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| CONGREGATION SONS OF ISRAEL, | : SUPERIOR COURT OF NEW JERSEY<br>: APPELLATE DIVISION<br>: DOCKET NO. A-1339-22 |
| Plaintiff/Respondent | : |
| v. | : On Appeal from an Order for<br>: Judgment dated December 1, 2022 |
| TOWNSHIP OF LAKEWOOD ZONING BOARD OF ADJUSTMENT, TOWNSHIP OF LAKEWOOD AND CONGREGATION MEOROSNOSSON, INC., | : Superior Court of New Jersey<br>: Law Division<br>: Ocean County<br>: Docket No. OCN-L-2664-18-PW<br>:<br>: SAT BELOW:<br>: Hon. MARLENE LYNCH FORD |
| Defendants/Appellant | : |

# AMENDED BRIEF OF DEFENDANT/APPELLANT CONGREGATION MEOROSNOSSON, INC.

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DATED: July 11, 2023

**CONGREGATION SONS OF ISRAEL**
**VS.**
**TOWNSHIP OF LAKEWOOD ZONING BOARD OF ADJUSTMENT, TOWNSHIP OF LAKEWOOD AND CONGREGATION MEOROSNOSSON, INC.**

**DOCKET NO. A-1339-22**

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## VOLUME I
## (Da1 – Da151)



[1] As detailed in the Statement of Facts there was earlier related litigation between Congregation Sons of Israel and Congregation Meorosnosson about the legality of the Sons of Israel (Lot 8) parking use of the Meorosnosson Lot 5. The Sons of Israel's 2012 Chancery Lawsuit (Docket No. OCN-C-239-12) resulted in an Opinion/Order on June 5, 2017 by Judge Hodgson (reversed in 2019 by the Appellate Court). The Transcript of that Opinion by Judge Hodgson (Da29) was an Exhibit/document in evidence before the Zoning Board in the N.J.S.A. 40:55D-68 Hearing on October 15, 2018.

[2] Also as detailed, in 2017, Meorosnosson had filed to the Zoning Board an Application for Interpretation of the 1972 School Site Plan (Da13). The Zoning Board by Resolution of January 8, 2018 found it did not have Jurisdiction. Meorosnosson filed suit challenging that Board deferral (Docket No.: OCN-L-422-18). On August 17, 2018, Judge Ford affirmed that Board deferral of Jurisdiction. The Transcript of that Opinion (Da82) was an Exhibit/document in evidence before the Zoning Board in the N.J.S.A. 40:55D-68 Hearing on October 15, 2018. See also FN1.

## VOLUME II
## (Da152 – Da298)

[3] The attached Da257 through 261 are copies of microfilmed newspaper articles from the Asbury Park Press on the referenced dated in the 1960's. The documents are in the quality available and no better-quality document is available.

## PRELIMINARY STATEMENT

This case involves basic zoning law and procedures established by the Municipal Land Use Law (MLUL) for determining the validity and legality of non-conforming uses/structures. The law as to burden of proof and MLUL procedures has been long defined by case law. This case has become convoluted and distracted by collateral litigation as to whether the predecessor in title to the School property owned by Congregation Meorosnosson ("Meorosnosson" or "School") granted an easement by a 1963 agreement to the Congregation Sons of Israel ("Sons of Israel" or "Synagogue") for Synagogue staff/attendees to park on School property. In the collateral litigation --- now in a companion appeal (Docket A-2790-21) --- the Chancery Court determined an easement for this Synagogue off-site parking was established. However, the issue before the Zoning board was whether this off-site parking use/facility on the School property was ever authorized and legal under zoning law.

The zoning law issue --- whether the Synagogue off-site parking use on the School property is currently a permitted use and, if not, was the off-site parking use demonstrated to be a legal pre-existing nonconforming use --- was brought to the Zoning Board by the School as per N.J.S.A. 40:55D-68. The fact is that whether the off-site parking use was granted permission by the property owner by an easement or simply an informal license is not relevant to its zoning illegality.

The Zoning Board --- despite repeated erroneous advice from the Zoning Board attorney --- rendered the legally correct determination and Resolution that the Synagogue off-site parking on the School property is a prohibited use under current zoning and there was no proof presented by the proponent to demonstrate that the off-site parking was ever a legally permitted use under zoning regulations. The Synagogue's appeal of that Board determination was presented to Judge Marlene Lynch Ford. By Opinion/Order dated December 1, 2022, Judge Ford reversed and invalidated the Zoning Board's decision.

As shall be detailed, the Trial Court's Opinion is erroneous in numerous particulars. The Court erroneously allowed the plaintiff to expand the record by allowing numerous document/exhibits not before the Zoning Board. The Court was completely in error in overruling the Board determination that off-site parking on the School property by another separate use/property is prohibited under current zoning. The Court was further in error overruling the Zoning Board as to the burden of proof as to the validity of the use; the Board following 70+ years of case law in holding the burden is on the Synagogue as the proponent of the nonconforming use. The Trial Court clearly erred in ruling the burden was on the School as objector to the use. The Court Opinion --- that overruled and invalidated the Zoning Board Resolution --- was procedurally and substantively based upon

numerous errors and should be reversed. The Zoning Board determination/Resolution should be restored and affirmed.

## STATEMENT OF PROCEDURAL HISTORY

In August 2018, the School filed an application to the Zoning Board for a determination as per N.J.S.A. 40:55D-68 as to the legality of the Sons of Israel off-site parking facility/use of the School's Lot 5 property (Da7-28). After a hearing on October 15, 2018 (1T)[1], the Zoning Board by Resolution determined the Sons of Israel Lot 8 parking use of the School Lot 5 was not a permitted use currently and had not been demonstrated to be a legally valid or approved non-conforming use (Da1). Sons of Israel filed a timely Complaint to the Law Division challenging that determination (Da89). After an Amended Complaint was filed (Da112), Answers were duly filed by Lakewood (Da152), the Board of Adjustment (Da160), and the School (Da128). The case was delayed due to the ongoing then pending Appeal of the Chancery Court Opinion/Order that the Synagogue had an Easement for this parking use. A Motion filed in April of 2019 (Da177-194) by the School sought to bar proposed new Exhibits proposed by the Synagogue in Pre-Trial

[1] Transcript references are as follows:
1T Transcript of Lakewood Zoning Board of Adjustment Hearing on N.J.S.A. 40:55D-68 Application;
2T Transcript of Motion Hearing on Defendant School's Motion in Limine, Order entered June 2, 2022 (Da224); and
3T Transcript of Trial consisting of Oral Argument on record – September 22, 2022.

submissions (Da171) that were not in the record before the Zoning Board. That Motion was orally argued on May 24, 2019 (2T); however, the Order denying the Motion was belatedly entered on June 2, 2022 (Da214). Consequently, an extensive number of documents/exhibits not before the Zoning Board were submitted by the Synagogue and considered by the Trial Court (See Da215-218) although the Trial Court never specified which documents it considered. The case came before the Trial Court on September 12, 2022 for Oral Argument (3T) presumably on the record before the Zoning Board (Da7-88) (Da195-213), the additional Exhibits submitted by the Synagogue (Da195-213) and new Exhibits submitted by the School to rebut certain claims (Da219-261). The Court rendered a written Opinion/Order on December 1, 2022 invalidating the Zoning Board determination (Da270). This Appeal was filed timely (Da289).

## STATEMENT OF FACTS

To provide a frame of reference, some background facts are appropriate. These facts are essentially undisputed and are set forth in the Opinion by Chancery Judge Hodgson in the related easement litigation --- now on Appeal (Docket A-2790-21). Prior to 1963, the Jewish Center and Hebrew Day School (Jewish Center) owned the rectangular 101,250 S.F. corner parcel in Lakewood, bordered by Sixth Street (north), Madison Avenue (east), Fifth Street (south), and other Lots (west) (Da23). For years prior to 1963, the Jewish Center operated a religious

primary school on that site, and significant portions (including now Lot 8) were vacant and apparently used for casual parking or student recreation (Da31-33). In 1962, the Congregation Sons of Israel (Sons of Israel) was formed, aligned with the Jewish Center with a number of common members and supporters (Da27). On January 7, 1963, the Jewish Center and the Sons of Israel entered into an Agreement (Da23) that provided for 10 items of intended mutual cooperation, including a provision that the Jewish Center would convey a vacant (30,000 S.F.) corner portion (now Lot 8) of its School parcel to the Sons of Israel, to construct and operate a new synagogue on that parcel. Paragraph 10 (Da26) provided that the Jewish Center:

> Agrees to permit the (Sons of Israel)--- to utilize for parking purposes the vacant lands it owns on Madison Avenue and also on Sixth Street and to permit use of the lands on Sixth Street for boiler room use and for a water cooling tower.

In fact, the Jewish Center had already conveyed to the Sons of Israel the Lot 8 by deed dated December 28, 1962 --- ten days prior to the 1963 Agreement. That Deed did not reference or convey any easement for Lot 8 to access or use the remaining School Lot 5 for any purpose (Da3). The Sons of Israel constructed the synagogue on Lot 8 during 1963 (Da33). No Zoning Approval or Site Plan Approval has ever been produced for the synagogue on Lot 8, nor is any Zoning Approval or Site Plan Approval known to exist or been produced for zoning

approval for off-site parking of Lot 8 staff/attendees vehicles on the School Lot 5 (Da1-3, Da32-33).

In September 1972, the Jewish Center applied to the Lakewood Planning Board and Zoning Board for variances and Site Plan Approval to construct a substantial "addition to an existing school with insufficient parking, insufficient side lines, and exceeding the maximum lot coverage" on its Lot 5 (71,250 S.F.). The Application or Site Plan (Da13-22) did not reference or depict any on-going or proposed off-site parking use by Lot 8 staff/attendee of the Lot 5 property. In fact, as Lot 5 had insufficient parking capacity on site for the expanded school, the application required a parking variance for the expanded School use (Da18-20). The Sons of Israel received Notice of the Variance/Site Plan Application and participated in the Public Hearing. The records (Da13-22) established that there was no claim by either the School or Synagogue for a Zoning approval for Lot 8 staff/attendee vehicles to utilize the School property as an off-site parking area, or that such a parking use/right existed. The representation by both parties was "although the evidence presented indicates parking provision (for the school on Lot 5) to be less than those required pursuant to the existing ordinance, the applicant (the school) will have the benefit of parking facilities on adjoining properties owned by (Sons of Israel) should additional parking facilities be required". (Da19-

20) [2]On that basis and representations, the School expansion was approved by Resolution in November 1972 (Da18), and thereafter became operational with an expanded student attendance and parking need.

The adjoining Lot 5 School and the Lot 8 Synagogue apparently co-existed cooperatively for a number of years to a sufficient degree that no litigation or Zoning disputes are known to have been pursued (Da34). In 2007, the Jewish Center began having financial issues (Da34). On June 15, 2007, the principal of the Sons of Israel (Rabbi Tendler) had the 1963 Agreement (Da23) (not in recordable form) recorded in the County property records by having it attached to a self-serving recordable document (Da34). The Jewish Center filed a Chapter 11 Bankruptcy Petition in 2008. The School property was sold in August 2010 to Meorosnosson at a Bankruptcy Court Auction; "subject to liens, claims, interest, encroachment, and encumbrances". (Da34-35) After acquisition, Meorosnosson restored the facility to be a well-attended primary school for Orthodox Jewish students (See Da29-47).

Thereafter, issues and disputes began to arise, primarily over the Sons of Israel staff/attendees parking in the School Sixth Street courtyard. The courtyard was not and has never been lined, marked, or signed as a parking area, nor are

[2] In 1972, the Sons of Israel owned two nearby vacant parcels (Lot 6 and Lot 10) that were used for parking. Lot 6 was later sold by the Sons of Israel and has been occupied by housing. Lot 10 remains vacant and owned by Sons of Israel.

there any drive aisles or fire lanes (Da5; Da13-22; Da31). The Sixth Street courtyard is regularly used for assembly recreation and transversed by the students. At the same time, the courtyard was regularly being driven into haphazardly by Lot 8 vehicles. As there are no aisles or marked spaces, and the vehicles would park in all directions. The situation was, and continues to be, chaotic and present obvious and continuing hazards and concerns as to the safety of the students and access for fire or emergency vehicles (1T11-4 to 20:1T30-8 to 34-14). Meorosnosson efforts to block and/or control this parking resulted in the Sons of Israel filing a Complaint and Order to Show Cause in November 2012 in the Chancery Division in Docket No.: OCN-C-239-12. That Complaint, among other claims, asserted that the Sons of Israel had a permanent easement for Lot 8 staff/attendees to park on the Lot 5 parking lot and the Sixth Street courtyard by the 1963 Agreement (Da29-47). By decision dated July 15, 2016, Judge Hodgson had granted the Sons of Israel Partial Summary Judgment that the Synagogue by the 1963 Agreement had easement rights to use portions of the School Lot 5 property, including the courtyard area, for parking of its Lot 8 staff/attendees. After the Partial Summary Judgment, Judge Hodgson held a further hearing over 5 hearing dates in 2017 to address the balance of the issues, including determining possible parking layouts of the courtyard to make its use feasible and safe. The Court issued an oral decision on June 5, 2017 (Da27-48) and a Final Order on June 27, 2017 holding that an

easement for Lot 8 parking had been granted by the 1963 Agreement and remains in force on Lot 5 on the courtyard and the Fifth Street parking area, but the Court did not decide the layout of the courtyard for parking use, finding it not to within the Court's jurisdiction and expertise (Da31). The School in August 2017 appealed the Final Order and all the Orders entered by Judge Hodgson to the Appellate Division. While that easement litigation was ongoing, in November 2016 the School filed an Application to the Zoning Board as per N.J.S.A. 40:55D-70(a) for an Interpretation as to whether the 1972 School Expansion Resolution and Site Plan provided for or allowed for the use of Lot 5 for off-site parking by synagogue staff/attendees or precluded such parking. The Zoning Board on December 4, 2017 declined jurisdiction to render an Interpretation of the 1972 Site Plan as per a Resolution dated January 8, 2018. Meorosnosson filed a Complaint challenging that Board deferral. By Summary Judgment, the Law Division (Judge Ford) on August 17, 2018 affirmed that deferral, finding the Zoning Board could properly find it had no jurisdiction to interpret the 1972 School Site Plan approval (Da82-88).

The School on August 23, 2018 then filed the instant Zoning Board application (Da7-28) as a "person interested in land upon which a nonconforming use or structure exists" as per N.J.S.A. 40:55D-68 for a Board determination as to whether this off-site parking use by Lot 8 staff/attendee on Lot 5 was a legal use or

a legal nonconforming use. The School included in the appeal a number of exhibits and documents to be considered by the Board as identified in the Resolution (Da7-82) --- none being disputed as to authenticity. The Sons of Israel as the owner/proponent of the nonconforming off-site parking use on Lot 5 received Notice, submitted a pre-hearing letter (Da62-67) and participated through its attorney; however the Sons of Israel did not submit any evidence or testimony at the Board hearing. As listed in the Resolution, the documents/records that constituted the Board Record consisted of the Meorosnosson Application, the 1972 Site Plan documents, the 1963 Agreement, the June 2017 Chancery Judge Hodgson easement Opinion, certain historical Site photographs, and attorney Letters outlining the legal positions. See (Da7-88).

At the Board hearing, the School presented the various documents (Da7-88), including the 1972 Approved School Site Plan that depicted the courtyard on the School Lot 5 (Da3-22). The School courtyard had no curb cut off Sixth Street, no marked parking aisles, no marked parking spaces, no fire lane, and no setbacks from buildings --- nothing that marks or references the courtyard to be available for vehicle use of parking (Da22). The School Attorney represented that a diligent search had not located any Township records of a Site Plan approval or Building Permit for the Synagogue on Lot 8 or for off-site parking on School Lot 5 (1T5-3 to 11-3). Site photographs of current parking usage and conditions were presented,

showing that Lot 8 attendees/staff regularly and typically parked in the School courtyard in a chaotic and haphazard manner (1T11-4 to 20). Board Attorney Dasti opined the Board should defer on the Application as not within its jurisdiction. He confirmed that a Township search located no record of any Site Plan or variance approvals/Resolution or permits applicable to the Lot 8 Synagogue, nor as to the School property being approved for Lot 8 off-site parking use (1T11-21 to 17-11). Attorney Dasti nevertheless continued to opine the Board should not make a determination as to whether the off-site parking use of the school Lot 5 is or is not a legal nonconforming use as per N.J.S.A. 40:55D-68 (1T17-12 to 25-10).

At that point, the Board Chairman requested the Sons of Israel Attorney to present any proofs that would demonstrate any Zoning approvals or a zoning right to utilize this School Lot 5 as an off-site parking facility/use by the Synagogue. Attorney Kelly acknowledged the Synagogue had no records, documents, or evidence to demonstrate that Synagogue parking use on the School Lot 5 had ever been legal and/or been approved by any Zoning Board or authority. Attorney Kelly's position was that the Synagogue was constructed on Lot 8 in approximately 1963, and no records of any approvals or variances for either the synagogue or its off-site parking use of the School Lot 5 are known to exist or could be located. The Sons of Israel's position was that the Sons of Israel did not have any burden to present any such proofs, and the Zoning Board should not

consider the 1972 School Site Plan documents/Approval that did not show any parking for Synagogue use. The Sons of Israel asserted that the Board should decline to render a determination as to whether the off-site parking on School property is a valid or non-conforming use, and the Sons of Israel had no burden to demonstrate the use was ever authorized or conforming. (1T25-15 to 30-7)

The Board Chairman pointed out that the Synagogue's off-site parking use on the Lot 5 courtyard is at the entry to the school and clearly presented severe safety and fire access hazards. The Chairman again inquired if the Sons of Israel had any evidence as to any zoning approval or authority authorizing or allowing such unorganized off-site parking use of the school property. The Sons of Israel's response was that the 2017 Chancery Court decision (Da29-48) --- holding that the 1963 Agreement granted a parking easement --- superseded any such zoning concern or issue. The Board Chairman stated that in his observations over many years, parking had not occurred on the School courtyard, and was never the courtyard's intended or approved use. The Chairman viewed the off-site parking use as a current prohibited use and that the Synagogue had the burden of proof to demonstrate that there was a pre-existing legal right or approval under zoning law to operate that non-permitted facility on Lot 5 (1T30-8 to 33-14; T34-3 to 14).

The Board Attorney Dasti again repeated that he viewed the parking issue differently, as an ordinance enforcement issue for the Township or its Police

Department and, if the Township declines to address the issue, the School should commence another lawsuit seeking enforcement (1T35-2 to 20; 1T36-8 to 18). During the discussion, Attorney Kelly indicated that he understood the Board Chairman's legal point (1T37-21 to 25). The Sons of Israel attorney continued that the Chancery Court determination that an easement for parking had been established by the agreement in 1963 (Da23) should supersede or negate the zoning legality issue, even though the parking use was "not per Township approval." (1T38-24 to 39-1) The School's avenue would be a new Complaint seeking Township enforcement of Ordinances (1T39-2 to 41-25). The Sons of Israel attorney again acknowledged no proof could be produced that the Synagogue had ever received a Site Plan or variance approval for the off-site parking by Lot 8 attendee/staff on School Lot 5, or that such off-site parking use was legal under zoning at its inception in approximately 1964 (1T42-2 to 47-8). The Board Attorney reiterated his opinion that the Board should defer on N.J.S.A. 40:55D-68 determination and the School should pursue enforcement by the Township and/or a new lawsuit (1T49-9 to 52-4).

At that point, Board members made observations or inquiries (1T52-7 to 56-25). Attorney Kelly reiterated that the parking "easement" had been upheld by the Chancery Court (Da29) and the Board should defer to that Ruling (1T57-1 to 58-25). A Board member commented that in his opinion the correct legal analysis ---

"is (the use) valid or not valid, nobody can prove to us that it is valid so therefore it's not valid" (1T60-6 to 8). The Sons of Israel Attorney responded "no, that's not how it works" (1T60-9), insisting that Sons of Israel had no burden and the Board was obligated "to assume it was conforming" (1T60-9 to 61-10). That concluded the presentations, with the School's exhibits (Da7-88) in evidence (1T61-24 to 67-6) and the Sons of Israel submitting no Exhibits or testimony.

Board Member Gelley moved that the Synagogue off-site parking on the School Lot 5 "is not a valid nonconforming use" (1T62-14). After Board discussion (1T62-16 to 67-15), the Board Attorney again (for about the sixth time) repeated that in his opinion the Board should defer a determination (1T67-16 to 70-2). The Motion was seconded (1T70-25 to 71-19); the Board members essentially all commenting that off-site parking on the School Lot 5 is not a valid nonconforming use but being unsure (given the Board Attorney's repeated opinion) of the correct Board action (1T71-9 to 73-22). The Board then voted and the Motion passed, 3 affirmative, 2 negative, 1 abstain (1T73-23 to 75-12). The Board on November 19, 2018 adopted the Resolution (Da1-6), memorializing the Determination that the Sons of Israel off-site parking on the School Lot 5 was not a legal use or a legal nonconforming use.

Although not relevant on the critical issue, after the Board determination the Sons of Israel vehicles continued to park on the School courtyard and the School

got a permit and began to erect a fence. The Synagogue filed an Order to Show Cause before Judge Hodgson to restrain the alleged interference with its parking easement on Lot 5. Judge Hodgson granted that restraint along with an award of attorney fees/costs. A Notice of Violation issued by the Township against the Synagogue for its continued parking on October 26, 2018 was stayed by Consent Order pending further action (Da105-107).

The plaintiff Synagogue commenced this suit challenging the Zoning Board decision on November 1, 2018 --- even prior to the Resolution (Da1) being adopted on November 19, 2018 --- by a Complaint in Lieu of Prerogative Writs (Da89) and seeking to restrain any enforcement. A Consent Order was entered on November 16, 2018 staying any such enforcement actions (Da105). Thereafter, the Sons of Israel in Pre-Trial submissions to Trial Judge Ford (Da171-173, Note 8) indicated an intent to submit as Trial exhibits a large volume (57) of documents from the Chancery litigation not presented to the Zoning Board (Da174). The School filed a Motion in Limine in May 2019 to Limit the record to the record before the Zoning Board (Da177-186). Sons of Israel filed their Opposition (Da195-213) The Trial Court (Judge Ford) had Oral Argument on May 24,2019 (2J), but only rendered her Order denying the Motion on June 2, 2022 (Da214). On June 25, 2019, the Appellate Court rendered a Decision/Opinion in the easement Appeal reversing all Judge Hodgson's 2016/2017 easement

decision/Orders and all Enforcement Orders, and remanded for further proceedings to determine the rights, if any, created by the 1963 Agreement and whether any such rights remain in effect. That Chancery Remand Trial re-commenced on January 28, 2020 and, with Pandemic delays and a Trial over several Hearing days, ended on August 2, 2021. On March 29, 2022, Judge Hodgson rendered an Opinion/Order that concluded again that the Synagogue by the 1963 Agreement had obtained an easement to park vehicles on the School Lot 5 and that remains in effect. That Chancery Court determination was appealed by the School and is now pending as a companion appeal. (Docket A-2790-21)

After the Chancery March 2022 Decision, this case as to the Zoning Board Resolution before Judge Ford was reactivated. On June 2, 2022, the Court entered an Order that denied the School's 2019 Motion in Limine (Da214) seeking to bar the Sons of Israel from expanding "the record" of the Zoning Board by documents listed in their Order to Show Cause and Pre-Trial Memorandum (Da174), mostly from the Chancery litigation. The Court's Order provided vaguely that the numerous additional Exhibits would be "marked for identification" and the Court would rule upon the admission of each at Trial. The Sons of Israel then submitted with its Trial Brief a substantial collection of 57 documents numbered Exhibits A through EEE (Da174-176). Those Exhibits did not include some of the Exhibits actually in the record to the Zoning Board; most of the documents were not

relevant to the Zoning issue, were not before the Zoning Board, and/or were disputed factually (Da215-218). As shall be detailed, Sons of Israel relied on some unverified communication from the Board attorney (Da262) --- not submitted to the Board --- to belatedly promote the false assertion that there were no applicable zoning or site plan regulations in place in approximately 1964, when the off-site parking use on Lot 5 allegedly commenced. Given the vagueness and error of the Court's ruling on the not-in-the-record Exhibits to be submitted by Sons of Israel (Da214), the School submitted a supplemental Certification identifying the Exhibits actually before the Zoning Board (Da215) and also submitted a number of rebuttal Exhibits to respond to the Synagogue claim (Da219-261) as to the non-existence of zoning and site plan standards until 1984. Those Rebuttal Exhibits consisted of relevant portions of the 1971 Lakewood Code Book (Da220-253), a 1965 Ordinance amending the Site Plan Ordinance (Da254), and copies of newspaper articles in the 1960s detailing Lakewood Site Plan approvals (Da257-261) and rebutting the false assertion belatedly submitted (Da262) that there was no Site Plan Approval Ordinance until 1984.

The Trial was before Judge Ford on September 22, 2022, being oral argument presumably on the Board record. The additional exhibits considered were not identified (2T). On December 1, 2022, the Court rendered an Opinion (Da270) and Order for Final Judgment (Da288) invalidating the Zoning Board

determination, apparently on the basis that the Board determination was arbitrary and collaterally estopped by the Chancery Court Opinion on the easement. The Court in its Opinion made no identification or clarification as to "Ruling" on whether and which of the numerous "not in the record below" documents were considered by the Court in evidence. However, the Court clearly improperly considered some of these improperly submitted and incorrect documents by the plaintiff Synagogue in its findings. This Appeal was then timely filed (Da299). This Appeal is scheduled to be heard in conjunction with the Appeal of the Chancery Easement Opinion/Order.

## LEGAL ARGUMENT
## POINT I

### THE SCHOOL'S APPLICATION/APPEAL TO DETERMINE THE VALIDITY OF THE SYNAGOGUE'S OFF-SITE PARKING USE OF THE SCHOOL LOT 5 AS A NONCONFORMING USE WAS PROPERLY BEFORE THE ZONING BOARD AS PER N.J.S.A. 40:55-68 (RAISED BELOW BEFORE ZONING BOARD Da1 AND TRIAL COURT Da270)

To appreciate the issues, some historical background is important as to Zoning and its role in development and use of land. Through the early 1900's, property could be used largely at the will of the owner. Property owners could also grant easement rights to third parties to use the owner's property without regard to municipal approval or any "zoning" scheme. There was no requirement of Municipal approval, and no Land Use Boards existed. See Lake Intervale Homes

inc. v. Parsippany-Troy Hills, 28 N.J. 423, 433 (1958); Loechner v. Campbell, 49 N.J. 504, 506-511 (1967). The Map Filing Law in 1898 provided for very limited municipal regulation and control as to the ability of a property owner to develop and to unilaterally use property. In the early 1900's, rudimentary legislative and administrative efforts were pursued to establish limited Municipal regulation over development and use of property. In 1921, the U.S. Department of Commerce promulgated a recommended Standard Zoning Enabling Act; thereafter adopted in whole or part by most States. See 1 Anderson, American Law of Zoning (4th Ed.) § 2.21, p. 71-72. Andres v. Ocean Twp. Bd. Of Adj., 30 N.J. 245, 255 (1959); Commercial Realty v. First Atlantic, 122 N.J. 546, 553-555 (1991). The constitutional validity of zoning was finally confirmed in Euclid v. Ambler, 272 U.S. 365 (1926).

In 1927 the State Constitution was amended to authorize municipalities to adopt zoning regulations within limitations. See Cunningham, Control of Land Use in New Jersey, 14 Rutgers L.R. 37 (1969). In 1928 the Zoning Enabling Act was adopted, following the recommended Standard Act. In 1930 the first Planning Act provided for master plans, planning boards, and subdivision/site plan procedure. See Pennington Homes v. Planning Bd. of Stanhope, 41 N.J. 578, 583 (1964). These Acts authorized municipalities to adopt zoning ordinances that would classify properties into use districts or zones, with the requirement that use and

development of property be approved by a Land Use Board by a Subdivision or Site Plan process. See generally Cox & Koenig, New Jersey Zoning and Land Use Administration § 1-1. Most municipalities adopted Zoning Regulations in the early 1930's. Roselle v. Wright, 21 N.J. 400, 408-410 (1956). In 1953, the new Planning Act was adopted; this Act was more sophisticated, establishing the two step (Preliminary and Final Approval) procedure for Subdivisions and Site Plans. That Planning Act was comprehensively replaced by the 1975 Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.; ("MLUL"), now the current law.

From its inception, zoning has been described as the "separation of the municipality into districts and the regulation of buildings and structures in the districts so created in accordance with their construction and the nature and extent of their use." Mansfield Swett Inc. v. West Orange, 120 N.J.L 145 (E&A 1938). Zoning into districts that delineate permitted uses and bulk standards for each separate lot/parcel became known as "Euclidian" zoning. As per the Enabling Laws, variances or exceptions for a use or structure not permitted on a particular lot/parcel are to be considered by the Planning Board or Zoning Board under proof standards as defined. See N.J. Hegeman Co. v. River Edge, 6 N.J. Super. 495 (App. Div. 1949); Rockhill v. Chesterfield, 23 N.J. 117 (1957). The relevant point is that since the early 1930's the development and use of property has been subject to and controlled by zoning. An owner no longer had the unilateral right or ability,

or allow third parties by easement or permission, to use or develop an owner's property, without complying with zoning requirements and obtaining a zoning approval. Property owners certainly could not by license or easement authorize another party to use or develop the owner's property for any second facility or use without being approved by the zoning officials/process.

With that said, the MLUL --- as one of its determinative procedures --- established in N.J.S.A. 40:55D-68 an administrative process by which an "interested party" can obtain a determination as to whether a ongoing use of a particular property is a current legal use or a legal pre-existing nonconforming use/facility. The School is the owner of Lot 5; but the owner and proponent of the off-site parking use of Lot 5 is the Sons of Israel. As an entity "interested" in Lot 5, Meorosnosson certainly had the status and right to file an administrative action as per N.J.S.A.40:55D-68. As detailed in Cox & Koenig, New Jersey Zoning & Land Use Administration § 27–1.1, p. 588 (2023):

> A Zoning Board of Adjustment is authorized to consider whether a particular use or structure qualifies for the protection afforded to legitimate nonconforming uses and structures. This type of review may arise at the request of the owners of the purported use or structure in the form of an application for certification or, alternatively, it may be the result of an administrative action commenced by a person or entity objecting to the use or structure and desiring that it be eliminated.

This distinction between the Sons of Israel as owner and proponent of the "nonconforming use" and the Objector School is very important. The Sons of

Israel is "the owner of the purported nonconforming use" (the off-site parking use on Lot 5) by its "easement" claimed from the 1963 Agreement. The School is not the owner or proponent of that parking use/facility; the School is an interested party under N.J.S.A.40:55D-68 "objecting to the use or structure and desiring it be eliminated". The MLUL establishes the Zoning Board as the body required to hear the action, make a record for court review, and to apply its own local knowledge and expertise to make an informed determination. The Zoning Board cannot deny jurisdiction or a hearing on some nonsensical basis that the issue belonged in Court (as asserted by plaintiff and, surprisingly, the Board Attorney). As noted in Bell v. Tp. of Bass River, 196 N.J. Super. 304, 314 (Law Div. 1984) the Board of Adjustment is particularly well equipped to address nonconforming use disputes, which involves questions as to when a use commenced, the interpretation of zoning regulations then in force, and the interpretation of present regulations. See also Cox, § 27-2.1 p. 595 (2023). Stafford v. Stafford Zoning Bd., 154 N.J. 62, 69 (1998). Thus, the School (Meorosnosson) --- although not an "applicant" for a "Certificate certifying that the use or structure existed before the adoption of an ordinance which rendered the use or structure nonconforming" --- was properly entitled and required under N.J.S.A. 40:55D-68 to bring an administrative action to the Zoning Board "objecting to the (nonconforming) uses or structure and desiring

it be eliminated". The Zoning Board had the obligation to hear and decide the issue, with the record to be presented by the parties and properly did so.

## POINT II

### AN OFF-SITE PARKING USE/FACILITY ON THE SCHOOL LOT 5 FOR LOT 8 SYNAGOGUE STAFF/ATTENDEES IS NOT A PERMITTED USE FOR EITHER LOT 8 OR LOT 5 UNDER CURRENT ZONING REGULATIONS (RAISED BELOW BEFORE ZONING BOARD Da1-6 AND TRIAL COURT Da270)

The current situation --- the regular parking of Lot 8 staff/attendee vehicles on the Lot 5 courtyard without any marked spaces, drive aisles, or fire lanes, and with vehicles driving and parking in all directions, at the entry yard of a grade school --- is clearly unsafe and chaotic. To assert that this chaotic and unsafe use/situation is or ever was "permitted" and conforming under Zoning Regulations is patently absurd. At the Board hearing, the Sons of Israel did not demonstrate, or even make any effort to demonstrate, that Lot 8 or Lot 5 has ever received any zoning approval or had any zoning authority for its use of Lot 5 as an off-site parking lot/facility for its Lot 8 vehicles. The School did produce in evidence a 1972 Zoning Variance and Site Plan for the Lot 5 School (then being expanded), that approval/plan did not provide --- either in the Resolution or the Site Plan --- for any use of the School courtyard for any parking, either by School vehicles or off-site parking for Lot 8 staff/attendees. The 1972 School Site Plan/Variance records (Da13-22) established the Sons of Israel participated, made no assertion of

a Lot 8 parking use or right on Lot 5, and actually agreed and represented that there was availability for School Lot 5 parking requirements on nearby properties then owned by the Sons of Israel, as Lot 5 was deficient for the School's own parking needs (Da13-22).

The Sons of Israel asserts that its off-site parking use of the School Lot 5 is a currently "permitted" use on Lot 5, because parking standards are specified for "places of worship" under Section 18-905 (Da266) and for "public and private schools" under Section 18-906 (Da268). Parking for a principal use on a lot/parcel has always been deemed a customary accessory use on that same Lot, See Chatham v. Donaldson, 69 N.J. Super. 277 (App.Div.1961). The Sons of Israel assert that its off-site parking on Lot 5 is a current permitted use is because parking is a permitted accessory use for a school and place of worship. However, an "accessory use" must be located on the same Lot as the principal use it is supporting. The Lakewood Zoning Regulations at Section 18-200 "Definitions" defines "Accessory Use, Structure or Building" as

> "a use, structure, or building that is customarily incidental and subordinate to that of the principal and on the same lot. No accessory use shall form the basis for a claim of right to a principal or main use." (Emphasis added)

The "parking" standards in Section 18-905 (for houses of worship) and Section 18-906 (for schools) do not mean that parking lots for a different Lot/use are a permitted accessory use. The sections define the amount/number of parking spaces

as an accessory use/structure permitted and required to be "on the same lot" to support that principal use. To assert that an off-site parking facility/use serving a different third party lot/use or operating a commercial independent parking lot --- on a property/lot that has its own principal School use and inadequate parking --- is a permitted accessory use on that school property is patently ridiculous. To assert that the accessory parking facility for a Lot's principal use can be committed to parking for other different properties and uses, without regard to zoning approval, would render all parking standards as useless. Such a claim is logically absurd.

An off-site parking facility/use for another separately owned property, with its own use and parking need, has always been deemed a separate principal use, and requires a Variance and Site Plan Approval as to both the property generating the off-site parked vehicles and the property receiving the off-site parking use. See Mistretta v. City of Newark 33 N.J. Super. 205, 215-218 (App.Div. 1954) (use variance for bank parking lot on adjacent parcel zoned residential; Court grants approval); Rain or Shine Box Lunch Co. v. Bd. of Adj. of Newark, 53 N.J. Super. 252 (App.Div. 1958) (catering business use variance for off-site parking on nearby commercial parcel; Board denies; Court remands) Wajergast v. Broadway Thirty-Third Corp., 66 N.J. Super. 346 (App.Div. 1961) (office off-site parking lot on adjacent lot seeks variance/site plan, Zoning Board approves; Court invalidates); Suesserman v. Newark Bd. of Adj., 61 N.J. Super. 28, 34 (App.Div. 1960)

(catering business off-site parking lot, Zoning Board approves, Court invalidates); O'Donnell v. Koch, 197 N.J. Super. 134 (App. Div. 1984) (Funeral home off-site parking lot on adjacent lot; Zoning Board approves, Court affirms).

Perhaps most on point, in Bell Atlantic New Jersey Inc. v. Riverdale Zoning Bd., 352 N.J. Super. 407 (App. Div. 2002) Bell-Atlantic communications center applied for a use variance to establish an off-site parking lot for employees/trucks on a nearby separate gas station. The Zoning Board denied, the Trial Court reversed, and the Appellate Court affirmed. The relevant point is that parties and the Court all understood and acted on the basis that parking for a different off-site use/lot was not a permitted accessory use on the gasoline station lot, so a use variance was required. The point is again in Nuckel v. Boro. Of Little Ferry Pl. Bd., 208 N.J. 95, 101-103 (2011). There the Court found that locating a driveway for a separate Lot/use (hotel) on a portion of a lot occupied by its own principal use (auto body shop) was prohibited as two principal uses on one lot. A driveway (similar to a parking area) is typically an accessory use to a principal use on the same lot/property. A driveway for a separate lot/use is a prohibited second principal use.[3]

[3] It should be noted that Lakewood and Little Ferry have the same definitional requirement of "accessory, use structure" --- that the accessory use must be located on the same lot as the principal use. The location of accessory parking for Lot 8 (synagogue) on Lot 5 (School) is prohibited by that case and definition.

The Sons of Israel's theory and the Trial Court's determination (Da279) --- that because "parking" is an accessory use for "houses of worship," and "schools," that means a paved area (not approved for parking) on the school lot can be used as an off-site parking use/facility for a house of worship on a different Lot /use (when the School has deficient parking) --- is clearly wrong and absurd. The use of the School courtyard as an unregulated, unmarked, unsafe "off-site" parking facility for the Lot 8 property is not a "permitted" facility or accessory use on the School Lot 5.

Beyond being a prohibited use, the use of the School courtyard for an off-site parking facility for another Lot/use would require Site Plan Approval for that second use. The school Lot 5 was required to have Variance/Site Plan Approval in 1972 to expand the school. If the courtyard were to be used for the off-site parking of another use/Lot, there certainly would have to be an approval of proper signage, fire lanes, space and lane markings, all by an appropriate site plan. There can be no dispute that under current Zoning Regulations, Site Plan Approval for such an off-site parking, use --- providing for marked spaces, aisles, signs, fire lanes, access drive --- is required.

## POINT III

### THE BURDEN OF PROOF AS TO THE LEGALITY OF THE NONCONFORMING OFF-SITE PARKING USE OF THE SCHOOL LOT 5 BY THE SYNAGOGUE ATTENDEES/STAFF WAS ON THE SONS OF ISRAEL AS PROPONENTS OF THE USE (RAISED BELOW BEFORE ZONING BOARD Da1-6 AND BEFORE TRIAL COURT Da270)

Under N.J.S.A.40:55D-68, the "owner of the purported nonconforming use or structure" --- the Sons of Israel as owner and proponent of the "easement" for the off-site parking use on Lot 5 --- is required to participate and has the burden of proof to demonstrate that the prohibited use/facility was legal when it commenced and existed before the ordinance which rendered the use or structure nonconforming. In those circumstances, the "owner of the nonconforming use or structure" *de facto* becomes the "applicant" that the now nonconforming use is a legal pre-existing use.

That the burden of proof resides in the party claiming the right to continue is a principle of long-standing. Heagan v. Borough of Allendale, 42 N.J. Super. 472 (App.Div. 1956) is perhaps the first case to analyze the policy considerations. There, the property was in a residential zone since the first zoning in 1929. The first floor had been used as a restaurant prior to zoning and was a legal nonconforming use. At some point, the second floor residence had morphed into use for dining and dancing with music. Being pre-MLUL, there was no administrative process for such nonconforming use disputes. The neighbors filed

this suit against the restaurant/bar and Borough seeking the halting of the nonconforming second floor use. The Appellate Court --- the distinguished Judges Clapp, Jayne, and Francis --- analyzed the burden of proof, stating:

> A word might be said as to the burden of proof which rests on the respective parties in an action such as this. Plaintiffs make out a *prime facie* case with respect to the second floor by establishing that the present zoning ordinance prohibits the use of that floor for dining and dancing. It then falls upon the defendants, the owners and the public officials, to establish that the use, though nonconforming, nevertheless existed at the time of the passage of the ordinance; and where (as here) ordinances and amendments thereto have been adopted, which place a property from time to time in various zones in all of which, however, the use has been prohibited continuously over a period, then defendants must establish that this use existed when the first of these ordinances was adopted. This places a heavy burden on defendants in situations such as that before us, where (of course, it is happening increasingly more often) the applicable zoning ordinance was adopted over 20 years ago. However, a rule such as this, under which he who claims a nonconforming use is compelled to establish his claim, comports with the policy of the law in this State not to favor such a use.

That the burden of proof rests upon the proponent of the non-permitted use has been followed in numerous cases. See e.g. Moore v. Bridgewater Tp., 69 N.J. Super. 1, 10 (App.Div. 1966) (quarry now nonconforming, "this cast upon the quarry defendants the burden of establishing that such use, though nonconforming, nevertheless existed at the time of the passage of the township's ordinance"); Miller v. Bd of Adj. of Boonton 67 N.J. Super. 460, 471 (App. Div. 1961); Weber v. Pieretti, 72 N.J. Super. 184 (Ch. Div. 1962) (bottling operation in residential zone; "the burden of proving the existence of a nonconforming use prior to the

adoption of a zoning ordinance is upon the party asserting such use.") Universal Holding Co. v. North Bergen Tp., 55 N.J. Super. 103 (App. Div. 1959) (building constructed 1919; Zoning Ordinance adopted 1934, front portion of building zoned commercial, rear portion zoned residential; used as manufacturing (nonconforming); Court invalidates manufacturing use, proponent fails to meet burden of proof); State v. Loux, 76 N.J. Super. 409 (App.Div. 1962) (property used for boat storage, zoned residential; illegal as no proof presented use in place prior to 1950 Zoning residential).

Those pre-1975 cases were tried by the Courts because there was no administrative procedure to address nonconforming use disputes. The MLUL established the administrative process under N.J.S.A. 40:55D-68." by which the owner or potential owner of a nonconforming use/structure could obtain a "Certificate certifying the use or structure existed before the ordinance which rendered the use or structure nonconforming". This administrative process is also available to objectors to a nonconforming use, and in fact must be used by such objector. Conforming to the common law decisions, the "applicant" references the proponent of the nonconforming use needing the determination that the use is a pre-existing nonconforming use entitled to continue. The statute contemplated a means and method by which a prudent purchaser or mortgage lender of a property containing a nonconforming use could secure legal assurance that the use has a

right to continue. Belmar v. 201 16th Avenue, 309 N.J. Super. 663, 674-676 (Law Div. 1979). The statute also requires an objector to an alleged nonconforming use to utilize that administrative avenue --- instead of a lawsuit --- to obtain the determination of the Board and have a record made. The objector is not seeking the Certificate to continue the nonconforming use, and thus is not the "applicant" for such Certificate. The objector is seeking an administrative determination as to whether the nonconforming use is legally in place and is entitled to its continuation.

The cases after the MLUL and N.J.S.A. 40:55D-68 confirm that the burden of proof is with the proponent of the nonconforming use. In Ianieri v. East Brunswick Zoning Bd., 192 N.J. Super. 15 (Law Div. 1983), a residence began being partially used in 1955 for a second non-permitted use, an antique shop; the use being limited and did not draw objection. In 1981, the property was sold and the new owner obtained a sign permit and erected a business sign, to expand the business. A neighbor "appealed" the sign and use to the Zoning Board, with the new owner participating. The Board concluded that the antique use --- although ongoing for over 25 years --- was an illegal nonconforming use. On appeal by the owner, the Court, citing Heagan, held that the burden of proof to show the antique use was legal was "upon a party who claims a nonconforming use." As the owner had presented no evidence, the Court found the Board determination proper that it

was an illegal nonconforming use without authority to continue. That the antique use had been in operation for over 25 years did not work an estoppel. As stated in Hilton Acres v. Klein, 35 N.J. 570, 581 (1961), an owner can attain no rights from an illegal use because it has continued for an extended period before being challenged. "Nor, a fortiori, may a property owner, by unilateral action, secure a valid nonconforming use based on a violation of the Zoning Ordinance."

The claim by the Sons of Israel to the Board and the Court, and which the Court erroneously adopted (Da270) was that the burden is on the party who files the application. The claim and finding was confused, misleading, and totally in error. In many of the cases, the issue comes to the Board on an application by the property owner for a "Certificate of Nonconforming Use." In those instances, the owner is both the proponent --- the "party who claims a nonconforming use" is legal --- and the "applicant" for the Certificate. Where the Appeal arises by an objector, the burden as to the legality remains on the "party who claims a nonconforming use is legal."

In Ferraro v. Zoning Bd. of Keansburg, 321 N.J. Super. 288 (App. Div. 1999), property acquired by foreclosure had an occupied house and a second unoccupied structure. The owner's application for a building permit to renovate the second structure into a second residence was denied (two uses on one lot); the owner appealed to the Zoning Board and was the "applicant" for the Certificate.

The Board denied the application. On appeal, the Court affirmed it was the burden of the proponent of the use "to establish existence of lawful residential occupancy as of the commencement of the Zoning Regulation as well as its continuation afterward," citing Ianieri. As no such evidence had been presented, the Court upheld the Board determination.

In Bonaventure Int. v. Spring Lake, 350 N.J. Super. 420, 432-433 (App.Div. 2000), the site/use began years ago as a seasonal hotel with a small restaurant for guests only. Gradually the use morphed incrementally without zoning/variance approval into a hotel with 96 seat restaurant. In 1991, the property was converted to a condominium, with the hotel as one unit and the restaurant a separate unit. The restaurant re-opened as a 96 seat a la carte restaurant, with banquets, off-premises catering, and a liquor license. Neighbors filed a 40:55D-68 Appeal objecting as an illegal nonconforming use. The owner's lawsuit to block the Administrative Appeal was denied. After a hearing, the Board found portions of the current nonconforming use were not preexisting or legal, but enforcement barred by estoppel. The Trial Court found that the 96 seat restaurant use could be continued, but the banquet/catering uses were not legal. That was essentially upheld by the Appellate Decision. To the point as to the burden of proof, the Appellate Court stated (at p. 427):

> The burden of proving the existence of a nonconforming use is upon the party asserting such use. One commentator has emphasized that "it

> is important that the evidence presented to the board establish exactly what the use was at the time of adoption of the ordinance, its character, extent, intensity and incidents," citing Cox § 11-2.2 (2002).

It is important to recognize that the neighbors (the objectors to the use) filed the Administrative Appeal, but were not deemed the "applicants" as referenced in N.J.S.A. 40:55D-68; the burden of proof was recognized as "upon the party asserting such use".

S&S Auto Sales inc. v. Zoning Bd. of Stafford, 373 N.J. Super. 603, 608 (App.Div. 2004) --- the sole case cited by Sons of Israel and the Trial Court (Da279) for the burden of proof being on the School --- does not stand for that proposition. The Lot owner was the applicant seeking a Certification of valid preexisting nonconforming use for automobile sales. Auto sales had been permitted when that use was initially established; auto sales use later became prohibited in 1993. In 2001 the owner ceased active auto sales use due to a business slowdown, but continued relevant activity on the Lot and expressed to the municipality an intent to return to auto sales use. In 2002, Borough officials advised that the nonconforming auto sales use was abandoned. S&S then applied for a Certificate of Nonconforming Use, the issue being whether the auto sales use had been abandoned. The Board denied the owner's application, finding the nonconforming use had been abandoned. The Appellate Court reversed, finding no abandonment. The relevant point here is that at the inception of the Court's analysis on the legal

issue --- primarily abandonment --- the Court references that in this case "It is the burden of the property owner to establish the existence of a nonconforming use as of the commencement of the changed zoning regulation and its continuation afterward," citing Ferraro. That was an accurate statement for that case, as the owner S&S was the "applicant" for the Certification and the proponent. S&S was not intended and did not change the principle, in place since at least Heagle, that in an objector appeal the burden of proof is on the party asserting the legal validity of the nonconforming use.

In Euneva LLC v. Keansburg Board of Adj. 407 N.J. Super. 432, 436 (Law Div. 2008), the owner/proponent had been denied a permit to renovate the property as a multi-family residence --- a non-permitted use --- and appealed to the Zoning Board. The Court accurately stated, "the party seeking to continue the nonconforming use bears the burden of proving the nature of the use's character at the time the ordinance was adopted making it nonconforming," citing cases. The Court found the proponent had presented sufficient evidence of the nonconforming use being legally preexisting and not being abandoned and reversed the Zoning Board's denial of the Certificate.

Berkeley Square Asso v. Zoning Board of Trenton, 410 N.J. Super. 255 (App. Div. 2009) provides a more nuanced analysis that the burden of production may shift depending on the sub-issue. In Berkeley, a new owner obtained by

foreclosure a derelict 20 unit apartment building, now zoned single family residence. Permits to renovate the apartment building were issued as a pre-existing-nonconforming use. An appeal to the Zoning Board was filed by the objecting neighborhood association. The building, when constructed and operating, had been a permitted use (undisputed); the issue was had the nonconforming use been lost by abandonment. The Zoning Board upheld the Zoning Officer approval and the Trial Court affirmed by Summary Judgment. On Appeal, the Appellate Court found that the burden of proof does not rest upon which party files the appeal; the burden to prove a current nonconforming use had been permitted by Zoning at its inception rests upon the proponent of that position. After that is established, if the claim is the nonconforming use was abandoned, the objector then has the burden to come forward with some evidence of abandonment to then require the owner (or proponent) to sustain its ultimate burden. On all issues, the proponent of continuation of the nonconforming use bears the burden of proof.

The point is that the burden of proof has always been on the proponent of the current nonconforming use as being legal preexisting use; to prove that the use, when initially put in place, was legally permitted. If the proponent cannot prove --- that, the now nonconforming use is illegal and must stop. In most situations, the proponent of the nonconforming use is the owner and the "applicant" for the certificate. That Meorosnosson, here as an objector, filed the application as

allowed by N.J.S.A. 40:55D-68 does not shift the burden of proof to Meorosnosson; the burden remains on the Sons of Israel as proponent of the nonconforming use. The Trial Court clearly erred in finding and shifting the burden of proof onto the School to establish that other off-site parking was not a pre-existing nonconforming use (Da279).

## POINT IV

**THE PLAINTIFF SYNAGOGUE AND THE ZONING BOARD ATTORNEY (NOT THE ZONING BOARD ITSELF) ERRONEOUSLY ASSERTED BELOW THAT THE CHANCERY COURT DETERMINATION --- THAT A PARKING EASEMENT ON LOT 5 WAS ESTABLISHED BY THE 1963 AGREEMENT --- WAS DETERMINATIVE AS TO THE N.J.S.A. 40:55D-68 DETERMINATION OF THE ZONING BOARD. THE TRIAL COURT ERRONEOUSLY ADOPTED THAT ANALYSIS/ POSITION (RAISED BEFORE ZONING BOARD Da68, Da1 AND BEFORE TRIAL COURT Da270; APPEAL TRIAL COURT OPINION/ORDER Da270)**

The Zoning Board made the legal determination that the current use of Lot 5 for an off-site parking for Lot 8 staff/attendees is not a permitted accessory use in the ROP Zone or as an accessory to a private school use as per §18-906 (Da1-6). The plaintiffs made no sensible argument that this legal determination is not correct. Obviously, even if such off-site parking use were permitted under current Regulations, there would be Bulk Variances and Site Plan Approval required, with parking space markings, drive aisles, fire lanes, direction signs, and entry/exit drives marked, and adequate pedestrian ways defined and in place. The facts and

simple logic would dictate that an off-site parking use for a different property/use on a school yard is not a current permitted use.

The proponent of this nonconforming use failed to produce any evidence to the Board that this off-site parking use was legally permitted at the use's commencement (approximately 1964). That this nonconforming parking morphed into use pursuant to an agreement (or easement) granted by the then Lot 5 owner (Da23) is not relevant to whether it is a valid preexisting nonconforming use under Zoning. There was no proof or evidence that now nonconforming was legal and permitted at the time of its inception and/or that there ever was a zoning variance and/or site approval for this off-site parking use. With the lack of any proofs, the Board determination could really not be otherwise than in this Resolution (Da1). The burden of proof rests in the proponent of the nonconforming use, here the owner of the purported off-site parking easement (Sons of Israel). The Board action/Resolution had to be analyzed in that context --- that the nonconforming use is not protected and is not legal unless the Sons of Israel demonstrated by sufficient proofs that the off-site parking use was legally permitted or approved on Lot 5 at the time of its inception. If the proponent can establish the use was legally put in place and thereafter became prohibited, the proponent then must then "establish exactly what the use was at the time of adoption of the ordinance (prohibiting the use), its character, extent, intensity and incidents." Bonaventure Int., 350 N.J.

Super. at 433; DEG LLC v. Twp. of Fairfield, 198 N.J. 242, 272 (2009). If the proponent fails to meet its proof burden, the Zoning Board is obligated to find the nonconforming use is not a legal use and cannot continue.

In the context of this case, the Sons of Israel had the burden to prove that --- under the Development Regulations then in effect (presumably 1964) --- each of the following requirements:

1. That an off-site parking use/facility serving a different use/lot owned and operated by a different owner was a permitted use on the School Lot 5.

2. That on Lot 5, having in place a principal use (School), it was permitted use to locate and operate a second principal use (off-site parking lot for another property/use) on Lot 5.

3. Assuming that both (1) and (2) above have been demonstrated, that there was no requirement for Site Plan approval for the layout and terms of such off-site parking facility for Lot 8 to be located on Lot 5 occupied by a grade school.

4. Assuming that (1), (2), and (3) above have all been demonstrated by sufficient proofs, the proponent would have to provide sufficient evidence of exactly what the use was at the time that some later ordinance was adopted that prohibited this off-site (and second) use on the School Lot 5, and its "character, extent, intensity and incidents" at that time so that the Zoning Board could determine exactly the scope and extent of the nonconforming use that is legal.

The Sons of Israel presented no evidence at all to the Zoning Board as to its off-site parking use being permitted at its inception or at any time thereafter. The Sons of Israel's only position was that the then Lot 5 owner granted the Sons of

Israel its permission (easement) to use portions of Lot 5 for synagogue parking in 1963, and that parking thereafter commenced and has continued in some vague degree to the present. It is important to recognize that --- in every situation as to a nonconforming use --- the disputed use was likely always initiated either by the owner or a third-party with the permission of the owner. That the owner gave the illegal user permission or even an easement for the use is not controlling or even relevant to the zoning legality of the use. The issue is whether the use/facility was legal and permitted by the Zoning at its inception and thereafter, and the burden to prove that zoning legality is on the proponent of the nonconforming use.

In fact, beyond the total lack of any proofs by the Sons of Israel, the 1972 Site Plan Application and Resolution (Da13-22) that approved the School expansion on Lot 5 to its present use/size, established the following facts:

1. The parking capacity on the School's Lot 5 was deficient for the School's own parking requirements and a variance was needed.

2. That the Sons of Israel as Lot 8 owner was on notice and participated in the hearing.

3. That there was no reference or claim by anyone in that 1972 application/proceeding that an off-site parking use/facility for Lot 8 staff/attendees was in use on the School Lot 5 and was legal.

4. That the Sons of Israel Lot 8 not only did not claim to be using the School Lot 5 for parking but would provide "parking facilities on adjoining properties owned by the Sons of Israel should additional parking facilities be required" due to the deficient parking capacity on the School Lot 5 for School needs (Da20).

That the Sons of Israel did not assert in 1972 its now claimed zoning right to have an off-site parking use on Lot 5 --- when the School expansion with deficient school parking was being assessed --- certainly precludes any assertion now that any zoning authority for that off-site parking use of Lot 5 existed in 1972 or exists now. Knowing there was a deficiency of parking on Lot 5 for the School's own use, the Sons of Israel represented that excess parking capacity was available on Sons of Israel's properties nearby so as to induce Approval for the School expansion. Those representations certainly preclude any conflicting claim now that the Sons of Israel had a pre-existing zoning right in place in 1972 to an off-site parking on the School Lot.

The presumption of validity and correctness of a Board determination is well-settled. See cases cited at Cox §42.21. As stated in McDowell Inc. v. Bd. of Adj., 334 N.J. Super. 201, 224-225 (App.Div. 2000), cert. den. 167 N.J. 88 (2001), a "Board's decision denying prior nonconforming use protection or expansion is entitled to greater deference than a decision finding and protecting a prior nonconforming use". The burden was upon Sons of Israel to point to facts and evidence in the record that "is so overwhelmingly in favor of the applicant that the Board's action can be said to be arbitrary, capricious or unreasonable." Med. Realty v. Bd. of Adj., 228 N.J. Super. 226, 233 (App. Div. 1988). Here as found by the Board, the Sons of Israel presented absolutely nothing to demonstrate that the

now nonconforming off-site parking use was a legal and permitted use under zoning at its inception (or at any time thereafter). The Trial Court Opinion reversing that Board determination is clearly invalid.

## POINT V

**THE SUBMISSION BY PLAINTIFF OF NEW DOCUMENTS NOT BEFORE THE ZONING BOARD WAS NOT PROPER. THE TRIAL COURT'S RELIANCE ON SUCH DOCUMENTS FOR ITS INCORRECT DECISION REQUIRES REVERSAL (RAISED BEFORE TRIAL COURT Da177-194, COURT ORDER APPEALED Da214, Da270)**

As detailed, the Trial Court was clearly confused and incorrect as to the legal issue, the burden of proof, and the facts relevant. The June 2017 Chancery Court Decision (Da29) --- that the 1963 Agreement (Da23) had established an "easement" allowing Lot 8 staff/attendee to park on the School Lot 5 and that such easement had not been abandoned --- was in evidence to the Zoning Board. The School's position was that that irrespective of such easement, such off-site parking use of Lot 5 is not permitted by current zoning rules and no prior authority in zoning established such use as legal (Da68). The School submitted a limited number of documentary Exhibits to the Board to support its position (Da7-88).

The Zoning board hearing proceeded with the record being only the documents submitted by the School (See Da1, listing Da7-88) inclusive of Judge Hodgson's June 2017 easement decision (Da29) and the 1963 Agreement (Da23). The Sons of Israel --- although being the "owner" and "proponent" of the off-site

parking use --- did not present any exhibits or evidence as to any "zoning" authority by which the off-site parking could be deemed a "pre-existing" legal nonconforming use. Its position was that the "easement" or permission by the then owner of School Lot 5 in 1963 allowing Lot 8 parking use on Lot 5 superseded or negated any need for any zoning authority or approval (Da62). The Zoning Board correctly followed the Law and found the off-site parking on School property had not been demonstrated either as a current permitted use or a legal nonconforming use (D1).

With those limited documents being "the record before the Board" as referenced in the Resolution (Da7-88), on the Appeal, in Pre-Trial submissions (Da171, Paragraph 8) the Sons of Israel offered that it intended to produce at Trial numerous additional documents that had not been before the Zoning Board (Da174) [4]. Defendant School moved in April 2019 for an Order to Limit the Record to the Exhibits before the Zoning Board (Da177). The Court heard the Motion on May 19, 2019 (2T), but delayed ruling on the Motion pending the outcome of the remand easement Trial. After that Opinion/Order by Judge Hodgson in March 2022, the Trial Court entered an Order (Da214) on June 2, 2022

[4] This "Index" was submitted by Sons of Israel and attached to the Certification of Attorney R.S. Gasiorowski (Da179) to the Court in April 2019 in support of the School's Motion to Limit Exhibits to the Record before the Zoning Board (Da177). At that time, the plaintiff Sons of Israel had noted in the Pretrial Orders, an intent to submit numerous documents outside the Board Record (Da171, Paragraph 8).

denying the School's Motion "without prejudice", and allowed the plaintiff to submit a number additional exhibits marked for identification (Da174). The Court Order further provided the Court at Trial would rule upon each such Exhibit. (Da214) The Court Order further stated:

> 3. That the Court will accept as judicial notice any ordinances, laws, statutes, any testimony made under oath including in the parallel proceedings in Chancery Court, and any exhibits that may be referred to by reference in connection with the deliberation of the Zoning Board.

Premised on that Order, Sons of Israel submitted its Trial Brief, with additional documents to be considered at Trial, being marked Exhibits A to EEE (approximately 57 documents/exhibits) (Da174). For inexplicable reasons, the Exhibits submitted only included some of the documents/exhibits actually presented to the Zoning Board; being the 1963 Agreement; (Da23); 1972 School Site Plan documents (Da13-22); 6/5/17 Transcript of Judge Hodgson's decision (Da29); 8/17/18 Transcript of Judge Ford decision upholding Z.B. Resolution declining to interpret 1972 School Site Plan (Da82); Gasiorowski 8/23/2018 Supplemental Letter to Z.B. (Da8); Board Attorney Dasti's 9/17/2018 Letter (Da53); and Attorney Kelly's Opposition 10/9/2018 Letter (Da62). For unknown reasons, Sons of Israel failed to include the following Exhibits that were before the Board and referenced in its Resolution: School Attorney 9/14/2018 Letter (Da49) School Attorney 9/19/2018 Letter (Da59); School Attorney 10/12/2018 Letter

(Da68); the 1972 Site Plan Documents and historical site photographs (Da68-81). This confused and confusing submission was improper, but allowed by the Court below.

The issues before the Board was: (1) Is the off-site parking use by Lot 8 on the School Lot 5 currently a legal accessory use on Lot 5 and (2) if not, has the proponent of the nonconforming off-site parking use on the School Lot 5 provided sufficient evidence to demonstrate that when that use commenced (presumably 1964) the use was legal under the Zoning Regulations then in effect and, if so, what was the extent of the use. If the off-site parking use is legal, was not Site Plan approval also required.

As to the submission and consideration of such new documents not before the Board, the long-standing rule in zoning law is that the record on an Appeal is the record/documents presented to the Zoning Board. The Trial Court is charged to determine whether the Board determination --- that the proponent of the nonconforming off-site parking use on Lot 5 failed to provide sufficient evidence to meet its burden that this off-site parking use was legally permitted by the Zoning Regulations in effect at the use's inception --- was arbitrary. The Trial Court was not to create its own record or suffer the creation of a new record. See Biern v. Morris, 14 N.J. 529, 537-538 (1954). Matters outside of the record before the Board are not to be considered by the Court. See Cox at §42-2.2 citing cases.

The Plaintiff's voluminous new Exhibits were not properly before the Court. The Court is not supposed to reconsider or "retry" the issues based upon the new submissions by the plaintiff, most of which are not germane or relevant to the real Zoning issue. To the extent the Trial Court determined to consider any document/exhibit not part of the record before the Zoning Board, the Trial Court in its Order stated it would identify the exhibit and identify the basis for its consideration and provide the Defendant School the proper ability to respond or demonstrate its inaccuracy or irrelevancy (Da214). The Trial Court failed to do even that. Further, the Trial Court used factually false Exhibits (Da262) to arrive at the erroneous conclusion that there were no Zoning Site Plan Ordinance or requirements in effect prior to 1984 (Da280-281). That assertion and Court finding is clearly unfounded, and was totally improperly presented to the Court and the Court's use of this was invalid.

## POINT VI

**THE PLAINTIFF, AND THE ZONING BOARD ATTORNEY, ASSERTION THAT THE CHANCERY COURT DETERMINATION THAT AN EASEMENT FOR PARKING EXISTS IS DETERMINATIVE ON THE OFF-SITE PARKING USE BEING A LEGAL NONCONFORMING USE AND THE BOARD SHOULD HAVE DEFERRED ITS DECISION --- WAS WITHOUT MERIT (RAISED BEFORE ZONING BOARD Da68 AND BEFORE TRIAL COURT Da270)**

The Sons of Israel primary position at the Zoning Board hearing (Da62) and at Trial was that the determination by the Chancery Court --- that the 1963

Agreement created an easement allowing for Lot 8 staff/attendees to park on portions of Lot 5 and that use has not been abandoned (Da29) --- is somehow conclusive on the Zoning issue as to whether such off-site parking use/facility on Lot 5 is now a legal use, or a legally established nonconforming use. There really should be no serious debate that an off-site parking use/facility for another property/use on a fully-occupied school property having about 400 students (operating under a 1972 Variance and Site Plan Approval because its own parking availability on site was deficient) is not a currently permitted second use on the School property (Da1, Da268). That the school courtyard asserted as this off-site parking Lot does not have marked parking spaces, or drive aisles, no fire lanes, and is used chaotically by cars driving and parked in all directions, transversed by school children at the school building exit/entry, makes any claim of zoning authority or approval illogical and invalid. Whether the property owner consented to or allowed that use at its inception is not actually relevant as to the issue of whether the use was legal under Zoning, at its inception.

During the Board hearing, the Board Attorney at several points made several legally erroneous comments to the effect that in his opinion the Zoning Board does not have (or should not take) jurisdiction to decide whether this off-site parking use/facility on Lot 5 is a legal nonconforming use (see 1T17-12 to 25-10). The Board Attorney repeatedly opined that the Zoning Board should defer and the

School's remedy is to pursue zoning enforcement to the Township Police or file a new lawsuit seeking the Court to Order the Township to enforce Zoning Codes (1T40-9 to 50-25; 1T51-11 to 53-4). The Trial Court Opinion cited the Zoning Board Attorney's comments in ruling that the Board did not have jurisdiction for its ruling (Da275).

As detailed, the Zoning Board has been charged with the authority and responsibility to make a determination as to whether a use --- the off-site parking use by Lot 8 of the School Lot 5 --- is now a nonconforming use under current Zoning and, if it is, whether it is a legally grandfathered nonconforming use. The determination of such zoning nonconforming use issues has been assigned by the MLUL to the Zoning Board --- and not to the Courts, the Police Department, the Governing Body or some other functionary. The Board Attorney's repeated opinion and the Trial Court determination is clearly in error.

The Board --- primarily the Board Chairman --- had the good sense and responsible judgment to recognize the proper framework of the relevant law, that the Board was the proper forum and had jurisdiction, and that the chaotic and unsafe nonconforming current use required the Zoning Board to decide the issue (1T49-3 to 51-10). The Police, the Township or even the Court cannot enforce any Ordinance or Code until there is an adjudication that the off-site parking use on Lot 5 is not a "legal pre-existing" nonconforming use. After the Zoning Board

determination on October 15, 2018, the Township did issue a Notice of Violation against the Sons of Israel and its illegal parking use. The Sons of Israel even before the Board Resolution, then filed this Complaint challenging the Board decision and to enjoin the enforcement action, joining the Township as a defendant (Da89). Judge Hodgson in the easement litigation held Meorosnosson in contempt for pursuing the violation. The parties then agreed to temporarily not pursue enforcement by a Consent Order (Da105).

The Zoning Board is the proper forum established in N.J.S.A. 40:55D-68 to make the findings and determination as to a use being currently nonconforming, and its "pre-existing" legal status. Any such "enforcement" action to the Police or Township would have to be by a "Writ of Mandamus." See Loigman v. Tp. Committee of Middletown, 297 N.J. Super. 287, 299 (App.Div.1999) An action to require municipal enforcement action only has life if the "ministerial duty is one that is absolutely certain and imperative, involving merely the execution of a set task, and when the law that imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment and discretion". Vas v. Roberts, 418 N.J. Super. 509, 517-518 (App.Div.2011).

The Plaintiff's claim, the ZBA Attorney's proffer at the Board Hearing, and the Trial Court ruling that the Board had no jurisdiction and should have deferred deciding the zoning validity of the nonconforming off-site parking use were all

without merit. The Zoning Board is charged with the responsibility, and is particularly well equipped to address nonconforming use disputes. In fact, the authority to make a determination as to nonconforming status cannot be made by any other Municipal entity or officer, and certainly not by the Police or the Governing Body. See Cox at §27-2.1; Cronin v. Township Committee, 239 N.J. Super 611, 618 (app div 1990); Paruszewski v. Tp. Of Elsinboro, 154 N.J. 45, 54-55 (1998). The Zoning Board's acceptance of jurisdiction, consideration of the facts and documents presented, and placement of the "burden of proof" as to the legality of the nonconforming use was completely correct, if not heroic, as the Board was bombarded at the Board Hearing with incorrect advice from the Plaintiff's attorney and the Board's attorney (1T49-3 to 75-8). To the extent the Trial Court relied upon the position of the ZBA Attorney (Da275), that advice and position was incorrect, and the Zoning Boad correctly followed the law and its charge/responsibility.

The off-site parking is not legal under current Zoning. There was no proof that the off-site parking use was ever legal or permitted by Zoning Regulations, in 1964 or at any time. That was the issue, and the Board correctly decided that there was no proof as required that the off-site parking use was legal, or that the off-site parking use was not a valid nonconforming use. The Board properly followed the Law, and its determination was valid.

## POINT VII

### PLAINTIFF'S IMPROPER SUBMISSION AND THE TRIAL COURT'S ACCEPTANCE OF DOCUMENTS NOT BEFORE THE BOARD MISLEAD THE TRIAL COURT TO MAKE INACCURATE FINDINGS (RAISED BELOW TO TRIAL COURT Da174-223; COURT ORDERS APPEALED Da214, Da270)

The Sons of Israel did not present any evidence or documents to the Zoning Board to even address its burden of proof to establish that this off-site parking use on Lot 5 was ever a legal permitted or approved use. On appeal, in an effort to establish some claim of preexistent legality, the Sons of Israel then proffered (Da171, Da174-176) and over objection (Da177-213) was permitted to present a confused conglomeration of documents (Da174), not before the Board and not relevant, for the Court to supposedly consider. The Trial Court erroneously allowed the Sons of Israel submission of documents (Da214).

That the current unregulated, unmarked, chaotic and unsafe use of the Lot 5 courtyard for off-site parking lot for Lot 8 staff/attendees is not a permitted use under current Zoning Regulations was really solely a legal determination as properly determined by the Zoning Board (Da1-6). That being the case, the burden at the Board was on the "proponent" of the use to demonstrate that when the use came into existence it was legal and permitted under Zoning Rules. The Sons of Israel made absolutely no effort to address or prove these points at the Board; its position was it had to prove nothing (Da1-6; See 1T49-3 to 75-8).

In its improper belated submission of documents not before the Board, the Sons of Israel tried to claim that no Zoning Approval was required at the inception of that off-site parking use (presumably about 1964). In its Statement of Facts to the Trial Court, the Sons of Israel made the following assertions as fact, based upon these new documents not before the Board --- the claims were not before the Board and were not correct:

> 112. A search of the relevant Ordinances of the Township of Lakewood reveal that the Ordinances establishing the Land Subdivision and Site Plan Applications were not adopted until 1971, more than six (6) years after the Congregation constructed its synagogue in or about 1964 and after the School was constructed. See Township of Lakewood Ordinance Adopting Ordinance No. 2000-53 submitted herewith as **Exhibit VV** (Da224).
>
> 113. Additionally, on February 20, 2019, counsel for the ZBA forwarded a copy of the Township of Lakewood Revised Ordinance 18-8.1 "Site Plan Required", which states that site plan approval was not required for non-residential improvements of vacant land (such as the construction of the synagogue on the Congregation's Property) until 1984. See February 20, 2019 email and Township of Lakewood Revised Ordinance 18-8.1 "Site Plan Required" attached thereto submitted herewith as **Exhibit WW**." (Da262)

The documents that supposedly supported that claim (Da262) were improperly presented and were not a "fact." To respond and demonstrate the falsity of these assertions, the School submitted its own additional response documents, being certain 1971 Lakewood Code Pages (Da220-253) along with a 1965 Ordinance (Da254) and 1960's newspaper articles detailing that Site Plan review and Approvals regularly took place in the 1960's (Da257-261).

The Trial Court was obviously misled by the false claim of no Site Plan requirement until 1984 and partially based its invalidation of the Board determination on the following incredibly improper and mistaken analysis (Da280-281):

> "The Board also made a factual finding that no site plan approval was issued for the Synagogue. However, the Ordinance which created review of site development plans was only adopted by Lakewood Township in December 1984, whereas, construction of the Synagogue was completed in 1964. Thus, to the extent that the decision of the ZBA was based on facts not proven in the record, this finding is clearly arbitrary, capricious and unreasonable."

It is the above "finding" by the Court that is wrong. This finding was not based on anything before the Board or in the Board Hearing; it is solely based upon one of the documents --- an email from Board attorney Dasti to Sons of Israel attorney Yaccarino dated 2/20/2019 (after the Board Hearing) that attaches a Lakewood Code updated page of Section 18-8 about Site Plans. The Dasti email states the incredibly wrong conclusion "best we can determine, the Ordinance requiring Site Plans was adopted in December of 1984" (See Da262). This document was part of the Sons of Israel improper submission (Exhibit WW on Index Da174) allowed by Order (Da214). This false and absurd Board attorney assertion was passed on to the Court in the improper Sons of Israel submission allowed by the Court, and then erroneously adopted by the Court as "fact"

(Da280). To accept that Lakewood had no Site Plan Ordinance/Review until 1984 is indicative of how erroneous the Court's analysis was.

Recognizing the inaccuracy of some of these new documents allowed by the Court, the School did submit with its Trial Brief documents attempting to show this assertion is to no Zoning/Site Plan requirements were in place was false (See Da215-218; Da219-261). The Trial Court apparently disregarded those rebuttal documents. As detailed in those documents, Lakewood re-codified its Code in the 1971 Code Book --- being the recodification of Ordinances previously adopted into the new 1971 Code Book, by "National Code Consultants" (that later became Coded Systems Corporation) (Da220-260). The 1971 Code Book, as all such Code Books, was periodically updated and amended --- as Ordinances are amended, new Ordinances passed, or existing Ordinances repealed --- by periodically replacing pages or adding pages in the Code. The date of the replacement page is on the bottom right-hand corner of the particular page, and the replacement page is inserted into the Book. By that technique, the 1971 Code Book remains current. As Meorosnosson Rebuttal Exhibits, (submitted as only to rebut the Sons of Israel improper new submissions and false assertions) were the Cover Page, Introduction, and adoption Ordinance 7/8/71 of the 1971 Code Book (Da220-227). As detailed in the Introduction, the 1971 Code Book was a Recodification of Ordinances that were previously adopted and in place (Da224). The 1971 Code Book had eighteen

Chapters (I through XVIII); Zoning (including site plan requirements) was Chapter 18 (XVIII). The adopting Ordinance (Da224) and the Introduction (Da222) do not state or reference there being any changes to that Zoning Chapter from what was previously in place. The Introduction states (at Da222):

> "Since the code has been adopted by Ordinance, it is now a single Ordinance replacing all former sources. The revisions have nevertheless prepared a table of sources section so that any student of the Municipality's law may find the source Ordinance for each section of the new code. This table is located at the back of the code."

Note the Table of Source section of the 1971 Code Book (as located, with page revisions through 9/96) (Da228-253). The 1971 Code Book remained in use until the 2000 Code Book. Section 18-8.1 of the 1971 Code established the Site Plan requirement for review and approval for new developments. Section 18-8.1 requiring site plan approval for new developments was already in the 1971 Code Book; it was not first adopted in 1984 to first appear as the 1984 code revision page replacing the earlier 1971 Code Book page. That 18-8.1 requirement was certainly in place on the school expansion in 1972 and triggered its need for Site Plan approval (Da13-22). The date in the right corner of 1984 Revision Page of 12/84 does not mean that the site plan section only first came into existence in 1984; it means the section was on a 1984 re-issued page in the Code Book.

That the Site Plan requirement in Section 18-8.1 was in existence prior to 1971, and at least since 1961, was established by several rebuttal documents. The

"Table of Source" pages from that 1971 Code Book at Page A-17 (Da246) shows that the source of 1971 Section 18-8.1 (the Site Plan requirements) was the 1961 Revised Ordinance Section 12.06. The previous codification to 1971 was apparently the 1961 Revised Code; Chapter 12 of that 1961 Code was entitled "Zoning" and Section 12.06 set forth the Site Plan Requirement for new development, as confirmed by the Table of Sources. That section 12.06 of the 1961 Code provided for the Site Plan requirement is confirmed by the Ordinance adopted by Lakewood on October 14, 1965 (Da254) that changed Section 12.06 Site Plan Requirements as to time for submission prior to the Hearing.

To further confirm that Site Plans were required in Lakewood in the 1960's, several Asbury Park Press articles were submitted in rebuttal showing Site Plan requirements were in force and existence:

1. July 20, 1962 (Asbury Park Press), Details that new apartment complex would be subject to a Site Plan requirement to be required by an Ordinance to be adopted August 1962 (Da257).

2. March 15, 1963 (Asbury Park Press), Details Site Plan Ordinance to be amended to provide Planning Board has final approval (Da258).

3. March 20, 1963 (Asbury Park Press), Details "change" in Site Plan Ordinance to require survey by licensed surveyor (Da259).

4. November 20, 1963 (Asbury Park Press), Details that Site Plan for a nursery/garden supply business was approved, and that a Site Plan for a 40 unit apartment building was denied by the Planning Board because it proposed parking in the front yard which was not permitted (that site is relatively near the school site) (Da260).

5. March 19, 1969 (Asbury Park Press), Details that Site Plan approval was granted by the Planning Board for three office buildings at 4th and Madison Avenue (also near the school) (Da261).

These Exhibits further demonstrate that the Sons of Israel's bald claim and the Courts critical finding --- that there was no Site Plan Ordinance or requirement prior to 1984 ---was certainly not true and were offered and accepted improperly. Site Plan requirements were in effect in 1961 (or perhaps even earlier). The Trial Court's acceptance of the improperly submitted documents to arrive at the false conclusion that "the Ordinance which created review of site development plans was only adopted by Lakewood Township in December 1984" (Da280) was clearly in error --- even the Site Plan application in 1972 for the school expansion (Da13) certainly established the existence of such Site Plan requirement in 1972. The Trial Court actions in accepting these documents and relying on same for a demonstrable false critical finding clearly require invalidation.

## CONCLUSION

The several errors in the plaintiff's position and the Trial Court decision is actually very clear and simple, once the law and the burden of proof are properly understood. The Sons of Israel assert the right to operate an off-site parking use for its Lot 8 staff/attendees on the school Lot 5. That off-site parking use for Lot 8 vehicles is clearly not currently a permitted accessory use on the school Lot 5. That being the case, the Sons of Israel had the burden to prove that at the time that

use commenced (in around 1965) that off-site parking use on Lot 5 was permitted by Zoning and/or approved by a proper Board action. If the proponent of the nonconforming use does not prove that, the nonconforming use is not legal, is not valid or protected, and cannot continue. The Sons of Israel presented no evidence to demonstrate that the now nonconforming off-site parking use on Lot 5 was permitted by Zoning or approved when commenced or actually was ever permitted. That the illegal use may have commenced with the consent or an easement by the then owner of Lot 5 is not actually relevant on the zoning legality of the prohibited facility/use, nor is it relevant that the illegal use continued in some fashion for many years. The Zoning Board actually made the only proper determination, given the total lack of proofs by the proponent of the nonconforming use. That Board decision should be affirmed by this Court. The Trial Court's Opinion and acceptance of documents was clearly in error on numerous procedural and substantive points. The Court's Opinion/Order should be invalidated.

Respectfully Submitted,

R.S. Gasiorowski, Esq.
Attorney for Defendant
Congregation Meorosnosson

Dated: July 11, 2023

**Superior Court of New Jersey – Appellate Division**
**Letter Brief**
Appellate Division Docket No. A-001339-22

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## Letter Brief on Behalf of: Defendant Respondent, Township of Lakewood

August 29, 2023

Honorable Judges, Superior Court of New Jersey
Appellate Division
CN 006, Trenton, NJ 08625

Re: Congregation Sons of Israel
(Plaintiff/Respondent)

vs.

Township of Lakewood Zoning
Board of Adjustment, Township
Of Lakewood (Defendant Respondents)

And

Congregation Meorosnosson, Inc.
(Defendants/Appellant)

On Appeal from Order of Final Judgment entered by the Honorable Marlene Lynch Ford, A.J.S.C. Superior Court of New Jersey, Law Division, Ocean County, Docket No. OCN-L-2664-18-PW on December 1, 2022.

Honorable Judges:

Pursuant to R. 2:6-2(b), this letter in lieu of formal brief is submitted on behalf of Defendant/Respondent, Township of Lakewood, in response to Defendant/Appellant Congregation Meorosnosson, Inc. appeal in this matter. Please note that Defendant/Respondent Township of Lakewood has not appealed the trial court's Order for Final Judgment and thus designates itself as a Defendant/Respondent.

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## PRELIMINARY STATEMENT

Because Defendant/Respondent Lakewood Township was not a primary defendant in this litigation, but essentially a nominal party, it is respectfully requested that the Court accept this Letter Brief in lieu of a more formal Appellate Division Brief on its behalf.

## PROCEDURAL HISTORY

Defendant/Respondent Lakewood Township shall rely upon the Statement of Procedural History as set forth in Defendant/Appellant's brief at Db-3 to – 4.

## COUNTERSTATEMENT OF FACTS

Defendant/Respondent Lakewood Township shall only address the facts specifically related to the claims raised against it in this litigation. Counts Two and Three of the Plaintiff's Amended Complaint (Da-112 to -127) sought relief against the Township requesting that a Notice of Violation, issued pursuant to the Defendant Zoning Board of Adjustment's determination in a matter between Congregation Sons of Israel and Congregation Meorosnosson, be deemed invalid. The complaint sought restraints from any enforcement related to the Plaintiff's use of the Sixth Street lot. The basis for the request to dismiss the Notice of Violation is as a result of the Zoning Board's

November 19, 2018 Resolution No. 4010A (Da-1 to -6). The violation, originally attached to the Plaintiff/Respondent's Trial Brief as an exhibit, is attached to this Brief as "Lakewood DLa-1". That Notice of Violation simply states the following:

> No development shall take place within the Township nor shall any land be significantly cleared or altered, nor any use or change in the use of any building or other structure nor shall any watercourse be diverted or its channel or floodplain dredged or filled, nor shall any parking areas, accessory or otherwise, or access ways thereto, be constructed, installed or enlarged, nor shall any building permit, certificate of occupancy or other required permit be issued with respect to any such structure, land or parking area, except in accordance to an approval of such development granted pursuant to this Section, unless exempted and Section 18-601 in related subsections.

This description cites Section 18-600 of Lakewood's Unified Development Ordinance, and alleges that a violation has occurred because there was no site plan approval for the parking area. The parties uniformly agreed that the Notice of Violation was based solely upon the Zoning Board's resolution after an inspection of the property. The Zoning Board's resolution found no evidence of site plan approval which would have entitled the Plaintiff to utilize a portion of Defendant Meorosnosson's property for parking. This was the crux of the case before the trial court: whether the determination of the Zoning Board was correct, or as Plaintiff asserted, an arbitrary, capricious or unreasonable ruling. In accordance with the Trial Court's opinion dated December 1, 2022 (Da-270 to -287) final judgment was entered (Da-288) finding, *inter alia*, that the Township's Notice of Violation was

null, void, and thus withdrawn.

## LEGAL ARGUMENT

Defendant/Appellants Point I through Point VI are not addressed to Defendant Respondent Lakewood and thus shall not be addressed separately.

Defendant/Appellant's arguments contained in its Points I through VI do not address in any way the claim against the Defendant/Respondent Township regarding the Notice of Violation. It is assumed that if Defendant/Appellant's appeal is successful, the determination of the trial court to dismiss the Notice of Violation would be reversed and thus reinstated. If not successful, the voiding of that notice would be affirmed.

The Defendant/Respondent Township, however, took no position on whether a violation exists because a site plan was never approved by the Municipality (which gave rise to the Notice of Violation) or whether the use of the easement parking lot area is grandfathered or pre-dates the Ordinance's requirement of site plan approval. The Municipality's participation in the trial of the matter below was only to enforce the Notice of Violation if it was determined that site plan approval was required. The Notice was issued following the Zoning Board's determination that no site plan was ever obtained to use the property for parking. The Trial Court held that the

Zoning Board exceeded its authority in adopting its resolution, and thus held its action to be arbitrary, capricious and unreasonable. It thus held that the Notice of Violation was to be deemed void. As the Defendant/Respondent Township advised the trial court, it really had no dog in this fight and would be guided by the ruling of the trial court regarding the need for site plan approval for this easement for a parking area. Given the fact that at the time the Notice of Violation was issued – prior to a determination whether the parking area was either grandfathered or there was no need to comply with the site plan ordinance —it is submitted that the issuance of the Notice of Violation was appropriate at the time.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Defendant/Respondent Township of Lakewood will continue to adhere to the rulings of the trial court and this Court regarding the issuance of the Notice of Violation.

Respectfully submitted,

SECARE & HENSEL
Attorneys for Respondents

By: *Harold N. Hensel*
HAROLD N. HENSEL

Dated: August 29, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
**CASE NUMBER: A-1339-22**

| | |
|---|---|
| CONGREGATION SONS OF ISRAEL,<br><br>Plaintiff/Respondent,<br>v.<br><br>TOWNSHIP OF LAKEWOOD ZONING BOARD OF ADJUSTMENT,<br><br>Defendant,<br><br>TOWNSHIP OF LAKEWOOD,<br><br>Defendant/Respondent,<br><br>and<br><br>CONGREGATION MEOROSNOSSON, INC.,<br><br>Defendant/Appellant. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>OCEAN COUNTY<br><br>Docket No.: OCN-L-2664-18-PW<br><br>SAT BELOW<br>Honorable Marlene Lynch Ford, A.J.S.C. |

# RESPONDENT'S BRIEF

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Dated: November 20, 2023

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## PRELIMINARY STATEMENT

"Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." Murr v. Wisconsin, 582 U.S. 383, 394 (2017). One such property right entitled to protection is an easement, "an incorporeal interest in land, entitling one person to make some use of another's property." Mahony v. Danis, 95 N.J. 50, 58 (1983). This case is about one property owner's right to be free from public and private interference with its long-established and long-interfered-with express easement rights on its neighbor's parking lot.

Over six decades ago, the Jewish Center & Hebrew Day School of Lakewood a/k/a Jewish Center & Hebrew Day School of Lakewood a/k/a Bezalel Hebrew Day School & Jewish Center ("HDS"), an owner of contiguous lots in Block 69 in Lakewood Township in Ocean County (the "Property"), conveyed an unencumbered fee title in one of those lots ("Lot 8") to the Respondent Congregation Sons of Israel (the "Respondent"), on the condition that the Respondent would erect a synagogue thereon. Within the same instrument conditioning the conveyance, HDS authorized Respondent "to utilize" an adjacent lot ("Lot 5") "for parking purposes." Respondent then built

the synagogue in the 1960s and its congregants have had an easement to use Lot 5 for parking ever since.

Despite this, for more than a decade, the Appellant Congregation Meorosnosson (the "Appellant"), a relatively recent transferee of Lot 5, has persistently and defiantly pursued a variety of means and methods to challenge Respondent's use of the easement inside and outside of court.

After the Chancery Division found for Respondent on the easement issue, Appellant attempted to get around the court's ruling by reframing the relief it was seeking as land-use-related and going to the Defendant Township of Lakewood Zoning Board of Adjustment (the "Board"). At first, based on the objections of Respondent and the Board's own attorney, the Board declined to entertain Appellant's effort to circumvent the Chancery Division's decision and, on appeal to the Law Division on a complaint in lieu of prerogative writs, the Assignment Judge affirmed the Board's declination decision. But after Appellant then brought a nearly identical application to the Board a second time, the Board inexplicably, and contrary to the advice of its attorney, entered into the fray of the legal dispute between the parties by not only entertaining a hearing on Appellant's collateral challenge but issuing a resolution in favor of Appellant's unwarranted request for relief.

On Respondent's complaint in lieu of prerogative writs, the trial court vacated the Board's resolution. This Court should affirm the trial court's ruling in favor of Respondent vacating the Board's action for lack of jurisdiction to entertain Appellant's collateral attack on Respondent's valid easement.

## COUNTERSTATEMENT OF PROCEDURAL HISTORY

### I. The Easement Litigation and First Zoning Board Hearing

On April 1, 2013, Respondent filed an amended verified complaint against Appellant in the Chancery Division under OCN-C-239-12 seeking, among other things, a judgment in its favor regarding its easement rights in Lot 5 of Appellant's property (the "Property"), including its parking rights on the Fifth Street and Sixth Street Lots (the "Easement") (Ra1-Ra42).[1]

On July 15, 2016, after hearing argument on competing summary judgment motions, the Honorable Francis R. Hodgson, J.S.C., Ch. P.,[2] granted partial summary judgment to the Respondent, ruling that Respondent had easement rights in the Property that Appellant should be permanently restrained from interfering with, including to park on Lot 5 (Ra150-Ra151).

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[1] "Ra" designates Plaintiff-Respondent's Appendix.
"Aa" designates Appellant's Appendix.
"Ab" designates Appellant's Brief.
"Tb" designates Defendant-Respondent Township of Lakewood's brief.

[2] Though Judge Hodgson is presently Assignment Judge for Ocean County, during all relevant times discussed herein he was Presiding Chancery Division Judge.

On October 19, 2016, while final resolution of the Easement litigation remained pending, Appellant submitted a request to Francine Siegel, the Zoning Enforcement Officer (the "Zoning Officer") of Defendant/Respondent Lakewood Township (the "Township") seeking an interpretation of the Appellant's predecessor in title's variance and related site plan granted by the Planning Board in 1972 pursuant to N.J.S.A. 40:55D-70 (Ra160-Ra162). The letter asked the Zoning Officer to determine that the Planning Board's 1972 site plan (the "Site Plan") did not permit parking by anyone on the open area along the Sixth Streeet side of the Property owned by Appellant (Ra160-Ra162).

On November 4, 2016, after the Zoning Officer declined to offer the requested interpretation, and with the Easement Litigation still pending, Appellant applied to the Board seeking the same interpretation (the "First Application") (Ra163-Ra164).

On December 22, 2016, Respondent wrote to the Board opposing the First Application and attaching multiple exhibits to its objection (Ra43-Ra159).

While the zoning matter remained pending, Judge Hodgson conducted a five-day bench trial between March 28, 2017 and April 10, 2017 (Aa29-Aa48).

On April 20, 2017, counsel for the Board issued a letter to the Zoning Officer agreeing with Respondent's objection on the grounds that the Board lacked the authority to issue interpretive guidance regarding the meaning of

decades-old zoning resolutions, particularly to the extent that an interpretation of the same resolutions were already a subject pending judicial determination in active litigation, as was the case here (Ra165-Ra166).

On June 5, 2017, Judge Hodgson ruled in favor of Respondent, holding, among other things, that Respondent had easement rights to park in the Sixth Street Lot that it had never abandoned (Aa29-Aa48).

On June 27, 2017, Judge Hodgson entered judgment in favor of Respondent awarding money damages due to Appellant's interference with Respondent's easement rights (Ra167-Ra169).

On August 7, 2017, Appellant filed its initial appeal of Judge Hodgson's partial summary judgment ruling under Appellate Division Docket No. A-5303-16T3 (Ra170-Ra172).

Meanwhile, on December 4, 2017, while the 2017 Appeal remained pending, the Board unanimously voted to decline Appellant's invitation to interpret the meaning of the Planning Board's 1972 Site Plan (Ra173-Ra215).

On January 8, 2018, the Board approved Resolution #4010 memorializing its decision (the "First Resolution") (Ra216-Ra217).

On February 21, 2018, by way of a complaint in lieu of prerogative writs filed in the Law Division in Ocean County, Appellant appealed the First Resolution declining to interpret the Site Plan (Ra218-Ra227).

On August 17, 2018, the Honorable Marlene Lynch Ford, A.J.S.C., granted Respondent's motion for summary judgment dismissing the complaint with prejudice and affirming the Board's determination not to propound an interpretation of the Site Plan (Ra228-Ra234).

II. The Second Interpretation Application and the Appellate Remand

On August 23, 2018, less than one week after Judge Ford dismissed Appellant's appeal of the First Resolution declining to interpret whether the Site Plan permitted parking on Lot 5, Appellant again asked the Board to interpret whether parking on the same area of Lot 5 required a variance and site plan approval (the "Second Application") (Aa7-Aa12). In the alternative, Appellant sought a determination of the validity of the use of Lot 5 for parking as a nonconforming use (Aa7-Aa12).

On September 17, 2018, the Board's counsel objected to Appellant's request for "an opinion as to whether [Respondent] ever obtained site plan approval for parking facilities" on the Property (Aa53-Aa58).

On September 19, 2018, Appellant's counsel submitted a letter in response to the Board's counsel's letter, contending, among other things, that there never was a site plan approval for the 1972 HDS expansion that included parking and that Respondent "has to establish the fact that they have a site plan approval as well as an approval . . . to provide for parking" on Lot 5 (Aa61).

On October 9, 2018, Respondent submitted a letter to the Board's counsel in opposition to Appellant's application (Aa62-Aa66). In the course of articulating its objection, Respondent "fully incorporate[d] that which [wa]s set forth in its December 22, 2017 [sic] Opposition" (Aa63).

A hearing took place on Appellant's application on October 15, 2018. At the conclusion of the hearing, the Board passed a motion, and then later issued Resolution No. 4010A (the "Second Resolution") memorializing its finding that using the Sixth Street lot for purposes of parking was not a valid non-conforming use (1T160-T161;T174-T175;Aa1-6).[3]

On November 1, 2018, Respondent filed a verified complaint in lieu of prerogative writs against the Board and the Township in the Law Division in Ocean County seeking an order reversing the Board's determination in the Second Resolution that Respondent's use of the Sixth Street Lot was invalid, among other relief sought (Aa89-Aa104).

On April 9, 2019, Appellant moved to limit the record in Respondent's complaint in lieu of prerogative writs to the record that was before the Board on the Second Application (Aa179-Aa194).

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[3] "1T" designates the October 15, 2018 Lakewood Zoning Board transcript
"2T" designates the May 24, 2019 motion in limine transcript
"3T" designates the September 22, 2022 trial transcript

On May 24, 2019, the parties argued the motion in limine before Judge Ford (Aa214-Aa218). Disposition of that matter was substantially delayed due to the COVID-19 pandemic (Ra235-Ra239), such that no order on the motion in limine would be entered "due to administrative oversight" until three years later when the motion was denied (Aa214).

Meanwhile, on June 25, 2019, the Appellate Division, in an unpublished decision, No. A-5303-16T3,[4] reversed the Trial Court's prior partial summary judgment order and remanded the case for further proceedings.

III. Continuation of Easement Trial, Nullification of Board Resolution

The Easement Litigation trial resumed before Judge Hodgson on January 28, 2020 and, following delay imposed in part by the COVID-19 pandemic, concluded on August 2, 2021 (Ra240-Ra265).

On March 29, 2022, Judge Hodgson issued an opinion and order ruling, among other findings, that Respondent had an express easement on the Sixth Street Lot and the Fifth Street Lot during religious services which existed as long as the Property was used as an Orthodox Jewish synagogue (Ra240-Ra265).[5]

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[4] Although this is an unpublished decision, it is referenced here not for its precedential value but to set forth the history of this case, not implicating R. 1:36-3.

[5] Appellant has brought a separate appeal of that decision, which has been fully briefed but remains pending under Appellate Docket No. A-2790-21 T2.

Meanwhile, on June 2, 2022, Judge Ford denied Appellant's motion in limine to limit the record on Respondent's complaint in lieu of prerogative writ (Aa214).

Judge Ford then heard oral argument on Respondent's prerogative writ complaint in September 2022 and, on December 1, 2022, issued a written decision finding that the Second Resolution was arbitrary, capricious, unreasonable, "clearly not supported by the facts or law, and beyond the jurisdiction of the [Board]" (Aa276). The court granted the relief sought by Respondent, denied all relief sought by Appellant, and nullified the Second Resolution (Aa270-Aa288).

This appeal follows.[6]

## COUNTERSTATEMENT OF FACTS

I. HDS's conveyance of lot and easement to Respondent

More than six decades ago, on January 7, 1963, pursuant to a written agreement (the "Agreement"), HDS conveyed an "unencumbered fee title" to Lot 8 to Respondent consistent with the premises described in a December 31, 1963 recorded deed from the HDS to Respondent (the "Deed"), on the express condition that Respondent would "enter into a contract to erect a sanctuary, lounge, daily chapel, social hall with stage, Rabbi's study, offices, library, board

[6] The Board, though nominally a party, has declined to participate in this appeal.

room, bride's preparation and powder rooms kitchens and related rooms and facilities on the said lands and premises" consistent with the plans set forth in Respondent's existing contract with an architectural firm (Aa23-Aa28). Among other things, the Agreement also provided that Respondent's sanctuary would be erected within two years and "shall perpetually be maintained in accordance with Orthodox Jewish tenets-and not otherwise," and that the HDS would "permit [Respondent] to utilize for parking purposes the vacant lands it owns on Madison Avenue and also on Sixth Street " (Aa23-Aa28).

On June 5, 1972, "[i]n appreciation of the many considerations extended by [Respondent] to the . . . Hebrew Day School through all the years," HDS officers sent a confirmatory writing "advis[ing] that the Congregation or any of its affiliates may use the facilities of the Day School, present and future, on the same cooperative basis, without charge" (Ra21).

A little over three months later, on September 22, 1972, the HDS applied for a variance to the Board "to construct an addition to an existing school with insufficient parking, insufficient side lines and exceeding the maximum lot coverage" (Aa13-Aa18).

On November 2, 1972, following a hearing, the Board approved the HDS's application subject to the approval of the Lakewood Township Planning Board (the "Planning Board") of the "consolidation of lots 4 and 5 into one

overall lot size" and the granting of a permit, with construction to begin within six months of the Planning Board's approval (Aa19-Aa21). The Board found "although evidence presented indicates parking provisions to be less than those required pursuant to the existing ordinance, the applicant will have the benefit of parking facilities on adjoining properties owned by the Congregational [sic] Sons of Israel should additional parking facilities be required" (Aa19-Aa20). The Board further found "that the relief requested . . . can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance of the Township" (Aa20).

That same year, consistent with the variance application, the HDS submitted and the Planning Board approved the Site Plan for a proposed addition to the school (Aa22). For nearly four decades thereafter, Respondent continued to use Lot 5 for parking without apparent controversy and without ever abandoning that use (Ra243;Ra259).

II. Appellant's acquisition of Property and interference with easement

On June 15, 2007, the Agreement was recorded in the Ocean County Clerk's Office (Ra23).

On August 11, 2010, in connection with a Chapter 11 bankruptcy petition filed by the HDS, the United States Bankruptcy Court for the District of New

Jersey issued an order authorizing the sale of the Property to Appellant "subject to all liens, claims, interests, encroachments, and encumbrances" (Ra26-Ra29).

Sometime after Appellant took possession in 2010, it began interfering with Respondent's easement rights by, among other things, padlocking the HVAC room to which Respondent was entitled to access under the Agreement and utilizing the Sixth Street Lot for student drop-offs and pick-ups thereby creating an impediment to Respondent's access (Ra243-Ra244;Ra263). Litigation between the parties ensued shortly thereafter and has been ongoing since (see generally Ra235-Ra241).

III. Appellant's applications to the Board

On November 4, 2016, Appellant filed the First Application seeking an interpretation under N.J.S.A. 40:55D-70(b) listing Appellant as the "applicant" for the interpretation (Ra163-Ra164). In December 2017, at the hearing, counsel for the Board referred to Appellant as the "applicant" for an interpretation as to "what the zoning board meant when they adopted a resolution in 1972" (Ra176-Ra177). Chairman Abe Halberstam (the "Chairman") repeatedly remarked during the hearing that it was not clear why the parties were before the Board "if the judge ruled on the case" in the Easement Litigation, and it remained subject to appeal (Ra178-Ra179). During the hearing, Appellant's counsel sought the Board's interpretation as to "what it believes that site plan approval

of resolution of 1972 meant" (Ra190). The Board, on the advice of its counsel, unanimously approved the motion "declin[ing] the introduction to be able to review this particular information" (Ra205-Ra207), and passed a confirming resolution to that effect (Ra216-Ra217).

As with its earlier application to the Board, in its second application in August 2018, as well as in counsel's letter in support thereof, Appellant repeatedly referred to itself as the "applicant" seeking an "interpretation" that Respondent's use of Lot 5 was not legal (Aa7-Aa12).

At the October 15, 2018 hearing on the Appellant's second application for an interpretation from the Board, the Board's attorney made the following representation:

> MR. DASTI: Just so the record is clear, I've been speaking with Mr. Gasiorowski, the attorney for the applicant. Mr. Kelly, the attorney for the adjoining property owner, the Son's property, for lack of a better characterization and have indicated to them that there is no need for, and we will not set any expert testimony.
>
> Each of the attorneys will have an opportunity to present their case. They have presented over the last week and a half an encyclopedia thick of documents that you've all had an opportunity to review.
>
> CHAIRMAN HALBERSTAM: Which is right here on my desk.
>
> [1T4-13 to 1T4-25.]

Appellant's counsel noted, "I have submitted a series of documents as well . . . as had my adversary, Mr. Kelly" (1T5-13 to 1T5-15).

At one point, a board member made a motion that Respondent's use of Lot 5 for parking under the Easement was "not a valid conforming use" (1T62-13 to 1T62-14). By a vote of three to two with one abstention, the Board voted in favor of that motion (1T74-9 to 1T74-25).

After the vote, the following transcribed exchange took place:

> BOARD SECRETARY: So what does that mean?
>
> CHAIRMAN HALBERSTAM: I don't know what it means.
>
> BOARD SECRETARY: We have three no's,[7] one abstained.
>
> CHAIRMAN HALBERSTAM: Abstain goes with the majority. Motion passes.
>
> BOARD SECRETARY: And three yes'.
>
> BOARD MEMBER: Motion passes.
>
> BOARD SECRETARY: You need to know what that means?
>
> CHAIRMAN HALBERSTAM: Whoever needs to know what it means, knows what it means.
>
> [1T75-2 to 1T75-14.]

[7] This was a misstatement, as the record reflects three votes in favor of the motion and two opposed, with one abstention (1T74-9 to 1T74-25;Aa5-Aa6).

Following the hearing, the Board issued the Second Resolution memorializing its finding that using the Sixth Street lot for purposes of parking was "not a valid, preexisting non-conforming use," having found no site plan approvals, permits, or resolutions allowing such use (Aa1-6). The Board acknowledged Respondent's easement rights on Lot 5 as found in Judge Hodgson's order, but found the order did "not override or negate the need for conformance to zoning or . . . obtaining zoning approval for the supposed easement use" (Aa5). "The Parking lot use on the Sixth Street courtyard as an off-site parking area for Lot 8 has been non-conforming," the Board found, "and there is no evidence presented that such non-conforming use/structure ever was validly established as per zoning requirements" (Aa5). "[P]arking in general on that courtyard area," the Board found, "is not a valid or legal non-conforming use" and "should not occur or continue unless and until there is a proper zoning application for the necessary site plan and variance approvals" (Aa5).

## LEGAL ARGUMENT

### POINT I
### APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED BY RULING THAT THE BOARD LACKED JURISDICTION TO ASSESS THE VALIDITY OF RESPONDENT'S USE IS INCORRECT

In point I of its brief, Appellant principally contends that the trial court erred by holding that the Board did not have jurisdiction or authority to adopt Appellant's interpretation of the Respondent's use of the Sixth Street Parking

Lot as a "non-conforming use" pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -92 (MLUL). Because the trial court's finding that the Board lacked jurisdiction was correct, Appellant's argument fails.

From the time that Appellant made its first application to the Board in 2016, Respondent and the Board's counsel have maintained that the Board lacks jurisdiction to issue interpretative guidance regarding the meaning of a decades-old site plan, especially when the validity of the use is already subject to judicial determination in ongoing litigation (Ra165-Ra166). This was the correct determination as the Board initially confirmed in its unanimous decision and corresponding resolution declining the invitation to interpret the Planning Board's 1972 Site Plan, and as Judge Ford then affirmed (Ra173-Ra217). When Appellant then brought another application less than a week later, again seeking an interpretation the Board lacked jurisdiction to make, the Board's counsel again objected (Aa53-Aa54). That ought to have been the end of the matter.

Instead, the Board ignored the advice of its own counsel and held a hearing for the purpose of formulating and announcing its "opinion as to whether [Respondent] ever obtained site plan approval for parking facilities" on the Property (Aa53-Aa58). The arbitrary and capricious resolution that resulted never should have occurred because the Board had no authority to act on Appellant's request to begin with.

A. Standard of review

When reviewing the decision of a zoning board, the Appellate Division ordinarily applies the same standard as the trial court in evaluating the board's decision, according deference thereto due to "their peculiar knowledge of local conditions." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Franklin, 233 N.J. 546, 558 (2018) (quoting Price v. Himeji, LLC, 214 N.J. 263, 284 (2013)). However, "a board's decision regarding a question of law . . . is subject to a de novo review by the courts, and is entitled to no deference since a zoning board has 'no peculiar skill superior to the courts' regarding purely legal matters." Id. at 559 (quoting Chicalese v. Monroe Twp. Planning Bd., 334 N.J. Super. 413, 419 (Law Div. 2000)). The same is true for appellate courts when reviewing trial courts' decisions where "review of the judge's interpretations of law and the applications of law to facts is de novo." Mountain Hill, L.L.C. v. Twp. Comm. of Tp. Middletown, 403 N.J. Super. 146, 193 (App. Div. 2008).

Here, the Board's determination as to its own jurisdiction is purely a question of law and is therefore viewed afresh on appeal without deferring to the Board in any respect.

B. Zoning Board's authority under MLUL

It is well-established that "[t]he Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the

statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). Reviewing courts must "ascribe to the statutory words their ordinary meaning and significance . . . read them in context with related provisions so as to give sense to the legislation as a whole," and "construe and apply the statute as enacted." Ibid. (quoting In re Closing of Jamesburg High School, 83 N.J. 540, 548 (1980)). Reviewing courts must not "rewrite a plainly-written enactment of the Legislature . . . presume that the Legislature intended something other than that expressed by way of the plain language . . . or 'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" Ibid. (citations omitted).

Under the MLUL, the powers of a zoning board of adjustment are narrow and circumscribed, and include, in pertinent part,[8] the power to: decide appeals alleging enforcement errors by administrative officers, N.J.S.A. 40:55D-70(a); or to "decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by . . . ordinance, in accordance with this act." N.J.S.A. 40:55D-70(b).

The Board also has authority to act in connection with an application brought before it pursuant to N.J.S.A. 40:55D-68, which provides, in pertinent part that:

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[8] The MLUL further authorizes boards of adjustment to take other actions not relevant here. N.J.S.A. 40:55D-70(c)-(d).

> Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.
>
> The prospective purchaser, prospective mortgagee, or any other person interested in any land upon which a nonconforming use or structure exists may apply in writing for the issuance of a certificate certifying that the use or structure existed before the adoption of the ordinance which rendered the use or structure nonconforming. The applicant shall have the burden of proof. Application pursuant hereto may be made to the administrative officer within one year of the adoption of the ordinance which rendered the use or structure nonconforming or at any time to the board of adjustment.
>
> [Ibid.]

A "[n]onconforming use" for purposes of the MLUL refers to any "use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment." N.J.S.A. 40:55D-5.

A separate provision of the MLUL concerns appeals that may be taken to the board of adjustment from an administrative officer's enforcement decisions, providing:

> Appeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer of the municipality based on or

> made in the enforcement of the zoning ordinance or official map. Such appeal shall be taken within 20 days by filing a notice of appeal with the officer from whom the appeal is taken specifying the grounds of such appeal.
>
> [N.J.S.A. 40:55D-72.]

Synthesizing the plain text of these provisions of the MLUL, any "use or activity which was lawful" before a zoning ordinance was enacted or revised but which does not "conform" to the zoning requirements imposed before the ordinance by default "may be continued." A "person interested in any land upon which a nonconforming use . . . exists may apply," to the board of adjustment for a "certificate" which such person will only obtain upon proving "that the use . . . existed before the ordinance which rendered the use . . . nonconforming."

The Legislative purpose of these provisions has "been consistently construed as allowing a property owner to indefinitely continue a nonconforming use." S&S Auto Sales, Inc. v. Zoning Bd. of Adjustment for the Borough of Stratford, 373 N.J. Super. 603, 621 (App. Div. 2004). N.J.S.A. 40:55D-68 "has constitutional implications" and "expressly protects a vested right by permitting a pre-existing nonconforming use to co-exist with an ordinance that facially prohibits it." DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 271-72 (2009) (quoting William M. Cox et al., New Jersey Zoning and Land Use Administration § 11-1.1 at 270 (2008)).

"A zoning board of adjustment "may exercise only those powers granted by statute." Cerebral Palsy Ctr., Bergen Cty., Inc. v. Mayor & Council of Borough of Fair Lawn, 374 N.J. Super. 437, 444 (App. Div. 2005) (quoting Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 54 (1998)). Where a board of adjustment acts beyond its narrow statutory authority, its action is "null and void." Isihos Bros. P'ship v. Twp. of Franklin, 376 N.J. Super. 591, 597 (Law Div. 2000).

Not included within the zoning board of adjustment's limited statutory powers is the power to entertain a collateral attack by an interested party objecting to and appealing from a decision by an administrative officer approving the use. When faced with that issue, this Court reasoned:

> To permit an interested party to challenge the issuance of a building permit by denominating his appeal as a request for an interpretation would render nugatory the time constraint provided by N.J.S.A. 40:55D-72a. The 20 day limit was clearly designed to insulate the recipient of a building permit or other favorable disposition from the threat of unrestrained future challenge. It was intended to provide a degree of assurance that the recipient could rely on the decision of the administrative officer. That this is so is perhaps best evidenced by the action of our Legislature amending N.J.S.A. 40:55D-72a in 1979 to require that an appeal be filed within 20 days rather than 65 . . . [A] person to whom a permit is issued may protect his right by providing reasonable notice to all those who might wish to challenge the undertaking. Ibid. By providing notice to all interested parties, i.e., persons "whose rights to use, acquire or enjoy property is or may be

> affected by any action taken under [the Municipal Land Use Law]," see N.J.S.A. 40:55D-4, the holder of a permit may obtain some measure of protection against direct and collateral attacks upon his rights.
>
> [Sitkowski v. Zoning Bd. of Adjustment of Borough of Lavallette, 238 N.J. Super. 255, 260-61 (App. Div. 1990) (citation omitted) (second bracket in original.]

C. The Board's lack of authority to act on Appellant's application

Appellant presented an application to the Board on two alternative grounds: first, seeking an "interpretation" pursuant to N.J.S.A. 40:55D-70(a) and (b) as to whether the use of Lot 5 for vehicle parking by the staff, attendees, and other invitees of the synagogue on Lot 8 "was . . . legal or permissible without there being a proper variance and Site Plan approval" (Aa7; Aa10); and second, "[a]s an alternative application," "a determination and/or issuance of a certificate" under N.J.S.A. 40:55D-68 "as to the validity of the non-conforming use of portions of Lot 5" for parking purposes (Aa10-Aa11). Appellant has since abandoned attempting to argue that the action it was seeking from the Board was in any way authorized by N.J.S.A. 40:55D-70, and, for reasons that will be explained, N.J.S.A. 40:55D-68 is plainly inapplicable.

Turning first to N.J.S.A. 40:55D-70, Appellant's application, coming approximately fifty-four years after the synagogue was built, and forty-six years after the Board's resolution granting HDS's use variance and site plan approval (Aa13-Aa22), was clearly not an appeal under subsection (a) from "any order,

requirement, decision, or refusal made by an administrative officer," from which the Board may only entertain an appeal if brought within twenty (20) days under N.J.S.A. § 40:55D-72(a), nor does Appellant attempt to make that contention. Nor does subsection (b) apply as Appellant was seeking an interpretation of what was permitted under the 1972 site plan, not a "zoning map" or "ordinance" (Aa8-Aa12). In any event, at the hearing before the Board, Appellant's counsel foreclosed reliance on N.J.S.A. 40:55D-70, noting that Appellant was "focusing on 68" (1T12-17) and Appellant does not rely on or even cite that provision in its appellate brief. Therefore, any argument that the Board's actions were authorized under N.J.S.A. 40:55D-70(b) has been waived. See Midland Funding LLC v. Thiel, 446 N.J. Super. 537, 542 n.1 (App. Div. 2016) ("[A]n issue that is not briefed on appeal is deemed waived.").

Next, as to N.J.S.A. 40:55D-68, as noted by counsel for the Board in his April 20, 2017 letter to Appellant's counsel in response to Appellant's first attempt to obtain relief from the Board, that provision is also wholly inapplicable to the relief Appellant sought (Ra165-Ra166). The statute authorizes the Board to entertain an application for "a certificate certifying that the use . . . existed before the adoption of the ordinance which rendered the use . . . nonconforming," ibid., and Appellant was manifestly not seeking a "certificate certifying" that a valid nonconforming use "existed." Indeed,

Appellant was seeking a determination from the Board that the Respondent's use of Lot 5 for parking was "not in fact a valid, nonconforming use" (1T16-1T17). In other words, Appellant invoked N.J.S.A. 40:55D-68 for the purpose of obtaining relief directly contrary to the statute's plain purpose of "expressly protect[ing] a vested right by permitting a pre-existing nonconforming use to co-exist with an ordinance that facially prohibits it." Fairfield, 198 N.J. at 271-72. Because "a certificate certifying" a nonconforming use "existed before," is not the same thing as a "certificate certifying that the use did not exist before," Appellant's application was contrary to the statute's text and purpose and should never have been entertained by the Board.

Indeed, looking at the Legislative scheme as a whole, it is clear, as this Court reasoned in Sitkowski more than thirty years ago, the purpose of the twenty-day limit in N.J.S.A. 40:55D-72(a) was "to provide a degree of assurance that the recipient" of a favorable disposition on a proposed land use from an administrative office "could rely on the decision of the administrative officer" to "obtain some measure of protection against direct and collateral attacks upon his rights." Sitkowski, 238 N.J. Super. at 260-61. This matter, in which Respondent's longstanding use of Lot 5 has suddenly, after more than six decades, become subject to collateral attack is the realization of the exact concerns that this Court flagged and addressed in that case. Even though the

Planning Board approved the Site Plan in 1972, Respondent found itself appearing before the Board to defend its use of Lot Five twice in the same year nearly half a century later. That should never have been the case because the MLUL provides protection from such a belated collateral attack.

Moreover, as discussed in more detail in Point II, infra, even putting aside the procedural defectiveness of Appellant's application, on the merits the application fails because Appellant has made no threshold showing that Respondent's use is now or ever was "nonconforming" as the MLUL defines that term, having pointed to no zoning ordinance with respect to which Respondent's parking on Lot 5 was noncompliant. N.J.S.A. 40:55D-5. The precedent relied upon by Appellant does not counsel otherwise.

In Bell v. Bass River, 196 N.J. Super. 304, 313 (Law Div. 1984), the Law Division judge collected cases suggesting that "boards of adjustment have been entertaining questions involving non-conforming uses," while noting "[n]one of these cases . . . has addressed the question of the jurisdiction of the Board of Adjustment to hear non-conforming use issues." Ibid. The Law Division held that in the specific instance "when an administrative officer refuses to issue a building permit . . . on the ground that a particular use is not nonconforming under the local zoning ordinance, an appeal from the refusal may be taken to the board of adjustment" and would be within the Board's jurisdiction. Ibid. That

is, of course, entirely distinguishable from what happened here. There was no permit application denial that led to an interpretation by the Board; nor did Appellant request the Board interpret a zoning ordinance related to a permit refusal. Instead, Appellant improperly sought and obtained the Board's opinion on whether a neighbor's use of its property was consistent with any approved site plan.

Similarly, in Twp. of Stafford v. Stafford Twp. Zoning Bd. of Adjustment, 154 N.J. 62, 69 (1998), also relied upon by Appellant, the Court noted that a person "whose application to certify a nonconforming use is denied . . . must first file an appeal or application with the zoning board," but that is different from what happened here. The applicant was not seeking to "certify" a nonconforming use that preceded an ordinance, but instead was arguing that the use was not consistent with any ordinance.

Accordingly, for the above reasons and those relied upon by the trial court below, the conclusion is inescapable that the Board lacked the statutory power and authority to opine on whether Respondent's use of Lot 5 for the past half-century had site plan approval. Because the Board exceeded its statutory authority, Cerebral Palsy Ctr., 374 N.J. Super. at 444, the trial court was correct in ruling the Board's action null and void. Isihos, 376 N.J. Super. at 597. Appellant's claim that the Board had jurisdiction to decide the parking

enforcement dispute before it is meritless, and you should affirm nullification of the Board's action on de novo review.

## POINT II

## AS APPELLANT FAILED TO PRESENT ANY ORDINANCE THAT WAS PURPORTEDLY VIOLATED BY RESPONDENT'S ALLEGED "NON-CONFORMING USE" OR ANY OTHER PROOF THAT RESPONDENT'S USE WAS IN ANY PERTINENT RESPECTS NON-CONFORMING THE COURT PROPERLY DENIED APPELLANT'S CLAIM AT THE THRESHOLD LEVEL

For the reasons already described in Point I, the Board lacked the statutory power and authority to entertain Appellant's application in the first instance and its resolution issued subsequent the hearing was void ab initio. This being a threshold issue, this Court should affirm Judge Ford's opinion granting final judgment to Respondent on that basis alone, and it is not necessary for you to address the remaining issues. However, in the interest of completeness, and in the event this Court disagrees with Respondent's arguments in Point I, Respondent will address the remaining arguments while preserving its argument that none of these issues need to be reached.

In point II, Appellant alleges that Respondent's use of Lot 5 for parking is "unsafe," "chaotic," and "not a permitted use" for Lot 5 (Sb23-Sb24), and that a variance and site plan approval would have been necessary in order for the use to have been legal (Ab25-Ab26).

Article IX, Ch. 18-905 and -906 of the Lakewood Municipal Code collectively allow parking for places of worship and for schools, respectively (Aa266;Aa268). Upon reviewing these authorities, the trial court determined that "Section 18-901(A)(21) of the Lakewood Zoning Ordinance . . . governs uses of this property," along with Sections 18-905 and 18-906 governing "parking and buffer requirements" for places of worship and schools, respectively (Aa279). Section 18-901(A) sets forth the municipality's forty-seven (47) separate zoning districts, including, as relevant for purposes of this appeal, the zoning designation reserved for a Residential Office Park (ROP) (Aa279). Such zoning districts may include "'places of worship' in accordance with the requirements of § 18-905" and "'public and private schools' in accordance with the requirements of § 18-906" (Aa279) (quoting Lakewood Municipal Code, §18-903(I)(1)(b)). Because these ordinances allow Respondent's present use of the Sixth Street Lot for synagogue parking on their face, the trial court properly held that the Appellant's claim under N.J.S.A. 40:55D-68 that Respondent's use is nonconforming fails as a matter of law (Aa280).

On appeal, Appellant argues that Respondent's use of Lot 5 for parking related to Respondent's offsite use on Lot 8 is an impermissible "accessory use" disallowed pursuant to Lakewood Zoning Regulation Section 18-200 without a

variance or site plan approval (Ab24). Section 18-200, in pertinent part, defines "Accessory Use" as a "use . . . that is customarily incidental and subordinate to that of the principal and on the same lot. No accessory use shall form the basis for a claim of right to a principal or main use." Lak. Muni. Code §18-200. Appellant relies on Bell Atlantic New Jersey, Inc. v. Riverdale Zoning Bd., 352 N.J. Super. 407 (App. Div. 2002), and Nuckel v. Boro of Litle Ferry Pl. Bd., 208 N.J. 95, 101-103 (2011), in support of its argument that an offsite parking lot as an accessary use ordinarily requires a use variance (Ab25). Appellant contends it is "clearly wrong and absurd" for Respondent to use Lot 5 for an accessory use to its house of worship on a different lot (Ab27). Appellant is mistaken and the cases it cites are distinguishable.

"[A]n accessory use is implied as a matter of law as a right which accompanies a principal use." Shim v. Washington Twp. Planning Bd., 298 N.J. Super. 395, 401 (App. Div. 1997). "Zoning ordinances which permit 'customarily incidental' accessory uses to the main activity permit, by implication, any use that logic and reason dictate are necessary or expected in conjunction with the principal use of the property." Charlie Brown of Chatham, Inc. v. Bd. of Adj. for the Twp. of Chatham, 202 N.J. Super. 312, 323 (App. Div. 1985) (emphasis added). "The allowance of a primary use generally authorizes all uses normally accessory, auxiliary or incidental thereto . . . and 'accessory

use,' in turn, is defined as a use 'customarily incidental to the principal use of a building.'" Zahn v. Bd. of Adjustment, 45 N.J. Super. 516, 521-22 (App. Div. 1957) (citation omitted).

In Nuckel, 208 N.J. at 113, the Supreme Court of New Jersey determined that a hotel was required to obtain a use variance for its proposed driveway that, if approved, would be installed on an adjacent lot that housed an auto body shop that was a pre-existing nonconforming use. In Bell Atlantic, 352 N.J. Super. at 408-09, 414 unlike in Nuckel, the property owner sought a use variance for its offsite parking at a nearby gas station lot and the board of adjustment found that the property owner had not met its burden of meeting the criteria of N.J.S.A. 40:55-70(d), a determination that the trial court reversed, with this Court affirming the trial court. Ibid.

Here, unlike in Bell Atlantic or Nuckel, no one came to the Board seeking permission for construction or expansion. Rather, the only reason that Respondent's accessory use of Lot 5 was even before the Board was because Appellant sought to collaterally attack Respondent's pre-existing right of access to that lot under the Easement. This distinction is determinative and is supported by this Court's recent unpublished decision in Lakewood Realty Assoc., LLC v. ZBA of Lakewood, No. A-1981-20, 2022 N.J. Super. Unpub.

LEXIS 1214 (App. Div. July 5, 2022),[9] affirming the trial judge's ruling that a property owner proposing to construct a hotel on its lot did not need to apply for a variance where access to the hotel through a driveway "relie[d] solely on a cross-easement over an adjacent parcel." Id. at *14-15. This Court held that, "[a]s the trial judge correctly noted, a variance was not required" for the hotel's site plan approval because the property owner "was not proposing to build, expand, or revise driveway access to his proposed hotel, because it had already been built." Id. at *11.

As in Lakewood Realty Assoc., Respondent never proposed to expand or revise the parking lot or its use of the parking lot. Contrary to Appellant's contention, there is no issue of a "separate principal use." The Agreement between the HDS and Respondent expressly provided that the HDS had conveyed a deed to Lot 8 to Respondent for the purpose of erecting a synagogue and would "permit [Respondent] to utilize for parking purposes the vacant lands" on Lot 5 (Aa23;Aa26). As found by Judge Hodgson, the Agreement created an Easement that has never been abandoned. "An easement is a property right which cannot be taken away without observing constitutional rights," Am. Metal Co. v. Fluid Chem. Co., 121 N.J. Super. 177,

[9] As this is an unreported decision, pursuant to R. 1:36-3, Respondent attaches it hereto (Ra266-Ra273) and is aware of no contrary authority.

181 (Law Div. 1972), but which would be rendered essentially worthless here if Respondent were not permitted to use the Easement for the same purpose for which it was granted. As Judge Hodgson further found, to the extent that the parking situation has become "chaotic" since Appellant acquired the Property such chaos is attributable to Appellant's use, and not to Respondent's use, which remains necessary for its congregants to have access to the structure used as a house of worship on Lot 8.

Accordingly, "logic and reason dictate" that the Township's "[z]oning ordinances which permit 'customarily incidental' accessory uses to the main activity permit, by implication" continued offsite parking on Lot 5 as an accessory use to Respondent's principal use of the structure on Lot 8 for a house of worship. Charlie Brown of Chatham, 202 N.J. Super. at 323. Appellant's claim to the contrary is meritless.

## POINT III

## APPELLANT IS INCORRECT THAT THE BURDEN OF PROOF AS TO THE LEGALITY OF A NONCONFORMING USE FALLS ON THE PROPONENTS OF THE USE RATHER THAN ON THE "INTERESTED PERSON" BRINGING THE APPLICATION TO THE BOARD

Appellant's claim that the Respondent had the burden of proving the validity of its pre-existing non-conforming use on Appellant's application to the Board misapprehends the text and purpose of the MLUL.

The MLUL provides, in pertinent part, that any "person interested in any land upon which a nonconforming use or structure exists may apply in writing for the issuance of a certificate certifying that the use . . . existed before the adoption of the ordinance which rendered the use or structure nonconforming. The applicant shall have the burden of proof." N.J.S.A. 40:55D-68 (emphasis added).

The Legislative purpose of the statute is to allow for continuance of "a pre-existing nonconforming use to co-exist with an ordinance that facially prohibits it." Fairfield, 198 N.J. at 271-72. Consistent with that clear Legislative purpose, the plain text of the statute unmistakably and unambiguously provides that it is the "person" who "appl[ies] in writing" to the Board who "shall have the burden of proof." N.J.S.A. 40D:55-68. The word "shall," of course, is not a Legislative suggestion but a Legislative mandate. See State v. Bolvito, 217 N.J. 221, 223 (2014) ("The New Jersey Legislature's choice of the word shall, is ordinarily intended to be mandatory, not permissive."). Because there is no dispute that Appellant was the "person" who "appl[ied] in writing" to the Board, there should also have been no dispute that Appellant had the burden of proof before the Board.

Appellant, contrary to this straightforward reading of the statute, insists that Respondent, as "proponent" of the "non-permitted" use carries the burden

of proof on an application by an objector to that use brought decades after the use came into existence. Appellant has not offered any theory as to how this interpretation comports with either the plain meaning or the purpose of the statute or any reason why, in this instance, the applicable interpretive principles should be disregarded.

In many cases, the property owner, or a prospective property owner, is both the proponent of the use and the party applying for issuance of the certificate. In such cases, the property owner, as the applicant seeking the certificate, will carry and bear the burden of proof that the use pre-existed the ordinance. See, eg., S&S Auto Sales, 373 N.J. Super. at 613 (App. Div. 2004) ("It is the burden of the property owner to establish the existence of a nonconforming use as of the commencement of the changed zoning regulation and its continuation afterward."). But that does not mean that the property owner will bear the burden of proof even when a neighbor asks the Board for relief. On the contrary, the statute could not be clearer that "[t]he applicant shall have the burden of proof." N.J.S.A. 40:55D-68.

In Appellant's view, the Legislature intended that the "applicant" referred to in N.J.S.A. 40:55D-68 must refer to "the proponent of the nonconforming use," even if the actual applicant objects to the nonconforming use notwithstanding that this interpretation cuts directly against the statutory text.

No canon of statutory interpretation, for example, would support Appellant's contention that the "'owner of the nonconforming use or structure' de facto becomes the 'applicant'" under the MLUL for the certificate certifying the use preceded the ordinance (Sb28).

First, as a sheerly factual matter, this is a claim of astonishingly recent origin. Again, in both of its 2018 applications to the Board, the Appellant referred to itself as the "applicant," not Respondent. Nor did Appellant claim that Respondent was the "de facto applicant" at either Board hearing or at any point in the action in lieu of prerogative writ proceedings that took place between 2019 and 2022. This argument arose for the first time in Appellant's appellate brief. It is meritless, but even if it were not, Appellant cannot benefit from it now on appeal, having pressed repeatedly in the proceedings below that the burden of proof was on the "proponent" of the use but never having once asked the Board or the Court to consider its novel "de facto applicant" theory of statutory interpretation. See Regan v. City of New Brunswick, 305 N.J. Super. 342, 357 n.6 (App. Div. 1997) (citations omitted) (noting that appellate courts will ordinarily "not consider an issue raised for the first time on appeal unless it relates to 'jurisdiction of the trial court or concern[s] matters of great public interest,' or otherwise constitutes 'plain error.'").

Second, as a legal matter, no language in the text supports that interpretation, nor has Appellant pointed to any case law construing the MLUL to include a "de facto applicant" exception. Nor, if such a doctrine did exist, would it apply here. "De facto," after all, means "actual" or "existing in fact." See Black's Law Dictionary 448 (8th Ed. 2004). Respondent was not the "actual" applicant to the Board; in fact, it was the "actual" opponent of both applications. To construe the opponent of an application as the "actual" applicant is confounding and nonsensical.

In support of the statutory sleight-of-hand, Appellant focuses primarily on Heagan v. Borough of Allendale, 42 N.J. Super. 472 (App. Div. 1956), a decision that preceded the MLUL by nearly two decades, and also cites "numerous cases" that follow Heagan on the burden of proof issue, all pre-dating the MLUL (Sb28-Sb30). Needless to say, cases decided before the MLUL was drafted offer no insight on the meaning of the

The post-MLUL case law relied upon by Appellant serves Appellant no better. Appellant relies heavily, for example, on Berkeley Square Assoc. v. Zoning Bd. Of Adjustment of Trenton, 410 N.J. Super. 255 (App. Div. 2009), a case in which the Appellate Division grappled with the issue of whether a nonconforming use had been abandoned. But that is totally distinguishable from this matter where (1) there is no proof that Respondent's use is nonconforming

and (2) the Chancery Division twice found that Respondent had not abandoned the use (Aa29-Aa48;Ra240-Ra265).

Appellant cites Ianieri v. East Brunswick Zoning Bd., 192 N.J. Super. 15 (Law Div. 1983) for the proposition that as a matter of law "the burden of proof is with the proponent of the nonconforming use" (Sb31). But that situation is distinguishable from Appellant's application regarding a use by Respondent that Appellant has never proven is non-conforming, now or before.

Moreover, as Appellant acknowledges the genesis of the dispute in Ianieri was when "the new owner obtained a sign permit and erected a business sign" and the "neighbor 'appealed' the sign and use to the Zoning Board, with the new owner participating" (Sb31). In other words, the property owner was both the proponent of the use and the applicant before the zoning board in Ianieri, as was the case in Ferraro v. Zoning Bd. of Keansburg, 321 N.J. Super. 288 (App. Div. 1999) and Eltrym Euneva, LLC v. Keansburg Planning Bd. of Adjustment, 407 N.J. Super. 432, 436-37 (Law Div. 2008), other cases on which the Appellant relies. Nor does Bonaventure Int'l Inc., v. Borough of Spring Lake, 350 N.J. Super. 420 (App. Div. 2002), also relied upon by Appellant, warrant a different outcome, because, as the Appellate Division noted in Berkeley, the issue before the zoning board in that case concerned a property owner who had "expanded a

non-conforming use," which is distinguishable from whether a nonconforming use existed to begin with. Berkeley, 410 N.J. Super. at 264 n.4.

This was not a situation in which the property owner applied for a permit or a variance and then an objector presented the issue to the Board. Here, Appellant initiated the issue and therefore under the clear terms of N.J.S.A. 40:55D-68, Appellant was the applicant who inescapably had the burden of proof, as the statute lends itself to no other interpretation. Ibid. Appellant, under any metric, failed to satisfy that burden. Necessarily, before demonstrating that a nonconforming use preceded the ordinance that made the use nonconforming, the applicant must first show that the enacting of an ordinance caused a previously authorized and conforming use to be nonconforming to the new ordinance--a showing that, as the trial court correctly found, Appellant failed to make in the proceedings below (Aa278-Aa279). That ruling was correct and should not be disturbed on appeal.

## POINT IV

## THE TRIAL COURT CORRECTLY ADOPTED AND APPLIED THE CHANCERY JUDGE'S DETERMINATION THAT THE AGREEMENT GOVERNED THE ISSUE OF PARKING ON LOT 5 AND APPELLANT'S ARGUMENT TO THE CONTRARY IS MERITLESS

In point IV, Appellant alleges that Judge Ford erred by adopting and applying Judge Hodgson's determination that the issue of parking on Lot 5 was governed by the Agreement (Ab37). Appellant is incorrect.

"[C]ollateral estoppel, also known as 'issue preclusion,' . . . is an equitable principle that arises [w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment," in which case "the determination is conclusive in a subsequent action." Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85 (2012) (quoting Restatement (Second) of Judgments § 27 (1982)).

The doctrine forecloses future litigation when:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding . . . (2) the issue was actually litigated in the prior proceeding . . . (3) the court in the prior proceeding issued a final judgment on the merits. . . (4) the determination of the issue was essential to the prior judgment . . . and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [In re Estate of Dawson, 136 N.J. 1, 20 (1994).]

Here, because all five of the above factors were present, Judge Ford was correct that Judge Hodgson's prior ruling regarding the use of Appellant's property for parking was entitled to conclusive, determinative effect in the action in lieu of prerogative writ. Appellant, in the action in lieu of prerogative writ before Judge Ford, specifically argued that Appellant's use of Lot 5 for parking was disallowed without zoning approval (Aa281-Aa282). In granting final judgment to Respondents, Judge Ford noted that earlier that same year, following the appellate remand, Judge Hodgson had found that Respondents

"established . . . an express permanent easement to the use of the Defendant's property for parking, both on the Fifth Street Lot and the Sixth Street lot, since the early 1960s," and "that site plan application by [HDS] approved in 1972 and 1993 did not affect or limit those rights" (Aa273).

In his prior decision, Judge Hodgson had also found that HDS had previously applied for and obtained a variance from the Township in 1972 to "construct 'an addition to an existing school with insufficient parking, insufficient side lines and exceeding the maximum lot coverage'" (3-29-22 opinion at 3). In approving the variance, the Township stated "although evidence presented indicates parking provisions to be less than those required pursuant to the existing ordinance, the applicant will have the benefit of parking facilities on adjoining properties owned by [Plaintiff] should additional parking facilities be required" (Ra243;Aa20). Accordingly, the issue presented to Judge Ford as to whether Respondent's use of Lot 5 for parking was disallowed absent zoning approval was identical to an issue that was litigated and decided on the merits by Judge Hodgson in the prior proceeding in which Appellant participated and in which such determination was essential. Since all five elements were met, Judge Ford correctly held that Appellant was collaterally estopped from asserting its zoning claim. Dawson, 136 N.J. at 20.

## POINT V

## APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED BY DENYING ITS MOTION IN LIMINE IS MERITLESS

In Point V, Appellant principally argues that Respondent presented the trial court with "voluminous new Exhibits" that "were not properly before the Court" because they were "not part of the record before the Zoning Board" (Ab46). This argument is without merit.

The Supreme Court of New Jersey has "uniformly . . . endorsed" the proposition that "[i]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for an abuse of discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (quoting Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008)). "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Id. at 383-84. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021). Moreover, in a bench trial, reviewing courts presume that "[a] judge sitting as the factfinder is certainly capable of sorting through admissible and inadmissible evidence without resultant detriment to the

decision-making process." State v. Kern, 325 N.J. Super. 435, 444 (App. Div. 1999).

Here, Appellant does not attempt in Point V to identify any specific documents that Judge Ford erroneously relied upon in her decision. Much less has Appellant shown that Judge Ford's reliance on any particular piece of evidence lacked any "rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Chavies, 247 N.J. at 257.

Respondent attached multiple exhibits to its December 22, 2016 objection to the First Application for an interpretation from the Board (Ra43-Ra159). Respondent "fully incorporate[d]" those exhibits in its objection to Appellant's second application for an interpretation from the Board (Aa63). Counsel for the Township acknowledged at the October 15, 2018 hearing that both Respondent and Appellant "presented . . . an encyclopedia thick of documents that you've all had an opportunity to review," which Chairman Halberstam then acknowledged was "right here on [his] desk" (1T4-20 to 1T4-25).

On appeal, tellingly, Appellant does not identify which specific documents or exhibits presented to Judge Ford that were allegedly not presented to the Board below in opposition to either or both of Appellant's municipal applications, instead referring vaguely to "new documents not before the Board"

(Ab45). Much less has Appellant established how Judge Ford's decision to consider any particular document lacked any rational basis. This lack of a showing by Appellant falls far short of meeting its burden of demonstrating that the trial court abused its discretion by considering the evidence presented. Hanges, 202 N.J. at 383-84.

## POINT VI

## APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN ITS RULING THAT THE BOARD LACKED JURISDICTION IS MERITLESS FOR REASONS ALREADY DISCUSSED

In point VI, Appellant alleges that the trial court erred by ruling that the Board lacked jurisdiction to decide the issue before it when the Board was "the proper forum . . . to make the findings and determination as to a use being currently nonconforming and its 'pre-existing' legal status" (Ab49). Because Appellant's Point VI simply restates under slightly different formulations the very same arguments raised in its Points I and IV, Point VI fails for the same reasons already discussed herein. Unlike Appellant, Respondent will not burden the Court's resources and patience by presenting duplicative arguments to those already covered in other portions of this brief. Instead, Respondent will briefly address only those portions of Point VI that raise issues or arguments differing from those Appellant raises elsewhere in its brief.

To the extent Appellant seems to contend in Point VI that the Board had the statutory power and authority to "adjudicat[e] that the off-site parking use on Lot 5 is not a 'legal pre-existing nonconforming use" because no other municipal authority had the power to do so, this process-of-elimination theory of governmental power has no purchase. As has already been explained, N.J.S.A. 40:55D-70 sets forth limited powers for zoning boards of adjustments. The Legislature did not see fit to imbue the Board with a catch-all, residual authority to police nonconforming uses that the Board deems "chaotic and unsafe" in the subjective opinion of its members (Ab48). Rather, the Board is empowered only to "decide appeals" regarding alleged enforcement errors pertaining to enforcement of zoning ordinances under subpart (a), to "hear and decide requests for interpretation . . . upon which such board is authorized to pass by any zoning or official map ordinance" under subpart (b), and to grant or deny applications for variances under subparts (c) or (d). N.J.S.A. 40:55D-70. Appellant has pointed to no errors in the enforcement of any existing ordinance nor has Appellant pointed to any ordinance authorizing the Board to interpret a site plan before a different municipal body that there is no record evidence about. Nor was Appellant seeking a variance.

Accordingly, and for reasons already discussed, the Board lacked statutory authority to entertain the application brought by Appellant and the arguments Appellant raises in Point VI are without merit.

## POINT VII
## THE POINTS RAISED IN POINT VII ARE ALL LACKING IN MERIT

In Point VII of Appellant's brief, Appellant first duplicates multiple arguments raised in earlier points, including that the trial court erred by considering documents not presented to the Board (addressed in Point V), that Respondent's "off-site parking" is not a permitted use (addressed in Point II), and that the burden of establishing the legality of Respondent's use of Lot 5 on Appellant's application before the Board was on Respondent (addressed in point III) (Ab51).

After repeating the above arguments, Appellant pivots to the argument to which Point VII is primarily dedicated: that the trial court erred by finding that that "the Ordinance which created review of site development plans was only adopted by Lakewood Township in December 1984, whereas, construction of the Synagogue was completed in 1964" (Ab53). In Appellant's view this was "a demonstrabl[y] false critical finding" of the court that required "invalidation" (Ab57). For purposes of brevity, Respondent will focus its response to Point VII on the primary argument, which for reasons that will be described is meritless.

"Because the Law Division's prerogative writ jurisdiction stems from its inherent power and from constitutional imperative, the Law Division can review the facts of the case and make independent findings where necessary." Meszaros v. Planning Bd. of City of S. Amboy, 371 N.J. Super. 134, 137 (App. Div. 2004).

Under the well-established standard of review of judicial factfinding on appeal, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

Appellant's chief claim in Point VII is that Judge Ford erred by issuing a purportedly "critical finding" regarding the Township's site development plan ordinance. In order to address this claim it is appropriate to view the trial court's finding in context. In finding the Resolution arbitrary, capricious, and unreasonable, the trial court chiefly relied on four key legal rulings: (1) that its "review of the entirety of the record in connection with the school's supplemental application . . . was again tainted by the Board's lack of jurisdiction" (Aa278), (2) that the Board had applied the burden of proof to the wrong party (Aa280), (3) that the "Board exceeded its statutory authority by acting as an enforcement agency" (Aa281), and (4) that both Appellant and the Board were collaterally estopped from contending that there was "a lack of

evidence in the record that the Sixth Street Lot had ever ben utilized for a parking lot" (Aa282-Aa283).

In the course of its decision, the trial court also made findings of fact including that the alleged "chaotic" parking issues on Lot 5 "were created by the Defendant School's decision to use that particular area for a student pickup and drop off zone" (Aa282) as well as the mixed question of law and fact that Appellant takes issue with in Point VII—that:

> The Board made a factual finding that no site plan approval was issued for the synagogue. However, the ordinance which created review of site development plans was only adopted by Lakewood Township in December 1984, whereas construction of the Synagogue was completed in 1964. Thus, to the extent that the decision of the ZBA was based upon facts not proven in the record, this finding it is clearly arbitrary, capricious, and unreasonable.
>
> [Aa280-Aa281.]

Judge Ford's four key legal rulings, for reasons already described, are absolutely correct and should be affirmed on appeal. Accordingly, even if the court did err with respect to the site plan ordinance finding that Appellant takes issue with—a contention that Respondent disputes for reasons that will be discussed—such error was not outcome determinative and therefore must be disregarded as not "clearly capable of producing an unjust result." R. 2:10-2.

In any event, Appellant has not established that the trial court's site plan ordinance finding was erroneous. Again, viewing the trial court's finding in context, its main point was that the Board's factual finding that the synagogue never had site plan approval was unsupported by the record. This was and remains correct and Appellant presented no evidence to support the Board's finding either below or on appeal.

Instead, Appellant expends several pages of its brief vigorously contending that the Township's attorney was wrong when he wrote, in a February 20, 2019 email to Appellant's counsel that "the ordinance requiring site plans was adopted in 12/1984," and attached thereto an excerpt from the Township's Municipal Code, as revised in 1984, containing §§ 18.8 and 18-8.1 regarding site development plan approval (Ab53-Ab57;Ra274-Ra277). Appellant then cites to the 1971 Code Book, appended to its brief, in particular the "Table of Sources" that referenced §18-8.1 as being premised on Revised Ordinance § 12.06 enacted in 1965 (Ab56). Section 12.06, included in Appellant's appendix bears almost no resemblance to § 18-8.1 the ordinance derived therefrom, other than that both enactments concern site plan requirements. Indeed, it appears to be simply a prefatory enactment that, other than specifying the timing and amount copies of a site plan to be submitted to the Planning Board, contains virtually no substantive requirements, instead

referring to "the requirements hereinafter set forth" but Appellant has not provided the sections that follow thereafter. Critically, for purposes of this analysis, § 12.06 does not include the requirement from § 18-8.1 that "[s]ite plan approval shall be required where there is a change in use of an existing structure," or that "[n]otice shall be given to all property owners withing 200 feet of the proposed change" (Compare Ra275-Ra277 with Aa254-Aa255).

Moreover, as Appellant acknowledges, this supplemental filing was not even presented to the Board in the initial instance, much less did the Board rely upon it, but it was instead presented to Judge Ford in support of its action in lieu of prerogative writ (Ab54). Indeed, the Board was explicit in explaining that it was relying on the lack of "evidence of a site plan" approval in finding that Respondent's use of Lot 5 for parking was "not an allowed use" (Aa2). This turns on its head the requirement imposed upon land use boards to base their factual findings on "substantial evidence," rather than based on inferences from lack of evidence. Darst v. Blairstown Tp. Zoning Bd. of Adjustment, 410 N.J. Super. 314, 325 (App. Div. 2009). Or "[s]tated more pithily . . . 'absence of evidence is not evidence of absence.'" Chambers v. Sec'y Pa. Dep't of Corr., 442 F. App'x 650, 656 (3d Cir. 2011).

Accordingly, Judge Ford remains absolutely correct that the Board's finding that a site development plan for the change in use for Lot 5 was required

in 1964 is a finding entirely lacking in record support based on the record presented to the Board. For the same reason, the Board's finding that there was no approved site plan is also untethered to the record, as the Board admitted.

For these reasons, Appellant's claim that the trial court erred by finding that the Board lacked record support for its determination as to the lack of site plan approval is meritless and even if there was error, it was harmless and should be disregarded under Rule 2:10-2.

## CONCLUSION

For the above reasons, and for those set forth in the underlying trial court opinion, Judge Ford's opinion and order finding final judgment on behalf vacating the Board's determinations must be affirmed.

Respectfully submitted,

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Dated: November 20, 2023

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December 8, 2023

**Via: eCourts**
Honorable Judges, Appellate Division
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 West Market Street, P.O. Box 006
Trenton, New Jersey 08625-0006

**Re: Congregation Sons of Israel v. Township of Lakewood Zoning Board, Township of Lakewood and Congregation Meorosnosson Inc.**
**Docket No.: A-001339-22**
**Letter Reply Brief on Behalf of Defendant/Appellant Congregation Meorosnosson**

TO THE HONORABLE JUDGES OF THE APPELLATE COURT:

This is an Appeal by the Defendant/Congregation Meorosnosson of the Opinion/Order of the Superior Court Law Division reversing and invalidating the Resolution of the Lakewood Zoning Board that determined Congregation Sons of Israel's regular use of the Meorosnosson (Lot 5) school property as an off-site parking use/facility for the Sons of Israel separate Lot 8 attendees/staff was not a current legal use or a non-conforming use. The application had been brought to the Zoning Board by the School pursuant to N.J.S.A. 40:55D-68 of the Municipal Land Use Law (MLUL).

The defendant Meorosnosson submitted its Appeal Brief and Appendix on July 11, 2023. The defendants Zoning Board and Township have submitted their Briefs. Plaintiff/respondent Sons of Israel has submitted its responding Brief and Appendix on November 28, 2023. Kindly accept this Letter Reply Brief on behalf of Meorosnosson, in support of this Court reversing and voiding the Opinion/Order of the Law Division and restoring and affirming the Resolution/determination of the Lakewood Zoning Board.

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## STATEMENT OF PROCDURAL HISTORY
## STATEMENT OF FACTS

This defendant/appellant relies upon the Statement of Procedural History (Db3) and Statement of Facts (Db4) previously submitted.

## LEGAL ARGUMENT

### THE ZONING BOARD RESOLUTION/DETERMINATION WAS PROPERLY FOUNDED IN THE LAW AND RECORD. THE TRIAL COURT OPINION/ORDER VACATING THAT RESOLUTION WAS UNFOUNDED IN THE LAW AND FACTS

This is the Appeal of the Trial Court's reversal and invalidation of the Zoning Board Resolution finding that the Sons of Israel Synagogue Lot 8 use of the portions of the School Lot 5 for an off-site parking use/facility is not a legal use and not a nonconforming legal use. The assertions below by the Sons of Israel was that (1) the Zoning Board had no jurisdiction to consider the School's Application for that determination under N.J.S.A. 40:55D-68; (2) that regular parking on the School Lot 5 by a third party Lot 8 was currently a permitted accessory use/facility on the School Lot, (3) that the burden of proof as to the validity of that non-conforming off-site parking use was on the School, and that the proponent Sons of Israel had no burden, and (4) that the claim/finding by the Chancery Court in separate litigation that an "easement" had been established in 1963 on the School Lot 5 permitting the Lot 8 Sons of Israel attendee/staff vehicles to park at will rendered the

non-conforming use issue moot or irrelevant. All those issues were presented to the Court below (Judge Marlene Ford), and the Trial Court ruled incorrectly on each issue.

Part of the reason for its incorrect determination was that the Trial Court did not limit the record in its review to the record/documents presented to the Zoning Board. The Trial Court denied the School's Motion to Limit the Record to the Record before the Board and allowed the Sons of Israel to submit 57 additional documents, exhibits, or transcript excerpts mainly from the separate "easement" litigation between the parties in Chancery Court before Judge Hodgson. As a consequence, the Trial Court did not decide the case in the proper context of determining on the record sent to the Board whether the Board determination was arbitrary and unfounded. Instead, the Trial Court misunderstood the relevant legal principles and burdens of proof as to N.J.S.A. 40:55D-68 non-conforming use appeal/determination, and then vaguely allowed and relied upon exhibits or claimed facts not presented to the Zoning Board, improperly submitted by the Sons of Israel and allowed, and inaccurate on facts deemed relevant by the Court. (Da179-194; Da215-218)

The various legal issues that were incorrectly asserted by the Sons of Israel --- and incorrectly adopted by the Trial Court --- have been properly detailed in the School's Appellate Brief; the Sons of Israel Brief continues to assert its legally incorrect and illogical analysis on those issues. In this Reply Brief, the errors and illogic of the Sons of Israel claims, and the Trial Court's findings and analysis that adopted those unfounded claims, will be succinctly detailed.

A. THE BOARD OF ADJUSTMENT HAD JURISDICTION FOR THE SCHOOL'S 40:55D-68 APPLICATION (IN SUPPORT OF Db Pt. I AND RESPONDING TO Pb Pt. I)

The Sons of Israel continues to assert the Zoning Board did not have jurisdiction to hear and decide the Meorosnosson application under N.J.S.A. 40:55D-68 for a determination as to whether the Lot 8 attendee/staff parking use of the School Lot 5 was a legally constituted pre-existing non-conforming use/facility. The Sons of Israel largely responds with a confused and irrelevant argument about the "interpretation" provision at N.J.S.A. 40:55D-70 and that the School's Application under N.J.S.A. 40:55D-68 is somehow barred or precluded by a prior School Application for Interpretation of the 1972 School Site Plan that the Zoning Board declined to hear.

That the Zoning Board declined to consider a prior Interpretation appeal under N.J.S.A. 40:55D-70 is not relevant and is not an issue here. The Sons of Israel's claim here is that the Zoning Board can only entertain an application under 40:55D-68 from a party (presumably the property owner) applying for a "certificate certifying that the use … existed before the adoption of the ordinance which rendered the use … nonconforming," and has no jurisdiction or authority to entertain under N.J.S.A. 40:55D-68 an application from an objector asserting that an on-going use is non-conforming and is not a legal pre-existing use. The Sons of Israel position is neither logically nor legally founded.

As detailed in our Brief, it has been long established that an interested party has standing to object to and litigate the legal validity of an on-going non-conforming use. Prior to the MLUL, such objectors had to bring that action in Superior Court. See e.g

Heagen v. Borough of Allendale, 42 N.J. Super. 472 (App. Div. 1956) and cases cited Db 28-29. The MLUL established an administrative appeal process and forum by 40:55D-68 for such non-conforming use legality issues --- that process/forum to be used by either an applicant for a certificate of valid non-conforming use or an objector to an on-going use as being non-conforming and not legal. The Courts have repeatedly recognized the Zoning Board as particularly well equipped to address such nonconforming use disputes. See Bell v. Tp. of Bass River, 196 N.J. Super. 304, 314 (Law Div. 1984) .

The 40:55D-68 process and avenue is not only available to an objector to the non-conforming use, but is required to be utilized. For example, in Ianieri v. East Brunswick Zoning Bd. 192 N.J. Super. 15 (Law Div. 1983) a neighbor/objector filed an application to the Zoning Board challenging the 25 year use of a residence as an antique shop, and its expansion, as an illegal non-conforming use. The Zoning Board concluded, as here, that the antique shop was not a legal valid non-conforming use, and had to cease. The Law Court's Opinion (Judge Skillman) affirming that Board decision remains valid and is often cited 40 years later. In Bonaventure Int. v. Spring Lake, 350 N.J. Super. 420 (App. Div. 2000), the objecting neighbors to a restaurant/banquet facility in Spring Lake filed an application under 40:55D-68 to the use/facility as not legal. The Court affirmed the application was within the Board's jurisdiction. The Unified Board decided the current uses were not pre-existing or legal, but that enforcement was estopped due to the Borough not acting sooner and allowing certain permits. The Law Court and Appellate Court modified the Board decision, finding the restaurant use valid as pre-existing, but the

banquet /catering uses to be not valid pre-existing non-conforming uses. Berkeley Square Asso. V. Zoning Bd. of Trenton, 410 N.J. Super. 255 (App.Div. 2009), makes the same point. There, an objecting neighborhood association filed an application to the Zoning Board asserting that a vacant apartment building could not be renovated and re-occupied as it was not a legal use and had been abandoned. The Zoning Board found that the apartment use was a valid pre-existing legal use, and that determination was affirmed by the Trial and Appellate Courts.

The point is that the process and forum as per 40:55D-68 is mandated for use by either a party seeking to certify the validity of a non-conforming use or an objector challenging the validity/legality of an on-going non-conforming use. The Sons of Israel assertion that the Zoning Board did not have jurisdiction --- and the Court should dismiss its application on that basis --- is without merit and, in fact, is nonsensical. The Trial Court's finding that the Zoning Board erred in determining on the nonconforming use validity is clearly in error.

It again should be noted that prior to and during the Board hearing, the Board Attorney repeatedly interjected his opinion that the Board should not decide the matter. That position and advice was clearly in error. The Board majority wisely disregarded that opinion and made the correct analysis and decision --- probably because an unorganized parking scrum at the door of a grade school is a clear safety hazard and zoning non-starter. That Board decision is a testament to their competence and fortitude. Their decision on jurisdiction was certainly correct, and should be affirmed.

B. THE SONS OF ISRAEL (LOT 8) OFF-SITE PARKING USE/FACILITY ON THE SCHOOL LOT 5 IS NOT A LEGAL ACCESSORY USE/FACILITY ON LOT 5. THE TRIAL COURT DETERMINATION THAT THIS WAS A LEGAL ACCESSORY USE IS INCORRECT. (IN SUPPORT OF Db Pt. II AND IN RESPONDING TO Pb Pt. II)

Probably the most illogical position asserted by the Sons of Israel --- and adopted by the Trial Court --- is that an off-site parking use/facility serving a different property is a permitted accessory use on the School Lot 5, because "parking" is a permitted accessory use to a School under Section 18-906 (Da268). The Lakewood Zoning Regulations as to accessary uses --- as in most towns --- provides and requires that any accessory use be located on the same Lot as the principal use that it is supporting. See Lakewood Section 18-200. Almost every use --- be it residential, commercial, or a school/religious facility --- has an accessory parking requirement established and necessary to serve the parking needs of that particular use. To assert that means that other third-party property or uses can legally commandeer or with the owner's authorization take over and use portions of that Lot/use's parking capacity for an off-site third party parking is patently absurd and illogical. Such an analysis --- if found valid --- would render all accessory parking standards as useless, as the spaces could be rented or assigned to third parties at the Lot owner's discretion. Our Appeal Brief cites numerous cases holding that such off-site parking use on a Lot with its principal use is not permitted without variance and site plan approval (Db25-26). That the Trial Court found that the "School submitted no proofs that the Plaintiff's use of the Sixth Street Lot is not a permitted use on the property under current regulations or ordinances" (Da279) is simply unexplainable. The Regulations

clearly prohibit such third party parking on the School Lot, and logic dictates that such an off-site parking use cannot be a legal or conforming accessory use.

As support for its illogical claim, the Sons of Israel references the unreported Lakewood Realty Assoc. LLC v. ZBA of Lakewood, Dkt A-1981-20, 2022 NJ Super. Lexis 1214 (App. Div. 2022) (Pb 30-31).[1] That case does not support the Sons' position. In Lakewood Realty the use of the easement across the car wash lot for access to the hotel lot/use had been approved by a Zoning Board Subdivision and Variance Approval in 2015. The Court found that the 2015 Board Subdivision Approval of that access easement use removed the need for a second Board Approval. In this case, there was no Board Site Plan/Variance Approval for this nonconforming off-site parking use/facility on the School Lot 5. The Point remains as asserted by Meorosnosson, without Board Approval of a variance/site plan the off-site parking use of Lot 5 is an illegal use by Zoning Law

C. THE BURDEN OF PROOF AS TO THE LEGALITY OF THE NON-CONFORMING USE WAS ON THE PROPONENT --- THE SONS OF ISRAEL. THE PLAINTIFF'S POSITION AND THE COURT'S RULING WAS INCORRECT AND INVALID (IN SUPPORT OF Db Pt. III AND IN RESPONDING TO Pb Pt III)

A further critical error in the Sons of Israel's position --- and the Trial Court ruling --- was as to the burden of proof. The Zoning Board in the hearing and in its Resolution got it correct --- that the burden to prove the pre-existing legality of a current nonconforming use rests upon the proponent of the use. The Sons of Israel Brief persists in the claim that the burden of proof rested on the School objector, and that the Sons of Israel as proponent

[1] The defendant Meorosnosson's Attorney here was the Attorney for the Plaintiff-Appellant Lakewood Realty Associates in that case.

of the nonconforming use had no proof burden (Pb32-36). The Trial Court surprisingly adopted that position. (Da279)

It should be noted that any Sons of Israel claim that this position on burden of proof was not asserted by the School below (Pb 35-36) is simply not accurate. The point and relevant case law was presented to the Zoning Board in a legal analysis letter before the Board hearing (Da71). At the Board hearing, the Board Chairman repeatedly asked the Sons of Israel and its Attorney to present facts or evidence to demonstrate that this off-site parking use was legal at its inception or had ever received a Site Plan or variance Approval. The Sons of Israel Attorney repeatedly responded with an acknowledgement that no such proof could be produced (1T25-15 to 30-7; 1T30-8 to 34-14; 1T42-2 to 47-8). The Sons of Israel position at the Board hearing and now is that the zoning legality issue is superseded and negated by the Chancery Court ruling that a parking easement/permission was granted by the School to the Sons of Israel in the 1963 Agreement. The burden of proof point was fully briefed to the Trial Court, and that Court's ruling that the School had the burden of proof --- and not the Sons of Israel as proponent of the non-conforming use/facility --- is inexplicable and incorrect.

The burden of proof point has been briefed in our initial Appellate Brief (Db28-36). To the Sons of Israel assertion that 40:55D-68 placed the burden on an objector "applicant" filing an application to challenge the legality of a non-conforming use, that assertion has been dismissed in Bonaventure Int. 350 N.J. Super. at 427 and Berkeley Square 410 N.J. Super. at 265. In both cases, the Application was filed by neighbor

objectors. Both decisions affirm that the burden of proof rests upon the proponent of the continuation of the non-conforming use. That is clearly the law since Heagan in 1956 and under the MLUL, and rests upon solid policy reasons and analysis set forth in numerous Court Opinions. The Sons of Israel position is without merit, and the Trial Court's ruling that the burden of proof rested on the School and was not met is clearly error.

D. THE 40:55D-68 APPEAL WAS NOT BARRED OR PRECLUDED BY THE CHANCERY COURT DECISION (IN SUPPORT OF Db Pt. IV AND RESPONDING TO Pb Pt IV)

The Sons of Israel continues to assert that the issue of the zoning illegality of the on-going nonconforming use of the off-site parking use on the School Lot 5 is collaterally estopped or foreclosed by the Judge Hodgson's Chancery Court ruling that the 1963 Agreement established a parking easement on the School Lot 5 that remains in place. The Trial Court, again in error, adopted that erroneous and illogical position.

The 40:55D-68 zoning issue is whether the nonconforming off-site parking use is entitled to continue as being either (1) legally in place prior to zoning regulations prohibiting the use or (2) being legally authorized by a Board site plan/variance approval. The claim that the nonconforming use is legal under zoning because the use was allowed or put in place by the property owner or with the owner's permission or by easement is actually irrelevant. In practically every instance, a nonconforming use will be commenced either by the owner or with the owner's permission. That the property owner allowed the nonconforming use is irrelevant as to its zoning legality. The fact that in 1963 the Lot 5 owner allegedly extended a permission to the Sons of Israel Lot 8 to park attendee/staff

vehicles on Lot 5 --- whether by easement or informal license --- is irrelevant to the zoning/nonconforming use legality issue. The Chancery Court Opinion/Order was that by the 1963 Agreement Paragraph 10 the School Lot owner granted to the Synagogue Lot 8 a parking easement on Lot 5, and that easement has not been abandoned by the Sons of Israel. That Opinion/Order is certainly not decisive or even relevant to the Zoning Board issue and decision that the off-site parking use/facility on the School Lot 5 is non-conforming under current Zoning Regulations and there is no proof such off-site parking use/facility was ever legal under zoning at its inception or any time thereafter.

That there was no "pre-existing" legal off-site parking use by the Sons of Israel Lot 8 on the School Lot 5 --- and that there is no zoning or variance Board Approval for such parking use --- was actually logically established by the 1972 Site Plan/variance Approval applied for and received by the Lot 5 School for its expansion project (Da13-22). That Site Plan Plat and Resolution clearly does not provide for or allow off-site parking for Lot 8 attendees/staff on Lot 5. In fact, those documents confirm the School Lot 5 had deficient parking for its own school requirements and applied for and received a parking variance. That is certainly conclusive that the Zoning Board's analysis and decision on the zoning issue is correct. The Trial Court ruling that this 40:55D-68 Appeal/Board determination is somehow collaterally estopped by the Chancery Court ruling that the 1963 Agreement provided a parking permission/easement by the Lot 5 owner to Lot 8 is simply incorrect.

E. THE SONS OF ISRAEL'S SUBMISSION OF NUMEROUS/57 DOCUMENTS NOT IN THE BOARD RECORD --- AND THE TRIAL COURT'S ALLOWING SUCH SUBMISSION AND RELYING ON

CLEARLY ERRONEOUS CLAIMS THEREIN --- WAS IMPROPER (IN SUPPORT OF Db Pt V and VII, RESPONDING TO Pb V AND VII)

Besides the substantive errors, the Trial Court erred procedurally as to the "record" to be considered. As previously described, the School on August 23, 2018 filed an Application to the Zoning Board under 40:55D-68 for a determination as to the legality of the non-conforming off-site parking uses by the Sons of Israel Lot 8 on the School Lot 5. With its Application, the School Attorney submitted several documents/exhibits as intended exhibits/evidence (Da 7-48). Thereafter, certain additional legal correspondence between the School Attorney, Board Attorney, and the Sons of Israel Attorney (Da49-88) were presented as Exhibits before the Board at the hearing. The Sons of Israel's legal position was set forth in its pre-hearing letter (Da62) --- that it had no burden to prove its off-site parking use of Lot 5 was ever legal by zoning and thus no exhibits or evidence were submitted to the Board with that letter.

At the Board hearing, the School Attorney moved in evidence without objection the various documents submitted with the Application (Da7-48) and the pre-hearing legal correspondence (Da49-88). The Sons of Israel presented no exhibits/evidence; its position in reply to repeated inquiries from the Board Chairman was that it had no burden or need to prove anything and the then in place Chancery Court parking easement ruling (Da29-48) was dispositive (1T25-15 to 34-14).

The Sons of Israel commenced this lawsuit prior to the Board Resolution being adopted by the premature filing of a Complaint and Order to Show Cause seeking restraints, with a collection of documents appended that were not in evidence before the Zoning Board. Later in its Pre-Trial submission, the plaintiff listed additional documents not before the Zoning Board as proposed Exhibits (See Cert. Da182-194). The Trial Court then denied the School's Motion to Limit Exhibits to the record/exhibits before the Board; the Order allowed the Sons of Israel to submit the 57 additional documents to "be marked for identification... and the Court will rule upon each of them if they fall outside of those parameters" (Da214). The Court at Trial then never so ruled on the various documents, and apparently considered all the additional documents in its Final Opinion/Order. To the extent those documents created a new and different case to the Court than heard by the Zoning Board cannot be quantified, but clearly this vague mishandling improperly created a new and different case and record than presented to the Zoning Board. See Biern v. Morris, 14 N.J. 529, 537 (1954). It is further clear that the Trial Court, relying on a erroneous memo outside the Board Record (Da262), erroneously concluded that there was no Site Plan requirement applicable to the School or Synagogue properties before 1984 (Da 280-281), [2] and partially based in ruling on that claimed fact.

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[2] How the Sons of Israel and/or the Trial Court could reconcile that no Site Plan Requirement before 1984 assertion/conclusion with the fact that in 1972 the School was required to obtain Site Plan/Parking Variance Approval (Da13-22) for

The Trial Court's procedure as to the record to be considered by the Court was totally invalid and in contradiction to the well-established rule that the record before the Court is limited to the record before the Zoning Board. This improper process clearly resulted in the Court making errors in fact and law.

## CONCLUSION

As detailed, the Trial Court's decision --- reversing the Zoning Board's determination that the Lot 8 off-site parking use/facility on the School Lot 5 was not a permitted accessory use and was not established as a legal non-conforming use and was thus invalid --- was clearly in error on several substantive bases. Further, the Trial Court's allowance of numerous documents to be reviewed by the Court that were not before the Zoning Board was clearly error, and resulted in erroneous findings by the Court. In fact, the Zoning Board decision was properly founded in logic and in law, and that Board decision/Resolution should be reinstated and affirmed.

Respectfully submitted,

R.S. GASIOROWSKI
Attorney for Defendant/Appellant

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its expansion is illogical. That the Sons of Israel continues to assert this Trial Court finding of no applicable Site Plan Ordinance before 1984 (Pb48) is valid is further evidence that its position makes no sense.