to the trial court ... unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of greater public interest." *Nieder*, 62 N.J. at 234. The record is clear that a request was never made by Plaintiff to amend the Complaint, and thus the trial court could not have granted Frank's MTD without prejudice because it was never before the trial court in the first place. T65:24-25 (When asked whether the Complaint was dismissed with prejudice, the trial court correctly recalled that "there wasn't a request to amend or – or – or anything that was asserted").

Additionally, the Complaint was dismissed for legal reasons that no number of amendments could cure. If a complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. *See Lembo v. Marchese*, 242 N.J. 477, 496-96 (2020). Indeed, re-drafting the Complaint cannot cure that it was brought *years* out of time, nor could it change Plaintiff's failures to act when he had the opportunity. Thus, Plaintiff's theory that is now brought for the first time that the trial court erred by dismissing the Complaint with prejudice can be readily discarded as it has no support in law or logic.

VII. Plaintiff's Reliance On Unpublished Decisions Highlights The Futility Of The Complaint (Not Raised Below).

Plaintiff's inability to locate binding precedent to support his position only demonstrates that the trial court's well-reasoned opinion must be upheld. Notwithstanding, the *Oliviera* and *Matthews* matters cited by Plaintiff actually contravene Plaintiff's argument.

In *Oliviera*, plaintiffs filed for injunctive relief directly against their neighbors to enjoin their continued violation of the fence ordinance. *see also Olivia*, A-3630-20, 2023 WL at *2 ("Thus, we focus our discussion on the trial court's analysis of plaintiff's direct action for injunctive relief against defendants..."). Here, Plaintiff plainly did not apply for injunctive relief directly against Frank as he merely filed the Complaint, not a verified complaint and order to show cause. Indeed, Plaintiff's Complaint indisputably seeks to challenge the permits themselves and obtain a de facto, out-of-time appeal by not seeking to abate an alleged nuisance and, instead, compel Frank to submit his own appeal to the zoning board for a determination of the appropriateness of the permits. Thus, Plaintiff cannot assert a purported enforcement action to obtain relief he was required to seek administratively.

Further, the complainant in *Oliviera* took action upon becoming aware of zoning violations. *See Olivia v. Twp. of Mahwah*, 2023 WL 2781312 at *2 (Complainant filed a complaint with the Township within a week after the subject permit was obtained). Indeed, in *Oliviera*, the Appellate Division explicitly noted that the claim for injunctive relief was "timely filed within forty-five days of the

June 17 deadline...” and then went on to conduct an analysis to confirm the enforcement claim was timely filed with the 45-day period. *Id.* at *5-6 and 14-15. That is not the case here as Plaintiff has waited between 13 years and nearly six months from the time of the alleged violations to file the Complaint, indisputably rendering Plaintiff’s claims untimely even under the non-binding authority newly cited by Plaintiff.

Likewise, Plaintiff’s reliance on *Matthews* is also misplaced, even putting aside that it is not binding precedent that can be used to overturn the trial court’s order dismissing the Complaint. In *Matthews*, the complainants brought an action directly to enjoin the property owner pursuant to N.J.S.A. 40:55D-18, and not under Rule 4:69-6(a). *Matthews v. Ehrmann*, 2019 WL 692127, *7 (App. Div. Feb. 20, 2019). Here, Plaintiff brought a writ of mandamus cause of action that falls under Rule 4:69. Pa13. Moreover, the Complaint is not only directed at Frank, but also the Borough and Zoning Officer – public entities. Thus, while *Ehrmann* is directly against a private individual, the Complaint is seeking to compel a public entity and public official to take a certain action, which is squarely an action of prerogative writ. Pressler & Verniero, Current N.J. Court Rules, cmt. on Rule 4:69, cmt. 1 (2021) (“Thus R. 4:69 governs challenges to municipal action”). Further, the Complaint is not seeking to enjoin Frank directly, but rather to compel Frank to submit an application to the Borough. *See e.g.* Pa14 (“Compelling Defendant to

submit to the Zoning Board of Adjustment for the Borough of West Long Branch for a review of the Property and Permits...”). Notably, Plaintiff cannot point to any excerpt from the *Oliviera* decision nor the *Matthews* decision standing for the contention that the time to file an enforcement action is limitless -- because none exists even in the unpublished decisions that ***Plaintiff*** cites.

Furthermore, the Court’s analysis was in accord with binding precedent, considered the arguments made by all parties and cases cited by Plaintiff, namely *Harz v. Borough of Spring Lake* and *Mullen v. Ippolito Corp.*, both of which the Court distinguished and analyzed at length. *See* T42:20-48:9. Plaintiff relied on *Harz*, a binding Supreme Court decision, states that “N.J.S.A. 40:55D-72(a) specifically provides that appeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative office of the municipality based on or made in the enforcement of the zoning ordinance.” *Harz*, 234 N.J. at 321. Thus binding precedent expressly affirms the 20-day deadline in an appeal of an administrative decision, which is precisely what the Complaint is. The trial court properly considered this analysis at length and it should be upheld. *See* T42:25- 43:7 (“Plaintiff asserts that the appeal process, under N.J.S.A. 40:55D-72, does not preclude the plaintiff’s right to file an action to enforce the zoning ordinance under N.J.S.A. 40:55D-18. Plaintiff asserts that *Harz v. Borough of Spring Lake* supports the proposition that an interested party has the right to seek review of an

offending non-conforming decision at any time by a court through N.J.S.A. 40:55D-18”). In fact, the Court pointed out that the *Harz* decision actually supports the contention that an appeal must be filed, despite Plaintiff’s attempts to mislead the Court by cutting its quotation short to avoid this fact. *See* T46:8-10 (“This quote is taken out of context and does not relieve plaintiff of his obligations to exhaust his administrative remedies. In fact, just two sentences later, the Court in *Harz* stated that, ‘After filing the prerogative writs action, she filed an appeal with a zoning officer...”).

Accordingly, Plaintiff’s unpublished decisions cannot overturn binding precedent and, in any case, both *Oliviera* and *Matthews* confirm that the trial court’s analysis was legally correct.

VIII. The Trial Court Erred In Denying Frank’s Motion For Sanctions (Da1-5).

Both Rule 1:4-8 and N.J.S.A. 2A:15-59.1 provide for reasonable attorneys’ fees beginning when the non-prevailing party had no reasonable good faith belief in the merit of its action. Here, the Complaint filed by Plaintiff made claims that were plainly and obviously deficient as a matter of law. For purposes of imposing sanctions, an assertion is deemed “frivolous” when “no rational argument can be advanced in its support,” “it is not supported by any credible evidence,” “a reasonable person could not have expected its success,” or “it is completely untenable.” *See Belfer v. Merling*, 322 N.J. Super. 124, 144 (App. Div. 1999); *see*

also *First Atl. Fed. Credit Union v. Perez*, 391 N.J. Super. 419, 432 (App. Div. 2007). See also *Baratta v. Deer Haven, LLC*, 431 N.J. Super. 534, 538 (Law Div. 2011) (finding that the defendants' counterclaim, which did not have any reasonable basis in law, had been asserted for the purpose of harassment, noting that "the court believes strongly the counterclaim was filed for litigation leverage -- to force the plaintiffs to expend more money, while also serving as a potential trade-off on settlement talks").

Here, each of Plaintiff's claims were completely untenable as they were either time barred, did not meet the basic elements required by the claim alleged, or both. Indeed, each cause of action was dismissed for several reasons evidencing the true purpose that the Complaint was brought – to further harass Frank. The well documented history between Frank and Plaintiff shows numerous complaints to the police and the Borough. Pa118-201. Plaintiff's graduation of harassment to the court system has necessitated substantial fees, time and stress on Frank who had no choice but to defend this frivolous lawsuit. Importantly, Frank has only ever sought to make improvements to his home and has properly obtained permits for each improvement. Notwithstanding, Plaintiff's vendetta against Frank knows no bounds as this case has now been litigated up to this Court because Plaintiff does not approve of Frank's patio area. This is not the behavior of a "deeply concerned" citizen as posited in Plaintiff's brief but is that of an unhinged individual that is overbearing

and continues to harass his neighbor. Pb9. As such, it is clear that the Complaint has no legal basis but was also brought for an improper purpose – to harass Frank – and the trial court erred in denying the Sanctions Motion.

The trial court erred by discounting and failing to consider the context of the Complaint and applying it to the meritless Complaint. Indeed, the trial court summarily concluded that it “cannot find that Plaintiff acted in bad faith bringing this application and motion for reconsideration.” Da18. This finding ignores the record of harassment of Plaintiff demonstrating the bad faith purpose of bringing the Complaint notwithstanding its multitude fatal deficiencies.

CONCLUSION

Based on the foregoing, Frank submits that this Court must overturn the trial court’s Order denying Frank’s Sanctions Motion and must uphold the trial Court’s Order dismissing Plaintiff’s Complaint with prejudice.

Dated: Woodland Park, New Jersey
 January 3, 2025

Respectfully submitted,

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January 29, 2025

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Richard J. Hughes Justice Complex
Trenton, NJ 08625-0006

Re: Steven Schulz v. The Borough of West Long Branch,
James Miller, In His Official Capacity As Zoning
Official, and Andrew Frank, Individually
Appellate Docket No. A-0003736-23T1
Trial Court Docket No. MON -L-3272-23
On Appeal from Superior Court, Law Division, Monmouth
County
Sat Below: Honorable Andrea I. Marshall, J.S.C.

Honorable Judges of the Appellate Division:

I represent the Defendants-Respondents, Borough of West Long
Branch and James Miller in the above-referenced appeal. Since I will be relying
heavily on the Brief and Appendix filed on behalf of the Defendant-Respondent-
Frank, I am filing this letter brief, in lieu of a more formal brief.

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PRELIMINARY STATEMENT

The brief filed on behalf of Defendant-Respondent-Frank adequately sets forth the position of the Defendant-Respondent-Borough and Miller with respect to the impetus for plaintiff having brought his complaint to begin with and his (plaintiff's) chronic harassment of the Defendant-Frank. Pa. 119-201. That is 83 pages of documented vitriol by plaintiff against Defendant-Frank, many of the pages being police incident reports.

Plaintiff attempts, through court intervention, to have the court review zoning permits issued by the borough zoning official in 2010 (permit #2010-028), 2011 (permit #2011-097), 2022 (permit #2022-141), and 2023 (permit #2023-164). All of these permits had to do with various work done on or around Defendant-Frank's home on Summers Ave. in West Long Branch. Plaintiff has complained to the court that his complaints to the Borough were not acted upon, though the email responses and plaintiff's own admissions clearly indicate that, each time he called or wrote, he received a response from the zoning official.

Before getting into the various legal defenses to bringing these claims at such a late date, it cannot be overlooked that plaintiff's position that the court below gave short shrift to his position is belied by the transcript of the motions for dismissal. By this writer's count, the court's decision below took 30 pages (T34-

T63) and cited 25 different case decisions, 4 court rules, and 3 statutes. By any reasonable measure, the court's decision below was thorough.

Unlike what might occur in other motions, such as the defendants' motions to dismiss below, when this court below found that the plaintiff's complaint must be dismissed for a particular legal reason, it did not stop there. Rather, it went into each argument being advanced by the plaintiff and ruled that, in virtually each instance, why the complaint must be dismissed for that particular reason. Those pages (T34-T63) of the oral argument on the motions to dismiss should be sufficient for this court to affirm the decision below.

Of utmost importance here is to understand precisely what relief the plaintiff sought below, and now seeks on appeal. Counts one, three and four of plaintiff's complaint seek to review the permitting process of anywhere from 6 months to 13 years prior to his filing of his complaint. Count three seeks no relief against the Defendant-Borough or its zoning officer.

Let us be clear. Aside from his unsupported claim for fees and costs, Plaintiff-Appellant seeks no other relief against the municipality or its official except to have them compel the property owner to make a land use board application.

But what relief could the court possibly grant plaintiff on his complaint? What plaintiff is asking, and asked below, is for the court to order the

borough and its zoning officer to order the Defendant-Frank to file an application for variance relief before the Zoning Board of Adjustment. In simple terms, courts don't order property owners to file variance applications. Property owners decide on their own whether to seek variance relief or whether to defend themselves against any summons that might issue in Municipal Court. The municipality can't "make" or "order" the property owner to file an application to a land use board, and plaintiff cites no authority for such relief even being available. That situation is what prompted the court below to find that the plaintiff's complaint failed to state a cause of action upon which relief could be granted. T34-12 to T36-9 (all six cases cited by the court are omitted here).

Because of the passage of time, and based upon the authorities cited by the court below, in Defendant-Respondent- Frank's brief, and in this letter brief, it is respectfully submitted that this court is without authority to order the borough or its zoning officer to do anything with respect to Defendant-Frank's property, and must affirm the dismissal granted below.

PROCEDURAL HISTORY

Defendant-Respondent-Borough, and Defendant-Respondent-Miller rely upon the procedural history set forth in the Defendant-Respondent-Frank's brief. DF 4- DF6. There is no need to repeat the same history here.

STATEMENT OF FACTS

Both Plaintiff-Appellant (Pb6-Pb10) and Defendant-Respondent - Frank (DFb5-DFb10), with the exception of editorial comment by either, have adequately set forth the underlying facts. Briefly stated, Defendant-Frank at various times since 2010 applied for zoning and building permits to undertake various improvements to his house, whether that be for pool-area improvements, moving a bilco door access to the basement/crawlspace, or adding a second floor. All of these improvements dealt with a pre-existing single family residence in the R-22 zone in West Long Branch.

LEGAL ARGUMENT

As indicated above, and more thoroughly in the brief filed on behalf of Defendant-Respondent- Frank, and as more particularly detailed in Judge Marshall's thorough decision on the record below (T34-T63), upon both of which these defendant's rely, the plaintiff's complaint was dismissed for a number of legal reasons. Contrary to Plaintiff-Appellant's assertion, Her Honor's decision was not made on equitable grounds, but rather on legal grounds, numerous case decisions having been cited in support thereof.

This writer will not belabor the same points briefed extensively by Defendant-Respondent-Frank, but will highlight some of the arguments herein.

POINT I

**PLAINTIFF FAILED TO STATE A CLAIM UPON
WHICH RELIEF COULD BE GRANTED (T34-12 to T36-9)**

As stated earlier in this brief, plaintiff failed to articulate any legal basis upon which the relief he sought could be granted by the court. The relief plaintiff sought was to compel the borough and/or its zoning officer to “order” Mr. Frank to file an application for variance relief before the West Long Branch Zoning Board of Adjustment. No authority has been cited by plaintiff in support of such relief being able to be granted by the court. What has happened here is that the plaintiff, because of his issues, whatever they might be, with defendant- Frank, chose to involve the borough in attempting to get it (the borough and its zoning officer) to order Frank to take action which the municipal entity and official could not do. Effectively, the borough and its zoning official became stuck in legal proceedings which were nothing more than a neighbor dispute. Defendants, borough and zoning officer, rely upon the cases referred to in both Judge Marshall’s decision below (T34-23 to T35-25) and the citations provided in Defendant-Respondent-Frank’s brief, including, but not limited to: Rieder v. Department of Transportation, 221 N.J. Super 547,552 (App .Div. 1987); Christofaro v. Laurel Road Memorial Park, 43 N.J. Super 244,252 (App. Div. 1957); and Energy Rec. v. Department of Environmental Protection, 320 N.J. Super 59,64 (App. Div. 1999).

POINT II

PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES (T36-10 to T39-14; T40-18 to 22; T41-14 to T42-8)

Plaintiff takes great pains to argue that his position is not bound by statutes, court rules or case precedent, attempting to do an end run around those legal precepts. Defendant-Respondent- Frank has thoroughly briefed that issue, and Defendant-Borough and Defendant-Miller rely upon the same. The record below is replete with undisputed proofs that the plaintiff was fully aware of all of the actions taken by Defendant-Frank, and when those actions were taken. Plaintiff cannot, nor did he, argue surprise and claim that the statute and ordinances requiring him to take action warranted a different period of time than set forth in statute or case law. What he did do was to wait over 13 years in one case, 12 years in another, and the latest having been about 6 six months prior to his filing of his complaint. All of those facts are fully set forth in the Defendant-Respondent-Frank's brief, and referred to in Judge Marshall's opinion below.

N.J.S.A. 40:55D-72 clearly states that appeals from decisions of a Municipal Administrative Officer "shall be taken within 20 days by filing a Notice of Appeal with the Officer from whom the appeal is taken, specifying the grounds of such appeal." That was not done in time and, in fact, was never done, whether within or outside the 20-day time allowed. In addition, West Long Branch

Ordinance 16-2.7 sets forth the procedure for filing such an appeal, which plaintiff did not comply with.

Ironically, plaintiff's counsel penned an article in 2018 which clearly stated that a neighbor has a right to appeal a zoning permit, however, "[T]he important thing to keep in mind is that you can't sleep on your rights. If you find that a permit has been issued that needed variance relief, you have just 20 days to file an appeal of the zoning officer's decision. If you go beyond 20 days, you will have to explain what caused your delay." Pa 204. In this case, there isn't even an offer as to why the plaintiff delayed in his bringing his action, in some instances 13 years later.

Further support for the dismissal of plaintiff's complaint for failure to file within a specified period of time is found in Harz v. Borough of Spring Lake, 234 N.J. 317, 322 (2018), where the court specifically states that the time to appeal [20 days] begins to run from the date the interested person knew or should have known that the permit had been issued. Here, plaintiff knew of each claimed violation as or very shortly after each permit issued.

Plaintiff, however, relies on N.J.S.A. 40:55D-18, claiming he is not subject to the time limitations of the rule. But plaintiff is questioning the issuance of the permit, effectively an issue that should be raised on an appeal of the zoning officer's decision, and he did not do so. The court, therefore, properly dismissed

the complaint. To have ruled otherwise, the court would be condoning the filing of complaints like these 20, 30 or even 50 years after the claim occurred.

The unpublished decision in Asarnow v. City of Long Branch, 2013 N.J. Super., an Appellate Division decision (Pa 206-210) provides further support for the premise that when a party fails to exhaust administrative remedies, its claim is barred.

POINT III

PLAINTIFF'S CLAIM FOR A WRIT OF MANDAMUS IS ALSO TIME BARRED (T36-11 to T37-14)

The court below also dismissed the plaintiff's mandamus claim (Count One of the complaint) as being time barred. Those types of complaints have a 45-day time period within which a party may bring an action in lieu of prerogative writs. Rule 4:69-6(a). As with a zoning officer's determination, the time to bring such an action in lieu of prerogative writs begins to run when the complaining party knew or should have known of the permit's issuance.

Trenkamp v. Township of Burlington, 170 N.J. Super. 251, 259-268 (Law Div. 1979). Here, plaintiff knew about everything that was happening when it happened, but failed to bring any action. Accordingly, the court's decision to dismiss the mandamus action as being untimely filed should be affirmed.

POINT IV

**THE COURT’S DENIAL OF PLAINTIFF’S MOTION
FOR RECONSIDERATION WAS CORRECT
(Da13 to Da18)**

Firstly, though the plaintiff’s motion for reconsideration of the court’s order dismissing his complaint is referenced in the Plaintiff-Appellant’s Brief and Appendix, his Notice of Appeal (Pa 245) does not include any appeal from the order denying reconsideration (Da 13-18). Out of an abundance of caution, these defendants will briefly comment on that motion and its denial.

Rule 4:49-2 permits motions to reconsider, alter or amend an order. The seminal case of D’Atria v. D’Atria, 242 N.J. Super 392, 401 (Ch. Div. 1990), holds that you may not seek reconsideration simply because you are dissatisfied with the court’s decision. Rather, the preferred course is to file a motion for leave to appeal, or appeal. In either case, the proponent of the motion must demonstrate that the court acted in an “arbitrary capricious or unreasonable manner”. *Id.* Further, motions for reconsideration are only appropriate where the court’s order rests on a “palpably incorrect or irrational basis or the court clearly did not consider or failed to appreciate the significance of probative competent evidence.” D’Atria, *Supra*. As the court noted in its statement of reasons attached to the order denying reconsideration (Da 13-18), reconsideration is a matter “within the sound discretion of the court to be exercised in the interest of justice.” Cummings v.

Bahr, 295 N.J. Super 374, 384 (App. Div. 1996). Motions under Rule 4:49-2 are to only address issues that were before the court in the prior proceeding. Lahue v. Pio Costa, 263 N.J. Super 575 (App. Div. 1993), and cannot be used to obtain “a second bite of the apple.” Fusco v. Board of Educ. of City of Newark, 349 N.J. Super 455, 463 (App. Div. 2002).

In denying the motion for reconsideration, the court held, and these defendants agree, that there was “no basis to reconsider its [the court’s] previous decision on the issue of plaintiff’s failure to exhaust administrative remedies.” Da 17. The court reached a similar decision with respect to its dismissal under laches (Da 18).

These defendant’s believe the court ruled properly and in conformance with New Jersey law in denying the motion for reconsideration below.

CONCLUSION

For the reasons hereto stated, and more fully stated in the brief filed on behalf of Defendant-Respondent-Frank, these defendants submit that the court's decision below, dismissing all four counts of the plaintiff's complaint with prejudice, should be affirmed.

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Attorneys for Defendants-Respondents,
Borough of West Long Branch and
James Miller

By: Gregory S. Baxter
GREGORY S. BAXTER

STEVEN SCHULZ

Plaintiff-Appellant,

v.

THE BOROUGH OF WEST LONG BRANCH,
JAMES MILLER, IN HIS OFFICIAL
CAPACITY AS ZONING OFFICIAL AND
ANDREW FRANK, INDIVIDUALLY,

Defendant-Respondents.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

Docket No.: A-3736-23

Civil Action

ON APPEAL FROM
SUPERIOR COURT, LAW
DIVISION MONMOUTH
COUNTY

Sat Below:

Honorable Andrea I.
Marshall, J.S.C.

**PLAINTIFF-APPELLANT'S BRIEF IN OPPOSITION TO
DEFENDANT-RESPONDENT FRANK'S CROSS APPEAL**

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POINT I

THE COURT PROPERLY REJECTED THE DEFENDANT’S MOTION FOR SANCTIONS

Defendant Frank erroneously contends that this lawsuit was filed for the sole purpose of harassing him, and that this accordingly renders the lawsuit “frivolous” and entitles him to sanctions against Plaintiff. This allegation is untrue and unfairly attempts to malign Plaintiff’s legitimate exercise of his rights as a neighbor and interested party to ensure that Defendant is in compliance with the municipality’s zoning laws. The fact that the Plaintiff complained on several occasions that Frank was obtaining permits that seemed to unlawfully exceed what the Borough’s Zoning Code permits is Plaintiff’s right as a citizen. It can hardly be considered harassment because the municipality failed to take any action.

This continued threat that our case was filed for purposes of harassment rising to the level of frivolous is intended to chill the Plaintiff’s legitimate exercise of his rights. Defendant’s insistence that the Plaintiff should be sanctioned in this matter is in the nature of a SLAPP suit. See footnote 12 of Borough of Englewood Cliffs v. Trautner, 478 N.J. Super. 426, 446, 315 A.3d 800, 812 (App. Div. 2024) which explains the term SLAPP suit as “An acronym for Strategic Lawsuits Against Public Participation, whereby litigation is filed for the main purpose of stifling free speech rights by imposing “the expense and burden of defending a lawsuit.” LoBiondo v. Schwartz, 323 N.J. Super. 391, 418, 733 A.2d 516 (App. Div. 1999). In this case,

the claim in the nature of a SLAPP suit is the Defendant Frank's appeal of the Court's denial of its request for sanctions. They expected us to back off and quit the field to avoid the award of counsel fees in a case where we are rightfully seeking to enforce the zoning ordinance.

As we will continue to argue in this brief, our view of the law and the relief we are seeking should prevail. But, even if we do not ultimately carry the day, our complaint should never have been dismissed with prejudice. Plaintiff's claim is not time-barred under N.J.S.A. 40:55D-18, and without discovery, the Defendants have no facts to substantiate their claim of reliance, estoppel or laches.

A. WHAT CONSTITUTES A FRIVOLOUS ACTION

In re Est. of Ehrlich, 427 N.J. Super. 64, 77, 47 A.3d 12, 20 (App. Div. 2012)

the Appellate Division stated:

An assertion is deemed frivolous when “ ‘no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.’ ” *First Atl. Fed. Credit Union v. Perez*, 391 N.J. Super. 419, 432, 918 A.2d 666 (App. Div. 2007) (quoting *Fagas v. Scott*, 251 N.J. Super. 169, 190, 597 A.2d 571 (Law Div. 1991)). Where a party has a reasonable and good faith belief in the claims being asserted, reallocation of attorneys' fees and expenses will not be awarded. *Ibid.* Moreover, “a pleading will not be considered frivolous for purposes of imposing sanctions under *Rule* 1:4–8 unless the pleading as a whole is frivolous.” *United Hearts, L.L.C., supra*, 407 N.J. Super. at 394, 971 A.2d 434. Thus, when some allegations are later proved unfounded, a complaint is not rendered frivolous if it also contains non-frivolous claims. *Id.* at 390, 971 A.2d 434.

Under this standard, neither Plaintiff's complaint nor his appeal can possibly be considered frivolous. The Plaintiff submits that the Law Division's view of the law in this matter is patently wrong. We provided the Court with the unpublished cases of Oliveira¹ and Matthews² that completely agree with our view and which relied upon the published holding of the New Jersey Supreme Court in Harz v. Borough of Spring Lake, 234 N.J. 317, 191 A.3d 547 (2018). Accordingly, Plaintiff's claim is far from "completely untenable." Further, the Plaintiff clearly has a rational good faith belief in the claims. The undersigned expressed this view in an article in the *New Jersey Lawyer* magazine in 2023³, which clearly exemplifies that this matter was not based in bad faith, but under a published legal theory espoused by Plaintiff's counsel.

The Legislature has deemed the enforcement of zoning so important that N.J.S.A. 40:55D-18 allows the municipality, as well as any interested party, to take action at any juncture. Neighbors can and have taken action to enforce zoning violations when the zoning department seems unwilling.

B. PLAINTIFF'S GOOD-FAITH BONA FIDE PURSUIT OF ENFORCEMENT

¹ See Pa97 of Plaintiff-Appellant's Brief and Appendix filed 10/29/24.

² See Pa102 of Plaintiff-Appellant's Brief and Appendix filed 10/29/24.

³ Dennis M. Galvin & Amanda C. Wolfe, "Resolution Compliance the Board Attorney's Perspective" *N.J. Law*, August 2023, at 28, 29

The first step the Plaintiff took before engaging in this lawsuit was to retain an experienced municipal engineer/planner to evaluate the zoning conditions on the Frank property. That report identified multiple nonconforming conditions on the Frank property. In reliance on N.J.S.A. 40:55D-18, counsel for the Plaintiff wrote to the Borough of West Long Branch asking them to enforce their zoning ordinance and review the permits granted to Frank, while referencing the specific findings from Mr. Cole's report.

The within lawsuit was initiated when the municipality failed to act. The Plaintiff has the right to bring such a suit based upon N.J.S.A. 40:55D-18, which states in part:

In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct **or abate such violation**, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.

The Plaintiff alleged that Frank's property is out of compliance with the West Long Branch zoning ordinance, and that the permits he received are accordingly ultra vires and void ab initio. The Court below ruled erroneously against the law and public policy when it permitted the passage of time to cleanse these illegal

actions. But, notwithstanding the Court's ruling and our contention that the Court's ruling was made in error, this filing can never be seen as frivolous.

N.J.S.A. 2A:15-59.1 provides in section 2:

The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

For the reasons stated above and herein, our complaint has a reasonable basis in law and equity and is supported by a good-faith argument. The reality is that the Law Division decision to dismiss the Plaintiff's complaint for failure to state a cause of action came as quite a shock. As such, we ask that the Appellate Division affirm the Court's refusal to award sanctions and proceed to remand this matter for the trial that the Plaintiff deserves.

C. PLAINTIFF AS AN INTERESTED PARTY, HAS A STATUTORY RIGHT TO INSIST THE "PROPERTY IN QUESTION" COMPLY WITH THE ZONING ORDINANCE, AND PLAINTIFF'S LEGITIMATE EXERCISE OF THIS RIGHT CANNOT POSSIBLY CONSTITUTE "HARASSMENT"

Defendant Frank alleges that this action and our efforts have been calculated to harass him. The Plaintiff did alert the municipality when it seemed to him that permits were being improperly issued, and changes were being made to the property. As a neighbor, the Plaintiff is an interested party under N.J.S.A. 40:55D-18. He has the right to make such inquiries. West Long Branch's refusal to take his concerns

seriously is unjustifiable and forced his hand. It is a shame that Plaintiff was so ignored that he had to resort to filing an enforcement action in accordance with N.J.S.A. 40:55D-18.

Before this matter was even filed, Plaintiff hired a municipal planner/engineer to assess the conditions on Defendant's property in order to ensure that his complaints were valid. The engineer confirmed the Plaintiff's suspicions, and only then did the Plaintiff file this complaint. Oddly, Mr. Frank has never said that he did not need variances. Frank has never addressed the Cole Report⁴ that made a detailed analysis of the nonconforming conditions extant on the Frank property⁵.

Frank argued below that we were late to the game and so he was entitled to keep his nonconforming conditions. The Court below was in error for accepting that argument. Such a finding is contrary to the well-worn public policy that nonconforming structures need to be brought into conformity as soon as the law will allow. Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 143–44, 62 A.3d 908, 915 (App. Div. 2013).

The bottom line is that a neighbor as an interested party has the right to ensure that neighboring properties conform to the zoning ordinance. Just casting the Plaintiff as a complaining neighbor, or qualifying his addressing the zoning

⁴ See Pa221 of Plaintiff-Appellant's Brief and Appendix filed 10/29/24.

⁵ Tautologically, if Mr Cole is correct in his analysis of the needed variance relief, then it is clear that Mr. Schulz did not "harass" Mr. Frank by reporting each violation as they occurred – as they were valid complaints which the Borough should have acted upon.

violations as harassment, seeks to deny him the right to be heard at a land use board and to prejudice his substantive rights. The Supreme Court unquestionably agreed in Harz v. Borough of Spring Lake, 234 N.J. 317, 333, 191 A.3d 547, 556 (2018) stating “an adjacent property owner's rights “may be affected” by construction on neighboring property, the adjacent owner—as an interested party under the MLUL—has a right to have her concerns heard in some form.”

POINT II

THE HARZ CASE SUPPORTS OUR CONTENTION THAT N.J.S.A. 40:55D-18 CREATES THE RIGHT OF AN INTERESTED PARTY TO BRING AN ENFORCEMENT ACTION WITHOUT FILING AN APPEAL UNDER N.J.S.A. 40:55D-72(a)

Defendant Frank suggests that the Plaintiff’s brief misquoted the Supreme Court’s holding in Harz v. Borough of Spring Lake, 234 N.J. 317 (2018). The Supreme Court found on the unique facts of that case that Mrs. Harz received her opportunity to be heard. So, although the Court recognized that depriving an interested party of their right to be heard in a land use case violates the New Jersey Civil Rights Act, that was not the case for Mrs. Harz.

That hearing occurred for Mrs. Harz in an appearance before the land use board because she elected to file an appeal under N.J.S.A. 40:55D-72(a); not because she had to. In fact, she also took advantage of N.J.S.A. 40:55D-18. As the Supreme Court explained:

When the Third Permit issued, at first, **Harz did not proceed with an appeal to the Planning Board pursuant to N.J.S.A. 40:55D–72(a) but instead filed a prerogative-writs action and Order to Show Cause in Superior Court aimed at enjoining the permit. That was her right, and one contemplated by N.J.S.A. 40:55D–18.** Her success in obtaining a restraining order, however, did not signify that the Borough denied her the right to be heard. Indeed, after filing the prerogative-writs action, she filed an appeal with the zoning officer in the ordinary course. Nothing in the record suggests that had Harz not filed her action in Superior Court, the Planning Board would have denied her a hearing or that the prerogative-writs action was the catalyst for the hearing. For purposes of the Civil Rights Act, Harz did not exhaust the statutory process for securing her right to be heard under the MLUL.

Harz, 234 N.J. at 336–37 (emphasis added).

The Supreme Court relied on N.J.S.A. 40:55D-18 when it concluded that the right to be heard in a land use matter is a substantive right stating:

Last, because an interested party's right to be heard is inextricably tied to a party's property rights, we find that the MLUL right to be heard is substantive, not procedural. Moreover, it is a right that can be enforced through an action in lieu of prerogative writs. See id. at 478, 95 A.3d 210; see also N.J.S.A. 40:55D–18 (providing that “an interested party ... may institute any appropriate action or proceedings to prevent” erection of unlawful structure).

Harz, 234 N.J. at 335.

The Harz Court only referenced part of the authority contained in N.J.S.A. 40:55D-18 when it said that “ ‘an interested party ... may institute any appropriate action **or proceedings to prevent erection of unlawful structure.**” Harz v. Borough of Spring Lake, 234 N.J. at 335 (emphasis added). The Court below latched onto

that limited quote and found that the Plaintiff was not sufficiently proactive. What the Court failed to consider was the broad enforcement power granted by N.J.S.A. 40:55D-18. The statutory language is far more encompassing and includes the ability to “**correct or abate such violation**”. N.J.S.A. 40:55D-18 sets forth:

In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, **correct or abate such violation**, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises. N.J.S.A. § 40:55D-18 (emphasis added).

The Plaintiff in filing this action is relying on N.J.S.A. 40:55D-18 and was acting just as a Zoning Officer should in seeking to **correct and/or abate a violation of the zoning ordinance**. The Court below refused to accept that the Plaintiff had the right to file an action under N.J.S.A. 40:55D-18.

A. THERE IS NO TIME LIMIT ON ZONING ENFORCEMENT

There is no time limitation found in N.J.S.A. 40:55D-18 because public policy seeks to eliminate all nonconforming uses and structures as quickly as possible. If the legislature saw fit to impose a time limit to this statute, it would have. Further, case law emphasizes the importance of this public policy in Land Use. The fact that

the Court below found that the statute only applies to matters seeking to prevent construction conflicts with the enumerated language of the statute.

The law regarding nonconforming uses and structures was restated in Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 143–44, 62 A.3d 908, 915 (App. Div. 2013):

Although land use laws may confer a right to continue a pre-existing nonconforming use, “the policy of the law is to restrict them closely [.]” *Hay v. Bd. of Adjustment*, 37 N.J. Super. 461, 464, 117 A.2d 650 (1955). This is because their “ ‘tendency is to subvert rather than support sound planning.’ ” *Grundlehner v. Dangler*, 29 N.J. 256, 274, 148 A.2d 806 (1959) (Burling, J., concurring) (quoting *144 *Ranney v. Istituto Pontificio Delle Maestre Filippini*, 20 N.J. 189, 196, 119 A.2d 142 (1955)). Accordingly, municipalities “may impose restrictions on nonconforming uses, including prohibiting their expansion.” *Conselice v. Borough of Seaside Park*, 358 N.J. Super. 327, 333, 817 A.2d 988 (App. Div. 2003).

Municipalities may not, however, take “active” steps to eliminate nonconforming uses, and must wait with “ ‘fervent hope that they would in time wither and die and be replaced by conforming uses.’ ” *Fred McDowell, Inc. v. Bd. of Adjustment*, 334 N.J. Super. 201, 214, 757 A.2d 822 (App. Div. 2000) (quoting *Grundlehner, supra*, 29 N.J. at 263, 148 A.2d 806), *certif. denied*, 167 N.J. 88, 769 A.2d 1051 (2001). Moreover, given the statutory objective to eradicate nonconforming uses over time, local governing bodies may not adopt ordinances that authorize the restoration or replacement of all nonconforming structures, even on the condition that the cubic size of the replacement structure does not exceed the size of the existing structure. *Avalon Home & Land Owners Ass’n v. Borough of Avalon*, 111 N.J. 205, 543 A.2d 950 (1988). (emphasis added).

However, our position is that the permits issued by the Zoning Officer exceeded his authority and are void. The Supreme Court in Hilton Acres v. Klein, 35 N.J. 570, 581, 174 A.2d 465, 470 (1961) stated:

Our cases have consistently held that municipal action in the land use control field taken in direct violation of law or **without legal authority is void Ab initio and has no legal efficacy**. So a building permit issued contrary to a zoning ordinance or building code cannot ground any rights in the applicant. (emphasis added.)

So while a property with nonconforming conditions has a right to exist until abandoned or terminated, it must be valid at the time of its creation. Ferraro v. Zoning Bd. of Borough of Keansburg, 321 N.J. Super. 288, 291, 728 A.2d 863, 864 (App. Div. 1999). In this case Frank has no legal right to rely on the permits issued to him. None of the uses were conforming at the time of the creation.

Thus, just like the Zoning Officer, an interested party can seek abatement and correction of the zoning nonconformities on the Frank property under N.J.S.A. 40:55D-18. This concept rests on the public policy of bringing all lands into conformity with the zoning ordinance. The solution for Frank and the Borough remains a simple one.

If Frank wishes to maintain his improvements, Frank should file an application for variances with the Zoning Board. The Board will decide what, and if any, variance relief is appropriate. If Frank was to file for variances to the Zoning

Board, then the Plaintiff will finally be able to enjoy his right to be heard and to object to the requested relief.

The Zoning Official, by issuing permits that required variances, has deprived the Plaintiff and the public at large of their right to be heard.

POINT III

THE PLAINTIFF’S GOAL WAS TO FORCE FRANK TO SUBMIT TO THE JURISDICTION OF THE ZONING BOARD IN ORDER TO BRING HIS PROPERTY INTO CONFORMANCE WITH THE ZONING ORDINANCE

The Plaintiff has a legitimate purpose for filing this lawsuit. The goal of our abatement action under N.J.S.A. 40:55D-18 was to get Frank to make a variance application and submit it to the jurisdiction of the Zoning Board. It is possible that the Zoning Board will ratify some of its nonconforming conditions, but it is equally possible that some structures and conditions might need to be modified or eliminated. At the very least, it would provide Plaintiff with his substantive right to be heard under the MLUL. See Harz, 234 N.J. at 335. Frank has adamantly refused to file an application with the Zoning Board.

The Court’s dismissal of the complaint with prejudice was in error. The Court below was required to give the Plaintiff “the benefit of ‘every reasonable inference of fact.’” Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171, 249 A.3d 461, 469 (2021). In order to dismiss the Plaintiff’s complaint on the basis of laches or

equitable estoppel, the Court needed to make a finding of good faith reliance. The Court cannot possibly make such a finding summarily at the very initiation of a lawsuit. Facts need to be entered into the record, and this can only be done through the discovery process. In Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 430 N.J. Super. 132, 152–53, 62 A.3d 908, 920 (App. Div. 2013) the Appellate Division enumerated the elements for a finding of estoppel as it relates to zoning permit reliance:

In the specific context of the issuance of building permits, the application of estoppel requires proof of four elements: (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. *Jesse A. Howland & Sons, Inc. v. Borough of Freehold*, 143 N.J. Super. 484, 489, 363 A.2d 913 (App.Div.) (quoting *153 *Hill v. Bd. of Adjustment*, 122 N.J. Super. 156, 162, 299 A.2d 737 (App.Div.1972)), *certif. denied*, 72 N.J. 466, 371 A.2d 70 (1976). Even assuming, for the sake of discussion, the first three of these elements are present here, the fourth element of plaintiff’s “good faith reliance” has not been demonstrated.

The Court could not ratify the issued permits without a finding that Frank’s reliance on the permits was made in good faith, for which there are no facts in the record to support the trial Court’s finding. We intend to inquire in discovery about how these permits were obtained and what the rationale was for issuing the permits.

The Zoning Officer should have recognized that as the Frank property is undersized, he was without authority to grant any of the permits he granted. The Zoning Officer should have denied all of these requests for permits and directed Mr. Frank to the Zoning Board.

There are factual issues at question here: On what basis did the Zoning Officer repeatedly issue permits that should have been denied? Why did that occur and can the Zoning Officer explain his conduct? The discovery process is necessary to resolve these legitimate questions. We reiterate that the discovery process is necessary because Frank has repeatedly refused to simply submit to the Zoning Board's jurisdiction.

POINT IV

BASIC LAND USE PRINCIPLES CONFIRM THE IMPROPER ISSUANCE OF PERMITS CONFERS NO RIGHTS

The Appellate Division in Hay v. Bd. of Adjustment of Borough of Fort Lee, 37 N.J. Super. 461, 464, 117 A.2d 650, 651–52 (App. Div. 1955) laid out our public policy fundamentals in the area of zoning over 70 years ago:

Reference to some fundamentals may be useful for orientation purposes. A prime purpose of zoning is to bring about the orderly physical development of the community by confining particular uses to defined areas. Nonconforming uses are inconsistent with that purpose. They are recognized and permitted to continue only because they are antecedent to the ordinance. However, the policy of the law is to restrict them closely; although they may be continued they may not be enlarged or extended. *Monmouth Lumber Co. v. Ocean Township*, 9 N.J. 64, 87 A.2d 9 (1952); 652

Rockleigh Borough, Bergen County v. Astral Industries, 29 N.J.Super. 154, 102 A.2d 84 (App.Div.1953), certification granted 15 N.J. 591, 106 A.2d 41 (1954).

The Legislature has dealt with one phase of such uses. N.J.S.A. 40:55-48 provides: ‘Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied and any Such structure may be restored or repaired in the event of Partial destruction thereof.’ (Emphasis ours).

Thus it may be said that case law and legislative enactment point clearly to a policy that preexisting discordant uses should be reduced to conformity as speedily as is compatible with justice. Rockleigh Borough v. Astral Industries, supra. Aside from physical anomaly, another important reason for his intention may be noted. Such uses, particularly a business use in a residence zone, commonly give the property owner an economic advantage over his neighbors, amounting at times to a monopoly because the character of the zone prevents the establishment of competition. That is not a consequential factor here because of the presence of other similar nonconforming enterprises in the zone.

N.J.S.A. 40:55D-48 was replaced with identical language in N.J.S.A. 40:55D-68. This passage critically highlights that it is the public policy of New Jersey to eliminate nonconforming zoning conditions as soon as practical. N.J.S.A. 40:55D-68 permits “Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued.” However, the structure must be created **validly** prior to the change in the ordinance.

Critical to the right to continue to use a nonconforming use or structure is the owner’s ability to prove that it was valid when created. In Ferraro v. Zoning Bd. of

Borough of Keansburg, 321 N.J. Super. 288, 291, 728 A.2d 863, 864 (App. Div.

1999) the Appellate Division found that:

There was no proof presented to show whether a then-lawful use existed in the structure in question at the time of adoption of the zoning ordinance, much less to show continuity of such use thereafter. Although Ferraro argues that the Board and the trial judge improperly shifted the burden to him to establish non-abandonment, the Board properly noted that prior occupancy as a residence had never been proved. It was Ferraro's initial burden to establish existence of lawful residential occupancy as of the commencement of the zoning regulations as well as its continuation afterward. *See Cox, New Jersey Zoning and Land Use Administration* Sec. 11-2.3 (GANN, 1999); *Ianieri v. East Brunswick Zoning Bd. of Adjustment*, 192 N.J. Super. 15, 20, 468 A.2d 1072 (Law Div. 1983). *see also Berkeley Square Ass'n, Inc. v. Zoning Bd. of Adjustment of City of Trenton*, 410 N.J. Super. 255, 265–66, 981 A.2d 127, 134 (App. Div. 2009).

The Supreme Court in DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 271–72, 966 A.2d 1036, 1053 (2009) reflected on N.J.S.A. 40:55D-68 and confirmed that a nonconforming structure only has the right to continue if it was valid when created, stating that:

The purpose of that provision, which has constitutional implications, is to protect “pre[-]existing nonconforming uses from changes made in municipal zoning ordinances.” *Do–A.2d 706* (2001). The statute expressly protects a vested right by permitting a pre-existing nonconforming use to co-exist with an ordinance that facially prohibits it. William M. Cox et al., *New Jersey Zoning and Land Use Administration* § 11–1.1 at 270 (2008).

The inquiry in connection with a certificate of nonconforming use is a limited one: whether the use predated the zoning ordinance

that rendered it illegal and whether it conformed with the zoning laws in effect at its inception. David J. Frizell, 36 *N.J.* to protection.⁸ *Ibid.*; Cox et al., *supra*, § 11–2.3.

Municipalities have the right to bring all properties not consistent with their zoning ordinance into conformity unless the structure was valid at the time of its creation. Zoning Officers do not have the authority to grant a permit if a variance is required. A Zoning Officer is trained to deny any request for a permit when they are in doubt. In Cox & Koenig, New Jersey Zoning & Land Use Administration § 12-4 page 180 (2023), the authors explain that “[i]t should be emphasized that the zoning officer and building inspector should refuse to issue a permit in any case where there is doubt as to whether the applicant is entitled to it.”

As the Cole Report makes clear, multiple nonconforming conditions have been created by the improper issuance of permits to Mr. Frank where variances were obviously required. The Appellate Division addressed the erroneous issuance of permits in Irvin v. Twp. of Neptune, 305 N.J. Super. 652, 657–58, 702 A.2d 1388, 1391 (App. Div. 1997) stating:

For an estoppel to be applied against the Township, its administrative officials must have made an “erroneous and debatable interpretation of the ordinance” in “good faith and within the ambit of [their] duty,” upon which the owner of the property relies in good faith. *Jantausch v. Borough of Verona*, 41 *N.J. Super.* 89, 94, 124 *A.2d* 14 (Law Div. 1956), *aff’d*, 24 *N.J.* 326, 131 *A.2d* 881 (1957). However, “good faith” on the part of a zoning official is satisfied only by demonstrating the existence of “an issue of construction of the zoning ordinance or statute,

which, although ultimately not too debatable, yet was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted *without any reasonable basis* or that the owner proceeded without good faith.” *Jesse A. Howland & Sons, Inc. v. Borough of Freehold*, 143 N.J.Super. 484, 489, 363 A.2d 913 *658 App.Div.), *certif. denied*, 72 N.J. 466, 371 A.2d 70 (1976)³. In *Hilton Acres v. Klein*, 35 N.J. 570, 581–583, 174 A.2d 465 (1961), the Court reaffirmed the well established principle 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,” and that no estoppel may arise in such situations.** “[T]he protection of the public interest ...must be the first concern of the judiciary.” *Id.* at 583, 174 A.2d 465; *see also* Cox, *New Jersey Zoning and Land Use Administration*, § 23–5, p. 420–21 (1997). (emphasis added).

As the permits were erroneously issued, either a future Zoning Official or an interested party has the right in accordance with N.J.S.A. 40:55D-18 to seek abatement of these nonconforming conditions. The Plaintiff’s complaint stated much more than a mere fundament of a claim and should never have been dismissed.

A. MULLEN V. IPPOLITO CORP. WAS DIRECTLY ON POINT

The trial Court refused to consider the holding in Mullen v. Ippolito Corp., 428 N.J. Super. 85, 104, 50 A.3d 673, 684–85 (App. Div. 2012), a case that is directly on point. The only distinguishing factor on the part of the Plaintiff in Mullen is that the Mullen attorneys failed to bring their action under N.J.S.A. 40:55D-18.

In Mullen, the borough Zoning Official refused to enforce the zoning law for over a decade despite ongoing complaints from the neighbor. The facts of the Mullen

case are similar to the Plaintiff's action. There are two major differences that make our case even more compelling. First, unlike the Mullen Plaintiffs, the Plaintiff in this case sought abatement in accordance with N.J.S.A. 40:55D-18. Second, the Plaintiff in this case took the extra step of hiring a planner/engineer to provide a detailed report to confirm the nonconforming conditions that exist. The Township rejected the Plaintiff's concerns, and thus violated his constitutional right to be heard.

Judge Fuentes, in reversing the Law Division in Mullen, held:

The Court's holding in *Garrou* was grounded on **a profound appreciation of a citizen's right to seek the enforcement of laws, when violations of these laws have gone unaddressed by those responsible for their enforcement over an extended period of time.** (emphasis added)

The Court below missed the real significance of the holding in Mullen which is the importance of the Zoning Officials' duty to enforce the zoning ordinance. It is clear that proper enforcement of the zoning ordinance is critical public policy. Neighborhoods can devolve quite quickly when broken windows go unrepaired and zoning ordinances go unenforced.

POINT V

N.J.S.A. 40:55D-18 EMPOWERS ALL ZONING ENFORCEMENT

The Court below was led to an improper conclusion. N.J.S.A. 40:55D-18 is clear on its face. It is not ambiguous and imposes no prerequisites or time limitations.

As the Supreme Court reminded us in Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 261, 231 A.3d 606, 611 (2020):

Our first step in interpreting a statute is to look to ‘the actual words of the statute, giving them their ordinary and commonsense meaning.’ *State v. Gelman*, 195 N.J. 475, 482, 950 A.2d 879 (2008). ‘If the plain language leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources.’

N.J.S.A. 40:55D-18 states clearly:

In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.

This law provides that **“the proper local authorities of the municipality or an interested party, in addition to other remedies, may institute any appropriate action or proceedings to... correct or abate such violation.”** Id. This language reveals that an interested party has the same standing as a local authority. This law is the font of all zoning enforcement. Further, this law does not require exhaustion of other remedies. It does not require filing an appeal with the Zoning Board. It plainly states that **“in addition to other remedies, may institute any appropriate action or proceedings”**. Id.

Defendant Frank's property is a nonconforming undersized lot which means every permit granted to him to expand his home required a review by the Zoning Board. Had the Zoning Officer denied the requested permits, his neighbor, the Plaintiff, would have an opportunity to be heard before the Zoning Board. As such, the Plaintiff has been deprived of his constitutional right to be heard as explained by the Supreme Court in Harz v. Borough of Spring Lake, 234 N.J. 317, 333, 191 A.3d 547, 556 (2018).

POINT VI

THE PLAINTIFF'S COMPLAINT IS NOT TIME BARRED

The Court erred when it ruled that the complaint was time barred. The Plaintiff's primary position is that only valid pre-existing nonconformities have a right to be continued indefinitely per N.J.S.A. 40:55D-68. However, all other nonconforming uses or structures may be abated at anytime pursuant to N.J.S.A. 40:55D-18 which is evergreen.

A. R. 4:69-6 DOES NOT APPLY

The Court below misapplied R. 4:69-6. The enforcement of the zoning ordinance is not among actions listed in Section (b) Particular Actions. While this Rule is generally thought of when a matter regarding zoning is instituted, it does not apply to the case at bar.

(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of

public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after **45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality**, provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution (e.g., “Variance--Store in residential zone denied”), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection; N.J. Ct. R. R. 4:69-6.

B. NO OFFICIAL ACTION WAS TAKEN AND NO NOTICE WAS PUBLISHED

In order to determine if the Frank property had nonconforming conditions, Michael Cole, a municipal planner/engineer was engaged. He confirmed the Plaintiff’s suspicions that the home and its accessory structures required variance relief. His report detailing the required variances, was delivered to the Administrator of West Long Branch by letter dated August 8, 2023.⁶ The Municipal Attorney responded on August 14, 2023 and while he agreed that the fence required correction, he rejected our request that the Township take action to enforce the zoning ordinance. The Plaintiff’s complaint was filed on October 17, 2023.⁷ We have never contended that R. 4:69-6 applies because an action to abate a non-

⁶ See Pa21 of Plaintiff-Appellant’s Brief and Appendix filed 10/29/24.

⁷ See Pa3 of Plaintiff-Appellant’s Brief and Appendix filed 10/29/24.

conforming condition is a municipal power and should not be limited as a matter of public policy.

However, should the Court conclude that the requirements of R. 4:69-6 apply, then the time to file is still open as the municipality has never published notice of its action. As such, the time in which the Plaintiff must file an action has not yet accrued.

C. THE PERMITS ISSUED ARE VOID AND NO TIME LIMIT APPLIES

Najduch v. Twp. of Indep. Plan. Bd., 411 N.J. Super. 268, 274, 985 A.2d 663, 667

(App. Div. 2009) the Appellate Division Judge Skillman restated the law:

However, even if the time *Rule 4:69–6* allows for direct review of a municipal agency's action has expired, an action that was “ ‘utterly void’ ... is ‘subject to collateral attack at any time.’ ” *Thornton v. Village of Ridgewood*, 17 N.J. 499, 510, 111 A.2d 899 (1955) (quoting *V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment of Summit*, 8 N.J. 386, 395, 86 A.2d 127 (1952)). As stated by former Chief Justice Weintraub, then a Law Division Judge, “where there is no semblance of compliance with or authorization in the [governing] ordinance, the deficiency is deemed jurisdictional and reliance will not bar even a collateral attack after the expiration of time limitation applicable to direct review.” *Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 94, 124 A.2d 14 (Law Div. 1956), *aff'd*, 24 N.J. 326, 131 A.2d 881 (1957); *accord Auciello v. Stauffer*, 58 N.J. Super. 522, 527–28, 156 A.2d 732 (App. Div. 1959); *see also Sitkowski v. Zoning Bd. of Adjustment of Lavallette*, 238 N.J. Super. 255, 261–62, 569 A.2d 837 (App. Div. 1990).

The permits issued by the Zoning Official required variances and are thus void. Moreover, the issuance of these permits deprived the Plaintiff of his right to

object to the issuance of variances before the Zoning Board and violated his constitutional right to be heard. So, in effect, the time to file our case cannot be dismissed because the permits issued should be found to be utterly void and therefore, the Plaintiff was not out of time to file.

**D. THE PLAINTIFF'S NEW JERSEY CIVIL RIGHTS CLAIM
ACCRUED WHEN THE MUNICIPAL ATTORNEY
INDICATED THE TOWNSHIP WOULD NOT ACT**

The Plaintiff wanted to be sure its claims were valid. It hired Mr. Cole who confirmed the Plaintiff's concerns. The Township was put on notice that Zoning Board action was required and should have taken action to correct this injustice and encourage the Defendant Frank to appear before the Zoning Board. Their decision to reject the Plaintiff's concerns deprived the Plaintiff of his constitutional right to be heard before the Zoning Board. Harz v. Borough of Spring Lake, 234 N.J. 317, 334, (2018) So this case involved two causes of action.

The Plaintiff's cause of action alleging the violation of his civil rights under N.J.S.A. 2A:14-2 has a two-year statute of limitations. The observation made by the Law Division in Kratovil v. Angelson, 473 N.J. Super. 484, 497–98, 282 A.3d 651, 658 (Law. Div. 2020) applies directly to our case:

Here, Plaintiff has asserted causes of action arising under both N.J.S.A. 52:14-7(d) and R. 4:69-6(c). Satisfaction of the statute of limitations for either claim will allow the case to proceed on the merits. Save Camden Pub. Schs. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 488, 186 A.3d 304 (App. Div. 2018). Considering the statute of limitations *498 under the New

Jersey Civil Rights Act, N.J.S.A. 2A:14-2(a), as well as the forty-five day period for filing an action in lieu of prerogative writ, R. 4:69-6(a), the court in Save Camden held that a favorable ruling on either statute of limitations defense would “afford plaintiffs the right to proceed with the merits of their substantive relief.” 454 N.J. Super. at 488, 186 A.3d 304. (emphasis added)

Following the holding in Kratovil, even if R. 4:69-6 applies, the Plaintiff’s civil rights claim is well within time and the matter below should not have been dismissed on the basis of time.

E. THE PLAINTIFF IS NOT OUT OF TIME

The Plaintiff’s action is not a prerogative writ matter, but even if it is, the Township never published notice of its action, so the time limitation of R.4:69-6 has not been triggered. Also, the permits issued by the Zoning Official are corrupt and are utterly void which means that they are subject to collateral attack at any time. Finally, the Plaintiff’s cause of action has two components; abatement under N.J.S.A. 40:55D-18 and violation of his constitutional right to be heard under N.J.S.A. 2A:14-2. The later law has a two year time limit and the Plaintiff filed a mere 60 days after the Township refused to vindicate his right to be heard. For all these reasons we ask that this case be remanded to the Law Division.

POINT VII

WEST LONG BRANCH RECOGNIZES THE RIGHT OF INTERESTED PARTIES TO TAKE THE EXACT ACTION THE PLAINTIFF FILED

N.J.S.A. 40:55D-18 provides the enforcement fire power to bring nonconforming uses and structures into compliance with the law. West Long Branch, like all New Jersey Municipalities, has created zoning enforcement ordinances. Section 18-9.1 Enforcement provides that “It shall be the duty of the Building Inspector, or the Code Enforcement Officer, and any duly authorized assistants to cause any building, plans or premises to be inspected or examined and to order in writing the remedying of any conditions found to exist in violation of any provisions of this Chapter.”

The Zoning Officer’s duty is to uphold the zoning ordinance. We do not know why the permits below were issued but they were, in error and are void. As such, anyone including a future Zoning Officer, could seek to bring the Frank property into conformance.

Compliance with the local zoning ordinances is an exceptionally important public policy. West Long Branch recognizes that fact and in section (c) of Section 18-12 VIOLATIONS AND PENALTIES provides:

(c) In addition to the remedy or remedies hereinbefore provided, **any person, persons, company or corporation violating this Chapter or any provision or section thereof, may be proceeded against** by the Borough of West Long Branch, or by the Building Inspector or Code Enforcement Officer of the Borough of West Long Branch, **or by the owner of any property in the Borough of West Long Branch, by appropriate action or proceeding in equity or otherwise** to prevent and enjoin any threatened violation or any existing violation or any continuing

violation of this Chapter or any provision or section thereof.
(emphasis added)

As explained repeatedly throughout this brief, the Zoning Officer has an ongoing duty to enforce the zoning ordinance and to bring all nonconforming uses and structures into conformance. N.J.S.A. 40:55D-18 brings to bear all possible enforcement methods. As is clear in section 18-12(c), West Long Branch recognizes our standing and approves of our cause of action, notwithstanding the position they have taken throughout this litigation.

The Plaintiff respectfully requests that the Appellate Division remand this matter to the Law Division to allow us to vindicate our rights.

CONCLUSION

The Court below trivialized the Plaintiff's constitutional right to be heard by agreeing with the Defendants, without any facts, that this matter was just a nuisance suit by a neighbor. Almost all zoning cases involve a dispute among neighbors.

The Plaintiff's claim and reliance on N.J.S.A. 40:55D-18 are way more than a fundament of a cause of action and in a fair fight we expect to carry the day.

We respectfully request that the dismissal of this matter be reversed, that the matter be remanded, and that a case management conference be scheduled so we can proceed to take the deposition of the Defendants.

Further, we respectfully request that Defendant's request for sanctions be denied. Plaintiff is engaging in a legitimate exercise of his rights as a neighbor and

interested party and his exercise of these rights cannot possibly constitute “harassment.”

Respectfully submitted,

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Attorneys for Plaintiff

By: /s/ Dennis M. Galvin

DENNIS M. GALVIN

Dated: February 19, 2025

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STEVEN SCHULZ,

Plaintiff/Appellant,

v.

THE BOROUGH OF WEST LONG
BRANCH, JAMES MILLER, IN HIS
OFFICIAL CAPACITY AS ZONING
OFFICIAL, AND ANDREW FRANK,
INDIVIDUALLY,

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-0003736-23

On Appeal from:

SUPERIOR COURT OF NEW JERSEY,
MONMOUTH COUNTY, LAW
DIVISION

Docket No: MON-L-3272-23

Sat below:

Honorable Andrea I. Marshall, J.S.C.

ANDREW FRANK,

Defendant/Cross-Appellant,

v.

STEVEN SCHULZ,

Plaintiff/Cross-Respondent.

BRIEF IN FURTHER SUPPORT OF RESPONDENT/CROSS-APPELLANT
ANDREW FRANK'S CROSS-APPEAL OF THE TRIAL COURT'S JULY 9, 2024
ORDER

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PRELIMINARY STATEMENT¹

Plaintiff's Complaint is frivolous as it (i) was brought for the sole improper purpose of harassing Frank, and (ii) is procedurally deficient for a number of reasons rendering it untenable.

First, the trial court erroneously failed to consider that Plaintiff brought the Complaint for the sole purpose of harassing Frank therein disregarding the mountain of evidence showing Plaintiff's unhinged vendetta against Frank. The Complaint is nothing more than Plaintiff's latest attempt to torment Frank, which is made evident by the Complaint itself and the voluminous history of Plaintiff's crusade against Frank. Accordingly, filing the Complaint for such an improper purpose is frivolous under the prevailing legal standard and Frank should be awarded fees attendant to defending this unfounded action .

Second, the Complaint is untenable evidenced by the trial court's wholesale dismissal of same. Indeed, Plaintiff does not even dispute that Counts I and III of the Complaint were legally deficient and rightfully dismissed. Moreover, the Complaint's enforcement claims are simply out of time no matter how Plaintiff tries to position them. It cannot be disputed that these claims are Plaintiff's attempt to find *something* to justify a lawsuit against Frank -- no matter how meritless --

¹ Frank will only address the arguments with regard to its Cross-Appeal in accord with the Rules of Court and this Court's scheduling order. Frank relies on its Respondent's brief filed on January 3, 2025 in opposing Plaintiff's appeal.

evidenced by the fact that the permits effectively being appealed were issued as long ago as 13 years. Unfortunately for Plaintiff, there are time limitations to bring his claims no matter how they are couched.

Accordingly, pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1, the trial court's denial of Franks motion for sanctions should be overturned and sanctions should be issued against Plaintiff and his counsel, who either knew or should have known that Plaintiff's claims are procedurally barred. Sanctions should include an award of all reasonable litigation costs and attorneys' fees incurred by Frank arising from Plaintiff's misconduct.

LEGAL ARGUMENT

I. The Complaint Was Filed In Furtherance Of A Personal Vendetta Against Frank (Da1-5).

The Complaint is anything but "legitimate" as it is nothing more than the next step in Plaintiff's unceasing harassment of Frank, beginning with police and zoning complaints and progressing to the present misuse of the Court system. Critically, Plaintiff's complaints to the police and zoning board are equally as baseless as the present Complaint, which in the aggregate makes Plaintiff's true goal readily apparent -- to continue his vendetta against Frank despite the absence of any viable claim. A basis upon which a pleading can be found frivolous is if it is "in bad faith, solely for the purpose of harassment, delay or malicious injury." N.J.S.A. § 2A:15-59.1(b)(1). "Sanctions are warranted only when the pleading as a whole is frivolous

or of harassing nature.” *United Hearts, L.L.C. v. Zahabian*, 40 N.J. Super. 379, 390 (App. Div. 2009). Similarly, “Rule 1:4-8 has a punitive purpose in seeking to deter frivolous litigation, [and] it also seeks to compensate a party that has been victimized by another party bringing frivolous litigation.” *Deutch & Shur, P.C. v. Roth*, 284 N.J. Super. 133, 141 (Law Div. 1995) *abrogated in part on other grds.*, *Segal v. Lynch*, 211 N.J. 230, 260 (2012).

Here, the Complaint itself and Plaintiff’s actions leading up to the filing of the Complaint make it readily apparent that this matter was brought with the purpose of harassing Frank. Indeed, Plaintiff’s malice towards Frank is well-documented, including calling the police because Frank was using a leaf blower, and putting logs under Frank’s tires. Pa154-156, 187-189. Another example is Plaintiff calling the police over *grass clippings* on a *neighbor’s* lawn. Pa192-194. The absurdity of Plaintiff being concerned about grass clippings on someone else’s property to the extent he called the police readily demonstrates that Plaintiff’s never-ending crusade against Frank is personal, and the Complaint is just the latest salvo in his one-sided war. In fact, the neighbor’s comments with respect to this complaint contrasts Plaintiff’s agenda against Frank. Pa194 (Plaintiff’s and Franks neighbor “quickly explained that the grass clippings had been there for over three years and that when they were initially dumped there was a question about the property line; however, they had no issue with Frank what so ever *adding that Schulz is just*

attempting to get them involved with their dispute”) (emphasis added). These are only a few reported examples of Plaintiff’s conduct that provide a mere taste of the torment that Frank has suffered at the hands of Plaintiff.

Additionally, the Complaint itself demonstrates Plaintiff’s true motivation in filing this action -- to harass Frank and not as a concerned citizen as Plaintiff purports. Indeed, the Complaint makes allegations against Frank centered around improvements for which Frank obtained permits as long as *fifteen years ago*. Pa5-6. As such, it is clear that Plaintiff retained an attorney to try and find any shred of purported wrongdoing by Frank to continue his aggressive badgering and intimidation. If this matter was truly resulting from Plaintiff’s genuine concern it undoubtedly would have been brought properly within the applicable deadlines and certainly not over a decade after the fact. Unfortunately for Plaintiff, even the claims that were scraped together are legally unsustainable as confirmed by the trial court. It is plain that Plaintiff will take any and every opportunity to harass Frank even when it has nothing to do with Plaintiff, which is shown by this very action. Pa4 (Plaintiff’s property is not even neighboring the Property, but is one house away).

This well documented fixation has now extended to this matter wherein Plaintiff desperately is attempting to find any flaw with Frank’s patio notwithstanding that Frank properly obtained permits for the improvements to his Property. Thus, Plaintiff’s characterization that he is merely exercising “his rights

as a neighbor and interested party to ensure that Defendant is in compliance with the municipality's zoning laws" is ludicrous. Prb1. In reality, Plaintiff is attempting to weaponize the justice system by bringing this bad faith litigation in an attempt to intimidate and hassle Frank. Plaintiff must be deterred from continuing to harass Frank with baseless complaints, which is squarely within the punitive purpose of Rule 1:4-8.² *See Deutch & Shur, P.C.*, 284 N.J. Super. at 141.

II. Plaintiff's Complaint Was Frivolous As It Was Filed Without Any Reasonable Basis In Law Or Equity (Da1-5).³

Both Rule 1:4-8 and N.J.S.A. 2A:15-59.1 provide for reasonable attorneys' fees beginning when the non-prevailing party had no reasonable good faith belief in the merit of its action. Here, the Complaint filed by Plaintiff made claims that were plainly and obviously deficient as a matter of law. For purposes of imposing sanctions, an assertion is deemed "frivolous" when "no rational argument can be advanced in its support," "it is not supported by any credible evidence," "a reasonable person could not have expected its success," or "it is completely untenable." *See Belfer v. Merling*, 322 N.J. Super. 124, 144 (App.

² Plaintiff's reference to a SLAPP suit is yet another procedurally deficient and misguided argument that must not be considered. Indeed, an anti-SLAPP suit must be brought by order to show cause that includes statutory criteria neither of which was done by Plaintiff. *See* N.J.S.A. 2A:53A-51 to -55.

³ Frank incorporates the arguments made in its brief in opposition to Plaintiff's Motion for Reconsideration and briefs in support of Frank's Motion to Dismiss as to the frivolity of Plaintiff's Complaint.

Div. 1999); *see also First Atl. Fed. Credit Union v. Perez*, 391 N.J. Super. 419, 432 (App. Div. 2007); *Baratta v. Deer Haven, LLC*, 431 N.J. Super. 534, 538 (Law Div. 2011) (finding that the defendants' counterclaim, which did not have any reasonable basis in law, had been asserted for the purpose of harassment, noting that "the court believes strongly the counterclaim was filed for litigation leverage -- to force the plaintiffs to expend more money, while also serving as a potential trade-off on settlement talks").

As argued more completely in Frank's Respondent's brief, Plaintiff's Complaint is untenable as a matter of law rendering it frivolous. Db22-50. Plaintiff again attempts to ignore the Complaint itself by thrusting forward its contention that his "claim is not time barred under N.J.S.A. 40:55D-18." *See* Prb2. No matter how Plaintiff attempts to retroactively couch his claims, he cannot escape that as pled the Complaint is an amalgamation of three different mechanisms: (i) an appeal of the Permits pursuant to N.J.S.A. 40:55D-72 as the entire Complaint seeks an appeal of the Permits, (ii) an enforcement action pursuant to N.J.S.A. 40:55D-18 by way of Counts II and IV, and (iii) a prerogative writ action subject to Rule 4:69-6 by way of Plaintiff's first cause of action for a writ of mandamus. Pa13-19. Thus, the Complaint must meet the procedural requirements of each of these mechanisms -- which it squarely does not. Counter to *his own pleadings* Plaintiff now only assert two of his claims

the enforcement claims -- which are also deficient. As such, Plaintiff has all but abandoned his first and third causes of action confirming that they are frivolous. Indeed, Plaintiff does not so much as mention either his claims of writ of mandamus, nor his substantive due process claim pursuant to N.J.S.A. 10:6-2(c) in the entirety of his reply brief.⁴ *See generally* Prb. Presumably, this is because, for example, there can be no non-frivolous explanation for pursuing a writ of mandamus claim against a non-government entity.

Tellingly, Plaintiff only clings to his misguided theory that his enforcement claims pursuant to N.J.S.A. 40:55D-18 cannot be time barred. This is outright incorrect as binding precedent stands for the contention that laches precludes Plaintiff from sitting on his rights -- which is exactly what occurred here. *Marini v. Borough of Wanaque*, 37 N.J. Super. 32, 41 (App. Div. 1955) (The court held that plaintiff was barred by laches because “he knew what was going on ... and withheld his legal fire during a period in which he knew or had reason to know that a substantial sum of money was being invested in the improvement of this

⁴ Plaintiff only makes puzzling arguments regarding the time requirement of Rule 4:69-6, which accrues from the time that the interested party knew or should have known of the issuance of the permit. *See* Da57 (citing *Trenkamp v. Township of Burlington*, 170 N.J. Super. 251, 259-268 (Law Div. 1979)). Moreover, Plaintiff does mental gymnastics to concoct a two-year statute of limitations by combining a civil rights causes of action that does not exist in the Complaint with Rule 4:69-6. Prb24-25. Not only is this nonsensical and fails to dispense of the time requirement, but it ignores the ministerial act and exhaustion of administrative remedies requirements pursuant to Rule 4:69-6.

property); *see also* .” *Fox v. Millman*, 210 N.J. 401, 417-418 (2012) (“Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is ‘an unexplained and inexcusable delay’ in exercising a right, which results in prejudice to another party”). Indeed, *Cox & Koenig* explicitly and specifically apply estoppel and laches principles to enforcement causes of action. *See* Da55 (“Once they know or should have known about the violation, such plaintiffs will be held to the time limits for appeals to the zoning board of adjustment, to the courts in an action in lieu of prerogative writs or to laches or estoppel defense in action seeking injunctive relief and damages”). Contrary to Plaintiffs’ contentions, the *Harz* case as well as the unpublished *Oliviera* and *Matthews* cases do not support its arguments that enforcement actions are without time limits as addressed in Frank’s Respondent’s Brief -- arguments that Plaintiff does not and cannot dispute. Db45-47. In fact, these cases serve to illustrate the deficiencies of the Complaint as well as his failure to bring a proper enforcement action. *See id.*

This is a clear instance where Plaintiff sought to bring an action, *any* action, against Frank and in doing so pieced together a wholly deficient Complaint. While Plaintiff spills much ink discussing the Cole Report, this Court cannot get there as the procedural thresholds are not met. Indeed, the Complaint does not meet numerous baseline requirements no matter how Plaintiff postures and “Frankensteins” together different legal principles. Even

if Plaintiff's counsel intended to bring a non-frivolous Complaint, he still should have known that when disentangled, the Complaint's causes of action were not viable and procedurally barred for a number of reasons. This is alone enough - - even putting aside Plaintiff's mal intent -- to constitute a frivolous action according to the very statute cited by Plaintiff. *See* N.J.S.A. 2A:15-59 ("The nonprevailing party knew, or *should have known*, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity...") (emphasis added); *see also* Prb5. Further, an article written by Plaintiff's attorney does not absolve him from misleading this matter, and actually highlights the deficiency in the Complaint. The New Jersey Lawyer Magazine article instructs that "only the governing body, through its zoning officer or enforcement official, can enforce ordinance requirements..." Pa266. In direct contradiction to this instruction, the Complaint sought an order compelling Frank to submit applications for permits it already received to the Board, which is neither enforcement through the zoning officer or enforcement official. Pa16, 19.

Accordingly, the Complaint is frivolous as its claims are fatally deficient for a myriad of reasons all of which Plaintiff should have known. Together with the Plaintiff's improper purpose of bringing the Complaint to terrorize Frank,

the deficiencies in the Complaint render it frivolous and entitle Frank to the substantial fees necessary to defend this action.

CONCLUSION

Based on the foregoing, Frank submits that this Court must overturn the trial court's Order denying Frank's Sanctions Motion and must uphold the trial Court's Order dismissing Plaintiff's Complaint with prejudice.

Dated: Woodland Park, New Jersey Respectfully submitted,
 March 11, 2025

ANSELL GRIMM & AARON, P.C.

/s/ Anthony J. D'Artiglio
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