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CONGREGATION SONS OF ISRAEL	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO. A-2790-21
Plaintiff/Respondent	: On Appeal from Orders dated
v.	: February 21, 2019, February 21, 2019, May 29, 2019, May 29, 2019, June 5, 2019, August 26, 2019, February 5, 2020, March 29, 2022, March 29, 2022, April 26, 2022
CONGREGATION MEOROSNOSSON, INC.	: Superior Court of New Jersey : Chancery Division : Ocean County : Docket No. OCN-C-239-12
Defendant/Appellant	: SAT BELOW: : Hon. Francis R. Hodgson, Jr.

SECOND AMENDED APPELLATE BRIEF OF DEFENDANT/APPELLANT, CONGREGATION MEOROSNOSSON, INC.

Dated: February 1, 2023

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APPENDIX

Congregation Sons of Israel vs. Congregation Meorosnosson, Inc.

Appellate Court Docket No.: A-2790-21

[1] Transcript attached for explanation of January 8, 2013 Order, which was prior to first Appeal

[2] Per Case Manager, this Transcript is permitted to be included in Appendix.

[3] Poor quality photo was provided and filed in this condition, no other is available.
[4] Poor quality photo was provided and filed in this condition, no other is available.
[5] Poor quality photo was provided and filed in this condition, no other is available.

[6] Not omitted because Transcript filed with Court as an Exhibit to Certification

[7] Not omitted because it was filed with Trial Court as an Exhibit to Certification

[8] Not omitted because filed with Trial Court as an Exhibit to Certification
[9] Not omitted because filed with Trial Court as an Exhibit to Certification

[10] Poor quality photo was provided and filed this way and there is no alternative available.

[10] Not omitted because this was filed as an Exhibit with the Trial Court
[11] Not omitted because this was filed as an Exhibit with the Trial Court

[12] Photos Da5535, 536, 547, 548-553, 556, 568, 570, 571, 581-583, 585, 591 & 597 image quality is poor but was filed this way, no alternative is available.

[13] Photographs of poor quality filed with Trial Court, not otherwise available.

[14] This Point Six from a previously filed Appellate Brief (A-5303-15T3) is included because it is relevant to show the Trial Court error argued at Point Seven in this Appeal.

[15] Not omitted because filed as an Exhibit with Trial Court.
[16] Not omitted because filed as an Exhibit with the Trial Court.

DEFENDANT MEORSONOSSON REPLY TO OPPOSITION TO MOTION TO COMPEL RETURN OF MONIES:

[17] Not omitted because filed as an Exhibit with the Trial Court.
[18] Not omitted because filed as an Exhibit with the Trial Court.
[19] Not omitted because filed as an Exhibit with the Trial Court.

PLAINTIFF'S TRIAL EXHIBITS:

DEFENDANT'S TRIAL EXHIBITS:

EXHIBITS FILED OCTOBER 8, 2021 WITH PLAINTIFF'S POST-TRIAL BRIEF

** Identifies documents already referenced in the Appendix

STATEMENT OF PROCEDURAL HISTORY

On November 12, 2012, Plaintiff Congregation Sons of Israel, ("Sons of Israel", also "Synagogue") filed an Order to Show Cause and Verified Complaint **(Da1 to 33)** against Defendant Congregation Meorosnosson ("Meorosnosson", also "School") seeking to have the Court declare and enforce a purported easement for vehicles from plaintiff's synagogue on Lot 8 to park on the School's adjacent Lot 5 - upon which a private grade school was located. Meorosnosson filed Responsive papers and Answer and Counterclaim **(Da36 to 105).** By Order dated January 8, 2013 Judge Buczynski entered a Temporary Order pending further proceedings. **(Da106)** Sons of Israel filed an Amended Complaint on April 1, 2013 with Exhibits **(Da123);** Meorosnosson filed its Answer. **(Da144)** An unsuccessful Mediation effort and discovery followed.

On April 28, 2016, Sons of Israel filed a Motion for Partial Summary Judgment as to the Second, Third, and Fifth Counts **(Da160)** seeking a determination that an easement for the Sons of Israel to park vehicles on the School property (the Sixth Street Courtyard and the Fifth Street Lot) was created by a 1963 Agreement and remained in place, Meorosnosson filed a Cross-Motion with Exhibits **(Da162)** seeking a determination that the 1963 Agreement did not establish an easement. On July 15, 2016, the Court. (Judge Hodgson, Jr.) rendered an oral Opinion that the Synagogue by the 1963

Agreement Paragraph 10 possessed an easement to park vehicles in the School's Lot 5 Sixth Street courtyard and the Fifth Street parking area and to have its heating system connect to the School's heating system, granting plaintiff Partial Summary Judgment as to the Second, Third, and Fifth Counts and denied defendant's Cross-Motion for Partial Summary Judgment. An Amended Order was entered July 15, 2016 **(Da218)** an Amended Order on July 25, 2016. **(Da220),** and a Second Amended Order on August 16, 2016 **(Da170)** which ordered that an "easement" for parking was valid and that Sons of Israel is entitled to reconnect its HVAC system to the boiler room and water cooling tower on Defendant's property. In a Case Management Order dated September 6, 2016, the Court set a trial date to "determine issues regarding parking and utilization of the Fifth Street and Sixth Street parking lots and other issues." **(Da172)**

A Testimonial Trial was held on the remaining issues to determine if the "easement" had been abandoned and the methodology of parking and use of the Lot 5 parking areas by Lot 8 attendees on March 28, March 29, and April 4, 2017. The Court rendered an oral Opinion on June 5, 2017 **(Da177)** holding that the "easement" remained in place but not resolving the actual methodology of such joint parking use. A Final Order was entered on June 27, 2017. **(Da207)** A timely Notice of Appeal was filed. **(Da839)**

On December 21, 2017, Sons of Israel filed an Order to Show Cause to Enforce Litigant's Rights, **(Da210 to 237)** asserting non-compliance with the Final Order, primarily in allowing its students to walk in the school courtyard among Synagogue parked vehicles. Opposition was filed by the School **(Da238 to 276)**. A hearing was conducted on February 14, 2018 and the Trial Court entered an Order awarding sanctions and attorney's fees to Sons of Israel on March 6, 2018 **(Da2285)** and March 26, 2018 **(Da292)**, with a Statement of Reasons. **(Da287)** The Meorosnosson Motion to amend the Appeal to include the Sanctions Order was granted on May 18, 2018. **(Da294)**

The Synagogue thereafter on June 4, 2018 filed a new Order to Show Cause to enforce Litigant's Rights, asserting continuing violations arising from children/students in the School courtyard among the Synagogue parked vehicles **(Da295),** with Exhibits in support **(Da297 to 417).** Opposition was filed by the School **(Da419 to 508)**, with a Response Certification and Exhibits by Synagogue **(Da517 to 603).** A hearing was conducted by Judge Hodgson on October 17, 2018 (1T) with plaintiff's Rabbi Tendler testifying, continuing on December 4, 2018 with Rabbi Tendler and the School presenting two witnesses (3T). The Synagogue submitted an affidavit of services for a fee award as sanctions **(Da672).** The Court thereafter entered an Order **(Da971)** on May 29, 2019 and Statement of Reasons on January 15, 2019 **(Da690)** awarding plaintiff sanctions and attorney fees.

While the Appeal and Order to Show Cause was pending, the School on August 23, 2018 filed an Administrative Appeal to the Lakewood Zoning Board of Adjustment as per N.J.S.A. 40:55D-68 for a determination whether the Synagogue's (Lot 8) off-site parking use of the School's Lot 5 was a legal nonconforming use. The Sons of Israel participated in the Board hearing on October 15, 2018 **(Da899)**. The Zoning Board determined that the off-site parking use of the School Lot 5 by the Synagogue Lot 8 staff/attendees was not a legal nonconforming use and was prohibited; the Resolution thereafter adopted on November 19, 2018. **(Da894)** The Sons of Israel filed a Complaint in Lieu of Prerogative Writs in the Law Division challenging that Board Decision (Docket OCN-L-2664-18).[1]

Acting as per that Zoning Board ruling, the School erected fencing in its courtyard a few days later. On October 19, 2018 the Synagogue filed another Order to Show Cause seeking restraints and sanctions because the School, acting in follow-up to the Board ruling, erected the fence in the courtyard **(Da643 to 656)** At a hearing that date for temporary restraints, Judge Hodgson ordered the fence removed (2T46-19). A Consent Order was later executed in

[1]The Trial on that challenge was held before Judge Ford on September 2, 2022 and the Court on December 1, 2022 issued an Opinion/Order reversing and invalidating the Board Resolution. The defendant Meorosnosson has filed a separate Appeal of that Order/Opinion, Docket No.: A-001339-22. Meorosnosson will be moving to have this Appeal and that Appeal consolidated or heard together by the same Appellate Panel.

the Law Division lawsuit challenging the Zoning Board Resolution agreeing that enforcement action, including a fence, would be stayed pending a Court determination in that case. **(Da669)** The plaintiff submitted an affidavit of services for legal costs incurred on this proceeding. **(Da686)** The Court on May 29, 2019 again issued an Order awarding sanctions and attorney fees to the Synagogue against the School. **(Da969)**

On June 25, 2019, the Appellate Court rendered its Decision/Opinion **(Da751)** reversing and invalidating all of Judge Hodgson's Decisions/Orders, including that the synagogue had an easement for parking its staff/attendee vehicles on the School Lot 5 and all enforcement Orders, and remanded the matter for a full plenary hearing to determine the nature of the rights created by the 1963 Agreement and whether any such rights remained in effect. On July 11, 2019, Meorosnosson filed a Motion for Disqualification of Judge Hodgson as per N.J.S.A. 2A15-49 and R. 1:12-1. **(Da764 to 795)** Opposition was filed. By Order dated August 26, 2019, Judge Hodgson denied the Motion. **(Da814)** By Motion for Reconsideration filed December 24, 2019, the School again requested Judge Hodgson to recuse himself from the Remand Trial. **(Da846 to 870)**, the plaintiff filed opposition. **(Da871 to 885)** Judge Hodgson on January 17, 2020 (5T) again denied the Recusal. **(Da891)** Also on December 24, 2019, the School filed a Motion to Compel Return of Monies paid pursuant to the Trial Court's Final Judgment and sanctions/enforcement

Orders which had been vacated by the Appellate Court ruling **(Da816 to 813).** Opposition was filed **(Da835).** Judge Hodgson also denied this Motion by Order dated February 5, 2020 **(Da976).**

The Trial on the remand was held by Judge Hodgson on January 28 (6T), January 29 (7T), January 30 (8T), February 3 (9T), February 4 (10T) and February 5, 2020 (11T). It was held in abeyance due to the Covid Pandemic, and continued on July 27, 2021 (12T), July 28, 2021 (13T) and August 2, 2021 (14T). Trial Briefs were submitted. On March 29, 2022, Judge Hodgson rendered a written Opinion/Order **(Da978, 980)** that the Sons of Israel (Lot 8) by the 1963 Agreement had been granted an easement (so long as the Synagogue exists) to park its staff/attendee vehicles on the School Lot 5 --- in the Sixth Street courtyard and the Fifth Street parking lot without limitation --- that remains in force. The Court's March 29, 2022 Order specifically relied on the Court's oral decision on June 5, 2017 **(Da177)** --- although that decision had been reversed and vacated by the Appellate Court. An amended Order was entered April 26, 2022 **(Da1004)**, again adopting the Courts June 5, 2017 oral decision and dismissing Meorosnosson's counterclaim. The Order further provides that the 1963 Agreement provides an express easement for Sons of Israel to use the School's heating system "for as long as it's HVAC is located on that site." **(Da978).** Meorosnosson filed a timely Notice of Appeal on May 13, 2022. **(Da953)**

STATEMENT OF FACTS

In the early 1960s, the entire rectangular corner parcel of about 300' by 300' in downtown Lakewood, now known and designated as Block 69 Lots 5 and 8 and having frontage on Fifth Street, Sixth Street and Madison Avenue, was owned by the Jewish Center/Hebrew Day School and was used as the Hebrew Day School, for grade School students. The School building was much smaller than presently. In approximately 1962, the Jewish Center entered a relationship with other religious-oriented entities, Congregation Sons of Israel and the New Congregation Sons of Israel. On December 31, 1962, the Jewish Center executed a Deed **(Da166)** conveying a vacant 150 foot by 150 foot portion (now Lot 8) of its parcel to the New Congregation Sons of Israel. That Deed did not include any easement to Lot 8 for use of the School's remaining Lot 5. On January 7, 1963, the Jewish Center entered into a written Agreement with Sons of Israel and New Congregation Sons of Israel with 10 numbered paragraphs, providing for various mutual cooperations on the uses of the adjoining Lot 5 and Lot 8. **(Da13)** The dispute arises out of that 1963 Agreement --- whether paragraph 10 of that agreement established a permanent parking easement on Lot 5 (and an express easement for the Synagogue to use the Sixth Street boiler room) or only a temporary license that was waived, terminated, or ended by subsequent conduct and/or actions.

The 1963 Agreement **(Da13)** provided in Paragraph 1 and 2 that the Jewish Center would convey Lot 8 to the "New Congregation Sons of Israel" (not the Plaintiff, Sons of Israel). The New Congregation would thereafter construct on Lot 8 a "sanctuary, lounge, family chapel, social hall...." That Deed for Lot 8 had been already finalized on December 31, 1962. **(Da166)** The remaining Paragraphs (Paragraph 2 through 10) provided various terms as to intended cooperative operation of the properties between the two then cooperative entities. One paragraph provided that, upon completion of the new synagogue and commencement of religious services, the Synagogue would pay the Jewish Center $10,000 annually for the School's operations, to continue only as long as the Jewish Center operates the School. The remaining provisions provided for certain personal licenses or cooperations between the Jewish Center and the New Sons of Israel and that certain officers or principals were to be officers of both entities. Paragraph 6 provided that the operations of the synagogue of New Congregation Sons of Israel be conducted by a Board made up of 3 members of the Sons of Israel and 3 members of the Hebrew Day School. The provision primarily at issue (Para. 10) states: **(Da16)**

> 10. The party of the first part further agrees to permit the party of the third part to utilize for parking purposes the vacant lands it owns on Madison Avenue and also on Sixth Street and to permit use of lands on Sixth Street for boiler room use and for a water cooling tower."

This Agreement was not then recorded or intended to be recorded as its

execution was not acknowledged or notarized as required by N.J.S.A. 46:14-2.1. The synagogue was then constructed and completed during 1963, (TT22-1 to 25), and commenced use in December 1963. No Land Use Application or Approval from the Township for the Synagogue's construction, nor allowing for the synagogue Lot 8 parking to occur on the school Lot 5, has even been produced. The Synagogue and Township acknowledged there was an unsuccessful exhaustive search by Rabbi Tendler of synagogue files and by Township officials of Town Records, (6T114-1 to 124-25), and no such approvals or records can be produced.

In 1972, about 8 years after the synagogue was completed and operating, the Hebrew Day School filed a site plan/variance application to renovate and to expand the school building on Lot 5 to the Lakewood Board of Adjustment and Planning Board. As an adjoining owner, Sons of Israel was noticed of the Application and public hearing and attended, participated, and concurred in the School's Application. As established by the 1972 Board documents **(Da901 - to 904; Da938 to 944**), the School Lot 5 was deficient in size and capacity to meet even the School's own parking requirement for the expanded school. Sons of Israel represented and agreed that the School parking deficiency could receive a variance and that any occasional deficiency would be accommodated on other property owned by the Sons of Israel. **(Da944)** At the time, the New Sons of Israel owned a nearby vacant parcel (Lot 10) across Sixth Street from

the Synagogue and School and also owned an adjoining Lot 6 parcel (still owned by the Synagogue) available for parking vehicles. No claim was raised in that 1972 Site Plan/Variance Hearing that Sons of Israel had any claim or right to use the school lots for off-site parking for Synagogue staff/attendees, **(Da944)** which obviously would have impacted the school Lot 5 expansion.[2] The 1972 approved Site Plan **(Da938)** does not show or denominate any parking as being in the Sixth Street courtyard, depicted as an open concrete courtyard with a walkway from Sixth Street to the School's front entry. There was no "parking" by Lot 8 attendees on school property approved by the Resolution or designated in the Site Plan by legend or symbol. The 1972 Approved Site Plan does not designate or allow parking of any kind in this Sixth Street courtyard area. **(Da938)**

Apparently in conjunction with the then cooperative effort of the 1972 Application to expand the Hebrew School, the Jewish Center by memo dated June 5, 1972 **(Da19)** reaffirmed the permission that the Sons of Israel and its affiliates "may use the facilities of the Day School, present and future, on the same cooperative basis, without charge." This 1972 memo was also not notarized or intended to be recordable. The School (Lot 5) and the Sons of Israel (Lot 8) at that time apparently coexisted in relative harmony. Any

[2]At that time in 1972, the 1963 Agreement was not recorded or recordable and thus was private and not known or knowable by the Township Zoning Officials unless disclosed, which it was not as appears from the 1972 records **(Da938 to 946)**.

permissive occasional parking use by the (Lot 8) attendees/staff on the School property (Lot 5) from 1963 through 1972 --- when the expanded school was approved --- was part of that mutual cooperation and religious purpose. That informal cooperative arrangement apparently continued without significant dispute for a number of years.

During the years after 2000, the Jewish Center/Hebrew School began to fail financially and enrollment declined. Upon learning of the possible Bankruptcy and future sale of the School property to a third party, on June 1, 2007 Rabbi Tendler of the Sons of Israel unilaterally had created by its attorney a notarized "Corporate Action" document **(Da907)**. In this document, the Sons of Israel, in a self-serving assertion, "certified" that the non-recordable January 7, 1963 Agreement created an "easement". The "Corporate Action of Congregation Sons of Israel" was then attached to the non-recordable 1963 Agreement[3] and June 5, 1972 memo, and the collective document was then recorded by the Sons of Israel in the Ocean County Clerk's property records. **(Da907-912) (8T-1 to 13-23)** **Neither Meorosnosson, its predecessor in title or the trustee signed that "corporate action"** nor is there any evidence any of them then were aware of it being filed. In 2008, the Jewish Center/Hebrew School filed a Chapter 11 Bankruptcy Petition.

[3]It should be noted the 1963 Agreement Plaintiff attached to the Corporate Action is missing page 2 **(Da911).**

Meorosnosson --- an entity unrelated to either the Jewish Center or Sons of Israel --- acquired the School property (Lot 5) for bona fide consideration of $2,200,000 in a Bankruptcy auction sale in August 2010. **(Da20)**

After taking title to the School property (Lot 5) in 2010, Meorosnosson revitalized the School. Within a short time, enrollment returned to approximately 400 students. At some point thereafter, the mutually cooperative relationship with the Sons of Israel devolved, with disagreements over the Lot 8 parking use on the School property (Lot 5). (12T17-5 to 45-24) In approximately 2013, Sons of Israel unilaterally "chiseled out" a curb cut in the Sixth Street curb in front of Lot 8 to facilitate vehicles driving into Lot 8 and then into the Sixth Street courtyard (Lot 5) to park (8T34-1 to 43-25; 13T111-6 to 118-21). The Lot 8 use of Lot 5, and the efforts by Meorosnosson to block Lot 8 vehicles from parking in the Sixth Street courtyard, led to the commencement of this lawsuit in 2012 **(Da4)** by a Complaint by Sons of Israel primarily seeking to enjoin the School from interfering with and precluding Lot 8 staff/attendees from parking in the School's Sixth Street courtyard and the Fifth Street lot.

As noted, in April 2016 Sons of Israel filed a Motion for Partial Summary Judgment seeking a determination that the 1963 Agreement established a permanent easement allowing Synagogue staff/attendees to park vehicles on the School's Sixth Street Courtyard and Fifth Street parking lot.

(Da160) Meorosnosson filed a Cross-Motion for Summary Judgment, asserting that the 1963 Agreement did not create an easement, but only a permissive license that had terminated. **(Da162)** The Court rendered an oral Opinion and Amended Partial Summary Judgment on August 16, 2016 that the Sons of Israel had a permanent easement for Synagogue vehicles staff/attendees to park on the School's Sixth Street Courtyard and Fifth Street parking area and to use the School's boiler room and water cooling tower **(Da170)**.

After that partial Summary Judgment Order, Judge Hodgson then conducted a testimonial hearing as to whether the parking easement had been abandoned, defining and establishing the "joint use" of the School property, and possible damages. The Court rendered an oral opinion on those issues on June 5, 2017, **(Da170)** with a Final Order on June 27, 2017 **(Da207)**. Meorosnosson filed an appeal. The Appellate Court in its June 2019 Opinion **(Da839)** reversed and invalidated the Partial Summary Judgment, the Final Order and all enforcement Orders and remanded the matter for a full plenary hearing.

As noted earlier, in 2018 while the above Appeal was pending, the School filed an Administrative Appeal to the Zoning Board as per N.J.S.A. 40:55D-68 - seeking a determination as to whether the off-site parking use of the School Lot 5 by the Synagogue Lot 8 staff/attendees was a legal nonconforming use. By Resolution on November 19, 2018, **(Da894)** the

Zoning Board ruled that such Lot 8 off-site parking use was not a permitted use and was not a valid pre-existing, nonconforming use on Lot 5. (See, footnote 1). After the Appellate Court remand, the School moved for an Order to Disqualify Judge Hodgson **(Da764)** as per N.J.S.A. 2A:15-49 and R. 1:12-1. That motion was denied by Order dated August 26, 2019. **(Da814)** A subsequent Motion for Reconsideration of that Recusal Request was also denied. **(Da891)**

The Trial on remand commenced on January 28, 2020. Initially, the Court heard arguments (6T4-18 to 62-4) on various Motions in Limine. The Court ruled that transcripts of witness testimony from the earlier trial could not be used in lieu of live testimony, that the Zoning Board Resolution of November 19, 2018 **(Da662)** that the off-site parking use by Lot 8 of Lot 5 was not a current legal use and not a legal nonconforming use was not relevant or admissible, and that the Zoning Board Interpretation Resolution of November 2017 declining to interpret the 1972 School site plan approval was not relevant or admissible. (6T62-13 to 72-25). After opening statements by Synagogue's attorney (6T76-5 to 82-5) and School's attorney (6T82-7 to 102-13), the Sons of Israel's first witness Rabbi Tendler testified he moved to Lakewood in 1978 as a rabbinical student, joined the synagogue in 1991 as Youth Director, and became the Rabbi in 1995. He described the School site and the Synagogue site, using a 2010 Aerial photograph.**(Da900)** He stated that synagogue

staff/attendees have been using the School's Fifth Street lot and Sixth Street courtyard for parking daily since he has been there in 1991 (6T104-5 to 111-25).

The plaintiff then called current Zoning Board Attorney Jerry Dasti. He authenticated the minutes and documents as to the 1972 School Variance/Site Plan approval for its expansion. **(Da901 to 904; Da923 to 934; Da938 to 944)** The Board secretary had done a diligent search and no records could be found of a Zoning Application or an Approval for the Lot 8 Synagogue constructed in about 1963. The 1972 School Lot 5 Site Plan documents **(Da901 to 904)** were entered into evidence. (6T113-21 to 142-19)

On January 29, 2020, plaintiff presented Janet Zagorin. She was born in Lakewood in 1951, grew up on 7th Street, and from 1956 through the mid-1960s attended Lakewood Schools. Her home was a few blocks from the School/Synagogue site and she would regularly walk on Sixth Street. She has always been a member of Congregation Sons of Israel and actively attended the Synagogue after it opened in December 1963. After college, she lived elsewhere but visited her family home in Lakewood regularly. Her father had been actively involved in the Synagogue's construction and opening. She regularly observed vehicles of Synagogue attendees parked in the School's Fifth Street lot and Sixth Street courtyard in the period immediately after 1963 (7T6-3 to 53-1). On cross-examination, Zagorin testified that in the 1960's the

Sixth Street courtyard area was gravel and was regularly used as a children's play/activity area. There was no entry/curb cut on Sixth Street, and Synagogue attendees would drive over the curb and park haphazardly in the Sixth Street courtyard. In her observations, many drivers in Lakewood were haphazard and would park anywhere without regard to rules. (7T54-6 to 82-20).

The Trial continued on January 30, 2020, with the Synagogue's Rabbi Tendler. He testified that the Synagogue takes care of lighting and snow removal on the Fifth Street lot and School's courtyard. He also testified as to how the 2007 "corporate action" document **(Da907)** that attached the 1963 Agreement was unilaterally executed and recorded in the County Clerk's office at his instigation because he was concerned the School Lot 5 was possibly changing ownership. (8T5-1 to 13-23) On cross-examination, he testified he came to Lakewood in 1978 as a student and became involved with the synagogue in the early 1990's. (8T14-1 to 28-6) He acknowledged that around 2013 a portion of curb on Sixth Street in front of the Synagogue Lot 8 was chiseled out by the Synagogue to facilitate staff/attendee vehicles driving onto the Synagogue's Lot 8 and then crossing over and parking in the School's Courtyard. Prior to that, the curb had been painted yellow for years. (8T34-1 to 36-25) Tendler was questioned about the statements in the 2007 "corporate action" document **(Da907)** that recorded the 1963 Agreement; he acknowledged the synagogue had for years and continues to own the nearby

vacant Lot 6 that is available for parking for synagogue attendees and for School overflow parking. (8T32-1 to 25) He testified that the Sixth Street courtyard has been used primarily by a limited number of synagogue staff/attendees with some type of disability, usually about 6 or 7 vehicles (8T14-3 to 96-18). On re-direct, Rabbi Tendler stated in recent years there are three daily morning services at 7:00, 7:50 and 8:15 A.M., also three services each night and student programs all day. When he started as Rabbi in 1995, there was only one morning service, the number of services (and parking use) has increased over the years (8T96-18 to 110-25).

The Trial continued on February 3, 2020 with the School's Traffic Engineer, Alexander Litwornia (out of turn). He testified that any parking in the Sixth Street Courtyard is inconsistent with and not valid under the 1972 School Site Plan. **(Da934)** The Sixth Street curb line in that 1972 Plan has no curb cut for vehicle access shown. On his site visit in 2013, he observed that a portion of the curb in front of Lot 8 had been chiseled out to form an informal curb cut. The Sixth Street courtyard has no fire lanes or parking lines and is unsafe and unsuitable for parking next to a school. (9T3-20 to 34-15). On cross-examination, Litwornia opined that the Sixth Street courtyard was not a legal parking area because the 1972 Site Plan **(Da934)** showed a walkway through it, no fire lanes, and no approved parking spaces or plan. (9T34-19 to 80-3) Cross-examination continued on February 4, 2020. Litwornia reiterated

that the 1972 School Site Plan showed no parking in the Sixth Street courtyard and no curb cut. Litwornia discussed the processes for Site Plan approvals and curb cuts (10T3-15 to 54-17). In his opinion, the absence of any evidence of a Board approval for the 1963 synagogue raises legal issues as to its validity (10T54-19to 67-1).

On February 5, 2020, Planner Andrew Thomas appeared as the School's witness (out-of-turn). He testified as to site plan/variance procedures and that the 1972 School Site Plan **(Da934)** does not depict any parking in the Sixth Street courtyard, only in the Fifth Street Lot. He presented a 1963 aerial photograph of the site. In that photo, the Sixth Street area is vacant and appears to have vegetation and the Fifth Street lot area appears like a parking or open area. He then presented a 2010 aerial photograph **(Da900)** which shows the 1972 School addition with the Sixth Street concrete courtyard and the Fifth Street lot as an open area. Thomas was at the site in November 2019 and observed up to 19 vehicles pull in the chiseled curb cut on Lot 8, cross over and enter the Sixth Street courtyard, park, and later exit through the chiseled curb cut in front of Lot 8. The 1972 Site plan **(Da934)** does not have any curb cut on school Lot 5 for vehicle access to the courtyard (11T4-15 to 46-15). On cross-examination, Thomas acknowledged he knew of no Site Plan for the School earlier than the 1972 Plan and knew of no Site Plan for the Lot 8 synagogue. He also acknowledged the 1972 Site Plan did not have a parking

legend depicted on the Fifth Street lot (11T46-17 to 75-24).

Trial was then suspended for an extended time due to the Covid pandemic, resuming on July 27, 2021 (12T) with the School presenting Lakewood resident Abraham Bursztyn. He commenced residence at 415 Sixth Street in about 1978 at age 5, located across from the School and Synagogue. Those properties were essentially the same then as presently; he observed them daily during his school years through 1990. He never observed vehicles parking in the Sixth Street courtyard, and on many occasions he and other children would play there. He returned to Lakewood in 1995 to reside in the same neighborhood through 2005 and regularly observed the site; no vehicles parked in the Sixth Street courtyard (12T4-9 to 17-1). On cross-examination, Bursztyn testified he continued to reside in a different address in Lakewood from 2005 through 2008, observed the site daily, and never saw any vehicles parking on the Sixth Street courtyard. In 2010, Meorosnosson purchased the School property (he is affiliated) and around that time synagogue staff/attendees began parking in the Sixth Street courtyard. In 2013, the Sons of Israel chiseled out an entry cut on the curb on Sixth Street in front of Lot 8 to facilitate vehicles parking in the School courtyard. For the past several years, he has been regularly working at and for the School and has observed the safety problems arising from vehicles driving into and parking in the School courtyard (12T17-5 to 45-24).

The School then presented Chaim Abadi, age 60 and a life-long Lakewood resident. He resided in the site neighborhood from age 3 to 21 and attended the Hebrew Day School from 1963 through 1970. Then the school buses dropped the children off on Sixth Street and the children would enter the School through the Sixth Street Courtyard and play in the courtyard before school, during recess, and after school. In his observations, no vehicles parked in the Sixth Street courtyard. Thereafter, during the 1970's/1980's he would occasionally observe the site and did not observe any parking. About 10 years ago, he began to observe parked vehicles in the courtyard (12T49-22 to 65-3). On cross-examination, it was established that after ceasing attendance at the school in about 1970, he visited the site relatively infrequently (12T65-8 to 81-17). The School's next witness, Ezra Goldberg, a 40 year Lakewood resident, attended the School for grades 3 through 8 (1981 through 1986). He came to school by bus, getting off on Sixth Street and entering the school through the courtyard. He did not recall ever observing parked vehicles in the courtyard (12T83-1 to 86-24).

On July 28, 2021, the School presented Abraham Halberstam, who began residing in Lakewood about 31 years ago at age 24. He has observed the site on many occasions, residing nearby for several years in the late 1980's and working locally as a property manager. Over the years, he had never observed vehicles parking in the Sixth Street courtyard, until such parking began in the

last several years (13T4-20 to 21-3). On cross-examination, it was established Halberstam is the Chairman of the Zoning Board. He had moved from the neighborhood in about 2001 to a few miles away (13T21-6 to 41-16). On re-direct, Halberstam testified that he did not consider the courtyard as a legal parking area (13T41-29 to 48-10). The School then rested (13T49-22).

Plaintiff Synagogue then called traffic engineer John Rea as a rebuttal witness, allowed over defendant's objection (13T50-19 to 54-22). Rea opined the fact that the 1972 Site Plan did not reference parking on the Fifth Street lot or Sixth Street courtyard did not mean that parking was not permitted there (13T55-24 to 64-20). On cross-examination, Rea acknowledged that the 1972 Site Plan **(Da934)** had no fire lane in the Sixth Street courtyard and no curb cut on Sixth Street for access to the courtyard. The curb cut that now existed on Sixth Street was in front of Lot 8. He also acknowledged that the 1972 Site Plan depicted a walkway from Sixth Street across the courtyard to the School entry (13T65-3 to 96-20). On re-direct, there was further inquiry as to the 1972 Site Plan and a 1993 proposed Site Plan **(Da934)** that apparently was not filed or approved (13T97-3 to 104-24). The Synagogue then presented former Township Attorney Jan Wouters. He testified about a letter he authored in 2013 **(Da919)** opining the Sixth Street curb cut was not illegal (13T106-3 to 110-24). On cross-examination, Wouters acknowledged that he knew of no permit or Board approval for the 2013 curb cut (13T111-6 to 118-21).

The Synagogue presented Jeffrey Staiger, former township engineer. He testified that he had advised Attorney Wouters in 2013 of his opinion that aerial photographs taken in the 1990's showed a curb cut on Sixth Street; however, he could not produce the photographs referenced (13T120-6 to 125-4). On cross-examination, he stated he did not observe the site in 1993, and the now existing curb cut is in front of Lot 8 and not in front of the School's courtyard. (13T 125-8 to 132-1).

The Synagogue presented Oscar Amanik, a Lakewood resident since 1978 and student at the Hebrew Day School from 2nd to 8th grades (1954 to 1961). He recalled playing in the Sixth Street courtyard. He also recalled parking his car in the Sixth Street courtyard a number of times in the 1970's, in the 1990's taking his father to services, and between 2000 and 2010 observed vehicles parked there. (13T134-21 to 144-10). On cross-examination, it was established that he ceased attending the School in 1961, before the synagogue was built (1963). At the times he parked there in the 1970's most likely school was not in session (13T144-13 to 151-22).

Trial resumed on August 2, 2021 with Sons of Israel presenting Harrison Pfeffer. He attended the Hebrew Day School from age 2 (1990) through 2002. He testified that the buses left the children off on Fifth Street. The Sixth Street door to the courtyard was not used for entry, but the students would exit those Sixth Street doors on going home. He recalls occasionally seeing vehicles

parked in the Sixth Street courtyard in 1990-2002 time periods. After 2002, he attended the synagogue every Saturday, but did not recall any vehicles parking in the Sixth Street courtyard (14T4-25 to 28-7). On cross-examination, Pfeffer testified that during his school years the Fifth Street lot was used as a playground and only the principal parked a vehicle there. He confirmed that he had no recollection of vehicles parking in the Sixth Street courtyard on Saturdays after 1990 (14T28-10 to 41-15). That concluded the Synagogue's rebuttal testimony (14T42-13). Discussion on the Exhibits as evidence and a briefing schedule followed (14T42-15 to 51-3). That concluded the Trial.

On March 29, 2022, Judge Hodgson rendered his written Opinion **(Da980 to 1003)** and Order **(Da1004)** that the 1963 Agreement had established a permanent easement for Synagogue staff/attendee parking on the School courtyard and property and to use the boiler room and water tower. By Order filed April 26, 2022, it was amended to include dismissal of Defendant's Counterclaim, among other things. The Court also relied on its prior 2017 decision **(Da177, 207)**. This Appeal was then filed. **(Da953)**

LEGAL ARGUMENT
POINT ONE

THE TRIAL JUDGE ERRONEOUSLY FAILED TO RECUSE HIMSELF ON THE REMAND TRIAL AFTER MAKING CREDIBILITY DETERMINATIONS ON THE CASE AND WITNESSES. THE PREDISPOSITIONS WERE EVIDENCED IN THE REMAND DETERMINATION/OPINION, AND SHOULD INVALIDATE THAT OPINION/ORDER (APPEALS FROM ORDERS DENYING MOTION

FOR RECUSAL Da974, AND FINAL ORDER Da978, Da1004)

As detailed, this case has an extensive litigation history beginning in 2012 with the Sons of Israel's Complaint **(Da13)** seeking to establish a purported permanent easement for parking vehicles for its Synagogue/Lot 8 staff/attendees on portions of the School's adjacent property (Lot 5), a private school for primary students. This "easement" purportedly was established by a 1963 Agreement **(Da19)** between the then owners of the school Lot 5 and the Sons of Israel's adjacent Lot 8. The case in its early stages was under the supervision of Chancery Judges Buczynski and/or Grasso, both of whom retired, then assigned to Chancery Judge Francis R. Hodgson, Jr. in approximately 2015.

In 2016, Motions for Partial Summary Judgment were filed by both the Sons of Israel and Meorosnosson. The Sons of Israel sought a determination that the 1963 Agreement (Paragraph 10) established a permanent easement for the Lot 8 staff/attendees to park vehicles on portions of Lot 5. **(Da160)** Meorosnosson sought a determination that the 1963 Agreement established only a permission or license which had lapsed, been abandoned, or revoked. **(Da162)** On July 15, 2016 Judge Hodgson rendered an oral opinion that the 1963 Agreement and subsequent conduct established that the Sons of Israel had a permanent easement to park its staff/attendee vehicles in the school's Sixth Street courtyard and Fifth Street parking lot and to have the Synagogue

heating system connect to the School's heating system. Judge Hodgson then entered various Orders, the last being August 16, 2016 **(Da170)** granting the Sons of Israel Partial Summary Judgment and extending primary parking rights to the Sons of Israel on the School's (Lot 5) Sixth Street courtyard and Fifth Street parking area. As the layout for a safe joint use of the Lot 5 courtyard was uncertain and undefined, Judge Hodgson set a Trial date "to determine issues regarding parking and utilization of the Fifth Street and Sixth Street parking lots and other issues."**(Da172)**

Thereafter, a Trial was held by Judge Hodgson over four days in March/April 2017 on the remaining issues of whether the easement had been abandoned and defining the "utilization of the Fifth Street and Sixth Street parking lots". As detailed in the Court's Opinion **(Da177 to 206)** the principals of both entities - - Rabbi Tendler of the Sons of Israel and Rabbi Bursztyn and his son Abraham Bursztyn as the current Meorosnosson Administrator - - testified. Rabbi Tendler testified that the synagogue had been using the School courtyard for parking for many years. **(Da198)** Meorosnosson's Rabbi Bursztyn testified differently, that the courtyard had not been used for parking other than an occasional tradesman vehicle and had been consistently used as a school play/pedestrian area until the Synagogue started having staff/attendees park there in around 2010/2012. **(Da197)**

Each side also presented traffic experts and planning experts as to the

feasibility of the Sixth Street courtyard ever safely being intended or able to function as an off-site parking area for the Synagogue Lot 8, or for parking in general. The Sons of Israel traffic expert Rea indicated the Sixth Street area could be used for parking given its small size and being in front of the school, only with a layout for "stacked parking" with a valet or coordinator and a pedestrian walkway for safety. Meorosnosson's traffic expert Litwornia testified that a safe parking plan, and the Rea parking proposal, could not function on the Sixth Street area due to lack of setbacks, lack of fire lane access, stacked parking problems, and lack of handicap spaces. Meorosnosson also presented Planner Thomas' testimony that the Sixth Street courtyard was not a parking area due to its location at the entry of the school, use for student play/assembly, the 1972 Site Plan, and historical photographs, all establishing that the courtyard was not legally or physically useable as Lot 8 off-site parking facility. **(Da196 to 197)**

After the Testimonial Trial, Judge Hodgson on June 5, 2017 rendered his final oral Opinion, **(Da177 to 207)** accepting as credible the testimony of past parking use by the Sons of Israel - discounting the Meorosnosson testimony/evidence - and concluding the parking "easement" had not been abandoned or terminated. However, Judge Hodgson could not lay out a plan for how this joint use of Sixth Street courtyard/parking area would operate safely or be laid out, leaving it to the parties or the municipality. **(Da189)**

Meorosnosson filed its Appeal of that Final Order. **(Da839)**

While that Appeal was pending, given the absence of any parking layout or marked spaces or lanes on the courtyard, there were repeated conflicts and issues resulting from the impossibility of joint use between students entering/leaving the School and a parking lot at the entry of a 400 student grammar school. In December 2017, the Sons of Israel filed an Order to Show Cause seeking sanctions, asserting that students/pedestrians walking or assembling in the School courtyard lot was a violation of the Final Order. **(Da210)** Judge Hodgson agreed and entered a substantial sanctions Order against the School **(Da285);** the appeal of which was incorporated into the Appeal. There were further conflicts, resulting in further Order to Show Cause, and Sanction Orders **(Da295, Da643, Da967, Da971)**

The Lakewood Zoning Board ruled in October 2018 on the N.J.S.A. 40:55D-68 Application that the Sons of Israel's parking use of the school property was not legal as there was no zoning authority or approval for the Synagogue parking use on Lot 5. **(Da894)** Meorosnosson then placed fencing to block that non-approved parking. In another Order to Show Cause, **(Da643 to 733)** Judge Hodgson ordered the removal of the fencing (2T), that the Synagogue parking could continue, and later entered an Order/Judgment on May 29, 2019 awarding attorney fees/sanctions in the amount of $32,966.96 and $11,257.50 against Defendant Meorosnosson. **(Da969, Da971)**

On June 25, 2019, the Appellate Court found that the Trial Court's determination --- that a permanent "easement" was established by the 1963 Agreement and had not been terminated or abandoned --- was unwarranted and invalid. The Appellate Court remanded the case for a full evidentiary Trial as to all issues --- including what rights were created by the 1963 Agreement and whether the authority had been terminated or abandoned --- and vacated all Judge Hodgson's rulings. **(Da751)**

After the Appellate Court Remand, Meorosnosson filed a Motion requesting Judge Hodgson to recuse himself and the Remand to proceed to a new judge. **(Da764 to 814)** The basis was that Judge Hodgson had incorrectly made a summary Ruling that an easement existed on inadequate facts and had thereafter heard extended testimony by witnesses for the Sons of Israel and Meorosnosson on the issues of parking use and/or possible expiration of any parking use on the School property. Judge Hodgson then entered a Final Opinion/Order on June 5, 2017 based upon firm credibility determinations in favor of Sons of Israel witnesses, and also discounted or found non-credible the Meorosnosson witnesses in confirming his earlier ruling that the 1963 Agreement effectuated an easement, and that the "easement" had not expired or been waived or abandoned. Also, Judge Hodgson had made additional credibility determinations in his sanctions Rulings in 2018 and awarding sanction/attorney fees against the School. **(Da969, Da971)** That Motion for

Recusal was denied by Judge Hodgson, **(Da814)** the Court finding that recusal was not warranted as its earlier determinations were "not based on credibility or to the extent there were credibility determinations were not indicative of prejudice or predetermination (4T1-16). A subsequent Motion for Reconsideration of that Recusal Denial was also denied. **(Da891)** This erroneous and unfair determination led inevitably to the legal errors in the Trial Court's Final Opinion/Order now on appeal here.

The need and basis for Judge Hodgson's recusal were clear and simple. The Courts have consistently found that in a non-jury context where a Judge has rendered a final decision, inclusive of weighing witness credibility, and then the case is remanded because of the erroneous exclusion of evidence bearing on those issues involving an assessment of credibility, the first judge should be recused or withdraw and a new Judge hear the matter on remand. The basis is the recognition that the first Judge had prematurely made a firm determination both on the issues and each side's witnesses. Having already made firm decisions --- it is unrealistic to believe or expect the same Judge to have an open mind both as to the merits and credibility upon hearing the same and/or further witnesses or evidence, particularly given that the Judge had earlier concluded such further evidence was not needed or relevant.

The relevant principle is set forth in N.J.S.A. 2A:15-49 and also R 1:12-1; providing that a Judge should be precluded from further participation where

the judge "has given his opinion upon a matter in question." This has been consistently held to warrant the recusal of a Judge who has made definitive rulings after hearing testimony, with the rulings involving weighing credibility, upon a remand requiring additional evidence and testimony from those witnesses. There are numerous cases supporting such disqualification/recusal. See In re Guardianship of H.G., 155 N.J. Super.186, 195 (App. Div. 1977); N.J. Div. of Youth and Family Services v. A.W., 103 N.J. 591, 617, 618 (1986); Biddle v. Biddle, 166 N.J. Super. 1,7(App. Div. 1979); J.L. v. J.F., 317 N.J. Super.418, 438 (App. Div.), cert. den.158 N.J. 685 (1999); Brown v. Brown, 348 N.J. Super. 466, 493(App. Div.) cert.den.174 N.J. 193 (2002); Cameco v. Gedicke, 299 N.J. Super. 203, 216 (App. Div. 1997); Carmichael v. Brian, 310 N.J. Super. 34, 49 (App. Div. 1998).

It is recognized that disqualification/recusal may not apply where a Court has made a ruling only on a Motion for Summary Judgment and/or a preliminary evidential ruling, on documentary evidence alone and solely legal in nature. See Matthews v. Deane 196 N.J. Super. 441, 444-445(Ch. Div. 1984); Hundred East Credit Corp. v. Schuster, 212 N.J. Super. 350,358(App. Div. 1986). However, disqualification/recusal has been consistently found required where the Trial Judge had heard evidence and testimony and made a determination on the merits that included assessments of witness credibility. In that situation, the remand because of a premature determination should be

heard by a new Judge. See Johnson v. Johnson, 411 N.J. Super. 161, 175 (App. Div. 2009), rev. on other grounds 204 N.J. 529 (2010) (Judge resolved factual disputes against party without a hearing and expressed opinion as to credibility of witness); P.T. v. M.S., 325 N.J. Super. 193, 200 (App. Div. 1999) (Remand to be heard by a different Judge when a necessary plenary hearing was not conducted, and Judge entered sanctions for failure to comply with Orders); Leang v. Jersey City Bd. Of Ed., 399 N.J. Super. 329, 380 (App. Div. 2008), aff. in part rev. in part 198 N.J. 557 (2009) (Judge expressed opinions on credibility on Summary Judgment Motion, remand should be heard by different Judge); J.L. v. J. F. 317 N.J. Super. 418, 438 (App. Div. 1999) (first Judge found party's position not credible).

As noted, beyond the first trial and credibility determinations there, Judge Hodgson post the 2017 Final Judgment had two testimonial sanctions hearings and imposed substantial sanctions upon Meorosnosson for asserted violations of the Final Order. Both sanction hearings involved testimony by the principals of both parties and a weighing and finding on their credibility. As noted in P.T., Supra, the imposition of sanctions for the violation of the Final Order invalidated and remanded by the Appellate Court is an additional factor that supported and mandated a disqualification/recusal of Judge Hodgson here.

One of the primary functions of judicial disqualification/recusal "is to maintain public confidence in the integrity of the judicial process, which in

turn depends on a belief in the impartiality of judicial decision making." United States v. Nobel, 696 F. 2d 231, 235 (3rd Cir. 1982) cert. den. 462 U.S. 1118, (1983) N.J.R. Canon 3C and R 1:12-1 recognizes that the perception of fairness and integrity is as important as the correctness of the judgment. State v. Kettles, 345 N.J. Super. 466 (App. Div. 2001); State v. Tucker, 264 N.J. Super. 549, 554 (App. Div. 1993), cert. den. 135 N.J. 468 (1994). A Judge "shall be disqualified if, among other things, there is any reason which may preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." State v. Perez, 356 N.J. Super. 527 (App. Div. 2003) Litigants ought not to have to face a Judge where there is a reasonable question of impartiality. Panitech v. Panitech 339 N.J. Super. 63 (App. Div. 2001)

The litigation history clearly warranted Judge Hodgson disqualifying/recusing himself from continued handling of the remand. Judge Hodgson made a premature determination on insufficient evidence that the 1963 Agreement established a permanent easement for parking on the School property. Thereafter there was an extended Testimonial Hearing in which principals and experts for both sides testified; the issues being whether the "easement" in the 1963 Agreement had been terminated or abandoned by either the parties' conduct in the 1972 school site plan application or by non-use, and how and whether the off-site parking use could safely operate. Judge Hodgson

in his 2017 Final Opinion **(Da177)** made credibility findings as to those witnesses, finding that the Meorosnosson witnesses' testimony was unconvincing and that the synagogue's Rabbi Tendler, as to continued parking use of the School's Fifth and Sixth Street areas, had "clearly convinced" the Court that the School property had been used for Synagogue parking "consistently since the construction of the synagogue and that the Plaintiff had never taken action to abandon the easement rights created by the...63 Agreement". **(Da198)**

The 2019 Appellate ruling **(Da751)** found Judge Hodgson's summary determination as to the 1963 Agreement and "easement" was unwarranted and vacated "all of the other orders under review" and remanded for a Trial on all the issues. However, as detailed in Judge Hodgson's 2022 Opinion now an Appeal, Judge Hodgson on the remand "proceeded to try the issues on remand as a continuation of the 2017 trial." **(Da980)** The Court's 2022 Opinion "amplifies and supplements this Court's June 5, 2017 oral decision" - that being the Opinion the Appellate Court completely vacated. Thus, by the Trial Court's own words, on remand it did not begin anew as instructed with an open mind but considered the remand trial as "a continuation of the 2017 trial." **(Da980)** The Court having arrived at fixed determinations from that 2017 Trial, it is evident that on the remand the Court implicitly shifted the burden of proof from the Synagogue to prove its easement claim onto the

School to dislodge and overcome the findings and credibility determinations already "convincingly" made by the Court. The failure of Judge Hodgson to recuse led inevitably to the Opinion now on Appeal - unfairly and in contradiction to the Appellate Court remand.

POINT TWO

THE PLAINTIFF'S EVIDENCE AT TRIAL FAILED TO MEET ITS BURDEN TO PROVE THAT THE 1963 AGREEMENT ESTABLISHED A PERMANENT EASEMENT ON THE SCHOOL LOT 5 FOR AN OFF-SITE PARKING USE BY STAFF/ATTENDEES OF THE SYNAGOGUE LOT 8 OR FOR ACCESS TO THE SIXTH STREET BOILER ROOM (APPEALS THE FINAL OPINION/ORDER Da978, Da980, Da1004)

The Sons of Israel's Complaint posited that a perpetual easement for parking of the Synagogue's staff/attendees' vehicles on portions of the School Lot 5 was established by Paragraph 10 of the 1963 Agreement. The Synagogue asserts the perpetual right to drive vehicles at will onto the School property and park in the courtyard entry/assembly/play area --- an area intended to be and actually utilized by children accessing the School --- and on the School Fifth Street parking lot. Meorosnosson asserted that the Sons of Israel does not have a perpetual easement for parking, that the 1963 Agreement (in particular Paragraph 10) is not a Deed of conveyance and the "permission" extended at most a license or temporary permission later waived or ended by the 1972 School expansion and site plan.

The documents established that the two entities in 1962 were

interconnected, with officials from the Jewish Center involved and in leadership positions the New Sons of Israel. **(Da13, Da166)** The 1963 Agreement did not convey a Deeded easement for Lot 8 staff/attendees to park in areas of the School Lot 5 in perpetuity. That an easement was not established is clear from the terms used, type of document involved, and that no such parking use or area, particularly in the courtyard, was ever legally established in compliance with relevant Land Use laws. The 1972 School Site Plan **(Da923 to 934; 938 to 944)** had no reference to Synagogue parking on School property and in fact was based on and provided for the contrary --- that the School had a shortage of parking for its own use. That 1972 approved plan and the synagogue participation should be conclusive evidence of the illogic and invalidity of the claim of perpetual "easement."

The 1963 Agreement did not by its wording and form convey an easement or a perpetual right. The Agreement provided in Paragraph 1 that the Jewish Center will convey, by a separate Deed to be later executed, the property known as Lot 8 to the Sons of Israel. As of that 1963 Agreement, the Deed providing for Lot 8 to the Sons of Israel had already been executed (December 31, 1962) and finalized. **(Da166)** Paragraph 2 through 10 **(Da14)** provides for certain terms of mutual operational promises, for each entity to operate cooperatively with the other, for their related purposes. These Paragraphs did not invoke or reference permanent rights. Paragraph 2 provided

that the Sons of Israel would construct on Lot 8 a synagogue (completed in December 1963). Paragraph 3 provided that Sons of Israel would pay $10,000 annually to the Jewish Center so long as the Jewish Center operates the Hebrew Day School on Lot 5. Paragraph 4 provided for a possible reverter of Lot 8 if the synagogue was not timely constructed. Paragraph 5 provided the synagogue would be operated in accord with Orthodox Jewish tenets. Paragraph 6 provided that the Sons of Israel will be governed by six (6) Trustees, with three (3) of those Trustees appointed by the Jewish Center. Paragraph 7 provided the Jewish Center would cease conducting religious services in the School when the synagogue became operational. Paragraph 8 provided that the synagogue sanctuary will separate men and women as provided by Jewish law. Paragraph 9 provided that disputes as to matters of Jewish law will be decided by specified Jewish Councils. Lastly, the Paragraph 10 primarily at issue provided that the Jewish Center "agrees to permit" the Sons of Israel "to utilize for parking purposes the vacant lands it owns on Madison Avenue and also on Sixth Street" and also to permit use of lands on Sixth Street for boiler room use. These Paragraphs are in the nature of mutual promises on operational issues between related cooperative entities to be effective and limited to the period of anticipated cooperative ownership by the entities/parties to the Agreement and to be subject to change by circumstances, or agreement, or change of ownership. Illustrative of the

overall misconception in the Trial Court's analysis and rulings is that the Court also found that the portion of Paragraph 10 that Meorosnosson would "permit use of lands on Sixth Street for boiler room use and for a water cooling tower" established that the Sons of Israel Synagogue had a permanent "easement" to be supplied heat from the school's heating system. **(Da1005)**. It is submitted there is no such "easement" for use of a heating system. That ruling --- although the heating system was never the primary issue --- is clearly indicative of the error of the Trial Court's analysis.

Paragraph 10 was phrased as a "permission" to the then related neighbor, allowing synagogue parking on then vacant areas on the School property. The provision did not use "easement," and did not provide the permission is irrevocable or perpetual. Paragraph 10 certainly did not provide or contemplate that then vacant areas of School property would remain forever "vacant" and could not at some future time be actively devoted for School use and purposes. The term "agrees to permit" infers a temporary permission that can be withdrawn in the future. It does not invoke a conveyance as does the term "grant" or "convey an easement" - normally used in a Deed of permanent conveyance. The entire context was as a personal license - between two then-interconnected religious entities with then common officers - establishing temporary and mutually cooperative ground rules for allowing the Synagogue to be constructed and get operational, to continue so long as determined

appropriate, until circumstances change, or the Synagogue and School properties are no longer owned and operated cooperatively.

The 2019 Appellate Opinion **(Da751)** summarized the documented facts and relevant law as to the 1963 Agreement and criteria for identifying and/or distinguishing an easement or a license. The Court found that **(Da760):**

> The language of paragraph ten of the 1963 does not definitively establish an easement. Although the term "easement" need not be included, the term "permission" is ambiguous as to whether the interest may be something other than an exclusive grant. In addition, consideration of the surrounding circumstances leaves doubt as to whether an easement was intended.

The Court further noted that even if an easement was established by the 1963 Agreement, "an issue of material fact remains as to whether it has been abandoned." As the Court noted, action by or on behalf of the easement holder (or license holder), or acquiescence in such actions by the property owner that is adverse and defiant of the easement or license, can establish that the easement or license has ended or expired. The Court thus concluded by vacating Judge Hodgson's earlier Decision/Orders stating:

> The duration for the grant in paragraph ten is unspecified, and there is no "clear manifestation that the parties intended" perpetual performance. It is also unclear whether a different type of interest may have been intended. Because the 1963 Agreement is ambiguous, surrounding circumstances may be addressed There remains genuine issues of material fact as to what type of property right was conveyed and whether it was abandoned. Thus, partial summary judgment should be reversed and the case remanded for trial to determine what interest was created, its scope, and whether it remains in effect. **(Da761)**

It must be emphasized that the burden of proof - to prove that the documents conveyed an easement, a permanent perpetual property right - rested upon the Sons of Israel. See Thikol Chem. Corp. v. Morris Cty. Bd. of Taxation, 41 N.J. 405, 416-417 (1964); Carton v. Cruz Const. Co., 89 N.J. Super. 414-419 (App.Div. 1985); River Dev. Corp. v. Liberty Corp., 45 N.J. Super. 445, 463 (Ch. Div.1957); Camp Clearwater Inc. v. Pluck, 52 N.J. Super. 583, 596-597 (Ch. Div. 1958), aff. 59 N.J., (App. Div. 1959), cert. den. 32 N.J. 348 (1960). As shall be detailed, the evidence presented at the Remand Trial clearly failed to actually meet that burden - that the 1963 Agreement was ever intended to convey a perpetual or permanent easement and that the "permission" did not expire or terminate thereafter, particularly as circumstances changed with the 1972 School expansion and Site Plan process.

Before addressing the proofs - or lack thereof - directly, cases referenced by the Appellate Court should be discussed. As noted, Paragraph 10 referencing the parking use does not define or state a term or end date of the parking privilege. In that context, as stated in West Caldwell v. Caldwell, 26 N.J. 9, 29 (1958):

> Perpetual contractual performance is not favored in the law; and a construction affirming a right in perpetuity is to be avoided unless given in clear and peremptory terms. It is not often that a promise will properly be interpreted as calling for perpetual performance. (emphasis added)

If the term or end date is not defined in the Agreement and is uncertain, the Court will interpret the contract as "requiring performance for a reasonable time or until terminated by a reasonable notice" (at p. 30). In In Re Miller, 90 N.J. 210, 218-219 (1982), the Supreme Court was determining the life of an agreement as to the division of royalties from the late orchestra leader Glenn Miller when no term was stated. The Court, citing West Caldwell, stated:

> Perpetual contractual performance is not favored in the law and is to be avoided unless there is a clear manifestation that the parties intended it. The documents themselves contain no words that would indicate such intent. (emphasis added)

The Court went on to state:

> Ordinarily, if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time. As is pointed out in the Restatement of Contracts, when parties to a contract have not agreed in respect of a term that is essential to a determination of their rights and duties, a term that is reasonable in the circumstances is supplied by the court.

See in accord Home Properties v. Ocino Inc., 341 N.J. Super. 604, 613 (App. Div. 2001). Here Paragraph 10 has no express term as the duration of the "permission" to the synagogue staff/attendees to park vehicles on the Lot 5 property. Therefore, that "permission" is certainly terminable either on notice, or a reasonable time after 1963, or upon a change of circumstances effectuating its termination. The permissive authority extended by Paragraph 10 was in the nature of a temporary license, as detailed in Kearney v. Mun. San. Landfill Auth., 143 N.J. Super. 449, 456 (Law Div. 1976):

> A license and other lesser interests in land are distinguished by less than an exclusivity of possession. A license creates a right of use and occupancy in the licensee to the extent necessary to perform an agreement between the parties. A license confers authority to go upon the land of another and do an act or series of acts there, but it does not give rise to an estate in land. "A license is simply a personal privilege to use the land of another in some specific way or for some particular purpose or act." (citations omitted)

In actuality, disputes over deeds or agreements about such permissions have largely faded away because of the advent of Land Use Laws that prohibit or limit such joint use of property without defined zoning approvals. However, older cases are instructive on the burden to prove that an "easement" was intended. For example, in East Jersey Iron Company v. Wright, 32 N.J. Eq. 248 (Ch. 1880), the issue was whether a document which granted to a mining company the exclusive right to place equipment and mine iron ore was an easement or a revocable license. The Court found that the original document, being permissive and executory, was not an easement but a personal privilege - a license. It could be revoked by the licensor, by operation of law on the passing of title, or by death of the licensor, and had been revoked. A similar analysis is in Eckert v. Peters, 55 N.J. Eq. 379 (Ch. Div. 1897). There, the owner of a seafront parcel conveyed by Deed an inland parcel together with "the free use and full rights of sufficient land on my seafront for bathing purposes, with the right to erect thereon bathhouses, and use the same free of charge, undisturbed, at any time." The Court found the circumstances and the

vague language in the Deed supported that the permission to place bathhouses was a revocable license, as otherwise the broad terms would allow the permission holder to take over the entire property. The language provided only a license - "an authority to do a particular act or series of acts upon another's land without possessing any estate thereon" (55 N.J. Eq. at 384). As a license, the permission had been revoked by the death of the license parties and/or the conveyance of the property. Id. As detailed in Kiernan v. Kara, 7 N.J. Super. 600, 603 (Ch. Div. 1950), a license is subject to revocation upon one of the following events, (1) the will of the licensor; (2) the death of either of the parties; (3) and the conveyance of the land upon which it is intended to operate. See Quigley Inc. v. Miller Family Farms Inc., 266 N.J. Super. 283, 294-295 (App. Div. 1993); also, Polakoff v. Halphen, 83 N.J. Eq. 126, 128 (Ch. Div. 1914).

A key circumstance confirming that the 1963 Agreement was never intended to and did not convey an easement right is the circumstances of its execution and its form. Conveyances of title and permanent easement/property rights are customarily done by Deed - the formality intended to allow it to be recorded so as to achieve the intent of preserving permanent title rights. Here, the Deed to convey the permanent title rights of Lot 8 was executed on December 31, 1962. **(Da166)** Certainly, if there had been an intent to convey with Lot 8 any permanent easement rights in the School's Lot 5, that easement

would have logically been included in the contemporaneous Deed. That it was not - but was part of an agreement in non-recordable form as one "Permission" among a number of temporary cooperations or permissions-is certainly substantial evidence that the "permission" granted was not intended as a permanent easement or title right. Almost all cases dealing with whether a perpetual easement was created by an instrument arose in the context of the interpreting an old Deed, many from the 1800s. See e.g., Sergi v. Carew, 18 N.J. Super. 307 (Ch. Div. 1952); Camp Clearwater Inc. v. Plock, *supra*; Leasehold Estates Inc. v. Fulbro Holding Co., 47 N.J. Super. 534 (App. Div. 1957). As noted earlier, the problem has decreased because of zoning approval requirements and as noted in Pilar v. Lister Corp., 38 N.J. Super. 485, 499-500 (App. Div. 1956), aff. 22 N.J. 79 (1957):

> It must be appreciated that the modern practice is to compose the terms of Deeds of conveyance more explicitly expressive than yesteryear of the intentions of the parties thereto so their recordation will be regarded as authentically evidential.

Here, the 1963 Agreement **(Da13)** (and the 1972 memo) **(Da19)** was not acknowledged in recordable form. See N.J.S.A. 46:15-1 and 46:14-2.1. It would seem logical that if the parties intended to establish an easement for Lot 8 on the School Lot 5 (or for access to the boiler room), that easement would have been included in the 1962 Deed for Lot 8 to provide notice to the world. Paragraph 10 was at most a temporary permission for the synagogue to utilize

portions of Lot 5 for parking and the boiler room for some undefined limited period. As there was no expiration date, pursuant to Miller the permission must be deemed to have ended either (1) upon being waived by the Sons of Israel, as in the 1972 school expansion, (2) after a reasonable time (3) on notice, or (4) on a change of ownership. In fact, each of those terminating events took place. A Court cannot create a better contract than the parties executed. Graziano v. Grant, 326 N.J. Super. 328 (App. Div. 1999) As shall be further detailed, the plaintiff actually presented no substantive evidence as required by the Appellate Court Remand that supports its burden of proof to demonstrate that perpetual parking easement was conveyed in 1963 and remains in place or an easement to use the boiler room.

POINT THREE

THE TRIAL COURT ERRED IN EXCLUDING FROM EVIDENCE THE LAKEWOOD ZONING BOARD RESOLUTION THAT THE LOT 8 OFF-SITE PARKING ON THE SCHOOL LOT 5 IS NOT A LEGAL NONCONFORMING USE. THERE IS NO MUNICIPAL LAND USE BOARD APPROVAL FOR ANY SUCH JOINT PARKING USE ON THE SCHOOL LOT 5. THE 1972 SITE PLAN APPROVAL FOR THE EXPANSION OF SCHOOL PROPERTY DOES NOT INCLUDE JOINT PARKING USE, INFERENTIALLY PRECLUDES SUCH USE, AND IS CONCLUSIVE THAT NO EASEMENT EXISTED OR THAT THE LICENSE TERMINATED (APPEALS FROM TRIAL COURT RULING ON MOTION IN LIMINE EXCLUDING BOARD RESOLUTION 6T 62-13 TO 72-25)

While the first Appeal was pending before the Appellate Court, the School in August 2018 filed an Administrative Appeal to the Zoning Board as

per N.J.S.A. 40:55D-68 for a determination as to whether the off-site parking use by Synagogue Lot 8 staff/attendees was a valid and legal pre-existing, nonconforming use on the School Lot 5. The Zoning Board on October 15, 2018 conducted a hearing - both the School and the Synagogue, each represented, participated. Witnesses and evidence was presented on the issues. The Zoning Board concluded that the off-site parking of Synagogue Lot 8 staff/attendee vehicles on the School Lot 5 is not now a permitted use, and that no proof was presented that use is a legal pre-existing non-conforming use; the Resolution of November 19, 2018 memorialized that determination. **(Da894)**

After the Appellate Court remand, pursuant to the Case Management Order shortly before the first Trial date the parties exchanged witness/exhibit lists. Included in the School's exhibit list was the Transcript of the 2018 Zoning Board hearing, the hearing minutes, and the Zoning Board Resolution. The Synagogue then moved *in limine* at Trial to bar those documents from being submitted in evidence. That Motion in Limine was heard on January 28, 2020, at the Trial commencing. (6T4-18 to 62-4). The Trial Court granted the Synagogue Motion, and barred the hearing/transcript, minutes, and most importantly the Board Resolution from evidence. (6T62-13 to 72-25) That ruling was incorrect; the Resolution - and that there is no land use approval for this joint use of the School property by an off-site parking use - is critical to

the proper understanding and determination in this case.[4]

To appreciate this point, some historical background is important as to planning/zoning Approvals and their role in controlling the use of land. Many years ago, before zoning or development laws, property could be developed and used at will without regard to public safety or planning. There was no Municipal control, and no planning or zoning boards existed. See Lake Intervale Homes Inc. v. Parsippany-Troy Hills, 28 N.J. 423, 433 (1958); Loechner v. Campbell, 49 N.J. 504, 56-511 (1967). In the late 1800's into the early 1900's, to the extent "controls" existed on land use, those "controls" came about through Deed covenants, easements or restrictions. The Map Filing Law in 1898 began to provide limited regulation in municipalities as to controlling the right to unilaterally use or develop property. In the early 1900s, rudimentary legislative efforts were pursued to establish governmental regulation over development and use of property; however, their legality was uncertain. In 1921, the U.S. Department of Commerce promulgated a Model State Zoning Enabling Act; thereafter adopted in whole or part by most States. See 1 Anderson, American Law of Zoning (4th Ed.) § 2.21, p. 71-72. New Jersey adopted its first rudimentary Zoning Enabling Law, patterned after the

[4]As noted earlier, by Opinion/Order dated December 1, 2022 Judge Ford in Docket No.: OCN-L-2664-18 reversed and invalidated the Zoning Board Resolution. The defendant Meorosnosson has filed a Notice of Appeal and will seek consolidation or coordination of this Appeal and that Appeal as they are inter-related.

Model Act, in 1924. See Andrews v. Ocean Twp. Bd. Of Adj., 30 N.J. 245, 255 (1959); Commercial Realty v. First Atlantic, 122 N.J. 546, 553-555 (1991). The constitutional validity of zoning was confirmed in Euclid v. Ambler, 272 U.S. 365 (1926). As a consequence, in 1927 the State Constitution was amended to allow an Enabling Law to authorize municipalities to adopt zoning regulations within limitations. See Cunningham, Control of Land Use in New Jersey, 14 Rutgers L.R. 37 (1959). The Legislature in 1928 adopted a Zoning Enabling Act, again following the Model Act, broadened in 1930 by the first Planning Act, codified as R.S. 40:55-1 to 21, that allowed for master plans, planning boards, and subdivision procedure. See generally Pennington Homes v. Planning Bd. of Stanhope, 41 N.J. 578, 583 (1964). These Acts allowed municipalities to adopt zoning ordinances to classify properties into districts or zones. See generally Cox & Koenig, New Jersey Zoning and Land Use Administration §1-1; Roselle v. Wright, 21 N.J. 400, 408-410 (1956). By the early 1930's, most municipalities had adopted zoning regulations that established limited zoning controls.

In 1953, a new Planning Act was adopted, replacing the earlier Law. This Act was more sophisticated, establishing for example the two step Preliminary and Final Approval procedure for Subdivisions and Site Plans. This 1953 Planning Act was in place in 1963 when Sons of Israel acquired Lot 8 and constructed its Synagogue. Presumptively, that construction of the

Synagogue at that time would have required a Site Plan Approval from a Board. Certainly, any plan for the Synagogue to have a permanent parking right/facility on the adjacent School Lot 5 would have had to be included and approved as part of the Synagogue Lot 8 Site Plan and the adjacent 1972 School's Lot 5 Site Plan. That no site plan that authorizes such off-site parking use/facility has been produced, and apparently does not exist, precludes any finding that the Synagogue has legal authority to use School property.

That an off-site parking lot serving an active non-residential use on a different adjacent occupied lot required a variance from the Zoning Board is established by cases contemporaneous to this 1962/1963 period. See Susserman v. Newark Bd. of Adj. 61 N.J. Super. 28 (App.Div. 1960) Rain or Shine Box Lunch Co. v. Bd. of Adj. Newark, 53 N.J. Super. 252 (App.Div. 1958) Wazergast v. Broadway Thirty-Three Corp., 66 N.J. Super. 346 (App.Div. 1961) Given that the School Lot 5 was actively occupied, the use of a portion of Lot 5 as a parking lot for the Synagogue Lot 8 would actually constitute a second use (an off-site parking facility), which would necessitate a use variance for two uses (one being non-permitted) on one lot. Such a proposal, to be legal, would have certainly required a Board Site Plan and use variance application, both in 1963 and 1972. See Nuckel v. Little Ferry Planning Board, 208 N.J. 95(2011). A parking area to service an off-site use/building located on a second lot owned by another owner renders that

parking area/lot a part of that second off-site use/building. See e.g., Bell Atlantic N.J. Inc. v Riverdale Zon. Bd., 352 N.J. Super. 407 (App.Div.2002)(use variance required to locate off-site parking on adjacent lot occupied by gas station); also O'Donnell v. Koch, 197 N.J. Super. 134 (App.Div.1984).

The School Lot 5 in 1963 was a fully functioning Grade School. The Sons of Israel certainly would have had to present such a parking use on Lot 5 as part of a Site Application, particularly for approval of a perpetual parking use, to be legal. No such Plan or Approval was presented and apparently does not exist. Prior to 1963 and 1972, the School (Lot 5) was occupied by a more modest size grade School in the central portion, with the property having frontages on Sixth Street, Madison Avenue and Fifth Street. In September 1972, the then owner applied for Site Plan and Variance Approval to construct additions to the existing School, including the annex toward Sixth Street, and to extend the building to within approximately 20 feet of the Fifth Street boundary. Several variances for this expansion were required, including for insufficient parking on the School site for its own needs, for deficient setbacks, and for lot coverage in excess of the maximum. **(Da901 to 904; Da923, 934; Da938 to 946)** The Sons of Israel, as owner of adjoining Lot 8, was noticed and actually participated in the hearing. The Approval Resolution **(Da894)** confirms that the insufficiency and/or lack of adequate parking on Lot 5 for the

School's own requirements was addressed and found approvable based on the representation, with the concurrence of the Sons of Israel, that the School "will have the benefit of parking facilities on adjoining properties owned by the Congregation Sons of Israel should additional parking facilities be required." **(Da945)** Thus, it was represented by Sons of Israel, that the insufficiency of parking for the School's own needs on Lot 5 would be mitigated by parking spaces being made available on the other nearby properties then owned by Sons of Israel. No representation or claim was made then by the Sons of Israel that any areas or parking spaces on the deficient School site were perpetually committed for the Sons of Israel Lot 8 parking. That failure to assert any parking right in that 1972 site plan process certainly precludes any such claim 40 years later, in 2012.

The 1972 Approved Site Plan, with the concurrence of plaintiff, is conclusive evidence that the plaintiff never had any permanent parking easement, and that any claim to a parking license on the School site was certainly waived and terminated. The approved Site Plan. **(Da934)** shows the Fifth Street lot adjacent to the School with the legend "Paved Recreation and Parking Area", and is the area designated and approved for parking vehicles for the School use and/or guests. There was no representation or approval for regular off-site parking use of the School property by other owners/properties, such as the Synagogue Lot 8.

On the Approved Plat, the Sixth Street courtyard is an open and bisected by a walkway from the Sixth Street sidewalk to the entry of the School. The Site Plan contains no legend or designation of this courtyard as being intended, designated or authorized for vehicle parking; nor does the Resolution authorize such parking. These facts clearly establish that the Sixth Street courtyard was not proffered by the School or approved by the Board as a vehicle parking area. The courtyard is clearly for assemblage and access to the School for students and visitors. Importantly, there was no approval on the Site Plan; nor was there in place until 2013 any curb cut on Sixth Street to allow vehicle access into this courtyard area. There was simply no claim or approval that Lot 8 attendees/staff could legally park Lot 8 vehicles in the School entry courtyard. The concept is bizarre.

Any logical consideration of the Site Plan process would recognize that no Zoning Board would approve this courtyard as a pedestrian walkway and assemblage area for students and visitors, and also as an area for unrestricted haphazard vehicle parking. Common sense calls out the incompatibility and safety hazards that have and do occur from such dual use. That 1972 Resolution and Approved Site Plan was never superseded or overruled by any amended or new development/zoning application. That being the case, the 1972 Resolution/Approved Site Plan is binding on the School property and cannot be unilaterally disregarded or superseded by the Court premised on the

Synagogue's claim of easement parking rights.

Pursuant to Land Use Law, use of the School property must be strictly in conformance with that Approved Site Plan and Resolution. Neither the School, nor the plaintiff, nor anyone else, including the Court, has any authority to disregard or supersede the Approved Site Plan. Any significant revision of a previously Approved Site Plan, even arising from litigation, requires a re-hearing and approval before the relevant Board with public Notice. See Whispering Woods v. Middletown Tp., 220 N.J. Super. 161 (Law Div. 1987). The Trial Court does not have the unilateral jurisdiction or authority to supersede or violate this 1972 Resolution and Site Plan, or to order that this School courtyard be used as a joint parking lot or for "priority use" by the Synagogue.

The party who claims easement rights in a property subject to a development application - particularly an adjacent owner on notice of the development that may affect his claimed easement -has the obligation to participate at the Board hearing and present his easement rights. See Kline v. Bernardsville Assn. Inc., 267 N.J. Super. 473, 478-480 (App. Div. 1993). Sons of Israel in 1972 did not assert any claim of easement parking rights on the School property. It, in fact, represented that any parking deficiency of the expanded School could and would be accommodated by School parking use on other nearby property owned by the Sons of Israel. At the time the Synagogue

owned nearby Lots 6 and 10. Certainly that position is both evidential and conclusive that no perpetual parking easement was intended or existed, and whatever parking permission was granted was abandoned. The plaintiff is certainly estopped from now - many years later and long after the School expansion - from asserting that the Resolution/Site Plan can and should be overridden and disregarded. See Bray v. Cape May City Zoning Bd., 378 N.J. Super. 160, 167 (App. Div. 2005) (applicant for development approval before Zoning Board estopped by contradictory position taken in prior Board application); Piccone v. Carlin, 40 N.J. Super. 393 (Law Div. 1956), also Leasehold Estates Inc. v. Fulbro Holding Co., 47 N.J. Super. 521, 562-564 (App. Div. 1957).

The 1963 Agreement Paragraph 10 created at most a temporary license. There is no right in either the defendant, the plaintiff, or even the Court, to disregard or override the Approved Site Plan and to direct the use of this walkway/courtyard area on Lot 5 for parking vehicles for another property owner/user. It was in that context that the 2018 Zoning Board Resolution **(Da894)** determining that the off-site parking use by Lot 8 staff/attendees on the School Lot 5 is not now a permitted use, and is not a legal pre-existing, non-conforming use, was extremely relevant, and should have been allowed in evidence. As detailed in Pell v. Tp. of Bass River, 196 N.J. Super. 304, 314 (Law Div. 1984), the Zoning Board is particularly well equipped to decide

such nonconforming use disputes, which involve issues as to when the use commenced, the interpretation of past and present zoning regulation, and the Board's particular local knowledge. See Stafford v. Stafford Zoning Bd., 154 N.J. 62, 69 (1998). In such matters, the burden of proof is on the party claiming the right to such nonconforming use. See Janieri v. East Brunswick Zon. Bd., 192 N.J. Super. 15 (Law Div. 1983); Bonaventure Int. v. Spring Lake, 350 N.J. Super. 420, 427 (App.Div. 2000); Berkeley Sq., Asso. V. Zoning Bd. of Trenton, 410 N.J. Super. 255 (App.Div. 2009). The Court can even take judicial notice of such a Board Resolution. See Charlie Brown of Chatham v. Bd. of Adj., 202 N.J. Super. 312 (App.Div. 1985). The Court's refusal to accept in evidence the Zoning Board Resolution determining that the Lot 8 off-site parking facility/use on the School is not legal or valid, and never was established as a valid pre-existing nonconforming use, was clearly in error.

POINT FOUR

REVIEW OF THE TRIAL EVIDENCE CONFIRMS THE PROOFS PRESENTED FAIL TO DEMONSTRATE A PERMANENT EASEMENT WAS INTENDED AND CREATED, AND DEMONSTRATE ONLY A LICENSE WAS INTENDED AND CREATED THAT HAS TERMINATED (APPEALS FINAL OPINION/ORDER Da978, Da980, Da1004)

The Appellate Court found that the 1963 Agreement and its paragraph 10 were ambiguous, "does not definitively establish an easement", and that

"consideration of surrounding circumstances leaves doubt as to whether an easement was intended" **(Da760)**. The Court noted, citing In re Estate of Miller, that perpetual performance of such a claimed contractual permission "is not favored in the law and is to be avoided unless there is a clear manifestation that the parties intended it" **(Da755)**. The Court noted that "The duration for the grant in paragraph ten is unspecified and there is no clear manifestation that the parties intended perpetual performance." **(Da762)**

With that, the Appellate Court reversed the Summary Judgment and remanded the matter for a trial in which the matter could be reconsidered "in light of surrounding circumstances", **(Da757)** citing Rosen v. Keeler 411 N.J. Super. 439, 451(App.Div.2019) The plaintiff had the burden of proof --- to prove sufficient "surrounding circumstances" to demonstrate that the parties in 1963 intended and agreed that a perpetual easement for parking on the School property was being created and granted. Review of the trial evidence discloses and confirms that the plaintiff never actually presented any evidence bearing on the "surrounding circumstances" in 1963 or thereafter that met its burden of proof.

The Synagogue presented as witnesses on its direct case only Rabbi Tendler, Janet Zagorin, and Attorney Dasti. The first witness, Rabbi Tendler, the head of the Synagogue since 1995, presented limited testimony. He had no involvement or knowledge of the circumstances of the 1963 Agreement. He

became involved with the Synagogue in 1991 and thereafter observed that Synagogue attendees/staff regularly parking in the School's Fifth Street Lot and Sixth Street Courtyard (6T104-5 to 111-20). On his return to the witness stand (after other witnesses out of turn), he testified that, upon finding out in 2007 that the School property may be up for sale due to financial issues, he located in Synagogue records the 1963 Agreement and had Attorney Brown have the 1963 Agreement --- not itself in recordable form --- recorded in the County Clerk's records by attaching it to a Corporate document that was in recordable form (**Da907**). Tendler acknowledged that prior to 2013 there was no curb cut on Sixth Street; in 2013 a curb cut in front of Lot 8 was chiseled out to allow for vehicles to mount the curb to access the School Lot 5 courtyard more easily. Importantly, Rabbi Tendler offered no testimony as to any circumstances surrounding the 1963 Agreement or the 1972 School Site Plan. (6T96-18 to 110-25). The Synagogue next presented current Zoning Board Attorney Jerry Dasti. He presented limited testimony authenticating the minutes and Resolution as to the 1972 School Variance/Site Plan Approval for its expansion, (**Da901 to 904; Da923 to 999**) and stated that a search of Board records located no records of any application or approval of the 1963 Synagogue (6T113-21 to 142-19).

Janet Zagorin testified she was born in 1951 and grew up in the Synagogue/school neighborhood, going to school and passing the site regularly

in the 1960's and attending the synagogue after it opened in December 1963. She went to college at Douglass in about 1969, and during college regularly visited her home in Lakewood. After college, she lived elsewhere but regularly visited her home. She had no knowledge of the 1963 Agreement. Her knowledge was limited to having observed - primarily in the late 1960's and early 1970's --- vehicles of Synagogue attendees parking in the School's Fifth Street Lot and Sixth Street Courtyard. (7T6-3 to 53-1) The courtyard was gravel and was also used as children's play/activity area in that time period. There was no curb cut on Sixth Street and vehicles would mount the curb into the courtyard and park haphazardly. She made the observation that the drivers at that time, many having recently moved from New York, were particularly haphazard in their driving and parking techniques and did not adhere to the rules. (7T54-6 to 82-20). It should be noted the 1963 Agreement paragraph 10 **(Da16)** did allow a temporary license for Synagogue attendees to park on vacant areas of the School Lot 5 and that permission presumably extended through 1972, when it presumably ended with the School expansion. That Ms. Zagorin observed Synagogue attendees parking on School property in the late 1960's/early 1970's would be consistent with the temporary license. That was the extent of plaintiff's direct case.

The defendant School as part of its response case presented Traffic Engineer/Planner Litwornia and Planner Thomas. Each of their testimony was

to the effect that the facts and records from the 1972 School site plan/parking variance process and approval did not infer or provide that Synagogue parking was intended or referenced to be on School property. The Sixth Street Courtyard was laid out as a pedestrian courtyard with a walk entryway across the middle. There was no curb cut on Sixth Street on the 1972 Plan to allow vehicles to access the Courtyard. The Synagogue was noticed and participated in the 1972 School application and did not assert any parking right/use on School property. Both Litwornia and Thomas also testified that the courtyard had no fire lanes, no marked parking spaces or travel lanes, and is designed and laid out as a pedestrian way/assembly area for the students. Without marked spaces and lanes and with no fire lane and proximate to a primary school, the courtyard is unsafe for use for vehicle access or parking. (Litwornia 19T11-1 to 79-19); Thomas 11T4-15 to 75-24). Defendant School also presented witnesses Abraham Bursztyn: (12T) Chaim Abadi, Ezra Goldberg, (12T) and Abraham Halberstam (13T) - all long term Lakewood residents of the Synagogue/School neighborhood. All testified similarly that in their observations and experience from the 1960's through recent years, vehicles had not parked in the School's Sixth Street Courtyard. That concluded the defense response case.

The plaintiff --- having presented no substantive direct case --- over defendant's objection was allowed to present as rebuttal Traffic Engineer John

Rea, former Township Attorney Jan Wouters, and former Township Engineer Jeffrey Staiger. Rea testified that in his opinion the absence of any legend or markings of vehicle parking being allowed in the School courtyard on the 1972 Site Plan did not necessarily mean that parking could not occur there. He did acknowledge there was no indicia that such parking was approved and the plan showed a concrete walkway across the middle of the courtyard. (13T55-24 to 104-24)Former officials Wouters and Staiger briefly testified to a 2013 Township Letter expressing their opinion that the Synagogue chiseling out of a curb cut in 2013 in front of Lot 8 was not illegal. (13T111-6 to 125-4)

In fact, this Synagogue rebuttal testimony only confirmed that the 1972 Site Plan **(Da934)** had no reference to permit parking in the courtyard and that no curb cut was authorized or existed in that plan on Sixth Street to foster vehicle access into the Lot 5 courtyard. Certainly, none of this testimony provides any basis on the "surrounding circumstances" of the 1963 Agreement so as to demonstrate an intent and agreement at that time to establish a perpetual easement.

Continuing with improper "rebuttal" testimony, the Sons of Israel then called Oscar Amanik and Harrison Pfeffer, two long-time Lakewood residents. Amanik was a student at the School from 1954 to 1961 - before the 1963 Agreement and synagogue. He had no knowledge or involvement in the 1963 Agreement. He recalled parking his vehicle in the Sixth Street Courtyard on

occasions in the 1970's and in the 1990's, and between 2000 and 2010 he occasionally observed vehicles parked there. He acknowledged that on the occasions he parked or made these observations it was likely the School was not in session (13T144-13 to 151-22). Pfeffer testified he attended the School from 1990 to 2002. His recollection was that in those years the Fifth Street Lot was not used for any parking (other than 1 vehicle) and was used as a play/recreation area. He recalled seeing vehicles parked at times in the Sixth Street Courtyard, although the school students exited every day out the School's Sixth Street exit and through the courtyard. After 2002 he attended the synagogue every Saturday and did not observe any vehicles parked in the Sixth Street Courtyard. (14T4-25 to 41-13) That concluded the plaintiff's rebuttal case.

The point of this exposition is to illustrate that absolutely none of the plaintiff's proofs addressed the "surrounding circumstances" in 1963 or in a relevant time thereafter to sufficiently establish that the parties in 1963 had the intent and agreement to establish a permanent easement. The plaintiff's evidence was totally vague and irrelevant to the proofs required - its proofs being to the effect that over the years its witnesses would on occasion either park their vehicles or had observed other parked vehicles in the Sixth Street Courtyard. Those claims were contested and disputed by the defense lay witnesses; several defendant witnesses testifying that over the years, from the

late 1960's through about 2013, vehicles did not or only on very isolated occasions park in the Sixth Street Courtyard. The point is that the plaintiff certainly did not even address its burden of proof as defined by the Appellate Opinion - to establish sufficient "surrounding circumstances" to the 1963 Agreement to prove that the Agreement was intended to be and was a permanent easement. The Plaintiff's affirmative evidence totally failed on the issue as defined by this Court in its Remand Opinion.

In fact, as detailed in Points 2 and 3, there are a number of undisputed and undisputable facts and circumstances that establish that the 1963 Agreement as to parking set forth at most a temporary permission/ license that ended. Those undisputable facts and relevant "surrounding circumstances" include the following:

1. That the December 31, 1962 separate Deed **(Da166)** conveyed the title to Lot 8, and any easement rights in favor of Lot 8 would have logically been included and set forth in that Deed if such were intended.

2. That the 1963 Agreement did not reference or include the terminology of "permanent", "perpetual", or "easement". **(Da13)**

3. That the 1963 Agreement was not notarized or in recordable form, evidencing an intent that it not be recorded so as to not extend beyond the then owners or be permanent. **(Da13)**

4. That the 1972 Site Plan documents and Resolution establishes: **(Da901 to904; Da923 to934; Da938 to 946)**

    A. That the synagogue did not assert any easement-parking rights existed in 1972.

B. That the School site had insufficient parking for its own needs and required a variance for the expansion. If a Synagogue parking right existed on School property, that would logically be relevant and preclusive to the School expansion and, if it existed, was required to be disclosed and asserted by the Synagogue.

C. That the 1972 Approved Site Plan does not Show or reference any parking in the Sixth Street /Courtyard. There is no curb cut for vehicle access, and a walkway located in the middle of the Courtyard, indicating the courtyard was solely for pedestrian use.

D. That the 1972 School Resolution/minutes establish that the Synagogue was on notice, and because the School site parking was particularly deficient for the school's own needs, the Synagogue volunteered its other nearby parcels for the School overflow parking needs.

5. That there was no curb cut on Sixth Street to allow vehicles access into Lot 5 from the 1960's until the Synagogue chiseled out the curb in 2013 in front of its own Lot 8, not the School Lot 5.

6. That there is not presently, and no proof that there ever has been, a curb cut on Sixth Street in front of the School Lot 5 that would allow vehicles to access the supposed shared parking lot on the School Courtyard. It would be totally illogical to conclude that a purported shared parking lot in that courtyard on School property could be put in place in 1963 and exist for 50 years without an approved curb/driveway access on Sixth Street in front of Lot 5. Further, the School Lot 5 has never had any easement or license on Lot 8 to have its vehicles drive into and over Lot 8 to then access the School's Lot 5. That School vehicles (Lot 5) never had and do not have any right to drive into and over Lot 8 to access the supposed "shared" parking area in the Lot 5 Courtyard confirms that parking was never contemplated in the Courtyard.

7. That the Synagogue, recognizing the 1963 Agreement was non-recordable, resorted to a subterfuge to record that document as an attachment to another Document in 2017. **(Da907)**

8. That the Lakewood Zoning Board in its November 2018 Resolution determined that this off-Site parking facility/use on Lot 5 for Lot 8

staff/Attendees is not now a legal use and has never been a legal pre-existing nonconforming use. **(Da894)**

These undisputed facts are the surrounding circumstances that establish that the 1963 "permission" for parking on any portion of the School Lot 5 was, at most, a personal license that was ended no later than 1972. The Trial Court's determination and Opinion is clearly legally and factually unwarranted and incorrect.

POINT FIVE

EVEN IF THE 1963 AGREEMENT COULD BE DEEMED AS CONVEYING A PERPETUAL EASEMENT, THAT USE CANNOT BE EXPANDED AND EXCEEDED BEYOND THE BOUNDS AND LIMITATIONS OF THAT EASEMENT USE IN APPROXIMATELY 1964. THE TRIAL COURT OPINION AND ORDER EXPANDING THAT USE IS IN ERROR. (APPEALS FINAL OPINION/ORDER Da978, Da980, Da1004)

Plaintiff's claim is that the 1963 Agreement conveyed an express easement for the Sons of Israel officials/congregants to park vehicles on the defendant School's Fifth Street lot and Sixth Street courtyard, to be jointly used with the School. In that context, it is settled that an easement created by a conveyance is fixed and limited to the use and terms of the conveyance at the time of the Grant. The Court has no authority to expand the easement or use of the easement beyond those limits. See Eggleston v. Fox, 96 N.J. Super. 142, 147 (App. Div. 1967). As stated in Hyland v. Fonda, 44 N.J. Super. 180, 187 (App. Div. 1957), "the servient tenement will not be burdened to a greater

extent than was contemplated or intended at the time of the creation of the easement * * * and the use of the easement must not unreasonably interfere with the use and enjoyment of the servient estate." As held in Eckert v. Peters, 55 N.J. Eq. 379 (Ch. 1897), an easement cannot be read to provide the easement holder authority to utilize all areas of the burdened property. Such an interpretation would construe the easement holder to control the entire burdened property, and the Court "cannot put this construction on the grant."

Here, at most the claim of Sons of Israel is that in 1963 the plaintiff (and its officials/congregants) were permissively allowed to park in the Fifth Street parking lot, jointly with the vehicles of the School and its staff/teachers, or in the Sixth Street Courtyard. At that time in approximately 1964 and immediately thereafter, the Synagogue had only one morning service and one evening service per day. (8T96-18 to 110-25) At that time, the School on Lot 5 was much smaller (before the 1972 School expansion) and substantial areas were vacant. There was no curb cut on Sixth Street approved in 1963 or 1972 to allow vehicle access into the courtyard. The actions that fomented this lawsuit is that the Synagogue, many years after the School expansion in 1972, in 2007 unilaterally recorded the Agreement as a purported "easement" **(Da907)** and thereafter commenced active parking use of the Sixth Street Courtyard. Meorosnosson acquired the School in 2010. (**Da20)** In recent years, the number of services and events at the synagogue had increased to three

morning services, three evening services, and expanded day use and attendance. (8T96-18 to 110-25) In 2013, the plaintiff chiseled a curb cut in front of Lot 8 on Sixth Street so that its staff/attendees could easily access and park vehicles in increased volume in the School's courtyard. (8T34-8 to 44-25) Substantial evidence and the 1972 Site Plan support the common sense point that the courtyard was designed and used for access/assembly for the School students and has never been legally or physically designed or intended for parking.

The plaintiff's use and control of these two areas (Fifth Street lot and Sixth Street courtyard) began to expand by the early 2010's far beyond and in excess of any neighborly "permission" to Synagogue staff/attendees to be incidentally parked on "the vacant lands" of the School. The Synagogue now has expanded to multiple morning and evening services, and has far more daily attendance and use throughout the day now than in the 1960's.

The net effect is that the Trial Court has granted the unlimited domain and entitlement to the Sons of Israel over both the School's Fifth Street Lot and its Sixth Street Courtyard, to have unlimited priority rights and to preclude any School use at all on the Sixth Street Courtyard. The rights now granted to the plaintiff are without limitation or any notice requirement; defendant's School is left with limited capability to use its Fifth Street parking lot and no safe use at all of the Sixth Street Courtyard by its students at any time. Any use of the

courtyard for entry/exit or assembly is precluded under imposition of sanctions. The Synagogue has been granted total priority rights to the Fifth Street Lot and Sixth Street Courtyard for its parking use, with the School left with only the obligation to own and maintain those facilities for the Synagogue's priority use. This is certainly and clearly far beyond the incidental and temporary "permission" granted in the 1963 Agreement. The Trial Court's ruling is simply not logical or valid.

POINT SIX

THE TRIAL COURT FAILED TO FOLLOW THE APPELLATE COURT'S REMAND, AND ERRONEOUSLY TRIED AND DECIDED THE ISSUES AS A CONTINUATION OF THE 2017 TRIAL AND DECISION (APPEALS THE FINAL OPINION/ORDER Da978, Da980, Da1004)

As noted, the Trial court in August 2016 decided the easement claim in favor of Sons of Israel on Summary Judgment. The Trial Court then in 2017 conducted a testimonial Trial on the remaining issues and issued by oral Opinion on June 5, 2017 **(Da177, 189)** and Final Order. **(Da207)**On the Meorosnosson Appeal, the Appellate Court **(Da751)** reversed and invalidated the Summary Judgment, finding that determination as premature and not supported by the evidence. As that was the basis for the Court's ruling on the other issues, the Appellate Court vacated "all of the other orders under review" --- inclusive of the determinations on all other issues/paragraphs of the 1963 Agreement and sanctions Orders --- and remanded the entire matter for a "trial

to determine what interest was created, its scope, and whether it remains in effect." **(Da763)**

Since all the Orders of the Trial Court were vacated, the remand for a new Trial was on all issues, to commence anew. However, compounding the error and prejudice arising from the Trial Court (Judge Hodgson) denying the Meorosnosson recusal Motions, the Trial Court did not follow the Remand Order. Instead, the Trial Court "proceeded to try the issues on remand as a continuation of the 2017 trial" **(Da981).** The Trial Court went on, stating:

> The Court heard ten witnesses during the 2017 Trial and fourteen witnesses during the continuation --- some of which were recalled from the 2017 proceeding. This written Opinion amplifies and supplements this Court's June 5, 2017 oral decision.

Thus, the Trial Court did not adhere to the Appellate Court Remand Order and try the case anew on its merits. That in itself is incorrect and places the case and this Appeal in a confused procedural state. The fact is the 2017 Final Order was reversed and invalidated because the Trial Court made its determinations prematurely and without adequate facts or circumstances. The Remand was not to continue with those proceedings, but to try the case anew --- with the burden of proof on the plaintiff.

The entire premise of the case law on recusal as set forth in Point I herein is that a litigant, on a remand, is entitled to a Judge considering the case anew with an open mind. The Trial Court here clearly did not abide by the

Remand Order. By addressing the case as a "continuation" of the earlier premature and invalid process and decision, the Trial Court committed error that mandates the invalidation of the Trial Court's March/April 2022 Opinion/Order.

POINT SEVEN

THE TRIAL COURT ERRED IN DENYING MEOROSNOSSON'S MOTION TO COMPEL THE RETURN OF MONIES PAID PURSUANT TO THE JUNE 27, 2017 JUDGMENT AND MARCH 6, 2018 ORDER WHICH WERE VACATED BY THE APPELLATE DIVISION ON JUNE 25, 2019 (6T72:7-25)(Da 976)

In the prior Appeal, Meorosnosson challenged multiple orders including the June 27, 2017 Final Judgment which established a priority parking right and entered Judgment against Meorosnosson in the amount of $4,529.60. On April 19, 2018, Meorosnosson filed a Motion in the Appellate Division to amend its 2017 Appeal **(Da842)** to include the March 6, 2018 "Sanctions Order" **(Da285)** which had been entered by Judge Hodgson on Plaintiff's order to show cause to enforce litigant's rights alleging Defendant violated the June 27, 2017 Order, as well as the February 14, 2018 hearing on the Litigant's Rights Claim. The Appellate Division granted the motion on May 18, 2018 **(Da294)**

Defendant made three payments to Plaintiff in connection with the June 27, 2017 Final Judgment and the March 6, 2018 Order awarding sanctions and attorney's fees: $4,529.60 (awarded in the June 27, 2017 Order); $11,543 (attorney fees awarded from the March 6, 2018 Order); and $1,000 (sanctions

awarded in the March 6, 2018 Order), these payments totaled $17,073.23. **(Da826)** After the Appellate Division decision reversed all of the Orders, Defendant demanded their return ultimately filing a Motion to Compel the Return of the Monies paid pursuant to those orders. The Trial Court denied the Motion.

The March 6, 2018 Sanction Order is a memorialization of the Court's decision at the February 14, 2018 hearing. **(Da285)** The Order provides that Defendant "...is in violation of this Court's June 27, 2017 Order of Judgment" and further that Defendant was sanctioned and "must pay Plaintiff $1,000... for its violations of the June 27, 2017 Order of Judgment prohibiting the ingress and egress of children of the school owned and operated by Defendant in such a way that they walk in between parked cars on the street or in the Sixth Street Parking Lot during religious services when Plaintiff is utilizing the Sixth Street Lot for parking during religious services. . ." The Order further states: **"that an award for reasonable counsel fees shall be granted in favor of Plaintiff and against Defendant for fees incurred as the result of Defendant's violations of the June 27, 2017 Order of Judgment and Plaintiff's counsel shall submit an Affidavit of Services within fourteen (14) days for the Court's consideration." (Da285)** Thereafter, Plaintiff submitted an Affidavit of Services and the Court entered a March 26, 2018 Order awarding the amount of $11,554.63 and a March 23, 2018 Statement of

Reasons. **(Da287)** The March 26, 2018 Order was ministerial, determining the quantum of attorney fees that were actually awarded in the March 6, 2018 Order. The Trial Court erroneously found that Defendant did not appeal the "enforcement action" of the Court and that the Appellate Division did not "...intend to vacate the enforcement proceedings this Court entered pursuant to Rule 1:10-3 as it was not challenged specifically." (6T72-7, 25)**(Da976)** This is incorrect. The Court's ruling is in the February 14, 2018 hearing transcript which was a part of the earlier appeal and was memorialized in the March 6, 2018 Order - which was vacated by the Appellate Division. On its face, the March 6, 2018 Order **(Da285)** recites that the matter was brought before the Court by an Order to Show Cause and the Court considered the submissions and arguments of counsel and "a Proof Hearing held on February 14, 2018 and the Court having concluded Defendant...is in violation of the June 27, 2017 Order of Judgment entered against the Defendant..." The March 6, 2018 Order was appealed; it is the predicate order upon which relief was ordered by the Trial Court and it was reversed and vacated.

The Trial Court did not have the authority to hypothesize that the Appellate Division did not intend to reverse the enforcement proceedings when the Appellate Division actually did vacate the Order entered in connection with the enforcement proceedings and entered an Award for sanctions and attorney's fees. The Appellate Division specifically noted the March 6, 2018

"sanction order" and vacated it – along with the award of sanctions and attorney's fees. Defendant also addressed the enforcement order in its Amended Appeal and briefed it at Point Six of its Appellate Brief **(Da746)**. The Appellate Court took away any authority the Court had to award sanctions or attorney's fees when it vacated the March 6, 2018 Order. The Trial Court also ignored the fact that $4,529.60 was paid pursuant to the June 27, 2017 Order and $1,000.00 was paid as a sanction pursuant to the March 6, 2018 Order. The decision of the Court must be reversed.

POINT EIGHT

THE TWO FEBRUARY 21, 2019 ORDERS AND THE TWO MAY 29, 2019 ORDERSAWARDING SANCTIONS/ATTORNEY'S FEES RELATING TO THE SIXTH STREET VIOLATIONS AND THE FENCE VIOLATION ARE NOT ONLY PRODUCTS OF THE ERRONEOUS JUNE 27, 2007 ORDER OF THE TRIAL COURT-WHICH RESULTED IN AN UNCONTROLLED AND DANGEROUS SITUATION IN FRONT OF A 400-STUDENT GRADE SCHOOL AND WAS SUBSEQUENTLY VACATED BY THE APPELLATE DIVISION ON JUNE 25, 2019 - BUT ALSO AN ABUSE OF THE TRIAL COURT'S DISCRETION (Da295, 965; 971) (Da643, 967, 969) (3T109:20; 3T112:13; 3T112:22) (Da690,692)

Meorosnosson appeals from four (4) Orders stemming from two applications of Plaintiff Sons of Israel: the first by way of a June 4, 2018 Order to Show Cause to Enforce Litigant's rights (Sixth Street Violation) **(Da295)** (1T,3T) asserting among other things that the school was in violation of the June 27, 2017 Order (which at the time was under appeal) in allowing its students to walk or assemble in the Sixth Street courtyard while synagogue

vehicles are parked **(Da295-297, 508)** The other, an Order to Show Cause with Restraints entered October 19, 2018 in relation to a fence installed by Meorosnosson on its property pursuant to a permit issued by the Township after the Zoning Board ruling that off-site parking by the Synagogue on the School Lots was not a legal nonconforming use.**(Da643)** ("Fence Violation"). The Court entered a February 21, 2019 Order **(Da965)** for the Sixth Street Violations awarding sanctions of $2,500 and an award of attorney fees – later determined in a May 29, 2019 Order to be $32,966.96 **(Da971)**. The Fence Violation resulted in a February 21, 2018 Order **(Da969)** awarding temporary restraints and an award of attorney's fees later determined in the amount of $11,257.50 by Order entered May 29, 2019 **(Da969)**. As set forth more fully below, all of these Orders should be vacated.

This case has a long and tortuous history; the disastrous impact of the Trial Court's rulings after the August 16, 2016 Summary Judgment Order **(Da170)** was entered finding a permanent parking easement existed is clear. The Trial Court then decided at an August 31, 2016 Case Management Conference to hold a hearing "to determine issues regarding parking and utilization of the Fifth and Sixth Street parking lots" and other issues. **(Da172)** It cannot reasonably be disputed that the Sixth Street courtyard in front of this 400-student grade school is an unsafe and improper off-site "parking facility" for the Sons of Israel. An example of the photographic evidence at the earlier

February 14, 2018 hearing **(Da284)** exemplifies this condition of having cars parked haphazardly in a school courtyard with no fire lane, no parking space lines, absolutely none of the requirements usually mandated by site plan approval. After the 2017 Trial, the Trial Court apparently realized it did not have the jurisdiction to lay out a site plan for the parking use of the courtyard. However, rather than mandate a requirement or referral for an application to a Lakewood Board for such review and approval - an action that should have taken place in 1963 or 1972 if Sons of Israel's claim had any validity - the Trial Court ordered that Sons of Israel "shall have priority rights to use the parking lots." This decision - subsequently reversed by the Appellate Division along with the subsequent Orders relating to violations of it - resulted in an uncontrolled situation, with synagogue vehicles parked at random in various directions at any and all times.

As to the Sixth Street Violation, Meorosnosson's Rabbi Burstyn **(Da508)** responded to the allegations and photos **(Da340-354)** filed by Plaintiff pointing out there are unsafe consequences of the Trial Court's earlier decisions, referencing the testimony of the Plaintiff's traffic expert that "valet" parking would be necessary and pointing out that the Plaintiff never set up organized parking or barriers to protect the children as proffered at the earlier trial **(Da510)**. Rabbi Bursztyn details the haphazard and unsupervised parking of the Sons of Israel congregants in the Sixth Street Courtyard, their refusal to set

up pedestrian barriers, that pedestrians enter the courtyard as a short cut to other areas; that a full time security guard would be necessary to prevent people from using the courtyard, and the efforts of Defendant to instruct personnel and children not to walk through parked cars in the Sixth Street courtyard.**(Da511, 512)** He further detailed his efforts "...to obtain review and/or site plan for proper legal use of the courtyard," pointing out Sons of Israel opposed all of this- appearing before the zoning board to object to all of his efforts. **(Da537, 879, 892)** The photographs show vehicles are parked randomly and haphazard, at random times, and this is the cause of children being photographed near the vehicles.

Rabbi Tendler testified in support of Plaintiff's application. He admits he did not advise his congregants how to park, responding "...they're adults. They know how to park," and further affirms the photos showing his congregants parking indiscriminately. (3T29-2; 3T30; 48-18) He admits his photographs do not all show violations of the Court's Order. (1T80); (1T86-10) (1T89-10; 1T91-2) In fact, because so many of the photographs entered do not show violations, the Court actually interjected to help Tendler: "essentially they are going to have to walk between those cars to get to the front of the School." To which Tendler responds: "Correct." (1T94-13-18) Over and over, the photographs do not show children walking in-between cars. (1T12:9) Meorosnosson's head of transportation testified that even though he used to

drop students off at the Sixth Street, he as well as all the other bus drivers stopped this when Rabbi Bursztyn made them aware of the Court's order and now they all drop off at Fifth Street. (3T51:18-3T50) Mordechai Bursztyn, an assistant to the School, testifies to his efforts to monitor pick up/drop off to comply with the Court's order, to tell the children and advise parents they cannot drop off at the Sixth Street courtyard. (3T70-74)

As to the Fence Violation, the Trial Court entered an Order to Show Cause with Restraints on October 19, 2018 (**Da643**)(2T) finding that a fence installed by Defendant interfered with the Plaintiff's access to Sixth Street, even though it was authorized by the Township with a permit issued to the School after the Zoning Board determined that the parking was not an authorized use and the Township issued a Notice of Violation to the Sons of Israel on October 25, 2018 for parking on Defendant's property without a site plan. **(Da651, 688)** The Court entered a permanent restraint until the Appellate Division ordered otherwise, finding an intentional violation where attorney's fees were appropriate in the amount of $11,257.50. (3T110-112) **(Da967, 969)** This impossible situation really illustrates and confirms the error and illogic of Sons of Israel's position and the Trial Court's rulings in 2016 and 2017- now adopted once again by the Trial Court. Without any variances or site plan approval, the Trial Court has endorsed an uncontrolled, unlined, non-designed parking lot to be established at the entry courtyard of a 400-student grade

school --- a site entirely occupied by the school. The hazards of such an unplanned and unapproved set-up are obvious.

The June 27, 2017 Final Judgment as well as the Partial Summary Judgment Order and the March 6, 2018 Sanctions Order were under appeal at the time the Trial Court heard the Sixth Street Violations and the Fence Violation applications and were subsequently reversed on June 25, 2019. The continued existence of this uncontrolled parking lot for "priority" use by the synagogue at the entryway courtyard of a 400-student school can only result in continued conflict between pedestrians, students, and vehicles. This situation illustrates why Land Use laws and Boards exist, to regulate and define property use for an orderly safe use. The Appellate Division vacated the March 6, 2018 Order awarding sanctions and attorney's fees; the within situation is no different and these Orders should also be reversed.

1. The Trial Court Abused Its Discretion In Awarding Sanctions And Attorney Fees And Finding Defendant Intentionally Violated The June 27, 2017 Final Judgment **(Da690)**

The Trial Court's January 15, 2019 Statement of Reasons as to the Sixth Street Violation (Da717) points out this is the "second violation based on the same activity," a reference to alleged similar conduct which was the subject of the Order to Show Cause in 2018 resulting in the March 6, 2018 Order (ultimately vacated by the Appellate Division). The Trial Court actually "cut and pasted" from the Court's March 23, 2018 Statement of Reasons to use in

the January 15, 2019 Statement of Reasons **(Da287)** - re-adopting its statement that it hoped that Defendant would comply with the Court's decision "either by directing the buses to Fifth Street or through the parties agreeing to provide a fenced pathway to the school along the edge of the Sixth Street parking area." **(Da694)** This exact language is found at page 3 of the March 23, 2018 Statement of Reasons. **(Da289)** However, in the Sixth Street violation it was undisputed that Defendant did comply with the Court's Order by "directing the buses to Fifth Street;" even Rabbi Tendler conceded this. To find intentional and willful conduct based on a mistake of fact certainly warrants an abuse of discretion. Not only was the basis for the Court's decisions- the June 27, 2017 Order -ultimately vacated by the Appellate Division along with the Sanctions Order previously appealed by Meorosnosson, but the evidence in the record clearly did not show any willful or intentional violation by Defendant; the Court's decision rests without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. See, Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 1997).

Although the Trial Court found the entity Congregation Meorosnosson responsible for any child/person on the Sixth Street courtyard as shown in the photographs, Tendler admitted many of his photos did not show any actual violation. It was also undisputed and admitted by Sons of Israel that since the Court's order Defendant's buses no longer drop "a couple hundred children" at

the Sixth Street courtyard. (1T125:18-22; 1T126:6; 1T141;143) While the Court considered this to be a "second violation based on the same activity," the Appellate Division a short time later vacated that alleged first violation which was presented at a hearing on February 14, 2018 hearing. **(Da692)** That reversal was based on Point Six **(Da746)** of Defendant's Appellate Brief in that matter which argued that the Court's June 27, 2017 Order created an uncontrolled and dangerous situation. The same holds true now. Moreover, the Court does not cite to anything Meorosnosson did intentionally which allows people to walk through the courtyard, because there is nothing in the record to support such a finding. Nothing Tendler testified to involved the Defendant *intentionally* allowing children to walk through the courtyard. Instead, the evidence undisputed by Plaintiff was that the Defendant's buses stopped dropping students at the Sixth Street courtyard to comply with the Court's Order.

The Trial Court's ruling on the Fence Violation also confirms the impossible situation following the June 27, 2017 Order. The Trial Court found Meorosnosson did not comply with the "intent" of the June 27, 2017 Order and therefore it was intentional. (2T37:10) The two Orders entered on February 21, 2019 as well as the two Orders entered on May 29, 2019 in the amounts of $11,257.50 **(Da969)** and $32,966.60 **(Da971)** should be vacated.

CONCLUSION

Based upon the June 2019 prior Appellate ruling, the 1963 Agreement, and the relevant law and the evidence, this Court should vacate and reverse the Trial Court Rulings and enter Judgment dismissing plaintiff's Complaint and further grant the defendant Judgment to the effect that the 1963 Agreement created only a temporary parking license and that license has been waived and/or terminated. Further, the Court's ruling that an express easement exists for the use of Meorosnosson's heating equipment/boiler room is not legally within the scope of an "easement" and is further indicative that the entire Agreement was in the nature of a revocable license between then related entities which must be validated. The Court is also requested to reverse the various sanction and fee orders imposed on the School and direct the return of all funds paid pursuant to the Trial Court's incorrect Orders.

Respectfully submitted,

BY: _____
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Attorney for Appellant/Defendant

Dated: February 1, 2023

CONGREGATION SONS OF ISRAEL,	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : **DOCKET NO. A-2790-21 T2**
Plaintiff/Respondent	:
	: CIVIL ACTION
	:
	: On Appeal from Orders dated February
v.	: 21, 2019; May 29, 2019; May 29, 2019;
	: June 5, 2019; August 26, 2019;
CONGREGATION MEOROSNOSSON, INC.,	: February 5, 2020; March 29, 2022; March 29, 2022; April 26, 2022
	:
Defendant/Appellant.	: Superior Court of New Jersey : Chancery Division, Ocean County : Docket No. OCN-C-239-12
	:
	: SAT BELOW: : Hon. Francis R. Hodgson, Jr.

AMENDED PLAINTIFF/RESPONDENT'S BRIEF
AND
APPENDIX OF PLAINTIFF/RESPONDENT
VOLUME I
1-27

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[1] The March 29, 2020 Trial Opinion is erroneously identified in Defendant's Table of Orders as Da1054.

TABLE OF PLAINTIFF'S APPENDIX

PRELIMINARY STATEMENT

In 1963, the Congregation Sons of Israel ("Congregation" or "Plaintiff") was granted an easement in real property known as 419 5th Street (Lot 5, Block 59) (the "Subject Property") in Lakewood, New Jersey. Congregation Meorosnosson, Inc. ("Defendant") purchased the Subject Property at a bankruptcy auction in 2010 with actual knowledge it was taking the Subject Property subject to the Congregation's written recorded easement. However, after the purchase of the Subject Property, Defendant began intentionally and maliciously interfering with Plaintiff's historic property rights. In 2012, the Congregation initiated its action against Defendant to protect its easement rights.

Following the entry of an order for partial summary judgment granted in 2016 in favor of Plaintiff and a five-day trial in 2017 addressing issues related to the validity and enforceability of Plaintiff's easement and whether said property rights were terminated, waived or abandoned, the Trial Court entered an order of judgment in favor of the Congregation confirming the Congregation's historic easement rights. Defendant appealed the decision, and on June 25, 2019 the Appellate Division reversed the Trial Court's prior partial summary judgment order and order for judgment, as well as certain other orders on appeal, and remanded the case for further proceedings.

Following remand from the Appellate Division, as well as various pre-trial motions, the Trial Court sitting as the fact finder conducted a bench trial. After judging the credibility of the witnesses and considering all competent evidence, the Trial Court properly concluded ("2022 Judgment") that in the early 1960s express easement rights were granted to the Congregation by the Jewish Center & Hebrew Day School of Lakewood a/k/a Bezalel Hebrew Day School & Jewish Center ("Hebrew Day School"). The Trial Court determined the attendant circumstances surrounding the granting of the property rights establish the Congregation received an easement to utilize the Subject Property for parking and to connect the Congregation's HVAC system to the boiler room on the Subject Property. As established during Plaintiff's case in chief, these rights were continuously utilized by Plaintiff without interference by the grantor from the 1960s, through the 70s, 80s, 90s and up to 2010, when Defendant purchased the Subject Property. The evidence also establishes that the Congregation's easement rights were never waived, terminated or abandoned.

The Congregation submits this brief in response to Defendant's appeal from the 2022 Judgment as well as various orders entered in Plaintiff's favor prior to the 2022 Judgment, including orders entered as a result of Defendant's repeated and blatant violations of court orders then in place.

PROCEDURAL HISTORY

1. On November 12, 2012, Plaintiff filed an Order to Show Cause and Verified Complaint against Defendant to enforce its express easement following Defendant's interference with Plaintiff's rights, including its right to utilize the Subject Property for parking along Madison Avenue and Fifth Street ("Fifth Street Lot") and Sixth Street ("Sixth Street Lot"), as well as to connect its HVAC system to the boiler room located on the Subject Property. **(Da1-4)**

2. On April 1, 2013, Plaintiff filed a nine-count Amended Verified Complaint seeking judgment in its favor to determine the Hebrew Day School granted enforceable easement rights in 1963 or, alternatively, the Congregation was granted irrevocable rights in the Subject Property. **(Da123-143)** On April 29, 2013, Defendant filed an Answer to the Amended Complaint. **(Da144)**

3. After nearly four (4) years of litigation, on April 29, 2016, Plaintiff filed a Notice of Motion for Partial Summary Judgment. **(Da160)** In response, on June 28, 2016, Defendant filed a Notice of Cross-Motion for Summary Judgment. **(Da162)** The only issue argued on the competing motions for partial summary judgment was a question of law, not fact: whether the 1963 Agreement constituted an express easement. **(Da160-164)** On July 15, 2016, the Trial Court entered an Order granting partial summary judgment in favor of Plaintiff finding the rights conveyed to Plaintiff by the 1963 Agreement constitute enforceable

easement rights ("Partial Summary Judgment Order"). **(Da218-219)** On August 16, 2016, the Trial Court entered an Amended Partial Summary Judgment Order correcting the legal property description. **(Da170 -171)**

2017 Trial

4. Following a five-day trial in 2017 on the issues not resolved by the Partial Summary Judgment, where witnesses on behalf of both parties testified and documents were marked into evidence, the Trial Court entered an Order on June 27, 2017 granting judgment in favor of the Congregation and against Defendant ("2017 Judgment") finding (1) Plaintiff was granted an easement; (2) said easement was not waived, abandoned or otherwise terminated; and (3) Defendant violated Plaintiff's rights by interfering with its easement rights. The 2017 Judgment also restrained Defendant from interfering with Plaintiff's easement rights, as well as other equitable and monetary relief. (**Da207-209**)

5. The Trial Court also determined Plaintiff established, based on the evidence and testimony provided at trial, that the interference by Defendant was, in part, because of Defendant starting to utilize the Sixth Street for student drop off and pick up instead of Fifth Street which had been historically utilized.

> Previously and prior to 2010 children [attending school] have been dropped off and picked up from the Fifth Street – from Fifth Street, and currently, parents drop off at [Sixth Street][1]. As the unloading

[1] It appears the Trial Court's reference to Fifth Street rather than Sixth Street was in error.

> of the children in the morning during the religious services constitutes, as this Court finds, an unsafe condition, the unloading of the children while cars are parked in the Sixth Street lot for morning services unnecessarily interferes with the plaintiff's easement rights.

(Da177-206; Da201 49:4-12)

6. Among other relief granted therein, the 2017 Judgment specifically prohibited Defendant from permitting egress or ingress of children to the school by way of the Sixth Street Lot during religious services, ordered Defendant to remove certain obstructions from the Fifth Street Lot, and ordered Defendant to pay $4,529.60 for actual damages suffered because of Defendant's interference with Plaintiff's easement. **(Da207-209)**

Defendant's 2017 Appeal

7. On or about August 7, 2017, Defendant filed a Notice of Appeal of the Partial Summary Judgment Order, the 2017 Judgment, and other orders entered prior to its appeal. Defendant did not apply for a stay pending its appeal ("2017 Appeal"). **(Da839)**

Plaintiff's First and Second Post-Judgment Enforcement Actions for Defendant's Violations

8. On December 21, 2017, Plaintiff moved to enforce litigant's rights by filing an order to show cause alleging Defendant violated the 2017 Judgment ("First OTSC"). The nature of the violations was two-fold. First, Defendant's (non-operational) vehicles and storage trailers remained on the Fifth Street Lot,

interfering with Plaintiff's use thereof and in violation of the 2017 Judgment. Second, there were ongoing violations of the prohibition against children utilizing the Sixth Street Lot for ingress and egress by walking between parked cars on the Sixth Street Lot during religious services. **(Da210-217)**

9. Following the hearing on Plaintiff's First OTSC on February 14, 2018, and finding Defendant in violation of the 2017 Judgment, on March 6, 2018 an Order was entered awarding $1,000.00 in sanctions against Defendant and in favor of Plaintiff for Defendant's post-judgment interference with Plaintiff's easement rights. (**Da285-286**) In accordance with the March 6, 2018 Order, an affidavit of services was submitted to the Trial Court for an award of attorney's fees. Defendant submitted opposition to the application for fees and, on March 23, 2018, the Trial Court issued its Statement of Reasons for granting Plaintiff's fee application **(Da287)**[2]. On March 26, 2018, an Order was entered awarding $11,544.63 in attorney's fees and costs to Plaintiff. (**Da292-293**)

10. On or about April 18, 2018, Plaintiff filed an Amended Notice of Appeal. As set forth in Defendant's "Addendum to Amended Notice of Appeal", the only Orders under consideration relevant to money damages awarded were the June 27, 2017 Order of Judgment and the March 6, 2018 Order (misidentified

[2] The March 23, 2018 Statement of Reasons misidentifies Plaintiff as Defendant and Defendant as Plaintiff. The parties do not dispute the intent of the Trial Court's opinion.

as a March 8, 2018 Order). (**Da842**) Although entered before Defendant moved to amend its 2017 Appeal on April 18, 2018, Defendant did not appeal the March 26, 2018 Order awarding attorney's fees and costs. Id.

11. In the days following the February 14, 2018 OTSC hearing and following the Trial Court's entry of the March 6, 2018 and March 26, 2018 Orders, Defendant continued to permit the drop off of children either on or in front of the Sixth Street Lot, and the children continued to ingress and egress the school through the Sixth Street Lot and parked cars during religious services. This despite the court ordered prohibition against doing so and despite the availability of the Fifth Street Lot for student access. **(Da300-440)**

12. As a result of the continued violations, on June 4, 2018, Plaintiff filed its second Order to Show Case seeking an award of attorneys' fees and a sanction of daily fines ("Second OTSC"). **(Da295-440)** On or about June 18, 2018, Defendant filed opposition thereto. **(Da441-541)** On or about July 25, 2018, Plaintiff filed a reply to Defendant's opposition and in further support of its Second OTSC. **(Da542-669)** A hearing on Plaintiff's Second OTSC was held on October 17, 2018 **(1T)**[3] and continued December 4, 2018. **(3T)** The Trial Court

[3] 1T= October 17, 2018 Transcript of Motion
2T= October 19, 2018 Transcript of Order to Show Cause
3T= December 4, 2018 Transcript of Order to Show Cause
4T= August 26, 2019 Transcript of Motion to Disqualify
5T= January 17, 2020 Transcript of Motion for Reconsideration Disqualify and

granted Plaintiff's Second OTSC awarding $2500.00 in sanctions **(Da965-966)** and as directed, Plaintiff submitted an affidavit of services. **(Da672)** On May 29, 2019, the Trial Court entered an Order awarding Plaintiff $32,966.96 in fees resulting from Defendant's continued violations. **(Da971-972)**

Defendant's Application before the Lakewood Township Zoning Board of Adjustment ("ZBA") Pending the 2017 Appeal and Plaintiff's Prerogative Writ Action

13. On August 23, 2018, while the 2017 Appeal was pending, Defendant filed an application with the ZBA seeking an interpretation of certain historic land records related to the Subject Property (a 1972 Variance Application, Site Plan and Resolution) pursuant to N.J.S.A. 40:55D-70, and also requesting a certification of a pre-existing nonconforming use under N.J.S.A.

Motion to Compel Return of Monies
6T= January 28, 2020 Trial Transcript
7T= January 29, 2020 Trial Transcript
8T= January 30, 2020 Trial Transcript
9T= February 3, 2020 Trial Transcript
10T= February 4, 2020 Trial Transcript
11T= February 5, 2020 Trial Transcript
12T= July 27, 2021 Trial Transcript
13T= July 28, 2021 Trial Transcript
14T= August 2, 2021 Trial Transcript

40:55D-68 ("ZBA Application").[4] **(Db44-45)** On October 9, 2018 the Congregation filed an objection to the ZBA Application. On October 15, 2018, the parties appeared before the ZBA and presented their respective arguments.[5] Ignoring the advice of its counsel, and over the objections of the Congregation and with no proofs supporting Defendant's application, on October 15, 2019, the ZBA passed a motion that the Congregation's use of the Sixth Street Lot for parking was a non-conforming use. **(Da897)**

14. On November 1, 2018, the Congregation filed its Verified Complaint in Lieu of Prerogative Writs and an Order to Show Cause against the Township and ZBA along with its brief in support thereof, appealing the October 15, 2018 determination of the ZBA and an October 25, 2018 Notice of Violation issued by the Township ("PW Action"). **(Pa1)** The ZBA's Resolution #1040A on the School's Application was adopted on November 19, 2018 ("ZBA Resolution"). **(Da662-667)** After a hearing and full briefing by the parties in the PW Action, on December 1, 2022 the Honorable Marlene Lynch Ford, A.J.S.C.

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[4] Defendant had filed a prior application with the ZBA in November of 2017 requesting an interpretation of a prior owner's1972 Application for variance relief and other related documents pursuant to N.J.S.A. 4055D-70. The ZBA denied this application whereupon Defendant filed an Action in Lieu of Prerogative Writ on February 21, 2018. The Defendant's Action in Lieu of Prerogative Writ was ultimately dismissed on August 17, 2018. **(Da257-258)**

[5] Despite Defendant's representation to the contrary, neither party presented witnesses during the October 15, 2018 ZBA hearing. **(Db45 and Da894-899)**

issued an opinion and Order entering judgment in favor of Plaintiff, rendering the ZBA's Resolution null and void and granting other relief set forth therein. Defendant has filed a separate appeal from the December 1, 2022 Order. **(Db46 FN4)**

Plaintiff's Third Post-Judgment Enforcement Action for Defendant's Violations

15. Prior to the ZBA's November 19, 2018 adoption of the ZBA Resolution and immediately following the October 15, 2018 hearing on Defendant's Application, Defendant contacted the Township of Lakewood and applied for a fence permit. **(Da649-653)** Upon receipt of Defendant's request for a fence permit, Plaintiff notified Defendant that should it attempt to erect any barrier interfering with the Congregation's easement rights and in violation of the 2017 Judgment, it would file an emergent application for relief. **(Da654)** The Township attorney authorized the Township to grant Defendant its fence permit, "with the understanding that any building is at risk." **(Da653)** Undeterred, Defendant proceeded with its efforts to install a fence across the Sixth Street Lot in direct contravention of the 2017 Judgment. **(Da645-659)** Then, on October 19, 2018, Plaintiff filed a third OTSC with the Trial Court seeking injunctive and monetary relief resulting from Defendant's violations of the 2017 Judgment ("Third OTSC"). **(Da643-659)**

16. A preliminary hearing on Plaintiff's Third OTSC for Defendant's installation of a fence across the Sixth Street Lot in violation of the 2017 Judgment was held on October 19, 2018. On that date, the Trial Court found Defendant to be in violation of the 2017 Judgment and ordered immediate removal of the fence. **(2T)** The Trial Court admonished Defendant for its most recent attempt to avoid the injunctive relief previously entered against Defendant. **(2T 36:18-47:18)**

17. On November 19, 2018, Defendant filed opposition to Plaintiff's OTSC. **(Da660-671)** The final hearing on the OTSC continued December 4, 2018. **(3T 101:23-113:1)** On February 21, 2019, the Trial Court entered an Order directing Defendant to immediately reimburse Plaintiff $550.00 (the cost for removing the fence improperly erected) and restraining Defendant from additional interference pending the resolution of the 2017 Appeal or further order of the Trial Court. **(Da965-966)** An award of attorneys' fees was also granted. Plaintiff was directed to submit and subsequently filed an affidavit of services. **(Da686-689)** On May 29, 2019, the Trial Court entered an Order granting Plaintiff's fee application in the amount of $11,257.50. **(Da969)**

Appellate Division Remand for Further Proceedings

18. Following full briefing and oral argument on the 2017 Appeal, the Appellate Division rendered its opinion on June 25, 2019, reversing and

vacating all "orders under review" and remanding the case for further proceedings "to determine what [property right] interest was created, its scope, and whether it remains in effect." **(Da751)** The opinion also stated:

> We conclude that there remain issues of material fact as to whether an easement was created by the 1963 agreement, and if an easement was established, there remain issues of material fact as to whether the easement is perpetual. Finally, even if a perpetual easement had been established, there remain issues of material fact as to whether the easement was subsequently terminated.

The Appellate Division explained further that "the surrounding circumstances, including the physical conditions and character are to be considered" on remand:

> Questions concerning the extent of the rights conveyed by an easement require a determination of the intent of the parties as expressed through the instrument creating the easement, read as a whole, and in light of the surrounding circumstances.

(Da751-763)

19. The Appellate Division did not order a new trial. Rather, it remanded the matter for "further proceedings". Additionally, the Appellate Division did not direct that a new judge be assigned to preside over the remand proceedings. **(Da776-780)**

Defendant's Motion to Disqualify Trial Judge

20. On July 11, 2019, Defendant filed its Motion to Disqualify The Honorable Frances Hodgson, P.J.Ch. from presiding over the remand proceedings claiming that since Judge Hodgson made credibility determinations

during prior proceedings, he could not be impartial during the remand proceeding. **(Da764-813)** On July 24, 2019, Plaintiff filed opposition to Defendant's Motion to Disqualify. On August 26, 2019, the Trial Court heard arguments from counsel on Defendant's Motion to Disqualify. **(4T)**

21. The Trial Court rejected the Defendant's arguments noting:

> Defendant…omits the remainder of the rule which clarifies the recusal as not warranted when the Judge's opinion was made during the course of proceedings in the pending action. In other words, 1:12-1(d) only applies if [the] Court gave some sort of opinion outside of the confines of the normal proceedings.

(4T 11:14-23) The Trial Court concluded that:

> [It] has not formed any bias or prejudice against any of the parties in making determinations of what evidence to rely on based on testimony [p]resented before it. The Court [made] determinations based on that testimony. And the Court is satisfied that there is no bias or prejudice as a result of those rulings.

(4T 14:20-25) The Trial Court denied the Defendant's Motion to Disqualify by Order on August 26, 2019. **(Da974)**

22. On December 24, 2019, Defendant filed its Motion for Reconsideration of the Trial Court's Order denying Defendant's Motion to Disqualify. **(Da846-870)** On January 2, 2020, Plaintiff filed a certification in opposition to Defendant's Motion for Reconsideration. **(Da871-890)** On January 17, 2020, the Trial Court heard oral argument and denied Defendant's Motion for Reconsideration. **(5T and Da891-892)**

Case Management Conferences on Remand Proceedings

23. On June 26, 2019, counsel for Plaintiff and Defendant appeared before the Trial Court for a Case Management Conference at which time the parties agreed to maintain the status quo until resolution of the remanded matters. **(Da837)** On July 15, 2019, the Trial Court entered a Case Management Order, in part, memorializing the parties' agreement to maintain the status quo. **(Da845)**

24. On September 23, 2019, the parties appeared before the Trial Court for another Case Management Conference regarding trial of the remanded issues. **(Da886-890)** The parties and Trial Court conferred and agreed to bifurcate the remand proceedings. At that time, the Trial Court stated:

> [W]hat has [been] suggested is that we try as the first part of this case really the issues that the Court decided on summary judgment. Those issues including essentially the nature of the property rights that involve the Sixth, primarily the Sixth Street parking area.
>
> I think that necessarily in order for me to decide these issues, or given the ambiguity I'm going to require to hear testimony as to the behavior of the parties at or about the time that these property rights were created, or the purported property rights were created…
>
> But in any event, the Court I think is necessarily going to be required to hear how the parties behaved afterwards, which include the use of that property, the use of the parking area.
>
> * * *
>
> And I'll hear evidence as to those things, as to the creation of those property rights, the behavior of the parties at or about the time and

> afterwards to the extent that they will impact on this Court's ability to decide on what ambiguities existed and to try to address those ambiguities.

(Da888 8:24-10:9) Any claims regarding monetary damages and other issues not resolved in the first part, were to be tried if necessary. Defendant agreed to how the bifurcated remand proceedings would proceed. **(Da890)**

Defendant's Motion for Monies Paid

25. On December 24, 2019, Defendant filed its Motion to Compel return of the monies paid by Defendant to Plaintiff pursuant to the Trial Court's Orders entered on June 27, 2017; March 6, 2018; and March 26, 2018 (although the March 26, 2018 Order was admittedly not appealed). **(Da816-834).** On January 2, 2020, Plaintiff filed its opposition to Defendant's Motion to Compel return of the monies paid. **(Da835-838)**

26. A hearing on Defendant's Motion to Compel return of the monies paid was held before the Trial Court on January 17, 2020, at which time a decision was reserved **(5T 34:7-44:13)**. On January 28, 2020, the Trial Court provided its oral opinion on Defendant's Motion to Compel stating, in part, that Defendant did not argue in its appeal of the violation orders that the orders were the result of an abuse of discretion. **(6T 71:5-72:10)** The Trial Court concluded that since Defendant did not specifically challenge the legality of the post-trial enforcement proceedings coupled with the fact there was no stay in place

pending Defendant's 2017 Appeal, the Appellate Division did not intend to vacate the enforcement proceedings. **(6T 70:19-72:25)**. On February 5, 2020, the Trial Court entered an Order denying Defendant's Motion to Compel the return of monies paid. **(Da976)**

Congregation's Motion in Limine

27. On January 23, 2020, Plaintiff filed a Motion in Limine to exclude the transcript of the October 15, 2018 Lakewood ZBA hearing, minutes of the ZBA hearing, and the ZBA Resolution (collectively "ZBA Record") from being admitted as evidence by Defendant in the remand proceedings. The Trial Court heard arguments regarding the admissibility of the ZBA Record at the commencement of the trial on January 28, 2020 finding that the ZBA Record was not relevant to a determination of the issues on remand as outlined by the Appellate Division. **(6T)** The Trial Court also ruled that the statements made by members of the ZBA during the ZBA Proceedings were inadmissible hearsay but did not bar Defendant from calling those members to testify during the remand proceedings. **(6T 65:11-70:18)** "I'm more concerned about the behavior of the parties and the surrounding circumstances of the behavior of the parties to the contract and how they behaved." (**6T 36:1-5**) "The Appellate Division […] charged this Court with trying to figure out what the intent of the parties was in 1963. As part of that, the Court is allowed to look at surrounding

circumstances…So, the question is the parties' intent in 1963." **(6T 55:18-23)**

Denial of Plaintiff's Application to rely upon Trial Transcripts from 2017 Trial during Remand Proceedings

28. In its pre-trial memorandum filed with the Trial Court, Plaintiff requested the parties be able to rely upon the transcripts of the trial testimony of witnesses who testified during the 2017 trial. The Trial Court denied this application and stated it was going to require that all witnesses be recalled if the parties wished their testimony to be heard, further clarifying "I'm satisfied that [the remand proceeding] is a new hearing." **(6T 65:6-10)**

Trial on Remand

29. The trial on remand began on January 28, 2020, and concluded on August 2, 2021. Both parties recalled witnesses who testified during the 2017 Trial, called new witnesses, and submitted documentary evidence into the record. Post-trial briefs were submitted by the parties. **(6T-14T)** On March 29, 2022, the Trial Court found the Hebrew Day School had granted Plaintiff an enforceable easement which had not been waived, abandoned or otherwise terminated by writing that:

> The threshold issue before the Court is the nature of the rights conveyed by the 1963 Agreement. With the benefit of the evidence adduced at trial and in consideration of the surrounding circumstances, this Court finds that the parties intended for the written Agreement to create an easement permitting Plaintiff to park on the 6th Street Lot as long as the synagogue is in operation and further, the parties intended an easement permitting Plaintiff access

to Defendant's boiler room as long as it has an interest in the personalty located on the premises.

* * *

[I]t is this Court's conclusion that the parties intended the 1963 Agreement to create an easement for Plaintiff to have parking privileges for as long as the synagogue is operating on the site. Similarly, the parties intended an easement as to the Defendant's boiler room for HVAC. The Court comes to this conclusion after examining the plain language of the instrument and examining surrounding circumstances. Those circumstances include themes within the Agreement that demonstrate an intent that the synagogue remain independent and operate indefinitely. Other circumstances include an examination of the physical plan referenced in the Agreement and the concomitant needs for the synagogue's successful operation. Finally, the Court considered the conduct of the parties after executing the Agreement and later after the Agreement was recorded.

* * *

Defendant contends that evidence of Plaintiff's abandonment can be found in the [Hebrew Day School]'s 1972 site plan…Defendant asserts that the omission of the Sixth Street lot as available parking is proof that neither party used the Sixth Street lot for parking at the time…

This Court is not persuaded that this evidence constitutes evidence of either abandonment or supports Defendant's argument that there was never an easement for parking on Sixth Street.

* * *

Lastly, Defendant has asserted that Plaintiff has unlawfully expanded its easement rights by conducted more services since 1963…The evidence showed that the school did not need to make use of the Sixth Street lot for parking—the evidence showed that the buses and parents were able to drop the children at the curb on Sixth Street as well as Fifth…Based on the totality of the evidence,

> this Court finds that the parking rights were not limited to one morning service. The parties surely intended for the synagogue to thrive and recognized that the number and hours of the services would change and increase. It is the Court's conclusion that in those limited times when the synagogue and the school's use of the Sixth Street lot is conflicted, the synagogue would receive priority for parking.
>
> * * *
>
> In conclusion, this Court has found from the credible evidence adduced at trial that the 1963 Agreement constitutes an express easement that conveyed parking rights to Plaintiff which permitted them to park on lots located on both the Fifth Street and Sixth Street lots and access the Sixth Street boiler room to maintain its HVAC; and further, those rights were intended to run with the land and continue until such time as there is no longer a synagogue that maintains Orthodox Jewish [Tenets] on the location; and finally, the easement was not extinguished or abandoned.

(Da980-1003). The Trial Court entered an Order on the same date memorializing its written opinion. **(Da978-979)**

30. On April 26, 2022, the Trial Court entered its First Amended Order expanding the March 29, 2022 Order to incorporate by reference prior findings consistent with the Trial Court's findings following the trial on remand, as well as outlining other specific relief omitted from the March 29, 2022 Order. **(Da1004-1005)**

31. On May 13, 2022, Defendant filed its Notice of Appeal.

COUNTERSTATEMENT OF FACTS

Conveyance of Land

1. The Congregation is a non-profit religious organization that owns and operates a synagogue located at Lot 8, Block 69, commonly known as 590 Madison Avenue, in Lakewood, New Jersey (the "Congregation's Property"). **(Da123-143)**

2. Defendant is a religious organization with a principal place of business located at the Subject Property, adjacent to the Congregation's Property. Id.

3. Prior to Defendant's purchasing the Subject Property in 2010, the Subject Property was owned by the Hebrew Day School. Id.

4. Prior to 1963, the Hebrew Day School owned both the Subject Property and the Congregation's Property and conducted Jewish religious services in the school operated on the Subject Property. Id.

5. Prior to 1963, the Congregation operated a synagogue, off Ridge Avenue on East Fourth Street in the Township of Lakewood ("Fourth Street Synagogue"), east of the Congregation's Property. **(7T 20:2-21:25)**

6. Prior to 1963, Rabbi Levovitz was the principal of the Hebrew Day School and the Rabbi of the Fourth Street Synagogue. **Id., at 35:10-16; 36:3-20**.

7. Prior to 1963, Rabbi Levovitz and members of the Fourth Street Congregation endeavored to build a new Orthodox Jewish synagogue on the corner of Sixth Street and Madison Avenue, property then owned by the Hebrew Day School. **Id., at 33:18-41:6.**

8. On December 31, 1962, the Hebrew Day School deeded a portion of its property to the Congregation. **(Da123-143)**

Conveyance of the Easement and Construction of Synagogue

9. Pursuant to a written agreement dated January 7, 1963 (the "1963 Agreement"), the Hebrew Day School agreed to subdivide Block 69 described in the 1963 Agreement as "the southwest corner of Sixth Street and Madison Avenue" (what would later become Block 69, Lot 8) and convey that property on the condition that the Congregation erect the synagogue thereon. **(Da13-18**)

10. In exchange for the Congregation's promise to construct the synagogue in accordance with plans approved by the Hebrew Day School which plans provided no onsite parking, the Hebrew Day School granted the Congregation an easement to utilize the Subject Property "for parking purposes the vacant lands it owns on Madison Avenue [Fifth Street Lot] and also on Sixth Street [Sixth Street Lot] and to permit use of lands on Sixth Street for boiler room use and for a water cooling tower." **(Da13-18)** The 1963 Agreement further provides:

> [U]pon accepting the deed to the aforesaid tract of land described…[the Congregation] will undertake to enter into a contract to erect a sanctuary, lounge, daily chapel, social hall with stage, Rabbi's study, offices, library, board room, bride's preparation and powder rooms, kitchens and related rooms and facilities on the said lands and premises in accordance with plans [approved by the Hebrew Day School]…

(Da13-18)

11. The 1963 Agreement also provides "[i]t is further understood and agreed that the said New Congregation Sons of Israel sanctuary shall perpetually be maintained in accordance with Orthodox Jewish tenets and not otherwise." **(Da13-18)**

12. The 1963 Agreement also provides once the Congregation completed construction of the synagogue, the Hebrew Day School would cease conducting religious services at its school. **(Da13-18)**

13. The 1963 Agreement was executed by authorized representatives of Plaintiff and the Hebrew Day School and acknowledged by witnesses. **(Da13-18)**

14. In reliance upon and in accordance with the 1963 Agreement, the Congregation constructed the synagogue on the corner of Sixth Street and Madison Avenue with no onsite parking. **(Da123-143 and 7T 22:6-9; 33:16-17; 36:21-23)**

Plaintiff's Use of Subject Property Following Construction Pursuant to Easement for Parking and Boiler Room

15. The main entrance of the Congregation is located on the Sixth Street Lot allowing access to the main sanctuary of the synagogue. **(7T 43:10-12)** From the time the Congregation opened in the early 1960s to present, the Sixth Street Lot has been utilized for parking by members of the Congregation to attend services in the synagogue. **(7T 46:7-47:24; 8T; 13T 134:22-151:23; 14T)**

16. Parking on the Sixth Street Lot was so busy on certain holidays there was a parking attendant in place to make sure all the congregants had a place to park. **(7T 68:5-12)** During certain holidays such as Yom Kippur and Rosh Hashanah, both the Fifth Street and the Sixth Street Lots were full of vehicles belonging to members of the Congregation. **Id., at 83:13-25.**

17. From the time the Congregation opened in the early 1960s, the lower entrance to the synagogue located on the Fifth Street Lot was utilized by the members of the Congregation mainly when there were events held in the synagogue's auditorium "because they could go in straight into the auditorium [and they] don't have to go up the steps." **Id., at 45:13-46:7.**

18. In furtherance of the 1963 Agreement, the Congregation also connected its HVAC system ("Congregation's HVAC system") to the boiler room located on the Subject Property now owned by Defendant. **(Da123-143 and Da948)**

19. Plaintiff's continued utilization of the Subject Property was consistent with and fully authorized by easement rights granted in the 1963 Agreement.

1972 Addition to Hebrew Day School

20. In 1972, the Hebrew Day School filed a variance application ("1972 Application") for the construction of an addition to its school extending over a portion of its Fifth Street Lot. **(Da926)** The 1972 Application was filed to permit the Hebrew Day School to "[c]onstruct an addition to an existing school with insufficient parking, insufficient side lines and exceeding the maximum lot coverage." Id. There is no reference to the number or location of parking areas on the Subject Property in the 1972 Application or the 1972 site plan ("1972 Site Plan") submitted in support of the 1972 Application. **(Da934)**

21. There is no reference in the Planning Board resolution ("1972 Resolution") granting the 1972 Application as to where parking is permitted or prohibited on the Subject Property. The only reference to parking in the 1972 Resolution granting the variance is as follows:

> [T]he applicant is unable to secure any additional lands surrounding its present location and although evidence presented indicates parking provisions to be less than those required pursuant to the existing ordinance, the applicant will have the benefit of parking facilities on adjoining properties owned by the Congregation Sons of Israel should additional parking facilities be required.

Id. **(Da931-933)**

22. The 1972 Application, 1972 Resolution, and supporting 1972 Site Plan are devoid of any reference to permitted or prohibited parking areas on the Subject Property owned by Defendant's predecessor in title. **(13T 60:7-61:24)**

23. The addition to the Hebrew Day School permitted under the 1972 Resolution did not affect the Congregation's utilization of the Fifth Street or Sixth Street Lots for parking. Id.[6]

24. According to minutes for the January 15, 1974 meeting of the Lakewood Township Planning Board, Shepherd Gerszberg, attorney for the owners of the property now owned by Defendant, appeared in support of the Hebrew Day School's 1972 Application and explained that "Parcels 3A and 3B conveyed to the Congregation Sons of Israel [now designated as Block 69, Lot 8] . . . both served the same community; parking facilities for both institutions," explicitly acknowledging that the Fifth Street and Sixth Street Lots provided for parking for both the Hebrew Day School and the Congregation. **(Da903)**

25. Following construction of the addition, parking on the Fifth and Sixth Street Lots by members of the Congregation continued without interference by the Hebrew Day School through the 1970s. In furtherance of the grant of

[6] The addition to the Hebrew Day School on the Fifth Street Lot approved by the 1972 Resolution encroaches on the Plaintiff's Property. The Congregation did not object to this encroachment given its easement rights over the Subject Property. **(Da130)**

easement, throughout the 1970s the Fifth Street Lot was generally used as an overflow lot for the Congregants when the Sixth Street Lot was full. (**13T 138:11-139:6; 140:24-141:23; 143:7-143:35; 149:23-150:2**)

Facts Established at Trial Regarding Continued Use of Easement Rights Without Interference from 1963 through 2010

Parking on Fifth Street and Sixth Street Lots

26. Plaintiff called several witnesses having specific and detailed recollections of parking on the Sixth Street Lot from the time the Congregation opened its doors in 1963 through the present, and witnesses who testified as to the impact of the 1972 addition to the Hebrew Day School and interpretations as to the 1972 Site Plan, a site plan from 1993 and a survey from 2008. **(6T-8T; 13T-14T)**

27. The following facts were established in Plaintiff's case-in-chief by the uncontroverted testimony of Janet Zagorin, a life-long member of the Congregation and daughter of the synagogue's founding President: The Sixth Street Lot has always been used for parking since the Congregation opened in 1963 to present, as it is closest to the entrance to the main synagogue. The Fifth Street Lot was used for activities and events in the auditorium located off the Fifth Street Lot or when the Sixth Street Lot was full during holidays. Additionally, Ms. Zagorin provided credible and detailed background of the circumstances surrounding the Hebrew Day School's deeding of its property to

the Congregation and the 1963 Agreement wherein the Hebrew Day School granted the Congregation easement rights in the Subject Property. **(7T)**

28. Oscar Amanik established that parking on the Sixth Street Lot continued during the 1970s through the 2000s. Mr. Amanik specifically recalled his parking on the Sixth Street Lot during the Yom Kippur War in 1973. **(13T 138:11-139:6)** Mr. Amanik also testified he drove his father to daily morning services throughout the 1990s and parked in the Sixth Street Lot. Id., at 140:5-17. Mr. Amanik recalls his father parking on the Sixth Street Lot, relaying the story of an incident when his father had a diabetic episode and drove straight from the Sixth Street Lot, across Sixth Street and into a home across from the Congregation. Id., at 141:13-24.

29. Harrison Pfeffer, a member of the Congregation and former student of the Hebrew Day School, testified the Congregation utilized the Sixth Street Lot for parking from the mid-1990s while he attended school at the Hebrew Day School. Mr. Pfeffer specifically recalled that when dropped off for an early morning program at the Congregation before school, the Sixth Street Lot was filled with cars belonging to congregants attending morning services at the Congregation. Mr. Pfeffer testified the Sixth Street Lot has always been used for parking by the Congregation as far back as he could remember. **(14T 23:7-24:15)** Mr. Pfeffer also testified that during 1990 through1993 when he attended

the pre-school program at Hebrew Day School, he was picked up at the Sixth Street Lot. **(14T 13:2-14:2)** However, the undisputed facts established that pick up would have been after Plaintiff's morning services were over and before evening services began. Additionally, Mr. Pfeffer testified that when he attended the primary school from 1993 through 2002, he was nearly always dropped off and picked up at the Fifth Street Lot and was only picked up at the Sixth Street Lot on "a couple of occasions." **(14T 14:6-16:7; 17:6-19:3)**

30. Plaintiff established that since 1993 the Congregation has paid the bills associated with lighting the Fifth Street and Sixth Street Lots and for the snow removal on the Subject Property until buying its own plow, since which time the Congregation has been performing the snow removal. These facts were established through the uncontroverted testimony of Rabbi Tendler. **(8T 5:3-7:3)**

31. The testimony of Township of Lakewood's former attorney, Jan Wouters, and current engineer, John Staiger, established the curb cut located on the Congregation's property utilized to access the Sixth Street Lot is legal, safe and has been present since the early 1990s. Plaintiff's expert, John Rea, also confirmed the curb cut is present in the 1993 Site Plan. **(Da916 and 13T 63:6-15, 77:22-106:3-111:20 and 121:4-130:25)** Rea testified that in the October 2008 survey ("2008 Survey") there is a break in the sidewalk on the plan where

the curb cut is located on Sixth Street. **(Da951 and 13T 77:22-83:24)**

32. In direct contradiction to the sworn testimony of the Township of Lakewood's attorney and engineer and Plaintiff's expert, one of Defendant's experts, Alexander Litwornia, testified unconvincingly and incredibly that as of 2012, there was no legal curb cut on the Sixth Street Lot and no such curb cut was present in the 1993 Site Plan. **(9T 68:20-69:12)** Defendant's second expert, Andrew Thomas, testified there was nothing on the 1972 Site Plan explicitly permitting parking on the Sixth Street Lot but admitted that the absence of the word "parking" on a site plan "doesn't meant it's specifically excluded." **(11T 71:16-20)**

33. Likewise, Defendant's fact witnesses lacked credibility and failed to provide any relevant information as to the circumstances surrounding the 1963 grant of easement rights from the Hebrew Day School to the Congregation or the Congregation's use of the Subject Property in accordance with those rights. Defendant called four fact witnesses who unconvincingly claimed they "never" saw parking on the Sixth Street Lot. **(12 T and 13T)**

34. Defendant's first fact witness, Abraham Bursztyn, an employee of Defendant and son of the operator, claims that when his family moved across the street from the Congregation in the 1970s, he used to stare out his window onto the Sixth Street Lot between 6:30 a.m. and 8:55 a.m. before leaving for

school. Bursztyn claimed that from 1978 to 1985 beginning when he was five (5) years old until he was twelve (12) years old he "never" saw any vehicles in the Sixth Street Lot. Bursztyn alleged that the Congregation only began to utilize the Sixth Street Lot for parking after Defendant purchased the Subject Property in 2010, contradicting the credible and detailed testimony of Zagorin, Amanik, Pfeffer and Tendler. Bursztyn also claims that from the time he returned to Lakewood in 1995 after spending five years in upstate New York, he never saw any cars parked on the Sixth Street Lot – again contradicting the detailed recollections of the Congregation's fact witnesses. **(12T 4:12-21:8, 26:9-36:2)**

35. Defendant's second fact witness, Chaim Abadi, testified he attended the Hebrew Day School from 1963 through 1969 and arrived at school between 8:10 a.m. and 8:30 a.m. and he never saw cars parked in the Sixth Street Lot. **(12T 58:13-19)** However, as Zagorin and Tendler testified, during those years, morning services began at 7:00 a.m. and would have been over by the time Abadi arrived at school. **(8T 106:16-20 and 107:19-108:2)** Abadi admitted that after 1969, he generally was not in the area of the Congregation or the Sixth Street Lot and was at the school "infrequently", providing no relevant or credible evidence as to the use of the Sixth Street Lot by the Congregation from 1969 to present. **(12T 69:5-77:14)**

36. Ezra Goldberg, Defendant's third fact witness, did not move to

Lakewood until 1980 or 1981 when he was nine (9) or ten (10) years old, and attended the Hebrew Day School from Third to Eighth Grades from 1980 through 1985. Goldberg testified he did not recall any cars parked in the Sixth Street Lot when he arrived for school around 8:45. **(12T 84:17-25)** Again, there was only one morning service at Plaintiff's synagogue during this period that began at 7:00 a.m. and would have concluded by the time Goldberg arrived for school. Thus, this testimony regarding the Subject Property was wholly irrelevant.

37. Defendant's final fact witness, Abraham Halberstam, did not move to Lakewood until 1988 when he was in his 20s and testified he had "no reason to believe" cars parked in the Sixth Street Lot. **(12T 5:15-22 and 12:12-20)**

Congregation's HVAC System Connected to Boiler Room located on Subject Property

38. The Congregation's HVAC system was still connected to the boiler room located on the Subject Property throughout the 1980s. In 1984 the Congregation at its own cost paid for a complete modernization of the heating and cooling system located on the Subject Property servicing both the Hebrew Day School and the Congregation. **(Da129 and Da948)**

39. On August 2, 2021, the parties stipulated to the following facts regarding Plaintiff's HVAC system connection to the boiler room located on the Subject Property:

a. The heating supply system located on the property owned by the Defendant that was present in April 2013 when Henry Lindner [a plumber] inspected it was connected to the boiler located on the property owned by the Plaintiff.

b. The heating supply located on the property owned by the Defendant that was present in April 2013 when Henry Lindner inspected it was connected to the boiler located on the property owned by the Plaintiff since before 1984 when Henry Lindner assisted in the installation of the boiler.

(Da948)

Curb Cut on Congregation's Property Accessing the Sixth Street Lot

40. Plaintiff established that since construction of the Congregation in 1963 there was an "opening in the sidewalk" along the Sixth Street Lot allowing congregants to enter the Sixth Street Lot. **(7T 47:14-23)** The curb cut located on the Congregation's property accessing the Sixth Street Lot is legal and safe and appears on aerial photos as far back as the early 1990s.[7] **(Da919; 13T 106:3-111:20; 121:4-131:25)** The curb cut was also present on a site plan prepared in 1993. **(Da 916; 13T 63:6-15)**

Congregation's Maintenance of Fifth and Sixth Street Lots

41. The Congregation has paid the electric bills related to the flood

[7] Defendant mistakenly represents to this Court that Rabbi Tendler concedes the curb cut on Plaintiff's Property entering the Sixth Street Lot was not present until 2013 **(Db56).** ***Rabbi Tendler never made such a concession***. In fact, Rabbi Tendler, the Lakewood Township attorney, and the Township engineer all testified the curb cut in question was present as far back as 1993 and there was only a repair to the curb cut in 2013. **8T 34:16-35:8; 13T 107:22-110:24; 122:10-125:4.**

lights located on the Fifth Street and Sixth Street Lots since at least the early 1990s to present. **(8T 5:3-6:7)** Additionally, the Congregation has paid for and arranged for snow removal from the Fifth Street and Sixth Street Lots since at least the early 1990s to present. Id., at 6:9-7:3.

Morning Prayer Schedule at Congregation

42. Prior to Rabbi Tendler becoming the Rabbi of Plaintiff in the early 1990s, there was a single morning prayer service that started around 7:00 a.m. This service was conducted in the main sanctuary located closest to the entrance by the Sixth Street Lot. Between 2008 and 2009, two additional services were added: a 7:50 a.m. service (conducted in the secondary sanctuary located closer to the Fifth Street Lot entrance) and an 8:15 a.m. service (conducted in the main sanctuary). The 7:00 a.m. service is typically completed by 7:50 a.m.; the 7:50 a.m. service is typically completed by 8:45 a.m.; and the 8:15 a.m. service is typically completed before 9:15 a.m. **(8T 104:14-109:7)**

Recordation of Easement

43. On June 15, 2007 (three years before Defendant purchased the Subject Property) Plaintiff caused the 1963 Agreement to be recorded as an easement in the Ocean County Clerk's Office at Book 13677, page 1285 ("Recorded Easement") after the Congregation became concerned with certain activities regarding the Subject Property. **(Da907 and 8T 7:11-13:23)** The Trial

Court admitted the Recorded Easement into evidence over Defendant's objection determining it is further evidence of the Congregation's intention to protect its historical easement rights in the Subject Property and the Congregation did not abandon or terminate its easement rights. **(Pa2-3)**

Hebrew Day School Bankruptcy and Defendant's Purchase of Subject Property

44. In 2008, the Hebrew Day School sought protection under Chapter 11 of the Bankruptcy Code by filing a voluntary petition for relief in the United States Bankruptcy Court, District of New Jersey (the "Bankruptcy Court"). **(Da125-126)**

45. Following the auction of the Subject Property, on August 11, 2010, the Bankruptcy Court entered an Order authorizing the sale of the Subject Property from the Hebrew Day School to Defendant (the "Sale Order"). **(Da20-23)** Paragraph 3 of the Sale Order provides that the buyer, Defendant, shall take the Subject Property "subject to all liens, claims, interests, encroachments, and encumbrances" granted to and enjoyed by Plaintiff. Id. Defendant has never disputed it was aware of and took title to the Subject Property with actual knowledge of and subject to the 1963 Agreement and Recorded Easement. **(Da907)**

Defendant's Interference with the Congregation's Easement Rights After Purchasing the Subject Property

46. Sometime after Defendant purchased the Subject Property in 2010, Defendant began interfering with the parking easement enjoyed by Plaintiff over the Fifth Street and Sixth Street Lots by drilling holes in the Sixth Street Lot and installing bollards across the lot and utilizing the Sixth Street Lot for student drop off and pick up when the Fifth Street Lot had historically been utilized for such activity. **(Da123-139; Da 177 48:18-49:12; 6T and 8T)**

47. In 2012 Defendant also padlocked the access to Plaintiff's HVAC system located on the Subject Property, cut the heating pipes to the Congregation and denied the Congregation access to its system in direct contravention of the 1963 Agreement and Plaintiff's historic easement rights. **(Da123-139)**

48. Following the 2017 Judgment enjoining Defendant from permitting its students from walking through the Sixth Street Lot during the Congregation's services or otherwise interfering with Plaintiff's easement rights, the Trial Court determined Defendant repeatedly interfered with Plaintiff's right to park on the Sixth Street Lot. **(Da210-217; Da 285; Da 290-292; Da300-672; Da 842; Da965-9692T; 3T 101:23-113:1)**

STANDARD OF REVIEW

The standard of review of a trial court's factual findings is one of deference, requiring that the facts as found are supported by adequate competent evidence. While the trial judge's factual findings are considered binding on appeal, the findings must be supported by substantial and credible evidence. As articulated in Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-484 (1974),

> [The appellate division does] not disturb the factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice…and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions.

When an appellant claims that the judge erroneously granted an order for judgment, the issue for the trial judge and the appellate court is the same: could the evidence, together with legitimate inferences that can be drawn from it, sustain a judgment in favor of the party opposing the application for judgment? Dolson v. Anastasia, 55 N.J. 2, 5 (1969).

The appellate court reviews the trial court's determinations, premised on the testimony of witnesses and written evidence at a bench trial, in accordance with a deferential standard. The appellate court needs only to decide whether the findings made could reasonably have been reached on "sufficient" or

"substantial" credible evidence present in the record, considering the proofs as a whole. The court gives "due regard" to the ability of the factfinder to judge credibility. In re Adoption of Amend. To Northeast Water, 435 N.J. Super. 571, 583-584 (App. Div. 2014). Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)(quoting In re Trust Created by Agreement Dated Dec. 20, 1961, ex rel. Johnson, 194 *N.J.* 276, 284 (2008)); *accord* Rova Farms, supra, 65 N.J.at 483-484.

Questions of law are decided de novo and a trial court's interpretation of the law and the legal consequences flowing therefrom is not entitled to any special deference. Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

LEGAL ARGUMENT

I. THE PROOFS SUBMITTED BY PLAINTIFF ESTABLISH AN EXPRESS EASEMENT WAS GRANTED IN THE SUBJECT PROPERTY THAT WAS NOT WAIVED, ABANDONED OR OTHERWISE TERMINATED. ALTERNATIVELY, PLAINTIFF WAS GRANTED AN IRREVOCABLE LICENSE. (7T, 8T, 13T, 14T, Da13-35, Da123-143, Da177-209; Da213-237 Da278-418; Da517-659; Da690-693' Da900-925; Da948-952; Da958-1005)

A. The terms of the 1963 Agreement, the intent of the parties, and the surrounding circumstances support a finding the Hebrew Day School granted the Congregation an express easement in the Subject Property. (7T, 8T, 13T, 14T, Da13-35, Da123-143, Da177-209; Da213-237; Da278-418; Da517-659; Da690-693; Da900-925; Da948-952; Da958-1005)

The proofs submitted by Plaintiff during the remand proceedings establish that when the respective leaders of the Hebrew Day School and Congregation entered into the 1963 Agreement, the Hebrew Day School intended to grant Plaintiff express easement rights in the Subject Property. In furtherance of the 1963 Agreement, the property owned by the Hebrew Day School was conveyed to Plaintiff in exchange for the Congregation's obligation to construct and operate the synagogue in accordance with the tenets of Jewish Orthodox.

Defendant has not disputed that in return for Plaintiff's promise to construct the synagogue, Plaintiff was given rights over the Subject Property for parking to be utilized by the synagogue and to tie its heating system to the boiler room located on the Subject Property. Moreover, Defendant does not dispute the synagogue was constructed without any onsite parking.

While Plaintiff maintains that the 1963 Agreement is unambiguous and created an express easement, the Appellate Division found ambiguities existed and the circumstances surrounding the grant of rights from the Hebrew Day School to the Congregation must be considered on remand before the Trial Court could determine whether an easement was granted. Following the Appellate Division's decision, the Trial Court conducted a multi-day trial wherein the trier of fact considered the sworn testimony of the witnesses called by the parties and evidence admitted during the proceedings. The Trial Court ultimately determined Plaintiff met its burden and established by clear and convincing evidence it was granted an express easement in the Subject Property that was neither abandoned nor otherwise terminated.

The general rules governing easements are well-known and easily stated. The Restatement (Third of Property) provides, "[a]n easement creates a non-possessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property: Servitudes, § 1.2 (2000). New Jersey law is in accord. *See, e.g.,* Krause v. Taylor, 135 N.J. Super. 481, 484 (App. Div. 1975). ("An easement is an interest in the land of another affording a right to use the other's land"). The Appellate Division has explained an "easement appurtenant is created when the owner of one parcel of property (the servient estate)

grants rights regarding that property to the owner of an adjacent property (the dominant estate)." Rosen v. Keeler, 411 N.J. Super. 439, 450 (App. Div. 2010).

"The court's goal is to ascertain the intention of the parties to the contract as revealed by the language used taken as…in its entirety, the situation of the parties, the attendant circumstance, and the objects they were thereby striving to attain." Cruz Mendez v. ISU Insurance Services, 156 N.J. 556, 570-571 (1999). "The document, moreover, must be read as a whole without artificial emphasis on one section with a consequent disregard for others. Literalism must . . . give way to context." Schenck v. HJI Associates, 295 N.J. Super 445, 452-453 (App. Div. 1996) certif. denied, 149 N.J. 35 (1997). See also Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 339 (App. Div.), certif. denied, 188 N.J. 353 (2006).

Although no particular words are necessary to convey an easement, the language must be "certain and definite in its terms" to clearly show the intention to transfer the interest. Borough of Princeton v. Bd. Of Chosen Freeholders, 333 N.J. Super. 310, 324 (App. Div. 2000), aff'd, 169 N.J. 135 (2001); see also Hammet v. Rosensohn, 26 N.J. 415, 423 (1958). Easements may be granted or reserved pursuant to a written document allowing one party to use a certain portion of the land owned by another party for a given purpose such as access or utilities, or to perform certain acts within such property. Such agreements

typically provide for a description of not only the area affected by such easement or license, but also the extent of the access or related rights granted thereunder.

In addition to the terms of the conveyance of the property from the Hebrew Day School to the Congregation in exchange for the promise to construct a synagogue and operate it in accordance with Orthodox Jewish tenets, the 1963 Agreement specifically states that the Hebrew Day School "agrees to permit [the Congregation] to utilize for parking purposes the vacant lands [the Hebrew Day School] owns on Madison Avenue [Fifth Street Lot] and also on Sixth Street and to permit use of lands on Sixth Street for boiler room use and for a water cooling tower." **(Da13-18)**

The description of the easement is specific, and the uses provided serve and benefit the Congregation. **(Da13-18)** In accordance with the 1963 Agreement, the Hebrew Day School agreed to convey "the southwest corner of Sixth Street and Madison Avenue" to the Congregation on the condition the Congregation erect a synagogue on the granted property. **(Da13-18)** In return, the Congregation agreed to construct the synagogue complete with "a sanctuary, lounge, daily chapel, social hall with stage, Rabbi's study, office, library, board room, bride's preparation and powder rooms, kitchens and related rooms and facilities" on the deeded property. **(Da13-18)** The respective leaders of the Hebrew Day School and Congregation entered into this agreement fully aware

the property deeded to the Congregation did not have provisions of on-site parking to support the congregants during services, religious celebrations and other attendant activities to be conducted on the Congregation's Property in the areas specifically identified in the 1963 Agreement. Additionally, the Hebrew Day School did not require the Congregation to construct a boiler room to support its HVAC system on its property.

In furtherance of this intended existence, the property deeded to Plaintiff by the Hebrew Day School was conveyed in exchange for the Congregation's obligation to construct a synagogue thereon and to operate the synagogue in accordance with Orthodox Jewish tenets. In return, as specified in the 1963 Agreement, Plaintiff was granted an easement over the Subject Property for parking to be utilized by the employees, congregants and guests of the synagogue and to tie in the Congregation's HVAC system to the boiler room located on the Subject Property. **(Da13-18)** Following completion of the synagogue in 1963 and over the ensuing forty-seven years, the easement was used by members of the Congregation and their guests without incident until 2010 when Defendant purchased the Subject Property at the bankruptcy auction.

Defendant argues the 1963 Easement Agreement lacks formality and was not in recordable form when recorded in 2007. **(Db8-9; Db43)** This argument lacks foundation and was previously rejected by the Trial Court. The purpose

of any recording is to place persons on notice of issues involved in the title to real estate. Arguments as to the validity of a recording would only be relevant to claims of constructive notice, not actual notice. The 1963 Agreement was recorded in 2007, long before Defendant purchased the Subject Property in the bankruptcy sale. Most importantly, this Defendant took title to the Subject Property in 2010 with actual knowledge of the easement. Thus, Defendant's challenge to the sufficiency of the recording is moot. **(Da20-23)**

Compare the circumstances in PNC Bank v. Axeslsson, 373 N.J. Super. 186, 190 (Ch. Div. 2004), where the court held the purchaser of real property did not take title free of an unrecorded easement where it had actual knowledge of the easement. There the court found:

> This statute specifically provides, however, that the unrecorded interest is not void against a later-recorded interest taken with knowledge, actual or constructive, of the recorded interest. Accordingly, if plaintiff knew of defendant's unrecorded easement when it took its mortgage, N.J.S.A. 46:22-1 would validate the unrecorded easement against the bank.

In this case, Defendant had actual knowledge of the recorded easement before its purchase through the Bankruptcy Court which specifically provided in the notice of sale that any purchaser took title subject to liens and encumbrances. **(Da20-23)**

Regardless, the fact remains the 1963 Agreement was in recordable form. N.J.S.A. 46:14-2.1 provides the maker of an instrument made on behalf of a

corporation or other entity may appear before an officer as defined by N.J.S.A. 46:14-6.1, and the instrument may be acknowledged before an attorney at law. Here, the 1963 Agreement establishes the authority for the corporate officers of the parties to execute the agreement as the agreement was approved by the trustees of all the parties and attested to by the secretaries of each corporation. Both the Deed and the 1963 Agreement were executed by David Goldstein as the president of the Hebrew Day School, the grantor, and attested to by the secretary, Michael P. Silverman, also an attorney at law. **(Da13-18; Da166-169)**

On remand, the Appellate Division instructed the Trial Court to determine the intent of the parties in 1963 considering the surrounding circumstances. The Trial Court held a five-day trial and considered the testimony of witnesses and evidence presented. Given the clear and convincing evidence presented by the Congregation, and in accordance with the general rules of easement construction and interpretation, the Trial Court determined an easement was granted by the Hebrew Day School to the Congregation. The Trial Court's determination cannot be disturbed because its findings are well supported by substantial and credible evidence.

i. The Congregation did not terminate or abandon its easement rights in the Subject Property. (7T, 8T, 13T, 14T, Da13-35, Da123-143, Da177-209; Da213-237 Da278-418; Da517-659; Da690-693; Da900-925; Da948-952; Da958-1005)

The Defendant failed to submit any evidence to support its position the Congregation terminated or abandoned its easement rights in the Subject Property. Defendant contends the 1972 addition to the Hebrew Day School is evidence Plaintiff abandoned its easement rights in the Subject Property. However, the proofs submitted show this simply was not the case. Plaintiff continued to exercise its easement rights from the time it was granted the property interest in 1963 unabated until Defendant began interfering with these rights in 2010. Plaintiff utilized the Fifth and Sixth Street Lots for parking for nearly five (5) decades, paid (and continues to pay) for the lighting required for the parking areas, provides snow removal for the parking areas and provided for a complete modernization of the boiler room located on the Subject Property. Moreover, the 1972 addition did not interfere with Plaintiff's enjoyment of its easement rights.

"It is the exclusive right of the owner of the dominant tenement [Plaintiff] to say whether or not the servient owner [Defendant] shall be permitted to change the character and place of the servitude suffering the burden of an easement localized and defined." Ingling v. Public Service Electric & Gas Co., 10 N.J. Super. 1, 8 (App. Div. 1950). "Where the easement comes into being by way of an agreement", as is the case here, the "universally accepted principle" is that the "landowner may not, without the consent of the easement holder,

unreasonably interfere with the latter's rights or change the character of the easement so as to make the use thereof significantly more difficult or burdensome." Kline v. Bernardsville Ass'n, Inc., 267 N.J. Super. 473, 478 (App. Div. 1993). Thus, only the holder of the easement can unilaterally terminate an easement through renunciation. See Rossi v. Sierchio, 30 N.J. Super. 575, 578 (App. Div. 1954). There is no authority for the proposition the grantor/owner of property subject to an easement can simply renounce the easement.

To establish abandonment, the asserting party must present clear and convincing evidence of the intent to abandon on the part of the dominant estate. Fairclough v. Baumgartner, 8 N.J. 187, 190 (1951). This evidence must show there is action by the dominant tenant respecting the use authorized indicating an intention never to make the use again. See Leasehold Estates, Inc. v. Fulbro Holding Co., 47 N.J. Super. 534, 563 (App. Div. 1957). While abandonment is generally exhibited by intent and prolonged lack of use, a servitude benefit is extinguished by abandonment when the beneficiary relinquishes the rights created by the servitude. Restatement Third of Property, Servitudes, Section 7.10, part 1.

The Congregation presented credible and detailed evidence of its uninterrupted utilization of its easement rights in the Subject Property from the early 1960s. Defendant's own witnesses admitted at trial that the 1972 Site Plan

and related documents are not conclusive evidence Plaintiff was prohibited from parking on the Sixth Street Lot or the Congregation's easement rights in the Subject Property were terminated. **(11T 71:16-20)** Additionally, Zagorin, Amanik, Tendler, and Pfeffer each provided credible testimony Plaintiff continuously utilized the Fifth Street Lot and Sixth Street Lot for parking long after the 1972 Site Plan was approved. **(7T, 8T, 12T-14T)** The trial record is devoid of evidence suggesting this was not the case from the time the synagogue was constructed in accordance with the 1963 Agreement. Additionally, the Congregation's HVAC system remained connected to the boiler room on the Subject Property from the time the Congregation was constructed until 2012 when Defendant cut off the system. **(Da129, Da948)** Moreover, Rabbi Tendler established without contradiction that the Congregation has paid for the lighting and snow maintenance of the Fifth and Sixth Street Lots since at least 1995 when he took over as the Rabbi of the Congregation, through to the present. **(8T 5:1-6:18)** In 2007, Rabbi Tendler caused the 1963 Agreement to be recorded as an easement in attempt to protect the Congregation's historic easement rights proving unquestionably that the Congregation never terminated its easement rights. **(8T 8:19-13:25)**

Based upon the evidence presented at trial, the Trial Court correctly concluded Defendant failed to establish the 1972 Site Plan prohibited parking

on the Sixth Street Lot or the easement granted to the Congregation in the Subject Property was renounced or terminated as a result of the 1972 Site Plan approval. Moreover, the Trial Court found the testimony of the Congregation's witnesses was credible and the evidence establishes the Congregation continuously and without interruption enjoyed its easement rights in the Subject Property, including utilizing the Fifth Street and Sixth Street Lots for parking and connecting its HVAC system to the boiler room located on the Subject Property. **(Da980)** Accordingly, the Congregation never abandoned or terminated its easement rights.

ii. The easement is not perpetual and is only enforceable so long as the Congregation operates in accordance with Orthodox Jewish tenets. (Da13-18; Da751; Da980)

In its June 25, 2020 decision, the Appellate Division stated "if an easement was established, there remain issues of material fact as to whether the easement is perpetual [and] if a perpetual easement had been established, there remain issues of material fact as to whether the easement was subsequently terminated." **(Da751)** As noted by the Appellate Division, "[p]erpetual contractual performance is not favored in the law and is to be avoided unless there is a clear manifestation that the parties intended it." In re Estate of Miller, 90 N.J. 210, 218 (1982).

The Congregation never took the position the easement is perpetual, acknowledging the easement was granted in exchange for and conditioned upon the Congregation's express promise to operate the synagogue in accordance with Orthodox Jewish tenets. **(Da13-18)**

An easement may "be created for a fixed term or for the accomplishment of a specific purpose," although the "extent of the easement created by a conveyance is fixed by the conveyance." Eggleston v. Fox, 96 N.J. Super 142, 147 (App. Div. 1967). An intent for an easement to expire may be expressed by a limitation containing the words, 'so long as,' 'until' or 'during,' or a provision that upon the happening of a stated event the interest will expire. Id., at 146-147.

Paragraph 5 of the 1963 Agreement expressly requires the synagogue shall "be maintained in accordance with Orthodox Jewish tenets and not otherwise." Thus, the easement was created for the "accomplishment of a specific purpose" and the "extent of the easement was fixed by the conveyance" — the 1963 Agreement. **(Da13-18)** The parties intended that the Congregation's easement rights in the Subject Property will continue until such time as it ceases operation in accordance with Orthodox Jewish tenets. If the Congregation no longer operates in accordance with Orthodox Jewish tenets, the grant of easement rights will terminate. For example, if the Congregation sold its

property to be utilized as a fast-food restaurant, the successor in ownership would no longer have the right to park on the Fifth Street or Sixth Street Lots.

As such, the easement granted is not perpetual, but will expire should the Congregation cease operations in accordance with Orthodox Jewish tenets. However, so long as the Congregation continues to operate in accordance with Orthodox Jewish tenets, Defendant and any successors in interest are restrained from interfering with the Congregation's easement rights.

B. Alternatively, the Congregation was granted an Easement by Necessity or an Irrevocable License. (Da13-18; Da166-169; Da948, Da 980; 7T, 8T)

The Congregation steadfastly maintains the 1963 Agreement constitutes a grant of an express easement by the Hebrew Day School to the Congregation, only terminable by Plaintiff. However, assuming *arguendo* this Court was to disagree, the Court may alternatively conclude the evidence presented establishes an easement of necessity by implication or an irrevocable license was created.

i. The evidence presented at trial establishes an easement by necessity was created. (Da13-18; Da166-169; Da948; 7T; 8T)

"Easements of necessity arise by virtue of inference or implication of an intent implied from the facts surrounding the primary conveyance." Tidewater Oil Company v. Camden Securities Company, 49 N.J. Super. 155, 161 (Ch. Div. 1958). Typically, an easement by necessity arises where there was a unity of

ownership and the subsequent severance of title resulted in the grantee or grantor owning a parcel that, as a result of the conveyance, is landlocked. See Ghen v. Piasecki, 172 N.J. Super 35, 40 (App. Div. 1980).

Prior to deeding Plaintiff the property upon which the synagogue was constructed, the Hebrew Day School owned both the Subject Property and the Congregation's Property. While the Congregation's Property is not technically landlocked, it is surrounded by the Subject Property on its western and southern borders, and by public roadway on its eastern and northern borders. There is no available parking on the Congregation's Property. Given the terms of the 1963 Agreement (construction of the synagogue in return for use of the parking lots and the boiler room located on the Subject Property) and the manner in which the Congregation's Property was developed (no provisions for parking or a boiler room), an easement by necessity has clearly been established under the circumstances of this case.

In Tidewater, the plaintiff sought an easement that could not "in a strict sense, be designated as an easement of necessity in the classic sense, as plaintiff has a means of ingress to and egress from the demised lands other than that which could be afforded over the disputed lands, and since without the easements sought he would not be deprived of any access to the beneficial use of the property." Tidewater, supra, 40 N.J. Super. at 161. In finding the plaintiff

had established it did have an easement by necessity created by implication even though the property was not landlocked, the court reasoned as follows:

> The 'necessity', however, which may give rise to an easement does not necessarily connote that without an easement the dominant tenant could have no beneficial enjoyment of his lands whatsoever, and the word should be understood as meaning ***'reasonably necessary for convenient, comfortable or beneficial enjoyment.'*** Kelly v. Dunning, 43 N.J. Eq. 62, 10 A. 276 (Ch. 1887), aff'd sub nom., Dunning v. Kelly, 46 N.J. Eq. 605, 22 A. 128 (E. & A. 1890); Karason Co. v. Anglo- American Leather Co., Inc., 136 N.J. Eq. 344, 41 A.2d 895 (Ch. 1945). ***Such designation is preferable to the naked use of the word 'necessity.'***
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> ****
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> > 'that the parties to the conveyance are presumed to act with reference to the actual, visible and known condition of the properties at the time and to intend that the benefits and burdens manifestly belonging respectively to each part of the entire tract shall remain unchanged.'

Tidewater, at 161-162 (emphasis added).

In this case, the Hebrew Day School subdivided its lot and then conveyed the new lot to Plaintiff in exchange for Plaintiff's obligation to construct a synagogue. Given the "actual, visible and known conditions" of the Congregation's Property (surrounded by the Subject Property and public roadways), the parties to the 1963 Agreement understood there would be no parking or a boiler room on the Congregation's Property and, thus an easement of necessity was granted by implication from the new lot into the Subject Property.

Alternatively, if it is determined the rights conveyed by the 1963 Agreement are a "license," then it is respectfully submitted Plaintiff possesses an irrevocable license, and entry of judgment declaring that Plaintiff's license rights are irrevocable and Defendant is bound by the irrevocable rights conveyed to Plaintiff is appropriate.

ii. Should it be determined the Hebrew Day School's grant of property rights to Plaintiff is a license, the license granted to the Congregation is coupled with an interest and, therefore, is irrevocable. (Da13-18; Da166-169; Da948; 7T; 8T)

To the extent Plaintiff's rights under the 1963 Agreement are deemed to be a license, this Court can conclude sufficient evidence was presented to support a finding the license is coupled with the following interests and rights: (1) the right to continue to operate a synagogue pursuant to the Orthodox Jewish tenets; (2) the right to construct a synagogue and utilize parking on the Subject Property, and (3) the right to utilize the boiler room located on the Subject Property. The Plaintiff's license coupled with these interests and rights is irrevocable as a matter of law so long as the interests and rights continue.

A continued license coupled with an interest is irrevocable so long as such an interest endures. The adjudications sustaining the irrevocability of such licenses are usually based upon one of two theories. One is that where the licensee expends substantial sums of money in pursuance of the privilege and

such expenditures are made with the acquiescence of the licensor, the license is regarded as executed and, as such, irrevocable. The other more commonly employed theory is that in such circumstances, it would permit a fraud to be practiced on the licensee to allow the licensor to revoke, and therefore there is justification to invoke the preventive principles of equitable estoppel. Moore v. Schultz, 22 N.J. Super. 24, 29 (App. Div. 1952); Vide, Silsby v. Trotter , 29 N.J. Eq. 228, 232-233 (Ch.1878); East Jersey Iron Co. v. Wright, 32 N.J.Eq. 248 (Ch.1880); Morton Brewing Co. v. Morton, 47 N.J.Eq. 158, 163(Ch.1890); New Jersey Suburban Water Co. v. Town of Harrison, 122 N.J.L. 189, 194 (E. & A.1939). In such cases, the authority confirmed is not merely permission; it amounts to a grant or an easement, and where it is so construed it takes the qualities of a right in the land itself. 25 Am. Jur. 2d Section 129.

The Congregation's construction of a synagogue on the property conveyed to it by the Hebrew Day School, the 1984 modernization of the heating system for the benefit of Defendant and Plaintiff, Plaintiff's payment of the electric bills for lighting of and snow removal from the Fifth Street and Sixth Street Lots, and the Congregation's acquiescence in the Hebrew Day School's encroachment onto the Congregation's Property when the Hebrew Day School constructed an addition to its property in 1972, constitute substantial consideration for the rights conveyed to Plaintiff under the 1963 Agreements.

The evidence establishes this alternative as well: Plaintiff has a license coupled with an interest and that license is irrevocable. Without all the benefits and rights conveyed in the 1963 Agreement, including the parking rights, the Congregation would not have conveyed the various benefits outlined herein to Defendant. Furthermore, the Congregation certainly would not have erected a synagogue because it could not have properly and reasonably operated the synagogue and its related uses without the rights conveyed by the Hebrew Day School, nor can it continue to operate and function today without these rights.

iii. Alternatively, if the Court finds that the license is not coupled with an interest then equity dictates the Defendant is estopped from revoking the license. (Da13-18; Da166-169; Da948; 7T; 8T)

Given the significant improvements undertaken by the Congregation in reliance on the terms of the 1963 Agreement, Defendant is also equitably estopped from revoking the license. In addition to a license becoming irrevocable where the licensee expends substantial sums of monies pursuing the privilege, a license is also irrevocable if permitting revocation would allow the licensor to practice a fraud on the licensee, such as revoking a license to cut timber after the licensee has already cut the timber and prepared it for removal. Moore v. Schultz, 22 N.J.Super. 24, 31 (App. Div. 1952), aff'd o.b., 12 N.J. 329 (1953); 25 Am. Jur. 2d Easements and Licenses §122 (2004).

Thus, in the alternative, if it were to be determined an easement was not

granted or a license coupled with an interest was not conveyed, equity dictates that given the expenditures by Plaintiff in reliance of the Hebrew Day School's promises, Defendant is now estopped from revoking the license granted to Plaintiff.

II. THE TRIAL COURT DID NOT ERR IN DETERMINING DEFENDANT FAILED TO SUBMIT SUFFICIENT PROOFS PLAINTIFF IMPROPERLY EXPANDED ITS EXPRESS EASEMENT. (Da1-25; Da978-1005; 2T; 3T; 6T-8T; 13T; 14T)

Defendant suggests that even if an easement was conveyed to Plaintiff in 1963, the trial court impermissibly expanded the rights granted by the easement. **(Db63)** "In that context, it is settled that an easement created by conveyance is fixed and limited to the use and terms of the conveyance at the time of the Grant [sic]." **(Db63)** Contradicting the credible testimony of Plaintiff's fact witnesses, Defendant makes the unsubstantiated claim that it was only after Plaintiff recorded the easement in 2007 that the congregants commenced "active parking use of the Sixth Street [Lot]." **(Db64)** Defendant also falsely claims that "in recent years", the number of services and events at the synagogue had increased to three morning services, three evening services, and expanded day use and attendance." **(Db65).** While Rabbi Tendler testified that the number of morning services were expanded from one to three, fifteen (15) years ago (well before Defendant purchased the Subject Property), there is nothing in the record to support Defendant's claim that the number of evening services was increased or

"day use and attendance" has expanded. Not surprisingly, the record cited by Defendant (see **Db65 and 8T 96:18-110:25**) is devoid of any proofs supporting Defendant's unsubstantiated claims of an increase in membership of the synagogue. While Rabbi Tendler testified as to the additional morning services, there is nothing in the record cited by Defendant supporting its claim Plaintiff increased the number of evening services or the synagogue has "far more daily attendance". Additionally, as set forth in detail in Plaintiff's Counter Statement of Facts, Defendant's claim there was no curb cut until 2013 is also false. **(Db56; 8T 34:16-35:8; 13T 107:22-110:24; 122:10-125:4)** Thus, Defendant's claim Plaintiff expanded its use of the Fifth Street and Sixth Street Lots "in the early 2010s" is baseless. **(Db65)**

Moreover, the Trial Court did not grant Plaintiff "unlimited domain and entitlement. . .to have unlimited priority rights and to preclude [Defendant's] use at all on the Sixth Street [Lot]" as Defendant suggests. **(Db65)** The claim is preposterous. The Trial Court only limited Defendant's use of the Sixth Street Lot for student drop off and pick up during services at the synagogue and after ***Defendant*** following five decades of the Hebrew Day School utilizing the Fifth Street Lot as its main entrance to the school to the Sixth Street entrance. It was Defendant who began interfering with Plaintiff's historic easement rights after it purchased the Subject Property in the bankruptcy auction. The only limit of

use imposed by the Trial Court is Defendant cannot utilize the Sixth Street Lot in a manner such that children walk through the cars parked during morning services. The record is void of any claim that evening services interfere with the Defendant's use of the Sixth Street Lot since the students are generally already out of school by the time evening services begin (at sundown). The Trial Court did not restrict Defendant's use of the Fifth Street Lot in anyway except to require the removal of non-operational vehicles and other garbage interfering with both parties' ability to park in the Fifth Street Lot. **(Da207-209)** Additionally, Defendant's claim it is "left only with the obligation to own and maintain those [parking] facilities for the [Congregation's] priority use" is disingenuous since it is the Congregation providing snow removal from the Subject Property and paying for the lighting for the Fifth and Sixth Street Lots at its own expense. **(Db66 and 8T 5:3-7:3)** There is nothing in the Trial Court's ruling or other decisions suggesting the Trial Court granted Plaintiff authority to utilize the Subject Property to the exclusion of Defendant. That suggestion is particularly absurd given the facts established through both parties' witnesses. Plaintiff enjoyed its easement rights without interruption from 1963 through 2010—while the prior owner used the Fifth Street Lot on the Subject Property for staff parking and for student ingress and egress. It was only after Defendant changed its behavior that a dispute arose requiring court intervention.

"The extent of the rights conveyed rests on the intent of the parties as expressed in the language creating the easement, taking into account the surrounding circumstances." Village of Ridgewood v. Boldger Found., 104 N.J. 337, 340 (1986), citing, Caribbean House, Inc. v. N. Hudson Yacht Club, 434 N.J. Super. 220, 226 (App. Div.2013). "When no limitation is placed on the extent of the use of an easement, it may be used for all reasonable purposes." Id.

Applying the facts as determined by the trial judge, the Trial Court determined that the evidence established that Defendant did not need to utilize the Sixth Street Lot for parking and that parents and school buses were able to drop off children on the Fifth Street Lot. The Court also found that Defendant failed to demonstrate a need to utilize the Sixth Street Lot for short-term parking or that Plaintiff's use of the Sixth Street Lot conflicted with Defendant's use. **(Da1003)** Thus, Defendant's suggestion that its use of the Subject Property is being overly burdened is contradicted by the fact Defendant can continue utilizing the Fifth Street Lot for student drop off and pick up as well as staff parking. This had been the case for five decades before Defendant changed the use, interfering with Plaintiff's historic easement rights.

III. THE PARTIES STIPULATED AS TO HOW THE REMAND TRIAL WOULD PROCEED AND THE REMAND TRIAL WAS CONSISTENT WITH THE APPELLATE DIVISION'S OPINION. (Da886-890; 980-1005)

Defendant contends that the Trial Court "erroneously tried and decided the issues as a continuation of the 2017 trial and decision." **(Db66-68)** The Appellate Division remanded the within matter "for further proceedings." It did not order a new trial. Rather, it gave specific direction as to what issues had to be resolved and what facts should be considered in determining those issues. Additionally, on remand, the Trial Court denied Plaintiff's request to rely upon the prior trial testimony of the witnesses who previously testified in the 2017 trial, requiring all prior witnesses be recalled and permitting any new witnesses to be added to the extent required to establish proofs for the Trial Court's consideration of the issues to be resolved on remand. **(6T 62:5-65:10)** The Trial Court ruled, without objection from Defendant, that the Appellate Division did not order a new trial. **(6T 63:17-25)** More importantly, Defendant consented to the way the remand proceedings would be tried and never raised an objection to the manner in which the remand proceedings were conducted. **(Da890)** Finally, the Trial Court's March 29, 2022 Opinion and April 26, 2022 First Amended Order only incorporate prior factual findings and conclusions of law consistent with the determinations following the remand proceedings. As noted in the March 29, 2022 Trial Opinion, the Appellate Division did not address all of the issues tried in 2017. **(Da980)** As such, the Trial Court incorporated those prior consistent rulings in its Trial Opinion. Defendant cannot now complain about

how the proceedings were conducted after consenting to how the remand process would take place.

The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when the party urged the lower court to adopt the proposition now alleged to be error. The rule is based on considerations of fairness and preservation of the integrity of the litigation process. "Elementary justice in reviewing the action of a trial court requires that that court should not be reversed for an error committed at the instance of a party alleging it." Bahrey v. Poniatishin, 95 N.J.L. 128, 133 (E. & A. 1920). Thus, where error was advanced to secure a tactical advantage at trial, the party responsible will not be permitted to complain on appeal. "The defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought and urged, claiming it to be error and prejudicial." State v. Posntery, 19 N.J. 457, 471 (1955) see Carrino v. Novotny, 78 N.J. 355, 369 (1979) (holding that defendant who induced erroneous involuntary dismissal was bound by error and could not later contest amount of co-defendant's liability). See also Terminal Constr. Corp. v. Bergen County Hackensack River Sanitary Sewer Dist. Auth., 18 N.J. 294, 339 (1955); Spedick v. Murphy, 266 N.J. Super. 573, 593

(App. Div. 1986), *certif. denied,* (holding that appellant could not object to admission of doctors' testimony where court and counsel all agreed that doctors could testify). The rationale is not far removed from that underlying the doctrine of waiver, in that counsel has deprived the court of the opportunity to make a correct ruling and the adversary of the ability to meet the objection. See United States v. General Motors Corp., 226 F.2d 745, 750 (3d Cir. 1955); Vartenissian v. Food Haulers, Inc., 193 N.J. Super. 603, 610 (App. Div. 1984).

Defendant consented to the manner in which the remand proceedings took place and during the course of those remand proceedings never raised an objection the proceedings amounted to an impermissible continuation of the 2017 trial. Moreover, Defendant fails to cite any legal authority for its position that the way the remand proceedings took place is the basis for some sort of relief from the Appellate Division. As such, any objections raised by Defendant in this appeal as to procedure must be overruled.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO DISQUALIFY JUDGE HODGSON AND/OR ITS MOTION FOR RECONSIDERATION OF THE COURT'S DENIAL OF DEFENDANT'S MOTION TO DISQUALIFY. (Db23-33; 5T; Da764-815)

Defendant moved to disqualify Judge Hodgson from presiding over the proceedings following the 2019 remand. R. 1:12-2 provides "[a]ny party, on motion made to the judge before trial or argument and stating reasons therefore,

may seek that judge's disqualification." Rule 1:12-1 sets forth general standards for disqualifying a judge. Generally, the Rule requires disqualification if a judge has given an opinion upon a matter in question in the action that is directed primarily at statements made **outside** of the declarant's role as a judge. As set forth in State v. Medina, 349 N.J. Super. 108, 130 (App. Div. 2002)

> Rule 1:12-1(d) provides that a judge 'shall be disqualified on the court's own motion ... if the judge has given an opinion upon a matter in question in the action.' However, the Rule contains an important qualification. A judicial statement of opinion in the course of the proceeding in the case ... or in another case in which the same issue is presented [does] not require disqualification. A judge [may] continue to participate in a case when [an] opinion which he has rendered ... was expressed in the course of [the] proceedings regarding the same controversy. The rule's prohibition is directed primarily at statements made outside of the declarant's role as a judge.
>
> Apart from R. 1:12-1(d), a judge must recuse himself 'when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.' R. 1:12-1(f). However, exposure to inadmissible evidence in the course of pretrial proceedings generally does not require disqualification of the judge even where the judge is to serve as the fact- finder. 'A judge sitting as the fact-finder is certainly capable of sorting through admissible and inadmissible evidence without resultant detriment to the decision-making process. Trained judges have the ability to exclude from their consideration irrelevant or improper evidence and materials which have come to their attention.'

N.J.S.A. 2A:15-49 directs that "[n]o judge of any court shall sit on the trial or argument of any matter in controversy in a case pending in his court,

when he: ...” (c) “has given his opinion upon a matter in question in such action…” This statute specifically qualifies this basis of disqualification:

> This section shall not be construed to prevent a judge from sitting on such trial or argument because he has given his opinion in another action in which the same matter in controversy came in question or given his opinion on any question in controversy in the pending action in the course of previous proceedings therein...

The issue of when a judge should disqualify himself from hearing a matter is one which our courts have addressed on many occasions. Disposition of a motion for disqualification is entrusted to the sound discretion of the trial judge whose recusal is sought. See State v. Buckner, 437 N.J. Super. 8, 37 (App. Div. 2014). Absent a showing of bias or prejudice, the participation of a judge in previous proceedings in the case before him is not a ground for disqualification. And as is the case here, the fact a judgment resulting from previous proceedings is reversed on appeal is likewise not a sufficient ground for disqualification. See State v. Walker, 33 N.J. 580, 591 (1960).

In each case cited by the Defendant, the Appellate Division specifically directed the matters reversed and remanded for further proceedings be assigned to a new judge. **(Db30-133)** No such directive was given by the Appellate Division in the within matter and the reason is obvious - recusal is not warranted.

Any opinions and findings of the Trial Court have been made during the pre-trial, trial and post-trial proceedings and said opinions did not warrant

recusal. Defendant acknowledges recusal does not necessarily apply where a court made a ruling on a summary judgment motion or on a preliminary evidential ruling, based upon documentary evidence alone and solely legal in nature. Instead, Defendant suggests disqualification was warranted because the trial judge heard evidence and testimony and made determinations on issues that included assessments of witness credibility. In the present case, there was no erroneous exclusion of evidence bearing on any issues, nor does Defendant even suggest there was. Instead, the Appellate Division previously ruled certain inferences should not have been drawn from the affidavits submitted by the parties competing partial Summary Judgment Motions.

Moreover, the cases cited by Defendant do not support its contrived position. First, Defendant cites Johnson v. Johnson, 411 N.J. Super. 161, 174-175 (App. Div. 2009), rev. on other grounds, 204 N.J. 529 (2010) (an appeal from an arbitration award related to a child-custody and parenting-time issues). Unlike the present case, the Appellate Division remanded the matter to another Family Part judge out of concern that the judge "may be committed to his findings based on the arbitration award." Id. The Appellate Division specifically found that "[t]he Family Part judge here could not evaluate the threat of harm to the children…and could not confirm the award. He erred in doing so." The Appellate Division cited no such concern in the instant case.

Defendant also cites P.T. v. M.S., 325 N.J. Super. 193 (1999), another family law matter (parental reunification with a child). In P.T., the Appellate Division found the "judge's statements went considerably beyond what was needed or necessary to resolve the issue at hand and cast doubt upon the realistic possibility of an impartial hearing the same judge on remand." Id., at 200. Once again, the Appellate Division specifically directed that the matter be reassigned on remand. In stark contrast, the Trial Court did not make any "statements" or determinations beyond what was necessary in any of the pre-trial, trial, or post-trial proceedings, nor does the Defendant make any such claim.

While Defendant also suggests that the post-judgment imposition of sanctions by this Court warrants recusal under P.T., the Appellate Division specifically clarified that:

> in the normal course of litigation, a trial judge's findings of fact, including findings regarding the credibility of parties, and findings…***that a party has violated a court order, do not warrant reassignment.*** We find the facts and procedural history here sufficiently unique that a fresh look may benefit all parties—most of all, the child.

Id. (Emphasis added.) Again, in stark contrast to the P.T. case where the court made statements beyond what the case required and in doing so cast doubt on the court's prospects for impartiality, no such determination was made or doubt cast by the Appellate Division about the Trial Court in the June 25, 2019 appellate opinion.

Defendant next cites Leang v. Jersey City Bd. of Ed., 399 N.J. Super. 329 (App. Div. 2008), aff'd. in part, rev. in part on other grounds, 198 N.J. 557 (2009) for the position that where a judge expresses opinions on credibility issues on a summary judgment motion, the case should be heard by a different judge on remand. However, in Leang, the Appellate Division remanded and specifically directed the matter be assigned to a different judge than the one who decided the summary judgment motion. "Where a judge resolves disputed issues of fact based on opposing certifications without an evidentiary hearing and expresses opinions respecting credibility, the matter should be remanded to another judge." Id., at 380.

Unlike Leang, the Trial Court did not make credibility issues on the parties' competing affidavits submitted for their partial Summary Judgment Motions. Rather, in deciding summary judgment, the Trial Court only made legal interpretations of the 1963 Agreement. To the extent the Trial Court considered testimony during the prior trial - an appropriate proceeding to make credibility determinations - such determinations at trial do not warrant recusal or disqualification. The weighing of witness credibility Defendant suggests warrants recusal in the within matter is the testimony of witnesses offered by both parties at trial as to the usage of the Sixth Street Lot for parking and the impact by the 1972 expansion of the School on the Congregation's property

rights. Credibility determinations made when granting the Partial Summary Judgment are not at issue on appeal.

Finally, Defendant cites J.L. v J.F., 317 N.J. Super. 418, 438 (App. Div. 1999), again suggesting that recusal is required where a court has weighed the evidence or made credibility findings. The J.L. matter involved a civil action against an uncle for sexual abuse of his nieces. Once again distinguishing that case from the instant case, in J.L. the Appellate Division specifically directed the hearing on remand on discovery and tolling issues must be conducted by a different judge because the motion judge improperly made credibility determinations on summary judgment.

The cases cited by the Defendant do not support its contrived position that ***any*** credibility determinations made by a trial judge warrant disqualification on remand. Each of the Trial Court's determinations were properly made during the proceedings prior to Defendant filing its appeal. The Trial Court did not make any inappropriate credibility determinations, nor did it make its final decision without considering the evidence and testimony offered at trial and, therefore, recusal was not required or necessary. Had the Appellate Division considered the Trial Court's previous rulings as cause to reassign the remand proceedings to a new judge, it would have so directed.

Defendant failed to submit any evidence supporting a finding the Trial Court could not conduct a fair and unbiased hearing, or that it would not have been counterproductive to require a new judge to acquaint themselves with the proceeding. While there is no question judges must refrain from sitting in any causes where their objectivity and impartiality may fairly be brought into question, there must be some proof of bias or prejudice. See In re Advisory Letter No. 7-11 of Supreme Court Advisory Committee on Extrajudicial Activities, 213 N.J. 63 (2013). Even where a judge's prior comments are stern, a trial judge is not required to recuse himself if his comments do not reveal bias or prejudice. See State v. J.J., 397 N.J. Super. 91, 103 (App. Div. 2007), certify. granted, 194 N.J. 446 (2008). And in the present case, bias and prejudice are absent.

Defendant did not provide any proofs Judge Hodgson would not be able to remain objective and impartial while presiding over the remand proceedings. Thus, absent a showing of bias or prejudice, the participation of a judge in previous proceedings in the case before him is not a ground for disqualification. See State v. Walker, 33 N.J. 580, 591 (1960). Simply put, a judge is not required to recuse himself from remand proceedings because the judgment resulting from previous proceedings had been reversed on appeal. See Hundred East Credit Corp. v. Eric Shuster Corp., 212 N.J. Super 350, 358 (App. Div. 1986) (Recusal

not required where trial judge had given his opinion on fraud issue at initial trial). As previously stated, a judge may continue to participate in a case when an opinion he has rendered was expressed during the proceeding regarding the same controversy. See State v. Medina, 349 N.J. Super. 108, 129 (App. Div. 2002).

Consideration must also be given to the fact it would be counterproductive to require a new judge to acquaint himself or herself with the remanded litigation. See Graziano v. Grant, 326 N.J. Super. 328, 349 (App. Div. 1999). In Graziano, an appeal was taken from a Chancery Division action involving specific performance by a physician in a medical practice following the court's grant of summary judgment. The Appellate Division found certain questions of fact should have precluded summary judgment and therefore remanded the matter for an evidentiary hearing. Regarding the remand, the Appellate Division specifically noted that although it had authority to assign the case to a different judge, such authority should be sparingly exercised, and the case did not call for the assignment of the matter to another judge who would have to become acquainted with the matter.

The within matter was initiated over seven (7) years before the remand and has been before three (3) Chancery judges during its history. There have been multiple pre-trial motions and proceedings, a full trial, and post-trial

proceedings all before Judge Hodgson. Given the absence of a showing of bias or prejudice or any other basis for recusal, there is no question it would have been counterproductive to require a new judge to handle this matter.

Defendant failed to demonstrate any objectively reasonable basis requiring Judge Hodgson to recuse himself or be otherwise disqualified from hearing any proceedings on remand from the Appellate Division. The trial judge was not required to recuse himself from the remand proceedings merely because certain orders entered by the Trial Court had been reversed on appeal or because the Trial Court rendered a final decision following a full trial. There was no allegation of malice or ill will against the Defendant. Defendant has failed to make any showing of bias or prejudice. Finally, the Appellate Division did not make any findings warranting recusal or disqualification, and the absence of the Appellate Division requiring the case be reassigned on remand is further evidence recusal was unwarranted. Thus, denial of Defendant's Motion to Disqualify was proper and should not now be disturbed in this appeal.

Unsatisfied with the Trial Court's well-reasoned denial of Defendant's Motion to Disqualify, Defendant filed its Motion for Reconsideration. New Jersey Court Rule 4:49-2 provides, in part, that a motion for reconsideration of an order "shall state with specificity the basis on which it is made, including a statement of the matters or controlling decision which counsel believes the court

has overlooked or as to which has erred." While Defendant suggested the Trial Court denied its Motion to Disqualify on the basis the court did not make findings of credibility of the witnesses during the trial, this inaccurate and contradicted by statements made by the Trial Court when placing its opinion on the record denying Defendant's Motion to Disqualify on August 26, 2019. **(5T 3:1-17:21)**

Defendant failed to identify a single "matter or controlling decision" the Trial Court overlooked or erred when rendering its August 26, 2019 denial of Defendant's Motion to Disqualify. Rather, Defendant took statements made by Judge Hodgson out of context to persuade him he somehow erred. Additionally, Defendant failed to present any evidence of bias or prejudice. Highlighting only the Trial Court's prior unfavorable rulings, on appeal Defendant fails to identify any controlling fact or decision the Trial Court overlooked in denying its Motion to Disqualify. The Trial Court properly denied Defendant's Motion for Reconsideration of the Court's August 26, 2019 Order denying Defendant's Motion to Disqualify Judge Hodgson and the orders denying recusal should remain undisturbed.

V. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION TO COMPEL RETURN OF MONIES PAID OR BY GRANTING PLAINTIFF'S APPLICATIONS FOR SANCTIONS AND FEES FOR VIOLATIONS BY DEFENDANT OF THE 2017 JUDGMENT. (Da170; Da207;

Da210-693; Da751; Da816-Da844; Da965-967; Da969; Da976; 5T 34:4-44:13; 6T 4-76)

A. The Trial Court's Denial of Defendant's Motion to Compel Return of Monies was not an Abuse of Discretion. (Da170; Da207; Da210-603; Da751-763; Da816-Da844; Da965-967; Da969; Da976; 5T 34:7-44:11; 6T 4-76)

i. The Proofs Submitted during the 2017 Trial resulting in the $4,529.60 in Damages Awarded Remain the Same and Support the Award for Damages. (Da177-209; 6T)

Among the damages awarded in the 2017 Judgment, $4.529.60 related to Defendant's interference and resulting costs incurred related to the cutting of Plaintiff's connection to Defendant's heating system, the cost of reconnecting the system, and the costs related to removal of a barrier improperly installed by Defendant. During the 2017 trial, Plaintiff produced several witnesses who testified as to this interference and the damages incurred by Plaintiff. In response to Defendant's Motion to Compel the return of monies paid prior to the 2019 Appellate Decision, Plaintiff argued that should the Trial Court once again determine that Plaintiff was granted easement rights in the Subject Property, the proofs related to Plaintiff's damages claim will be identical to those which the Trial Court relied upon when it entered the 2017 Judgment. **(Da177-209)** The basis of the Appellate Division's 2019 reversal and remand was the Trial Court should not have resolved the issue of whether an express easement was granted on Plaintiff's Motion for Partial Summary Judgment given the ambiguities of

the 1963 Agreement. **(Da751-763)** The Appellate Division did not make any rulings as to the Trial Court's determination of damages during the 2017 Trial. As such, in response to Defendant's Motion to Compel return of the monies paid, the Trial Court affirmed the award of these damages in its First Amended Order entered on April 26, 2022 by incorporating its prior ruling related to the 2017 Judgment. **(6T 70:19-73:25; Da1004)**

Alternatively, if the Appellate Division finds the Trial Court should have taken proofs on the determination of the damages established during the 2017 trial prior to affirming those damages, then it is respectfully submitted the Trial Court's failure to compel the return of the $4,529.60 awarded following the proofs submitted during the first trial was harmless error. If the Trial Court had required the refund of these monies paid, Plaintiff would have submitted the identical proofs it had previously submitted, resulting in the identical damages being awarded following the Trial Court's April 26, 2022 First Amended Order. **(Da 1004)** If this Court determines that the Trial Court's denial of Defendant's Motion to Compel return of the monies awarded following the initial trial was not harmless error, then Plaintiff requests this Court remand the matter for the limited purposes of a proof hearing on those damages awarded in the 2017 Judgment and affirmed in the April 26, 2022 First Amended Order.

ii. The Trial Court Correctly Ruled the Appellate Division Did Not Intend to Vacate the March 6, 2018 Contempt Order. (Da751-763; Da70:19-72:25)

Defendant argues that (1) since the March 6, 2018 Contempt Order was seemingly vacated by the Appellate Division in its June 25, 2019 decision and (2) the March 26, 2018 Order (which Defendant admits was not appealed) awarded fees related to the March 6, 2018 Contempt Order, the monies paid pursuant to both March 2018 Orders should be returned. But Defendant's arguments ignore the essential truths.

The Appellate Division's decision did not eradicate Defendant's violations of Court Orders prompting the sanctions imposed by the Trial Court. The Appellate Division was completely silent as to the merits of the contempt orders other than stating at the conclusion of its opinion that "we vacate all of the other orders under review." **(Da763)** As the Trial Court explained, the Appellate Division's silence on the Trial Court's reasoning behind the entry of the contempt orders was evidence the Appellate Division did not intend to vacate those orders or reward Defendant for its failure to comply with the 2017 Judgment.

> No claims were made [by Defendant to the Appellate Division] that the Court erred procedurally or substantively as to an enforcement of its orders. To accept defendant's argument that this Court should vacate all of its enforcement actions would be the equivalent of enforcing a stay of the court action that was never applied…

* * *

> The law in New Jersey is to the contrary. It's well established that a party's obligation to perform under a trial court order is not automatically stayed by the filing of an appeal or other proceedings in the Appellate court. That's Rule 2:9-5a. A review of this Court's order enforcing litigant's rights pursuant to Rule 1:10-3 under an abuse of discretion standard, Barr v. Barr, 418 N.J. Super. 18, page 486 (App. Div. 2011). See also, Innes v. Carrascosa . . . 391 N. J. Super. 453 at page 498 (App. Div. 2007).
>
> Abuse of discretion occurs when a decision is, 'made without a rational explanation inexplicably departed from established policies, or rested on an impermissible basis.' Flagg v. Essex Prosecutor, 171 N.J. 561 at page 571 (2002). Internal citations omitted.
>
> Here, there is no claim by [Defendant] in [its] appeal that the court erred in such fashion in those enforcement proceedings, and the Appellate Division didn't even address it. It is this Court's view that the Appellate Division did not intend, therefore, to vacate the enforcement proceedings this Court entered pursuant to Rule 1:10-3 as it was not challenged specifically and does not appear to have been before the Court. I'll note that, generally, there are specific requirements to appeal those which may be taken, and it doesn't appear that they were taken, and I would also not that the final order was not vacated, that March [26th] Order.

6T 70:19-72:25.

To require a return of the monies paid pursuant the March 6, 2018 Contempt Order (or the March 26th Order that was not appealed) in the absence of any finding by the Appellate Division that the entry of said orders was an abuse of discretion, and in the absence of a stay pending Defendant's appeal, would result in a court sanctioned reward to Defendant for its repeated contempt

of the 2017 Judgment. As such, the Trial Court's denial of Defendant's Motion to Compel return of monies paid was proper and its ruling should not be disturbed.

B. The Trial Court's Orders Entered against Defendant for its Continued Violations and Installation of a Fence across the Sixth Street Lot were not an Abuse of Discretion and Cannot be Disturbed on Appeal. (Da170; Da177-209; Da295- 693; Da965-972; 1T; 2T; 3T)

As set forth in detail in Plaintiff's Counter Statement of Facts, Defendant's violations of the 2017 Judgment were repeated, intentional and exhibited a total lack of regard for the rulings of the Trial Court. Defendant is now challenging the validity of the following four (4) Orders entered by the Trial Court in 2019 finding Defendant in contempt and granting sanctions and fees following the submission of documentary evidence and the testimony of witnesses who appeared on behalf of the parties: (1) a February 21, 2019 Order directing Defendant to pay $2,500.00 in sanctions; (2) a May 29, 2019 Order awarding $32,966.96 in attorney's fees to Plaintiff related to the continued use of the Sixth Street Lot for ingress and egress of students and parents during Plaintiff's services ("Sixth Street Violations") **(1T; 3T; Da295-603, Da672; Da965; Da967)**; (3) a February 21, 2019 Order granting $2,500.00 in sanctions; and (4) a May 29, 2019 Order awarding $11,257.50 in fees related to Defendant's installation of a fence across the Sixth Street Lot in violation of the

2017 Judgment ("Fence Violation"). **(2T; 3T; Da643-690; Da967-969)** Each of these four (4) Orders were entered following two days of hearings.

Regarding the Sixth Street Violations, Defendant attempts to cherry pick certain photos presented at the hearings, now claiming Plaintiff failed to submit sufficient proofs to establish Defendant continued to violate the 2017 Judgment. Defendant also alleges Plaintiff restrained Defendant from permitting attendees and visitors to walk through the Sixth Street Lot while congregants were parked there for services. **(Db74-75)** Plaintiff submitted the Certification of Rabbi Tendler in support of its contempt application related to the Sixth Street Violations, specifically identifying the daily violations of Defendant for months, along with 19 photos providing further proof of the continued violations from February 15, 2018 through July 2018. **(Da297-418; Da521-602).** Additional photographic evidence (46 additional photos) of the continued violations were submitted along with Rabbi Tendler's Supplemental Certification in further support of Plaintiff's application and in response to Defendant's opposition. **(Da603-642)** The few photos identified by Defendant not showing active violations were taken and presented to the Court to contextualize the violations as set forth in detail in Rabbi Tendler's Certifications. **(3T)** Those photos show parents and children exiting vehicles and walking towards the entrance of the school located on the Subject Property. Rabbi Tendler testified in detail as to

what each photograph depicted. **(1T; 3T 82-87)** As recognized by the Trial Court, a review of the certifications and hearing testimony clearly establishes Defendant continued to violate the 2017 Judgment by permitting its students to be dropped off in a way requiring them to walk through the Sixth Street Lot while cars were parked for those attending services in the Congregation. The record on appeal debunks Defendant's suggestion Plaintiff did not submit sufficient proof of the continued violations.

Regarding the Fence Violation, Defendant does not deny it installed a fence across the Sixth Street Lot immediately after the October 18, 2018 ZBA hearing. Following the ZBA hearing and the ZBA's oral ruling, Defendant immediately (even prior to the memorialization of the ZBA's ruling in the Resolution) applied for a fence permit over the objection of Plaintiff. Defendant argues, in part, that the Trial Court should not have found it in contempt because the fence was erected only after a permit was issued by Lakewood. **(Db75)** However, as noted by the Trial Court, the "highly unusual" way in which Defendant obtained the fence permit and the installation of the fence was evidence of its continued effort to avoid the restraints in the 2017 Judgment:

> The facts as I understand them necessarily…is that there was an application before the Zoning Board [by the School], an alternative means to try to undermine the Court's order that there was an easement. Keeping in mind that the Court had previously found as a matter of facts that from the 60s this area [the Sixth Street Lot]

was used as parking by both parties, and by the synagogue during service hours. And based on that there was an easement appurtenant to the [Congregation].

That based on that the Court issued an order that in essence provided that the [P]laintiff had [sic] easement to use the courtyard area between the two buildings [the Sixth Street Lot] for parking during services hours. It was an unfettered right…

In any event, the thrust of the Court's ruling was that parking was for the [Congregation] during service hours could not be interfered with. And that a way of interfering whether it was allowing children to ingress and egress, students to ingress and egress to the building, to the school, during these periods of time of service. It was my intent to prohibit that…

Undeterred, it appears that [the School] has sought the Planning Board's participation in this matter, the Zoning Board, and has sought an application to bar the use of parking in the area. And I think it's noteworthy that the application was heard on [October] 15th, and on the 16th an application for a zoning, for the zoning permit to build the fence was made prior to the memorialization of the resolution. Prior to what most practitioners understand is the time period for running of the period of the appeal.

So unusual was the application, apparently, that the Zoning Officer denied it initially, recognizing that the quickness of the application. The Borough Attorney had to weigh in and authorize the issuance of the permit with the proviso that it's at [Defendant's] own risk.

So rather than come to the Court and say, we're going to – we've got this ruling from the Zoning Board, we're going to need some relief from your order so we can put a fence up, the [Defendant] raced to the Zoning Officer, obtained a permit for a fence, at their own risk, prior to the filing of the resolution or the memorialization of the resolution.

> The Court recognizes this for what this is, another attempt to stretch the scope of the Court's ruling and test the Court's rulings in this matter. The Court has issued its rulings, these rulings may be disagreed with by the [Defendant]. Ultimately the Appellate Division will determine, whether the order should be vacated or not. But while it's in effect it should be followed.
>
> While it's in effect, if a party seeks to violate it, which clearly a fence across this property violates the easement, the parties should seek at least some remedial action by this Court indicating, at least until the memorialization of the resolution is filed, and the parties decide whether they're going to appeal, to maintain the status quo.

(Da2T 35:22-38:25)

On review, an appellate court need only decide whether the Trial Court's findings could reasonably have been "sufficient" or "substantial" credible evidence present in the record, considering the proofs as a whole. In re Adoption of Amend. To Northeast Water, 435. N.J. Super. 571, 583-584 (App. Div. 2014). As previously stated, the factual findings and legal conclusions of a trial judge sitting in a non-jury proceeding shall not be disturbed unless the Appellate Division is "convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interest of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (internal quotes omitted).

Based upon the evidence as presented to the Trial Court by certifications filed in support of and in opposition to Plaintiff's contempt applications, as well

as the testimony of witnesses, it is clear the Trial Court's rulings on the Sixth Street Violation and Fence Violation contempt applications were based on the credible evidence presented and those four (4) orders now appealed by Defendant should not be disturbed.

VI. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GRANTING PLAINTIFF'S MOTION IN LIMINE AND EXCLUDING RECORDS OF THE ZBA FROM THE REMAND PROCEEDINGS. (Pa4-27; 6T 4-76)

On November 19, 2018, the ZBA passed the Resolution and determined the Congregation's use of the Sixth Street Lot is an "invalid utilization." Defendant sought to have the Resolution, transcript of the hearing and minutes of the hearing ("ZBA Record") entered into evidence. This Resolution was subsequently adjudged to be null and void on Plaintiff's Prerogative Writ application. Regardless, the ZBA Record is irrelevant to a determination of what property right was conferred to Plaintiff in 1963 and whether that right was abandoned or terminated by Plaintiff. Thus, the Trial Court's exclusion of the ZBA Record was proper.

A. To the extent Defendant intended to rely upon the ZBA Record to establish an easement could not have been granted in 1963 because parking was not permitted and/or the Sixth Street Lot was never utilized by the Congregation for parking, the ZBA Record is irrelevant and inadmissible. (Pa4-27; 6T 4-76)

If evidence is to be admitted, it must be relevant, material, and competent. Relevant evidence is "evidence having a tendency in reason to prove or disprove

any fact of consequence to the determination of the action." N.J.R.E. 401. "In determining relevance, the trial court should focus on the logical connection between the proffered evidence and a fact in issue ... or the tendency of evidence to establish the proposition that it is offered to prove." Green v. N.J. Mfrs. Ins. Co. 160 N.J. 480,492 (1999).

The 2018 determination by the ZBA as to the validity of the current use of the Subject Property is irrelevant to determining what property interests were created in 1963 and whether those property rights remain in effect. Thus, the Resolution is irrelevant and inadmissible.

B. **To the extent Defendant intended to rely upon the ZBA Record for the purpose of establishing the circumstances surrounding the creation of Plaintiff's property rights, the ZBA Record is irrelevant. (Pa4-27; 6T 4:76)**

Neither the ZBA nor Defendant has identified what (if any) ordinance exists (from 1963 to present) rendering the Congregation's use of the Sixth Street Lot non-conforming. Thus, the ZBA Record lacks the competency to prove the facts Defendant is offering it to prove. See Green, supra. Additionally, the validity of the use of the easement was an issue before Judge Ford as part of Plaintiff's Prerogative Writ Action, not an issue before Judge Hodgson. Thus, the ZBA's determination as memorialized in the Resolution and the ZBA Record is irrelevant to the Chancery case and, therefore, inadmissible.

On August 23, 2018, Defendant filed its Supplemental Application with

the ZBA pursuant to N.J.S.A. 40:55D-68 for a determination as to whether use of the Sixth Street Lot located on the Subject Property for parking was a pre-existing non-conforming use. On October 15, 2018, the ZBA held a hearing on Defendant's Supplemental Application. Counsel for Plaintiff and Defendant were present. No witnesses were sworn in. During the hearing, members of the ZBA made comments regarding their understanding of the historic use of the Sixth Street Lot for parking, including their own purported observations. At the time of the ZBA hearing, the 2017 Judgment determined the Sixth Street Lot had historically been utilized by Plaintiff for parking. Although Defendant's appeal of the within matter was pending at the time of the ZBA hearing, the Trial Court's factual findings and legal conclusions were binding on the ZBA and that board was collaterally estopped from making contrary findings no parking by the Plaintiff's congregants had occurred on the Subject Property. **(Pa4-27; Da177-209; Da218-221)**

Additionally, the unsworn statements of the ZBA members are inadmissible hearsay. While transcripts of prior trial testimony are admissible under N.J. Court Rule 4:49-1(a), (transcripts of testimony of witnesses in prior proceeding in same case is admissible regardless of the availability of the witness), under N.J.R.E. 801(c) hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

the truth of the matter asserted. The statements made by the members of the ZBA regarding the historical use of the Sixth Street Lot are inadmissible hearsay. The members were not under oath, were not cross-examined, and their statements do not fall within any hearsay exception.

CONCLUSION

Defendant has never disputed it purchased the Subject Property with actual notice of Plaintiff's easement in the Subject Property. Rather, to avoid Plaintiff's property rights, Defendant has gone to extreme measures to create a narrative where Plaintiff, rather than Defendant, has created the "dangerous" situation now the subject of Defendant's complaints. But the record does not support Defendant's narrative.

The facts, as established by the evidence presented at trial, are that Plaintiff was granted an express easement in the Subject Property to utilize the Fifth and Sixth Street Lots for parking and to connect its HVAC system to the boiler room located on the Subject Property. These easement rights were enjoyed by Plaintiff continuously since 1963 and without interference until after Defendant purchased the Subject Property in 2010. Then, with actual knowledge of Plaintiff's recorded easement, Defendant maliciously cut Plaintiff's HVAC system connection to the boiler room located on the Subject

Property, padlocked Plaintiff access to the boiler room and began interfering with Plaintiff's right to park on the Fifth and Sixth Street Lots.

Defendant did not present any evidence regarding the circumstances surrounding the 1963 Agreement and failed to submit any credible or relevant evidence supporting its claim that the Congregation abandoned or terminated its easement rights in the Subject Property.

On the other hand, the Trial Court found as fact that Plaintiff met its burden of proof by submitting clear and convincing evidence it was granted an express easement in the Subject Property and said rights were continuously and actively enjoyed by Plaintiff without interruption until Defendant purchased the Subject Property in 2010. Defendant cannot now be rewarded for its contempt of the 2017 Judgment while an appeal was pending and Defendant failed to request or obtain a stay. Thus, the Trial Court properly denied Defendant's request for return of monies paid. Additionally, Defendant's Motion to Disqualify Judge Hodgson was properly denied, as was Defendant's request to rely upon the ZBA Proceedings. Substantial evidence supports all the factual findings and legal conclusions of the Trial Court. Accordingly, Defendant's Appeal must be denied in its entirety.

Respectfully submitted,

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Dated: March 28, 2023

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May 30, 2023

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

Re: Congregation Sons of Israel v. Congregation Meorosnosson, Inc.; Docket No. A-2790-21 on Appeal from Docket No.: OCN-C-239-12; Orders 2/21/2019, 2/21/2019, 5/29/2019, 5/29/2019, 6/5/2019, 8/26/2019, 2/5/2020, 3/29/2022, 3/29/2022 & 4/26/2022 by the Honorable Francis R. Hodgson, J.S.C. in the Ocean County Superior Court – Chancery Division

Letter Reply Brief of Defendant-Appellant, Congregation Meorosnosson

TO THE HONORABLE JUDGES OF THE SUPERIOR COURT, APPELLATE DIVISION:

Kindly accept this Letter Reply Brief for Defendant/Appellant Congregation Meorosnosson, Inc. There is a companion Appeal (A-1339-22) of a related determination by the Law Division (Judge Ford) invalidating the Zoning Board Resolution that the Sons of Israel off-site parking on the School property was an illegal use. Given this litigation's length, this Reply Brief will focus on the primary and concrete issues. The facts did not establish that the Sons of Israel met

its burden of proof that a permanent easement was established by the 1963 Agreement permitting off-site parking on the then vacant parts of the School's Lot 5 and use of the School heating systems. The evidence did not establish that a permanent easement was intended or granted, and the Lot 8 claims of continued permanent easements are not valid.

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REPLY TO COUNTERSTATEMENT OF FACTS

This litigation arises from a 1963 Agreement between then aligned Religious entities and differing interpretations of its vague provisions. This lawsuit commenced in 2012, primarily seeking a Court determination that the Sons of Israel Lot 8 has been granted a permanent easement in 1963 to use the School Lot

5 for Synagogue parking and to have a connection to the School heating system. The School's Brief accurately summarized the litigation history, dating back to the 1963 Agreement, and the testimony/evidence in the Remand Trial before Judge Hodgson (Db7 to 23). The Sons of Israel Brief also summarized the litigation history and Remand testimony/evidence (Pb20 to 36). With some differences in interpretation of events and characterizations, the 1963 Agreement and the evidence have been summarized in the Briefs.

POINT ONE

THE EVIDENCE/TESTIMONY DID NOT SUSTAIN THE PLAINTIFF'S BURDEN OF PROOF --- THAT A PERMANENT EASEMENT FOR PARKING AND HEATING PURPOSES WAS INTENDED AND ESTABLISHED BY THE 1963 AGREEMENT.

As detailed in the litigation history, there have been numerous missteps or errors in the process/procedure and substantive rulings in this case. These have led to this case --- which should have been a legal determination on known documents and facts --- to become fragmented and convoluted into a litigation odyssey, with lengthy litigation in the Chancery Court resulting in a 2019 Appellate Remand, a Zoning Board Hearing/Determination in 2018 on a N.J.S.A. 40:55D-68 Application, a Chancery Remand Trial, a Law Division Appeal on the 40:55D-68 Zoning Board Determination, and now two related Appeals of those two lower Court decisions. The School asserted that the Court below (Judge Hodgson) erred in not recusing himself from the Remand after he had made credibility and fact

determinations in the 2016/2017 proceedings, that the Court erred in excluding the 2018 Zoning Board Determination that the Lot 8 off-site parking is not a permitted use and is not a pre-existing nonconforming use. Further, the Court erred in proceeding on the Remand as a continuation of the 2016/2017 reversed proceedings. There were numerous evidential and substantive errors in the Remand Trial. Sons of Israel did not meet its burden of proof; did not establish that the 1963 Agreement intended and did grant a permanent easement for Lot 8 staff/attendee parking on the School Lot 5 and for permanent connection/access to the school heating system. The documents, the known facts, and the evidence/testimony simply do not establish that an easement was intended or granted by the 1963 Agreement. The Trial Court's determination is neither correct nor supported.

The burden of proof --- to demonstrate that the 1963 Agreement conveyed an easement, a permanent property right, as opposed to a temporary license or permission --- is upon the proponent, the Sons of Israel. See cases cited Db39. This Court's 2019 Opinion (Da751) determined that the 1963 Agreement does not itself "definitively establish an easement", stating (at Da760):

> "Although the term "easement" need not be included, the terms "permission" is ambiguous as to whether the interest may be something other than an exclusive grant. In addition, consideration of the surrounding circumstances leaves doubt as to whether an easement was intended."

The Appellate Court further found that the asserted permanent duration of the alleged right --- that must be in clear and peremptory terms --- was unspecified in the 1963 Agreement referencing In Re Miller, 90 N.J. 210, 218-219 (1982). After a summary of Law as to easement and licenses, the 2019 Appellate Opinion remanded for a Trial for the Plaintiff to provide sufficient evidence of the "surrounding circumstances" to establish the intention and documentation of the parties in 1963 to create a permanent easement, and as to whether that easement/license or permission had been abandoned, terminated or expired. This burden was not addressed, much less met by the Plaintiff. At the Trial, the Plaintiff presented no evidence as to the "surrounding circumstances" in 1963 as to the 1963 Agreement. The substantive evidence as to relevant actions or circumstances are supportive of these "permits" being temporary and only as between the then cooperative entities.

The Synagogue initially presented on its direct remand case only Rabbi Tendler, Janet Zagorin, and Zoning Board Attorney Dasti. Rabbi Tendler, the head of the Synagogue since 1995, had no knowledge of the circumstances of the 1963 Agreement. He became involved with the Synagogue in 1991 and testified he thereafter observed Synagogue attendees/staff regularly parked in the School's Fifth Street Lot and Courtyard (6T104-5 to 111-20). On his return to the witness stand (after

other witnesses out of turn), he testified that, upon learning in 2007 that the School may be for sale due to finances, he located in Synagogue records the 1963 Agreement and had the Agreement --- not itself in recordable form --- recorded in the County records by attaching it to a recordable Corporate document **(Da907)**. Tendler acknowledged that prior to 2013 there was no proper curb cut on Sixth Street for vehicles to access the courtyard. In 2013 a curb cut was chiseled out by Sons of Israel in front of Lot 8 to allow for vehicles to enter Lot 8 and access the courtyard. Rabbi Tendler offered no testimony as to any circumstances surrounding the 1963 Agreement or the 1972 School Site Plan (6T96-18 to 110-25).

The Synagogue then presented current Zoning Board Attorney Jerry Dasti. He presented limited testimony authenticating the minutes and Resolution of the 1972 School Variance/Site Plan Approval for the School expansion which was deficient for its own parking requirement **(Da901 to 904; Da923 to 999).** A Board search had located no records of any Application or Approval for the 1963 Synagogue (6T113-21 to 142-19).

The Sons of Israel then proffered Janet Zagorin. She was born in 1951 and grew up in the neighborhood, passing the site regularly going

to school in the late 1950's through the late 1960's. She attended the Synagogue after it opened in December 1963. She then went to college and resided at Douglass in 1969. During college she regularly visited her parents' Lakewood home. After college, she lived away from Lakewood but regularly visited her home. She had no knowledge of the 1963 Agreement. Her testimony was limited to her recollection that in the later 1960's and early 1970's Synagogue attendees would park for services in the School's Fifth Street Lot and Sixth Street Courtyard. (7T6-3 to 53-1) The courtyard was gravel and also used as children's play/activity area. There was no curb cut on Sixth Street and vehicles would mount the curb into the courtyard and park haphazardly, making the observation that drivers, many having recently moved from New York, were haphazard in their driving and parking. They did not adhere to the rules (7T54-6 to 82-20). The 1963 Agreement **(Da16)** did allow a temporary license for Synagogue staff/attendees to park on then vacant areas of the School Lot 5; that permission presumably extended through 1972, when it certainly ended with the School expansion. That Ms. Zagorin observed Synagogue attendees parking on School property in the late 1960's/early 1970's is consistent with the temporary license. That was the extent of plaintiff's direct case.

The School in response presented Traffic Engineer/Planner Litwornia and Planner Thomas. Each testified that the 1972 School site plan/parking variance Approval records did not infer or provide that any Synagogue parking was intended or approved to be on School property. There was no curb cut or drive on Sixth Street for vehicles to access the Courtyard. The Synagogue participated in the 1972 School application and did not assert any parking right/use on School property. The School courtyard had no fire lanes, no marked parking spaces or travel aisles. It is designed and laid out as a pedestrian way/assembly area for the students. It was not designed or safe for vehicle access or parking (Litwornia (9T11-1 to 79-19); Thomas (11T4-15 to 75-24).

The School further presented witnesses Abraham Bursztyn: (12T4-9 to 17-1) Chaim Abadi (12T49-22 to 65-3), Ezra Goldberg (12T83-1 to 86-24), and Abraham Halberstam (13T21-6 to 48-10) - all long term residents of the neighborhood. All testified similarly of their observations and experience from the 1960's through recent years, that vehicles had not parked in the School's Sixth Street Courtyard. That concluded the defense response case.

The Plaintiff --- having presented no substantive direct case --- over defendant's objection (13T50-19) was allowed to present as

rebuttal witnesses Traffic Engineer John Rea, former Township Attorney Jan Wouters, and former Township Engineer Jeffrey Staiger. Traffic Engineer Rea testified that the absence of any legend or markings of vehicle parking in the School courtyard on the 1972 Site Plan did not necessarily mean that no parking could occur there. He acknowledged no indicia that such parking was approved by the Planning or Zoning Board and that the Site Plan showed a concrete walkway in the courtyard. (13T55-24 to 104-24) Former officials Wouters and Staiger briefly testified about a 2013 Township Letter expressing their then opinion that the Synagogue chiseling out of a curb cut in 2013 in front of its Lot 8 was not illegal. (13T111-6 to 125-4)

Continuing with improper "rebuttal" testimony, the Sons of Israel called Oscar Amanik and Harrison Pfeffer, two long-time Lakewood residents. Amanik was a school student from 1954 to 1961. He had no knowledge of the 1963 Agreement. He recalled parking his vehicle in the School courtyard on "infrequent" occasions in the 1970's, the 1990's. Between 2000 and 2010 he occasionally observed vehicles parked there. On the infrequent occasions he made these observations the School was likely not in session (13T144-13 to 151-22). Pfeffer attended the School from 1990 to 2002. His recollection was that in

those years the Fifth Street Lot was not used for any parking (other than 1 school vehicle) and was a play/recreation area. As to the School courtyard, he recalled seeing vehicles occasionally parked, although the students exited every day out the Sixth Street doorway and through that courtyard. After 2002, he attended the Synagogue every Saturday and did not observe any vehicles parked in the School Courtyard. (14T4-25 to 41-13) That concluded the Plaintiff's entire case.

None of the Plaintiff's "proofs" addressed the "surrounding circumstances" in 1963 or any relevant time thereafter to address or establish that the parties, in 1963, had the intent and agreement to establish a permanent parking easement on the School Lot 5. Plaintiff's evidence was vague and irrelevant --- being to the effect that over the years its witnesses would on occasion either park their vehicles or observed other parked vehicles in the Sixth Street Courtyard. The principal witness Janet Zagorin only testified that as a child she regularly observed vehicles parked on the school property in the 1960's into the early 1970's. This is consistent with the acknowledged temporary license/permission ending with the School's 1972 expansion/approval. Other witnesses only referenced occasionally observing parking on an incidental basis. Those observations were

disputed by the School's several witnesses testifying that during the early 1970's through about 2013 Synagogue vehicles did not park. They parked only on isolated occasions parked on the school courtyard. Plaintiff did not address, much less meet, its burden of proof as defined by the Appellate Opinion - to establish sufficient "surrounding circumstances" to the 1963 Agreement to prove that the Agreement was intended to be and did establish a permanent easement.

There are a number of established facts and circumstances that support that the 1963 Agreement was at most a temporary permission/ license, and that ended no later than the School's 1972 expansion, including the following:

1. That the December 31, 1962 Deed **(Da166)** conveyed the title to Lot 8. Any easement rights in favor of Lot 8 would have logically been included and set forth in that Deed if such were intended. That Deed and the January 7, 1963 Agreement were contemporaneous documents.

2. That the 1963 Agreement did not reference the terminology of "permanent", "perpetual", or "easement". **(Da13)** The Agreement at Paragraph 10 only agreed "to permit" the "new Congregation Sons of Israel to utilize the then vacant lands on Madison Avenue and also on Sixth Street. The terms denote a temporary permission.

3. That the 1963 Agreement was not notarized or in recordable form, evidencing an intent that it not be recorded so as to not extend beyond the then owners or be permanent. **(Da13)**

4. That the 1972 Site Plan documents and Resolution established: **(Da901 to904; Da923 to934; Da938 to 946)**

A. That in the Board proceedings the Synagogue did not assert any easement-parking rights existed in 1972 on any school property or portion thereof, which it certainly was obligated to do if such easement right existed.

B. That the School site with the expansion no longer had any "vacant lands" as the entire Lot 5 was committed by the Site Plan to school needs and use. The School site had insufficient parking for its own needs and required a variance for the expansion. If a Synagogue parking right existed on School property, that would logically be preclusive to the School expansion and, if it existed, was required to be disclosed by both the Synagogue and by the School. See Db48 to 53, cases cited there.

C. That the 1972 Approved Site Plan does not show or reference any parking or accessway to the Sixth Street /Courtyard. There is no curb cut for vehicle access, and a walkway is located in the middle of the Courtyard, indicating the courtyard was solely for pedestrian use. The courtyard has no drive aisles, marked spaces or fire lanes.

D. That the 1972 School Resolution/minutes establish that the Synagogue was on notice and, because the School site parking was particularly deficient for the school's own needs, the Synagogue volunteered its other nearby parcels for the School overflow parking needs. The Sons of Israel at that time (1972) owned nearby vacant Lots 6 and 10, available for parking. The Sons of Israel later conveyed Lot 10 for development; it still owns Lot 6.

5. That there was no Zoning approved curb cut on Sixth Street to allow vehicles access into Lot 5. The Synagogue chiseled out the curb in 2013 in front of its own Lot 8, not the School Lot 5, and vehicles then enter the Synagogue Lot 8 and drive and park haphazardly in the School courtyard.

6. That there is not presently, and has never been, a curb cut on Sixth Street in front of the School Lot 5 that would allow vehicles to

access the supposed shared parking lot on the School Courtyard. It would be illogical that a purported shared parking lot could be put in place in 1963 and exist for 50 years without an approved curb/driveway access on Sixth Street in front of Lot 5. Further, the School Lot 5 has never had any easement or license on Lot 8 to allow school vehicles to drive over Lot 8 to then access the School's Lot 5. That School vehicles (Lot 5) never had and do not have any right to drive into Lot 8 to access the supposed "shared" parking area in the Lot 5 courtyard confirms that parking was never contemplated as a permanent easement.

7. That the Synagogue, recognizing the 1963 Agreement was non-recordable, resorted in 2007 to a subterfuge to record that document as an attachment to another Document. **(Da907)**

8. That the Lakewood Zoning Board in its November 2018 Resolution on the N.J.S.A. 40:55D-68 Application determined that this off-Site parking facility/use on Lot 5 for Lot 8 staff/Attendees is not now a legal use and has never been a legal pre-existing nonconforming use. **(Da894, excluded by Court below)**

These established facts are "surrounding circumstances" that establish that the 1963 "permission" for parking on the then vacant portions of the School Lot 5 was, at most, a personal license that ended no later than 1972. The Trial Court's determination and Opinion is clearly legally and factually unwarranted and incorrect.

POINT TWO

THE 1972 SCHOOL SITE PLAN APPLICATION/APPROVAL AS A MATTER OF LAW TERMINATED ANY SONS OF ISRAEL CLAIMED PARKING PERMISSION/EASEMENT ON THE SCHOOL LOT 5.

The Sons of Israel claim the 1963 Agreement extended a permanent easement for Lot 8 staff/attendee vehicles to priority park on the School's Lot 5 parking lot and courtyard, and the Trial Court so found. The Synagogue has never received nor provided any zoning or Site Plan approval for such an off-site parking use/facility on Lot 5, either from 1963 or thereafter. In 1972 the then School owner applied for Site Plan approval with parking and other variances to substantially expand the School. The Board records confirm that neither party --- the Sons of Israel nor the School --- informed the Planning or Zoning Board or the public that the Sons of Israel claimed any easement or continued entitlement for an off-site parking use for Lot 8 staff/attendees on the School Lot 5. Given that the expanded School was deficient in parking for its own school use, the off-site parking use on Lot 5 by a second property/use would certainly be critical for a proper evaluation of the School Application. Not only did the Sons of Israel not assert any right or permission for Lot 8 off-site parking use of the School Lot 5, the Sons of Israel represented to the Board that any occasional overflow school parking could be accommodated on other nearby vacant parcels then owned by the Sons of Israel --- at the time in 1972 the Sons of Israel owned nearby vacant Lots 6 and 10.

This 1972 School Site Plan --- and the position presented by both the School and the Synagogue that there was no off-site Synagogue parking easement or use --

- certainly mandates the Plaintiff's claim is invalid. Based on there being no claimed parking right, the Planning/Zoning Boards approved the School expansion. That any Planning/Zoning Board would approve a School expansion with an unmarked, unlined off-site third-party parking area with no curb cut, requiring cars to mount the curb and park in all directions immediately at an entry to a grade school is absurd. That certainly creates an estoppel and precludes any such claim having any validity now (see Point Three Db44). There is absolutely no basis to disregard or not be bound by that 1972 Site Plan and the representations and positions put forward in the Application/approval and Site Plan.

CONCLUSION

For the reasons and facts detailed in Defendant Meorosnosson's Brief and this Reply Brief, the Chancery Court's Final Opinion and all related sanctions Orders are in error. This Court respectfully should invalidate the Final Order and the various Sanctions and enter a Final Opinion and Order dismissing the Plaintiff's Complaint and determining the 1963 Agreement granted temporary permission/licenses that have been waived and/or terminated.

Respectfully submitted,

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RSG/jll
cc: Andrew Kelly, Esq. (via email)