

COZY COVE MARINA, INC., improperly
pled as COZY COVE PROPERTY, INC.
and LINDA TAVARES

Plaintiffs/Respondents,

vs.

NELSON PROPERTIES PARTNERSHIP;
(D/B/A NELSON MARINE BASIN, INC.)
JENNY NELSON SCARBOROUGH; GORDON
NELSON AND MARTHA B. NELSON

Defendants/Appellants

: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION

:
: Docket No.: A-383-23

:
: CIVIL ACTION

:
: On Appeal From:
: Superior Court of New Jersey
: Chancery Division
: Ocean County

:
: Heard Below:
: Honorable Mark A. Troncone, P.J. Ch. P.

**BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS
NELSON PROPERTIES PARTNERSHIP; (D/B/A NELSON MARINE BASIN, INC.)
JENNY NELSON SCARBOROUGH; GORDON NELSON
AND MARTHA B. NELSON IN SUPPORT OF APPEAL**

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STANDARD OF REVIEW ON APPEAL

The Appellate Court engages in a *de-novo* review of a trial court’s summary judgment decision. *Estate of Albanese v. Lowlio*, 393 N.J. Super. 355 (App. Div. 2007); *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162 (App. Div.), certify. Denied, 154 N.J. 608 (1998). The “trial courts interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” *Manalapan Realty v. Manalapan Twp. Comm.*, 140 N.J. 336, 378 (1995).

Under established rules of appellate review under *de novo*, the Appellate division is not bound and gives no deference to the legal conclusions of the lower court. *Toll Bros. Inc. v. Township of W. Windsor*, 173 NJ 502, 549 (2002)(noting that questions of law are subject to *de novo* review). Typically under *de novo* review, the Appellate division gives deference to the trial court’s factual findings “when supported by adequate, substantial and credible evidence.” *Id.* at 549(quoted *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 NJ 474, 484 (1974).

Here, as indicated in the trial court below, the trial court’s decision is solely based upon a matter of law. As such, this Court should engage in a *de novo* review of defendant’s appeal of the trial court’s summary judgment decision below.

PRELIMINARY STATEMENT

Plaintiffs' filed an Amended Complaint alleging that plaintiffs have used their docks, piers, and pilings on the subject Riparian Encroachment Area on defendants' property as part of their marina since 1972, and as such, are the owners by adverse possession of the said Riparian Encroachment Area. Plaintiffs' allege that their personal property on the Riparian Encroachment Area has been operated by plaintiffs and their predecessors as a marina for over fifty (50) years, which has been exclusively used by plaintiffs and their predecessors. Plaintiffs' Amended Complaint sought a declaratory judgment quieting title to the subject areas and tidelands by declaring that plaintiffs have acquired title to the Riparian Encroachment Area on defendants' property by adverse possession.

Defendants allege that plaintiff is not entitled to adverse possession since the subject Riparian Encroachment Area was dedicated and/or used for a public purpose, and that plaintiffs' adverse possession claim was not ripe since the thirty (30) year statutory period to claim adverse possession has not yet expired. Defendants also filed a Counterclaim against plaintiffs alleging that plaintiffs' encroachments on defendants' property constitutes trespass.

The trial court in the parties' motions for summary judgment granted plaintiffs' motion for summary judgment declaring plaintiffs' legal and equitable owners of the encroachments on defendants' property by way of adverse possession finding that the said encroachments was adversely possessed by the plaintiffs, i.e. the Riparian Encroachment Area. The trial court found that plaintiffs' possession of the Riparian Encroachment Area was open, hostile, notorious, and known to defendants. The trial court found that the defendants failed to take appropriate action within the statutory time period to protect its property interest.

The trial court also found that during the time of municipal ownership of the subject property and to the time the Borough conveyed the subject property to the defendants in 2007, the property was not dedicated to a public use and thus subject to the adverse possession claims of the plaintiffs. The trial court additionally found that defendants' notice from its counsel to plaintiff that their pilings and docks were encroaching on Holly Lake owned by Defendant Nelson Properties, and a formal demand that these encroachments on the property be removed was insufficient under the law to toll the thirty (30) year statutory period. The trial court also found that plaintiffs' filing of its Complaint a month prior to the July 10, 2021 anniversary date

of *Devins* did not toll the statutory period. Also, the trial court denied defendants' motion for summary judgment and dismissed its Counterclaim with prejudice.

The trial court erred in granting plaintiffs' motion for summary judgment, and also dismissing defendants' Counterclaim with prejudice. First, plaintiffs' motion for summary judgment should have been denied by the lower Court since the subject Riparian Encroachment Area was dedicated and/or used for a public purpose. Second, plaintiffs' motion for summary judgment should have been denied by the lower Court since defendants' took action within the thirty (30) statutory period demanding plaintiffs' remove its encroachments on defendants' property. Third, plaintiffs' motion for summary judgment should have been denied by the lower Court since plaintiffs initiated this litigation one month before the expiration of the requisite thirty (30) year statutory period.

Therefore, defendants' request that the Appellate Division reverse the decision of the trial Court below granting plaintiffs' motion for summary judgment, denying defendants' motion for summary judgment, and dismissing defendants' Counterclaim.

PROCEDURAL HISTORY

On June 7, 2021, plaintiffs Cozy Cove Property, Inc. and Linda Tavares filed a Verified Complaint for Adverse Possession (Quiet Title Action) against the defendants Nelson Properties Partnership (d/b/a Nelson Marine Basin, Inc). (*Da10-40*). On August 10, 2021, defendants filed an Answer to plaintiffs' Complaint.

On January 20, 2022, plaintiffs filed a First Amended Complaint. (*Da 41-53*). On February 1, 2022, defendants filed an Answer to the First Amended Complaint. On September 14, 2022, plaintiffs filed a Second Amended Complaint adding individual defendants Jenny Nelson Scarborough, Gordon Nelson, and Martha B. Nelson. (*Da54-64*). On October 18, 2022, defendants filed an Answer to the Second Amended Complaint and Counterclaim. (*Da65-73*). On October 28, 2002, plaintiffs filed an Answer to defendants' Counterclaim. (*Da74-77*).

The parties subsequently filed a motion/cross-motion for summary judgment. On May 26, 2023, the parties appeared for oral argument before Honorable Mark A. Troncone, P.Ch.P. of the Ocean County Superior Court on the summary judgment motions.¹ After further briefing by the parties, on August 4, 2023, the parties

¹ 1T refers to the transcript of the motions for summary judgment dated May 26, 2023.

appeared again for oral argument before Judge Troncone on the motions for summary judgment.²

On August 23, 2023, the Honorable Mark A. Troncone, P.Ch.P. of the Ocean County Superior Court entered an Order granting plaintiffs' motion for summary judgment, denying defendants' motion for summary judgment, and dismissing defendants' Counterclaim with prejudice along with various other relief. (*Da1-2*). The Court issued a written opinion in conjunction with its Order. (*Da3-9*).

STATEMENT OF FACTS

Defendant Nelson Properties Partnership d/b/a Nelson Marine Basin, Inc. ("Nelson Properties") is a registered corporation of the State of New Jersey with a partnership street address at P.O. Box 386, in the Borough of Island Heights, County of Ocean, and State of New Jersey. Defendant Gordon Nelson is the majority owner/partner/shareholder/agent of the defendant Nelson properties. Defendant Jennifer Nelson Scarborough is an owner/partner/shareholder/agent of the defendant Nelson properties. Defendant Martha B. Nelson was an owner/partner/shareholder/agent of the defendant Nelson properties, but is now deceased. Any

² 2T refers to the transcript of the motions for summary judgment dated August 4, 2023.

interests of defendant Martha B. Nelson in Nelson Properties is now vested in her Estate. Mark Nelson is an owner/partner/shareholder/agent of the defendant Nelson properties. Mark Nelson is not named in the Amended Complaint. (*Da98-101*).

Defendant Nelson Properties owns the properties located at 8, 12 and 30 Lake Drive, Block 50, Tax Lots 3.01, 5, 6, 7 and 14 in the Borough of Island Heights, County of Ocean, and State of New Jersey. (*Da78-89*). Defendant Nelson Properties also owns the property referred to as Holly Lake in the Borough of Island Heights, County of Ocean, and State of New Jersey. (*Da90-97*). Defendant Nelson Properties owns and operates Nelson Marine Basin, Inc. located at 12 Lake Drive in the Borough of Island Heights, County of Ocean, and State of New Jersey. (*Da98*).

Plaintiffs Linda Travers and/or Cozy Cove Marina Company, Inc. is and/or was at all times relevant to this matter hereto, the owners of real property known as 10 Lake Drive, Block 50, Lot 8, in the Borough of Island Heights, County of Ocean and State of New Jersey. (*Da28-36*). Plaintiffs' property is adjacent to and abuts portions of defendants' property.

The property referred to as Holly Lake as referenced herein at the time of conveyance from the Borough of Island Heights to Nelson Properties was originally recorded as Block 50, Lots Nos. 4 and 13 in the Tax Map of the Borough of Island

Heights, County of Ocean, and State of New Jersey. (*Da90-97*). However, Holly Lake has since been issued a new tax identification number on the Tax Map of the Borough of Island Heights as Block 50, Lot 6.01. (*Da90-97, 185-189*).

In 1999, Defendant Nelson Properties filed a lawsuit against the Borough of Island Heights entitled *Nelson Marine Basin, Inc., et als v. The Borough of Island Heights, et als*, Docket No. OCN-L-2921-99. This lawsuit asserted certain claims by the defendants against the Borough of Island Heights in connection with conditions of a Resolution of Approval adopted by the Planning Board/Board of Adjustment of the Borough of Island Heights on August 1, 1999, concerning a minor site plan application filed by the defendant Nelson Properties. The Borough of Island Heights counterclaimed against the defendant Nelson Properties alleging that their improper entry and utilization of Holly Lake owned by the Borough of Island Heights, Lot 4, Block 50. (*Da102-133*).

On November 19, 2001, the parties settled the litigation with the Borough of Island Heights whereas defendant Nelson Properties entered into a Lease Agreement with the Borough of Island Heights with an option to purchase Holly Lake, including the subject Riparian Encroachment Area alleged by plaintiffs in the present matter herein. The Lease Agreement provided for a seven (7) year lease term, at the

expiration of which Plaintiffs shall have the option to purchase the property for a price of \$90,000.00. The Release and Settlement Agreement specifically states and references the Riparian grants of Holly Lake as part of the property owned by the Borough of Island Heights. On April 12, 2007, defendant Nelson properties exercises its option and purchased Holly Lake, including the subject Riparian Encroachment Area. (*Da102-133*).

Plaintiff Cozy Cove Marina contains and/or previously contained a fuel dock on its property served by a 3,000 gallon tank. Plaintiff Cozy Cove Marina generates additional revenues from fuel sales, repairs, the ship store, winterization, boat hauling and launching. The above mentioned additional revenues from plaintiff Cozy Cove Marina, specifically the revenues from fuel sales, is and/or was for use by the public to fuel their marine vessels. (*Da134-177*).

The fuel dock on plaintiff's property also contained a pump station for use by the public to properly dispose of waste from marine vessels under the New Jersey Clean Vessel Act Program (NJCVA). (*Da134-177*). The New Jersey Department of Environmental Protection (NJDEP) provides grant and loan programs for the construction, renovation, operation and maintenance of pump out stations and pump stations for property disposal of sewage. One of the conditions of the NJDEP grant

and loan programs for funding of pump station under the New Jersey Clean Vessel Act Program (NJCVA) is the requirement that both public and private facilities must be open to the public and provide full and reasonable access to the pumpout/dump station. (*Da178*). Upon information and belief, plaintiffs pump station was for use by the public and funded under the New Jersey Clean Vessel Act Program (NJCVA).

The only way for public marine vessels to enter the plaintiff Cozy Cove Marina to access the fuel dock, pump station and other facilities is to traverse through Holly Lake owned by defendants. Also, certain portions of plaintiff's property extend beyond plaintiff's property line into defendants' property on Holly Lake including portions of the plaintiff's piers, docks, and pilings, referred to as the "Riparian Encroachment Area. Additionally, plaintiffs, without the consent of defendants and/or its preceding owners, constructed, use and maintain a floating dock encroaching on defendant's property.

On October 10, 2014, defendants' prior counsel corresponded with plaintiffs providing notice that plaintiffs pilings and docks were encroaching on Holly Lake owned by Defendant Nelson Properties, and a formal demand that these encroachments on the property be removed. (*Da179*). Despite defendants' demand, plaintiffs refused to remove their said encroachments on defendants' property.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SINCE THE SUBJECT RIPARIAN ENCROACHMENT AREA WAS DEDICATED AND/OR USED FOR A PUBLIC PURPOSE. (SEE APPENDIX – OPINION Da0007).

To acquire title by adverse possession, a claimant must prove that its possession of another's real property is: (1) hostile; (2) actual and exclusive; (3) open and notorious; and (4) continuous and uninterrupted for the statutory period. *Patton v. N. Jersey Dist. Water Supply Comm'n*, 93 N.J. 180, 186 (1983); *Mannillo v. Gorski*, 54 N.J. 378, 386-87 (1969). The adverse possessor bears the burden of proving these elements by a preponderance of the evidence. *Patton v. North Jersey Dist. Water. Supp. Comm'n*, 93 N.J. 180, 193 (1983); *Stump v. Whimco*, 314 N.J. Super. 570, 576 (App. Div. 1988).

Pursuant to *N.J.S.A. 2A:14-30*, the adverse possessor must wait thirty (30) years to acquire title of property for nonwoodlands, developed land, and riparian areas. *Id.* In discerning when the thirty (30) year time period commences, New Jersey courts originally held that when land is owned by the government and transferred to private ownership, the period of adverse possession against the

government is not counted in determining the validity of a claim of adverse possession. See *Patton*, 93 N.J. at 187. The New Jersey Supreme Court in *Patton* held that that defendant, being a subdivision of the State and engaged in the governmental function of providing utility services to the public, was immune from the plaintiff's claims of adverse possession. *Id.*

However, the question left unanswered by the *Patton* Court was whether sovereign immunity also bars claims against property, owned by the State, but not dedicated to public use. Subsequently, in *Devins v. Borough of Bogota*, 124 N.J. 570 (1991), the New Jersey Supreme Court held that adverse possession statutes do not run against the State or a municipality when the land has been dedicated to or used for a public purpose. *Id.* at 578-79. The rationale for banning adverse possession of public lands is obvious: adverse possession should not require deprivation of a property used for the common good; it would be injurious to the public if such land were lost due to the negligence of the State or municipal agents; and the statutes of limitation should not be read to divest State or municipal ownership of property held as a public trust. *Id.* at 576; *see also Simmons*

v. Township of Maplewood, unpublished opinion, 2007 WL 1931294 at 2. (Da189-192).

The *Devins* Court found that the “nullum tempus” exception to adverse possession should not be extended to include land held by a municipality for non-governmental purposes.” *Id.* at 575-76. The Court held that only “municipally-owned property neither dedicated to nor used for a public purpose is subject to acquisition by adverse possession.” *Id.* at 572. Thus, only land held by local government for a nonpublic purpose may be adversely possessed. *Id.* Otherwise, a plaintiff is barred from claiming adverse possession against a sovereign if the property was dedicated or used for a public purpose. *Id.*

The *Devins* Court adopted and clarified the definitions of dedication and public use as:

[t]he devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used now or in the future. The intention of the owner to dedicate and acceptance by the public are the essential elements of a complete dedication.

See *Devins, supra*, 12 N.J. at 575; quoting Denise Vincente Tighe, “*Devins v. Borough of Bogota: Municipal Property for Sale or Theft*,” 45 *Rutgers L. Rev.* 197, 222 (1992) (*Da*).

As such, evidence of a dedication of land “may be either express or implied and municipalities, as well as other entities, are capable of dedicating land for public use. Municipal land dedicated for use as a public street, road, or highway ... has almost universally been deemed to be held for a public purpose and immune from adverse possession. References to property as a paper street on municipal zoning and tax maps also usually confirm that the property is dedicated to a public use”. Tighe, *supra*, 45 Rutgers L. Rev. at 208, quoting 11A Eugene McQuillin, *The Law of Municipal Corporations*, §33.02 (3d ed. 1991).

A court also may find that a dedication is created in any of a number of ways which “manifest [an] intent to devote land to public use ...” Thus, a municipality may satisfy the required intent to devote the land for a public purpose through its written or oral statements, the posting of signs on the property or the erection of physical boundaries on the property. Paula R. Latovick, “*Adverse Possession of Municipal Land: It's Time to Protect This Valuable Asset*,” 31 U. Mich. J. L. Ref. 475, 500 (1998).

Moreover, the courts define “public purpose” broadly, to include “an activity which serves as a benefit to the community as a whole, and which, at the same time

is directly related to the functions of government.” The concept of public purpose must “expand when necessary to encompass changing public needs of a modern dynamic society.” *See Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 611 (App. Div. 1998).

Here, the property was dedicated and used by the public since the Plaintiff Cozy Cove Marina previously contained a fuel dock until several years ago on its property served by a 3,000 gallon tank. (*Da134-177*). Defendant Gordon Nelson personally witnessed boats not belonging to Cozy Cove Marina travel through Holly Lake and the subject Riparian Encroachment Area to fuel their boats. (*Da180-184*).

Most importantly though, in addition to the fuel dock, plaintiffs’ property also contained a pump station for use by the public to properly dispose of waste from marine vessels under the New Jersey Clean Vessel Act Program (NJCVA). The only way for public marine vessels to enter the Plaintiff Cozy Cove Marina to access the fuel dock and pump station was to traverse through Holly Lake directly through the Riparian Encroachment Area. (*Da180-184*). The New Jersey Department of Environmental Protection (NJDEP) provides grant and loan programs for the

construction, renovation, operation and maintenance of pump out stations and pump stations for property disposal of sewage. (*Da178*).

One of the conditions of the NJDEP grant and loan programs for funding of pump station under the New Jersey Clean Vessel Act Program (NJCVA) is the requirement that both public and private facilities must be open to the public and provide full and reasonable access to the pumpout/dump station. (*Da178*). Upon information and belief, plaintiffs pump station was for use by the public and funded under the New Jersey Clean Vessel Act Program (NJCVA).

As such, applying the definitions established by the *Devins* Court, and as further interpreted thereto, the public funding from the NJDEP to the plaintiff for the pump station is evidence of a dedication of the subject area with the intent to devote it for a public purpose.

Therefore, the Appellate Division should reverse the decision of the trial Court below since the subject Riparian Encroachment Area was dedicated to and used for a public purpose.

POINT II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SINCE DEFENDANTS' PROVIDED NOTICE AND DEMAND THAT PLAINTIFFS' REMOVE ITS ENCROACHMENTS ON DEFENDANTS' PROPERTY WITHIN THE THIRTY (30) YEAR ADVERSE POSSESSION STATUTORY PERIOD. (SEE APPENDIX – OPINION Da0007-0008).

In *Devins v. Borough of Bogota*, 124 N.J. 570 (1991), the New Jersey Supreme Court directed that the decision was to apply only prospectively. As a result, the date of the *Devins* opinion, July 10, 1991, is the earliest date for an adverse possession claim to ripen against government property held for a non-public purpose. See *N.J. Mfrs. Ins. Co. v. Breen*, 153 N.J. 424, 432 (1998); *N.J. Educ. Facilities Auth. v. Gruzen P'ship*, 125 N.J. 66, 76 (1991).

Here, defendants did take action to eject plaintiff from occupying, possessing or using the areas occupied by the encroachment filed within the thirty (30) years statutory period. On October 10, 2014, defendants' prior attorney Harvey L. York, Esq., sent a letter to Plaintiff providing notice that their pilings and docks which were improperly installed were encroaching on Holly Lake owned by Defendant Nelson Properties, and a formal demand that these encroachments on the property be removed. (*Da179*). Defendants' said demand was made before well before the

thirty (30) year statutory period expired in 2021. Defendants' letter provided notice and demand for plaintiffs to remove the encroachments on its property.

Respectfully, the trial Court erred in finding that defendants' notice from its counsel to plaintiff as the wrongful possessor upon defendants' lands is not sufficient under the law to toll the thirty (30) year statute. As held by the trial Court, the case of *J & M Land Co. v. First Union National Bank*, 166 N.J. 43, provides a comprehensive review and history of New Jersey adverse possession laws. In *J & M Land Co.*, the Supreme Court concluded that the title owner of the lands needed to take affirmative, decisive action to defend its title. *Id.* at 504.

Although the *J & M Land Co.* Court references the history of adverse possession claims for a landowner commencing an ejectment action, the *J & M Land* Court did not expressly rule that a title owner must pursue an ejectment action to defend its title. A landowner can elect to pursue an action in the Superior Court claiming title to real property or claiming the right to possession in lieu of an ejectment action, *Gretkowski v. Wojciechowski*, 26 N.J. Super 245, 247 (App. Div. 1953), even when the wrongful possessor has been in possession for twenty (20) years or more. *Stump v. Whibco*, 314 N.J. Super, 562, 582(App. Div. 1998).

Here, defendants' prior attorney formal notice to plaintiffs that their pilings

and docks were improperly installed and encroaching on Holly Lake owned by Defendant Nelson Properties, and the formal demand that these encroachments on the property be removed, was followed up by a Counterclaim by the defendants for judicial action to remove these encroachments. Applying the holding in the *J & M Land* Court, the defendants here can pursue their Counterclaim of removal of plaintiffs' encroachments on the defendants' property since notice and demand for removal was provided within the thirty (30) year statutory period followed upon by judicial action.

Therefore, the Appellate Division should reverse the decision of the trial Court below since defendants provided proper notice and demand for removal of plaintiffs; encroachments on defendants' property within the statutory period.

POINT III

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SINCE PLAINTIFFS' INITIATED THIS LITIGATION BEFORE ITS CLAIM FOR ADVERSE POSSESSION AGAINST THE DEFENDANTS WAS RIPE. (SEE APPENDIX – OPINION Da0008).

As established in *Point II*, supra, in *Devins v. Borough of Bogota*, 124 N.J. 570 (1991), the date of the *Devins* opinion, July 10, 1991, is the earliest date for an adverse possession claim to ripen against government property held for a non-

public purpose. See *N.J. Mfrs. Ins. Co. v. Breen*, 153 N.J. 424, 432 (1998); *N.J. Educ. Facilities Auth. v. Gruzen P'ship*, 125 N.J. 66, 76 (1991). As such, the statutory period for plaintiff to file a claim for adverse possession against the defendants did not expire until July 10, 2021. However, plaintiffs filed its Verified Complaint for Adverse Possession on June 7, 2021, one month before the thirty (30) year statutory period expired. Therefore, plaintiffs' adverse possession claim should be denied since it was filed prematurely before the expiration of the statutory period and not ripe against the defendants.

A claim is "ripe" for adjudication only where "the harm asserted has matured sufficiently to warrant judicial intervention." *Trombetta v. Mayor & Comm'rs of Atlantic City*, 181 N.J. Super. 203, 223 (Law Div. 1981). Claims are ripe for adjudication "only when there is an actual controversy, meaning the facts present 'concrete contested issues conclusively affecting' the parties' adverse interests." *Matter of Firemen's Ass'n Oblig.*, 230 N.J. 258, 275 (2017) (citing *N.J. Turnpike Auth. v. Parsons*, 3 N.J. 235, 241 (1949)). "There is a two-part test to determine ripeness of [a] controversy: '(1) the fitness of issues for judicial review; and (2) the hardship to the parties if judicial review is withheld at this time.'" *K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'l. Prot.*, 379 N.J. Super.

1, 9-10 (App. Div. 2005) (*quoting 966 Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp*, 299 N.J. Super. 501, 515-16 (Law. Div. 1995)).

Here, plaintiffs filed its Verified Complaint for Adverse Possession on June 7, 2021, one month before the thirty (30) year statutory period expired. At that time, there was no adverse possession claim, and the harm had not matured to warrant judicial intervention. There was no actual controversy warranting plaintiffs' action for adverse possession to quiet title against the defendants. As such, plaintiffs' filing of its Complaint before the statutory period expired should have tolled the thirty (30) year statutory period. Defendants' Counterclaim for removal of the encroachments should have then been considered timely based upon the tolling of the statutory period due to the filing of the Complaint, and then defendants' judicial action for removal of plaintiff's encroachments on defendants' property.

Therefore, plaintiffs' motion for summary judgment should have been denied by the lower Court since plaintiffs initiated this litigation one month before the expiration of the requisite thirty (30) year statutory period.

CONCLUSION

For all the aforementioned reasons, Defendant respectfully requests that the Appellate Division reverse the trial Court's decision below granting plaintiffs' motion for summary judgment, denying defendants' motion for summary judgment, and dismissing defendants' Counterclaim. Defendant also respectfully requests that the Appellate Division grant defendants' motion for summary judgment, and reinstate defendants' Counterclaim against the plaintiffs.

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Attorneys for Defendants/Appellants

By: 

RICHARD C. SCIRIA

Dated: February 2, 2024

COZY COVE MARINA, INC., improperly Pled as COZY COVE PROPERTY, INC. and LINDA TAVARES	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
	:	
Plaintiffs/Respondents,	:	Docket No.: A-383-23
	:	
vs.	:	<u>CIVIL ACTION</u>
	:	
NELSON PROPERTIES PARTNERSHIP; (D/B/A NELSON MARINE BASIN, INC.)	:	On Appeal From:
JENNY NELSON SCARBOROUGH; GORDON	:	Superior Court of New Jersey
NELSON AND MARTHA B. NELSON	:	Chancery Division
	:	Ocean County
	:	
Defendants/Appellants	:	<u>Heard Below:</u>
	:	Honorable Mark A. Troncone, P.J. Ch. P.
	:	

**RESPONDENT'S BRIEF ON BEHALF OF PLAINTIFFS/RESPONDENTS COZY COVE
MARINA, INC., IMPROPERLY PLED AS COZY COVE PROPERTY, INC.
AND LINDA TAVARES**

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I. INTRODUCTION.

This appeal arises from the Superior Court of New Jersey, Chancery Division's ruling on cross motions for summary judgement in favor of the Plaintiff-Respondent, Cozy Cove Marina and Linda Tavares (hereinafter – “Cozy Cove”) wherein it was found that Cozy Cove successfully established adverse possession of a portion of the non-riparian lake bed lands of Holly Lake formerly owned by the Borough of Island Heights (hereinafter – “Island Heights”) and currently owned by Defendants-Appellant, Nelson Properties Partnership D/B/A Nelson Marine Basin, Inc., (hereinafter – “Nelson”) (See Final Order of Judgement and Opinion, Da0001-Da0009).

In the following points, we shall explain why the lower court was correct in the ruling in favor of Cozy Cove finding adverse possession and confirming ownership of the parcel.

1. Does the mere writing of a letter constitute legal action for ejectment?
2. Does the use of the lake by the boating public dedicate the underwater land to or for the public good?
3. Can the statute of limitations be measured against the local government's period of ownership after the Devins ruling?

The lower court's ruling was well-founded and should be upheld by this Honorable Court. Both parties submitted undisputed material facts and neither raised any issues

with the other party's statement of facts. (See Da0250 – Da0258). Based upon this agreement regarding Material Facts the trial court was as a matter of law to rule on the adverse possession claim of Cozy Cove and address the three points of contention raised by the Nelson: 1) could adverse possession be claimed against Island Heights, 2) did Cozy Cove meet the statute of limitations, and 3) was the non-riparian lake-bed land, owned by Nelson and adjacent to Cozy Cove's Marina, put to public use since the Supreme Court decided Devins 191 N.J. *infra*? All three of these questions of law were addressed by the trial court and adverse possession awarded to Cozy Cove.

II. SUMMARY OF FACTS

Both Parties operate full-service marinas with boat slips, docking areas and various services for repair, fuel and convenience. (Da0215; Da0225). The footprint of the Parties properties and lands cover virtually all of the shoreline land area of Holly Lake. (Da0231; Da0239). Cozy Cove has owned its lake-bed land and operated its businesses for over 60 years. (Da0225-Da0227). The issue confronted by the lower Court was the adverse possession of the lake-bed lands directly in front of and on the side of the existing lands of the Cozy Cove Marina. (Da0233). These non-riparian lake-bed lands, claimed by Cozy Cove, have piling, docks, piers and a floating dock. (See Da0233 survey of the lake-bed lands in question). As the referenced survey presented herein shows, the property in question and subject to

adverse possession is less than a third of an acre and is exclusively water bound within the Cozy Cove docks, piers, catwalks and pilings, all of which are, and have been, used for business purposes for over 60 years.

III. STANDARD OF REVIEW

Appellate courts review the trial court's grant or denial of a motion for summary judgment de novo, applying the standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). The court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In the case at bar, there is no dispute of material facts and both Parties agreed to this matter was question of law based on possession for over 50 years. This issue is a legal one. Can adverse possession hold against municipal lake-bed land not put to public use after the Devins decision? In answer here should be yes as it was in the lower court for the reasons set forth herein.

An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is also de novo. *See* In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020). "[A] trial court's interpretation of the law and the legal consequences that flow from

established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552, (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, (1995)).

If a judge makes a discretionary decision but acts under a misconception of the applicable law or misapplies it, the exercise of legal discretion lacks a foundation and it becomes an arbitrary act, not subject to the usual deference. Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 409, (App. Div. 2020). In such a case, the reviewing court must instead adjudicate the controversy in the light of the applicable law in order to avoid a manifest denial of justice. State v. Lyons, 417 N.J. Super. 251, 258, (App. Div. 2010). Sackman Enters., Inc. v. Mayor, No. A-1102-22, 2024 N.J. Super. LEXIS 18, 7-8 (Super. Ct. App. Div. Feb. 20, 2024)

LEGAL ARGUMENT

POINT 1 - TRIAL COURT DID NOT ERR WHEN IT RULED THAT PUBLIC USE AND ACCESS OF THE LAKE DOES NOT "DEDICATE" THE NON RIPARIAN LAKE BED LAND FOR THE PUBLIC GOOD. (Da0007).

Contrary to the appellant's contentions, the use of the lake by the boating public does not amount to a dedication of the submerged land to or for the public good. The doctrine of dedication requires a clear and unequivocal intent by the landowner to dedicate the property for public use, which is conspicuously absent in the instant case. "Dedication is "the permanent devotion of private property to a use that concerns the public in its municipal character.'" Twp. of Middletown v. Simon,

193 N.J. 228, 240 (2008) (quoting Roger A. Cunningham & Saul Tischler, *Dedication of Land in New Jersey*, 15 *Rutgers L. Rev.* 377, 377 (1961)).

In Price v. Plainfield, 40 N.J.L. 608, the Court held that mere public use of property does not, in and of itself, constitute dedication absent evidence of the landowner's intent to relinquish control over the property for public purposes. The use of the lake by the boating public for access to the parties' marinas does not transform the lake bed into public property; rather, it reflects a permissive use of the water for recreational purposes.

“The defendants' counsel admits that circumstances may make its meaning uncertain. I think the circumstances around its use, in this case, are such as to settle its meaning beyond question; and its meaning is, a place for the resort of the public for recreation, air, and light. Had the word "square" been upon the map, I suppose there would hardly have been a contention but that it worked together with the other acts--a dedication. If the words "public park" had been upon it, no question would have arisen. But a park in a city means to the sense of every person a place open to everyone. It carries no idea of restriction to any part of the public or to any specific number of persons. Restrictions as to time of entrance or behavior of those entering are conceivable, but the idea that any class of the community is to be excluded, would not be entertained primarily by any person in connection with the idea of a park within the limits of a city. That it was to be a place of public resort, would be the impression which any person would receive, by looking at the map in this case, delineating a tract of sixty acres, with streets, and a square or block, upon which is marked "Park." See, Price v. Plainfield, 40 N.J.L. 608, 609-613 (1878).

Moreover, the record unequivocally demonstrates that Island Heights retained ownership and control over the lake bed, thereby negating any inference of dedication to the public. Absent a clear manifestation of intent to dedicate the

submerged land, the appellant's argument founders on the shores of legal precedent and established property law.

Although not address in the lower court decision, acceptance of Nelson's argument that the property in questions was lake bed land "dedicated for the public benefit"- would be running aground of *N.J.S.A.* 40A:12-13.¹ This statute authorizes municipalities to sell "at public sale" after "due public notice" lands not needed for public use. See, Nativo v. Hackensack, 76 N.J. Super. 512, 519 (App. Div. 1962).

As the method used by Island Heights, (what amounted to a settlement of the Nelson Marina litigation for a future payment), is far from the mandate of a public sale after public notice. Further, if appellant's argument is accepted, then his property would also be dedicated to the public good.

For this reason, Nelson reliance on Middletown is misplaced in the matter at bar. In Middletown, the Township conducted a public auction and seal bid sale. 193 NJ at 231-233.. In addition, the property in question in Middletown was conveyed back to the Township as a matter of convenience considering the pending litigation. Additionally, reliance on Devins did not help as the time was not 30 years. Devins,

¹*N.J.S.A.* 40A:12-13 - **Sales of real property, capital improvements or personal property; exceptions; procedure;** (formerly *N.J.S.A.* 40:60-26) in brief, provides that a municipal governing body may sell any lands or buildings not needed for public use in one of four ways, the first of which is by public sale to the highest bidder after public advertisement thereof in a newspaper circulating in the municipality where the lands are situate.

supra, 124 N.J. 580-581. For these distinctions, this Court should not be persuaded to consider Middletown which ultimately relied on the fact that the Plaintiffs in that matter had multiple chances to either buy the property or bring their action before the auction. Middletown, 193 N.J. at 240-241.

Additionally, there was no intention for this property to be dedicated for public use between Nelson and Island Heights. In fact, the opposite was true. A careful review of the Lease Agreement between Island Heights and Nelson specifically describes the intended use of the land, including the underwater land of Holly Lake. In fact, their agreement regarding all of the land, including the lands of Lake Holly, was spelled out in the Lease. (See Lease dated November __, 2001, between Island Height and Nelson, Para. 2.01(a), “Tenant shall use, occupy, and/or lease the Demised Premises **exclusively for purposes in connection with its operation of a marina business** located on adjacent lots 3, 4.01, 4.02, 5,6, 7 in Block 50 and shall not use the Demised Premises for any other use ...”). *Empasis added.* (Da0103). Nelson’s marina also has services like fuel, a store, repair facilities, and the like – the same as Cozy Cove. (Da0150, Da0156-0157). This proves an ample reason for the boating public to access the Nelson marina – just like access to the Cozy Cove marina. An interesting interpretation of Nelson’s argument of public use arises if, hypothetically, Cozy Cove did not offer any services or access to their marina for the boating public. Would access by the boating public

exclusively to the Nelson marina still create Nelson perceive dedications? Would this prevent Cozy Cove from establishing adverse possession? The answer would be no. Mere use of the water above the lake bed to access each marina does not equate to “dedication.” The lower court’s ruling should stand.

POINT II - THE TRIAL COURT DID NOT ERR WHEN IT RULED THAT COUNSEL'S LETTER DID NOT CONSTITUTE LEGAL ACTION FOR EJECTMENT (Da0007-Da0009)

In support of the lower court's ruling, it is imperative to distinguish between mere communication and legal action. Opposing counsel's writing of a letter, devoid of any formal legal proceedings, falls short of constituting a bona fide attempt at ejectment. In the present case, opposing counsel's actions amounted to nothing more than an informal communication, lacking the requisite legal force to disrupt our client's claim of adverse possession.

Legal **action** means, “lawful pursuit for justice or decision under the law, typically leading to proceeding within the jurisdiction’s court system. An entity accuses another for a unlawful action, to protect an entity’s rights from violation”. *Black’s Law Dictionary, 2nd Ed.* “A process to have a court of law settle an argument.” *Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/legal%20action>. Accessed 27 Feb. 2024. See also In re Wellhofer, 16 N.J. Super. 60, 71 (Super. Ct. 1951)(The term "action," unless accompanied by restrictive words, generally applies to any legal*

proceeding in a court of justice, whether at law or equity, to enforce a right, or redress a wrong).

This Court should consider the policy that the assertion of property rights through informal means, such as letters, does not toll the accrual of adverse possession. To hold otherwise would undermine the stability and certainty afforded by the doctrine of adverse possession and would allow property disputes to be perpetually unsettled through informal, non-adversarial means.

The heart of the adverse possession doctrine is the requirement for a property owner to commence an ejectment action against the possessor within the designated period of the statute of limitations. Patton v. N. J. Dist. Water Supply Com., 93 N.J. 180, 186-187 (1983).

Nelson did not file a claim or “action” for ejectment or trespass until the answer and counter claim to the second amended complaint was filed, on October 18, 2022. (Da0065-0073). This date is beyond the date required by Devins. *Infra*, Devins 124 N.J. at 580-581. The letter from Nelson prior attorney, dated October 10, 2014 is not a legal action. (Da0179).

In the case at bar, Nelson’s prior attorney’s sending a letter purportedly asserting the Nelson’s ownership interest in the disputed portion of the lake bed does not meet the threshold of legal action for ejectment. Ejectment is a legal remedy aimed at removing a party wrongfully in possession of land. It is a formal legal

proceeding that must be initiated through the proper channels, such as the filing of a complaint in court.

Historically, the Court has made a distinction between a procedural statute of limitations and a substantive one. A substantive statute of limitations is found in legislation creating a cause of action that did not exist at common law. LaFage v. Jani, 166 N.J. 412, 421 (2001); Negron v. Llarena, 156 N.J. 296, 300 (1998). With substantive statutes of limitations, when the time in which the action must be commenced expires, both the remedy and the right are barred. Id.

“A procedural statute of limitations, on the other hand, governs general causes of action, such as tort or contract actions, that were recognized under the common law. The running of a procedural statute of limitations bars only the remedy, not the right that existed at common law. Ibid. In addition, procedural statutes of limitations are not applied strictly and may be flexibly construed, subject to equitable principles. Ibid. Even substantive statutes, however, need not necessarily be construed rigidly. Negron confirmed that our "approach to substantive statutes of limitations has evolved to one that recognizes that their application depends on statutory interpretation focusing on legislative intent and purpose." Id. at 304, J & M Land Co. v. First Union Nat'l Bank ex rel. Meyer, 166 N.J. 493, 517 (2001).

As of October of 2014, Nelson was able to bring an action for ejectment or trespass. He did not do so. And he floated on his right to bring this action for seven years. When he finally did bring the ejectment action, the Statute of Limitation had expired. The trial court was correct, and this Court should confirm that ruling.

POINT III - THE TRIAL COURT CORRECTLY RULED THAT THE STATUTE OF LIMITATIONS CAN BE MEASURED AGAINST THE LOCAL GOVERNMENT'S PERIOD OF OWNERSHIP POST DEVINS. (Da0007-Da0009).

The appellant's assertion that the statute of limitations cannot be measured against the local government's period of ownership is devoid of merit and runs afoul of settled principles of adverse possession law in New Jersey. Under New Jersey law, the accrual of adverse possession is measured against the period of ownership of the true owner. N.J.S.A. 2A:14-31.² In the relevant case on point, Devins v. Borough of Bogota, 124 N.J. 570 (1991), the New Jersey Supreme Court held that adverse possessors may acquire title to property held by governmental entities, including local governments, provided all elements of adverse possession are satisfied.

“Ultimately, the issue is one of public policy. We believe the better rule concerning municipally-owned real property not dedicated to or used for a public purpose is to treat it like property owned by private owners.” Devins v. Borough of Bogota, 124 N.J. 570, 578 (1991).

² N.J.S.A. 2A:14-31, Thirty years' actual possession of any real estate, uninterruptedly continued by occupancy, descent, conveyance or otherwise, wherever such possession commenced or is founded upon a proprietary right duly laid thereon, and recorded in the office of the surveyor general of the division in which the location was made, or in the office of the secretary of state, pursuant to law, or wherever such possession was obtained by a fair bona fide purchase of such real estate from any person in possession thereof and supposed to have a legal right and title thereto, or from the agent of such person, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such real estate.

Adverse possession is a method of acquiring title by possessing property in a specified manner for a statutory period. The expiration of that period bars the owner's right to bring an ejectment action and transfers title from the owner to the possessor. Title passes to the adverse possessor when the owner fails to commence an action for recovery of the property within the specified statutory period. Patton v. North Jersey Dist. Water Supply Comm'n, 93 N.J. 180, 186 (1983). In effect, the acquisition of title by adverse possession is based on the expiration of a statute of limitation. O'Keeffe v. Snyder, 83 N.J. 478, 494, 416 (1980).

Furthermore, the statute of limitations serves as a bar to stale claims and promotes judicial efficiency by extinguishing ancient disputes that have lain dormant for an extended period. To adopt the appellant's position would eviscerate the purpose of the statute of limitations and contravene well-established principles of adverse possession law. The appellant's contention that the statute of limitations cannot be measured against the Island Height's period of ownership is unsupported by the prevailing legal principles governing adverse possession.

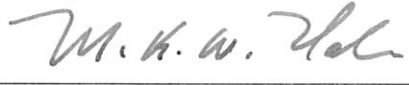
V CONCLUSION

In conclusion, each of the appellant's arguments lacks legal merit and is contradicted by established New Jersey case law. The lower court's ruling, which recognized the plaintiff's successful establishment of adverse possession, should be

affirmed by this Honorable Court. Cozy Cove had actual possession of property in question for the time required after the Devins decision. There is no question or disagreement as to the material facts. Therefore, this Court should deny the appeal and confirm Cozy Cove is the owner of the lake-bed lands in question. The time of Cozy Cove's adverse possession after Devins has not been challenged and the argument of Nelson as to the "dedication" of the waters of the lake for the public is not supported by any of the facts or case law. If this was true, the Nelson property would be subject to the same challenges and still be true now. The reality is that Nelson cannot have it both ways.

For the foregoing reasons, the lower court's ruling should be affirmed in its entirety. Nelson's letter does not constitute legal action for ejectment, the use of the lake by the boating public does not dedicate the submerged land to or for the public good, and the statute of limitations may be measured against the Island Heights period of ownership. This Honorable Court should uphold the integrity of the lower court's decision and affirm the Plaintiff-Respondent's successful establishment of adverse possession and is entitled to ownership of the property in question.

CARLUCCIO, LEONE, DIMON, DOYLE
& SACKS, LLC

By: 
MICHAEL K. W. NOLAN, ESQ.

Dated: March 22, 2024

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VIA ELECTRONIC FILING

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Re: **Cozy Cove Marina, Inc., et al. v. Nelson Properties., et al**
Docket No. A-000383-23

On Appeal From:
Superior Court of New Jersey
Chancery Division
Ocean County

Heard Below:
Honorable Mark A. Troncone, P.J. Ch. P.

Dear Honorable Judges:

Please be advised that this law firm represents the defendants in the above

matter. As such, please accept this letter brief in lieu of a more formal brief in reply to plaintiffs’ opposition to defendants’ Nelson Properties Partnership d/b/a Nelson Marine Basin, Inc. (“Nelson”) appeal brief.

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POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT SINCE THE PUBLIC USE AND ACCESS OF THE SUBJECT RIPARIAN ENCROACHMENT AREA WAS DEDICATED AND/OR USED FOR THE PUBLIC GOOD (SEE APPENDIX – OPINION Da0007)	4
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POINT III

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS’
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RIPE (*SEE APPENDIX – OPINION Da0008*)8

POINT IV

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PROCEDURAL HISTORY

Defendants rely upon the Procedural History set forth in its appeal brief.

STATEMENT OF FACTS

Defendants rely upon the Statement of Facts set forth in its appeal brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SINCE THE PUBLIC USE AND ACCESS OF THE SUBJECT RIPARIAN ENCROACHMENT AREA WAS DEDICATED AND/OR USED FOR THE PUBLIC GOOD (SEE APPENDIX – OPINION Da0007).

Plaintiffs Cozy Cove Marina, Inc. (“Cozy Cove”) in its opposition brief correctly states that the doctrine of dedication requires a clear and unequivocal intent by the land owner to dedicate the property for public use. *Township of Middletown v. Simon*, 193 N.J. 228, 240 (2008). However, plaintiffs are incorrect that the record unequivocally demonstrates that Cozy Cove Marina did not dedicate the riparian encroachment area for public use. Rather, plaintiffs fail to mention that Cozy Cove Marina contained a pump station for use by the public to properly dispose of waste from marine vessels under the New Jersey Clean Vessel Act Program (NJCVAP). The only way for public marine vessels to enter the plaintiff Cozy Cove Marina to access the pump station was to traverse through Holly Lake directly through the riparian encroachment area. (Da180-194).

The New Jersey Department of Environmental Protection (NJDEP) provides

grant and loan programs for the construction, renovation, operation and maintenance of pump out stations for proper disposal of sewage. (*Da178*). As such, one of the conditions of the NJDEP grant and loan programs for funding of pump station under the NJCVA is the requirement that both public and private facilities must be open to the public and provide full and reasonable access to the pump out/pump station. (*Da178*).

Accordingly, under the definition set forth in the *Simon* case, the subject riparian encroachment area was the defendants' private property dedicated and devoted to the public and for the public good. Unlike the plaintiff having the right to decide to allow guests as invitees on their property through the riparian encroachment area for Cozy Cove's fuel, store, and repair facility, the NJCVA requires that the pump station be open to the public, and also requires plaintiff to provide full and reasonable access to the pump out/pump station to the public. Therefore, the Cozy Cove pump station is clearly evidence that the riparian encroachment area was dedicated for public use and access with the intent to devote it for the public good.

Plaintiffs cite in their opposition brief the case of *Price v. Plainfield*, 40 N.J.L.

608 (1878), a case which is almost 150 years old, holding that mere public use of property does not, in and of itself, constitute dedication absent evidence of the land owners' intent to relinquish control over the property for public purposes. Although plaintiff is correct that the simple use of the lake by the boating public for access to the parties' marinas does not transform the lake bed into public property, plaintiff does not retain ownership and control over the lake bed based upon the required public access over the riparian encroachment area to the Cozy Cove pump station under the NJCVA.

Furthermore, whether or not there was an intention for the property to be dedicated for public use between defendant Nelson and Island Heights is irrelevant. The adverse possession time period did not run until the *Devins* decision in 1991, *see Point II, infra*. The pump station was on plaintiff Cozy Cove's property well within the thirty (30) year statute for adverse possession expired. (*Da134-177*). Thus, there is no need to consider the relationship of the lease between Nelson and Island Heights since the sale of Holly Lake from Island Heights to Nelson occurred well within the thirty (30) year statutory period.

Therefore, the Appellate Division should reverse the decision of the trial court

below since the subject riparian encroachment area was dedicated for the public good.

POINT II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SINCE DEFENDANTS SENT A FORMAL DEMAND FOR EJECTMENT OF PLAINTIFFS' ENCROACHMENTS ON THE SUBJECT RIPARIAN ENCROACHMENT AREA BEFORE THE ADVERSE POSSESSION PERIOD EXPIRED (SEE APPENDIX – OPINION Da0007).

There is no dispute presented in Plaintiffs' opposition brief that the time period for adverse possession of the subject riparian encroachment area did not begin to run until the date of the Devins' opinion on July 19, 1991. There is also no dispute in plaintiffs' opposition brief that defendants' prior attorney served a formal notice to plaintiffs that the pilings and dock were improperly installed and encroaching on Holly Lake owned by the defendant, and that the encroachments must be removed. (Da179).

Rather, plaintiffs argue in its opposition brief that defendants' prior counsel letter did not toll the adverse possession time period since it was not a legal "action" for ejectment or trespass citing *J & M Land Co. v. First Union Nat'l Bank ex rel. Meye*, 166 N.J. 493, 517 (2001). Although the *J & M Land Co.* Court references the

history of adverse possession claims for a landowner commencing an ejectment action, this Court did not expressly rule that a title owner must pursue an ejectment action to defend its title.

A landowner can elect to pursue an action claiming title to real property or claiming the right to possession in lieu of an ejectment action, *Gretkowski v. Wojciechowski*, 26 N.J. Super 245, 247 (App. Div. 1953), even when the wrongful possessor has been in possession for twenty (20) years or more. *Stump v. Whibco*, 314 N.J. Super, 562, 582(App. Div. 1998).

Therefore, the trial court decision should be reversed since the adverse possession time period was tolled by defendants' formal demand letter to plaintiffs to remove the encroachments from defendants' property.

POINT III

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SINCE PLAINTIFFS INITIATED THIS LITIGATION BEFORE ITS CLAIM FOR ADVERSE POSSESSION AGAINST THE DEFENDANTS WAS RIPE (SEE APPENDIX – OPINION Da0008).

There is no dispute that Plaintiff filed its Verified Complaint for adverse possession on June 7, 2021, one month before the 30 year statutory period expired. (Da10-40). At that time, there was no adverse possession claim, and the harm had

not matured to warrant judicial intervention. There was no actual controversy warranting Plaintiffs' action for adverse possession to quiet title against the Defendants.

Plaintiffs do not oppose this argument herein. As such, this Court should reverse the trial court below and grant summary judgment to the defendants since Plaintiffs' complaint was not ripe as filed one (1) month before the thirty (30) year statutory period expired.

POINT IV

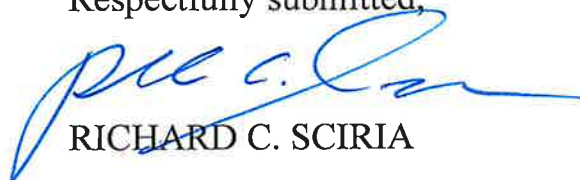
THE TRIAL COURT'S RULING THAT THE STATUTE OF LIMITATIONS CAN BE MEASURED AGAINST THE LOCAL GOVERNMENT'S PERIOD OF OWNERSHIP POST DEVINS IS IRRELEVANT TO DEFENDANTS' APPEAL (SEE APPENDIX – OPINION Da0007).

Defendants do not contest that the statute of limitations runs from the point of the *Devins* decision even when the subject riparian encroachment area is under the local government period of ownership. Regardless, plaintiff still has not met its burden for adverse possession since the statutory period did not toll for the reasons set forth in *Points II and III, infra*.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the trial court's decision be reversed, and that defendants appeal be granted.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "R.C. Sciria", is written over the typed name.

RICHARD C. SCIRIA

RCS:jbm

cc: Michael Nolan, Esq. (via electronic mail)
Client (via electronic mail)