LAW OFFICE OF G. AARON JAMES
River Centre 3
Second Floor
331 Newman Springs Road
Red Bank, New Jersey 07701
Tel: (732) 291-5143
Fax: (732) 291-5146
gjames@njcountrylawyer.com
G. Aaron James, Esquire (043341996)
Attorneys for Plaintiffs

MITCHELL NELSON; SARAH HEARN-NELSON; PAULINA GIRALDO Plaintiffs-Appellants, vs. MARISHA SIROIS; ADAM SIROIS; ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MIDDLETOWN Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000845-23 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MON- L-0192-23 Sat Below: Hon. Linda Grasso Jones, J.S.C.

BRIEF FILED ON BEHALF OF PLAINTIFFS-APPELLANTS IN REPLY TO OPPOSITION OF NOTICE OF APPEAL

LAW OFFICES OF G. AARON JAMES
River Centre 3, Second Floor
331 Newman Springs Road
Red Bank, New Jersey 07701
Tel: (732) 291-5143
ATTORNEYS FOR DEFENDANTS–APPELLANT

Of Counsel and on the Brief:

G. Aaron James, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules of Court

Statutes

PRELIMINARY STATEMENT

Defendants-Respondents Marisha and Adam Sirois ("Applicants") spend considerable time within their brief in opposition attempting to characterize and obfuscate Appellants' arguments. However, Applicants have no rebuttal for the actual and straightforward arguments in support of this appeal, which are threefold.

First, there stands a novel constitutional question as to whether a challenge to the issuance of a Certificate of Appropriateness by the Township of Middletown Landmarks Commission (the "Landmarks Commission"), which is not required to be published under the Rules of the Court, is time barred based on the date that a party had "actual notice," as argued by the Applicants below and in this instant appeal.

Second, preservation of the aesthetics of a historic district, particularly a historic district found on the National Registry of Historical Places, is of public interest.

Third, a resolution issued by Defendant-Respondent Township of Middletown Zoning Board of Adjustment (the "ZBA"), or any zoning board for that matter, that relies upon purported facts and evidence not found in any verbatim record due to the failure of the automated recording system is invalid pursuant to *N.J.S.A.* 40:55D-10(f).

Appellants will address these three issues and defer as to the balance of Applicants arguments that are mostly irrelevant, unsupported, and unpersuasive.

RELEVANT PROCEDURAL HISTORY

Appellants rely upon their "Relevant Procedural History" found within their Brief in Support of their Notice of Motion for Appeal.

STATEMENT OF FACTS

Appellants rely upon their "Statement of Facts" found within their Brief in Support of their Notice of Motion for Appeal.

LEGAL ARGUMENT

I. RESPONDENTS' ARGUMENTS SUPPORTING THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION TO ENLARGE PURSUANT TO *R.* 4:69-6(c) IGNORES WELL SETTLED CASE LAW

Setting aside the holding in *Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co.*, 204 N.J. 569 (2011), it is well settled law that enlargement pursuant to *R*. 4:69-6(c) must be granted in circumstances where there are either substantial and novel constitutional questions, or an important public rather than a private interest that requires adjudication or clarification. *See In re Ordinance 2354-12 of West Orange, Essex Cnty. v. Twp. of West Orange*, 223 N.J. 589, 601(2015).

Substantial and Novel Constitutional Question

Applicants' proposed "Addition" is an ultra-modern structure (Pa253 and Pa253) that is in stark contrast to the other homes in the Monmouth Hills Historic District ("Monmouth Hills") (Pa322-Pa335). Applicants were extremely effective in

misleading the motion judge as to the significance as to whether a home is "contributing." Their argument is that a "non-contributing" home within a historic district is not subject to any restrictions as to aesthetics. This conflates two unrelated concepts.

The term "contributing" related to a determination made as part of the application process for Monmouth Hills to be placed on the National Register of Historic Places. If a particular home is "historic," and when aggregated with other historic homes, justifies the neighborhood being designated a "historic district," that home is "contributing." (Pa259-Pa319) Invariably, any historic district will have homes that are non-contributing and any new home even if it replicates the identical characteristics of a "historic" home will never be considered "contributing." Stating the obvious, a "contributing" home must, in fact, be historic. However, once a historic district is established, whether a particular home was deemed "contributing" to that determination is irrelevant under the Municipal Land Use Law ("MLUL").

The ordinances relevant to the historic districts are found at Middletown Planning and Development Regulations, § 540-944 (the "Historic District Ordinances"). Section C(c) of the Historic District Ordinances defines "regulated activities" within a historic district to include a "change in the exterior appearance of any building, structure or improvement by addition, reconstruction, alteration, replacement or maintenance." There is no dispute that the Applicants seek to change the exterior appearance of their home that exists within a historic district.

Nothing in the Historic District Ordinances distinguishes between a regulated activity to a "contributing" home versus a "no-contributing" home within a historic district. The inquiry is initially around the nature of activity and then whether it is in a historic district. Period! Furthermore, the Historic District Ordinances make clear that the Landmark Commission's function is advisory and makes recommendations to the ZBA.

Substantial and Novel Constitutional Questions

There is no doubt that due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) In fact, the MLUL requires an opportunity for the public to be heard. *Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment*, 154 N.J. 62 (1998).

There can be no dispute, in reading what there is of the partial verbatim record in the instant matter, that Appellants, *inter alia*, objected to the modern aesthetic of the proposed Addition within the historic district in which they purchased their homes. It is also well-documented that the ZBA refused Appellants any opportunity to be heard on this issue based on the unequivocal claim that the ZBA lacked the authority challenge the "approval" of the Landmarks Commission.

There is no dispute that the ZBA and ZBA Counsel, Gregary Vella, Esquire, prevented Appellants from making any arguments or placing on the record any evidence to support an objection to the Addition's appearance being incongruent with all the other homes in Monmouth Hills and thereby destroying the historical aesthetic

Appellants, as owners of the only two neighboring properties now enjoy. Mr. Vella's prohibition came before Appellants even had the opportunity to call their first witness.

We ask the Court to critically read the excerpt from the transcript of the ZBA meeting of August 22, 2022 beginning at Page 83, Line 24 and ending at Page 85, Line 9. (Pa578-Pa581) That exchange occurred between Mr. Vella and Counsel for Appellants, G. Aaron James, Esquire, and Counsel for Applicants, John B. Anderson, III, Esquire, as Mr. James cross-examined the Applicants' architect Anthony D'Angelo. The motion judge erred in reaching her determination that Mr. Vella made no assertion as to the independent authority of the Landmarks Commission.

We ask the Court to note that months after that colloquy, when it came time to craft a Resolution, the ZBA purports, within one sentence, to have given consideration to the impact of this regulated activity to the aesthetics of the historic district. This is one of the manifold examples of the ZBA articulating in its Resolution findings that are either supported nowhere within any verbatim record or are contradicted by the available record.

Specifically, and after having denied Appellants the opportunity to be heard or present evidence around their concerns as to the impact the Addition will have on the historic district, the ZBA purports to have determined that "any stylistic criticisms of the proposed structure are unfounded." (Pa110) This moving of goalposts by the ZBA

is only one example as to how the determinations found in the Resolution are arbitrary and capricious, which Appellants would address in full on remand to the trial court.

Appellants were denied the opportunity to be heard around the ZBA's failure to maintain and develop an appropriate and harmonious setting for the historic districts within Middletown Township as required by Section A(2)(d) of the Historic District Ordinances.

Regulated Activities are de facto of "Public Interest"

Historic District Ordinances state that its "Purpose" is as follows:

> "The purpose of this section is to promote the educational, cultural, economic and general welfare of the Township through the preservation of historic buildings and structures and of places and districts through the development and maintenance of appropriate settings for such buildings, structures, places and districts which impart to residents and visitors alike a distinct aspect of the Township and which serve as visible reminders of the historical and cultural heritage of the Township, state and the nation."

There can be no clearer statement of a matter of public interest.

The Appellate Panel in *Berado v. Jersey City*, 476 N.J. super. 341 (App.Div. 2023) held that circumventing the considerations of a landmark commission raises novel questions as to a matter of public interest. *Id* at 355. Ironically, in *Berado*, there was no dispute that the role of the landmark commission is to "render written recommendations to the administrative officer or planning board." *Id*. at 358.

The offending action taking in *Berado* was that the landmark commission delegated its function to a "Historic Preservation Officer." In the instant case, the ZBA has delegated its function to the Landmark Commission.

By Exceeding its Authority, the ZBA Threatens the Public Interest

The Supreme Court long ago determined that when a zoning board exceeds its authority, such action threatens the public's interest. *See Stafford*.

Hopewell

Applicants request that the Court narrowly construe *Hopewell*, based on specific facts of that case versus the instant case. However, the holding in *Hopewell* was to abandon the “three-part standard" in favor of a more dynamic inquiry. In the instant case, the Addition is ultra-modern and will be the first home built in Monmouth Hills in over 20 years. (Pa259-Pa319) Contrary to Applicants’ arguments, concealment is ***not*** required in order to justify the extension. *See Hopewell*.

Counsel for Appellant did not rely on a non-legally trained contractor to determine his client’s statute of limitations time requirements. From the vote of the ZBA granting the application on September 13, 2022 until the ZBA informed Appellants that the Resolution was published on December 22, 2022, ***exactly 100 days transpired*** during which time Counsel for Appellants regularly and diligently communicated with the ZBA Secretary. Excluding the Christmas holiday break from December 23, 2022 until January 3, 2023, ***Appellants were provided with ten business days to submit their Complaint*** on Monday, January 16, 2023. Applicants indeed filed that week, but on Friday—***four days later***.

Counsel for Appellants concedes that the ZBA Secretary attached the affidavit of publication by Counsel for Applicants in an email sent minutes before the

beginning of the Christmas weekend. Counsel for Appellants conceded that there was a comedy of errors around internal communications in his office. However, we do not believe that the holding of *Hopewell* should be read so narrowly as to fall outside of the circumstances of the instant case, which are otherwise on all fours with the set of circumstances in *Hopewell*.

Whether resting upon a novel constitution question, a matter of public interest, or miscommunications had with the ZBA Secretary, it would be manifestly unjust to deny Appellants the opportunity to challenge the ZBA's resolution based on a footfall of only four days when the Addition will forever impact a historic district. Moreover, the three circumstances articulated in *In re Ordinance 2354-12 of West Orange*, two of which apply in the instant case, mandate enlargement.

II. RESPONDENTS' ARGUMENT THAT *R.* 4:69-6(a) IS APPLICABLE TO CHALLENGE THE ISSUANCE OF A CERTIFICATE OF APPROPRIATENESS IS MISPLACED

Applicants seek to re-write the Rules of the Court in making the following argument:

> "Assuming *arguendo* that the Objectors had no prior notice of the Certificate of Appropriateness, the Objectors acquired actual notice of

> the Certificate of Appropriateness on the evening of March 28, 2022 (at the very latest). (Pa426). As such, any challenge to the Certificate of Appropriateness would have been time barred as of May 12, 2022 *See N.J. Ct. R.* 4:69-6 (a)"

(SDb21)

However, *R.* 4:69-6(a) provides that

> No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.

Applicants cite not a single case to support a process that they made up before the ZBA on August 22, 2022 and reiterate on appeal on July 3, 2024. In contrast, Appellants cite *Scully-Bozarth Post # 1817 of Veterans of Foreign Wars of U.S. v. Planning Bd. of City of Burlington,* 362 N.J. Super. 296 (App.Div 2003) as an excellent example of the proper manner in which a zoning board addressed a "recommendation" of a landmark commission and in which a party "challenged" a zoning board resolution based on a recommendation by a landmark commission.

In the instant case, the Landmark Commission issued no report and failed to cite to the Historic District Ordinances as to the criteria that would have allowed not only a Certificate of Appropriateness to issue, but also, the Addition to be approved in the context of its impact on the historic district. The ZBA engaged in no such analysis within the partial verbatim record. The ZBA engaged in no such analysis within the Resolution.

If Applicants' argument is correct, and given the decision of the Landmark Commission has yet to be published, Appellants, ***as of today's date***, are not time-

barred from submitting an action in lieu of prerogative writs based on the clear language of *R.* 4:69-6. As such Applicants' argument is nonsensical and would result in protracting this litigation further.

III. THE RESOLUTION AND TRANSCRIPTS OF THE ZBA MEETINGS MAKE CLEAR THAT THERE EXISTS NO VERBATIM RECORD AS REQUIRED PURSUANT TO *N.J.S.A.* 40:55D-10(f).

There is no dispute that absent from the verbatim record is the three-hour meeting of May 23, 2022, upon which the ZBA relied in reaching the determinations found within its Resolution. Instead of addressing that elephant in the room, Respondents blame Counsel for Appellants for not following an imaginary script that none of Counsel for Applicants, the ZBA Counsel, any member of the ZBA, or any of Applicants' witnesses followed even before Counsel for Appellants spoke a word on August 22, 2022.

Appellants cite the following arguments made in their brief in support:

> "As held by the appellate panel in *Scardigli v. Borough of Haddonfield Zoning Bd. of Adjustment*, 300 N.J. Super. 314 (App.Div. 1997): "*N.J.S.A.* 40:55D-10(f) directs the planning board to 'provide for the verbatim recording of the proceedings by either stenographer, mechanical or electronic means.' Without such a record, courts are unable to engage in judicial review and ordinarily should remand for further proceedings. *Carbone v. Planning Bd. of Tp. of Weehawken*, 175 N.J.Super. 584, 586 (Law Div.1980) (because the submitted meeting minutes were inadequate and no verbatim record was made, matter remanded to planning board for rehearing); *Lawrence M. Krain Assoc. v. Mayor of Tp. of Maple Shade*, 185 N.J. Super. 336, 341 (Law Div.1982) (without verbatim recording of board of adjustment

> meeting, court could not decide if denial of variance was arbitrary or capricious, and remanded for new hearing on that part of the application)."

(Pb25-Pb26)

The Resolution reaches conclusions that are not supported anywhere within the available transcripts. One example is Applicants' expert referring to "the circulation element of the master plan as I had mentioned before." However, there is no prior reference of "the circulation element of the master plan" within the verbatim record. (Pa550) The ZBA concluded that the subject home was "smaller than peer homes in the area," as the "Planner presented the findings of a neighborhood study." (Pa110) However, no study was submitted and on cross-examination the planner admitted that he was completely unaware of the sizes of any home within his "study"—not even the similar house next door to the home owned by Applicants. (Pa635-Pa640)

Most problematic is the proactive objections by ZBA Counsel as to the admissibility of exhibits proffered by Appellants. While the confusing and aggressive approach to exclude evidence on May 23, 2022 was lost, a sample of a typical exchange was captured as part of another matter before the ZBA also on August 22, 2022 in which Counsel for Appellant was cross-examining that applicant in his capacity as a resident of Middletown. (Pa597-Pa616) Mr. Vella seems to have allowed the admission of an 2006 engineering report in the instant matter and again in that matter, and then seems to reverse himself in the midst of provide a rational to

exclude other evidence proffered by Mr. James. Query whether that report is available for the ZBA to consider in this matter.

The verbatim record is clear that Mr. Vella was not acting as a legal advisor to the ZBA but was presiding over the meeting. In fact, at times, he acted as an advocate for Applicants. An example of this was his questioning almost all of Applicants' witnesses ad hoc in order to adduce a statement that the Addition did not violate any height restrictions if you disregard the pillars it rests upon. (Pa477-Pa480) He even got impatient with one witness who was not answering the question in the manner the Mr. Vella required by shouting "I don't care about Witches. I want to know from the—" At which point even Counsel for Applicants had to interrupt him. (Pa480)

While Appellants offer these examples of disconnects between the Resolution and what little there is of a record, we argue that this is not an analysis for the Appellate Division, but for the motion judge below. We also do not believe it is up to an appellate panel to conduct the analysis as to whether the transcript of August 22, 2024, in fact, is a verbatim record of what the ZBA considered in reaching its Resolution, which we note is short to detail, analysis and reference to the record.

The absence of a full verbatim record would result in the trial court seeing only parts of what transpired at the ZBA meetings. It would be akin to trying to read a billboard on the other side of a New York City subway platform as two trains are passing by in opposite directions. Refusing Appellants an opportunity to make their

arguments around a Resolution that resulted from circumstances that unquestionably are exceptional would be unjust.

CONCLUSION

With respect to the instant appeal, Appellants seek a determination that the circumstances of this incredibly unique case satisfy the standards in *Rule* 4:69-6(c) and that the interest of justice warrant enlargement of the forty-five-day period. In this way the matter can return to the capable hands of the motion judge who can then make determinations as to how to best proceed.

While Appellants believe that the failure of the ZBA to create a verbatim record is fatal, any other conclusion would require additional evidence to confirm that the transcript of August 22, 2022 in no ways represents what occurred on May 23, 2022. The so called "re-do" served only to provide Applicants with the unfair advantage of restriking all testimony and responses to cross-examination having had sight of Appellants' questioning and proofs three months prior.

Fairness dictates that the motion judge's denial of Appellants' motion below be reversed.

Respectfully submitted,

Law Offices of G. Aaron James
Attorneys for Plaintiffs-Appellants

G. Aaron James

DATED: September 16, 2024

Foss, San Filippo & Milne, LLC
John B. Anderson, III, Esq. (038862010)
225 Broad Street
Red Bank, New Jersey 07701
Tel: (732) 741-2525
Fax: (732) 741-2192
janderson@fsfm-law.com

MITCHELL NELSON; SARAH HEARN-NELSON; AND PAULINA GIRALDO, Plaintiffs-Appellants, v. MARISHA SIROIS; ADAM SIROIS; ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MIDDLETOWN, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-00000845-23 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MON-L-0192-23 Sat Below: Hon. Linda Grasso Jones, J.S.C.

BRIEF FILED ON BEHALF OF RESPONDENTS, MARISHA SIROIS AND ADAM SIROIS, IN OPPOSITION TO APPELLANTS' APPEAL

Foss, San Filippo & Milne, LLC
225 Broad Street
Red Bank, New Jersey 07701
Tel: (732) 741-2525
Attorneys for Defendants/Respondents,
Marisha Sirois and Adam Sirois

Of Counsel and on Brief

John B. Anderson, III, Esq.

TABLE OF CONTENTS

TABLE OF JUDGMENTS

[1] The Zoning Board of Adjustment's unanimous approval and memorializing Resolution are intermediate decisions pertinent to the appeal and form the record upon which the Zoning Board of Adjustments' action is adjudged. See N.J. Ct. R. 2:6-2 (a)(2)(C). The Appellants place the Zoning Board of Adjustment's approval at issue in this appeal both by arguing that: a) it was arbitrary, capricious and unreasonable; and b) by seeking to create a new record by remand or otherwise.

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Ordinances

TABLE OF CONTENTS OF APPENDIX

[2] Because there are multiple Defendants/Respondents, the Appendix to the Appellate Brief submitted on behalf of the Defendants/Respondents, Marisha Sirois and Adam Sirois, will use the convention "SDa" with "S" intended to reference the Defendants'/Respondents' last name. See N.J. Ct. R. 2:6-8.

TABLE OF CONTENTS OF TRANSCRIPT(S)

[3] The Respondents are fully familiar with the rule-based citation conventions for transcripts pursuant to N.J. Ct. R. 2:6-8. That said, after consultation with the Court, the Respondents are adopting the same citation convention as the Appellants (who included the intermediate transcripts within their Appendix rather than producing them separately). Additionally, after consultation with the Court, the Respondents are not proffering full, separate, copies of the transcripts of hearings before the Zoning Board of Adjustment to avoid duplicative documentation.

PRELIMINARY STATEMENT

Over the course of eight (8) months before the Respondent, Zoning Board of Adjustment (the "ZBA"), the Respondents, Marisha and Adam Sirois (the "Homeowners"), introduced uncontroverted, sworn, testimony from three (3) experts and twenty-three (23) exhibits satisfying their legal burden and obtaining a unanimous vote of approval granting *e.g.* a height variance to expand their existing single-family home. Before voting to grant the variance relief, the ZBA carefully considered and weighed testimony amounting to three hundred (300) stenographic pages and the law affords their findings a deferential review on the record below. The Appellants, neighbors residing 260' away (the "Objectors"), were given a full and fair opportunity to attend all hearings, to cross-examine all witnesses and to present witnesses and exhibits of their own so long as they followed the rules. When an audio malfunction deprived the parties of a record of the May 23, 2022 hearing, the ZBA compelled a recorded rehearing before allowing any new testimony, before opening the matter to the public, and before deliberating or voting. All witnesses re-appeared and testified anew inclusive of cross-examination and without any time or other constraints whatsoever.

Nearly two (2) years after ZBA voted unanimously to grant the requested variances, the Objectors continue to leverage a time-barred, private, action in

lieu of prerogative writs to frustrate the property rights and approvals the Homeowners attained. Though afforded a recorded rehearing, the Objectors seek a third bite at the apple (in the form of a remand to the ZBA for *yet another rehearing*) to introduce evidence they tactically withheld in August and September 2022. Despite having copies of all publications of Notices of Approval in hand, the Objectors ignored the first notice and filed their prerogative writ out of time. Although complaints in lieu of prerogative writs must be decided on the record of the hearings below, the Objectors continue to pursue a roving investigation not grounded in the record below and, ultimately, some type of impermissible, supplemental, fact-finding.

Faced with requests for patently extraordinary relief caused solely by the Objectors' own elections, the Trial Court correctly: a) declined to remand the matter to the board of adjustment to conduct a rehearing of the rehearing; b) declined to grant discovery on matters unrelated to the subject property that post-date the vote of approval; c) declined to conduct a trial *de novo* by affidavit or certification to the Trial Court where the law limits the scope of review to the record adduced before the board; and d) declined to extend the time in which to file the complaint in lieu of prerogative writs for Objectors' failure to meet its burden to show that it was manifest that the interests of justice merited an extension. In the end, these off the record and undocumented issues which

require speculation regarding off-site conditions that do not yet exist have no bearing on the ultimate issue in an action in lieu of prerogative writs – whether the ZBA acted arbitrarily, capriciously and unreasonably.

PROCEDURAL HISTORY[4]

The ZBA accepted jurisdiction over the Homeowners' application on December 13, 2021. (Pa416).

At Objectors' request, the ZBA carried the matter twice (from December 13, 2021 to January 24, 2022 and, in turn, from January 24, 2022 to February 28, 2022 – a total of six (6) weeks). (Pa417; Pb5).

The ZBA did not reach the application on the evening of February 28, 2022. (Pa416; Pb5).

The Homeowners commenced their case in chief before the ZBA on March 28, 2022 with sworn testimony from Adam Sirois, a licensed land surveyor and a registered architect. (Pa416; Pa428; Pa438; Pa456). At the end of the evening, the matter was scheduled to resume on May 23, 2022. (Pa493).

On the evening of May 23, 2022, the Homeowners continued the presentation of their case in chief with supplemental testimony from Mr. Sirois,

---

[4] See prior footnote regarding the adoption of the *Appellants'* citation convention for the transcripts of the hearings before the Zoning Board of Adjustment. The transcript from the motion argued before the Trial Court will be referred to hereinafter as "1T."

the surveyor and the architect as well as testimony from a professional planner. (Pb5). All four (4) witnesses were cross-examined and the Objectors commenced (but did not conclude) their case in chief. (Pb5).

Immediately following the May 23, 2022 hearing, counsel for the ZBA wrote to the Homeowners and the Objectors to alert the parties that, due to an audio malfunction, there was no audio recording of the May 23, 2022 hearing. (Pa787).

As a result, before taking any further testimony on the application, the ZBA afforded the parties a full and fair opportunity to conduct a recorded rehearing where all witnesses were afforded a right to testify, where all witnesses were subject to cross-examination and where no time limitations were imposed – essentially a self-imposed remand. (Pa787; Pa499-502).

The rehearing commenced on August 22, 2022 where the surveyor, the architect and the planner once again testified and were once again subject to cross-examination. (Pa506; Pa512; Pa524). Because the recorded rehearing of the remainder of the Homeowners' case in chief took the entire evening, the rehearing was continued a second night (September 12, 2022) to allow the Objectors to call their witnesses and to allow those witnesses to be cross-examined with a verbatim record maintained. (Pa584-585).

On September 12, 2022, the Objectors concluded their cross-examination, the Objectors testified, the Objectors were subject to cross-examination, the hearing was opened to the public, counsel for both parties were afforded summations and the ZBA deliberated and voted, unanimously, to grant the Homeowners variance relief. (Pa631; Pa651; Pa733; Pa749; Pa0760).

On November 28, 2022, ZBA unanimously adopted a fourteen (14) page written Resolution of Approval detailing the evidence presented, the findings of fact and the legal underpinnings entitling the Homeowners to relief. (Pa099-112).

On December 2, 2022, the Homeowners published a Notice of Approval. (Pa804-805).

The ZBA later published its own Notice of Approval. (Pa806).

On December 22, 2022 – more than four (4) weeks before the deadline for the Objectors to file a complaint in lieu of prerogative writs – the Secretary for the ZBA (the "Board Secretary") emailed Objectors copies of **both** the Homeowners' Affidavit of Publication of a Notice of Approval and the ZBA's Affidavit of Publication of a Notice of Approval. (Pa803). In the body of the email, the Board Secretary emphasized that she was attaching two (2) Affidavits of Publication – for the publication by the Homeowner as well as the ZBA. (Pa803).

Objectors admit that they received the Board Secretary's email disclosing the Homeowners' publication. (Pa175).

There is no dispute that, pursuant to N.J.S.A. 40:55D-10 i., Homeowners' publication of the Notice of Approval triggered the commencement of the 45-day appeal period under R. 4:69-6 (b) (3). See N.J.S.A. 40:55D-10 i.

Objectors admittedly filed their Complaint in Lieu of Prerogative Writs out of time. (Pa113).

Six (6) months later, after a Pre-Trial Conference, exchange of Pre-Trial memoranda and numerous status conferences, on July 27, 2023, the Objectors filed a Motion to Extend the Period of Time in Which to File Their Complaint in Lieu of Prerogative Writs. (Pa113). The Objectors simultaneously sought relief in the form of a remand, discovery and/or a trial *de novo* to present to the Trial Court evidence not presented to the ZBA below. (Pa113-114).

On October 13, 2023, the Trial Court heard oral argument on the Objectors' Motion. (Pa850).

On October 18, 2023, the Trial Court denied the Objectors' Motion. (Pa847-848).

On November 19, 2023 (nearly one year after the ZBA adopted its Resolution of Approval and nearly two years after the first scheduled hearing

before the ZBA) the Objectors filed a Notice of Appeal (which was subsequently amended on December 18, 2023). (Pa862).

Though Objectors' Appellate Brief was originally due on February 26, 2024, it was only filed on June 7, 2024 and approved for filing on June 10, 2024. (Pb1).

STATEMENT OF FACTS

The Parties

The Homeowners, Adam and Marisha Sirois, own and occupy 24 Witches Lane, Highlands (Middletown), New Jersey designated as Block 770, Lot 4 on the Tax Maps of the Township of Middletown (the "Subject Property"). (Pa428).

The Homeowners applied for, and diligently pursued over the course of nearly a year, variance relief from Respondent, the ZBA, culminating in a unanimous approval. (Pa099; Pa101).

Appellants, Sarah Hearn-Nelson and Mitchell Nelson, are objectors who appeared at each and every hearing before the ZBA by and through their counsel, G. Aaron James, Esq. (Pa101). They own 27 Bayview Terrace, Highlands (Middletown), New Jersey. (Pa651).

Appellant, Paulina Giraldo, is an objector who appeared at each and every hearing before the ZBA by and through her counsel and partner, G. Aaron James,

Esq. (Pa101; Pa418). Ms. Giraldo owns 30 Bayview Terrace, Highlands (Middletown), New Jersey. (Pa702).

The Subject Property and Subject Structure

The Subject Property is located in the "Monmouth Hills" section of Middletown in an R-45 residential zone district. (Pa525-526; Pa102). The Subject Property is irregularly shaped and abuts two (2) separate roadways (Witches Lane and Bayview Terrace) as well as a walking path known as "Gypsy Pass." (Pa525-526; Pa102; SDa002). Witches Lane is on the uphill side of the Subject Property and is the only means of accessing the Subject Property by vehicle. (Pa526; Pa102). Bayview Terrace is downhill side of the Subject Property. (Pa526).

The Subject Property is situated on steep slopes defined to be "critical areas" under the Middletown Planning and Development Regulations, § 540-624 A. ("PDR"). (Pa445-446; Pa103). Approximately 54.6% of the Subject Property contains slopes in excess of 25% and defined to be "Class I Critical Areas." (Pa446; Pa103; SDa003; SDa027). A further 29.6% of the Subject Property has slopes of between 15% and 25% and defined to be "Class II Critical Areas." (Pa446; Pa103; SDa003; SDa027). In all, 84.2% of the Subject Property contains slopes defined to be Class I Critical Areas and Class II Critical Areas. (Pa446; Pa103; SDa003; SDa027). The Subject Property has a highpoint

of as much as 207' above sea level and a low point of approximately 155' above sea level for a 52' change in elevation from the front of the lot to the rear of the lot. (Pa444; Pa103). The extent and severity of the "critical" slopes on the undersized lot make a horizontal expansion of the existing undersized home impractical and dictate a vertical build. (Pa551).

The Subject Property is also heavily wooded with mature trees. (Pa432; SDa033; SDa034; SDa041).

There is an existing single-family home on the Subject Property. (Pa526; Pa103).

The existing single-family home dates to *c.* 1976. (Pa531; Pa103). The home was originally constructed with the benefit of variances for *e.g.* inadequate gross floor area, lot frontage, front setback, setback to structure supporting the parking area, rear yard setback, lot area and a variance to allow the construction of a home on a street that was not improved to municipal standards. (Pa531; Pa103; SDa016; SDa021).

The existing home is approximately 1,825 square feet spread over two (2) floors and set into the steep hillside. (Pa527). The existing home is constructed in a modern aesthetic and appears as a blue/grey wedge with a flat front façade and roof pitched downhill. The "first floor" of the home is sunken below the grade of Witches Lane and the home is accessed via a cantilevered foot bridge

connecting the driveway to the "second floor" of the home. (Pa527-528; Pa532-533; Pa103). The existing home is a "non-contributing" home in the Monmouth Hills District (as are the Objectors' homes). (Pa552; Pb9).

The Variance Relief

The Homeowners had to seek variances from the ZBA for height measured in both feet and stories as well as for front setback to a proposed, open, deck and to (re)build the home on a street that is not improved to municipal standards. (Pa099). Because the proposed height of the structure (44.9') exceeds the maximum allowable height in the zone (35') by more than 10%, the height variance measured in feet was a d. (6) variance pursuant to N.J.S.A. 40:55D-70 d. (whereas the height variance measured in stories was a c. variance). (Pa099).

Uncontested Proofs Received by the Zoning Board of Adjustment

Over the course of three (3) separate hearings before the Zoning Board of Adjustment, the Homeowners laid a record consisting of the testimony of three (3) separate experts and twenty-three (23) exhibits. (Pa412; Pa496; Pa625; Pa100-101). Though the Objectors cross-examined the witnesses, they offered no expert testimony of their own to contradict the Homeowners' expert testimony. (Pa627).

Among other things, the proofs adduced at the hearing demonstrated that the Subject Property is undersized. (Pa527). The Subject Property has frontages

on two (2) separate streets. (Pa526; Pa102). 84.2% of the Subject Property is classified as "critical" slopes which cannot be built on by ordinance. (Pa527; Pa103; SDa003; SDa027). There is a more than 50' change in elevation from the front of the property to the rear. (Pa444; Pa103). The existing home was built with the benefit of variances (that run with the land) *c.* 1976. (Pa531; Pa103; SDa016; SDa021). The existing home is objectively undersized for the zone having received a variance to allow for the structure to be smaller than otherwise required by law. (Pa531). The existing home is built in a modern aesthetic and "non-contributing" to the Monmouth Hills District. (Pa527-528; Pa552). Because the existing home is situated on steep slopes it: a) is solely accessible via a cantilevered bridge connecting Witches Lane and the second story of the home; b) is set partially atop piles driven into the ground in the rear of the home with a void beneath the mass of the structure; and c) the first floor of the home is set below the level of Witches Lane. (Pa528; Pa468; Pa532-533; Pa105; SDa029; SDa032). The proposed improvements consist of a third-story within the existing footprint of the home (that will appear to be a second story from the Witches Lane frontage). (Pa556; Pa106-107). Middletown measures the baseline for the height of a structure utilizing the average pre-construction grade at the four (4) corners of the home. (Pa468; Pa105). The fact that the rear of the home is set on piles contributes to the height variance by altering the

average pre-construction grade. (Pa468; Pa104). There is no practical way to expand the home horizontally without disturbing steep slopes. (Pa557; Pa106). There is no practical way to expand the home horizontally without disturbing mature trees (which themselves aid slope stability). (Pa557; Pa106). The steep slopes on the wooded lot accommodate a taller structure within the established footprint of the home. (Pa556; Pa111). The existing home is already constructed on a street not improved to municipal standards and would remain so constructed if the remaining variances were not granted. (Pa558; Pa104). The proposed front setback variance is to an open deck on the side of the home facing away from the Objectors' homes. (Pa559).

Objectors' homes are not contributing to the Monmouth Hills District. (P9). Objectors' homes are located 260' from the Homeowners' home. (Pa507; Pa107; SDa028). There is a roadway between the Homeowners' home and the Objectors' homes. (Pa675; SDa039). There is an interceding lot between the Homeowners' home and the Objectors' homes. (Pa675; SDa039). It is owned by the Township of Middletown. (Pa675). The Subject Property is wooded. (Pa461; SDa033; SDa034; SDa041). The Objectors' lots are wooded. (Pa462). The Objectors' homes (on "Bayview Terrace") are designed to take advantage of bay views in the opposite direction of the Homeowners' home. (Pa672; Pa712). The Homeowners' home will not impact the Objectors' water views.

(Pa674; Pa712). It is common for homes within Monmouth Hills to appear to be two (2) stories from one vantage point and three (3) or more stories from another. (Pa106-107; SDa 042-046; SDa048-049). In fact, Objector, Paulina Giraldo, lives in a taller home (50' plus feet) with significantly more stories (5 or even 6) than the Homeowners proposed. (Pa711-712).

Factual and Legal Basis for Approval of the Variances

The ZBA unanimously approved the Homeowners' application and adopted a fourteen (14) page Resolution of Approval that details the factual and legal basis (both positive and negative) for granting the variance relief. (Pa760; Pa099-112).

The Record Before the ZBA

The Homeowners appeared before the ZBA at four (4) separate hearings conducted on March 28, 2022, May 23, 2022, August 22, 2022 and September 12, 2022 respectively. (Pa099).

Because of an audio malfunction on the evening of May 23, 2022, the ZBA conducted a recorded rehearing of the May 23, 2022 hearing to ensure a verbatim record of the proceedings in accord with N.J.S.A. 40:55D-10 f. (Pa787; Pa499-502).

The rehearing commenced on August 22, 2022. (Pa499). The rehearing took place before the ZBA allowed any further testimony, opened the hearings

to the public, deliberated or rendered any decision on the matter. (Pa499). There were no temporal limitations placed on the rehearing which, in fact, continued on the evening of September 12, 2022. (Pa584-585). The ZBA compelled all witnesses to attend the rehearings to testify anew and to (re)submit to cross-examination. (Pa787; Pa584-585).

All parties were given the opportunity to create a record. (Pa787; Pa584-585).

For tactical reasons, *the Objectors* elected not to take make a record of certain evidential proffers despite having been afforded an opportunity to do so. (Pa566). That decision was verbalized on the record of the rehearing. (Pa566).

Absence of Constitutional Issues

Objectors seek a review of the Trial Court Judgment denying them a requested extension of time in which to file their Complaint in Lieu of Prerogative Writs. (Pa862). Objectors argue that the Trial Court erred by failing to acknowledge the existence of important and novel constitutional questions surrounding the absence of due process in the Middletown Landmarks Commission decision-making process. (Pa852). Notwithstanding the foregoing, the:

1) The Landmarks Commission is not a party to this action. (Pa862); and

2) The Objectors took no action to seek any type of review of the Landmarks Commission Certificate of Appropriateness though a copy of that Certificate was entered into evidence on the record of the March 28, 2022 hearing. (Pa426).

Absence of Issues of Public Interest

Objectors seek a review of the Trial Court Judgment denying them a requested extension of time in which to file their Complaint in Lieu of Prerogative Writs. (Pa862). Objectors argue that the Trial Court erred by failing to acknowledge the existence of important public rather than private concerns. (Pa852). Notwithstanding the foregoing, the Objectors admit that:

1) 27 Bayview Terrace (owned by the Objectors, Sarah Hearn-Nelson and Mitchell Nelson) is not a contributing home within the Monmouth Hills Historic District. (Pa651; Pb9);

2) 30 Bayview Terrace (owned by Objector, Ms. Giraldo) was completely destroyed by fire in 1994 (and, as such, is not original or historic). (Pa702; Pb9); and

3) In the words of the Objectors, "27 and 30 Bayview Terrace are the only two homes situated directly across the street from the rear of the Subject Structure, and whose occupants would be the only residents in the surrounding area impacted . . . ." (Pb10).

Publication of Notice of Approval

The Objectors admit that the Homeowners' December 2, 2022 publication of a Notice of Approval was fully disclosed to them in an email from the Board Secretary. (Pa803-805; Pa850-851). Objectors admit that the December 2, 2022 publication was not withheld from them or concealed from them. (Pa803-805; Pa850-851). Objectors admit that the December 2, 2022 Notice of Approval

triggered the commencement of the forty-five (45) appeal period. (Pa803-805; Pa850-851). Though the Objectors possessed the Notice of Approval early enough to file a timely appeal, the Objectors admit that they failed to timely file the Complaint in Lieu of Prerogative Writs. (Pa850). Objectors contend (without any legal precedent) that the failure of a "non-legally trained contractor" working for Objectors' counsel to read or appreciate the significance of the Notice of Approval should be grounds for extending the period of time in which to file the Complaint in Lieu of Prerogative Writs. (Pa854).

Evidence Outside the Record

A review of the transcripts from the hearings before the ZBA discloses that the Objectors only introduced three (3) exhibits. (Pa628). The majority of the remaining forty (40) exhibits attached as Exhibit A to the Certification of Krista Duno do not appear in the record of the proceedings before the ZBA. (Pa621; Pa101-102). Similarly, none of the exhibits to Paulina Giraldo's Certification or the Certification of G. Aaron James, Esq. were introduced as evidence during the ZBA hearings. (Pa621; Pa101-102). Moreover, many of those exhibits post-date the September 12, 2022 final hearing of the ZBA on the application in question. (Pa128; Pa815-839).

LEGAL ARGUMENT

I. BECAUSE THE OBJECTORS IGNORED THE PUBLICATION OF A NOTICE OF APPROVAL THAT THEY ADMITTEDLY OBTAINED, THE TRIAL COURT CORRECTLY DETERMINED THAT THE INTERESTS OF JUSTICE DID NOT MERIT A DISCRETIONARY ENLARGEMENT OF THE TIME IN WHICH TO FILE THEIR COMPLAINT IN LIEU OF PREROGATIVE WRITS (Pa847-848; Pa850-856; 1T18-1T20).

Interested parties disappointed with the outcome of a municipal land use hearing are afforded a review *of the record below* if they timely file a complaint in lieu of prerogative writs. The Objectors admittedly filed their complaint in lieu of prerogative writs out of time resulting in the need for the Objectors to file a motion to extend the time period in which to file. Failure to read email does not provide a legally cognizable basis for an enlargement of the period of time in which to file a complaint in lieu of prerogative writs. Nor does delegation to a "non-legally trained contractor" to analyze the legal significance of the body and attachments to an email provide a legally cognizable basis for an enlargement of the period of time in which to file the complaint in lieu of prerogative writs. With Objectors having failed to carry their burden to identify "substantial and novel constitutional issues," "important public rather than private interest that require adjudication or clarification" or any cognizable general equitable reason for an extension of time, the Trial Court correctly concluded that the Objectors showed no manifest interest of justice requiring an enlargement of time in which to file the complaint in lieu of prerogative writs.

"No action in lieu of prerogative writs shall be commenced . . . (3) to review a determination of a planning board or *board of adjustment* . . . after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality . . . . (emphasis added)." See N.J. Ct. R. 4:69-6 (b)(3).

N.J.S.A. 40:55D-10 i. instructs that, "[s]uch publication shall be arranged by the applicant unless a particular municipal officer is so designated by ordinance; provided that nothing contained in this act shall be construed as preventing the applicant from arranging such publication if he so desires." See N.J.S.A. 40:55D-10 i. Thus, the rule is that *the applicant* is required to publish the notice of decision and, even if the municipality varies that rule by ordinance, the applicant is still entitled to publish a notice of decision if so desired. See id.

Where, as here, both the Homeowners and the municipality publish a Notice of Approval, the Municipal Land Use Law is clear that, "[t]he period of time in which an appeal of the decision may be made **shall run from the first publication** of the decision, **whether arranged by the municipality or the applicant** (emphasis added)." See N.J.S.A. 40:55D-10 i.

The Homeowners published their notice of approval first – on December 2, 2022. (Pa804-805). Therefore, the Objectors were on notice that the statute of limitations for the filing of their action in lieu of prerogative writs ran from

that publication. See N.J.S.A. 40:55D-10 i. Accordingly, the deadline for Objectors to file their action in lieu of prerogative writs was January 17, 2023. See N.J. Ct. R. 4:69-6 (b)(3); see also N.J. Ct. R. 1:3-1 (discussing the computation of time). Because the Objectors conceded that they failed to timely file their action in lieu of prerogative writs, the Objectors moved to enlarge the period of time in which to file their complaint in lieu of prerogative writs pursuant to R. 4:69-6 (c).

Rule 4:69-6 (c) gives the court discretion to enlarge the time period in Rule 4:69-6 (b) only where "it is manifest that the interest of justice so require." See N.J. Ct. R. 4:69-6 (c). The three (3) traditional grounds for extending the statute of limitations are: 1) important and novel constitutional questions; 2) informal or *ex parte* determinations of legal questions by administrative officials; and 3) important public rather than private interests which require adjudication or clarification. Brunetti v. New Milford, 68 N.J. 576, 587 (1975). Balanced against those interests "is the important policy of repose expressed in the forty-five day rule. The statute of limitations is designed to encourage parties not to rest on their rights." Borough of Princeton v. Bd. Of Chosen Freeholders of County of Mercer, 169 N.J. 135, 152-153 (2001). Objectors present none of these three (3) reasons.

The Objectors never argued that there was any informal or *ex parte* determination of legal questions by administrative officials warranting an extension of the statute of limitations. (Pb9). Instead, the Objectors claimed that it was manifest in the interest of justice: a) that important and novel constitutional questions warranted an enlargement of time; and b) that public rather than private interest requiring adjudication or clarification warranted an enlargement of time. (Pa852-853). As a fall back, without pointing to any constitutional issues or public interests, the Objectors argued that general equitable considerations warranted an enlargement of time. (Pa854).

The Trial Court found no factual basis in the record indicating that this matter implicated important or novel constitutional questions so as to warrant an extension of time. (Pa852). The Trial Court found that the Objectors failed to provide any legal argument implicating important or novel constitutional questions. (Pa852). The Trial Court's findings were sound and should not be disturbed for this "garden variety" action in lieu of prerogative writ by a private landowner.

In an attempt to excuse the late filing, the Objectors struggle to develop a due process argument surrounding the Township of Middletown Landmarks Commission Certificate of Appropriateness placed into evidence at the March 28, 2022 ZBA hearing which Objectors attended. (Pa426). The Landmarks

Commission was not a party to the ZBA matter. (Pa862-866). Nor was the Landmarks Commission a party to the Objectors' Complaint in Lieu of Prerogative Writs. Assuming *arguendo* that the Objectors had no prior notice of the Certificate of Appropriateness, the Objectors acquired actual notice of the Certificate of Appropriateness on the evening of March 28, 2022 (at the very latest). (Pa426). As such, any challenge to the Certificate of Appropriateness would have been time barred as of May 12, 2022. See N.J. Ct. R. 4:69-6 (a); (Pa852). Having failed to timely seek any type of review of the *Landmarks Commission Certificate of Appropriateness*, left hanging is how the Objectors' due process rights would be violated by the Trial Court's refusal to exercise discretion to extend the period of time in which to file a complaint in lieu of prerogative writs challenging the *ZBA's Resolution of Approval* granting a height variance. Moreover, notwithstanding an abundance of time in which to do so, the Objectors elected not to introduce any type of expert testimony from a licensed professional planner or otherwise during the course of the hearings before the ZBA. (Pa627). Instead, the Objectors themselves (neighbors residing 260' from the existing and proposed "non-contributing" structure) were the only witnesses. (Pa627; Pa503). As such, Objectors made no record upon which to adjudge any alleged negative impact on their homes – both of which are likewise, admittedly, "non-contributing" to the Monmouth Hills District

themselves. (Pb9). Therefore, there is no colorable due process argument upon which to premise the requested extension of time.

Similarly, the Trial Court found that the Objectors' desire to frustrate the Homeowners from making the approved home improvements were private not public concerns. (Pa852). Again, the Trial Court's findings were correct and should not be disturbed. The Objectors are private home owners. (Pa101; Pa651; Pa702). Though the Objectors attempt to create some type of general public interest in the preservation of historic districts, the Objectors cite no legal authority. (Pb20-21). And, this argument falls flat when one considers that the Homeowners existing home is recognized as "non-contributing" to the district in the National Register of Historic Places Registration Form and that the Objectors home are not original to the district of contributing. (Pa552; Pb9). Furthermore, the Objectors also readily admitted, and continue to admit, that, "27 and 30 Bayview Terrace are the only two homes situated directly across the street from the rear of the Subject Structure, and whose occupants would be the only residents in the surrounding area impacted . . . ." (Pb10). That statement alone demonstrates that this is a purely private (not public) interest matter because the Objectors concede that the proposed improvements will not impact other homeowners. (Pb10). Objectors' admissions that none of the parties' homes are original to the district and that no other homeowners would be

impacted by the home improvements make the conclusion that this is a purely private issue inescapable. Since this is a private issue, there is no public interest basis upon which to premise the requested extension of time.

Lacking any novel and constitutional issues or public interests that require adjudication or clarification, the Objectors nevertheless sought an enlargement of the statute of limitations in reliance on Hopewell Valley Citizens' Group, Inc. v. Berwind Prop. Group Development Co., L.P., 204 N.J. 569 (2011). Because the Homeowners publication was disclosed to the Objectors, the Hopewell case (where the publication was concealed) is factually distinguishable. (Pa 803-805). Thus, Objectors' reliance is misplaced.

In Hopewell Valley Citizens' Group, Inc. v. Berwind Prop. Group Development Co., L.P., a citizens' group belatedly filed an action in lieu of prerogative writs challenging a three hundred fifty-nine (359) acre development consisting of at least eight (8) buildings totaling over 800,000 square feet as well as a daycare center, parking, interior roads and a wastewater treatment plant. Hopewell Valley Citizens' Group, Inc. v. Berwind Prop. Group Development Co., L.P., 204 N.J. 569, 572 (2011). Though both the developer and the municipality published a notice of approval, the Board Secretary failed to notify the citizens' group of the developer's notice of approval (and only notified the citizens' group of the municipality's notice of approval) causing a late filing.

Id. at 572-573. The trial court granted the defendant's motion to dismiss the action in lieu of prerogative writs as time-barred. Id. at 574. The Appellate Division affirmed. After granting certification, the Supreme Court was tasked with determining if the interests of justice warranted an enlargement of time under R. 4:69-6 (c). Id. at 578.

The Court analogized the facts before it to those of Cohen v. Thoft, 368 N.J. Super. 338 (App. Div. 2004). Id. at 584. In both cases, the plaintiffs belatedly filed actions in lieu of prerogative writs in reliance on correspondence with a board secretary that **solely** disclosed the existence of the municipality's notice of approval despite the earlier publication of separate notices of approval by the applicants. Id. Both cases recognized municipal negligence as a form of concealment justifying the invocation of R. 4:69-6 (c). Id. That said, the Court recognized that, "ignorance of the existence of a cause of action will not prevent the running of a period of limitations *except when there has been concealment*." Id. at 580.

The instant matter is distinguishable from both the Hopewell and Cohen cases because here the Board Secretary admittedly notified the Objectors of the Homeowners' Notice of Approval and furnished a copy. (Pa803) (stating, "Affidavits of publication for Sirois attached – the Board ad **and the Applicants' ad**. Merry Christmas! Erin") (emphasis added). All the Objectors

had to do was to read the email and calendar the filing deadline. The critical factual distinction in the instant matter is that there was utterly no concealment (negligent or otherwise). On the contrary, there was full and timely disclosure. (Pa803-805). The Board Secretary gave Objectors' office copies of Affidavits of Publication with regard to both advertisements and even pointed out the existence of two publication in the body of her email. (Pa803-805). Having received both affidavits of publication, it was incumbent on the Objectors to read the notices and apprise themselves of the controlling law. Had they done so, they would have found N.J.S.A. 40:55D-10 i. which clearly and unambiguously states, "[t]he period of time in which an appeal of the decision may be made **shall run from the first publication** of the decision, **whether arranged by the municipality or the applicant** (emphasis added)." See N.J.S.A. 40:55D-10 i. Objectors ignorance of the law does not provide grounds for enlarging the statute of limitations. See Hopewell Valley Citizens' Group, Inc. v. Berwind Prop. Group Development Co., L.P., supra, 204 N.J. at 580 (2011). Furthermore, and to address any contention that Ms. Duno's status as an independent contractor with no formal training as a paralegal should somehow change the result, the Trial Court's attention was called to Official Comment to Rule of Professional Conduct 5.3 which states:

> lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns,

> and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision . . . and should be responsible for their work product.

The Trial Court correctly relied on statements in Ms. Duno's certification when it concluded that the Board Secretary "provided assistance to Ms. Duno throughout, and on December 22, 2022 provided to Ms. Duno a copy of both the Sirois' affidavit of publication and the ZBA's affidavit of publication." (Pa854). The Trial Court correctly concluded that "[n]o information has been provided to the court that would indicate that plaintiffs were misled in any way by the ZBA, but rather, the information presented by the plaintiffs is that the plaintiffs' counsel delegated the follow-up work necessary to the successful filing of a timely prerogative writ complaint to a non-lawyer, non-employee, who had no background or training in the area of land use law, who did not know and apparently was not advised by plaintiffs' counsel that the time frame for filing of an appeal ran from the date of the publication of notice by the applicant, if that date is earlier than the publication by the ZBA, and who 'felt no need' to obtain information on the law from plaintiffs' counsel . . . ." (Pa855). The Trial Court correctly determined that there is no law that would permit the court to extend the filing due date due to an error in legal analysis by a non-lawyer

agent of the plaintiffs' counsel. (Pa856). As such, the Trial Court acted appropriately to deny the motion to enlarge the period of time in which to file the Complaint in Lieu of Prerogative Writs.

Because the Objectors failed to carry their burden to show any manifest interest of justice meriting an enlargement of the statute of limitations, the Trial Court correctly denied the Motion to Enlarge the Period of Time in Which to File the Complaint in Lieu of Prerogative Writs.

II. THE TRIAL COURT PROPERLY DETERMINED THAT THE ZONING BOARD OF ADJUSTMENT COMPLIED WITH N.J.S.A. 40:55D-10(f) BY CONDUCTING A REHEARING TO MAKE A VERBATIM RECORD BEFORE RECEIVING FURTHER TESTIMONY (Pa847-848; Pa856-861; 1T13-1T15).

N.J.S.A. 40:55D-10 f. requires municipal agencies to provide for verbatim recordings of proceedings by either stenographer, mechanical or electronic means. N.J.S.A. 40:55D-10 f. The purpose of the statute is to ensure that the reviewing court has a record upon which to determine whether the municipal agency's action was arbitrary, capricious or unreasonable. See Carbone v. Planning Board of Weehawken, 175 N.J. Super. 584, 586 (Law Div. 1980). Where no such record is available, the trial court ordinarily remands the matter back to the municipal agency with instructions to conduct a rehearing to make a proper record upon which the trial court may then determine the validity of the agency action. See id. Though the case of Carbone may be instructive for those

instances in which the absence of a verbatim record is first discovered *following the commencement of an action in lieu of prerogative writs*, it has no bearing on circumstances like these where an audio malfunction is discovered *during the pendency of the application* and where the board takes appropriate action to voluntarily conduct a rehearing to preserve a verbatim record. Here, the ZBA took immediate and appropriate action to correct the problem: it permitted the testimony to be re-presented. See (Pa787; Pa499-502). Making the Homeowners start from square one and to re-present proofs for which a verbatim record already exists makes no sense.

The Objectors moved for a remand and rehearing based upon an audio system failure at the May 23, 2022 hearing before the ZBA. (Pa847-848). The Trial Court acted properly in declining to remand the matter for a rehearing because the ZBA promptly discovered the audio malfunction during the pendency of the application and *conducted a full rehearing sua sponte* over two (2) nights to make the required verbatim transcript under N.J.S.A. 40:55D-10 f. (Pa787; Pa499-502).

On the Objectors' motion, the Trial Court received evidence that: a) following the May 23, 2022 hearing, the Board Secretary learned that the hearing audio was not recorded; b) the Board Attorney immediately disclosed the audio malfunction to the Homeowners' attorney and the Objectors' attorney;

and c) the Board Attorney took appropriate curative action to facilitate a rehearing where, "[t]he witnesses would again be subject to cross-examination and the evidence, and the witnesses presented by the objector would also have to re-testify [*sic*.]." (Pa787).

Over the course of two (2) separate nights – August 22, 2022 and September 12, 2022 – the ZBA conducted a rehearing and maintained a verbatim record of those proceedings pursuant to N.J.S.A. 40:55D-10 f. (Pa499-502; Pa584-585). The recorded rehearing took place before the ZBA received any further testimony, cross-examination, public comment, or summations on the application. (Pa499-502; Pa584-585). The recorded rehearing took place before the ZBA deliberated or decided the application. (Pa499-502.; Pa584-585). Each and every witness that testified at the May 23, 2022 hearing was subjected to direct examination and cross-examination anew on August 22, 2022 and September 12, 2022. (Pa498; Pa627). Both parties were afforded a full and fair opportunity to re-introduce any exhibits from the May 23, 2022 hearing. (Pa651) (stating, "So Mr. James you shouldn't have walked away. You can now proceed with any evidence you want to present to the Board.").

As a result, the Trial Court (and, in turn, the Appellate Division) received more than two hundred (200) pages of certified transcriptions from the rehearings conducted on August 22, 2022 and September 12, 2022 (not to

mention the 83 pages of transcripts from the March 28, 2022 hearing) upon which to determine the validity of ZBA's action. (Pa496-586; Pa625-761; Pa412-494).

Though the Zoning Board of Adjustment already conducted a full rehearing, the Objectors implored the Trial Court to remand the matter to the ZBA for *yet another* rehearing – effectively a third bite at the apple. (Pb27) (stating, "Appellants' ultimate position is that the matter should be remanded for rehearing . . . ."). In support of Objectors' request for a rehearing, Objectors claimed: a) that they were not given adequate time to lay a record at the rehearing, despite no time limit being imposed; b) that one of their witnesses was unavailable to attend the rehearing, despite the fact that the witness actually testified; c) that conducting a rehearing during the pendency of the application somehow inappropriately deprived the Objectors of an opportunity to introduce evidence, despite Objectors' strategic decision to withhold proffering such evidence at the rehearing. (Pa858-859). For the Trial Court's benefit, the Homeowners introduced relevant excerpts from the transcripts of the ZBA hearings to demonstrate that no temporal limitations were imposed on the rehearings, that all witnesses were afforded an opportunity to testify and that the Objectors made an affirmative election not to make a record of certain proofs despite having been afforded the opportunity. (Pa779-785).

The Objectors first argued that they were not given adequate time to lay a record at the rehearing. Contrary to the Objectors' assertions, the Trial Court received competent proofs in the form of transcript excerpts demonstrating that the ZBA did not set any time limitations on the rehearing. On the contrary, the Board Attorney specifically stated,

> So the first part of this meeting is going to be, the attorneys are [*sic.*] trying to do their best, their job to kind of recreate the testimony that was and that evidence that was [*sic.*] submitted at the May meeting. Then we're going to go to cross-examination like we did last time. And Mr. James will try to do the best possible be can do of [*sic.*] recreate his cross and his testimony. Once we get that done we're going to then proceed, continue as new stuff. **I don't perceive that we're going to finish tonight**. I know that Mr. James has at least one client that is home sick with their baby or young child . . . Well **we're then recarrying it to the 12th** . . . Okay, so that's what we're going to do today. (Pa500-501).

The above excerpt from the transcripts clearly demonstrated to the Trial Court that the ZBA did not limit the rehearing to a single evening or any set duration at all. (Pa500-501). Though the Board Attorney expressed a hope that the rehearing could occur in two (2) hours on the evening of August 22, 2022, the ZBA acknowledged that this might not be possible at the outset of the rehearing, indicated that the rehearing would be continued to September 12, 2022 if necessary and (in fact) allowed the rehearing to continue without

limitation on September 12, 2022. (Pa500-501; Pa629) (summarizing the direct and cross-examination of all witnesses at the continuation of the rehearing on the evening of September 12, 2022); (Pa584-585) (confirming there was insufficient time to cross-examine Andrew Janiw on the evening of August 22, 2022 and stating, "[h]old up, all right, for the record, this application is being carried to September 12th at 7:00 p.m. in these chambers . . . We expect all witnesses to be available for the plaintiff. Counsel you're going to be able to cross examine Mr. Janiw to start and then present any of your clients.").

Objectors next argued that their witness – Mr. Nelson – was unavailable to testify on the evening of August 22, 2022. As was amply demonstrated to the Trial Court, Mr. Nelson's absence on the evening of August 22, 2022 was irrelevant because the Objectors did not finish cross-examining the Homeowners' witnesses on August 22, 2022 and, as such, were not ready to re-call Mr. Nelson to testify at that time in any event. (Pa584-585). Furthermore, at the continued rehearing on September 12, 2022, the Objectors did, in fact, call Mr. Nelson to testify and he was subject to cross-examination. (Pa689) (commencing, "[s]ir please raise your right hand . . . please state your name, the spelling of your last name and give us your address sir . . . Mitchell N E L S O N, 27 Bayview Terrace . . . ."). The ZBA took testimony from Mr. Nelson without imposing any limits. (Pa689).

Objectors' final argument was that the rehearing somehow deprived them of an opportunity to introduce evidence. In that regard, the Objectors were never deprived of an opportunity to ask questions or introduce exhibits at the rehearing. (Pa651). On the contrary, *the Objectors* made a tactical decision not to introduce certain evidence. Objectors verbalized this tactical decision at the outset of their cross-examination of the Objectors' witnesses. In that regard, Objectors' counsel stated, on the record, "[j]ust for the Board's awareness Mr. Vella this will not be as exciting. There's no point in me asking questions we asked before that you guys objected to. So we'll try to narrow the focus." (Pa566). Aware that there was no record of the objectionable proffers from the night of May 23, 2022, Objectors chose not to make a record and elected to forego the introduction of testimony or exhibits. (Pa566). Having elected to forego making a record despite having been given a full and fair opportunity, Objectors blame the ZBA for their choice. The Trial Court acted properly by refusing to give the Objectors a third bite at the apple (via remand) when they refused to take a second bite. (Pa858).

Because the ZBA promptly discovered the audio malfunction and wisely conducted a rehearing before receiving any further testimony on the application or rendering a decision, the ZBA fulfilled its duty to maintain verbatim recordings of the proceedings pursuant to N.J.S.A. 40:55D-10 f. With the

benefit of a full, verbatim, record of the proceedings, there was nothing preventing the Trial Court from confirming the validity of the ZBA's unanimous approval of the Homeowners' application based upon the record below. In turn, the Trial Court acted properly in refusing to remand the matter to conduct what would have effectively been a "re-hearing of a re-hearing" for which a verbatim record already exists.

III. THE TRIAL COURT PROPERLY DECLINED TO ENTERTAIN A TRIAL *DE NOVO* (Pa847-848; Pa856-861; 1T15-1T16).

To adjudge whether the Trial Court erred by refusing to expand the record, it is important to re-emphasize the nature and scope of an action in lieu of prerogative writs. Often we gloss over black letter legal standards out of an imagined fear that we might be admonished for failing to provide a rote recitation of common and generally understood principals of law. In the ordinary course, we do not emphasize the scope of review or the available remedies. This is because there is typically general agreement amongst the parties on the rules of the game. But where, as here, a party asks the Court to depart from recognized legal standards to promulgate entirely new procedures, the prevailing law grounds the analysis.

Conditioned on a timely complaint in lieu of prerogative writs, Rule 4:69-6 (b)(3) allows the Trial Court "to review a determination of a planning board or board of adjustment." See N.J. Ct. R. 4:69-6 (a) and N.J. Ct. R. 4:69-6(b)(3).

A local zoning determination will be set aside only when it is "arbitrary, capricious and unreasonable." See Kramer v. Board of Adjustment, 45 N.J. 268, 296 (1965). Even if doubts are entertained as to the wisdom of the action, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion. See id. ". . . [W]hether the action was unreasonable, arbitrary or capricious must be decided upon the basis of what was before the planning board and not on the basis of a trial *de novo*, by affidavit or otherwise, before the Law Division." See Antonelli v. Planning Bd. of Waldwick, 79 N.J. Super. 433, 440-441 (App. Div. 1963); see also Kempner v. Edison, 54 N.J. Super. 408, 417 (App. Div. 1959) (stating, ". . . matters dehors the record of proceedings before the board of adjustment may not be considered by the appellate court.").

As the Antonelli case makes abundantly clear, the remedy in an action in lieu of prerogative writs is a review of the factual record developed before the board. The remedy is not a roving, endless, inquiry into matters outside that record. The ZBA's decision cannot be reversed based upon speculation about future conditions not in existence at the time of the hearings (or even now). The remedy is not to create a whole new record. As such, the Trial Court followed the law and properly declined the Objectors' motion to expand the record.

IV. THE CERTIFICATION IN OPPOSITION TO OBJECTORS' MOTION TO ENLARGE THE PERIOD OF TIME IN WHICH TO FILE THE COMPLAINT IN LIEU OF PREROGATIVE WRITS AND EXPAND THE RECORD BELOW WAS BASED UPON FACTS APPEARING IN THE RECORD AND REPLETE WITH RELEVANT, CERTIFIED, EXCERPTS FROM THE TRANSCRIPTS OF THE HEARINGS BEFORE THE ZBA (Not Raised Below by Appellants).

Objectors contend that the Certification of John B. Anderson, III, Esq. in opposition to the Objectors' Motion to Enlarge the Period of Time in Which to File the Complaint in Lieu of Prerogative Writs and Expand the Record Below was improper because it was not based upon personal knowledge or facts appearing of record. Objectors seemingly ignore the fact that Objectors' own motion was supported by a Certification of counsel as well as a Certification of a "non-legally trained contractor" working for counsel. (Pa812; Pa172-176). Setting this fact aside, the Certification of John B. Anderson, III, Esq. was both based upon personal knowledge and supported by facts appearing of record.

The Certification of John B. Anderson, III, Esq. addressed three (3) issues: a) the allegation that the ZBA failed to maintain a verbatim record; b) the allegation that the Homeowners (or the Board Secretary) were somehow at fault for Objectors' failure to timely file their Complaint in Lieu of Prerogative Writs; and c) the allegation that the Homeowners obtained their approval by fraud. (Pa779-785).

John B. Anderson, III, Esq. was counsel for the Homeowners and appeared at each and every hearing before the ZBA. (Pa779; Pa412; Pa496; Pa625). In that capacity, John B. Anderson, III, Esq. had personal knowledge of all hearings, was the recipient of the May 25, 2022 letter from the Attorney for the ZBA alerting the parties to the audio malfunction and personally participated in the rehearings of August 22, 2022 and September 12, 2022 where a verbatim record of the proceedings was maintained consistent with N.J.S.A. 40:55D-10(f). (Pa779; Pa412; Pa496; Pa625; Pa787). As such those portions of the Certification having to do with the record of the hearings before the ZBA were made based upon personal knowledge in accordance with R. 1:6-6. Likewise those portions of the Certification set forth facts admissible in evidence in the form of relevant excerpts from the certified transcripts of the hearings before the ZBA showing that: a) there were no time limits on the rehearings; b) all witnesses were afforded an opportunity to testify and subjected to cross-examination at the rehearings; and c) the Objectors verbalized their strategic decision not to make a verbatim record despite having been given a full and fair opportunity to do so. (Pa500-501; Pa584-585; Pa629; Pa651; Pa689). Moreover, the transcript excerpts referred to were actually appended to the Certification in accord with R. 1:6-6.

With respect to the Objectors' attempt to blame the Homeowners (or the Board Secretary) for their late filing, John B. Anderson, III, Esq. personally drafted the Homeowners' Notice of Approval and oversaw the transmission of the Homeowners' Notice of Approval to the newspaper and the Board Secretary. (Pa804-805). As such, John B. Anderson, III, Esq. had personal knowledge of the publication in question as required by R. 1:6-6. Additionally, those portions of the Certification discussing the Objectors' receipt of the Affidavit of Publication of the Homeowners' Notice of Approval were based upon email correspondence placed in the record *by the Objectors* in attachments to the Certification of Krista Duno (the "non-legally trained contractor" working for Objectors' counsel). (Pa763-776) Coincidentally, the Exhibit to Ms. Duno's Certification omitted the email attachment containing the December 2, 2022 Notice of Approval – the precise document at issue. (Pa775-776). Accordingly, counsel submitted the Certification based on facts of record and with *full* copies of the relevant documents appended in accordance with R. 1:6-6. (Pa803-805).

Addressing the allegation that the Homeowners' Resolution of Approval was obtained by fraud, the Certification, based upon personal knowledge of the attorney who cross-examined the Objectors, clearly demonstrated that the Homeowners did not make any fraudulent or potentially fraudulent proffers to the ZBA. On the contrary, the statements at issue regarding the existence of a

wooded-lot owned by the Township of Middletown and located between the Subject Property and the Objectors' property were adduced on cross-examination and made *by the Objectors themselves*. (Pa675; Pa698-699; Pa711). Moreover, those statements were elicited in response to statements made by Objector, Ms. Hearn-Nelson, to the effect that the Subject Property was right across the street from her home and leering down on her. (Pa675). Additionally, *the Objectors' statements* about the ownership and characteristics of the interceding lot were factually accurate both when made and when the motion was briefed and argued before the Trial Court. (Pa675, Pa698-699; Pa711). Clearly, the Homeowners cannot be said to have obtained an approval by fraud when they were not the declarants of the statements and when the statements at issue were factually accurate. Because the Certification was made by the attorney that cross-examined the Objectors based upon evidence in the record in the form of the excerpts from the certified transcripts of the hearings before the ZBA with the transcript excerpts appended to the Certification, the Certification was proper under R. 1:6-6.

Moreover, the Trial Court refused to expand the record below or grant discovery because, "[n]o evidence has been presented that would allow [ ] [the] court to conclude that the Sirois defendants obtained the ZBA approval by fraud." (Pa859). In other words, because the Objectors failed to carry their

burden. And, because, "[t]he court cannot expand the record presented before the ZBA to include things that happened after the ZBA's decision was made, and plaintiffs' request to obtain discovery and expand the record is without foundation in the law and must be denied." (emphasis added). (Pa860). These factual findings are correct and supported by the relevant sections of the transcripts. These legal conclusions are correct because sheer speculation about the detrimental impact of hypothetical future development of neighboring lots would not have been cognizable by the ZBA as a basis to deny or condition the Homeowners' application. See Landmark Land, L.L.C. v. Hazlet Twp. Planning Bd., 2007 N.J. Super. Unpub. LEXIS 787, *12 (App. Div. 2007) (upholding a Law Division finding that sheer speculation about the hypothetical future development of an abandoned paper street adjacent to a proposed subdivision was not a sufficient ground upon which to deny approval for an access road serving the subdivision). (Pa808-811 for a copy of the unpublished case that was placed before the Trial Court via counsel's certification).

The Trial Court did not commit error by reviewing relevant excerpts from the ZBA transcripts introduced via counsel's Certification because that is the precise record upon which the Trial Court is supposed to decide actions in lieu of prerogative writs.

V. THE TRIAL COURT'S JUDGMENT DENYING OBJECTORS' MOTION TO ENLARGE THE PERIOD OF TIME IN WHICH TO FILE THE COMPLAINT IN LIEU OF PREROGATIVE WRITS WAS PROPER AND NO APPEAL LIES FROM THE TRIAL COURT'S STATEMENT OF REASONS (Not Raised Below by Appellants).

The Objectors admitted that they failed to timely file their complaint in lieu of prerogative writs. (Pa113-114). The Objectors admitted that the sole cause of their late filing was their unilateral failure to review Homeowners' Affidavit of Publication of the Notice of Approval. (Pb17). The Objectors admitted receiving the Homeowners' Affidavit of Publication of the Notice of Approval more than four (4) weeks before their filing deadline. (Pa803-805). The Objectors failed to satisfy their burden to demonstrate that manifest interests of justice entitled them to an enlargement of time in which to file their complaint in lieu of prerogative writs under R. 4:69-6 (c). Because the Objectors failed to satisfy their burden, the Hon. Linda Grasso Jones, J.S.C. correctly entered Judgment declining to exercise discretion to extend the time in which the Objectors could file that complaint.

Rule 2:2-3 (a) allows appeals to be taken of right from "*final judgments* of the Superior Court trial division." See N.J. Ct. R. 2:2-3(a) (emphasis added). "[I]t is well settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons for the ultimate conclusion. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199

(2001); see also e.g. Heffner v. Jacobson, 100 N.J. 550, 553 (1985) (stating, "[a]n appeal lies not from a written or oral decision of a court, but only from a judgment or order"). Moreover, "[i]t is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of its affirmance." See Isko v. Planning Bd., 51 N.J. 162, 175 (1968), *abrogated on other grounds*, Commercial Realty & Resources Corp. v. First Atl. Properties Co., 122 N.J. 546 (1991).

Because appeals are taken from judgments and not written decisions, the Objectors' criticisms of the Statement of Reasons cannot form the basis for an appeal. As such, the Appellate Division should affirm the Trial Court's Judgment.

VI. THE INVITED ERROR DOCTRINE BARS OBJECTORS' CONTENTION THAT ISSUES THEY PLACED BEFORE THE TRIAL COURT ON MOTION WERE NOT RIPE FOR ADJUDICATION (Not Raised Below by Appellants).

As can be seen from the Objectors' "Notice of Motion to Enlarge the Period of Time to File and to Supplement the Record," the Objectors placed multiple issues before the Trial Court on motion. (Pa113-114). The Objectors did not confine their requested relief to an extension of time in which to file their complaint in lieu of prerogative writs. (Pa113-114). Instead, the Objectors simultaneously urged the Trial Court: a) to grant them discovery with the end goal of supplementing the record below; b) to expand the record below to

include documents that post-date the decision of the ZBA and to include documents that the Objectors previously chose not to proffer; and c) even to remand the matter to the ZBA based upon allegations that the ZBA failed to maintain a verbatim record pursuant to N.J.S.A. 40:55D-10(f). (Pa113-114; Pb27).

Having placed these issues before the Trial Judge in the first instance and having courted a ruling, the Objectors now complain that the Trial Judge should have refused to decide these issues for lack of "ripeness." Though the Trial Court acted entirely properly in entering Judgment on the motions before it, we do not even need to analyze the issue any further. That is because the Objectors ripeness argument is barred by the doctrine of invited error. "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when the party urged the lower court to adopt the proposition now alleged to be in error." See Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 447 (App. Div. 2021).

In Mack-Cali Realty Corp. v. State, various real estate developers, urban renewal entities, business owners and labor unions filed state and federal constitutional challenges to a Jersey City ordinance imposing a payroll tax inclusive of exemptions for employees who resided in Jersey City. See id. at 854. With the consent of all parties, the judge entertained oral argument on the

plaintiffs' motion for summary judgment and defendants' motion to dismiss with the common understanding that the court would issue dispositive rulings on all issues. Id. Prior to argument, plaintiffs' counsel stated that facial constitutional challenges were ripe for adjudication and that the timing was right for a decision on the merits today. Id. On appeal, the Court agreed with the defendants that the plaintiffs' objection to the procedure they invited was "meritless" and barred by the doctrine of invited error. Similarly, in the instant matter, the Objectors cannot plausibly claim that the Court should have withheld judgment on issues the Objectors elected to place before the Trial Court, briefed and argued. Having induced a ruling, the Objectors cannot be heard to claim the issues they raised were not ripe for adjudication simply because they do not like the decision.

VII. IF THIS COURT WERE TO EXTEND THE PERIOD OF TIME IN WHICH TO FILE THE COMPLAINT IN LIEU OF PREROGATIVE WRITS, IT SHOULD RETAIN ORIGINAL JURISDICTION TO DETERMINE IF THE ZBA ACTED ARBITRARILY, CAPRICIOUSLY AND UNREASONABLY (Pa022-Pa044; Pa065-Pa073).

Rule 2:10-5 allows the Appellate Division to exercise original jurisdiction as necessary to completely determine any matter on review. See N.J. Ct. R. 2:10-5. Rule 2:10-5 is intended to give the Appellate Division a means to "eliminate unnecessary further litigation." See Price v. Himeji, LLC, 214 N.J. 263, 294 (2013). In Price v. Himeji, LLC, the Supreme Court of New Jersey

upheld the Appellate Division's exercise of original jurisdiction as "entirely appropriate." Id. at 295. Price v. Himeji, LLC arose in the context of an appeal from a trial court order in a complaint in lieu of prerogative writs challenging a municipal zoning board of adjustment decision to grant variances. Id. In upholding the Appellate Division's exercise of original jurisdiction, the Supreme Court of New Jersey took the opportunity to provide guidance, stating, "an appellate court not only must weigh considerations of efficiency and the public interest that militate in favor of bringing a dispute to a conclusion, but also must evaluate whether the record is adequate to permit the court to conduct its review." Id.

Resort to original jurisdiction is particularly appropriate to avoid unnecessary further litigation where the record is adequate and no further fact-finding, administrative expertise or discretion is involved. Id. at 294. Likewise, resort to original jurisdiction is particularly appropriate where the standard and scope of review are identical to the standard and scope of review employed by the decision-maker into whose place the Appellate Division would step. Id. at 295. No useful purpose is served by remanding a land use matter to the lower courts for a review of a record that would be subject to review by the Appellate Division. See id. at 294 (quoting Bressman v. Gash, supra, 131 N.J. 517, 528-529 (1993)).

As is amply discussed in Section III, supra, in the context of a land use dispute, the role of the court is to evaluate whether the Zoning Board's decision 'is founded on adequate evidence.' See id. (quoting Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 385 (1990)). The record made before the Board is the record upon which the correctness of the Board's action must be determined. See id. (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 289 (1965)). In reviewing the record, the decision of the Zoning Board is accorded deference and the courts reverse only if they find that the Board acted arbitrarily, capriciously and unreasonably. See id. (citing Bressman v. Gash, supra, 131 N.J. at 529 (1993)).

Both this matter and Price v. Himeji, LLC involve appeals from decisions of a municipal zoning board of adjustment where the board's decision is entitled to deference and their decision will not be disturbed unless they acted arbitrarily, capriciously and unreasonably. Just like in Price v. Himeji, LLC, the ZBA developed a complete and thorough record consisting of over three hundred (300) pages of transcripts and a fourteen (14) page Resolution of Approval addressing the reasons for granting the variances challenged in Objectors' complaint. (Pa496-586; Pa627-761; Pa412-494; Pa099-112). Likewise, there is no further fact-finding, administrative expertise or discretion involved. The record is adequate to permit the Appellate Division to conduct a review for abuse of discretion. Efficiency and public interest militate in favor of bringing a two

(2) plus year dispute to a conclusion. If the Appellate Division extends the deadline to file the complaint in lieu of prerogative writs in the interests of justice under R. 4:69-6 (c), no useful purpose would be served by remanding the matter to the lower courts for their review of a record which is subject to review by this Court. As such, if the Appellate Division extends the deadline to file the complaint in lieu of prerogative writs, the Appellate Division should exercise original jurisdiction and decide the underlying merits of the appeal rather than remand.

If the Court needs to utilize its original jurisdiction to reach the substance of the matter, the record will amply demonstrate that the ZBA did not act arbitrarily, capriciously or unreasonably. (Pa099-112). The demonstrated fact that 84.2% of the undersized lot is encumbered by "critical" slopes that cannot be disturbed provided exceptional topographic conditions supporting the ZBA's grant of a c. (1) hardship variance. (Pa527; Pa552-553; Pa103; Pa106; SDa003; SDa027). See N.J.S.A. 40:55D-70 c. (1). The ordinance-based requirements to leave "critical" slopes untouched and to avoid deforestation allowed the ZBA to conclude that the benefits of a vertical build (in terms of public safety through continued slope stability and conservation of natural resources) outweighed any potential detriments thereby justifying the grant of a c. (2) balancing variance. (Pa551-553; Pa109-110). See N.J.S.A. 40:55D-70 c. (2); see also PDR § 540-

624 A.; see further PDR § 540-636 D. (2). These topographic and ecological concerns are recognized as special reasons justifying the ZBA's grant of a d. (6) height variance. See e.g. Davis Enterprises v. Karpf, 105 N.J. 476, 493 (1987) (stating, "[t]hus, a lot with unusual topography may provide a basis for a variance from restrictions as to maximum height."); see also N.J.S.A. 40:55D-2 a., b. and j. (recognizing *e.g.* public health, public safety, the avoidance of natural and man-made disasters and prevention of degradation of the environment as purposes of the Municipal Land Use Law).

Given that the Objectors reside 260' away in (taller) homes oriented in the opposite direction to take advantage of bay views, the ZBA was justified in finding that there was no substantial detriment to the public good in the form of any impact on light, air, open space, views or the like. (Pa507; Pa711-712; Pa107; Pa110-111; SDa028). Moreover, the ZBA was justified in finding that the variances could be granted without substantially impairing the intent and purpose of the ordinance because: a) it is common for homes in Monmouth Hills to appear to be two-stories from one vantage and three-stories or more from another vantage; b) the vertical build is grounded in the ordinance-based policies of avoiding disturbance of steep slopes; and c) the variance is a product of the fact that the existing and proposed home's height is amplified by the fact that the home is necessarily set atop piles to allow a level build on ground that drops

off more than 50' from the front of the lot to the rear. (Pa 444; Pa528; Pa468; Pa532-533; Pa674; Pa711; Pa106; Pa109-111; SDa042-046; SDa048-049; SDa032). See PDR § 540-624 A.; see further PDR § 540-636 D.

CONCLUSION

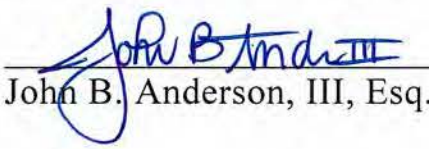
Because the remedy in an action in lieu of prerogative writs is limited to a deferential review of the record before the board of adjustment, the Trial Court correctly refused to allow the Objectors a third bite at the apple to make the record that they chose not to make when afforded the opportunity at a recorded rehearing before ZBA. Moreover, the Trial Court correctly refused to supplement the record to include speculation about future, off-site, conditions not in existence during the hearings before the ZBA and not in existence more than a year later when Objectors' motion was decided.

The ZBA's grant of a residential height variance is a purely private concern which the Objectors admit has no potential to impact anyone else in the community and which is devoid of any substantial and novel constitutional questions. The publication of the Homeowners' Notice of Approval was statutorily proper and (admittedly) conspicuously disclosed to the Objectors more than four (4) weeks before the filing deadline. Objectors' willful disregard of the email and ignorance of the law are not grounds for granting an extension of time. As such, the Trial Court correctly dismissed the Objectors' late-filed

complaint in lieu of prerogative writs because the Objectors failed to carry their burden to demonstrate a manifest interest of justice compelling an enlargement of time. For the foregoing reasons, the Appellate Division should sustain the Trial Court's October 18, 2023 Judgment.

If the Appellate Division identifies some manifest interest of justice meriting an extension of time that the Trial Court heretofore overlooked, the Appellate Division can, and should, exercise its original jurisdiction to review the more than three hundred (300) pages of transcripts for abuse of discretion because no useful purpose would be served in remanding the matter to the lower court for a review of a record that is subject to review by this Court.

Respectfully Submitted,
FOSS, SAN FILIPPO & MILNE, LLC
Attorneys for Defendants-Respondents,
Marisha Sirois and Adam Sirois

By: 
John B. Anderson, III, Esq.

Dated: July 2, 2024

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

MITCHELL NELSON, SARA HEARN-NELSON; PAULINA GIRALDO Plaintiff-Appellant, v. MARISHA SIROIS, ADAM SIROIS TOWNSHIP OF MIDDLETOWN ZONING BOARD OF ADJUSTMENT Defendant-Respondent	ATTORNEY: Collins, Vella & Casello LLC 2317 Highway 34, Ste. 1A Manasquan, NJ 08736 Attorney ID: 034361995 gwvesq@aol.com ON APPEAL FROM: Superior Court of New Jersey Law Div., Monmouth County APP DOCKET NO: A-000845-23 Docket No: MON-L-0192-23

Sat below:
Honorable Linda Grasso Jones, J.S.C.

CIVIL ACTION

RESPONDENT, ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MIDDLETOWN'S BRIEF

Of Counsel and on Brief:
Gregory W. Vella, Esq.

TABLE OF CONTENTS

1. TABLE OF CITATIONS OF CASES

2. TABLE OF CITATIONS OF STATUTES AND ORDINANCES

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

PRELIMINARY STATEMENT

Mitchell Nelson, Sarah Heard-Nelson and Paulina Giraldo ("Appellants") filed a Prerogative Writ against the Zoning Board of Adjustment of the Township of Middletown ("Zoning Board") and Marisha Sirois and Adam Sirois ("Respondents") challenging the Zoning Board granting variance relief to permit the Respondents to construct a 2,941 square foot addition to their single-family home.

This first issue before the Appellate Division is a result of the Appellants failing to file the Prerogative Writ within the time required under Rule 4:69-6(c) and appellants request to enlarge the statute of limitations. The second issue before the Appellate Division is the Appellants request to re-do the hearings before the Zoning Board that occurred on August 22, 2022, and September 12, 2022, because the Appellants were not happy with the outcome of those hearings and their request to expand the record below. The second issue is moot, if the Appellate Court denies the Appellants request to enlarge the time requirements of Rule 4:69-6(c).

The Zoning Board is not taking any position, as to the failure of the Appellants to comply with the requirements of Rule 4:69-6(c), other than, to reiterate what the Honorable Linda Grasso Jones, J.S.C.'s noted in her in decision that the Zoning Board provided both, the Zoning Board's Notice of Publication and

the Respondents Notice of Publication to the Appellants on December 22, 2022. PA 851. As admitted by the Appellants, the attorney for the Appellants relied on a "non-legally trained contractor" to determine his client's statutory of limitations time requirements. There has not been any misrepresentation with respect to when the notice of decisions was published by the Zoning Board or its staff.

PROCEDURAL HISTORY

The Respondents are the owners of 24 Witches Land in the Township of Middletown. The property is also identified as Block 770, Lot 4. The Respondents filed an application before the Zoning Board of Adjustment for variance relief to construct a 2,941 square foot addition to their home.

The first hearing on the application was heard on March 28, 2022. The second hearing was conducted on May 23, 2022. However, after the hearing, the Zoning Board discovered that there was no audio, just video, on the recording of the hearing. T 4:17 – 4:25 (August 22, 2022). As a result, the Zoning Board conducted a re-hearing of the May 23, 2022, hearing. The re-hearings were conducted on August 22, 2022, and September 12, 2022.

On September 12, 2022, the Zoning Board voted in favor of the application and adopted a Resolution of Approval on November 28, 2022. PA 99. Notice of Decision was published by the Respondent on December 2, 2022, and the Zoning Board published a Notice of Decision on December 8, 2022. The Appellants filed their Prerogative Writ complaint on January 20,2023. PA 001.

On October 18, 2022, the Honorable Linda Grasso Jones, J.S.C. denied the Appellants motion to enlarge the time to file the complaint pursuant to R. 4:69-6(c) and denied Appellants request to remand the matter back to the Zoning Board to

re-do the re-do hearing and denied Appellants request to expand the record. PA 847.

STATEMENT OF FACTS

The facts relevant to the appeal of the denial of Appellants request to remand the matter back to the Zoning Board to re-do the re-do hearing and request to expand the record are as follows:

The Respondents filed an application before the Zoning Board to construct a 2,941 square foot addition to their home, which required certain variances. The Zoning Board conducted the first hearing on the application on March 22, 2022.

The second hearing was conducted on May 23, 2022. After the hearing, the Zoning Board learned that the recording system for the May 23, 2022 meeting only recorded the video, but no audio. The Appellants and Respondents were advised of the failed recording and were advised if they could agree to a stipulation of facts for the hearing and if not, the Zoning Board would conduct a re-do hearing, since there was no audio recording of the May 23, 2022 hearing. The Appellants and Respondents could not agree to a stipulation of facts and the Board scheduled a re-do hearing for August 22, 2022.

At the August 22, 2022 hearing, the, Appellants, Respondents and the public were advised and instructed as follows:

> MR. VELLA: Mr. Chairman that's record. Just for the record, we had a three hour meeting on May 23rd, 2022 on this application. During that application the applicant had some individuals testify. We had cross examination. I don't even think one witness was partially testified.

Following that meeting under Municipal Land Use Law we are required to audio record these, which we always do, except for this instance. And what happened was that we are in a new room and we learned that the, we only recorded video, no audio. And apparently there was some internal switch within the computer system that, I'm not throwing the IT guys completely under the bus, but was, the microphones were turned off. And we had no idea we were not recording.

So after the hearing counsel for some of the objectors asked for an OPRA request. In our normal course, our Board secretary went back just to check the tapes and advised me that they didn't record. And that was the only application for this hearing. I then notified both counsel for the applicant and the attorney for the objectors that we had a problem. And we now have rescheduled this.
And this is, the parties couldn't agree to an agreement. This is not uncommon. This happened before us and like 15 years ago, Michael Steib was the attorney. One meeting just didn't record. We got up to –- we only knew about that in the Law Division. It got remanded back for the best attempt possible to recreate the evidence. Then it went back up to the Law Division. So that's essentially what we're doing.
We knew about it. If the application got approved or denied and we didn't do this and then someone filed a lawsuit, it would go all the way up there and the Judge would say go back down and redo it.
So I don't know if it's lucky, but we do know there was a problem so that's what we're here for, for recreation of the record. It's not kind of a redo.
The Board did hear all that testimony. We do have Mr. Truscott or has listened to the or was

available at the original March and Cathy Rogers were not here for May. They're going to hear this testimony here today so they'll be eligible to participate, even though I don't believe we're going to finish tonight.

> So the first part of this meeting is going to be, the attorneys are trying to do their best, their job to kind of recreate the testimony that was and the evidence that was submitted at the May meeting. Then we're going to go to cross examination like we did last time. And Mr. James will try to do the best possible he can do of recreate his cross and his testimony. Once we get that done we're going to then proceed, continue as new stuff. I don't perceive that we're going to finish tonight. I know Mr. James has at least one client that is home sick with their baby or young child.
> (inaudible)
> MR. VELLA: Okay. Well we're then recarrying it to the 12th, but I knew at least one of them wasn't. Okay, so that's what we're going to do today. Hopefully crunch three hours into two hours and go from there. And try to do the best we can to create the record.
> Now Board members you've heard the testimony previously. You're going to hear it again. What they
>
> presented is still viable, we're just trying to recreate a record if it goes to Court. Okay, Mr. Anderson please enter your appearance and we'll turn the clock back to May 23rd, 2022.
> (T 4:11 – 7:4) August 22, 2022

At the end of the August 22, 2022 hearing, Appellants did not complete the cross examination of Respondents Planner, Andrew Janiw, PP and Respondent Adam Sirois. The Appellant also did not have the opportunity to call his client. As a result, the re-do hearing was carried to September 22, 2022 and the Appellants, Respondents, and the Public were advised:

> MR. VELLA: Hold up, all right, for the record, this application is being carried to September
>
> 12th at 7:00 p.m. in these chambers. If you received certified mail, you will not receive it again. This is your notice for September 12th. This application is being carried without further notice.
> We expect all the witnesses to be available for the plaintiff. Counsel you're going to be able to cross examine Mr. Janiw to start and then present any of your clients. And any of the members of the public and conclude this matter.
> MR. JAMES: Mr. Janiw and Mr. Sirois.
> MR. VELLA: Yeah, I kept on forgetting Mr. Sirois. Yeah, correct. Okay.
> (T 89:24 – 90:12) August 22, 2022

At the September 22, 2022, the re-do hearing was continued and Appellant and Respondent were able to conclude the re-do testimony and then completed all remaining testimony for the application. On September 22, 2022, the Zoning Board approved the application and on November 28, 2022, the Zoning Board Adopted a Resolution of Approval. PA 098

The Appellants filed a motion to remand the matter to re-do the re-do hearing and expand the record, which was denied by the Honorable Linda Grasso Jones, J.S.C. on October 18, 2022. PA 849. This brief is in response to these issues on appeal.

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT THE MATTER SHOULD NOT BE REMANDED BACK TO THE ZONING BOARD TO RE-DO THE RE-DO HEARINGS AND THE RECORD CANNOT BE EXPANDED. PA 849

With respect to the Appellants request to reverse the Trial Court's ruling that the matter should not be remanded back to the Zoning Board to re-do the re-do hearing, the pertinent facts are not in dispute. On May 23, 2022, the Zoning Board held a hearing regarding the underlying application. This was the second meeting regarding this application on May 23. 2022. At the May 23, 2022 meeting certain witness for the Respondents testified and were cross examined by G. Aaron James, Esq., attorney for the Appellants. The attorney for the Appellant also presented witnesses, who were cross examined by the attorney for the Respondents. Following the meeting, the Board and the parties became aware that the video tape of the meeting only recorded the visual component and failed to tape the audio portion.

The Zoning Board is well aware of their responsibility to record all meetings either by stenographer, mechanical or electronic means pursuant to NJSA 40:55D-10. The Zoning Board is also aware of the numerous court decisions that hold that when a recording is either not done or the recording device malfunctions, the parties, if they agree can recreate the record, and if not, the matter should be remanded to redo the hearing.

Where no record has been made or the record is deficient, a trial court may attempt to reconstruct the record with the aid of counsel. *Scardigli v. Borough of Haddonfield Zoning Bd.*, 300 N.J. Super. 314, 322-23, (App. Div. 1997). If, however, the court cannot resolve the matter by stipulation of the record or by reconstruction, it must remand the case to the board with an order that it reconstruct the record. *Ibid.* If the board is unable to do so, it must then hear the testimony on the application anew. *Ibid.; Carbone v. Planning Bd.*, 175 N.J. Super. 584, 586, (Law Div. 1980).

Here, the Zoning Board became aware of this malfunction prior to the next hearing and prior to the Board making any decisions and prior to an appeal being taken. The attorneys for the Respondent and Appellant were asked if they would agree to a Stipulation as to the record of the May 23, 2022 meeting, which they could not agree. As a result, and pursuant to the law, a hearing was scheduled to redo the May 23, 2022 hearing and both parties were advised to have their witnesses re-testify and the they would also be re-cross examined. Neither party was limited to having their witnesses re-testify or re-cross examined.

This procedural history regarding this incident and the instructions to the parties and the Board were put on the record on August 22, 2022. It is noted that the everyone was specifically instructed as follows:

> So the first part of this meeting is going to be, the attorneys are trying to do their best, their job to recreate the testimony that

> was and the evidence that was submitted at the May Meeting. Then we're going to go to cross examination like we did last time. And Mr. James will try to do the best possible he can do to recreate his cross and his testimony. (T 6:5 – 6:11) August 22, 2022

The Appellant in this matter is asking the court to remand for a new re-do rehearing as the attempt by Counsel for the Zoning Board to reconstruction led to the obvious mischief and human nature that denied both parties' due process. Appellant has provided no evidence or any explanation of what "mischief and human nature" denied both parties' due process. The Zoning Board permitted both sides to re-testify, and all witnesses were re-cross examined, pursuant to the law. No due process was denied. Remanding the matter again, will not change any of the evidence submitted or testified to.

At no time, was either party limited in time to re-create the hearing. Remanding the hearing will not provide any new information, as the Board has already conducted the re-do hearing, which was required by law. As such, the matter should not be remanded, as the Board has already complied with the law.

The Trial Court correctly found that if the Zoning Board did not conduct the re-do hearing, the Trial Court would have had to remand the matter for a re-do hearing. Since this was already done, there is no reason or benefit to remand the matter back to re-do the hearing. PA 859

The Zoning Board complied with the requirements of the law and conducted a re-do hearing, which did not limit the Appellants or the Respondents and both were given ample opportunity to recreate the record. As such, the Appellate Court should affirm the decision of the Trial Court denying the request to remand the matter back to the Zoning Board to re-do the re-do hearing.

With respect to the Appellants' appeal of the Trial Court's denial of the request to conduct discovery and supplement the record. The law is clear. The record made before the Board is the sole factual recital and matters outside the record may not be considered by a court on appeal. *Kempner v. Edison*, 54 NJ Super 408, 417 (App. Div. 1959).

Here, the Respondent is attempting to supplement the record, not with evidence about the subject property but with proposals and documentation on property owned by the Township of Middletown, that neither the Appellant or the Respondent have any right to. It appears the Appellant wants to introduce documents regarding potential development of that property. Neither the Appellant nor the Respondent have any right to develop that property, as it is owned by the Township of Middletown. Moreover, from a review of the documents the Appellant desires to supplement the record with, they are only proposals. Moreover, the proposals are not even from the Township of Middletown, who own the property. There is no evidence that the property is

going to be developed and if so, to what extent. Further, the report was not even prepared for the owner of the property.

Regardless, the Zoning Board's decision must be based on the facts at the time of the application. The Zoning Board cannot decide any application based on what may or may not happen to other properties in the area.

The Zoning Board's decision can only be overturned if the board's decision is "arbitrary, capricious or unreasonable". If any Board would decide an application based on the hypothetical development of other properties in the neighborhood, that decision would be arbitrary, unreasonable, and capricious, as it would not be based on facts. The Appellant is attempting to cloud this matter with the potential development of another property, which is not permissible. Clearly the Appellant has a problem the potential development of property owned by Middletown, but that has no bearing on this application or the decision of the Board that was made with all the facts presented, not the potential or hypothetical development of another property. The Trial Court correctly found that purported evidence of events that may occurr in the future are nor relevant to the Zoning Board's decision. PA 860. As such, the Appellate Court should affirm the Trial Court's denial of the request to supplement the record.

CONCLUSION

For all the reasons, the Trial Court's holding denying the remand and denying the request to supplement the record should be affirmed.

COLLINS, VELLA & CASELLO, LLC
Attorneys for the Township of
Middletown Zoning Board of
Adjustment

Dated: 07/03/2024

By: /s/ GREGORY W. VELLA_____
Gregory W. Vella, Esq.

LAW OFFICE OF G. AARON JAMES
River Centre 3
Suite 320
331 Newman Springs Road
Red Bank, New Jersey 07701
Tel: (732) 291-5143
Fax: (732) 291-5146
gjames@njcountrylawyer.com
G. Aaron James, Esquire (043341996)
Attorneys for Plaintiffs-Appellants

MITCHELL NELSON; SARAH HEARN-NELSON; PAULINA GIRALDO Plaintiffs-Appellants, vs. MARISHA SIROIS; ADAM SIROIS; ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MIDDLETOWN Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000845-23 Civil Action On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION MON- L-0192-23 Sat Below: Hon. Linda Grasso Jones, J.S.C.

BRIEF FILED ON BEHALF OF PLAINTIFFS-APPELLANTS IN SUPPORT OF NOTICE OF APPEAL

LAW OFFICES OF G. AARON JAMES
River Centre 3, Suite 320
331 Newman Springs Road
Red Bank, New Jersey 07701
Tel: (732) 291-5143
ATTORNEYS FOR PLAINTIFFS–APPELLANTS

Of Counsel and on the Brief:

G. Aaron James, Esq.

TABLE OF CONTENTS

TABLE OF JUDGMENTS

TABLE OF AUTHORITIES

Statutes

TABLE OF CONTENTS OF APPENDIX

Page

TABLE OF CONTENTS OF TRANSCRIPT(S)[1]

1 The various transcripts included in the appendix are all exhibits to the Certification of Krista Duno. There served as evidence submitted to the motion judge and are of the meetings before Defendant-Respondent Township of Middletown Zoning Board of Adjustment (the "ZBA"). These exhibits ***are not*** stenographic transcripts of the arguments or testimony that form the record below in the Superior Court and therefore ***are not*** to be excluded pursuant to *R.* 2:6-1(a)(1).

PRELIMINARY STATEMENT

This case is an action (i) in lieu of prerogative writs and (ii) a collateral challenge based on fraud committed by Defendants-Respondents Marisha and Adam Sirois ("Applicants"); all as to a "Resolution" entered by Defendant-Respondent Township of Middletown Zoning Board of Adjustment (the "ZBA"). The instant appeal relates to the motion judge's determination to dismiss the Complaint in its entirety based on Appellants' filing it four days after the deadline calculated under *R.* 4:69-6 and based solely on Applicants' unanticipated and unnoticed publication.

The Complaint and requisite Pre-Trial Memorandum set forth in specificity Appellants' objections to the actions (i) of the ZBA in reaching its Resolution and (ii) of Applicants in fraudulently pursuing their application. Appellants filed motions to (i) enlarge the 45-day period by four days, and (ii) to supplement the record. The motion judge denied both motions and dismissed the Complaint in its entirety.

The subject proposed "Addition" required six variances and would express itself as an entirely new "ultra-modern" building and be the first new home built in over twenty years within the Monmouth Hills Historic District ("Monmouth Hills").

The complete absence of a verbatim record of a three-hour meeting of the ZBA is not in dispute. The Resolution makes clear that the ZBA relied upon evidence and arguments that were offered during an undocumented and unrecorded hearing.

The Resolution is woefully inadequate as it fails to use the word "exhibit" at all. The phrase "special reasons" is used once without any basis for concluding such exist. The words "conclusion," "concludes" or "conclude" are also absent from the

14-page Resolution. Finally, the ZBA relied on the net opinion of the Applicants' expert witness that was devoid of any basis for that expert's conclusions.

While Applicants were allowed to "mark exhibits into evidence," Appellants were not allowed to avail themselves to the residuum rule of evidence. The Resolution, but none of the transcripts, make clear that many of the exhibits that Appellants "marked for identification" were rejected. Nowhere in the available transcripts, including those of the purported "redo" meetings, is there any instance of Counsel for Appellants identifying any exhibits or moving exhibits into evidence.

Most troubling is that the ZBA abdicated its authority and responsibility of protecting the aesthetics of a designated historic district. Counsel for the ZBA states within the available verbatim record that the Township of Middletown Landmarks Commission (the "Landmarks Commission") has exclusive authority to approve a proposed structure within a historic district. However, the Resolution contradict by stating that Appellants' "stylistic criticisms of the proposed home are unfounded" without conducting any analysis of the ordinances relevant to historic districts.

Appellants' motions were based on omission, so there was no choice but to provide the entirety of the transcript to show what was absent from the record. It appears that the motion judge may have attempted to boil the ocean by making many findings without any support in the record. The subject motions sought to have the motion judge reach the determination as to only two binary questions for the threshold determination as to whether enlargement of the time for Appellants to file their complaint by four days is so manifest that the interest of justice requires it.

The first question is whether the preservation of a historic district that is listed on the National Register of Historic Places "constitutes an important public interest." The answer must be "yes" as the National Register protects historic sites for future generations of the public to enjoy. The question of whether the ZBA considered the impact of the Addition on the historic aesthetic of the community was not yet ripe.

The second question is whether due process is violated in the context of the Landmark Commission's independent determinations as to whether new structures are appropriate for historic districts by way of a process (i) without any notification to neighboring properties, (ii) without any form of a meeting—public or otherwise, (iii) without any requirement to publish its determination, and (iv) that may only be challenged by way of filing a prerogative writ under *R.* 4:69-6 within 45 days of such a determination, as both Counsel for the ZBA and Counsel for Applicants assert on the record. Of course, the answer must be that due process is violated. Whether the ZBA has deferred to the Landmark Commission is a question that was not yet ripe.

While this matter falls into two of the "three categories" that were traditionally required for enlargement, the Supreme Court dispensed with this requirement.

Finally, the motion judge conflates the notion of an opportunity to be heard with whether there exists a verbatim record of what the ZBA relied upon in making its determination. In the instant case, as the Resolution cites evidence and arguments not found in the record, the motion judge simply cannot reach a determination as to whether the Resolution was arbitrary, capricious and unreasonable, and/or unsupported by the evidence in the record.

PROCEDURAL HISTORY

On April 8, 2021, Applicants submitted plans for a 2,941 square foot ultra-modern "Addition" that would more than double their 2,314 square foot home located in the Monmouth Hills. (Pa180-Pa187; Pa362-Pa371; Pa377-Pa378)

On April 21, 2021, without any meeting of the Board of Directors, notice to shareholders, and without following any process at all, Applicants, including Marisha Sirois—an officer and a director of Monmouth Hills, Inc. ("MHI"), purportedly obtained MHI's "approval" to modify the property, which was submitted to the ZBA. (Pa186)

On May 20, 2021, Applicants purportedly obtain a Certificate of Appropriateness from the Township of Middletown Landmarks Commission (the "Landmarks Commission"), however there is no record of when the requisite application was made or whether any meeting was held to consider the same. (Pa190)

After various revisions to its plans, the Township of Middletown ("Middletown") denied Applicants' application for reasons stated within a Technical Memorandum dated December 3, 2021, which required Applicants to obtain variances from the ZBA. (Pa180-Pa187)

The first hearing was scheduled for December 13, 2021, however Applicants requested that the application be carried to the next meeting on January 24, 2022 and Appellants consented. (Pa417)

Counsel for Appellants contracted COVID-19, so at the January 24, 2022 meeting, the application was carried to the next meeting on February 28, 2022. (Pa418)

The ZBA did not reach the application on February 28, 2022, so it was carried to March 28, 2022. (Pa417)

On March 28, 2022, Applicants began their presentation and each Applicant Adam Sirois, his architect, and surveyor gave their direct testimony before the meeting was adjourned and the application was carried to May 23, 2022. (Pa412-Pa494)

On May 23, 2022, Applicants continued with the further testimony of each Applicant Adam Sirois, his architect, and his surveyor. Applicants' expert witness also testified. After completion of Applicants' presentation, Counsel for Appellants cross examined all four of Applicants' witnesses. Appellant Mitchell Nelson gave direct testimony and Counsel for Applicants cross examined him before the meeting was adjourned. Due to the failure of the recording system, there is no verbatim record of any of the four direct examinations or four cross-examinations that occurred over nearly three hours. (Pa60-Pa112)

On August 22, 2022, Counsel for ZBA instructed that although the events of May 23, 2022 were not recorded, each ZBA member should rely on what transpired. However, Counsel for ZBA could not himself remember whether Appellants called any witnesses. In fact, two Appellants, including Appellant Mitchell Nelson, who testified at the May 23, 2022 meeting were not present on August 22, 2022. The direct

testimony of Appellants' four witnesses was remarkably different as they all anticipated the questions that had been asked on cross-examination on May 23, 2022. As such the cross-examinations of Counsel for Applicants were likewise "unscripted" and having nothing to do with what transpired on May 23, 2022. The meeting adjourned after cross-examination as Mr. Nelson was not present, and the application was carried to September 12, 2022. (Pa115-Pa124; Pa496-Pa620)

On September 12, all three Appellants gave direct testimony and were cross examined by Counsel for Applicants. In total, the application was heard at the ZBA meetings held on March 28, 2023, May 23, 2022, August 22, 2022, September 12, 2022 (collectively, the "Subject Hearing"). At the conclusion, the ZBA voted in favor of Appellants' application at the last of these four meetings. (Pa624-Pa761)

There were no less than a score of emails exchange between Counsel for Appellants and the ZBA between September 12th and eve of the Christmas weekend to determine (i) when the decision would be adopted, and (ii) when the decision would be published. It took more than two and half months before the ZBA even adopted the Resolution. Counsel for Appellants could not have been clearer as to his clients' intention to appeal and the ZBA could not have been clearer that the ZBA would publish the decision in the Two River Times on December 8, 2022. (Pa763-Pa778)

On November 28, 2022, the ZBA adopted its resolution granted Appellants their variances (the "Resolution"). (Pa098-Pa112)

On December 22, 2022 and only a few minutes before the beginning of Christmas weekend, the ZBA email to the staff of Counsel for Appellants a copy of

the affidavit of publication confirming that the ZBA did in fact publish its decision in the Two River Times on December 8, 2022. Unbeknownst to Appellants, Counsel for the ZBA, and the ZBA Secretary, who were all aware of Appellants' intention to appeal the decision of the ZBA, Counsel for Applicants published the decision independently and without any prior notification on December 2, 2022. The affidavit evidencing that such publication was made 20 days earlier was also provided in the same email. (Pa764)

On January 20, 2023, Appellants filed their Complaint, which was within 45-days of the ZBA's publication of December 8, 2023, but 49 days after the Applicants' publication. (Pa001-Pa021)

On February 16, 2023, the motion judge scheduled a Pre-Trial Conference and set deadlines for submitting Pre-Trial Memoranda. (Pa058-Pa059)

By May 16, 2023, Counsel for the Appellants, Applicants, and the ZBA each filed their respective Pre-Trial Memorandum. (Pa60-Pa112)

On July 6, 2023, the motion judge held a case management conference in which Counsel for Appellants advised that his clients would be filing a motion to enlarge the period of time by four days to file and to supplement the record. Counsel for the ZBA stated that his client would not oppose the motion to enlarge the period of time by four days, whereas Counsel for Applicants stated that he would oppose.

On July 27, 2023, Appellants filed their motions. Counsel for both Applicants and the ZBA filed their oppositions and Appellants filed their reply. (Pa113-Pa846)

On October 13, 2023, oral arguments were held. (T; Pa847-Pa861)

On October 18, 2023, the motion judge denied both motions and subsequently dismissed the Complaint in its entirety, including Appellants' counts alleging fraud on the part of the Applicants, who were also named as defendants. (Pa847-Pa861)

On November 19, 2023, Appellants filed their Notice of Appeal. (Pa862-Pa867)

STATEMENT OF FACTS

The Subject Structure

In March 2020, Applicants purchased the 2,314 square foot single family dwelling (the "Subject Structure") located in Middletown designated as Lot 4, in Block 770 on the Middletown's tax map, commonly known as 24 Witches Lane, Middletown, New Jersey 07732 (the "Property"). (Pa180-Pa187; Pa377-Pa378) The Property is located in a Residential (R-45) Zone, and within Monmouth Hills, which is characterized by its historic mansions, dirt roads, steep slopes, and the complete absence of streetlights. (Pa259-Pa319)

Because the Property is on a steep slope, it has a buildable lot area of only 5,165 square feet where 30,000 square feet is required and a minimum circle diameter of 49.4 feet where 125 feet is required. In 1976, to accommodate the construction of the Subject Structure on such an undersized lot that is the Property, the ZBA granted seven variances. (Pa180-Pa187; Pa377-Pa378)

The Subject Structure remains structural sound and, as admitted by Applicant Adam Sirois, it perfectly serves their desire to have a "weekend spot" to escape from

the city. However, months after purchasing the Property, Applicants hired an architect to design a 2,941 square foot ultra-modern "addition" to their 2,314 square foot home (the "Addition"). (Pa428-Pa429)

The Surrounding Homes

Appellants Mitchell Nelson and Sarah E. Hearn-Nelson own the real property located at 27 Bayview Terrace, Middletown, New Jersey 07732 ("27 Bayview"), which they purchased in September 2017. (Pa418) Their home is nearly identical in size as the Subject Structure at 2,385 square feet. It is a non-contributing home within Monmouth Hills and built after the Subject Structure. However, it expresses itself architecturally as a small mock Queen Ann Victorian with hipped dormers, doghouse dormers, and clad with cedar shake. With few exceptions, all the homes in Monmouth Hills are either styled as either "colonials" or "mock Queen Anns." (Pa001-Pa021)

Appellant Paulina Giraldo is the owner of 30 Bayview Terrace, Middletown, New Jersey 07732 ("30 Bayview"), which she purchased in December 2020. (Pa418) 30 Bayview, along with 27 Bayview and the Subject Structure, are all seen almost immediately upon entering the Monmouth Hills. (Pa321) 30 Bayview Terrace is the most expensive home ever purchased in all of Monmouth Hills and is the most visually stunning and majestic property there. Most of the original structure was destroyed in a fire in 1994, but it was completely rebuilt in 1996 to the exact dimensions as the original Queen Ann Victorian that was first built in 1909. (Pa258-Pa319)

27 and 30 Bayview Terrace are the only two homes situated directly across the street from the rear of the Subject Structure, and whose occupants would be the only residents in the surrounding area impacted by having to see the full height of the proposed 45 foot tall, three-story ultra-modern, mostly glass structure, clad in vertical slats, with metal rails, cables, and turnbuckles around its decking, all as a result of the Addition. (Pa362-Pa371; Pa319)

Standing between the two homes owned by Appellants and the Subject Structure is real property designated as Lot 1, in Block 768 on the Middletown's tax map. Prior to Middletown acquiring it due to an unpaid tax bill of a little over $300 in 1987, this lot was part of 30 Bayview. In fact, the sewer lines, electric lines, cable television lines, telephone lines, gas lines, and water lines all run from 30 Bayview, across that lot, and tie into the mains located at Bayview Terrace. (Pa119-Pa124) Over the years, the vegetation on that lot has overgrown and soon after Appellant Giraldo purchased 30 Bayview, she began negotiations to acquire it from Middletown. (Pa841-Pa843) It is not a dense mature wooded area as can easily be seen in the many pictures that Counsel for the ZBA refused *sua sponte* to admit. (Pa245-Pa249)

The Subject Structure is in direct line of sight from the bay windows of the master bedroom suite of 30 Bayview Terrace and visually occupies the entire height of the bedroom windows when viewed from the bed. Despite its visibility from 30 Bayview Terrace, the Subject Structure has only four small windows visible from the master bedroom suite, so at night, the light pollution the Subject Structure emits within a lightly wooded area without streetlights is limited. (Pa245-Pa249)

Monmouth Hills Historic District

Historically, Monmouth Hills was primarily composed of historic mansions on multi-acre estates that served as "summer cottages" to some of the wealthiest families in the country. (Pa258-Pa319) It was a seaside community that was shut down and left vacant after each summer. 30 Bayview was the 8,000 square foot cottage of the Pembertons (railroad capitalist), Schwabs (as in, Charles Schwab Investments), Goodriches (as in, the tire manufactures), and Goerkes (as in, the department store chain) that ***sat as part of an eight-acre estate*** when it was built over 115 years ago. 30 Bayview is one of the most unique properties in the entire State. (Pa001-Pa021)

Over the years, and particularly during the 1970s and 1980s, Monmouth Hills hit hard times, and many of the lots of these grand estates were subdivided, and multiple smaller contemporary homes were hastily built to "squeeze in" between the more substantial historic mansions built at the turn of the 20th century. (Pa258-Pa319) The Subject Structure is a perfect example as is the home at 23 Witches Lane, which is the structure adjacent to the Subject Structure. Critical to the common scheme of the community, then and now, is that these handful of contemporary homes remain understated. (Pa258-Pa319)

Monmouth Hills, Inc.

Applicant Marisha Sirois is a director and officer of MHI. (Pa001-Pa021)

Each home in Monmouth Hills is owned in fee simple by their owner, who pays the full rate of real property taxes to Middletown and has the option of owning one share of MHI's stock to enjoy "services" provided by MHI. As such, MHI has

authority only as to the assets that it owns, which includes three lots that the corporation never sold, a clubhouse, and a tennis court. (Pa001-Pa021; Pa197-Pa213)

Notice of Environmental Violations by MHI

While MHI dedicated its roadway system in 1896 to Middletown by way of the filing of its subdivision map, Middletown has maintained the position that it's never "accepted" that dedication. Ultimately, and in 1989, Middletown and MHI, by way of ordinance, entered an agreement whereby the still dirt roadway system would be considered owned by MHI, and Middletown would be responsible for the non-routine maintenance of the roadway system. (Pa408-Pa410)

For reasons that are unclear, Applicant Marisha Sirois, who is a well-educated person who graduated from Harvard University, and the other six directors on MHI's Board of Directors, continuously vote to refuse to allow Middletown to perform maintenance on the roadway system as Middletown had done for its taxpayers who lived in Monmouth Hills over the first 100 years of Monmouth Hills' existence. (Pa220-Pa243; Pa380-Pa388);

The neglect has been so bad that the engineers MHI hired to assess the infrastructure, in their 2006 report (the "2006 Engineering Report"), deemed (i) the roadway system to be "dangerous" and (ii) the now 127-year-old terra cotta sewer system that constantly leaks effluent and causes an associated stench to be 50 years past its useful life. The 2006 Engineering Report noted that two retaining walls failed and once they collapse, they will bring down with them the roads that they support. (Pa220-Pa243) MHI fired that engineering firm, but as they predicted both retaining

walls partially collapsed, one in 2023 and the other in 2024, and brought down with them portions of two roads.

As MHI's roadway system crumbles, as calculated by another firm of engineers hired by MHI in 2022, it discharges 170 tons of road material into the Sandy Hook Bay each year. The New Jersey Department of Environmental Protection (the "NJDEP") informed MHI in August 2019 that it was in violation of environmental law and demanded that MHI provide a plan for remediation. (Pa373-Pa375) MHI has also fired this engineering firm.

After three years, including the years since Ms. Sirois has been on the Board, she and the other six directors have voted unanimously to take no meaningful action to address the NJDEP's findings. As a result, the NJDEP issued a Notice of Violation last year, which set a deadline by which MHI must remediate or be subject to fines of $50,000 per day. (Pa001-Pa021)

Highlands & Monmouth Hills Storm Water Mitigation & Green Infrastructure Project

During the entire course of the Subject Hearing, the Applicants and their Counsel argued that the Addition would not negatively impact Appellants because of the "dense mature wooded area" that sits between the Subject Structure and Appellants' homes. (Pa098-Pa112) What neither Appellants or the ZBA knew was that Defendant Marisha Sirois and the other officers and directors had long been negotiating that acquisition of Lot 1 in Block 768 from Middletown, so that it could

be clearcut of all its trees and dug out to serve as basin for stormwater runoff. (Pa812-Pa846)

As should be noted, all of the MHI directors and officers were present at all four of the meetings oddly passionate about allowing an ultra-modern 45-foot three story structure to be built for all to see upon entry into Monmouth Hills. The videos show the level of attendance and participation. (Pa588-589) It is no surprise that once the protracted hearing was completed, Applicant Marisha Sirois and the other directors went to work to finalize their plans around Lot 1 in Block 768 and finally announced the plans months after actions had been taken secretly. (Pa119-Pa171)

On July 20, 2023, Applicant Marisha Sirois and the other directors called a snap meeting of the MHI Board of Directors with inadequate notice and she voted to assess homeowners over $200,000 to fund MHI's commitments to the Highlands & Monmouth Hills Storm Water Mitigation & Green Infrastructure Project (the "Plan"). Tantamount to that plan is for the entirety of Lot 1 in Block 768 to become Basin #1.

In August 2023, the federal funding for the Plan was approved and MHI has applied for permits and other approvals with the work of clearcutting the trees to begin momentarily. (Pa119-Pa171; Pa812-Pa846)

LEGAL ARGUMENT

I. THE MOTION JUDGE ERRED IN FAILING TO CONSIDER PROBATIVE, COMPETENT EVIDENCE SUBMITTED BY APPELLANTS (Pa850, Pa852)

The motion judge states in the last sentence of the Statement of Reasons that: "The court has reviewed and considered all of the papers submitted on the motion." (Pa850) However, the motion judge makes multiple erroneous determinations that certain assertions made by Appellants are not with the record. The motion judge *inter alia* claims that:

i. Appellants filed no reply (Pa850), although the record is clear that a reply was submitted (Pa812-Pa846)-Pa825) and referred to specifically by Counsel for Appellants during oral arguments (T26-15 to T26-24);

ii. Appellants failed to cite to the record that the Counsel for Applicants and Counsel for the ZBA argued that the ZBA must deferred to the Landmarks Commission (Pa852) despite Appellants lifting the exact colloquy from the transcript (P580-Pa581) and pasting it into Appellants Pre-Trial Memorandum (Pa92); and

iii. Appellants gave no factual basis or legal argument around the "important and novel constitutional question" related to the lack of due process if the process as articulated by Counsel for the ZBA was in fact the manner by which the ZBA operates (Pa852), despite Appellants arguing within their brief at Page 10 as follows:

> *"The record is clear that both Counsels of the Defendants stated that the ZBA has no jurisdiction as to "regulated activities" within a historic district of Middletown and that it must defer to the decision of the Landmark Commission. While Middletown ordinances conflict with that determination, the instant matter was decided in that context. In fact, Counsel for Siros went further and stated that Plaintiffs would have only 45 days to appeal a decision of the Landmark Commission. If that is true, Plaintiffs rights to due process would be violated as the Landmark Commission sends out no notices and publishes no*

> *decisions. Query how would Plaintiffs even know there was a decision to challenge, let alone be able to do so in 45 days."*
>
> While Appellants have rightly omitted their briefs below, in the event Applicants or the ZBA challenge the above excerpt, Appellants shall supply the brief within its reply.

While there are other instances of the motion judge's failure to consider probative, competent evidence, there are even more instances of the motion judge reaching determinations that have no support in the record. While we appreciate the volume of documents was significant for a preliminary motion, the nature of Appellants being in a position to prove an omission, the entire set of transcripts and exhibits needed to be submitted.

II. THE MOTION JUDGE ERRED IN DENYING APPELLANTS' MOTION TO ENLARGE PURSUANT TO *R.* 4:69-6(c) (Pa852 - Pa853)

The narrow issue that was before the motion judge was whether it was so manifest that the interest of justice required enlargement of the 45-day limitations period contained in *R.* 4:69-6 when, in fact, (i) Appellants were provided not with 45 days, but with only 22 days over the winter holiday period to file their Complaint, (ii) the Resolution approved variances to double the size and create the first new home in 20 years, which is an ultra-modern building, within a historic district found on the National Registry of Historical Places, and (iii) the Resolution was made without the ZBA making any of the legally-required analysis of impact on the historic aesthetic of the recognized historical site.

The law is well-settled that enlargement must be granted in circumstances where (1) substantial and novel constitutional questions; (2) informal or ex parte determinations made by administrative officials that do not involve a sufficient crystallization of a dispute along firm lines to call forth the policy of repose and where the right to relief depends upon determination of a legal question; and (3) an important public rather than a private interest that requires adjudication or clarification. *See In re Ordinance 2354-12 of West Orange, Essex Cnty. v. Twp. of West Orange*, 223 N.J. 589, 601(2015). In addition, relaxation is dependent upon all relevant equitable considerations presented by the circumstances of the case before the court. *Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co.*, 204 N.J. 569, 583-84, 10 A.3d 211 (2011).

There is no dispute between the parties that if Counsel for Applicants had not independently published the notification of the ZBA's determination, Appellants' Complaint would be timely based on the date that the ZBA published the notification. While certainly entitled to do so, Counsel for Applicants front ran the ZBA publication by six days and failed to provide Appellants with an affidavit of publication. As a result, Counsel for Appellants was not made aware of the commencement of the 45-day clock until the eve of the Christmas weekend, which was 20 days (23 including the holiday weekend) into the 45-day period.

Appellants had no expectation that there was any need to rely on any information other than the ZBA Secretary's representation that the Resolution would be published on December 8, 2023. Appellants had likewise relied upon the

ZBA Secretary's representation that the Resolution would finally be adopted by the ZBA after two and half months after it was made.

Given the amount of communication from the day after the ZBA reached its determination on September 13, 2022 right up to the emailing of the affidavit of publication the day before the Christmas holiday, Appellants acted with tenacity. Appellants were extremely diligent in taking actions to ensure that their rights were not compromised, so it would be outrageous to suggest that they slumbered on their rights. Appellants provided a reason for not meeting the filing deadline, which did not result from the "legal analysis of a non-lawyer agent," but an assumption, right or wrong, that circumstances had not changed.

By the same token, Appellants are in no way critical of Counsel for Applicants filing his own publication. However, Applicants publishing in a newspaper different than that one in which the ZBA publishes its own notices, and not informing Appellants of its publication, were designed to, at the least, shorten the period of time Appellants would have to file their Complaint.

Appellants sought from the Superior Court a review of the decision of the ZBA to allow (i) the first new home construction in twenty years within Monmouth Hills, (ii) a notoriously modern three story structure visible upon entry into one of the most important historic districts in the State and one that is found on the National Register of Historic Places, (iii) the fraud around the concealment of Applicant Marisha Sirois's intention to acquire and clearcut the dense wooded area that the ZBA relied upon, and (iv) the fact that the ZBA gave no consideration

whatsoever as to the impact the Subject Structure will have on the historic aesthetic by deferring to the Landmark Commission.

Prior to 2011, the standard for enlarging the period to file a complaint pursuant to *R.* 4:69-6(c) was based on three types of challenges: (i) important and novel constitutional questions; (ii) informal or ex parte determinations of legal questions by administrative officials; and (iii) important public rather than private interests which require adjudication or clarification. *See generally Brunetti v. New Milford*, 68 N.J. 576 (1975)

In the instant case, Appellants challenges are of the first and third type. The record is clear that both Counsels of the Applicants and the ZBA stated that the ZBA has no jurisdiction as to "regulated activities" within a historic district of Middletown and that it must defer to the decision of the Landmark Commission. While Middletown ordinances conflict with that determination, the instant matter was decided in that context. In fact, Counsel for Applicants went further and stated that Appellants would have only 45 days to appeal a decision of the Landmark Commission. (P580-Pa581) If that is true, Appellants' rights to due process would be violated as the Landmark Commission sends out no notices and publishes no decisions. Query how would Appellants even know there was a decision to challenge, let alone be able to do so in 45 days.

In dispensing with Appellants' arguments as to due process, the motion judge erroneously concludes that no assertion around the ZBA deferring to the Landmarks Commission appears on the record. This is simply not accurate. The

motion judge also asserts that Appellants provide no factual basis or made no legal arguments supporting concerns of important and novel constitutional questions. This too is inaccurate.

Based on the assertions of Counsel to the ZBA on the record while the ZBA is in session, the ZBA defers the decision around impacts to historic districts to the Landmarks Commission. He goes on to state that Landmarks Commission is an autonomous municipal entity, Appellants' recourse in challenge any of its decision is to file a Complaint in Lieu of Prerogative Writs. Counsel made this assertion notwithstanding that decisions of the Landmark Commission are published and are not made during public meetings.

In Middletown, those who pay millions of dollars, as did the Appellants, to purchase homes in a historic district, have absolutely no ability to challenge, participate, or take legal action around a municipal decision to allow the construction of a three story 50 ultra-modern building across the street from their home. This construct raises important and novel constitutional questions that should be addressed by the Superior Court.

In addition to the novel constitutional question, there is the matter of important public interest. Appellants purchased property in the historic district that is recognized by the federal government. ***The importance of preserving historic places in this country for the benefit of the public cannot be understated.*** While Appellants seek to maintain their own quiet enjoyment of not being subjected to light pollutions and viewing a massive modern building, they purchased their

homes on good faith that the historic aesthetic would be preserved, particularly by Middletown for all to enjoy for the generations to come. It is not possible to build a historic community, which is why Appellants paid a premium.

The motion judge simply does not address the public interest in historical preservation or that all the other smaller homes are now able to double their sizes and become ultra-modern for the same reasons proffered by the Applicants. As the expression goes: "There goes the neighborhood!"

The standard applied by the High Court in Brunetti was clarified by the High Court in *Hopewell Valley*. In *Hopewell Valley*, the High Court held that the inquire is whether circumstances "satisfy the standards in *Rule* 4:69-6(c) and warrant enlargement of the forty-five-day period because 'it is manifest that the interest of justice so requires.' *Id* at 571. The High Court went further by stating that "[T]he plain language of paragraph (c) suggests that a court has discretion to enlarge a Rule 4:69-6(a) or (b) timeframe when it perceives a clear potential for injustice." *Id* at 578.

The plaintiff in *Hopewell* was informed by the Secretary of the Planning Board of Hopewell Township that that Board had published its notice on October 2, 2008. However, the developer that obtained the approval front ran and published his notice 5 days before. In overturning the dismissal, the High Court found that:

> *"Plaintiff was entirely reasonable in calling the Board Secretary for information. Unlike defendants, we do not view that action as a punishable short-cut. Rather, it was a logical and sensible approach. In response, Kiernan-O'Toole inadvertently misled plaintiff regarding the date from which the forty-five-day limit had to be*

> *calculated. To be sure, BPG was blameless, but so was plaintiff, which cannot be said to have slumbered on its rights. Further, the six-day delay was such that defendants could not have suffered prejudice sufficient to warrant the barring of this litigation. Indeed, this is the exact constellation of circumstances that Rule 4:69 was intended to address."*

Id at 584-585.

The instant case is on all fours with *Hopewell*. There is no doubt that the non-legally trained contractor working on behalf of Counsel for Plaintiff relied on the ZBA Secretary's statement that the ZBA would publish on December 8, 2022 in the Two River Times, which it did and provided an affidavit confirming the date of that publication. This person had no idea that anything else mattered and conveyed to her client the results as she understood them. Appellants offer this by way of explanation and not to blame anyone. Our position is that under these circumstances, relaxation should be provided based upon all relevant equitable considerations.

In *Hopewell Valley* the delay was six days, which the High Court determined that the "defendants could not have suffered prejudice sufficient to warrant the barring of this litigation." Given there is a four-day delay in the instant case, the same must be true here. Appellants were due to file on Monday based on Applicants' publication, but instead filed four days later on Friday. No prejudice was suffered sufficient to warrant barring of this litigation.

The circumstances of this case satisfy the standards in *Rule* 4:69-6(c) and warrant enlargement of the forty-five-day period because it is manifest that the

interest of justice so requires. Gone are the days in which information was publicly disseminated via publication in the newspaper. Appellants relied on the representation of the ZBA Secretary and did not anticipate a change in that circumstance. They have paid millions of dollars to live in a historical district, but the process in Middletown, as articulated by Counsel for the ZBA means that the Appellants have no voice in the maintenance of the historic aesthetic that they enjoy. There is also a public interest in historical preservation.

III. THE MOTION JUDGE ERRED IN CONSIDERING AN OPPOSITION TO A MOTION WHEN THE OPPOSING PARTY FAILED TO SUBMIT ANY EVIDENCE PURSUANT TO *R.* 1:6-2(a) (Pa859 - Pa861)

The motion judge was prohibited from basing her conclusions on Applicants' submissions that were devoid of a certification made by someone with personal knowledge.

Undeniably absent from Applicants' submission is any affidavit or certification of either Applicant to matters which they would have personal knowledge. There was nothing preventing Applicant Marisha Sorois from certifying that she was unaware of the plan to clearcut the "dense mature woods" that was the basis for obtaining her variances. She could have certified, as an officer of MHI, as to the context of the Plan. Instead, the Counsel for Applicants submits his own certification to explain what his clients knew. (Pa745-Pa789)

R. 1:6-6 is unambiguous:

> "If a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein."

Applicants were required to submit an affidavit or certification around matters for which they have personal knowledge. The mandates of *R.* 1:6-6 "are not merely formal requirements. They go to the heart of procedural due process." *Celino v. General Acc. Ins.*, 211 N.J. Super. 538, 544 (App. Div. 1986). Moreover, "[e]ven more egregious is the attempted presentation of facts which are neither of record, judicially noticeable, nor stipulated, by way of statements of counsel made in supporting briefs, memoranda and oral argument. Such statements do not constitute cognizable facts." (***emphasis added***) *Ibid.*

While Applicants did submit a certification, it was the certification of Counsel of Applicants, so all of their presentation of facts were "by way of statements of facts. Conversely, Appellants supported their motion with their own certification. However, in reply, Counsel for Appellants has no choice but to submit his certification, but only as to what is publicly available with no assertion as to what his client thought or believed.

Notwithstanding Applicants failure to submit a certification, the motion judge determined that: "It is noted that the information presented by plaintiffs does not show that Marisha Sirois was untruthful." (Pa839) Given that Applicant Marisha Sirois never testified as shown by the transcripts (Pa411-Pa727) and never submitted

a certification, the motion judge has no basis to reach such a conclusion.

IV. THE MOTION JUDGE ERRED IN FINDING THAT THE ZBA COMPLIED WITH *N.J.S.A.* 40:55D-10(f) (Pa857 - Pa859)

Appellants moved to supplement the record to secure the proofs to demonstrate that the ZBA failed to create a verbatim record as required pursuant to *N.J.S.A.* 40:55D-10(f).

There is no dispute between any of the parties that the nearly three hours in which four witnesses testify and were cross-examined on May 23, 2022 was not captured in a verbatim record. Counsel for the ZBA indicated on the record on August 22, 2022 that he was unable to recall who even testified. This is not a criticism as Counsel for Appellants certainly did not remember after five months later what transpired during those three hours in which he examined and cross examined four witnesses. It is not credible for any party to state what transpired during those three hours.

As held by the appellate panel in *Scardigli v. Borough of Haddonfield Zoning Bd. of Adjustment*, 300 N.J. Super. 314 (App.Div. 1997): "*N.J.S.A.* 40:55D-10(f) directs the planning board to 'provide for the verbatim recording of the proceedings by either stenographer, mechanical or electronic means.' Without such a record, courts are unable to engage in judicial review and ordinarily should remand for further proceedings. *Carbone v. Planning Bd. of Tp. of Weehawken*, 175 N.J.Super. 584, 586 (Law Div.1980) (because the submitted meeting minutes were inadequate

and no verbatim record was made, matter remanded to planning board for rehearing); *Lawrence M. Krain Assoc. v. Mayor of Tp. of Maple Shade*, 185 N.J. Super. 336, 341 (Law Div.1982) (without verbatim recording of board of adjustment meeting, court could not decide if denial of variance was arbitrary or capricious, and remanded for new hearing on that part of the application).

Generally, "the record made before the Board is the record upon which the correctness of the Board's action must be determined, and the receipt of testimony before the Superior Court is no substitute for this requirement." *Kramer v. Board of Adjustment*, 45 N.J.268, 289 (1965) (citing *Kempner v. Edison Tp.*, 54 N.J. Super. 408, 416-17 (App. Div. 1959)). However, the usual rules don't apply.

If the Court determines to go down the rabbit hole of attempting to make a determination as to whether what was said and not recorded in May was said when there was a recording in August, testimony of the participants is the only way to make such a determination. Since the May 23, 2022 meeting was video recorded without sound, there is an objective basis to make a comparison.

Instead of addressing that question, the motion judge took it upon herself to reach conclusions about what occurred and to change the discussion into a declaration that Appellants had an opportunity to be heard, which is hardly the point. (Pa836)

The ZBA's actions must "be grounded in evidence in the record." See *Tomko v. Vissers*, 21 N.J. 226, 239-240 (1956). In the instant case, the Resolution is not ground in evidence in the record. There is no consistency between findings in the

Resolution and the available transcripts. Counsel for ZBA argues that catching the problem while the matter was in flight was an advantage when it was fatal.

If by analogy, we compare a proceeding to a road tunnel through a mountain. The usual case of finding out afterwards that a meeting was not captured is like a collapse in the middle of the tunnel. There is a beginning and an end that are not going anywhere, so the parties can work backwards from the exit (*i.e.,* the Resolution). The recreation of the record in that case is limited to what was relevant to the Resolution. However, in this case, the tunnel was being bored from one side when a portion collapsed, but instead of removing and irradicating the blockage and continuing the same direction, we detour away from our course. It is an unknown where you will wind up and the remnants of the collapse are still present to consider.

Returning to the ZBA meetings, Appellants' ultimate position is that the matter should be remanded for rehearing as the attempt by Counsel for the ZBA to reconstruct led to obvious mischief and human nature that denied both parties due process. Unlike cases in which a trial judge or court attempts to reconstruct ***post-facto***, in the instant case, the attempt to do so while the hearing was in-flight destroyed the continuity and fairness of the process. It is a lawyer's dream to know the exact questions that will be asked on cross-examination of a witness months before they are to conduct the direct examination of the same witness.

As previously stated, the Resolution is not supported by the record. The motion judge determined that Counsel for Appellants were to blame for that failure. (Pa837) The motion judge suggested that Counsel for Appellants squandered their

"opportunity" to put matters on the record. However, none of these determinations explain why the Resolution references both facts and law not found in the record. There is nothing that Counsel for Appellants could do to prevent any member of the ZBA from relying on what transpired but was not recorded at the May meeting. This fact makes it impossible for the Superior Court to review the Resolution.

V. THE MOTION JUDGE ERRED IN REACHING DETERMINATIONS AS TO ISSUES THAT WERE NOT YET RIPE (Pa852 - Pa853)

Counsel for Applicants was extremely vocal in his request that the motion judge defer the decision on Appellants' motion and to move forward to decide all issues together in a singular hearing. The rationale was that it would be more efficient in the event the Appellate Division overturned the denial Appellant's motion.

In that context, it becomes apparent that the motion judge attempted to decide those issues to support the decision to deny the motion. However, such decisions were made without the entire record or arguments from the parties and were not ripe. In fact, the motion judge rightly states: "As the request for an extension of time for filing complaint in the present matter is denied, the remainder of plaintiffs' arguments are moot." (Pa835) This was found at the top of Page 8 of a 13-page statement of reasons.

There is no need to belabor this point as the majority of the last six pages relate to matters previously addressed above. However, it should be noted that the

video of the May 23 hearing (Pa837) was not available until sometime after the August and September meeting and was not available to either party. As far as mischief at the August and September 2022 hearings, Appellants are seeking leave to introduce that evidence, so that evidence has yet to be produced. There are many others.

CONCLUSION

The relief Appellants sought from the motion judge was straight forward.

They sought leave to file their Complaint four days late in the context of a proposed structure impacting a nationally recognized historic district forever. The ZBA made clear that it gave absolutely no consideration as to the new structure's impact on the historic aesthetic and prohibited Appellants from introducing any evidence in that regard. Both the technical memo and Resolution make no reference to the ZBA considering the issue around impact on the historic aesthetic and both state that the Landmarks Commission has already "approved" it as being appropriate for a historic district without any hearing or publication.

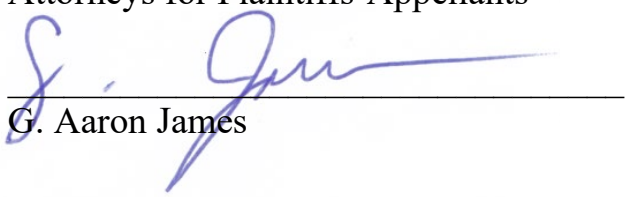
There is no dispute that the Resolution refers to exhibits that are not found as having been moved into evidence. There are a manifold of findings and determinations not found in the record. This fails to comply with the mandate of *N.J.S.A.* 40:55D-10(f). Remanding to have all parties recreate the evidence that supports the Resolution would be futile as the Resolution is inadequate on its face.

With respect to the instant appeal, Appellants seek a determination that the circumstances of this incredibly unique case satisfy the standards in *Rule* 4:69-6(c)

and the interest of justice warrant enlargement of the forty-five-day period. In this way the matter can return to the capable hands of the motion judge who can then make determinations as to how to best proceed.

Respectfully submitted,

Law Offices of G. Aaron James
Attorneys for Plaintiffs-Appellants



G. Aaron James

DATED: June 7, 2024