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APACHE AUTO WRECKERS, INC. **Plaintiff-Appellant,**	:	**SUPERIOR COURT OF NEW JERSEY**
v.	:	**Civil Action**
VILLAGE OF RIDGEFIELD PARK ZONING BOARD, **Defendant- Respondent**	:	**On Appeal from the Superior Court of New Jersey Bergen County, Law Division** **A-003919-23** **Docket No.: BER-L-6579-23** **Sat below:** **Hon. Christine Farrington, J.S.C.**

BRIEF OF APPELLANT APACHE AUTO WRECKERS, INC.

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PRELIMINARY STATEMENT

In this Appeal, the Appellant-Plaintiff, Apache Auto Wreckers, Inc. ("Apache") challenges two Law Division Orders. The first Order was an entry denying Apache's Motion for Reconsideration, dated July 29, 2024. The second Order is dated May 29, 2024, as a result of a final hearing, specifically remanding it to the Village of Ridgefield Park (the "Village") Zoning Board (the "Board") "for the purposes of permitting plaintiff to complete its cross examination of" of certain public officials and "for purposes of completion of the record."

By way of background, Apache is a licensed junk yard and has operated at the site in question as a lessee since on or about 1978. Apache became the owner of the property on or about 1997 and has always used the property as a junkyard. Prior to Apache operating the yard, it was previously operated as a (permitted-use) junk yard by its prior operator going back to the early 1950s, if not earlier, predating the Village's 1968 zoning.

On or about August 2, 2022, Apache made application to the Board for the purpose of obtaining a Certificate of Non-Conformity for the property located at 2 Mt. Vernon Street and 10-14 Industrial Avenue in Ridgefield Park, New Jersey, which was an adjacent building to the existing operating junk yard previously occupied by three (3) different permitted uses, an automobile oil

changing facility, a plumber and a body shop. It was Apache's desire to expand into those buildings which was then approved by the Board of Adjustment at that time.

Ultimately there were hearings on the 2022 application that took place on September 19, 2023 and October 17, 2023. However, during both hearings, the Board would not allow Apache to fully cross-examine any witnesses. Further, the Board prohibited Apache to present its case or produce any documents or witness it had present and ready to testify in support of its application. The proposed witnesses for Apache included the attorney that handled the 1998 application and the owner of Apache.

In lieu of on a motion made by the town attorney, the Board ruled it did not have to hear the application and denied same without hearing Apache's presentation. As a result of the vote by the Board on October 17, 2023, Apache's application was denied before it was afforded an opportunity to present its case.

The central issues raised in Appeal are the following:

a. Did the Trial Court err in its findings regarding its interpretation of the 1998 Resolution by not reviewing the entire record and solely limiting to its arbitrary interpretation of the 1998 Resolution?

b. Did the Trial Court err because while ordering remand, it prematurely and improperly made conclusive findings that were the central to the issue in dispute on remand, and thereby, allowing unintended consequences including the Board's unilateral and preemptive refusal to comply with the Order?

c. Were Apache's Due Process rights violated for not permitting it to cross-examine certain key witnesses presented by the Board?

d. Was there was an abuse of discretion by the Board in disallowing certain evidence to be presented, especially the prior non-conforming use?

e. Was the Board's decision in preventing the testimony of the original attorney involved in the 1998 application and the owner of Apache arbitrary, capricious, and unreasonable?

PROCEDURAL HISTORY

The matter below was a Prerogative Writs action under R.4:69-l in which Apache sought to reverse the Defendant-Respondent Zoning Board's (the "Board's") decision denying its application seeking a Certification of Non-Conformity. (Pa46-Pa53). On or about August 2, 2022, Apache made application to the Ridgefield Park Zoning Board (Pa24-Pa25) for the purpose of obtaining a Certificate of Non-Conformity for the property located at 2 Mt. Vernon Street and 10-14 Industrial Avenue in Ridgefield Park, New Jersey, which was an adjacent building to the existing operating junk yard previously occupied by three (3) different permitted uses, an automobile oil changing facility, a plumber and a body shop. (Pa24 to Pa28). It was Apache's desire to expand into those buildings which was then approved by the Board of Adjustment at that time.

Ultimately there were hearings on the 2022 application that took place on September 19, 2023 and October 17, 2023. (Pa56 at ¶ 4). As a result of the vote by the Board at the October 17, 2023 meeting, the application of Apache was denied before the applicant Apache could present its case. (Pa57 at ¶ 6). After the vote was taken to deny the Apache's application, at a subsequent meeting on November 11, 2023, upon information and belief, a written Resolution memorializing the Board's vote was taken and was adopted. (Pa57 at ¶ 7).

(Pa46-Pa53). During the hearings, Apache was prevented from producing witnesses and documents in support of its position, and the denial of the application took place after the Board denied Apache its right to present its case on the record. (Pa57 at ¶ 8).

The Complaint In Lieu of Prerogative Writ was filed on December 6, 2023. (Pa65-Pa97). On behalf of the Board, an Answer was filed on December 29, 2023. The Trial Court issued a Case Management Order, dated January 5, 2024 with briefing schedules. (Pa22 to Pa23). Apache filed its trial brief on April 22, 2024. (Pa65-Pa97). The Board filed its brief on May 14, 2024. A final hearing took place on May 29, 2024. Upon the conclusion of the final hearing, the Trial Court issued its Opinion and Decision, dated May 29, 2024. (Pa5 to Pa21).

On June 17, 2024, Apache filed its Motion for Reconsideration. (Pa98-Pa113). In the Court's decision in Apache's Motion for Reconsideration, dated July 29, 2024 (Pa1-Pa4), Judge Farrington specifically referenced Apache's request that the Trial Court's finding that the 1998 Resolution of the Board precludes Apache from operating a junkyard or storing scrap metal be reconsidered. (Pa101-Pa102). Judge Farrington found that "there was no failure to appreciate the significance of probative, competent evidence, and there is no allegation the court made its decision upon a palpably, incorrect, or irrational

basis." (Pa4). The Trial Court, therefore, found that the 1998 Resolution was controlling without the applicant being given an opportunity to present its case. Notwithstanding the Order remanding the matter to the Board with specific instructions, the Board attorney preemptively sent a letter, dated August 1, 2024, making it clear that he would not permit any testimony on the remand addressed to the 1998 Resolution. (Pa54). Said Order and Decision of May 29, 2024 and Order of July 29, 2024 (Pa1-Pa4 and Pa5-Pa21, respectively) are the subject of this Appeal.

STATEMENT OF FACTS

Apache is a licensed junk yard. The Defendant Zoning Board is a body politic of the State of New Jersey. By way of background, Apache has operated on the site in question as a lessee since on or about 1978. (Pa10). Apache became the owner of the property on or about 1997 and has always operated the property as a junkyard. (Pa15). Prior to leasing and subsequent ownership, the property had been operated in the same fashion as it has been operated by Apache going back to a time prior to when Ridgefield Park enacted it first zoning ordinance in 1968. (Pa7).

According to the Village of Ridgefield Park Ordinance, "Junkyards and Junk Dealers" are defined in § 231-1 and it is defined as:

> "[a]ny old, discarded or unused waste material of any type that has outlived its usefulness for its original purpose, **including iron, metals**, glass, paper, rags, clothes, machines, automobiles, motor vehicles or parts or accessories thereof, such as auto bodies and the like, and all other materials commonly or generally known as "junk" in the ordinary meaning of the word, acquired or collected for commercial purposes, including specifically but without limitation parts and portions of automobiles and discarded automobiles and automobile bodies." (*emphasis added*).

Thus, the 1998 Resolution never disallowed junkyard operations.

The Village Construction Official, Mr. Michael Landolfi, had issued at least two (2) municipal summons for violation of § 231-23(b) and § 231-26 of the

Village Ordinances. (Pa44 and Pa45). (i.e. junk not to be outside an enclosure and for violation of § 231-26 and i.e. stacking junk above the height of a fence for § 231-23(b). These summonses are pending before the municipal court for several months. [1] Thereafter, by consent of the local prosecutor and Apache, the issue of the nonconforming nature of the property was to be sent to the Board for confirmation.

On August 2, 2022, Apache made application to the Ridgefield Park Zoning Board for the purpose of obtaining a Certificate of Non-Conformity for property located at 2 Mt. Vernon Street and 10-14 Industrial Avenue, Ridgefield Park, New Jersey. (Pa42 to Pa43). Ultimately, the hearings on the application took place on September 19, 2023 and October 17, 2023. (Pa56 at ¶ 4).

At the conclusion of the last hearing on October 17, 2023, a motion was made to deny the application on various grounds. (Pa7). At the hearings, the Village of Ridgefield Park Borough Attorney through its counsels Phillip Boggia, Esq. and William R. Betesh, Esq. objected to the Plaintiff's application and objected to applicant producing any evidence to the Zoning Board despite Apache being there ready to proceed with counsel and multiple witnesses and exhibits. (Pa12 and Pa15). On the night of the hearing, among the witnesses Apache was

[1] Since this time, the same Village official, Mr. Landolfi, has issued multiple additional summons in August 2024, September 2024, October 2024, March 2025, April 2025, and May 2025 apparently for the identical violations.

prepared to produce were Frank Rivellini, Esq., the attorney who handled the application for Apache in 1998 and Joseph Savignano, the owner of Apache, who would have testified as to the circumstances surrounding the application in 1998. (Pa81). Needless to say, none of this testimony was permitted by the Board.

As a result of the vote by the Zoning Board at the October 17, 2023, the application of the Plaintiff was denied before the applicant Apache could present its case in any manner. (Pa17). After the vote was taken to deny the Plaintiff's application, at a subsequent meeting on November 11, 2023, a written Resolution memorializing the Board's vote was taken and was adopted. (Pa57 and Pa46-Pa53). During the hearing, Plaintiff was prevented from producing any witnesses, any testimony and any documents in support of its position and the denial of the application took place after the Board denied the applicant its right to present its case on the record. (Pa57 at ¶ 8).

In the Trial Court's decision in the Motion for Reconsideration, dated July 29, 2024, Judge Farrington specifically referenced Apache's request that the Court's finding that the 1998 Resolution of the Board precludes Apache from operating a junkyard or storing scrap metal be reconsidered. Judge Farrington found that "there was no failure to appreciate the significance of probative, competent evidence, and there is no allegation the court made its decision upon a palpably, incorrect, or irrational basis." (Pa2 to Pa4). Without reviewing a

complete record, the Court found that the 1998 Resolution was controlling without the applicant being given an opportunity to present its case. Notwithstanding the Order remanding the matter to the Board with specific instructions, the Board attorney, Carmine Alampi, Esq., sent a correspondence, dated August 1, 2024, making it clear unilaterally and preemptively that "**the Board will not allow any testimony regarding the 1998 resolution by such witnesses**." (*emphasis added*) (Pa54).

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS FINDINGS REGARDING ITS INTERPRETATION OF THE 1998 RESOLUTION BY NOT REVIEWING THE ENTIRE RECORD AND SOLELY LIMITING TO ITS ARBITRARY INTERPRETATION OF THE 1998 RESOLUTION. (Raised below Pa18-Pa20 and Pa101-Pa102).

Trial courts reviewing agency or board actions must make specific findings and provide clear reasons for upholding or overturning decisions. *See generally*, Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd. 369 N.J. Super. 552 (App. Div. 2004). Courts must ensure that municipal boards' factual determinations are "supported by substantial evidence." Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of West Windsor Township, 172 N.J. 75, 93 (2002). It is well-settled in New Jersey that a trial court's factual findings and legal conclusions must be

grounded in a comprehensive review of all competent evidence presented. If not, remand for more findings is appropriate.

Findings of fact are binding on appeal only if supported by "adequate, substantial, and credible evidence" in the whole record. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). A court commits reversible error when it selectively reviews evidence or fails to consider critical portions of the record. Cesare v. Cesare, 154 N.J. 394, 412 (1998) (requiring deference to trial court findings only when based on a thorough review of all credible evidence). The opinion of the trial courts must be reversed and corrected when factual findings are unsupported by or inconsistent with the record. Seidman v. Clifton Savings Bank, 205 N.J. 150, 169 (2011).

In the case at bar, the Trial Court's determination that the 1998 Resolution is controlling (Pa19 to Pa20), along with the Board attorney's determination that the Board, on remand, would prevent any testimony relating to the 1998 decision (Pa54), renders the decision of Judge Farrington "final" in the true sense of the word. Without the ability to produce evidence as to the meaning and interpretation of the 1998 Resolution, the remand would be pointless and moot, as the Trial Court has decided based on the incomplete record without allowing Apache an opportunity to present its case.

The Appellate Division must keep in mind that the initial application by Apache to the Board did not focus on the 1998 Resolution since Apache believed it was not relevant to the application being made. Instead, Apache's application to the Board was for recognition of their status as a pre-existing non-conforming use. The Trial Court, in ordering remand, made the following findings:

> "(t)he 1998 Resolution of the Board of Adjustment is valid . . ." and "[b]y virtue of applying for and receiving a variance subject to conditions, it is clear that the junkyard use, sought to be determined as pre-existing non- conforming, clearly was not . . . Plaintiff argues the Resolution permitted the storage of scrap metal. The court does not find that within the Resolution." (Pa19).

That determination was repeated by the Trial Court in its Order and Decision on Apache's Motion for Reconsideration, dated July 29, 2024. (Pa2 to Pa4). That determination goes to the essence and core of Apache's argument. [2]

In the present case, the Trial Court improperly interpreted the 1998 Resolution without conducting a full and fair review of the entire record. Specifically, the court overlooked the 1998 Resolution, thereby failing to consider the totality of the circumstances the past use. As stated in *Infra*, there were no full and fair opportunities to develop the record, as the two key witnesses, Commissioner Gerard

[2] The Trial Court concurred with the Village in that to the extent Apache was "seeking to legitimize storage of scrap and junk on the property, it was prevented from doing so by the 1998 Resolution." (Pa3).

Garofalow and Mr. Doug Hansen were not permitted to provide a full testimony, by way of a cross-examination. (Pa86 and Pa31, respectively).

Specifically, it is imperative to keep in mind that there was no prohibition of the storage of scrap metal in the 1998 Resolution. Apache's official business name is "Apache Auto Wreckers, Inc." As defined in the Village's Ordinance, Junkyards and Junk Dealers" are defined in under § 231-1 as follows,

> "[a]ny old, discarded or unused waste material of any type that has outlived its usefulness for its original purpose, **including iron, metals,** glass, paper, rags, clothes, machines, automobiles, motor vehicles or parts or accessories thereof, such as auto bodies and the like, and all other materials commonly or generally known as 'junk' in the ordinary meaning of the word, acquired or collected for commercial purposes, including specifically but without limitation parts and portions of automobiles and discarded automobiles and automobile bodies." (*emphasis added*).

Because scrap metal is a byproduct and incidental to discarded automobiles, it is expected to be part and parcel of Apache's ordinary operations. However, the Ordinance defines it "specifically but without limitation parts and portions of automobiles and discarded automobiles and automobile bodies." A plain reading of the Ordinance with the qualifying language ("without limitation"), is interpreted as storage of other scrap metal is permitted. In short, the type of operation that Apache operates is no deviation from the past use and is within the definition in the Ordinance.

This incomplete review undermines the reliability of the Trial Court's findings and deprived the parties of a fundamentally fair adjudication, requiring reversal. The Trial Court in this matter looked only at the 1998 Resolution and decided the matter based upon what was not in the Resolution. (Pa19 to Pa20). The Trial Court reasoned that if the storage of scrap metal was not specifically mentioned, then it was not permitted. However, this approach ignores the fact that the circumstances surrounding the application are relevant to the intent of the Board at that time.

Had the Court allowed the entire matter to be remanded, the owner of Apache would have told the Trial Court that for many decades, the Village had issued licenses to Apache as a junkyard. The reason that the Resolution did not mention junkyard was because it was not necessary. The property had been operated as such before the application and continued thereafter. Thus, the Trial Court's premature interpretation of the 1998 Resolution did in fact lead to an "absurd result," as further discussed in *Infra*.

II. THE TRIAL COURT ERRED BECAUSE WHILE ORDERING REMAND, IT PREMATURELY MADE CONCLUSIVE FINDINGS THAT WERE THE CENTRAL TO THE ISSUE IN DISPUTE ON REMAND, AND THIS RESULTED IN UNINTENDED CONSEQUENCES INCLUDING THE BOARD'S UNILATERAL AND PREEMPTIVE REFUSAL TO COMPLY WITH THE ORDER. (Raised below T4:8-10, T4:17-25, Pa2, Pa101-Pa102).

In New Jersey, administrative bodies must comply with judicial directives upon remand. In re Plainfield-Union Water Co., 14 N.J. 296, 305 (1954) (citing that to a remand is intended to "permit further evidence to be taken or additional findings to be made upon essential points"). Following a remand from the Court, the board is "required by law to carry out the mandate of the court," Stochel v. Planning Board of Edison, 348 N.J. Super. 636, 645, (2000) (citing *Cox's New Jersey Zoning and Land Use Administration*, § 33-6.2 (Gann, 2000). Thus, planning and zoning boards are obligated to strictly adhere to the court's directives and instructions. Courts must ensure that municipal boards' factual determinations are adequately supported by "substantial record." Cell South of N.J., Inc. v. Zoning Bd. of Adj. of West Windsor Twp., 172 N.J. 75, 84 (2002). If not, ordering a remand for more fact finding to develop a "substantial record" is appropriate.

In New Jersey, planning board hearings are quasi-judicial proceedings governed by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq. This framework ensures due process, including the right to cross-examine

witnesses. The MLUL and local board procedures affirm that all parties involved in a planning board hearing—including applicants, objectors, and members of the public have the right to cross-examine witnesses who provide sworn testimony. This right is fundamental to ensuring a fair and transparent decision-making process. If an applicant before a zoning board is denied the opportunity to respond to evidence submitted after the close of the hearing, a reversal is warranted. Mercurio v. DelVecchio, 285 N.J. Super. 328, 334 (App. Div. 1995), certif. denied, 144 N.J. 377 (1996). Thus, a failure to allow cross-examination and rebuttal violates procedural due process.

In the case at bar, the Trial Court erred because while ordering remand, it prematurely and improperly made conclusive findings that were the central to the factual issue in dispute on remand.

a) On one hand, in its May 29, 2024 Order and Decision, the Trial Court already made the following findings: The 1998 Resolution of the Board of Adjustment is valid and that "the storage of scrap metal" was not "within the Resolution." (Pa19).

b) On the other hand, in response to Apache's "clarification of what plaintiff will be permitted to do/present on remand," the issue was deemed as "moot." (Pa2).

Due to the Trial Court's premature and improper findings and declarations, and the lack of specific clarification for instructions on remand, the outcome was, in fact, an "absurd result." (Pa2). This is evidenced by the counsel for the Board, Carmine R. Alampi, Esq. in his letter of August 1, 2024 declaring the following in light of the issuance of the Trial Court's Order of Jul 29, 2024:

> "In accordance with the final ruling by Judge Farrington, the 1998 variance resolution has been adjudicated with finality. The said resolution does not permit the 'junkyard' activities including the storage of scrap metal, appliances and other materials other than the core items associated with the auto wrecking business and related auto parts. **As such, the Board will not allow any testimony regarding the 1998 resolution by such witnesses. Please be guided accordingly**." (*emphasis added*) (Pa54).

Mr. Alampi's letter preemptively and unilaterally states that the Board's willful intentions to contradict and disallow the intent and purpose of the Trial Court's Orders. The lack of specific instructions in the Trial Court's Order essentially opened the door for the Board's counsel to declare their intention to disobey the Order by disallowing any testimony of the key witnesses. Thus, it essentially permanently foreclosed on any and all opportunities to have Apache's due process rights to be afforded in future hearings on remand.

Due to the unilateral and preemptive act of disallowing any testimony of the key witnesses, the only option remained for Apache was to seek an Appeal with the

Appellate Division. Any further motion practice or application with the Trial Court would have also been pointless and futile.

In its Motion for Reconsideration, Apache sought to "clarify what Plaintiff is permitted to do on remand" (Pa101). The Court in its Order and Decision of May 29, 2024, conceded that that "[t]he court finds depriving plaintiff's counsel of the opportunity to cross examine and/or to present refuting evidence requires remand to the Board for the limited purpose of addressing that error." (Pa18). Apache interprets this passage to mean that it will be permitted to put on its affirmative case in chief by producing witnesses and exhibits. The Order and Decision of May 29, 2024 further stated that "[f]ollowing cross-examination of the two witnesses, the Board shall pass a further resolution detailing its findings and the basis, therefore." (Pa20).

To avoid any misunderstanding on the remand, Apache sought clarification in its decision to permit it to present its case in full and to produce witnesses and exhibits in support of its application, as is typical for any application. Otherwise, the matter will be an issue for the Appeal to the Appellate division without a full established record below. Here, in remanding the matter to the Board and allowing Apache to appear before the Board without the ability to introduce evidence regarding the 1998 Resolution was pointless and a mere exercise in futility.

III. APACHE'S DUE PROCESS RIGHTS WERE VIOLATED FOR NOT PERMITTING IT TO CROSS-EXAMINE CERTAIN KEY WITNESSES PRESENTED BY THE BOARD. (Raised below T4:8-10, T4:17-25, T10:6-14, Pa74-78 and Pa83-Pa85).

In New Jersey, planning board hearings are quasi-judicial proceedings governed by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq. This framework ensures due process, including the right to cross-examine witnesses. The MLUL and local board procedures affirm that all parties involved in a planning board hearing—including applicants, objectors, and members of the public have the right to cross-examine witnesses who provide sworn testimony. This right is fundamental to ensuring a fair and transparent decision-making process.

New Jersey courts have upheld the necessity of cross-examination in planning board proceedings. Municipal boards must consider only sworn, competent, and credible testimony from individuals available for cross-examination. *See generally*, Seibert v. Dover Tp. Bd. of Adj., 174 N.J. Super. 548 (1980). This ensures that decisions are based on reliable evidence. Stochel at 646. There is a valid objection if there is a contention that the applicants are deprived of the right to cross-examine witnesses. Stochel at 640 (despite upholding the board's decision, the court recognized importance of cross-examination rights in such proceedings). A claim involving an improper denial of cross-examination rights warrants a reversal

or remand because witnesses deprived the Plaintiff of a fair hearing, warranting reversal or remand. Willoughby v. Planning Board of Twp. of Deptford, 306 N.J. Super. 266, 276 (App. Div. 1997). The Appellate Division held that procedural due process was violated when a zoning board made a determination without affording the plaintiff a meaningful opportunity to be heard, including cross-examination of witnesses. The action of the Planning Board in refusing to give plaintiffs a fair opportunity to present all of their witnesses deprives the ultimate conclusion of legitimacy. Witt v. Borough of Maywood, 328 N.J. Super. 432, 444 (App. Div. 1998). Thus, it must be nullified. (Ibid).

It is helpful to review and compare other municipalities in the State of New Jersey to comparatively understand how these proceedings are administered. For instance, the Township of Montville outlines in its public hearing process as follows:

> "The Board, its staff, and the public, have the right to cross-examine these witnesses and finally, at the appropriate time, comment on the application." [3]

Similarly, the Borough of Fort Lee Planning Board's rules state the following:

> "The public shall have the right to cross-examine any and all witnesses, and the applicant shall have the right to cross-examine any witnesses in opposition." [4]

[3] Accessed at the agency website (https://www.montvillenj.org/234/Public-Hearing-Process).

While the Appellant acknowledges that these provisions are nonbinding or applicable to the Village of Ridgefield Park, they underscore the importance of cross-examination in evaluating the credibility and relevance of testimony presented during hearings.

During the final hearing, Mr. Alampi on behalf of the Village, incorrectly asserted that the Board hearing "treated this as a summary judgment motion, and nothing –- nothing beyond that." (T:7-8). Under R. 4:46, in a summary judgment motion, no fact finding is permitted; rather, it is intended to resolve genuine disputes of material fact. Mr. Alampi's aforementioned statement demonstrates the true intention of the Board, which is to disallow and prohibit a full hearing, on the merits, including cross-examination of witnesses. Further, their intentions are to deprive Apache of their right to a full and fair hearing, while disregarding the instructions on remand.

In this matter, one of the key witnesses that Apache sought to cross-examine was Commissioner Gerard Garofalow, who worked for the Village beginning in 1967 as a building inspector and zoning officer since 1967 (Pa12). During the hearing of October 17, 2023, the Board attorney did not have the witness sworn nor did he permit cross-examination of the witness despite a request for same. (Pa12). Further, the Board attorney commented that "[w]e are not cross examining

[4] Accessed at the agency website (https://www.fortleenj.org/319/Planning-Board).

Commissioners" followed by allowing Commissioner Garofalow testify as to the entirety of his experience as an employee of the Village and how that experience is related to Apache. (Pa18).

A member of the Board may and indeed is expected to bring to bear in its deliberations the general knowledge of the local conditions and experiences of its individual members. Baghdikian v. Bd. of Adj. of Borough of Ramsey, 247 N.J. Super. 45, 49 (App. Div. 1991) (citing Reinauer Realty Corp. v. Twp. of Lyndhurst, 59 N.J. Super. 189 (1960). However, the objectors must be given a full opportunity to respond to his comments. A decision must be based upon facts in the record. Therefore, in order to be usable in a decision, a particular fact must ordinarily appear in the record of the testimony taken at the hearing, so that the applicant or an objector may have an opportunity to refute it. See generally, Szoke v. Zoning Bd. of Adj. of Borough of Monmouth Beach, 260 N.J. Super 341 (AD 1992).

Here, Apache was never given an opportunity to refute the testimony of Commissioner Garofalow, nor was it permitted to put its case on to offer witnesses to refute that testimony although it was ready to do so. (Pa18). The testimony of Commissioner Garofalow went beyond common knowledge, or the type of general knowledge Board members are permitted to rely upon. (Pa12, Pa18, and Pa73).

The Plaintiff was completely denied the right to cross-examine Commissioner Garofalow and to present witnesses to refute his testimony.

The additional witness who was not permitted to cross-examine was Mr. Doug Hansen, an employee of the Village. He was the inspector for the Village when the Certificate of Occupancy was issued on December 12, 1998. (Pa7-Pa11 and Pa29). Further, Mr. Hansen's testimony in this matter at the first hearing as a witness for the Village was taken out of order. (T10:6-14). Mr. Hansen stated on the record that he was testifying in order to provide historical information concerning the property located at 14 Industrial Avenue, doing business as Apache Auto Wreckers. (Pa7-Pa11). At the conclusion of Mr. Hansen's testimony, counsel was Apache was permitted to cross examine the witness. (Pa10). However, due to the lateness of the hour and the request of the Board, Apache not complete the cross. (Pa74-Pa77).

Apache's trial counsel, Francis J. DeVito, Esq. sent a letter, dated October 10, 2023, to Mr. Alapmi "to issue a subpoena to Mr. Hansen to appear at next week's hearing on Tuesday, October 17, 2023 at 7:30 p.m." (Pa31). Counsel for the Village, Philip N. Boggia, Esq. responded in a letter, dated October 10, 2023, refusing to produce Mr. Hansen to appear. Among the reasons cited are:

> "Mr. DeVito has already had the opportunity to cross examine Mr. Hansen at the September 19, 2023 hearing . . . Mr. DeVito had already questioned Mr. Hansen, and his effort to force Mr. Hansen to return to another hearing

> amounts to harassment. . . Mr. DeVito is making this request at a time when the Village has not completed their presentation." (Pa33-Pa34).

Mr. DeVito responded, in his letter, dated October 13, 2023 (Pa35), and refuted the claims in the previous letter by Mr. Boggia of October 10, 2023. Mr. DeVito stated that he "did not complete my cross examination at the last hearing." He further asserts that "as a matter of due process, I do have the right to complete that cross examination." Lastly, Mr. DeVito further adds regarding

> "[T]he allegation that I have not given a reason for making the request, I believe the reason is self-evident i.e., to complete my cross examination of a witness produced by the Village. In any event in requesting the Chairman to issue a subpoena it is my reading of the statute that no reason need be given." (Pa35).

Needless to say, the Board Chairman refused to make Mr. Hansen available to complete his cross-examination. The Village foreclosed any and all opportunities to complete the testimony when Mr. Alampi sent a letter, dated August 1, 2024 stating the following:

> "In accordance with the final ruling by Judge Farrington, the 1998 variance resolution has been adjudicated with finality. The said resolution does not permit the 'junkyard' activities including the storage of scrap metal, appliances and other materials other than the core items associated with the auto wrecking business and related auto parts. As such, the Board will not allow any testimony regarding the 1998 resolution by such witnesses." (Pa54).

This was essentially the unilateral and preemptive action by the Board to prevent any effective or meaningful testimony to establish a record. Thus, it eliminated all possibility of ever establishing the variance sought by Apache.

IV. THERE WAS AN ABUSE OF DISCRETION BY THE BOARD IN DISALLOWING CERTAIN EVIDENCE TO BE PRESENTED, ESPECIALLY APACHE'S PRIOR NON-CONFORMING USE IN REACHING THEIR DECISION. (Raised below T4:5-8 and Pa83-Pa85).

In New Jersey, zoning boards have a duty to allow relevant evidence that directly pertains to the standards under the MLUL. (N.J.S.A. 40:55D-1 et seq.) Improperly excluding material evidence — especially proof of a lawful pre-existing non-conforming use — can constitute an abuse of discretion, making the board's decision arbitrary, capricious, and unreasonable. The must Board discharge its duty carefully and completely in its final determination. Price v. HIMEJI, LLC, 214 N.J. 263, 285-86 (2013). An agency abuses its discretion if it fails to consider competent, material evidence offered by a party. Excluding such evidence without good cause violates due process. Berger v. State Bd. of Examiners of Public Accountants, 71 N.J. 206, 233-34 (1976). The Boards must fully consider evidence presented to them. *See generally*, Jock v. Zoning Bd. of Adj. of the Twp. of Wall, 184 N.J. 562 (2005). Thus, if a board ignores or overlooks critical evidence during a hearing a reversal is warranted.

Under N.J.S.A. 40:55D-68, a lawful non-conforming use is protected and may not be eliminated by a zoning change unless abandoned. Prior nonconforming uses are protected as an "acquired a vested right to continue in such form, irrespective of the restrictive zoning provisions." Twp. Belleville v. Parillo's, Inc., 83 N.J. 309, 315 (1980). (See also Twp. of Fairfield v. Likanchuk's, Inc., 274 N.J. Super. 320, 327 (1994), stating that it is settled that use of land lawfully existing prior to the enactment of a zoning ordinance may be continued even though it does not comply with the use requirements of the new enactment). Non-conforming rights run with the land N.J.S.A. 40:55D-68. Thus, the New Jersey Supreme Court has held that a change in ownership does not affect the right to continue a nonconforming use. Urban v. Planning Bd. of Borough of Manasquan, 124 N.J. 651, 656-657 (1991).

The burden of proving the existence of a nonconforming use is upon the party asserting such use. Bonaventure Int'l Inc., v. Borough of Spring Lake, 350 N.J. Super. 420, 434 (App. Div. 2002) (citing Ferraro v. Zoning Bd., 321 N.J. Super. 288, 291 (App. Div. 1999)). However, the board must allow them a fair opportunity to present that proof recognizing that municipalities may not retroactively eliminate lawful nonconforming uses absent strict legal justification.

Under the MLUA, a property is deemed to have acquired a vested right to continue in nonconforming use, irrespective of the restrictive zoning provisions. N.J.S.A. 40:55D-1, et seq. Any nonconforming use or structure existing at the time

of the passage of an ordinance may be continued upon. (N.J.S.A. 40:55D-68). A board cannot deny a party the right to show that their use was legally established before zoning changes. Denying the chance to prove a prior non-conforming use violates due process and is an abuse of discretion. Evidence regarding non-conforming uses must be carefully considered. The owner or applicant bears the burden of proof by a preponderance of the evidence. Thus, a zoning board cannot dismiss such evidence lightly — it must analyze whether the prior use was continuous and lawful.

Here, Apache's position is that there was a valid a prior non-conforming use and it was prevented from an opportunity to present it. (T 4:5-8). Further, Apache intends to prove at the Board hearing that the use and structures on the property today are the same as those which existed before the implementation of zoning in Ridgefield Park in 1968. (Pa68). Thus, Apache sought to have this application be placed on the Board of Adjustment's calendar as soon as possible. (Ibid). However, Apache was procedurally deprived and foreclosed of its opportunity to present the case due to the following two reasons:

a) The Trial Court's premature and improper findings and declarations, and the lack of specific clarification for instructions on remand, did in fact lead to an "absurd result" (Pa2).

b) The preemptive and unilateral disallowance of the Board's attorney, by his letter of August 1, 2024. (Pa54).

V. THE BOARD'S DECISION IN PREVENTING THE ORIGINAL ATTORNEY INVOLVED IN THE 1998 APPLICATION AND THE OWNER OF APACHE TO TESTIFY WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE. (Raised below Pa86-Pa87).

In New Jersey, courts generally defer to decisions by local land use boards because they are presumed to have "special knowledge" about local conditions. This is a well-established standard in New Jersey land use law. The board's decision must be supported by substantial evidence in the record. *See generally*, Cell South of New Jersey, Inc., 172 N.J. 75, 83 (2002). If a board's decision is not based on "substantial evidence," it can be considered to be arbitrary and capricious. *See generally*, Kramer v. Bd. of Adj. of Sea Girt, 45 N.J. 268, 293 (1965). Planning boards cannot deny an application without providing a reason — rather, there must be a factual basis. Thus, a zoning board's decision will be upheld unless it is arbitrary, capricious, or unreasonable — meaning it lacks factual support, fails to follow legal standards, or is based on personal feelings rather than evidence.

Here, on the night of the hearing, among the witnesses Apache was prepared to produce was the testimony of Frank Rivellin, Esq., the attorney who handled the application for Apache in 1998. (Pa81). It was Apache's intention to have Mr.

Rivellini explain to the Board the circumstances surrounding the application and what occurred at each of the hearings in 1998. Also present and prepared to testify was Mr. Joseph Savignano, the owner of Apache, who would have testified as to the circumstances surrounding the application in 1998. (Pa81). Needless to say, none of this testimony was permitted by the Board. Apache does acknowledge the Board's ability to limit the scope of the presentation of the applicant. However, it is equally clear that the Board must allow an applicant to submit a case to the Board which would include witnesses and documents. In this matter, the Board did not permit such presentation. By doing so, its actions were arbitrary, capricious, and unreasonable.

CONCLUSION

For the foregoing reasons, we respectfully request the Appellate Division to find that the Trial Court erred in both Orders of May 29, 2024 and July 29, 2024. For the above reasons, the Appellate Division should remand this matter to the Trial Court with specific instructions and clarifying the scope to complete the Board hearing. Additionally, in order to avoid any further unilateral and preemptive attempts by the Board not to comply with the Trial Court's Order, there must be strict consequences for any intentional or deliberate noncompliance or disallowance.

Respectfully Submitted,

By: /s/ *Thomas Kim*
THOMAS KIM, ESQ.
Attorney for Appellant-Plaintiff

Dated: May 9, 2025

APACHE AUTO WRECKERS, INC. Plaintiff/Appellant, v. VILLAGE OF RIDGEFIELD PARK ZONING BOARD, Defendant/Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003919-23 **On Appeal From:** Law Division Bergen County Docket No. BER-L-6579-23 **Sat Below:** Hon. Christine Farrington, J.S.C.

RESPONDENT BRIEF

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On the Brief
Dated: June 6, 2025

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[1] Trial Court briefs are included in the Respondent Appendix to reflect that an issue germane to the appeal was raised before the trial court.

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PRELIMINARY STATEMENT

Plaintiff filed the subject application before the Board of Adjustment for the Village of Ridgefield Park as an application for a Certificate of Non-Conformity pursuant to N.J.S.A. 40:55D-68 to allow it to operate as a "junkyard." Plaintiff presented the application to the Board of Adjustment in effort to resolve Municipal Summons issued to it for violations of Sections 231-23(B) and 231-26 of the Village Code. 1T4-14; Pa024-Pa025; Pa044-Pa045. Plaintiff's application failed before the Board of Adjustment because a January 20, 1998 Resolution, which Plaintiff omitted from its application, identifies and governs the permitted uses for the subject property. Pa024-025. Although the Board scheduled a hearing on the application, once the Board realized that it previously granted a use variance in 1998, the Board concluded that the 1998 Resolution controlled the use for the subject property.

The trial court concluded, as it should, that the use variance and conditions of approval set forth in the 1998 Resolution is valid, enforceable and controlling. Pa019. The trial court also properly concluded that "by virtue of applying for and receiving a variance [in 1998] subject to conditions, it is clear that the junkyard use, sought to be determined as pre-existing non-conforming, clearly was not, and the uses to which plaintiff is entitled are detailed in the 1998 resolution and subject to the conditions therein." Pa019.

Notwithstanding the foregoing, the trial court also found that Plaintiff was not given the full opportunity to cross-examine witnesses, including a sitting board member. The trial court therefore concluded that despite the plain language of the 1998 Resolution, remand was appropriate "for the limited purpose of addressing that error." Pa018. The Court noted that the "remand is required for the completeness of the record to which plaintiff is entitled in the event of an appeal. Following cross-examination of the two witnesses, the Board shall pass a further resolution detailing its findings and the basis therefore." Pa020.

The Board of Adjustment was fully prepared to permit Plaintiff to cross-examine witnesses and present relevant testimony in accord with the trial court's order (Ra22); however, Plaintiff filed the instant appeal rather than proceeding with the remand.

The Board of Adjustment respectfully requests that this Court affirm the trial court's ruling with respect to the 1998 Resolution. The Board of Adjustment further respectfully requests that this Court find that any purported error by the Board in not permitting plaintiff the opportunity to fully cross examine witnesses or present other evidence was harmless and not prejudicial. The proposed evidence would not alter the plain language of the 1998 Resolution.

PROCEDURAL HISTORY

By letter dated August 2, 2022, Plaintiff filed an application for a Certificate of Nonconformity pursuant to N.J.S.A. 40:55D-68 in an effort to resolve Municipal Summonses issued to it for violation of Sections 231-23(B) and 231-26 of the Village Code and to permit it to operate as a "junkyard." 1T4-14; Pa024-Pa025; Pa044-Pa045. The application was heard before the Zoning Board of Adjustment on September 19, 2023 and October 17, 2023. Pa055. As the impetus for the application involved Municipal Summonses, the Village of Ridgefield Park appeared through the Village Attorney in opposition to Plaintiff's application. 1T5:17-22; Pa046. The Zoning Board of Adjustment denied Plaintiff's application by Resolution 1589-23 adopted on November 21, 2023, finding that two prior Board Resolutions adopted in 1998 granting use variances control the use of the subject site. Pa046-Pa053.

Plaintiff filed a Complaint in Lieu of Prerogative Writ on December 6, 2023. Pa055. Trial briefs were filed with the Court and trial took place on May 29, 2024. 1T. An order and decision was entered by the Hon. Christine Farrington, J.S.C. ret. on May 29, 2024. Pa005. Dissatisfied with the trial court's decision, Plaintiff filed a Motion for Reconsideration that was denied by the Court by order dated July 29, 2024. Pa001. Rather than move forward with the remand ordered by this Court, Plaintiff filed this appeal.

STATEMENT OF FACTS

On September 16, 2021, the Village of Ridgefield Park issued two Municipal Summonses to Plaintiff for violation of Sections 231-23(B) and 231-26 of the Village Code. Pa044-Pa045. Specifically, the Village cited Plaintiff for "junk not to be outside of enclosure" and for "pi[ing] or stack[ing] junk above the level at the height of the fence." Pa044-Pa045. In connection with the municipal prosecution, Plaintiff asserted that it was permitted to stack junk at its property above the fence line and it was determined that "the issue of the nonconforming nature of the property was to be sent to the Board of Adjustment for confirmation." Pa042. Thus, by letter dated August 2, 2022, Plaintiff an application for a Certificate of Non-Conformity pursuant to N.J.S.A. 40:55D-68 for a determination that the property qualified as a "junkyard." Pa042.

When Apache took ownership of the subject property in or about 1997, it applied to the Zoning Board of Adjustment for a determination that a use variance was not required at the subject Property and, in the alternative, for a use variance. Pa037. At that time, by Resolution dated January 20, 1998, the Zoning Board of Adjustment determined that a use variance was required for Apache to expand its operations. Pa037-Pa038. In other words, the Zoning Board of Adjustment determined in 1998 that the use sought by Apache was not a "permitted use" thus requiring a (d)(1) variance. Pa037-Pa038; Pa051.

Plaintiff's August 2, 2022 application is devoid of any reference to the prior land use application filed by Plaintiff in 1997 or the Resolutions adopted by the Zoning Board of Adjustment in 1998. Pb12; Pa042. Plaintiff did not submit a copy of the 1997 application or the 1998 Resolutions with the August 2, 2022 correspondence "since Apache believed it was not relevant to the application being made." Pb12; Pa 042. Indeed, it was only during the course of the second hearing date, after the 1998 Resolution and Notices were introduced by the Village Attorney who appeared in objection to Plaintiff's application, that it became clear to the Board that the 1998 Resolution governed the dispute and no further testimony was required. Pa049.-Pa052; 1T6:7-7:8.

At that point, a motion was made to affirm the validity of the January 1998 Resolution and a vote was taken. Pa016-017. The Board affirmed and acknowledged the validity of the January 1998 Resolution and determined that any activities not compliant with the Resolution be terminated immediately. Pa046-Pa053.

Through the 1998 Resolution, the Zoning Board of Adjustment granted Plaintiff a use variance subject to six very specific conditions. Pa037. The 1998 Resolution states in pertinent part:

> WHEREAS, Apache Auto Wreckers, Inc. represented by its attorney Frank Rivellini, has applied to the Board of Adjustment of the Village of Ridgefield Park for a determination that a use variance was not required, and in the alternative a use variance to its operation over the entire tract, at the premises located at 14 Industrial

Avenue and known as Block 151, Lot 7 on the Tax Map of Ridgefield Park;

* * *

WHEREAS, the Board of Adjustment, after carefully considering the evidence presented by the applicant and having given due opportunity for adjoining property owners and for the general public to be heard, has made the following factual findings:

1. Joseph Savignano, Apache's owner for twenty years testified regarding the history and use of the entire tract. The yard has existed on the site for 50 years. Apache used one building on the site for warehousing of parts, equipment, vehicles and servicing vehicles. Apache also parked empty trailers on the site. The other buildings on the site were occupied by Giordano Plumbing, Guys Auto Body and Nichols Lube, worked on trucks and had also parked trucks on the north side of the site.

NOW, THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Village of Ridgefield Park on this 20th day of January, 1998, that (1) the acting zoning official was correct that a use variance was required and (2) that approval of the application of Apache Auto Wreckers, Inc. be granted;

HOWEVER, said approval is expressly subject to the following terms and conditions:

1. Apache shall be permitted to warehouse and store its parts in the buildings on the premises.

2. There will be no sales from the buildings and sales shall only take place from the trailer in the yard where sales are presently being conducted.

> 3. Apache shall be allowed to store only its own vehicles stored on the premises.
>
> 4. Apache shall be permitted to service only its own vehicles stored on the premises.
>
> 5. The trailers which are permitted to be on the premises are as shown on the applicant's "plan" which consists of a topographic survey of the premises by Schan Associates, last revised October 2, 1997 which has been submitted to the Board.
>
> 6. Site plan approval is required regarding this matter. No expansion of a non-conforming use can be accomplished until a site plan has been submitted, reviewed and approved by the Board of Adjustment at a public hearing.

Pa037-Pa038.

Following the January 1998 approval with conditions, Plaintiff applied for site plan approval in or around April 1998. In its Notice of Hearing for site plan approval in 1998, Plaintiff wrote that it would appear before the Board for "Site Plan Approval and any and all required variances to allow the storage of parts, equipment and vehicles and service of same and parking of trucks on property commonly known as #2 Mt. Vernon Street and 10-14 Industrial Avenue, . . ." Pa041. Site Plan approval was granted July 21, 1998. Pa039-040.

The trial court reviewed the January 1998 Resolution and reached the same conclusion as the Board of Adjustment. The trial court concluded that the 1998 Resolution is valid and enforceable and that "the uses to which plaintiff is entitled are detailed in the 1998 resolution and subject to the conditions therein." Pa019.

STANDARD OF REVIEW

The Appellate Division is "bound by the same standards as . . . the trial court." Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs, 442 N.J. Super. 450, 462 (App. Div. 2015) (quoting Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super. 552, 562 (App. Div. 2004)). The Court's "role is to defer to the local land-use agency's broad discretion and to reverse only if we find its decision to be arbitrary, capricious, or unreasonable." Bressman v. Gash, 131 N.J. 517, 529 (1993). See also Zilinsky v. Zoning Bd. of Adjustment, 150 N.J. 363, 367 (1987). Decisions of Zoning Boards are presumed to be valid. Cell S. of N.J. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002); Willoughby v. Planning Bd. of Deptford, 306 N.J. Super. 266, 273 (App. Div. 1997). "[M]unicipal action is not arbitrary and capricious if exercised honestly and upon due consideration, even if an erroneous conclusion is reached." Bryant v. City of Atlantic City, 309 N.J. Super. 596, 60 (App. Div. 1998).

It is axiomatic that the "Board 'has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal.'" Kramer v. Bd. of Adjustment, 46 N.J. 268, 288 (1965) (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super 189, 201 (App. Div. 1960)). In addition, the Board may "exclude irrelevant, immaterial or unduly repetitious evidence." N.J.S.A. 40:55D-10(e).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE 1998 RESOLUTION CONTROLS (1T6:7-7:8; Pa019-Pa020)

The 1998 Resolution granting Apache a use variance controls Apache's application and prerogative writ action. The "use" of the property is governed by the 1998 Resolution and all conditions contained therein. Plaintiff asserts that it "believed [the 1998 Resolution] was not relevant to the application being made," which "was for recognition of their status as a pre-existing non-conforming use." Pb12. The 1998 Resolution, which stated that a "use variance was required" for Plaintiff's proposed use of the property (in 1998) and which granted the use variance subject to specific conditions, is absolutely relevant to a subsequent application for recognition of a pre-existing non-conforming use in 2022. The 1998 Resolution establishes the permitted use at the property and legally resolves the question of whether any purported pre-existing non-conformity existed in 2022 (i.e. after 1998).

Despite Plaintiff's characterization of the August 2022 application before the Zoning Board of Adjustment as a one for a Certificate of Non-Conformity pursuant to N.J.S.A. 40:55D-68, Plaintiff is not eligible for such a Certificate because the Board of Adjustment granted a (d)(1) use variance to Plaintiff in 1998. "A use variance as the term implies, permits a use of land that is otherwise prohibited by the

zoning ordinance." Nuckel v. Borough of Little Ferry Planning Bd., 208 N.J. 95, 101 (2011). Thus, once the variance is granted, Plaintiff's alleged use cannot be a pre-existing non-conforming use by operation of law. The 1998 Resolution is proof positive – without the need for any other evidence – that any pre-existing non-conforming use that may have existed prior to the 1997 application was changed by variance by the 1998 Resolution.

New Jersey courts recognize the application of *res judicata* to decisions of Zoning Boards of Adjustment. See Stop & Shop Co. v. Bd. of Adjustment, 162 N.J. 418 (2000); Bressman v. Gash, 131 N.J. 517 (1993). "A Board of Adjustment as a *quasi*-judicial body is empowered to take judicial notice of matters when and where appropriate." Charlie Brown of Chatham, Inc. v. Board of Adjustment for the Township of Chatham, 202 N.J. Super. 312, 326 (App. Div. 1985).

In Charlie Brown, the Appellate Division held that the Applicant was bound by the conditions set forth in a prior resolution of the Planning Board: "plaintiff is bound by the resolution of the Planning Board prohibiting, as a condition of site plan approval, the use of the second floor for residential purposes by the doctrines of *res judicata* and collateral estoppel." Id. at 327. "The principles of *res judicata* and collateral estoppel are applicable not only to the parties in courts of law, but also in administrative tribunals and agency hearings." Id. The resolution of the Planning Board was a determination by a *quasi*-judicial body which precluded plaintiff from

again submitting the same issue to the Zoning Board, also a *quasi*-judicial body, for a second determination. The issue was determined once and having been so determined could not be submitted for a second determination." Id. Likewise, here, Plaintiff is bound by the January 1998 Resolution of the Zoning Board of Adjustment. As a result of the foregoing, the determinations of both the Board of Adjustment for the Village of Ridgefield Park and the trial court were well within their authority to give due deference and consideration to the January 1998 Resolution.

The January 1998 Resolution (Pa037-Pa038) reflects the following:

- Prior to the application, Plaintiff used the yard of the property to park empty trailers: "Apache used ***one building*** on the site for warehousing of parts, equipment, vehicles and servicing vehicles. ***Apache also parked empty trailers on the site.***" Pa037 (emphasis added);

- In 1997 Plaintiff filed an application for a declaration that no variance was required or a variance to expand its operations at the subject property. Pa037;

- The Board of Adjustment found that a variance was required. Pa037;

- The Board granted the variance subject to 6 specific conditions. Pa038;

- Condition 1 permits Plaintiff to "warehouse and store its parts ***in the buildings*** on the premises" not in the yard. Pa038 (emphasis added);

- Condition 3 states that Plaintiff "***shall be allowed*** to store ***only*** its own vehicles on the premises" Pa038 (emphasis added); and

- Condition 3 does not permit Plaintiff to store anything other than Plaintiff's own vehicles on the premises at the subject Property; all other parts must be stored or warehoused inside the buildings at the subject Property. Pa038.

Plaintiff is bound by the conditions and limitations set forth in the 1998 Resolution. It is well recognized in New Jersey that Boards of Adjustment may impose conditions and limitations when granting variances related to expansion of non-conforming uses. In Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990), the Supreme Court stated:

> When a nonconforming use cannot be eliminated, a municipality may and should seek to harmonize the use with its environs. To this end, the municipality ought to require aesthetic improvement as a condition of expansion. **A municipality's ability to insist on specific changes as a part of the expansion safeguards the general welfare.** Through heightened control, a municipality can minimize inconsistencies with permitted uses. Thus, the aesthetic improvements should be fashioned with an eye towards integrating the appearance of the use with its surroundings, not simply effecting cosmetic changes.

Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990) (emphasis added).

When the Board of Adjustment granted the variance in 1998 subject to the conditions set forth herein, it did so as part of its ability to safeguard the general welfare. Plaintiff is bound by the 1998 Resolution and its conditions.

Notwithstanding the foregoing, even if Plaintiff were engaged in such activities before the January 1998 Board Resolution granting Plaintiff the variance

with conditions, Plaintiff is now bound by the 1998 Resolution and its conditions. The Board's interpretation of the 1998 Resolution as precluding the storage of scrap metal in the yard of the subject property are reasonable. Indeed, the trial court reached the same conclusion based on the plain reading of the 1998 Resolution.

In addition to its position that the use of the subject property as a junkyard is a pre-existing non-conforming use despite the 1998 Resolution granting Plaintiff a use variance with conditions, Plaintiff asserts that it is permitted to stack materials above the height of fence despite the Municipal Ordinances prohibiting such action. Plaintiff's argument is that stacking above the fence line is a pre-existing non-conforming use. The manner and method in which Plaintiff stores material on its property is a not a "use" as contemplated by the MLUL.

"Use" as contemplated by the MLUL refers to the purpose of the land or development. N.J.S.A. 40:55-65 permits zoning ordinances to "regulate the nature and extent of the use of land for trade, industry, residence, open space or other purposes." Stacking property above the fence line is not a "use" period. Indeed, Section 231 of the Village Code is set forth in Part III: General Legislation whereas the Zoning Ordinance is found in Chapter 96 in Part II: Land Use Legislation of the Village Code. The Zoning Board of Adjustment was without jurisdiction to rule on the question of whether the stacking junk above the fence line in violation of the

Village's property maintenance code is a pre-existing non-conforming use under the MLUL, namely because that is not a "use."

POINT II

REMAND IS UNNECESSARY AS NO TESTIMONY IS REQUIRED TO INTERPRET THE 1998 RESOLUTION (1T7:2-16; Ra12-Ra17)

No extrinsic evidence is required for the Board (and the Court) to interpret the 1998 Resolution. It is well within the Board's discretion to "exclude irrelevant, immaterial or unduly repetitious evidence." N.J.S.A. 40:55D-10(e). The Board concluded that the 1998 Resolution may be interpreted without testimony concerning its scope. Ultimately, it is within the Board's discretion to determine what, if any, evidence being presented is relevant and material. N.J.S.A. 40:55D-10(e).

Plaintiff presented the application in a confusing and chaotic manner. 1T5:8-7:16. Plaintiff elected to permit the objector to present evidence first. 1T5:8-7:16. Plaintiff failed to bring the Resolution to the attention of the Board. Pb12. When the Board realized that the Resolution was controlling, it was entirely within the Board's discretion to limit the evidence and rule on the plain language of the Resolution like a summary judgment motion. 1T:7:1-16.

To the extent Plaintiff claims that the 1998 Resolution contains "no prohibition of the storage of scrap metal" or that extrinsic evidence is required,

Plaintiff disregards the plain language of the 1998 Resolution which only permits the storage of Plaintiff's "own vehicles on the premises" or in the yard. Pa038. All other materials, including all parts other than the vehicles to be "stored or warehoused inside the buildings at the subject Property." Pa038. The 1998 Resolution specifically prohibits Plaintiff from operating as a "junkyard" regardless of whether Plaintiff operated as a junkyard prior to the adoption of the January 1998 Resolution. In 1998, the Board found that Plaintiff "used ***one building*** on the site for warehousing of parts, equipment, vehicles and servicing of vehicles. Apache also parked empty trailers on the site." Pa037 (emphasis added). The Resolution very specifically provides that the warehousing and storing of parts is to be done in the buildings on the lot, not in the yard. Pa038. It further provides that Plaintiff "shall be allowed to store ***only*** its own vehicles on the premises." Pa038 (emphasis added).

Plaintiff's position is further belied by the notice published by Plaintiff in 1998 for site plan approval sought "Site Plan Approval and any and all required variances to allow the storage of parts, equipment and vehicles and service of same and parking of trucks on property commonly known as #2 Mt. Vernon Street and 10-14 Industrial Avenue, . . ." Pa041. There is no reference to scrap metal or "junk yard" activities in either the Board's January 1998 Resolution and Plaintiff's 1998 Notice.

Although the trial court agreed with the Board's conclusion that the 1998 Resolution was controlling and clear on its face, the trial court found that Plaintiff was not given the opportunity to fully cross examine witnesses including one of the Board members. As a result, the trial court held that "remand is required for the completeness of the record to which plaintiff is entitled in the event of an appeal. Following cross-examination of the two witnesses, the Board shall pass a further resolution detailing its findings and the basis therefore." Pa020. The trial court noted that remand was appropriate "for the limited purpose of addressing that error." Pa018. The trial court also concluded, however, that the plain language of the 1998 Resolution governed the use permitted at the subject site.

To the extent limiting the evidence before the Board was an "error", it was a harmless error. There has been no denial of substantial justice here. See J. Abbott & Son, Inc. v. Holderman, 46 N.J. Super. 46 (App. Div. 1957). Because the 1998 Resolution controls and the Resolution sets forth with specificity the use for the site and conditions under which the variance was granted, the result would be the same, even if Plaintiff were able to establish that it operated as a junkyard prior to 1998. See Burbridge v. Mine Hill Tp., 117 N.J. 376 (1990).

Moreover, any evidence that Plaintiff may have presented in the form of permits or licenses after 1998 would not support a finding of any pre-existing non-conforming use insofar as a local municipality cannot create or deny a lawfully

created preexisting nonconforming use through permit process or other expression. McDowell, Inc. v. Bd of Adjustment of the Township of Wall, 334 N.J. Super. 201, 207 n.2 (App. Div. 2000). A lack of enforcement cannot establish a prior nonconforming right or convert an illegal use into a legal use. See Mahwah Tp. v. Landscaping Tech., 230 N.J. Super. 106 (App Div 1989) (holding that municipality was not estopped from enjoining use of the rear lot by reason of the fact that the building inspector or zoning officer had issued a certificate of continued occupancy because a certificate of occupancy is not a determination as to the legality of a use). Further, the evidence introduced by Plaintiff does not support Plaintiff's position. Pa026 is dated July 7, 1978; Pa029 dated December 12, 1998 permits "parking for trucks, trailers and equipment." Thus, the Board need not accept such irrelevant evidence and, even if it did, such evidence would not have established any alleged right.

As a result of the plain language of the 1998 Resolution, the Board of Adjustment did not act unreasonably, arbitrarily or capriciously in deciding the application for a Certificate of Non-Conformity pursuant to N.J.S.A. 40:55D-68 application without further testimony or evidence. Plaintiff knew that the 1998 Resolution was problematic to its application for the Certificate of Non-Conformity. That is precisely why Plaintiff omitted any reference to it in the letter to the Board or its presentation at the hearing.

Notwithstanding, following the trial court's decision, the Board was prepared to permit Plaintiff to conduct further cross-examination of the witnesses and present relevant testimony in compliance with the trial court's decision. Ra22. The Board, however, was not willing to permit Plaintiff to introduce testimony regarding the 1998 Resolution, which the Board and trail court found clear. Pa054. Rather than proceed with the remand, Plaintiff filed this appeal.

CONCLUSION

As a result of the January 1998 Resolution, this Court should affirm the trial court's finding that the "use" of the property is governed by the plain language of the Resolution such that Plaintiff is not entitled to a Certificate of Non-Conformity pursuant to N.J.S.A. 40:55D-68. Further, as no evidence that could be presented by Plaintiff could change the plain language of the 1998 Resolution, this Court should dismiss Plaintiff's appeal with prejudice and without remand to the Board of Adjustment.

Respectfully submitted,

Jennifer Alampi /s/

Jennifer Alampi

Dated: June 6, 2025

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APACHE AUTO WRECKERS, INC. **Plaintiff-Appellant,**	**SUPERIOR COURT OF NEW JERSEY**
	Docket No. A-003919-23
v.	
VILLAGE OF RIDGEFIELD PARK ZONING BOARD, **Defendant-Respondent**	**On Appeal from the Superior Court of New Jersey Bergen County, Law Division Docket No.: BER-L-6579-23**
	Sat below: **Hon. Christine Farrington, J.S.C.**

REPLY BRIEF OF APPELLANT APACHE AUTO WRECKERS, INC.

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PRELIMINARY STATEMENT

The Respondent's brief in opposition fails to acknowledge that Apache Auto Wreckers, Inc. ("Apache") is a licensed junkyard. Pa026 and Pa069. Apache became the owner of the property on or about 1997, and has always operated the property as a junkyard. Pa026 and Pa069. Prior to leasing and the subsequent ownership, the property had been operated in the same fashion as it has been operated by Apache going back to a time prior to when the Village of Ridgefield Park (the "Village") enacted it first zoning ordinance in 1968. Pa069. For many, many years the Village had issued licenses to Apache as a junkyard. Pa102.

The Respondent's brief incorrectly asserts that Plaintiff is not eligible for Certificate of Non-Conformity because the Board of Adjustment (the "Board") granted a use variance to Apache in 1998. (Resp. Br. p 9). Yet, it fails to take into account that Apache had expanded its site that encompassed two addresses: a) 2 Mt. Vernon Street, Ridgefield Park, New Jersey, which is the original site and b) 10-14 Industrial Avenue, Ridgefield Park, New Jersey, which is the expansion. On or about August 2, 2022, Plaintiff made an application to the Village Zoning Board for the purpose of obtaining a Certificate of Non-

Conformity for the expanded site with an address of 10-14 Industrial Avenue, Ridgefield Park, New Jersey. Pa024 and Pa025.

The Respondent appears to concur with the trial court's flawed rationale and erroneous interpretation in its Order and Decision. The Respondent essentially posits that if the trial court did not see any of reference to the proposed junk yard in the 1998 Resolution, then the use of the site as a junk yard must have been prohibited. Such rationale is a misinterpretation of the 1998 Resolution. Although on one hand, the Respondent also asserts that the Resolution establishes the permitted use at the property and legally resolves the question of whether any purported pre-existing non-conformity existed in 2022, it fails to reconcile the contradiction of the junkyard license issued to Apache since 1968 and the plain interpretation of the Village's Ordinance, as defined in § 231-1 for "Junkyards."

While the Respondent asserts that the Board was fully prepared to permit Plaintiff to cross-examine witnesses and present relevant testimony in accord with the trial court's order, in its letter dated June 18, 2024 (Ra22), this directly contradicts their letter of August 1, 2024, wherein they stated that "the Board will not allow any testimony regarding the 1998 resolution by such witnesses." Pa054. Based on the absolute and ominous position taken in the Respondent's

letter of August 1, 2024, it left Apache with no choice but to file the instant Appeal. Otherwise, proceeding on remand without any testimony regarding the 1998 Resolution would have been pointless and futile.

ARGUMENT

I. THE BOARD'S RELIANCE AND INTERPRETATION OF THE 1998 RESOLUTION WAS AND CONTINUES TO BE MISGUIDED AND MISPLACED, AS IT IS NOT THE CONCLUSIVE AND EXCLUSIVE AUTHORITATIVE SOURCE THAT "CONTROLS" THE ISSUES IN DISPUTE. (Raised Below: Pa078 to Pa083).

The findings of the Board must be supported by substantial credible evidence. (Davis Enterprises v. Karpf, 105 N.J. 476, 487 (1987). If the resolution of denial included no specific factual findings as to the statutory criteria, it must be remanded to the local board for reconsideration. Id. at 489. If a resolution is not clear in terms or intent, its enforceability can be challenged in court. (See generally, Hawrylo v. Bd. of Adjustment, Harding Twp., 249 N.J. Super. 568 (App. Div. 1991). A board is "free to accept or to reject the opinions of a planner proffered by an Applicant or objector." Hawrylo at 579 (citing Allen v. Hopewell Twp. Zoning Bd., 227 N.J. Super. 574, 581, (App. Div.), certif. denied, 113 N.J. 655 (1988)).

In the State of New Jersey, there is significant case precedence that warrants remanding applications to a board, upon finding that the board had acted arbitrarily, capriciously, and unreasonably. (*See* Dallmeyer v. Lacey Twp. Bd. of Adjustment, 219 N.J. Super. 134, 147 (Law. Div. 1987) (remanding application to

the Board of Adjustment for a new hearing after the Board denied a variance in which a conclusion the court found "difficult to justify" and based upon "mere speculation"); Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406, 419 (1961) (remanding application to the Board of Adjustment following the Board's denial of special exception use despite a formidable record in support of the application); Pagano v. Zoning Bd. of Adjustment of Twp. of Edison, 257 N.J. Super. 382, 398 (Law. Div. 1992) (remanding a variance application to Zoning Board of Adjustment after finding Board's decision "arbitrary, unreasonable and erroneous")).

Here, in reviewing the Resolution dated January 20, 1998, it is apparent that at that time the applicant took a position that a use variance was not required. Pa080. However, the Board made a finding that a use variance was required. Pa080-Pa081. There were "terms and conditions" in the 1998 Resolution. However, there was no prohibition of the storage of scrap metal in the "terms and conditions" of the 1998 Resolution. Pa080-Pa081. The second Resolution dated July 21, 1998, which was in the nature of a site plan approval, also did not prohibit the storage of scrap metal. Pa080-Pa081.

A colloquy that took place during the October 17, 2023 hearing between Mr. Alampi, the Board's attorney and Mr. Boggia, the Village Attorney (Pa080), indicates the inconclusive and ambiguous nature of the 1998 Resolution:

> "I don't think it's that complicated. I think the 1998 resolution is the key document."
>
> MR. ALAMPI: With no other explanation, no background, no sworn testimony, nothing, that should be it?
>
> MR. BOGGIA: I think the code official has the right to enforce that.
>
> MR. ALAMPI: I think we need more than that, don't we?

The above exchange indicates that the 1998 Resolution itself cannot "control" as the sole and exclusive authoritative source. Thus, it highly improper and premature to conclude that the 1998 Resolution "controls." Rather, based on the colloquy between the counsels for the Board and Village, even if the "1998 resolution is the key document," they conceded that "[w]ith no other explanation, no background, no sworn testimony. . . [they] need more than that." Pa080.

During the October 17, 2023 hearing, among the witnesses Apache was prepared to produce was the testimony of Frank Rivellini Esq., the attorney who handled the application for Apache in 1998. Pa081. It was the intention of Apache's counsel to have Mr. Rivellini explain to the Board the circumstances surrounding the application and what occurred at each of the hearings in 1998.

Also present and prepared to testify was Mr. Joseph Savignano, the owner of Apache, who would have testified as to the circumstances surrounding the application in 1998. Pa081. Regrettably, none of such testimony was permitted by the Board. Pa081. Without the testimonies of the key witnesses, a conclusion that the1998 Resolution "controls" by the trial court is highly improper and premature.

II. A PLAIN INTERPRETATION OF THE 1998 RESOLUTION DOES NOT SPECIFICALLY PROHIBIT NOR DISALLOW APACHE TO CONTINUE ITS JUNKYARD OPERATIONS NOR LIMIT THE TYPE OF SCRAP METAL AT THE SITE. (Raised Below: Pa082 and Pa083).

N.J.S.A. 40:55D-68 provides that "[a]ny 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." The purpose of the statute is to balance the municipality's interest in being able to amend its zoning ordinances with the property owner's interest in maintaining the use and value of their property. Palatine I v. Planning Bd., 133 N.J. 546, 562 (1993). The statute regarding the nonconforming uses and structures protects existing structures from changes in ordinances that later render them nonconforming. That protection is permanent unless the nonconformity is abandoned by the owner. Id. at 565. Further, when the permit is issued in good faith and in apparent compliance with the law, and the

permit-holder reasonably and in good faith relies on that permit, the issuing municipality is estopped from revoking it even if it was erroneously issued. Id. at 556.

In this matter, the Certificate of Occupancy (CO) for the property, dated July 7, 1978, granted Apache the ability to operate as a "junkyard." Pa026. Apparently the original CO was issued by Mr. Harry Hansen whom Mr. Douglas Hansen (another official with the Village) identified as his father. Pa10. During his limited cross-examination, Mr. Douglas Hansen testified that "except for 2003 when the license was delayed before it conformed to a violation notice there was no time during his tenure as construction official and Fire Marshall that Apache was not granted a license to operate as a junk yard." Pa010-Pa011. This directly contradicts the original CO issued by his father, Mr. Harry Hansen in 1978. Yet, Mr. Douglas Hansen testified that to his knowledge Apache had been in business since 1962 as an auto salvage yard (Pa011). [1] It was further established that Mr. Douglas Hansen had issued another CO to Apache on December 12, 1998. Pa029. [2] It was also established that Boswell Engineering had issued a letter dated May 12, 1998,

[1] Apache's position is that the references to and the characterizations of an "auto salvage yard" are identical and synonymous with an auto "junkyard." These terms are used interchangeably with no significant distinction.

[2] The CO issued in 1998 was for the expansion of Apache's site at 14 Industrial Avenue, whereas the 1978 CO was for the original address of 2 Mount Vernon Street.

confirming the property was in compliance and the CO could be issued. Pa011 and Pa029.

During the cross examination of Mr. Michael Landolfi, the current building inspector for the Village, on October 17, 2023, he testified regarding his direct knowledge of the Village Ordinance, specifically as it relates to "Junkyards and Junk Dealers" are defined in § 231-1:

> Q. Would you be so gracious for me and read out to me the definition of junk.
> A. Junk, any old, discarded or unused.
>
> Q. She cannot hear you.
> A. Any old, discarded or unused waste materials of any type that has outlived its useful purpose for the original purpose, including iron, metals, glass, paper, rags, clothes, machines.
>
> Q. Mike, slowly, slowly.
> A. Automobile, motor vehicles or parts or accessories thereof, such as auto bodies and the like, and all other materials commonly or generally known as "junk" in the ordinary meaning of the word, acquired or collected for commercial purposes, including specifically but not without limitation, parts and portions of automobiles and discarded automobiles and automobile bodies.
>
> Q. And now, I ask you to turn your attention to the same section for the definition of the term junkyard and ask that you read the definition from the Village ordinance.
> A. Any land or parcels thereof in which junk collected, placed or stored for commercial purposes or for any other remuneration whatever. A "junkyard" shall not include premises whereon the materials herein described as junk are kept or stored or disposed of by the owner or occupant of the premises by reason of their

> obsolescence in the ordinary sense of the word, or which originate on the premises and become obsolescent or are kept or stored for the use of the owner or occupant other than in the business of buying, selling or storing same.
>
> Q. **Now, is there any language in either of those definitions which limit the type of junk that can be stored in the junkyard**?
> A. **No**.

(*emphasis added*) Pa082 and Pa083.

Mr. Landolfi's testimony establishes that the Village's ordinances, in its definitional section, never disallowed or prohibited any storage of scrap metal. He further testified that there are no defined types of "junk" that are specifically prohibited in a junkyard. Contrary to the Respondent's brief, although there are "specific conditions" granted in the 1998 Resolution (Resp. Br. pp 5-6), there are no specific restrictions that prohibit the storage of specific "junk" at the site. Despite the Respondent concluding that the "1998 Resolution as precluding the storage of scrap metal in the yard of the subject property as reasonable (Resp. Br. p 13)," a plain reading of both COs (1978 and 1998), the 1998 Resolution, and the applicable text in the Village's Ordinance, as defined in § 231-1, yield a very different interpretation. Based on the plain and textual interpretation of all aforementioned documents, the following can be established:

1. The 1978 Resolution permitted Apache to operate a "junkyard" at the address of 2 Mt. Vernon Street in Ridgefield Park, New Jersey. (Pa026)
2. The 1998 Resolution expanded the site with an approval for "parking for trucks, trailers, and equipment" at the address of 14 Industrial Avenue, in Ridgefield Park, New Jersey. (Pa029)
3. The special conditions set forth in the January 20, 1998 Resolution do not limit nor prohibit Apache from its operation as a "junkyard" at the site. (Pa038).
4. The Village Ordinance for "Junkyards and Junk Dealers," as defined in § 231-1 does not limit the type of junk that can be stored in the junkyard. It was later confirmed by the testimony of the Village Building Official. (Pa082 and Pa083).

Thus, in order to obtain a full and complete analysis of the issues in dispute, all four sources of documents must be viewed in their totality in conjunction with one another. It appears that the Respondent, apparently for self-serving reasons, is applying a partial and selective interpretation of certain documents and incorrectly concludes that 1998 Resolution is "controls" and that the trial court "correctly concluded" the issues in dispute.

CONCLUSION

In summary, the Appellant respectfully requests that a remand with specific instructions for a full and fair hearing is warranted. As such, the trial court should be instructed to provide specific instructions and allow a full and fair hearing to take place, including the ability to call on certain witnesses to testify and to be subject to cross-examination. It is imperative that the Appellant be permitted to develop a full record so that their rights can be preserved for any future review or an Appeal.

Respectfully Submitted,
Attorney for Appellant-Plaintiff

By: /s/ *Thomas Kim*
THOMAS KIM, ESQ.

Dated: June 25, 2025