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RIVER DRIVE DEVELOPMENT, L.L.C.; RIVERFRONT RESIDENTIAL 1 LLC; RIVERFRONT RESIDENTIAL 2 LLC.; and RIVERWALK III, LLC,	:	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION**
	:	**Docket No.: A-002604-22**
Plaintiff/Respondent,	:	
v.	:	**SAT BELOW: Honorable Christine Farrington, J.S.C.**
BOROUGH OF ELMWOOD PARK,	:	
Defendant/Appellant	:	**Date of Submission: October 4, 2023**

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

In this case a developer asserts that the Borough of Elmwood Park should be encumbered with the ownership and maintenance costs of internal roadways which it created for its commercial property.

The internal roadways at issue were almost always described as "internal access roads" or "driveways" and no reasonable person would understand that those internal roads were intended to become the ownership responsibility of the Borough, absent express Borough approval.

The Planning Board and Plaintiff entered into a series of agreements which made roadway dedication fully conditional upon Borough approval. Each successive contract with the developer held a conditions clause which prevented a transfer of ownership unless *the Borough* expressly agreed to accept same by Ordinance or Resolution - which did not occur in this case.

The trial court's decision glossed over the obligations within the agreements and simply declared that the Borough accepted ownership regardless of the conditions within the agreements.

Those agreements aside, one would be hard pressed to glean from the trial Court's decision which subdivision plat or site plan or which agreement

was controlling in this case. None was specifically identified by the trial court as controlling.

The simple fact remains that the Planning Board was unrelenting in its position that Borough ownership of the internal roads could only be achieved by way of formal Borough approval, through ordinance or resolution. This condition was a vital component of its sub-division approvals. The Plaintiff accepted this condition at every point of the process. Plaintiff then proceeded to petition for the passage of a Resolution and dedication as required by this condition in 2021. The Borough declined to take on the burden of ownership finding it counter to the public interest. The trial Court reversed this legislative determination and transferred full ownership responsibility to the Municipality and its taxpayers. The instant appeal ensued.

PROCEDURAL HISTORY

This matter was commenced by complaint on December 2, 2021. The complaint was titled as a Complaint in Lieu of Prerogative Writs. (Pa380) An Answer was filed on September 7, 2021 (Pa461)

A Motion for Summary Judgment was filed on March 2, 2023 (Pa24)

The Court granted the Motion for Summary Judgment and issued a final Amended Order on April 28, 2023 (Pa1)

STATEMENT OF FACTS

The trial court in this matter issued its final Order which:

> "declared that the roads (known as Riverfront Boulevard and "Right of way "A") highlighted on the map and annexed hereto as Exhibit "A" (the Roads) are public roads that have been dedicated to the Borough, and such dedication has been accepted by the Borough, as a matter of law".(Pa2)

Notably "Exhibit A" is a tax map which cannot serve as a legal mechanism establishing ownership. (Pa4)

The trial court reached its determination by concluding that:

> "the Developer clearly dedicated the roads to the Borough by indicating the roads were public right of ways". (Pa18).

The trial court does not identify a plat plan or map or agreement which accomplished and indication that the roads were public rights of way. this. The record is barren as to what document or map "clearly dedicated the roads".

The history of this matter dates back to 2002 when part of the land at issue was first offered as a preliminary major subdivision.

The relevant portions of that document indicate that one of the roadways in question was an internal roadway of egress and ingress

> The roadway modifications will include the discontinuance and closing off of the driveway into and out of the Athletic Club Property from River Drive and the provision of **ingress and egress** to the newly configured Athletic Club Property from the **internal roadway** to be constructed by Applicant which will connect with Slater Drive. (Pa74-75)

Thus the first mention of the roadway at issue described an "ingress and egress" driveway for the church lot 1.01 from the "internal road" onto Slater Drive. (Pa74-75)

The roadway was not described as a public right of way or in any way a public road - rather it was described to the planning board as an "internal roadway".

> "Applicant seeks to discontinue the existing access to the Athletic Club Property from River Drive and to provide ingress and egress to such property exclusively from an **internal roadway**". (Pa73, Paragraph 9)

Plaintiff self-described the initial project as containing "a new internal road system connected at two locations to Slater Drive." (Pa73, Paragraph 9)

Plaintiff makes clear in its trial brief that the "Athletic Club Property is Lot 1.01 and that Lot 1.01 has never been owned by Plaintiffs ... and except for building a driveway from Lot 1.01 onto the Boulevard as a condition of RDD's Planning Board approvals, has never been part of the Development". (Pa37)

In essence, the initial site plan approval envisioned the developer creating a ingress and egress driveway (not a public roadway) for the Athletic Club Property (now church) at Lot 1.01. (Pa37)

The property or easement interest of the church of this ingress and egress "driveway" is a major issue raise by Defendant in this case.

The remainder of the initial Major Site Plan document refers to the roadway in question as an "interior roadway". The major site plan approval so indicating:

> "the Applicant seeks an exception/waiver with respect to the requirement under the Borough site plan ordinance of 60 foot wide **interior roadways.** The Applicant seeks to provide 50 foot **rights of way** with parking prohibited within **the right of way**". (Pa77, Par. "I")

The initial project spoke of the roadways as "interior roadways" and as a "50 foot right of way". It appeared to be a right of way for the

church property. (Pa77) There was no mention of a public street or public road. Pointedly there was no mention of any intent of "dedication as a public street". (Pa69-Pa92)

Plaintiff stated that the initial project was purely commercial - "a combination of office buildings, a hotel a bank and a restaurant". (Pa38)

Additionally the major subdivision document indicated that it was:

> "**subject to** any required resolution or establishment of utilities easements (existing or to be established) and **the ownership and maintenance of the internal roadway**". (Pa91, par"L")

The major subdivision plan document clearly left open the question of ownership of the internal roadway.

Plaintiff acknowledged in its brief that the initial roadway that was constructed was "an access driveway from Lot 1.01 onto the Boulevard". (Pa40)

A 2004 "Developer's Agreement" was authored for the next phase of the property development.

The Developer's Agreement indicated as follows at p.4:

> "all municipal/county improvements, if any, lying within the bed of the existing streets and the improvements therein, and such other aforesaid areas, if any, shall be and are to be dedicated by the deed, if required to public use, provided, however,

> **this agreement shall not constitute an acceptance by the Borough or the County of Bergen of such improvement until formally accepted as provided hereinafter** and the Borough and the County of Bergen shall accept said dedication of the required curbing, drainage pavement etc. upon the completion of the improvements required in the site plan **by ordinance or resolution**".(Pa115-116 par.2)

The Agreement specifically requires that any possible dedication "by the Borough" must be accomplished by "ordinance or resolution". Moreover the agreement does not define or delineate what it refers to when it speaks to areas "lying within the bed of the existing streets and the improvements therein, and such other aforesaid areas". The record does not reflect any "existing streets" in 2004.

The Developer's Agreement also indicates that it was the intention to carry forward all terms of the prior Developer's Agreement,

> "it is further understood and agreed that all terms and conditions of preliminary and final major site plan approval, conditional use variants as approval, and subdivision and re-subdivision approval and when and if given and if required to the developer **shall be incorporated herein by reference and made apart hereof** as Exhibit "A". (See p. 18 of Plaintiff's Exhibit "D")

The Developer's Agreement primarily relied upon by Plaintiff therefore incorporates the prior understandings of the major subdivision agreement

which referred to the road in question as an "ingress and egress" driveway, a "right of way" and an "internal access road" - not a public street or a street to be dedicated to the Borough.

Thereafter Plaintiff relies upon the December 8, 2010 Planning Board Resolution which indicated as follows:

> "the access road to the premises must be constructed in accordance with Borough standards and if the existing **access road** is not up to borough standards, the existing access road must be upgraded to Borough standards prior to the same being dedicated to the Borough of Elmwood Park at the cost and expense of the applicant". (Pa206 par."E")

This paragraph provides no definition of what portion of roadway "the access road" refers to or what the "existing access road" refers to. Presumably it refers to the ingress and egress *driveway* for the church, but this is entirely unclear.

There are no maps or plats attached to this Resolution (Pa209) in the record which reflect an intention of public street dedication. Rather the description refers to access roads.

Furthermore the foregoing Paragraph within the Resolution is contingent upon the execution of a Developer's agreement which indicates:

> "the Applicant shall execute a Developer's Agreement in form and content satisfactory to the Planning Board Engineer and Planning Board Attorney". (Pa207, Par. "L")

The Developer's Agreement prepared in accordance with the planning board resolution went on to indicate that the terms of the prior Developer's agreements were carried forward (Pa212, par. 2B). There was no mention of any public street dedication or any maps which delineated same. The map attached to the Developer's Agreement (Pa221) made no reference to public street dedication. It appears to only reference the Church "driveway" as a "roadway".(Pa212)

Thereafter, in 2018 Plaintiff filed for an additional application for an amended site plan approval to construct four (4) multifamily apartment buildings on Lot 2.01.

The Resolution clearly indicated that the:

> "Dedication of the Roadways to the Borough of Elmwood Park should be addressed by the Applicant **with the Borough**, and the Applicant shall be responsible to undertake any additional steps, as may be necessary, for the road dedication".(Pa319)

Both Plaintiff and the planning board clearly understood that any dedication must be addressed by the Borough and this as a "condition" of the agreement.(Pa332)

It was during that hearing that the issue of whether or not the roads were intended to become public roadways was brought to bear. The 2018 application was for "300 Riverfront Boulevard, Block 120, Lot 2.01, application for final site plan approval for construction of 3 Phases of a mixed use development". (See Transcript attached to Certification of Michael A. Bukosky, Esq., Exhibit "A" p.4)

Notably, Lot 2.01 is immediately adjacent to what has been described on the maps as "Riverfront Boulevard" which also notably serves as the driveway access to Lot 1.01. (The church lot) This is the same driveway and easement access and egress for Lot 1.01 referred to in Plaintiff's brief as a "driveway" for the church. Plaintiff has clearly indicated that they do not own this parcel.

Mr. Robert Kasuba, Esq., was the attorney for the Applicant, River Drive Development, LLC., during the 2018 application before the planning board. The issue of the roadway dedication as a public street and the jurisdiction of the planning board to address any dedication was clearly announced and discussed during the hearing. As Mr. Kasuba indicated:

> "if it turns out that it hasn't been accepted by operation of law, then we can talk about the issue of whether this Board would have jurisdiction regardless. (Pa565) (Transcript p.18-19)

Then Mr. Kasuba indicated:

> "so we're very comfortable with proceeding under the condition that Mr. Conte laid out, which is, you know, **to some extent we're doing this at our risk**, for lack of a better way of saying it.
>
> If it turns out this Board doesn't have jurisdiction at the end, well, we wasted time". (Pa565) (Transcript, p. 19)

The Board Attorney, Mr. Conte then indicated:

> "Mr. Kasuba is right, it's at their peril. The Board can continue to hear testimony".
> (Pa565) (Transcript, p. 19-20)

Thereafter Mr. Costa, the Board Engineer, indicated:

> "I believe it's up to the Applicant to request of the governing body to accept dedication of the roadway.
>
> What I'm not sure on, whether or not the governing body would have to do that by resolution or probably by ordinance". ..... Now, at this point, I don't know what the governing body did or didn't do, and if the road is still a private street and it's in a commercial zone **and not zoned for this use**, they need a use variance and I brought this up many, many, many months ago.
>
> So if it isn't, with all due respect, I don't think you have jurisdiction".
> (Pa566) (Transcript, p. 22)

Mr. Ingraffia who was a member of the Planning Board indicated:

> "I don't think this Board has jurisdiction if that's a private street". (Pa566) (Transcript, p. 23)

Mr. Costa, the Board Engineer, indicated that he did not believe the Planning Board had jurisdiction over the private street and that it probably required a use variance under the zoning codes. As he indicated:

> "So if it isn't, with all due respect, I don't think you have jurisdiction". (Pa566) (Transcript, p. 22)

Mr. Costa, the Board Engineer also indicated that:

> "the Board does not have jurisdiction because it's a use variance".
> (Pa566) (Transcript, p. 24)

Thereafter Mr. Costa, the Board Engineer indicated:

> "the only question out there is whether or not the governing body took acceptance of the roadway and dedicated it for public use, that it's no longer private.
>
> And I respectfully disagree, because if it is private, that little strip of land that you have ingress and egress is not zoned for this use. And I understand this is a Court case, and it's based on COAH and it's based on this specific lot. The problem, in my opinion, as an engineer and a planner, they left one of the lots out, if it's private. And you can't use that unless you get use variance to service these three hundred and ninety units.
>
> So you got one of two choices.
>
> Go to the governing body, get it done correctly, they accept it as a dedicated street and a public street, put a name on it, do their Ordinances, put their parking requirements or go to the Zoning Board for that use variance to use it to get there". (Pa568-569) (Transcript, p.32-33)

As Board Member Ingraffia indicated:

> "I don't quite understand how a particular roadway can be forced upon a Borough by operation of law. I don't understand where this operation of law is. .....it is my understanding that any dedication of any roadway requires the acceptance by the Municipality, either by ordinance or resolution, to be accepted and dedicated." (Pa569) (Transcript, p. 34-34)

Plaintiff's attorney, Mr. Kasuba, agreed that it was only the "governing body" which could accept a dedication. He stated to the Planning Board on December 12, 2018:

> Mr. Kasuba: I would just, the only point that I would make, is that the issue of dedication is really a governing body issue.
> Mr. Conte: Right.
> Mr. Kasuba: **I would accept as a condition** that the issue would have to be resolved, one way or the other, **with the governing body**".
> (Pa526) (Transcript pg. 13)

What is patently obvious is that the Plaintiff's own attorney recognized that the dedication of the by-roads at issue was conditional upon approval by the governing body - not the Planning Board and that "we would accept that as a **condition** to proceed". " (Pa526) (Pg14)

The Planning Board also requested that Plaintiff clear up ownership of the roadways:

> Mr. Costa: [Y]ou need to clean up the ownership of these roadways" (Pa545, Transcript, pg. 90)

Despite the various "conditions" and assumed "risks" attached to the Resolutions and Developer's Agreements and the absence of any approved maps or plats attached to those Resolutions or Agreements, the trial court "deduced" that the internal roadways were "clearly dedicated". (Pa18)

The trial court did not rely upon a particular map or plat but instead relied upon an unsupported statement in the 2021 Borough Resolution denying roadway dedication which provided:

> "Whereas, said Plat Plan shows public rights of way proposed for dedication to the Borough of Elmwood Park; and..." (Pa335)

The trial Court declared this "Whereas statement" as a controlling evidentiary foundation, rather than what it was - a "boiler plate" recitation likely lifted from the letter petitions of Plaintiff requesting dedication. (Pa321 and Pa451)

There is no indication in the record as to what "Plat Plan" this Resolution is referring to or if the Borough even reviewed such a Plat Plan. Presumably it was the letter petition addressed to Mr. Conte in 2018 (Pa451) or Mr. Wolper, (Pa332) which referenced a "2011 Plat", but the Plat referred to is never adduced within the record.

There is nothing in the record which reveals a "2011" Plat that "shows public rights of way proposed for dedication to the Borough" as suggested by the "Whereas" clause relied upon by the trial court.

All of the foregoing facts lead to the ineluctable conclusion that the byroads at issue are private roads which have a public right of access. Such by-roads have not been formally dedicated or accepted for dedication by the Borough, by law or otherwise.

POINT I

IT IS AXIOMATIC THAT A MUNICIPALITY CANNOT BE COMPELLED TO ACCEPT A DEDICATION OF LAND OWNERSHIP (Pa646 and Pa18 (final decision declined to address)

At all stages of the development process ownership of the internal roadways was explicitly made contingent upon acceptance by the Borough. The trial Court nevertheless transferred ownership and responsibility of the roads to the Borough in express contradiction to the Borough's own legislative determination to the contrary. This act of the trial court was improper. The Appellate Division has held that compelling roadway dedication cannot be imposed upon an unwilling municipality.

> "An individual cannot, at his pleasure, create public highways for his own benefit upon his own land, and impose upon the public the burden of maintaining them."
> **N.J. Transit Corp. v. Franco**, 447 N.J. Super. 361, 375-76 (App. Div. 2016)

The trial court disregarded long standing legal doctrine that

> "the public is not under any duty to accept a dedication of land and.... is not required to accept a dedicated street." **N.J. Transit**, supra at 375.

It was Plaintiff's burden and obligation to establish that the Borough accepted responsibility and ownership for the internal roadways in question.

The trial court in many ways switched this burden upon the Borough and imposed significant costs obligations upon the public without their approval. The trial court found acceptance to be automatic and stripped the Borough of any right to determine otherwise.

This was error. Where there is a dispute as to whether private property has been accepted by a municipality, the private property owner bears the burden to establish the requisite intent and actual dedication. **Velasco v. Goldman Builders, Inc.**, 93 N.J. Super. 123. 136 (App. Div. 1966)

If a dedication or acceptance is equivocal and an issue is raised on which reasonable minds may differ, the question becomes one of fact to be resolved by a jury or a proof hearing by the trier of the fact. As the Appellate Division stated within **Point Pleasant Manor Bldg. Co. v. Brown**, 42 N.J. Super. 297, 303-04 (App. Div. 1956)certif. denied, 23 N.J. 140 (1957))

> "[E]quivocalities on a map prepared by an alleged dedicator, not only do not serve to prevent a dedication, but (rather the contrary) they are, generally speaking, to be resolved against him and in favor of the public body."

Other courts have concurred. "Generally speaking, ambiguities are resolved against the dedicator and in favor of the public." **Twp. of Middletown v. Simon**, 193 N.J. 228, 241 (2008)

In this matter the trial court shifted the burden to the Borough and resolved all ambiguities against the Borough. It transferred ownership to the Borough even though it had already passed legislation declining acceptance.

There is no map or sub division plat attached to any Planning Board Resolution or any Developer's Agreement in the record which provides the "clear evidence" found by the court of an intent to dedicate. There is no proof in the record that any "authority" was even aware of any of the maps or plats submitted by Plaintiff into the record. There was significant dispute as to what agreement or plat was controlling - if any. The trial court shifted the burden to the Borough with a presumption of Borough ownership. The trial court irresponsibly relied upon the Resolution document (which it had previously voided as "arbitrary and capricious") to support the very entirety of its factual proof of Borough ownership. This was reversible error.

POINT II

THE MUNICIPALITY ALWAYS RESERVES THE RIGHT TO DECLINE A DEDICATION AT ANY TIME (Pa645) (final decision declined to address)

The statutory scheme relating to roadways provides that a municipality always retains the authority to release ownership of a roadway even if was dedicated to the public. As the Appellate Division held within **State by Comm'r of Transp. v. Birch**, 115 N.J. Super. 457, 463-64 (App. Div. 1971)

> Notwithstanding nonacceptance, the power of acceptance remains with the public authorities until such time as they reject or vacate the dedicated land by official municipal legislative action.

Both **N.J.S.A.** 40:67-19 and 40:67-1 memorializes this unfettered municipal power. **N.J.S.A.** 40:67-19. (Vacation of streets and places dedicated but not accepted; ordinance; notice and hearing) provides:

> Whenever there shall have been a dedication of lands as a public street or highway or a public square or public place, and the same has not been accepted or opened by the municipality, and it shall appear to the governing body that the public interest will be better served by releasing those lands or any part thereof from such dedication, the governing body may by ordinance release and extinguish the public right arising from said

> dedication as to the whole or any part of those lands, and thereupon said lands or the part thereof so released shall be effectually discharged therefrom as though the dedication had not taken place; but only after notice of the intention of the governing body to consider any such ordinance, and a hearing thereon, shall have been given as provided in section 40:49-6 of this title concerning ordinances for the vacation of streets.

N.J.S.A. 40:67-1. (Municipal ordinances) similarly provides:

> "The governing body of every municipality may make, amend, repeal and enforce ordinances to.....
> b. Establish, change the grade of or vacate any public street, highway, lane or alley, or any part thereof, including the vacation of any portion of any public street.....; vacate any street, highway, lane, alley, square, place or park, or any part thereof, dedicated to public use but not accepted by the municipality, whether or not the same, or any part, has been actually opened or improved....."

The statutory scheme always leaves the power of acceptance or vacation of acceptance with the municipality. Here the governing body exercised its statutory right not to accept the roadways at issue in the public interest. This was their statutory right. The trial court improperly disregarded this legislative right and compelled the municipality to accept a roadway with all the attendant obligations thereto even though it had legislatively determined to reject dedication. Accordingly, the trial court's error must be reversed.

POINT III

THE TRIAL COURT ERRED WHEN IT FOUND THE CRITERIA OF THE APPLICABLE STATUTE SATISFIED WITHOUT RESORT TO THE FACTUAL RECORD(Pa18-20)

The applicable statute relied upon by the trial court requires several explicit criteria to be satisfied before acceptance of a road may be operative.

N.J.S.A. § 40:55D-53(j) provides in relevant part:

> j. To the extent that any of the improvements have been dedicated to the municipality on the subdivision plat or site plan, the municipal governing body shall be deemed, upon the release of any performance guarantee required pursuant to subsection (a) of this section, to accept dedication for public use of streets or roads and any other improvements made thereon according to site plans and subdivision plats **approved** by the approving authority, provided that such improvements have been inspected and have received **final approval** by the municipal engineer.
> **N.J.S.A.** § 40:55D-53(j)

In accordance with the foregoing Statute three criteria must be established for dedication to occur.

1. The land must dedicated to the municipality on the subdivision plat or site plan *approved* by the approving authority.

2. Any performance guarantee must be released.

3. The *municipal* engineer must inspect and provide *final approval.*

Criteria 1 and 3 were not met in this case.

III, (A) *APPROVAL* OF THE SUBDIVISION PLAT OR SITE PLAN

There were numerous maps "seeded" throughout this matter. Each held various dates. None were specifically attached or referenced to any Resolution or Developer's Agreement. Nothing in the record revealed that any of the maps or plats were "approved" by the planning board. The record is unclear as to the provenance of the maps supplied by the Plaintiff or for what purposes they were prepared. Plaintiff refers to them as "recorded" sub division maps, but there is no evidence in the record that the planning board or Borough ever reviewed and "approved" them.[1] The trial Court primarily relied upon a tax map to identify the roadways in question.

Even if one were to assume that the maps were attached to a particular Resolution of Developer's Agreement, and assuming that the planning board reviewed them, those maps at best state that the roadways

[1] Plaintiff resisted providing transcripts of the prior planning board hearings in this case. Those transcripts may have revealed what plats were approved or not. The Borough filed a motion to compel such transcripts and Plaintiff provided only those transcripts of the last proceedings before the planning board in 2018 and not those going back to 2002.

at issue were "proposed streets R.O.W.". Presumably R.O.W. refers to a Right of Way. Under the law there are both public and private rights of way.

None of the maps, even assuming they were "approved", stated that the roads in question were "to be dedicated as a public street", just that they would be "rights of way". A right of way for access, ingress and egress is not necessarily a public street.

When these roadways were first established they were considered private ingress and egress rights of way. The maps at issue could easily be construed as an internal road or a driveway, as the roadway in questions were originally referenced.

III, (B) THE ABSENCE OF DEDICATION ON THE PLATS OR SITE PLANS

Plaintiff provided a number of site plan maps and plats. (See Ps 110)" (2002), "Pa171" (2004) and Pa173. There is no reference in any of them that there would be a "dedication" of a public street. Not one of the maps stated that the internal access roads or driveways were to be "dedicated to the municipality" on the subdivision plat or site plan as required by the statute.

One possibility is that they were intentionally not so designated, as Plaintiff desired to retain ownership for financial or other purposes. (Pa171) clearly references that a portion of what has been referred to as the "dogleg" or "loop" is simply an easement, stating, "existing access easement to remain". Presumably the access easement is for the church. This easement constitutes a significant portion of what plaintiff understands to have been "automatically dedicated" to the Borough. Who owns this easement or title to the parcel thereunder is unclear from the record.

At best some of the later plats or plans refer to a "public right of way". A public right of way is not a street. **N.J.S.A.** 48:3-17.2. Defines a "right of way" as "the area devoted to passing over, on, through or under lands....." whereas a "street" means "any highway, road, street, alley, lane or place dedicated to public use whether or not accepted....".

The use of the term "public right of way" does not directly correlate into a public street. A "right of way" usually denotes access, not ownership. Blacks Law Dictionary describes "Right of Way" as describing "a right belonging to a party to pass over land of another". Our Supreme Court within **In re RCN of NY**, 186 N.J. 83, 91-92 (2006) indicated that access can mean many different things.

> "the meaning of "using" a public right-of-way has different connotations. It could encompass all wires running either above or below any public street no matter the distance covered, or it could accept de minimis use or wires attached to buildings by private easements even when they cross above a public street.
>
> **In re RCN of NY**, 186 N.J. 83, 91-92 (2006)

There can be no doubt that the public was granted a right of access to the internal roadways in question. That right of access does not automatically transform the roads into public streets which the Borough must now accept for ownership, control and maintenance.

A municipality may or may not own the fee title to the property underlying a public right-of-way. In such cases the abutting property owners have that fee title, and that title usually extends to the centerline of the right-of-way. The right-of-way easement also generally extends beyond the improved roadway and includes sidewalks, if any, and parking strips.

While this general rule about the nature of the public right-of-way as an easement may not be clearly set out in state statutes, it is clearly set out in numerous new Jersey court decisions. For example:

> "In fact, it is well established that generally a municipality has no ownership in the bed of streets. Instead, the presumption is that title to one half of the road bed lies in the abutting property owner

> subject to whatever public right of way or easement may exist."
>
> **Menk Corp. v. Twp. Comm. of Barnegat**, 389 N.J. Super. 263, 270 (Super. Ct. 2006)

The general rule is that the title or fee in a public right of way remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement.

If the intent is to grant a fee interest, other than a mere easement for a public right of passage, that intent must be clearly stated and the use should be unrestricted.

The plats and plans neither envisioned nor described any grant of title or fee or that it was intended as a street for dedication. Therefore the Plaintiff fails to satisfy the first part of the test within **N.J.S.A.** § 40:55D-53(j).

There is no evidence that the planning board "approved" of any plat which "dedicated a public street".

III, (C) NO FINAL APPROVAL LET ALONE ANY APPROVAL BY THE BOROUGH ENGINEER

As the trial court plainly concludes at page 10 of its decision, (Pa15) Robert Costa was the Borough Engineer. The trial Court found that

Peter C Ten Kate was the planning Board Engineer. The trial Court states that "once again defendant is correct that Mr. Ten Kate was not the Borough Engineer". (Pa15).

N.J.S.A. § 40:55D-53(j) requires "approval by **the municipal engineer**". There is no evidence that the municipal engineer inspected and approved the roadways in question. Plaintiff did not submit adequate proofs that the **municipal engineer** examined the internal roadways at issue such that they were "inspected and have received final approval by the municipal engineer" for a "public street" or a "public road". **N.J.S.A.** § 40:55D-53(j)

Moreover, since the plans never called for a public street or public road an Engineer would have no reason to inspect them as such. Indeed the Planning Board Engineer rather pointedly found that the internal roads **did not comply with the Municipal zoning plan** and that they could not be approved no matter what their condition. Moreover the issues as to utilities, easements and maintenance was never resolved. Many cases have suggested that the Borough Engineer must inspect them as well:

> The engineer is to inspect the improvements and file with the governing body a "detailed report" "indicating either approval, partial approval or rejection" of the improvements. Conspicuous by its

> absence is any suggestion that the engineer will report that the improvements are not complete. After receipt of the engineer's report the governing body "shall either approve, partially approve or reject the improvements" and notify the obligor of the content of the engineer's report and its determination.
>
> **Barnegat v. DCA of N.J., Inc.**, 181 N.J. Super. 394, 400 (App. Div. 1981)

Plaintiff has simply not satisfied the objective criteria in the statute it relies upon nor submitted adequate proofs that the byroads were inspected as public streets in compliance with the zoning ordinances. The acceptance of dedication is therefore lawfully impossible, let alone "automatic" as the trial court determined.

Plaintiff similarly relied upon (Pa277) (the letter from Mr. Ten Kate) as conclusive proof of automatic dedication. This letter, which was not from the municipal engineer, clearly indicates that:

> [W]e have no records of the roads either being requested by the applicant to dedicate the roads or recommending that the Mayor and Council dedicate the roads.
>
> My recommendation would be that if the application is approved, a condition of the application should be that the public right of way be dedicated by Ordinance..." (Pa277)

Such a record clearly does not satisfy Plaintiff's heavy burden in this case which requires competent evidence that the planning board approved plats indicating street dedication and that such streets were inspected and given *final approval* by the municipal engineer.

The record does not support an "approved" plat designating the roadways as intended for dedication as public streets. Nor does the record support any *final approval* by the municipal engineer. The Statute relied upon by the trial court thus remains unsatisfied and it was error for the trial court to conclude otherwise.

POINT IV

THE TRIAL COURT ERRED IN NOT RECOGNIZING THE *CONDITION* OF BOROUGH APPROVAL ACKNOWLEDGED BY PLAINTIFF(Pa17)(not addressed by final decision)

Each Agreement and Resolution for the development of the tract of land at issue made roadway dedication and acceptance *conditional* upon formal approval by the Borough through ordinance of resolution.

The Developer's Agreements are formal contracts which should have been recognized by the trial court.

> Developer's Agreements have been used for a substantial period of time in the State of New Jersey to address the terms and conditions of an approval and to allocate responsibilities, obligations, privileges and rights during construction.
>
> Developer's Agreements have been upheld by the Courts as contracts between parties and given the same plain and ordinary meaning that is ascribed to all contracts. See, **East Brunswick Sewerage Authority v. East Mill**, 365 N.J. Super. 120, 125, 838 A.2d 494 (App. Div.2004). The Court should assume the validity of the provisions of these agreements as the parties are sufficiently counseled and experienced to express their intentions in clear contractual terms. Id. at 126-127, 838 A.2d 494.
>
> **Talcott Fromkin Freehold Assocs. v. Freehold Tp.**, 383 N.J. Super. 298, 314 (Super. Ct. 2005)

In 2002, the Developer's Agreement made the approval "subject to any required resolution or establishment of utilities easements (existing or to be established) and the ownership and maintenance of the internal roadway".

(Pa91, par "L")

A 2004 "Developer's Agreement" was authored for the next phase of the property development.

The Developer's Agreement indicated;

> "all municipal/county improvements, if any, lying within the bed of the existing streets and the improvements therein, and such other aforesaid areas, if any, shall be and are to be dedicated by the **deed**, if required to public use, provided, however, this agreement **shall not constitute an acceptance by the Borough** or the County of Bergen of such improvement until **formally accepted** as provided hereinafter and the Borough and the County of Bergen shall accept said dedication of the required curbing, drainage pavement etc. upon the completion of the improvements required in the site plan **by ordinance or resolution**". (Pa115-116 par.2)

This agreement made it clear that the parties agreed that in order for any dedication to occur there must first be a deed, and then "formal acceptance" by "ordinance or resolution".

No such deed was prepared by Plaintiff, nor was any resolution or ordinance sought to conclude formal acceptance. This are formal conditions of contract which cannot be abrogated.

Fourteen years later, in 2018, Plaintiff filed for an additional application for an amended site plan approval to construct four (4) multifamily apartment buildings on Lot 2.01.

The Resolution clearly indicated that the:

> "Dedication of the Roadways to the Borough of Elmwood Park should be addressed by the Applicant with the Borough, and the Applicant shall be responsible to undertake any additional steps, as may be necessary, for the road dedication".(Pa319)

Plaintiff clearly understood this as a "condition" of the agreement.(Pa332)

Indeed as late as 2021 Plaintiff's attorney referred to dedication being "conditioned" in corresponding with the Borough Mayor and Council. (Pa332) Plaintiff's attorney before the planning board indicated that "we accept that condition".

There can be no doubt that both parties understood the agreements to contain a condition before dedication could be achieved - and that

condition was formal acceptance by ordinance or resolution of the municipal council following a formal deed.

It was error for the trial court to disregard this agreement between the parties. It was clearly a significant component as to why the planning board was willing to sign off on the agreements. It reserved to the mayor and council the ultimate review and assessment as to the public efficacy of the internal roadways in question.

POINT V

THE ISSUES OF OWNERSHIP, MAINTENANCE AND PUBLIC ACCESS ARE SEPARATE INTERESTS TO BE DETERMINED ON A CASE BY CASE BASIS AND MUST BE ACCOMPLISHED BY A PROOF HEARING (Pa655) (not addressed by final decision)

N.J.S.A. § 40:55D-53(j), relied upon by the trial court, provides that a municipal governing body may in some cases be deemed "to accept dedication for public use of streets or roads".

"Public use of streets" does not necessarily intend ownership or maintenance obligations. "Public use" simply means that the public has a right of access and use.

In this case the roadways at issue were almost invariably described as "access roads". Often such roadways remain access roads to avoid burdening the municipality with maintenance costs and they are common within Commercial developments like the instant case. See **N.J.S.A.** § 27:7-94 which allows access roads provided the "access road is of sufficient design to support necessary truck and employee access as required by the industry". The Elmwood Park Borough Code also allows for such "internal roads" and "private interior roadways". (Pa649-650)The term "access road" has also been understood as a private roadway. See **N.J.**

Mfrs. Ins. Co. for Smith v. Pub. Serv. Elec. & Gas, 234 N.J. Super. 116, 117 (App. Div. 1989) (five and a half mile access road to Nuclear plant was a private road even though general public had access and was patrolled by local police)

Plaintiff seeks this court to compel the Borough to accept both title and responsibility for maintenance of the access roads in question. It also suggests that because public passage is self apparent that the Borough must *ipso facto* take ownership and responsibility of the private access road in question.

In New Jersey there are numerous private roads over which the public has unfettered access rights and which municipalities are not responsible for.

In **Barile v. City of Port Republic**, 186 N.J. Super. 587, 590 (Law Div. 1982), the Court recognized that the issue of determining the status of a road and the rights of the public to access are mutually exclusive. The conflict over maintenance between tax-paying property owners and the limitations of a municipality budget requires an assessment of each road on a case by case basis. **Id.** at 590, 594. In **Barile**, the City argued that the roads in question were private roads and thus the City had no

maintenance obligations. **Id.** at 590. For purposes of establishing the correct status of the roads, the Court defined public road as "a road in which the public possesses rights of passage or re-passage". **Id.** at 594. However, the Court noted that the status of a road does not obligate the City to maintain it. **Ibid**. In order for a municipality to be obligated to maintain a road, it must be accepted by the proper governmental unit. **Ibid**.

The Court then went on to discuss the history of acceptance by a governmental unit, specifically the origination of the roads and road returns in registered records. **Ibid**. The court noted that "only those roads which are so tabulated are those which the public body might be obligated to maintain." **Ibid.** In essence, in order for a resident to establish a right to public maintenance it must be shown that the road at issue is accessible to the public and has been formally recognized, by the government, as a public road through a system of public records **Ibid**. Here, public records demonstrate that the access road was initially described as an ingress and egress driveway for the Church Lot 1.10. At no time was the road designated as a public street.

The access road was characterized as a right of way and the issues of ownership and maintenance were left for further determination. There was never a clear intent to dedicate the roadway at issue.

Case law suggests that an evidentiary hearing is necessary where the obligation of maintenance and ownership is in question. The Appellate Division in **Parisi v. N. Bergen Mun. Port Auth.**, 105 N.J. 25, 41 (1987) found "the proofs as to the status of Marine Road not being a dedicated street . . . inadequate . . .* * * and therefore that an evidentiary hearing was necessary. **Id.**

The proponent of an alleged public street must prove both an intent to dedicate and acceptance by the municipality. **Barile v. Port Republic**, 186 N.J. Super. 587, 590 (Law Div.1982).

> It is settled that mere dedication of streets by a filed map or a reference in a deed to such map, and the opening of the streets as laid out, does not constitute them public highways, unless or until such streets are in some way accepted by public authorities or they are used by the public generally for 20 years as highways.
>
> **Highway Holding Co. v. Yara Eng'g Corp.**, 22 N.J. 119, 127 (1956)

The dedication of private lands to public use is essentially a matter of intent. **Haven Homes v. Raritan Tp.**, 19 N.J. 239, 246 (1955).

Acceptance of a dedication is a necessary prerequisite to imposing maintenance responsibility upon a municipality. **Velasco v. Goldman Builders, Inc.**, 93 N.J. Super. 123, 134 (App. Div. 1966).

See also **Barile v. Port Republic**, 186 N.J. Super. 587, 591 (Super. Ct. 1982) "Dedication and acceptance are separate and distinct matters" and **N.J. Transit Corp. v. Franco**, 447 N.J. Super. 361, 375-76 (App. Div. 2016) "It is settled that mere dedication of streets . . . does not constitute them public highways, unless or until such streets are in some way accepted by public authorities."

The issues of ownership, dedication, acceptance and responsibility are not clear on the record put forth by Plaintiff. A proof hearing is therefore necessary to identify and clarify the ownership and maintenance obligations at issue.

POINT VI

THE ZONING STATUS AND EASEMENT STATUS OF THE STRIP OF LAND UNDERLYING THE INTERNAL DRIVEWAYS ARE NOT CLEAR THEREBY PRECLUDING SUMMARY DISPOSITION (Pa659)(final decision declined to address)

From the outset of this matter the initial Developer's Agreement stated that it would create an ingress and egress driveway easement for the Church which was an abutting land owner. It was stated that this easement would remain. It was never clear which roadway was the intended easement - either the circular dog leg or the straight roadway (perhaps both). The initial document suggested it was the curved roadway. The Church clearly holds an easement interest in this roadway but was never inter-pled as an interested party. The ownership interest was never addressed. Arguably the easement interest may have been destroyed by the ownership conversion implemented by the Trial Court.

The Borough Engineer, Mr. Costa, cogently raised the issue of zoning and whether a public roadway or street could be recognized on the strip of land which the Plaintiff now seeks to have automatically dedicated to the Borough.

Mr. Costa correctly opined that the status of the strip of land shown as an access road on Plaintiff's property was not zoned for usage as a public street. Mr. Costa explained that it was his opinion that Plaintiff was obligated to make an application to the zoning board to allow for this use.

The salience of the Planning Board Engineer's opinion is two fold.

First, the review of the applications up to that time obviously assumed that a public street was not planned as part of Plaintiff's projects - otherwise an application before the zoning board would have been necessary.

Second, the Engineer's opinion that a zoning permit was needed begs the question - is the Plaintiff obligated to seek such a zoning approval before it seeks to compel the Borough to accept dedication of a public street which violates its own zoning ordinances.

Prior decisions have held that a road built in violation of zoning ordinances requires a variance.

In **Nuckel and Angel v. Board of Adjustment**, 109 N.J. Super. 194, 262 A.2d 890 (App. Div. 1970), the Defendant proposed to build a hotel on a lot and provide access to the hotel by constructing a driveway which would encroach on a corner of an adjacent lot, which was owned by the

same principals who proposed the construction of the hotel. When the Plaintiffs constructed the driveways the building inspector found them in violation of the zoning ordinances. The Appellate Division found that the driveways, since they were a means of access to the trailer park, were an expansion of the pre-existing nonconforming use and required a variance. **Id**. at 198-99.

Similarly, in **Wolf v. Zoning Board of Adjustment**, 79 N.J. Super. 546, 549 (App. Div. 1963), a restaurant sought to pave a portion of its lot, which was zoned as residential and on which a restaurant existed as a pre-existing, nonconforming use. The court found the parking lot was to be "used as a means of access to, or for the parking of vehicles of patrons of, a business, is in a use accessorial to the business and thus is itself in legal contemplation being used for the business purpose in question." **Id**. at 550-51. As the land being paved was previously not used for parking, a variance was required by the court. **Id.** at 551.

The instant case is the same. Here the Borough Engineer found the roadways non-compliant with the zoning ordinances. A variance is therefore required for the roadways in question.

Plaintiff's application before this court never answers this question nor addresses the zoning issue in any way.

The question of proper zoning leads to an additional question as to Plaintiff's burden of production and proof in the instant application.

Aside of the zoning issue there is the issue of nonexistent approval of the municipal engineer. The maps do not insure that the roadways at issue comply with either the zoning or the Residential Site Improvement Standards (RSIS) which requires that roadways be classified and comply with relevant regulations. (See **N.J.A.C.** 5:21-4.2). There is no proof that the roadways in question comply with the RSIS standards or that the Borough Engineer inspected them as such. It is likely that they were inspected as internal access roadways. Indeed the record revealed that the Planning Board Engineer found the streets non-compliant with the Borough zoning ordinances.

The Court placed substantial reliance upon the inspection of the roadways performed by an individual whom the Court acknowledges was not the municipal engineer. There is no evidence in the record as to what standards the roads were inspected. The record does not reveal whether the roads were inspected as driveways, internal roads, private roads, rights of

way, easements or public streets. Each have separate regulatory requirements under the law. There is nothing in the record which reveals that the Borough Engineer gave a final approval and inspected the internal roadways to be compliant with RSIS standards as "public streets" which is a necessary component to satisfy the controlling statute. Nor does the record reveal the required size or width of the roadways to be dedicated rendering the inspection of the internal roadways as a public street as dubious. Indeed the roadways appear to be facially non-compliant with the RSIS standards concerning emergency vehicle turn-arounds. The record is again unclear.

It is doubtful that the internal roadways were inspected to RSIS standards. The 2002 Developer's agreement referred to a turn around for fire and other emergency apparatus. (Pa91), (par."O") The maps supplied by plaintiffs reveal on their face apparent noncompliance with **N.J.A.C.** 21-4.2 as the RSIS relates to the dead end street created by Plaintiffs. The regulation plainly states that "Cul-de-sacs shall provide for a cartway turning radius of 40 feet and a right-of-way line eight feet beyond the edge of the cartway." No such turning radius is contemplated or shown on

Plaintiff's maps thus rendering the road facially noncompliant with RSIS standards, and, apparently, the 2002 Resolution.

The municipality cannot be mandated to accept for dedication a roadway that does not comply with the regulatory specifications for public streets. The RSIS standards (**N.J.S.A.** 40:55D-40.2) were developed as a result of legislation which mandates statewide uniform improvement standards that supersede existing municipal standards (See **N.J.S.A.** 40:55D-40.5)

Shifting ownership of non-compliant roads to the Borough, absent municipal engineer approval, was reversible error by the trial court.

POINT VII

THE ROADWAY IN QUESTION IS PROPERLY CONSTRUED AS A "BY-ROAD" (Pa665) (final decision declined to address)

There are three kinds of roads known to New Jersey law--1. Public roads. 2. Private roads. 3. By-roads.

A By-road is a private road over which the public has a right of access. By-roads were recently discussed and defined within **Tenn. Gas Pipeline Co., L.L.C. v. 1,693 Acres of Land in the Twp. of Mahwah**, No. 2:12-cv-7921 (WJM), 2015 U.S. Dist. LEXIS 57995, at *36 (D.N.J. May 4, 2015)

That court specifically held that By-Roads are private roads which the public may access but over which the pubic has no responsibility of maintenance.

> Finally, the Court rejects the State's argument that Bear Swamp Road cannot be a by-road simply because no public entity has taken responsibility for its maintenance. While the public has a right of passage and re-passage over a by-road, such a road does not impose upon the public a duty of maintenance.
>
> **Tenn. Gas Pipeline Co., L.L.C. v. 1,693 Acres of Land in the Twp. of Mahwah**, No. 2:12-cv-7921 (WJM), 2015 U.S. Dist. LEXIS 57995, at *36 (D.N.J. May 4, 2015)

The roadway at issue in this case is clearly a by-road. It is road over which the public has a right of access without an obligation of maintenance. It is not a public street to be owned and maintained by the Borough.

POINT VIII

THE DEVELOPER IS ESTOPPED FROM DENYING THE MAINTENANCE OBLIGATION (not raised below)

The Borough amply pleaded and argued that any dedication was conditional. Had the Court recognized such conditions the need to assert an estoppel argument did not exist. However, now that the trial court has found the conditions to be irrelevant to its final decision, an estoppel defense must be raised as a matter fundamental fairness to the Borough.

The Developer consented to the condition of Borough approval in its Developer Agreements. It recognized this condition when it sought Borough Council approval. However, as soon as the Developer obtained a negative result, the Developer switched its position and contended that the conditions no longer applied.

The Developer knew or should have known that once it agreed to comply with the resolutions and the Developer's Agreements, and then sold all some of its property and made its profit, that the Borough may now be without a remedy as it concerns the responsible party for maintenance, other than the taxpayers of the Borough. If the developer was dissatisfied with the Developer's Agreement it could have negotiated alternative

provisions or made other arrangements for ownership and maintenance of the roadways. See, **Park Center v. Zoning Bd.**, 365 N.J. Super. 284,(App. Div.2004).

By its conduct, the developer is estopped from denying its obligations. **Talcott Fromkin Freehold Assocs. v. Freehold Tp.**, 383 N.J. Super. 298, 315-16 (Super. Ct. 2005)

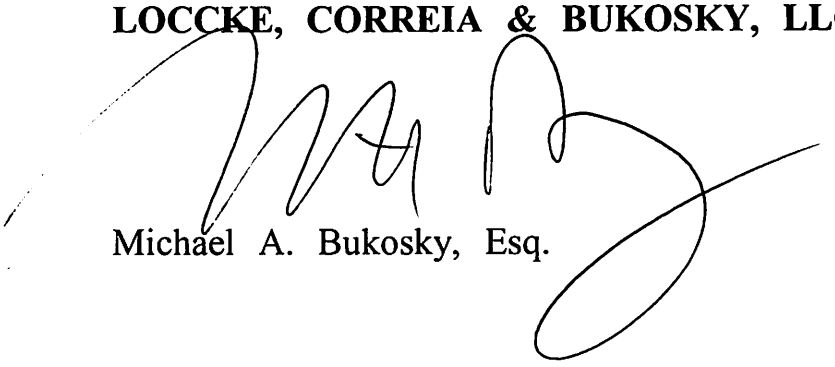
The doctrine of estoppel dictates that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to a party who with good reason and in good faith has relied upon such conduct. **Summer Cottagers Ass'n of Cape May v. City of Cape May**, 19 N.J. 493, 503-504, (1955).

In this case the developer knew that dedication was conditional upon Borough approval. When the Borough did not grant approval it disavowed it contractual arrangements and sued to relieve itself of the conditional obligation to which it had agreed. On grounds of fundamental fairness Plaintiff is now estopped from doing so.

CONCLUSION

For all of the above reasons the trial court's decision should be reversed and the matter should be remanded to the trial court to address the issues of ownership, access, and responsibility for maintenance.

Respectfully submitted,
LOCCKE, CORREIA & BUKOSKY, LLC



Michael A. Bukosky, Esq.

Date: October 4, 2023

RIVER DRIVE DEVELOPMENT, L.L.C.; RIVERFRONT RESIDENTIAL 1, LLC; RIVERFRONT RESIDENTIAL 2 LLC; and RIVERWALK III, LLC, Plaintiffs/Respondents, v. BOROUGH OF ELMWOOD PARK, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002604-22 On Appeal from: Superior Court of New Jersey LAW DIVISION-BERGEN COUNTY DOCKET NO.: BER-L-5108-21 Civil Action in Lieu of Prerogative Writs Sat Below: Honorable Christine Farrington, J.S.C., ret'd, t/a Date of Submission: November 20, 2023

PLAINTIFFS'/RESPONDENTS' BRIEF

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PRELIMINARY STATEMENT

Plaintiffs/Respondents River Drive Development, L.L.C. ("***RDD***"), Riverfront Residential 1 LLC ("***RR1***"), Riverfront Residential 2 LLC ("***RR2***"), and Riverwalk III, LLC ("***RIII***," and collectively with RDD, RR1, and RR2, "***Plaintiffs***") respectfully submit this memorandum of law in opposition to the brief filed in this appeal by defendant/appellant Borough of Elmwood Park (the "***Borough***").

Plaintiffs collectively own real property in the Borough consisting of four residential multifamily and mixed-use apartment buildings containing nearly 1,000 tenants, for which Plaintiffs pay approximately $1.7 million per year to the Borough in property taxes. After receiving final approvals from the Borough in 2004, Plaintiffs began construction of their development in 2005, which involved the building of two connected public streets throughout the various parcels (defined in the "Statement of Facts" section of this brief as the "**Roads**"). Plaintiffs built additional buildings, and improvements to the Roads, in 2011-2013, and 2013-2015, all in accordance with a recorded subdivision map, approved by the Borough, that showed the Roads as being dedicated to the Borough upon their completion.

In accordance with a settlement that Plaintiffs reached with the Borough in the second of two years-long Mount Laurel affordable housing lawsuits that

Plaintiffs were forced to bring, Plaintiffs applied to the Borough Planning Board in 2018 for approval to build additional residential buildings on their property. In response to questioning from the Planning Board, Plaintiffs submitted documentation showing that the Roads were public streets: i.e., they had been dedicated to the Borough on the two recorded subdivision maps relating to their development, and that such dedication was automatically accepted by the Borough in accordance with N.J.S.A. 40:55D-53.j.

As part of its 2019 approval of Plaintiffs' site plan, the Planning Board required that Plaintiffs request a resolution from the Borough Council acknowledging the Roads to be public streets (which was understood by all to be a simple formality). Plaintiffs made that request to the Borough Council, but after six months of silence, and without any prior notice to Plaintiffs, the Council entered a resolution on June 17, 2021 rejecting the dedication of the Roads.

On August 2, 2021 Plaintiffs commenced this action for, among other things, a determination that the Borough had accepted the dedication of the Roads pursuant to N.J.S.A. 40:55D-53.j, and that the Council's resolution was invalid. On April 28, 2023, the trial court granted summary judgment in favor of Plaintiffs, holding that the Borough was deemed to have accepted dedication of the Roads pursuant to N.J.S.A. 40:55D-53.j, and that the Roads were therefore public streets. In a well-reasoned and straightforward opinion, the court noted

that Plaintiffs had shown that there was no genuine issue of material fact relating to whether the Roads were public streets (a determination that was made particularly easy because the Borough did not submit a single affidavit, nor any other competent evidence, in opposition to the motion). And, as a matter of law the Roads clearly met all of the elements in favor of a conclusive presumption of dedication under the statute: (i) the Roads were dedicated to the Borough on the subdivision map, (ii) the Roads were inspected and received final approval from the municipal engineer, and (iii) the Borough released Plaintiffs' performance guarantees after the engineer approved same.

As Plaintiffs show in this brief, the Borough's appeal of the trial court's summary judgment ruling consists of endless repetition of the argument that, in spite of the clear language of N.J.S.A. 40:55D-53.j, the Borough can still decline to accept the Roads for any reason whatsoever. Tellingly, the Borough does not submit any case, statute, or other authority supporting that incorrect proposition. Beyond that, the remainder of the Borough's brief is a collection of red herrings and outright false statements of fact (like saying that the Roads, which service thousands of cars weekly, were only supposed to be the private driveway for the unrelated owner of an enjoining lot). Quite simply, the Borough's retroactive refusal to recognize the Roads as public streets is improper, and Plaintiffs remain entitled to summary judgment on their Complaint.

PROCEDURAL HISTORY

On January 20, 2021, Plaintiffs' counsel sent a letter to the Borough's counsel, requesting that the Borough Council enter a resolution acknowledging that pursuant to N.J.S.A. 40:55D-53.j, the Roads had been dedicated to, and accepted by, the Borough, and were therefore public roadways. (Da332-Da333[1].)

The Borough never responded to such letter, and at its meeting on June 17, 2021, the Borough Council, without prior notice to Plaintiffs, and without providing any rationale, entered Resolution R-238-21, pursuant to which it resolved that "the proposed dedication of [*sic*] Roadway as shown on the plat plan and conditioned in the resolution approved by the Elmwood Park Planning Board be and is hereby rejected and denied." (Da335.) The resolution was on the Council's consent agenda, which meant that there was no public discussion of same, nor rationale provided, prior to its passage. (Da377, Tr. 2:2-3, 24-25; Da378, Tr. 3:1-3.)

[1] For reasons unknown to Plaintiffs, the Borough, which was the ***defendant*** in this matter, prefaced each page number of its appendix, and cites to its appendix, as "Pa," despite the fact that it was not the plaintiff. Accordingly, references in this brief to "Da" refer to the ***Borough's*** appendix, because the Borough is the defendant in this matter; and references in this brief to "Pa" refer to ***Plaintiffs'*** appendix.

On August 2, 2021, Plaintiffs filed a complaint in lieu of prerogative writs against the Borough pursuant to R. 4:69-1 (the "***Complaint***"), asserting three counts: (i) Count One – that the June 17, 2021 resolution be invalidated and that a judgment be entered declaring the Roads to be public roads accepted for dedication by the Borough; (ii) Count Two – promissory and equitable estoppel against the Borough; and (iii) Count Three – in the alternative, that judgment be entered confirming that RDD may restrict access to the Roads in the event they were determined to be private roads. (Da395.) On September 16, 2021, the Borough filed its amended answer to the Complaint (Da492) and discovery ensued.

On March 2, 2023, after the close of discovery, Plaintiffs filed a motion for summary judgment on Counts One and Two of the Complaint (the "***Motion***"). (Da24.) The Borough filed its opposition to the Motion on March 21, 2023 (Da614), and Plaintiffs' filed their reply papers on March 27, 2023 (Pa1). The trial court held oral argument on the Motion on March 31, 2023, and entered an order, along with an opinion, granting the Motion on April 4, 2023 (Da6). The court subsequently amended such order to add "Exhibit A" on April 28, 2023 (Da1). In the order granting the Motion, the trial court noted that it had determined to grant summary judgment to Plaintiffs on Count One of the

Complaint, thereby rendering Counts Two and Three moot, and accordingly it deemed Counts Two and Three to be dismissed (Da2 at ¶¶ 2-3).

The Borough proceeded to file this appeal on May 3, 2023.[2]

STATEMENT OF FACTS

A. *Subdivision of Original Tract*

In 2001, RDD took title to a large tract of vacant land in the Borough (consisting of approximately 20 acres), bounded on the west by the Passaic River, on the north by Slater Drive, on the south by Route 46, and on the east primarily by River Drive (the "***Original Tract***"). (Da57[3] at ¶ 3.) The 2002 aerial view of the Original Tract shows that at such time, it was simply undeveloped land without any roads. (Da67.) Shortly thereafter, the Original Tract (which

[2] It should be noted that in the Borough's Statement of All Summary Judgment Items that it filed in this court on October 19, 2023, it does not actually list all of the items submitted to the trial court in connection with the Motion (i.e., it leaves out the reply certification of George Siller, and response to counterstatement of material facts, submitted to the trial court by Plaintiffs on March 27, 2023) and accordingly, Plaintiffs include same in their appendix submitted herewith.

[3] For reasons unknown to Plaintiffs, the Borough, which was the ***defendant*** in this matter, prefaced each page number of its appendix, and cites to its appendix, as "Pa," despite the fact that it was not the plaintiff. Accordingly, references in this brief to "Da" refer to the ***Borough's*** appendix, because the Borough is the defendant in this matter; and references in this brief to "Pa" refer to ***Plaintiffs'*** appendix.

had been part of multiple separate tax lots) became part of one tax lot on the Elmwood Park Tax Map – i.e., Block 1201, Lot 2.01.[4] (Da171.)

In 2002, RDD received final major site plan and subdivision approval from the Elmwood Park Planning Board (the "***Planning Board***") to subdivide the Original Tract into multiple new separate lots so that it could be developed with a combination of office, residential, and retail uses.[5] (Da69-Da92.) Part of that development would involve the construction of a new public "loop road," which for all intents and purposes is one road, but is referred to on certain maps as two roads, named Riverfront Boulevard (the "***Boulevard***") and Right of Way

[4] As a point of reference, it should be noted that Lot 1.01 has never been owned by Plaintiffs or parties related to Plaintiffs and, except for building a curb cut from Lot 1.01 onto the Boulevard in 2013 as a condition of RDD's Planning Board approvals, has never been part of the development. (Da57 at ¶ 3, fn1; Pa2 at ¶¶ 2-3; Pa29.) Lot 1.01, which at the time of the approvals in 2004 was a vacant building formerly used as a racquet club, is now owned by Hanaim Church Inc., which uses it as a church and religious school, and has approximately 200 parking spaces. (Da57 at ¶ 3, fn1.) The sole means of vehicular access to Lot 1.01 is by the Boulevard. (Da57 at ¶ 3, fn1.) Hanaim Church Inc. does not have, and has never requested, an easement to use the Boulevard for the simple fact that it does not need one: i.e., the Boulevard is a public road, and it is not necessary to have an easement to traverse a public road. (Pa2 at ¶ 5.)

[5] Technically, the original resolution granted approval to build a combination of office buildings, a hotel, a bank, and a restaurant, but such approvals were ultimately modified to provide for a combination of what presently exists: i.e., one office building, and numerous multifamily residential buildings. (Da58 at ¶ 3, fn1; Da201; Da313.)

"A" (the "***Unnamed Road***," and collectively with the Boulevard, the "***Roads***"). (Da58 at ¶ 4.) The approval resolutions, along with the Developer's Agreement entered into between the Borough and RDD on December 20, 2004 (the "***2004 Developers Agreement***"), required RDD to construct the Roads in compliance with the Borough's specifications and to post a performance bond for the completion of same. (Da90 at § 40.E; Da116 at § 4.d.) The 2004 Developers Agreement went on to expressly state that the Borough "shall accept said dedication of the required curbing, drainage, pavement, etc., upon the completion of the improvements required in the Site Plan by Ordinance or Resolution." (Da116 at § 2.)

On September 1, 2005, RDD recorded a subdivision map in the Office of the Bergen County Clerk, Map No. 9418 (the "***2005 Map***"), which subdivided the Original Tract into five lots: Block 1201, Lots 2.01, 3.01, 4.01, 5.01, and 5.02, with the Roads interspersed between them. (Da171.) With the exception of a slight alteration of lot and road dimensions by way of a subsequent 2010 subdivision map recorded on July 12, 2012, Map No. 9548 (the "**2010 Map**") (Da173), those lots and Roads have remained the same on the maps ever since.[6] (Da59 at ¶ 7.) Further, since 2005, the Borough's Tax Map has shown the

[6] In 2022, Lot 2.01 was subdivided into four separate lots – Lots 2.02, 2.03, 2.04, and 2.05 – but such subdivision is not relevant to the instant action and therefore is being disregarded for purposes of this analysis. (Da59 at ¶ 7, fn3.)

Roads as public streets that are not part of any tax lot, and has depicted the lots (subject to the minor revisions to dimensions) as set forth in Da175.

B. ***Construction and Transfer of Lot 5.01***

On December 15, 2004, RDD received approval to modify its original 2002 site plan in order to build a three-story office building on Lot 5.01, in accordance with the 2004 Developers Agreement. (Da59 at ¶ 8; Da177.) On September 2, 2005, RDD deeded Lot 5.01 to RFC-1, LLC ("**RFC**"), an affiliate of RDD. (Da59 at ¶ 9; Da187.) RFC commenced construction of the building in 2006, and completed such construction in 2007. (Da59 at ¶ 10.) As part of the construction, RFC built the Unnamed Road, and the first part of the Boulevard (i.e., the portion between Slater Drive and the southern boundary line of Lot 5.01) (Da59 at ¶ 10; Da192.) In connection with such construction, RFC was required to, and did, provide a performance bond to the Borough to secure RFC's completion of the Unnamed Road and the first portion of the Boulevard, and such bond was released upon completion of the construction in 2007. (Da59-Da60 at ¶ 10; and Da183 at § 5.F.) From 2006 through 2016, most of the space in the office building on Lot 5.01 was leased by RFC to Sealed Air Corporation, a large public company which used the building as its corporate headquarters. (Da60 at ¶ 10.)

In December 2016, RFC sold Lot 5.01 (which has a street address of 200 Riverfront Boulevard) to 200 RiverfrontBoulevard HP, LLC, an entity which is not related to Plaintiffs. (Da60 at ¶ 11; Da195.) Such lot is still in use as a commercial office building, and has approximately 283 parking spaces. (Da60 at ¶ 11.)

C. *Construction and Transfer of Lot 3.01*

In 2009-2010, RDD engaged in litigation with the Borough for the right of RDD to construct multifamily residential apartment buildings on Lots 3.01 and 4.01 and for the Borough to comply with its affordable housing obligations – *River Drive Development, L.L.C. v. Borough of Elmwood Park,* Law Division, Bergen County, Docket No. BER-L-822-09 – resulting in RDD obtaining the right to build such residential apartments. On December 8, 2010, the Borough Planning Board entered a resolution (the "***2010 Approval Resolution***") granting RR1 (an affiliate of RDD to whom RDD deeded Lot 3.01) final site plan and subdivision approval to construct a residential apartment building on Lot 3.01. (Da201; Da235.) The 2010 Map, the recording of which perfected the subdivision approval granted by the 2010 Approval Resolution, depicted the roads as public streets. (Da173.) Further, the 2010 Approval Resolution contained the following condition:

> The access road to the premises must be constructed in accordance with Borough standards and . . . the existing

> access road must be upgraded to Borough standards prior to the same ***being dedicated to*** the Borough of Elmwood Park at the cost and expense of the applicant.

(Da206 at Condition E, emphasis added.)

Pursuant to the 2010 Approval Resolution and the July 25, 2011 Developer's Agreement entered into between the Borough and RR1, RR1 posted a performance guarantee for its completion of the improvements, including the construction of the second and final portion of the Boulevard, and the upgrade of the portions of the Roads that had already been built in connection with the construction of Lot 5.01. (Da60 at ¶ 13; Da214 at § 9; Da231.) RR1 proceeded to build the apartment building and complete the Roads in 2012. (Da60 at ¶ 13.) On April 16, 2013, the Borough Council issued Resolution R-151-13 approving the release of RR1's performance guarantee that it posted in connection with such improvements. (Da233.)

Lot 3.01, which has a street address of 400 Riverfront Boulevard, is still owned by RR1, and is still in use as a 107-unit residential apartment building. (Da61 at ¶ 14.)

D. ***Construction and Transfer of Lot 4.01***

In 2013, RDD deeded Lot 4.01 to RR2 (an affiliate of RDD), which proceeded to construct a multifamily apartment building on such lot. (Da61 at ¶ 15; Da235.) As part of the municipal approvals for such construction, the

Borough required RR2 to construct certain curbing improvements in connection with the Roads, and post a performance guarantee in connection with same. (Da61 at ¶ 15.) RR2 proceeded to complete such improvements, and on May 11, 2015, the Borough Council issued Resolution R-166-15 approving the release of RR2's performance guarantee. (Da61 at ¶ 15; Da244-Da252.) Lot 4.01, which has a street address of 301 Riverfront Boulevard, is still owned by RR2, and is still in use as a mixed-use building with 51 residential apartments and 15,000 square feet of ground floor retail. (Da61 at ¶ 16.)

E. *Approvals to Build on Lot 2.01*

In 2015-2018, RDD engaged in litigation with the Borough for the right of RDD to construct multifamily residential apartment buildings on Lot 2.01 and for the Borough to comply with its affordable housing obligations – *In the Matter of the Affordable Housing Obligation of the Borough of Elmwood Park*, Law Division, Bergen County, Docket No. L-6375-15 – resulting in RDD obtaining the right to build such residential apartments. In 2018, RDD filed an application for amended site plan approval to construct four multifamily apartment buildings on Lot 2.01. (Da61 at ¶ 17.) During an October 10, 2018 hearing on such application, a member of the Borough Planning Board raised the issue of whether the Roads were public roadways. (Da61-Da62 at ¶ 17.) By way of correspondence dated October 18, 2018, and December 12, 2018, RDD's

counsel informed the Planning Board's counsel that the Roads had been dedicated and accepted for public use pursuant to N.J.S.A. 40:55D-53.j, and therefore were deemed public roads as a matter of law. (Da254-Da275.) In connection with that same discussion, the Borough Engineer wrote a letter to the Planning Board on November 26, 2018, in which it confirmed that the construction of the Roads was satisfactory and in accordance with Borough standards. (Da277.)

On January 16, 2019, the Borough Planning Board entered a *Resolution Approving the Amended Site Plan Application of [RDD]* (the "***2019 Site Plan Approval***"). (Da279.) Among other things, the 2019 Site Plan Approval included the following condition:

> Dedication of Roadways to the Borough of Elmwood Park should be addressed by Applicant with the Borough, and the Applicant shall be responsible to undertake any additional steps, as may be necessary, for the road dedication.

(Da275 at § A.)

On February 4, 2021, RDD and the Borough entered into a Developer's Agreement. (Da289.) Section 5.2 of such Developer's Agreement required RDD to furnish a performance guaranty for the cost of improvements to be made to the Roads in connection with the construction of the apartment buildings. (Da296-Da297 at § 5.2.) RDD proceeded to provide the requisite performance

guarantee. (Da62 at ¶ 20.) RDD deeded Lot 2.01 to RIII on March 26, 2021, and RIII remains the current owner of Lot 2.01. (Da62 at ¶ 20; Da327.)

F. *Borough's Purported "Rejection" of Dedication of the Roads*

In accordance with the 2019 Site Plan Approval, on January 20, 2021, RDD's counsel sent a letter to the Borough's counsel, requesting that the Borough Council enter a resolution acknowledging that the Roads had been dedicated to the Borough and were therefore public roadways. (Da332-Da333.)

The Borough never responded to such letter, and out of the blue, at its meeting on June 17, 2021, the Borough Council, without prior notice to Plaintiffs, and without providing any rationale, entered Resolution R-238-21, pursuant to which it resolved that "the proposed dedication of [*sic*] Roadway as shown on the plat plan and conditioned in the resolution approved by the Elmwood Park Planning Board be and is hereby rejected and denied" (the "***Denial Resolution***"). (Da335.) The Denial Resolution was on the Council's consent agenda, which meant that there was no public discussion of same, nor rationale provided, prior to its passage. (Da377, Tr. 2:2-3, 24-25; Da378, Tr. 3:1-3.)

G. *Easement does not Provide Public Right of Access over Roads*

Another of the conditions of the 2019 Site Plan Approval for Lot 2.01 was "[a] valid and properly executed easement agreement with the Borough for

access to the Passaic River Docks." (Da285 at § D.) The term "Passaic River Docks" refers to a floating dock on the Passaic River that is accessible from a portion of Lot 2.01 that abuts the Passaic River. (Da63 at ¶ 23.)

Accordingly, on February 24, 2021, RDD entered into an easement agreement with the Borough (the "***Dock Access Easement***"), pursuant to which RDD granted the Borough a public access easement for the use of a certain parking area and walkway on Lot 2.01 by persons accessing the dock (the "***Easement Area***"). (Da337-Da343.) The Easement Area cannot be accessed without first traveling on the Boulevard. (Da63 at ¶ 24; Da342.) However, if the Boulevard is a private road (the position taken by the Borough), then it is not possible for the public to access the Easement Area. (Da63 at ¶ 24; Da342.)

LEGAL ARGUMENT

The trial court properly granted summary judgment in favor of Plaintiffs on Count One of the Complaint, and Plaintiffs respectfully request that this court affirm the trial court's decision. Additionally, because of this court's *de novo* review, Plaintiffs also show herein why they are entitled to summary judgment under Count Two of the Complaint, to the extent that this may be relevant to this court's analysis.

On appeal, the Appellate Division conducts a *de novo* review of an order granting summary judgment, and applies the same standard employed by the

trial court. C.H. v. Rahway Board of Education, 459 N.J. Super. 236, 242 (App. Div. 2018). Summary judgment is designed to provide "a prompt, businesslike and inexpensive method" of disposing of any cause of action that does not present "any genuine issue of material fact requiring disposition at trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). Pursuant to R. 4:46-2(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

As explained by the Supreme Court, "a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a genuine issue as to any material fact challenged." Brill, 142 N.J. at 529 (1995) (internal quotations omitted). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

The essence of the inquiry on a motion for summary judgment is "whether the evidence presents sufficient disagreement to require submission to a jury or

whether it is so one-sided that one party must prevail as a matter of law." Pron v. Carlton Pools, Inc., 373 N.J. Super. 103, 112 (App. Div. 2004) (quoting Brill, 142 N.J. at 536). "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, 142 N.J. at 541 (internal quotations omitted).

I.

THE DEDICATION OF THE ROADS WAS AUTOMATICALLY ACCEPTED BY THE BOROUGH PURSUANT TO N.J.S.A. 40:55D-53.J (Da18-Da19)

As a matter of law, the Roads are public streets that were automatically deemed to be accepted by the Borough pursuant to N.J.S.A. 40:55D-53.j. Accordingly, Plaintiffs were and are entitled to summary judgment on Count One of the Complaint.

In N.J.S.A. 40:55D-53.j, the Legislature provides as follows:

> To the extent that any of the improvements have been dedicated to the municipality on the subdivision plat or site plan, the municipal governing body shall be deemed, upon the release of any performance guarantee required pursuant to subsection a. of this section, to accept dedication for public use of streets or roads and any other improvements made thereon according to site plans and subdivision plats approved by the approving authority, provided that such improvements have been inspected and have received final approval by the municipal engineer.

N.J.S.A. 40:55D-53.j. That section makes clear that once a municipality releases a developer's performance guarantee in connection with a street that has been dedicated to the municipality on the subdivision map, the municipality is deemed to have *automatically* accepted the dedication of such street without any further action. (Ibid.)

Given that N.J.S.A. 40:55D-53.j creates a conclusive presumption of dedication, there are literally no other issues relevant to this analysis. See Steelcase, Inc. v. Div. of Taxation, 13 N.J. Tax 182, 192 (1993) ("A conclusive presumption exists when an ultimate fact is presumed to be true upon proof of another fact, and no evidence, no matter how persuasive, can rebut it. A conclusive presumption is an artificially-compelling force which requires a trier of fact to find that such fact is conclusively presumed and evidence to the contrary is inadmissible.") As noted above, Plaintiffs satisfied all of the requisite elements for automatic acceptance of dedication under N.J.S.A. 40:55D-53.j. Accordingly, a conclusive presumption of acceptance of dedication has been created, and no other issues or evidence are relevant to this Motion.

Thus, the underlying issue presented to the trial court in connection with summary judgment on Count One of the Complaint was simple: whether the dedication of the Roads was *automatically accepted* by the Borough pursuant to

N.J.S.A. 40:55D-53.j. In addressing that issue, the only relevant questions to consider were (i) whether the Roads were dedicated to the Borough on the subdivision map, (ii) whether the Roads were inspected and received final approval from the municipal engineer, and (iii) whether the Borough released Plaintiffs' performance guarantees. As the trial court correctly found, the answer to all of those questions is "yes," and, as will be shown in this section, the Borough has not made a single valid argument to the contrary.

A. *The Roads were Dedicated to the Borough on the 2010 Map* (Da18)

First, the trial court properly held that the Roads were dedicated to the Borough on the 2010 Map.[7] Indeed, the 2010 Map expressly labeled the Roads as "***Borough of Elmwood Park Public R.O.W.***" (Da173, emphasis added). Though that fact in itself is more than sufficient to show dedication of the Roads,

[7] It should also be noted that the pursuant to N.J.S.A. 40:55D-53.j, the Unnamed Road and original portion of the Boulevard were also automatically dedicated when the performance guarantee was released in connection with the construction on Lot 5.01. (Da26 at ¶ 10; Da171.) However, for purposes of completeness (seeing as the final portion of the Boulevard, and upgrade of the existing portions of the Roads, were constructed in accordance with the development of Lot 3.01) (Da28 at ¶ 22), this brief primarily addresses the automatic dedication that occurred upon the release of the performance guarantees in connection with the construction of Lots 3.01 and 4.01. But, to be clear, Plaintiffs also assert that the dedication of the Roads was automatically accepted by the Borough by virtue of its release of the performance bond in connection with the construction on Lot 5.01 and the 2005 Map's depiction of the Roads as public streets.

the following additional facts also show that the Roads were dedicated to public use on the 2010 Map: (a) the Roads were not labeled "private" streets, and were not depicted in dashed lines or as part of any lot, thereby designating them as public property (Da173); (b) at the intersection of the Boulevard and the line of Lot 3.01 (where the Boulevard was being extended by an additional 32 square feet), there is an inscription stating "32 S.F. to be dedicated as public right of way," which would only make sense if the remainder of the Boulevard was already a public right of way (Da173); and (c) if the Roads were private streets, then non-owners of the Roads would need an easement to use them, and the 2010 Map did not show any easements over the Roads (and if such easements existed, they would have needed to be shown on the 2010 Map pursuant to N.J.S.A. 46:26B-2(b)(7)). (Da173.)

The Borough's primary argument in response to the above is that the Roads were listed on the 2010 Map as public "rights-of-way," not "streets," and therefore the Roads were not dedicated to the Borough on the 2010 Map. (Db23-Db24.) However, as the Borough itself acknowledges, a street is constructed within the bounds of a right of way. (Db24.) If a right of way is public, then clearly the road built within that right of way is also public. By showing the Roads on the 2010 Map as "***Borough of Elmwood Park Public R.O.W.***" (Da173, emphasis added), it is beyond dispute that RDD was dedicating the Roads to the

Borough (again, the description "***Borough of Elmwood Park Public R.O.W.***" does not leave any room whatsoever for ambiguity). This conclusion is buttressed by the fact that both the 2010 Map and the Borough's Official Tax Map depict the Roads as not being on, nor being a part of, any lot (and if the Roads were private property they would need to be part of a lot, or shown in dashed lines, on such maps). As such, in this context, the words "right of way" and "street" are being used synonymously.

The Borough next argues that the Roads cannot be public streets because the Borough does not have fee title to the Roads (Db26). However, the question of ownership has no bearing on the analysis of whether the Roads have been dedicated to public use. "Dedication is the permanent devotion of private property to a public use[,]" George Van Tassel's Community Funeral Home v. Town of Bloomfield, 8 N.J. Super. 524, 528 (Ch. Div. 1950), and "[i]t would . . . appear from long established rules that there may be a valid dedication . . . without any deed whatsoever." Id. at 529. Thus, dedicating a road to a municipality for public use can be accomplished without ever transferring fee title to such municipality. Ibid. Indeed, N.J.S.A. 40:55D-53.j does not state that conveyance of fee simple title of the streets to the municipality is a condition of dedication. Accordingly, whether the Borough's interest in the Roads is in the form of a right-of-way or a fee interest is irrelevant: the questions are simply

whether the Roads have been dedicated for public use (they have), and whether, as a matter of New Jersey statute, that dedication has been deemed accepted by the Borough (it has). The analysis stops there.

Finally, the Borough makes the conflicting arguments, both specious, that the trial court did not make clear what map it was relying on to reach the conclusion that the Roads were dedicated to the Borough; and then in the next breath says that the trial court was relying on the 2010 Map or the 2005 Map, but that it could not do so because the Borough never approved such maps. (Db14-Db15; Db22.) Both of those statements are false. In reality, the trial judge made clear on multiple occasions that she was referring to the 2010 Map and 2005 Map (which makes sense, because those are subdivision maps, and the statute requires that the dedication be on a subdivision or site plan map). (Da8-Da9; Da14-Da15; Da20.) Moreover, the subdivision maps were clearly approved by the Borough: the 2010 Map is signed by the Planning Board (both the Chairman and Secretary signed it), the Borough Engineer, and the Borough Clerk. (Da173.) (The 2005 Map contains the same signatures and approvals, except it is signed by the Zoning Board instead of the Planning Board (Da171).) The Borough Clerk even certified on the 2010 Map that "[t]he streets, roads, and public rights-of-way shown on this map have been approved by the proper municipal boards/authorities." (Da173.)

B. *The Roads were Inspected and Received Final Approval from the Municipal Engineer, and the Performance Guarantees were Released* (Da19)

It is beyond dispute that the Roads were inspected by, and received the final approval of, the Borough Engineer, and that Plaintiffs' performance guarantees were released upon such final approval. The record shows that at the times when the final construction of the Roads was performed (2011-13 and 2013-15), Plaintiffs posted performance guarantees to the Borough. (Da231-Da232; Da243-Da251.) The record further shows that in both 2013 and 2015, the Borough Engineer inspected the Roads and approved same. (Da233; Da252.) In fact, Boswell Engineering, the Borough Engineer at the times that the Roads were completed, later stated the following in response to an inquiry from the Planning Board:

> Boswell Engineering inspected the construction of the roads of Riverfront Development to Borough Standards. By virtue of the fact that we recommended to the Mayor and Council that the Performance Guarantees be released in 2015, we found the construction of the roads to be satisfactory and in compliance with Borough Standards.

(Da277.) It is further undisputed that the Borough Council released each of the above performance guarantees upon the advice of the Borough Engineer. (Da233; Da252.) This was consistent with the governing law, which says that a municipality can only release a performance guarantee after the improvements

have been inspected, and approved, by the municipal engineer. N.J.S.A. 40:55D-53.e(1).

Despite that clear evidence, the Borough somehow makes the outrageous argument that "[t]here is no evidence that the municipal engineer inspected and approved the roadways in question." (Db27.) However, contrary to the Borough's assertions, Boswell Engineering (through Mr. Ten Kate) was the municipal engineer at the time.[8] Accordingly, the Borough's counsel's assertions in this regard are nothing more than baseless obfuscation, unsupported by a single sworn statement from a representative of the Borough with actual factual knowledge. It is beyond dispute that the municipal engineer approved the Roads for public dedication.

Compounding the absurdity, the Borough then states that "the Public Engineer rather pointedly found that the internal roads did not comply with the Municipal Zoning plan and that they could not be approved no matter what their condition." (Db27, emphasis omitted; see also Db39-Db40.) Though the Borough provides no citation to support that statement, it is assumed that the Borough is referring to certain comments made at a Planning Board meeting on

[8] The trial court's opinion mistakenly says that Mr. Ten Kate wasn't the Borough Engineer, when in fact he was. (Da15.) The Borough has attempted to seize on this insignificant mistake to support its bizarre argument, but for the reasons above such argument is still unavailing.

November 14, 2018 (many years after the Roads were already built and approved) (Db11-Db12; Db14) by Robert Costa, the Planning Board engineer (who is not and was not the Municipal Engineer), *who had no involvement whatsoever in the inspection of the Roads*. (Pa3 at ¶ 9.) In those comments, Mr. Costa mused aloud that a separate zoning use variance may have to be obtained for the Roads if they were determined to be private roads. (Da566, Tr. 22:11-20; Da568, Tr. 31:15-25 and 32:1-25; Da569, Tr. 33:1-9.) That theoretical legal issue regarding a zoning use variance raised in 2018 has nothing to do with the municipal engineer's physical inspection of the Roads in 2013 and 2015. But, even if it did, the Borough conveniently fails to point out that (i) in the 2010 Map, the Borough Clerk certified as follows: "I hereby certify that the streets, roads, and public rights-of-way shown on this map have been approved by the proper municipal boards/authorities" (Da173), which certification could not have been made if there was any improper zoning; (ii) errant comments made by the Planning Board engineer are not a formal ruling and have no force of law or otherwise; and (iii) the Planning Board attorney opined at the next Planning Board meeting that there was no issue regarding the approval of the roads and the zoning, and that Mr. Costa was incorrect:

> So, again, there is no question in my mind, unequivocally, that this is the Board, and that it does not trigger a use variance. Secondly, with respect to the road dedication, I received a letter from Boswell

> Engineering, which I sent to the Chairman, because that I got within about ten days, I sent it to Giselle Diaz, the former representative from Boswell. She actually wasn't the engineer at the time, it was Peter TenKate. Mr. TenKate got back to me, he reviewed the file and said, as a result of the application pre-approvals and release of the performance bond, ***everything that was required to be done by way of the plans, including the road work, had been done, which is why they released the bond***.

(Da525, Tr. 11:20-25, 12:1-13) (emphasis added). After such pronouncement from the Planning Board attorney, the matter was put to rest, and tellingly this supposed "zoning issue" was not made a condition in the 2019 Site Plan Approval. (Da279-Da287.)

Finally, the Borough makes the tongue-in-cheek argument that, despite the clear controlling statute, the Roads cannot be public streets because acceptance of the dedication of the Roads was contingent upon the Borough passing a resolution of acceptance of such dedication, and the Borough never passed such a resolution. (Db30-33.) That argument ignores the fact that the entire basis of this lawsuit was to compel the Borough to enter an ordinance recognizing its acceptance of the dedication of the Roads (Da403 and Da404, at subsection (b) of *ad damnum* clauses), and that, as part of her summary judgment decision, the trial judge required that the Borough adopt a resolution accepting the dedication of the Roads. (Da20.)

II.

THE BOROUGH DOES NOT HAVE THE RIGHT TO "DECLINE A DEDICATION AT ANY TIME" (Da20)

Points I and II of Defendant's brief are different variations of the same underlying argument: i.e., that a municipality can always decline to accept the dedication of a street for public use despite the fact that such dedication was offered by way of an approved subdivision plat for which the work had been done and the performance bond released. That unsupported assertion is simply not true, and runs directly contrary to the plain, unambiguous language of N.J.S.A. 40:55D-53.j. Subsection "j" was added to N.J.S.A. 40:55D-53 by virtue of Senate Bill No. 2406, titled "An Act concerning dedication of certain municipal streets and improvements, and amending P.L. 1975, c. 291." 1991 N.J. Sess. Law Serv. Ch. 301 (Senate 2406) (West) (Da391-Da393). After the addition of subsection "j" to N.J.S.A. 40:55D-53, a municipality's acceptance of a dedicated road upon release of the performance bond became automatic, and rendered moot any requirement that the municipality take some affirmative act in order for a dedicated road to be accepted. Ibid.

The opinions and statutes cited by the Borough do not change that conclusion. The Franco case was a condemnation action in which the property owner had land in Weehawken that was the site of an industrial garage that had no site plan or subdivision approvals for any other use (as such, N.J.S.A.

40:55D-53.j was not addressed at all in the opinion), and which the property owner said had higher value because it could be developed as an access street for another part of the property located in different municipalities. N.J. Transit Corp. v. Franco, 447 N.J. Super. 361, 367-69 (App. Div. 2016). Though the land was not zoned to be a street, the property owner argued that it would not need to obtain a variance because it could simply dedicate the street to the municipality. (Id. at 375.) The court rejected that argument because the municipality could, and would likely, reject the hypothetical dedication, seeing as the street would service property in other municipalities that provided no tax revenue to Weehawken. (Id. at 375-77.) In other words, the property owner could not use dedication as an end-run around the variance requirement. (Id. at 377.)

That holding is inapposite to the instant matter, however, because it addressed undeveloped, non-entitled property that was not a street dedicated to the municipality on an approved plat map, and on which the municipality had not already approved the construction of roads and required a performance bond in connection with the construction of same. (Id. at 375-77.) In accordance with N.J.S.A. 40:55D-53.j, if the Borough wanted to decline to accept the dedication of the Roads, the time to have done so would have been when it was presented with the 2005 Map and the 2010 Map (just like Weehawken would have had the

right to reject the dedication of the hypothetical road at the time of its review of Franco's subdivision application). The Borough did not do so; and in fact, it expressly approved such maps. (Da171 and Da173.) The Borough's attempt to now try to reject the dedication of the Roads after it already approved the subdivision maps (which showed the Roads as public streets) is the type of *ultra vires* action that N.J.S.A. 40:55D-53.j prohibits.

The Borough's citations of N.J.S.A. 40:67-1 and 40:67-19 (both of which were not raised by the Borough in its argument at the trial court level[9]) are equally unavailing. N.J.S.A. 40:67-19 applies to property that has been dedicated to, but not accepted by, the municipality. Here, the dedication of the Roads was already accepted by the Borough. N.J.S.A. 40:67-1.b addresses, among other things, a municipality's right to pass an ordinance vacating a public street. It goes without saying, however, that this instant action has nothing to do with any ordinance by the Borough vacating a public street; rather, it has to do with the Borough's acceptance of dedication of the Roads. Accordingly, the Borough's ability to pass an ordinance vacating a public street, and the significant body of case law applicable to such right (which requires a showing

[9] Despite including such statutes in its table of authorities, they are not cited nor discussed anywhere in the substance of the Borough's brief.

that such vacation is in the public interest, among other things), are not relevant to the court's determination of the Motion.

III.

THE BOROUGH DID NOT, AND CANNOT, REBUT THE FACTUAL BASES OF THE MOTION (Da16)

In its rush to criticize the trial court's ruling, the Borough ignores the fact that it did not submit a single item of evidence in opposition to the Motion, and it was not able to rebut a single item in Plaintiffs' statement of material facts.

A. *The Borough has not Submitted any Competent Evidence* (Da11)

In order to defeat summary judgment, "the opposing party must demonstrate by *competent evidential material* that a genuine issue of material fact exists." Globe Motor v. Igdalev, 225 N.J. 469, 479-80 (2016) (internal quotations omitted) (emphasis added). "Competent opposition requires competent evidential material beyond mere speculation and fanciful arguments." Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009). Hearsay evidence is inadmissible, non-competent evidence, and is insufficient to defeat a summary judgment motion. Robbins v. Jersey City, 23 N.J. 229, 239 (1957). "One who has no knowledge of a fact except for what [they have] read or for what another has told [them] cannot provide an affidavit in compliance with Rule 1:6-6 and thereby support a favorable disposition of a summary judgment." Sellers v. Schonfeld, 270 N.J. Super. 424, 428 (App. Div. 1993).

Here, as the trial court expressly noted, the Borough submitted *no* competent evidence in opposition to the Motion. (Da11.) The only affidavit submitted by the Borough as part of its summary judgment opposition was a certification of its attorney in this case, which certification simply attached the transcripts of two 2018 Planning Board hearings (Da515-Da560), despite the fact that this case does not involve an appeal of any ruling of the Planning Board. Further, on nearly every page of its appellate brief, the Borough makes (incorrect) assertions about the construction and compliance of the Roads, yet not a single one of them is supported by a citation to the record, let alone a certification of a person with personal knowledge of the matter.

B. ***All of Plaintiffs' Material Facts Were Properly Deemed Admitted by the Borough* (Da11-Da16)**

As the trial court correctly found, as a matter of law, the Borough's response to Plaintiffs' statement of material facts did not suffice to dispute any of the asserted facts. (Da11-Da16.) Pursuant to R. 4:46-2(b), a party opposing a summary judgment motion must file a responding statement either admitting or disputing each of the facts in the movant's statement of material facts. "Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact." Ibid.

Subsection (a) of R. 4:46 requires that each fact shall be supported by a citation which "shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portion of exhibits relied on."

Here, all of the facts set forth in Plaintiffs' statement of material facts in support of the Motion (the "***Facts Statement***") must be deemed to be admitted for purposes of the Motion. (Da575-Da580.) There are forty-eight separately numbered paragraphs in the Facts Statement, and the Borough expressly or essentially admitted twenty of those paragraphs (1-6, 19, 21, 27, 31-32, 34-37, 41, and 43-46). The Borough's other responses consist of seventeen statements to the effect that the Borough "neither admits nor denies and leaves Plaintiff to its proofs" (11-14, 16-18, 22, 24-26, 28-30, and 38-40), four statements containing an admission but then supplementing it with additional "facts" without any supporting citation (10, 23, 42, and 47), and seven statements asserting some type of denial without any supporting citation whatsoever (7-9, 15, 20, 33, and 48). (Da575-Da580.) Accordingly, the Borough's responses to the Facts Statement (and its so-called "Counterstatement of Material Facts") should be rejected by this court, just as they were rejected by the trial court. See Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) ("The nonmovant cannot sit on [their] hands and still prevail.") As shown, all of the Borough's responses that were not admissions were not sufficient to constitute

a valid denial, and must therefore be deemed admitted for purposes of the Motion. (Da575-Da580.)

IV.

RED HERRINGS AND FALSE STATEMENTS IN THE BOROUGH'S BRIEF (not directly addressed by trial court)

In light of its inability to assert a meritorious defense to Plaintiffs' statutory argument, the Borough has instead decided to stuff its appellate brief with over forty pages of red herrings, misstatements, false statements, and irrelevant references and citations. The Borough largely focuses on contrived non-issues regarding title and zoning, discredited pronouncements of the Planning Board engineer that have no force of law or relevance in general, attempts to attribute significance to words such as "interior road" or "internal road" that have no legal meaning, and outright factual misrepresentations. Plaintiffs submit that the Court should disregard all of these other items as inadmissible in light of the conclusive presumption in favor of dedication of the Roads pursuant to N.J.S.A. 40:55D-53.j. However, out of an abundance of caution, Plaintiffs show in this section why each of these contrived issues has no merit.

As an additional preface to the consideration of these red herrings, it should be noted that over the past eighteen years, the Borough has approved two subdivision maps showing the Roads (the 2005 Map and 2010 Map) (Da171 and

173), numerous site plans showing the Roads (i.e., the site plans for the developments on Lots 2.01, 3.01, 4.01, and 5.01), building permits and certificates of occupancy for all of the buildings located on Lots 2.01, 3.01, 4.01, and 5.01, which are the lots abutting the Roads; and additionally, the Borough has engaged in two lawsuits with Plaintiffs seeking (unsuccessfully) to deny Plaintiffs' ability to build multifamily housing on the lots abutting the Roads (*River Drive Development, L.L.C. v. Borough of Elmwood Park*, Law Division, Bergen County, Docket No. L-822-09, and *In the Matter of the Affordable Housing Obligation of the Borough of Elmwood Park*, Law Division, Bergen County, Docket No. L-6375-15). In that time and in all of those venues, the Borough never once asserted that Plaintiffs did not have clean title to the land on which the Roads were built that would prevent them from being dedicated, nor did it ever assert that the Roads were built in violation of municipal zoning laws. Now, after Plaintiffs spent all of the time and money to build the Roads to the standards of public roads so that they could be dedicated to the Borough, the Borough has now conveniently decided to take the position that it does not want them. That is not how the process is supposed to work.

A. ***The Roads are not the "Driveway" of the Church*** **(not directly addressed by trial court)**

Throughout its brief, the Borough falsely states *ad nauseum* that the Roads were constructed as a driveway or access road for Lot 1.01, and that the owner

of Lot 1.01 might own the Roads or has an easement over the Roads. See, e.g., Db4 ("[T]he first mention of the roadway at issue described an 'ingress and egress' driveway for the church lot 1.01 from the 'internal road' onto Slater Drive"); Db5 ("In essence, the initial site plan approval envisioned the developer creating a[n] ingress and egress driveway (not a public roadway) for the Athletic Club Property (now church) at Lot 1.01.") Db8 ("Presumably [the term 'access road'] refers to the ingress and egress driveway for the church"); Db10 ("This is the same driveway and easement access and egress for Lot 1.01 referred to in Plaintiff's brief as a driveway for the church."); Db36 ("Here, public records demonstrate that the access road was initially described as an ingress and egress driveway for the Church Lot 1.01").

When Plaintiffs stated that they constructed a "driveway" for Lot 1.01 off the Boulevard, it means literally that – a curb cut from Lot 1.01 onto the Boulevard. (Pa2 at ¶ 2; Pa29.) They did not mean that the Boulevard was the access driveway for Lot 1.01. (Pa2 at ¶ 2; Pa29.) Indeed, ***no*** part of the Roads is on Lot 1.01, and ***no*** part of the Roads constitutes a driveway of Lot 1.01. (Pa2 at ¶¶ 3-4.) In fact, because the building on the Lot 1.01 property was vacant until 2013 (when it was purchased by the Church), the actual curb cut onto the

Boulevard from Lot 1.01 was not even constructed until 2013,[10] which was seven years after the original construction of the Boulevard. (Id. at ¶¶ 3-4.) This means that the Boulevard was being used for vehicles to reach the buildings on Lots 3.01, 4.01, and 5.01 before the curb cut was even made onto Lot 1.01. (Id. at ¶¶ 3-4.) As such, the Borough's repeated assertion that the Boulevard's original purpose was simply to be an access driveway for Lot 1.01 is both incorrect and nonsensical. In that regard, it bears emphasis that the Borough's counsel submits no affidavit or certification from anyone with factual knowledge on this issue.

B. ***There is no "Title Issue."*** **(not directly addressed by trial court)**

In various parts of its brief, the Borough attempts to create an issue of title and ownership that does not actually exist. See Db38 ("The issues of ownership, dedication, acceptance and responsibility are not clear on the record put forth by Plaintiff[s]. A proof hearing is therefore necessary to identify and clarify the ownership and maintenance obligations at issue.") Quite simply, there is no issue of ownership or title whatsoever.

[10] Plaintiffs' initial supporting certification stated that the curb cut was made in 2004-2005, but their subsequent certification corrected this to state that it was done in 2013. (Da57 at ¶ 3, fn1; Pa2 at ¶¶ 2-3; Pa29.)

First, Plaintiffs are not seeking Court approval to transfer the Roads to the Borough; rather, they are seeking a declaration that the dedication of the Roads to public use has already been accepted by the Borough. Plaintiffs' position in this matter is that the Roads were already automatically dedicated to the Borough as a matter of New Jersey statute, and are therefore public roads that must be maintained by the Borough. If the Roads are deemed to have already been accepted by the Borough as a matter of law, the nominal title owner is irrelevant, because the land underlying the Roads is subject to the public right-of-way and is for all intents and purposes the responsibility of the Borough.[11] The proposition cited by the Borough – i.e., that there is a presumption that property owners abutting a *public* street own title up to the middle of the roadbed – is only relevant to the question of what happens if the road is vacated by the Borough or taken by eminent domain, neither of which is at issue here.

[11] Moreover, should it be determined by the Court that the Roads are private, there is no question that they would then be owned solely by RDD. Plaintiffs showed very clearly that the Original Tract (which includes the entirety of the Roads) was originally owned by RDD. (Da57-Da58 at ¶¶ 3-4.) Thus, because the Original Tract (and therefore the land on which the Roads now sit) was owned by RDD, it goes without saying that the owner of Lot 1.01 never had title to such land.) (Ibid.) RDD never conveyed the Roads to any other entities, because the Roads (which were not part of any block or lot on the tax map) were not separately conveyable. This is consistent with Plaintiffs' position that once the Roads were built and the performance guarantee was released, the Roads were automatically dedicated to the Borough.

Further, the area described in the 2005 Map as "existing access easement to remain" does not indicate that some unknown party has title to, or an interest in, the Roads. (Da171.) Rather, that easement was granted by the New Jersey Department of Transportation (the previous owner of Block 902, Lot 7) to the previous owner of Lot 2.01. (Pa3 at ¶ 7.) In 2001, RDD purchased title to a portion of Block 902, Lot 7, which portion contained the easement area. (Id. at ¶ 7; Pa35.) At such time, the easement was extinguished by merger, even though it still appears on the filed map. (Id. at ¶ 7.) Clearly, it does not grant any unknown person or entity title to, nor rights in, the Roads. (Id. at ¶ 7; Pa35.)

Finally, contrary to the Borough's assertions, granting the relief requested by Plaintiffs would not have any effect on the owner of Lot 1.01 and there was no reason to make the Lot 1.01 owner a party to this action. No part of the Roads is on Lot 1.01, and even though the Lot 1.01 owner had the right by agreement to request an easement to use the Roads if necessary, it never did so because the Roads were already public streets. (Pa2 at ¶ 5; Pa8.) Declaring the Roads to be public roads would literally have no effect whatsoever on Lot 1.01, because Lot 1.01 does not have any control or right to restrict the use of the Roads, it uses the Roads now, and would continue to use the Roads without interference if they are declared to be public. (Pa2 at ¶ 5; Pa8.)

C. ***The Descriptions "Internal," "Interior," and "Access" Roads have no Legal Significance*** **(not directly addressed by trial court)**

Consistent with its "kitchen-sink" appeal strategy, the Borough devotes an inordinate amount of attention in its brief to its argument that colloquial references in the 2002 site plan approval to the as-yet-unbuilt roads as "internal roads," "interior roads," or "access roads" means that as a matter of law, the Roads could not have been dedicated and are therefore private streets. (Db3-Db5; Db34-Db38.) This argument is yet another red-herring, and does nothing to rebut any of the elements of N.J.S.A. 40:55D-53.j.

First, it must be noted that the Borough has not cited any legal authority whatsoever for the proposition that the description of an unbuilt road as an "internal road," "interior road," or "access road" means that such road must be a private road. (Db34.) The Borough's only support for its assertion is the cite of the N.J. Mfrs. opinion (Db35), but that case literally had nothing to do whatsoever with the issue of whether the words "internal road," "interior road," or "access road" mean "private road. N.J. Mfrs. Ins. Co. for Smith v. Public Service Elec. & Gas Co., 234 N.J. Super. 116 (App. Div. 1989). Needless to say, such case does not support the Borough's argument.

Second, the documents cited by the Borough all indicate that the Roads were to be dedicated upon completion. The 2004 Developer's Agreement

expressly contemplated that the Roads were to be dedicated to the Borough. (Da115.) To wit, Section 2 of such document provided that "the Borough . . . shall accept said dedication of the required curbing, drainage, pavement, etc., upon the completion of the improvements required in the Site Plan by Ordinance or Resolution." (Da115.)

Third, by citing the Borough ordinance which provides guidelines for "private interior roadways," the Borough actually proves the opposite of its point. (Db34.) If "interior roadway" on its own means a private road, then there would be no need to preface it with the word "private." (Db34.) Moreover, the fact that Plaintiffs did not build the Roads with a width of 24-feet (i.e., the standard for private roads), but rather provided 50-foot rights of way (the standard for minor *public* roads) also shows that there absolutely was the intention for the Roads to be public. (Da77 at § I.)

V.

THE BOROUGH HAS FORMALLY RECOGNIZED THE ROADS AS PUBLIC AND SHOULD THEREFORE BE ESTOPPED FROM ASSERTING OTHERWISE (not directly addressed by trial court)

Though it was not necessary for the trial court to consider, Plaintiffs also submit that they are entitled to summary judgment on Count Two of their Complaint as well, which seeks equitable estoppel, compelling the Borough to recognize the Roads as public streets.

"[E]quitable considerations are relevant in assessing governmental conduct and impose a duty on the court to invoke estoppel when the occasion arises." Middletown Policemen's Benevolent Ass'n v. Twp. of Middletown, 162 N.J. 361, 367 (2000); see also Ranchlands, Inc. v. Twp. of Stafford, 305 N.J. Super. 528, 538 (App. Div. 1997) ("Equitable principles of estoppel may be applied against a municipality where the interests of justice, morality, and common fairness clearly dictate that course.") (internal quotations and citations omitted); aff'd 156 N.J. 443 (1998). "In order to establish a claim of equitable estoppel, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act as to change his or her position to his or her detriment." Miller v. Miller, 97 N.J. 154, 163 (1984). Here, all of those elements have been satisfied.

A. *The Official Tax Map Recognizes the Roads as Public Streets* **(not directly addressed by trial court)**

Since the Roads were originally constructed in 2005-2007, the Tax Map of the Borough has shown both Roads as being public roads. Pursuant to the regulations governing municipal tax maps, "[p]rivate . . . streets shall be shown as lots with separate lot numbers or shall be shown with dashed lines. (See

Standards,[12] Pages S1, S11, S26, and S36)." N.J.A.C. 18:23A-1.15(d). The Standards further provide that private roads, regardless of whether they are shown as separate lots or with dashed lines, should be expressly labeled as "private." (Da356.) The Tax Map does not label the Roads as "private," [13] does not have them as their own separate lot, and does not show them in dashed lines. (Da175.) Rather, the Tax Map depicts the Roads by listing their names within solid lines, which is how public roads are to be designated. N.J.A.C. 18:23A-1.15(a) ("All dedicated streets, roads, and highways shall be shown by a solid line, considerably heavier than the lines used to show lot lines (See Standards, Page S1).")

Plaintiffs have relied to their detriment on the Tax Map's depiction of the Roads as public streets. To wit, when RDD deeded out Lots 2.01, 3.01, 4.01, and 5.01, the Roads were not part of the land that was conveyed by such deeds. (Da187, Da235-Da242, and Da327.) The Roads were not included as part of those conveyances because, based on the Tax Map, RDD believed that such

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[12] Per N.J.A.C. 18:23A-1.1(a)4, "***Standards***" means the "Standards" in the "Tax Maps, Regulations and Standards" of the Division of Taxation. Copies of Pages S1, S2, S11, and S36 of the Standards are attached as **Da353-Da356**.

[13] It should be noted that for roads in the Borough that are truly private roads, the Tax Map does in fact list them as "private." Solely for purposes of showing an example of this, annexed as **Da358** is a copy of Sheet 14 of the Tax Map, which lists Boumar Place (a road that has nothing to do with the Roads in question) as "Boumar Place (Private Road)."

Roads were public Roads, and more importantly, RDD could not have conveyed the Roads, because the Roads were not part of any block or lot on the Tax Map. See N.J.S.A. 46:26A-3.a(b) (noting that in order to be recorded, a deed conveying title to real property must include "a reference to the lot and block number of the real property conveyed as designated on the tax map of the municipality at the time of the conveyance or the account number of the real property.") It should also be noted that the Roads are the sole means of access to five residential, retail, commercial, and church properties that are traversed by thousands of cars of each week. (Da61 at ¶ 16.)

If the Borough's position that the Roads are private were to be accepted by the Court, it would leave RDD in a state of purgatory: i.e., it would own the Roads but no other land, yet the Roads would not be part of any lot or block and therefore not possible to sell or otherwise convey. RDD would be forced to assume ownership of the Roads, which do not exist as part of any block and lot, despite spending the last eighteen years under the assumption that it did not own them. It would also force RDD to have to maintain and insure streets that it does not use but are used by thousands of third parties each week, and in order to recoup such maintenance and insurance expenses RDD would have to assume the status of a toll-road owner and enter into easement and maintenance agreements with the unrelated owners of the lots abutting the Roads.

Accordingly, the Borough should be estopped from denying that the Roads are public streets.

B. *The Lot 2.01 Approvals and Developer's Agreement Recognize the Roads as Public Streets* (Da10)

Pursuant to N.J.S.A. 40:55D-53.a, a municipality can only require a developer to furnish a performance guarantee for "the cost of installation of ***only those improvements required by an approval or developer's agreement, ordinance, or regulation to be dedicated to a public entity***." (Emphasis added.) Pursuant to its 2021 Developer's Agreement with the Borough, RIII was required to, and did, provide a performance guarantee to the Borough in connection with certain required improvements that were to be made to the Roads as part of the construction of Lot 2.01. (Da62 at ¶ 20.) If the Roads were actually private streets, then, pursuant to N.J.S.A. 40:55D-53.a, the Borough could not have required a performance guarantee for improvements to be made to them. Moreover, in reliance on the fact that the Roads were public streets because the Borough was requiring a performance guarantee for their improvements, RIII proceeded to pay the cost of obtaining a performance guarantee for such improvements. (Da62 at ¶ 20.) It would be entirely unfair for RIII to have to incur the cost of the performance guarantee for improvements that it could not legally be made to guaranty. Accordingly, the Borough should be estopped from denying that the Roads are public streets.

C. *The Easement Area does not Include the Roads* (Da11)

Another of the conditions of the 2019 Site Plan Approval for Lot 2.01 was "[a] valid and properly executed easement agreement with the Borough for access to the Passaic River Docks." (Da285 at § D.) The term "Passaic River Docks" refers to a floating dock on the Passaic River that is accessible from a portion of Lot 2.01 that abuts the Passaic River. (Da63 at ¶ 23.)

Accordingly, on February 24, 2021, RDD entered into an easement agreement with the Borough (the "***Dock Access Easement***"), pursuant to which RDD granted the Borough a public access easement for the use of a certain parking area and walkway on Lot 2.01 by persons accessing the dock (the "***Easement Area***"). (Da63 at ¶ 24; Da337-Da343.) The Easement Area cannot be accessed without first traveling on the Boulevard. (Ibid.) However, if the Boulevard is a private road (the position taken by the Borough), then the public would have no legal right to access the Easement Area (unless they entered such area from the sky). (Ibid.) Thus, if the Borough's position were to be upheld, it would render the Dock Access Easement to be worthless. Moreover, RDD accepted the Dock Access Easement as a condition of its development approvals on Lot 2.01 because it was under the assumption that the Boulevard was a public street, and would not have agreed to such Dock Access Easement if it knew the Borough would refuse to recognize the Boulevard as a public street. (Ibid.)

Accordingly, the Borough should be estopped from denying that the Roads are public streets.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this court affirm the holding of the trial court granting summary judgment to Plaintiffs.

Respectfully submitted:

WOLPER LAW GROUP, LLC

Dated: November 20, 2023

By: /s/ *Adam D. Wolper*
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RIVER DRIVE DEVELOPMENT, LLC.; RIVERFRONT RESIDENTIAL 1, LLC.; RIVERFRONT RESIDENTIAL 2 , LLC.; and RIVERWALK III, LLC, and RIVERWALK III, LLC,	**: SUPERIOR COURT OF : NEW JERSEY : APPELLATE DIVISION : DOCKET NO.: A-002604-22**
Plaintiff/Respondent,	**: ON APPEAL FROM: : Superior Court, Law Division,**
v.	**: Bergen County**
BOROUGH OF ELMWOOD PARK,	**: SAT BELOW: : Honorable Christine : Farrington, J.S.C**
Defendant/Appellant	**: DATE OF SUBMISSION: : December 12, 2023**

APPELLANT BOROUGH OF ELMWOOD PARK'S REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

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POINT I

THE BOROUGH MAY ALWAYS DECLINE TO ACCEPT A DEDICATION WHEN IT DEEMS SAME TO BE IN THE PUBLIC INTEREST

Plaintiff takes issue with the Borough's "repetitive argument" that the Borough may "decline to accept the roads for any reason whatsoever". Furthermore, Plaintiff submitted that "the Borough does not submit any case, statute or other authority supporting that incorrect proposition". (Prb,3)

Plaintiff itself pointed to the case of **New Jersey Transit Corporation v Franco**, 447 N.J. Super. 361, (App. Div. 2016) which is unambiguous authority supporting the legal premise that a municipality may decline a dedication at any time for any reason.

> "[a] municipality that wishes to reject a dedication may pass an ordinance to that effect."**N.J. Transit Corp. v. Franco**, 447 N.J. Super. 361, 376 n.5 (App. Div. 2016)

Addressing the zoning and planning board rules at issue in that case the Appellate Division stated:

> "nothing contained in this section in any way limits the zoning power of any municipality. **N.J.S.A**. 40:55d-40.6. "Similarly, nothing contained in these rules shall be construed to limit the powers of any municipality to establish and enforce any requirement concerning ..... reservation of areas for public use, ***including streets.*** **N.J.A.C.** 5:21-1.5(d), (d)(1); see **N.J.S.A.** 40:55D-38(b)(4), -44. (Emphasis suppled)

New Jersey Transit concluded that even when a roadway was intended to be dedicated, "mere dedication of streets . . . does not constitute them public highways, unless or until such streets are in some way accepted by public authorities"., **N.J. Transit Corp. v. Franco**, 447 N.J. Super. 361, 375-76 (App. Div. 2016)

The trial court should have recognized and credited the Borough Council's Resolution declining to accept the dedication, which it had an absolute statutory right to do. The trial court's decision which deemed the Resolution to be arbitrary and capricious was not supported by any evidence whatsoever that the Borough's action were insufficient in any manner pursuant to law.

POINT II

THE RECORD DOES NOT DISCLOSE SITE PLANS AND SUBDIVISION MAPS WHICH WERE APPROVED BY THE PLANNING BOARD

In order to avail themselves of the statute in question, **N.J.S.A.** § 40:55D-53(j) requires that any dedication be predicated "according to site plans and subdivision plats *approved by the approving authority*"

In its pleadings before the trial court the Plaintiff left off the site plans, subdivision plats and other maps which were **attached to the 2004 and 2010 Planning Board Resolutions.** As such, the record does not show what those maps, site plans and subdivision maps revealed.

It was the plaintiff's obligation to provide a complete set of documents - not the Borough's obligation.

Plaintiff never Certified or provided any evidence that the maps it did finally submit to the trial court were indeed the site plans and subdivision plats approved by the planning board.

Plaintiff merely certified as Par. 6 and 7 of his Certification (Pa59) that the 2005 map and the 2010 map were recorded with the County Clerk, not that these were the "site plans and subdivision plans presented to and approved by the approving authority".

The record is barren because plaintiff declined to provide either the site plans, subdivision plans or the transcripts which would have discussed the relevant applications and, quite possibly, whether there was any intent to dedicate the roads or not.

The "**2010 map**" extensively relied upon by the Developer was a "subdivision map recorded on **July 12, 2012.** (See Pa 59, Par. 7 of George Siller Certification and map recorded on **July 12, 2012.** (See Pa 59, Par. 7 of George Siller Certification Exhibit "F"172-173 "the 2010 map")

The record does no reveal if this was the same map "approved" by the planning board.

The "site plan" map relied upon by the planning board in its 2010 approval Resolution, referred to a site plan at Sheet C-2, dated **November 4, 2010.** (Pa212)This map does not appear to be in the record.

Suffice it to say neither of these Site Plans or Major Subdivision maps or, for that manner, any of the maps relied upon by the Planning Board in its 2010 Resolution, relied upon a map "recorded on July 12, 2012" which was two years later.

There is no evidence that the July 12, 2012 map relied upon by Plaintiff was ever seen, let alone relied upon by the Planning Board.

Plaintiff and the trial court simply presumed, without competent evidence, that this was the relevant plat plan reviewed by the Planning Board.

The record is unclear what map or site plans the Planning Board relied upon or reviewed in 2005. They may have been attached to the Resolutions, but Plaintiff did not supply them.

The maps reviewed and relied upon by the trial court were never revealed to be those relied upon by the planning board. The maps relied upon by the trial court could not therefore properly serve as a legal evidentiary foundation for a roadway dedication.

The authenticity of the maps provided by Plaintiff is not the issue - the issue is what map ***the Planning Board reviewed and approved them***. If it was not the map offered by the Developer than the question remains - what map was presented before the Planning Board?

There is no competent evidence in the record that the map or site plans relied upon by the trial court were ever relied upon or even seen by the planning board or the Borough Engineers. This was an error of the trial court.

POINT III

THE FAILURE TO PROVIDE THE TRANSCRIPTS OF THE 2004 AND 2010 PLANNING BOARD RESOLUTION IS FATAL TO PLAINTIFF'S CLAIM OF DEDICATION

Plaintiff places almost exclusive reliance upon a 2010 Planning Board Resolution in which Plaintiff asserts that the internal roadways in question were addressed and intended for dedication. The transcript of that 2010 Resolution proceeding was never presented in this case.

Plaintiff did not provide a transcript but did provide a number of maps. (See Pa 110)" (2002), "Pa171" (2004) and Pa173 (2010). But there is no evidence in the evidentiary record that those maps or plats were ever reviewed or approved by the planning board in 2004 or 2010.

In New Jersey, where there is a dispute as to whether private property has been accepted by a municipality, the private property owner bears the burden to establish the requisite intent and actual dedication. **Velasco v. Goldman Builders, Inc.**, 93 N.J. Super. 123. 137, (App. Div. 1966) ("doubts are generally "resolved against the dedicator and in favor of the public")

In this matter the Plaintiff has not met its high burden. It was error of the trial court to essentially shift the burden of proof upon the Borough to prove that the dedication did not occur.

POINT IV

A DEVELOPER MAY NOT IMPOSE OWNERSHIP OF A ROADWAY THROUGH A CONFUSING AND OPAQUE RECORD

Plaintiff claims that dedication of the roads "was understood by all to be a simple formality". (Prb, 2)

That would be news to the 2010 and the 2018 planning boards which were resolute that no dedication could take place unless the Borough Council formally agreed.

The Plaintiff-Respondent then goes on to indicate that "in reality the Trial Judge made clear on multiple occasions that she was referring to the 2010 map and 2005 map". (Respondent's Brief, p.22)

There is no evidence in the record that the Borough was ever aware of either of these maps nor was there any evidence in the record that the Planning Board was made aware of such maps when it approved of the subdivision.

As noted earlier, the 2004 Developer's Agreement clearly indicated that "this Agreement **shall not constitute an acceptance by the Borough** or the County of Bergen of such improvement **until formally accepted** as provided hereinafter and the

Borough and the County of Bergen shall accept said dedication of the required curbing, drainage, payment, etc. upon the completion of the improvements required in the cite plan by Ordinance or Resolution". (Pa115-Pa116)

Six (6)years later, the 2010 Developer's Agreement incorporated and adopted this language and agreed that "the Developer further agrees to comply with any applicable portions of a Developer's Agreement between the Borough of Elmwood Park Zoning Board and River Drive Development Company dated December 20, 2004, a copy of which is attached hereto as Exhibit "B". (Pa212, ¶2B).

What was clearly intended by the Planning Board was that any roadway dedication was ultimately an issue to be addressed by the Borough or the County by formal resolution. Those entities would make the final decision, not the Planning Board.

POINT V

PLAINTIFF WAS REQUIRED TO NOTICE THE CHURCH WHO HOLDS AN IMPLIED EASEMENT WITHIN THE ROADWAYS AT ISSUE

As the Developer states in its brief at page 7, the initial roadway/driveway as proposed as far back as 2002 was an undefined "loop".

> "Part of that development would involve the construction of a new public "loop road" which for all intents and purposes is one road, but is referred to on certain maps as two roads, named Riverfront Boulevard (the "Boulevard") and Right of Way, (the "Unnamed Road"...)." Db8

Of course this "loop" was never really defined on the relevant maps. The best example is the map at Pa110.

This "loop" which constituted the majority of the roadways sought tobe dedicated by the Plaintiff was to be a new access way for the athletic club, later to become a church.

As the Resolution of a 2004 application to the Board of Adjustment (Pa69) stated:

> "Applicant seeks to discontinue the existing access to the Athletic Club Property from River Drive and to provide ingress and egress to such property exclusively from an internal roadway" (Pa73, ¶ 9)

There is no reason to suggest that the parties ever understood this driveway "loop" to be anything other than an "internal road" as it was clearly delineated in the 2004 agreement. The "exclusive" loop for ingress and egress is an implied easement. "An easement implied by necessity "is predicated upon the strong public policy that no land may be made inaccessible and useless." **Leach v. Anderl**, 218 N.J. Super. 18, 25 (App. Div. 1987). As the Board of Adjustment concluded:

> The roadway modifications will include the discontinuance and closing off of the driveway into and out of the Athletic Club Property from River Drive and the provision of ingress and egress to the newly configured Athletic Club Property from the internal roadway to be constructed by Applicant which will connect with Slater Drive. (Pa74-75)

In other words the "internal roadway" was to serve as a new driveway for the athletic center - this is clearly a form of constructive easement.

What is clear from the foregoing is that both the Developer as well as the Planning Board understood the "loop" was to be an ingress and egress for the immediate benefit of the Athletic Club.

The record in this matter clearly indicates that an ingress and egress roadway was created for purposes of access to the Athletic club/Church lot which had become landlocked after the County highway was expanded. This creation of an ingress and egress roadway is an implied easement in favor of the Athletic club and now Church. The Church should have been named as a party of interest in this case.

POINT VI

THE REMAINDER OF PLAINTIFF'S ARGUMENTS LACK MERIT

The Developer relies exclusively upon the elements of **N.J.S.A.** 40:55(d)-53.(j) and argues that this statute creates an "automatic" roadway dedication.

However, this section and statute must be read in *pari materia* with all of the other applicable statutes relevant to dedication. See for instance **N.J.S.A.** 40:67-19. "The governing body may by ordinance release and extinguish the public right arising from said dedication as to the whole or any part of those lands". See also **N.J.S.A.** 40:67-1. ("The governing body of every municipality may make, amend, repeal and

enforce ordinances to.... vacate any street... dedicated to public use but not accepted by the municipality...., whether or not the same, or any part, has been actually opened or improved...")

As we indicated earlier, the maps relied upon by the Plaintiff/Developer in this matter do not necessarily match up to the resolutions or the Developer's agreements. We do not know what maps any of the various engineers looked at in terms of their inspections.

There remains an ongoing dispute or lack of clarity concerning as to who was the municipal engineer at the relevant times. The Plaintiff/Developer argues that the Trial Court opinion mistakenly found that Mr. Ten Kate wasn't the Borough engineer.. (Plaintiff Brief, p.24)We do not know whether the *municipal engineer* inspected the roadways at issue using the maps provided. The trial court found that Borough Engineer did not.

Once again, this is Plaintiff's burden to prove with competent evidence, who indeed the Borough engineer was and what potential roadways he inspected. This is not the Borough's burden.

We note that the Developer never made any attempt to ask for reconsideration or correct the record concerning the identity of the municipal engineer. Plaintiff therefore tacitly accepted the trial courts' conclusion that Mr. Ten Kate was not the municipal engineer for the necessary inspection required by statute.

The zoning issue also remains. The Planning Board engineer indicated that a zoning variance was necessary for the roadways in question. (Plaintiff Brief, prb.25)

The Developer stated that this zoning issue was "put to rest" because the Planning Board attorney did not agree with the variance issue raised by the engineer. The Developer then relies upon the Planning Board attorney as the authority "to put the matter to rest". This is all well and good but ignores the consonant fact that its own attorney indicated during the same proceeding that he was agreeing to "proceed at his own risk" and that he agreed it was *only* the Borough who had the authority to dedicate the roads and *not* the Planning Board.

If counsel can bind as an agent "to put the matter to rest", then the Developer's attorney would have the similar authority to bind in terms of the requirements to seek final approval by the Borough.

The Developer suggests that the Borough did not submit any competent evidence and that therefore no material dispute of facts exists. It is not the Borough's burden to prove a dedication occurred. The Borough consistently argued that there was not adequate proof in the record to support a dedication - particularly one in which the proponent suggests occurred 13 years ago in 2010 or 18 years ago in 2005.

It is not the Borough's obligation to come forward with evidence to prove that a roadway was dedicated or not. Indeed the only competent evidence that the Borough could rely upon would be the documents and transcripts of the proceedings before the Planning Board and the documents and transcripts of the proceedings before the

municipal council. Other than those documents there is no other competent records that should ordinarily be considered.

It was the Developers' obligation to provide the relevant transcripts and provide copies of the relevant maps and site plans and plats which the Planning Board relied upon in issuing its resolutions and approvals.

The Plaintiff/Developer deliberately chose not to present those documents into the record. The Borough objected strenuously that both Plaintiff and the Trial Court were relying upon an incomplete record and that there needed to be clear records of what was considered before the Planning Board and what was discussed before the Planning Board. Otherwise, all that was happening was the mere assertions and allegations submitted by the Developer and a lot of guess work by the Trial Court as to what may have occurred 13 years ago but could not be specifically tethered to any place within the competent record.

It was error for the Trial Court to proceed without the benefit of those transcripts of any of the Planning Board resolutions, particularly those that occurred in 2004, 2005, and 2010. That is why the Borough demanded a proof hearing, which request the trial court denied. The Developer chose not to provide those transcripts and objected to a proof hearing despite the fact that the Borough filed a motion demanding that all relevant transcripts be provided to the Trial Court in this matter.

After a long motion fight the only transcript provided by the Developer was the 2018 Planning Board proceedings in which the Planning Board expressly indicated

that it had no authority to address the potential dedication and directed the Developer to seek approval from the Borough as a necessary legal requirement. The Planning Board relied upon this expression of obligation in approving the 2018 Resolution. At that time the Developer agreed that it was the Developer's obligation to proceed before the Borough and that it in fact would do so. Both parties relied upon this representation in going forward. Later the Developer would renege on this representation.

PUBLIC ACCESS AND PUBLIC OWNERSHIP ARE MUTUALLY EXCLUSIVE

The Developer confuses public access with public dedication. There is no doubt that the internal roadways in question presume a type of public access. Public access however, does not mean ownership. There is a difference between a right to public access and the issue of ownership. In this particular case the internal roadways are by-roads. In other words, they are privately owned roads to which the public has a right of unfettered access. The Borough contends that requiring the Developer to keep ownership and most importantly the obligation of maintenance places the Developer "in a state of purgatory". This is far from accurate. The roads must be maintained by the Developer and the public will continue to enjoy a right of access as necessary and proper. The Developer would not have to "assume the status of total owner and enter into easement and maintenance agreements with the owners of the lots abutting the roads". (Plaintiff Brief, pb.43). The simple fact is that the internal roadways are

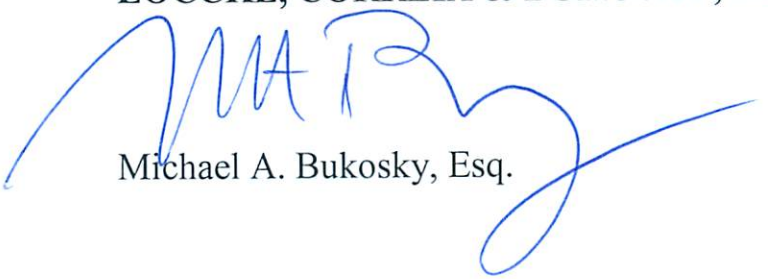
roadways to be maintained by the private owner for his commercial purposes - just like any mall or shopping center throughout the state. However, the public has a clear right of public access to these roadways which must remain unfettered both for the public's use as well as for the use of emergency vehicles, etc. This use is consistent with the required easement for the small dock which allows the public access to the Passaic River. The public access easement is merely extended through the internal roadways in question for the public to enjoy as necessary and appropriate.

There can be little doubt that in 2018 the Developer viewed the status of the roadways as it related to potential dedication to be unclear. That is why the Developer both stated that it was willing to proceed at its own risk and why it ultimately made a petition to the Borough to seek approval the dedication of the roads. There is no reason why the Developer would proceed in such a manner unless it viewed the dedication to be uncertain in 2018. Once the issue was presented to the Borough the Borough exercised it statutory rights pursuant to decline the dedication as it was fully entitled to do. It was only then that the Plaintiff contended that the roads were dedicated 13 years earlier in 2010.

CONCLUSION

For all of the above reasons the trial court's decision should be reversed and the matter should be remanded to address the issues of ownership, access, and responsibility for maintenance through a proof hearing with competent evidence.

Respectfully submitted,
LOCCKE, CORREIA & BUKOSKY, LLC



Michael A. Bukosky, Esq.

Date: December 12, 2023