# SUPERIOR COURT OF NEW JERSEY
## APPELLATE DIVISION – DOCKET NO. A-003709-22

**WILLIAM E. TAYLOR, IV. and RACHEL TAYLOR**

**vs.**

**ZONING BOARD OF THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH**

**and**

**THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH**

**CIVIL ACTION – On Appeal from an April 28, 2023 Order Denying Plaintiffs' Motion For Summary Judgment and a June 20, 2023 Trial Order Dismissing Plaintiffs' Complaint Entered in the Superior Court of New Jersey, Law Division, Monmouth County.**
**Sat Below: Lordes Lucas J.S.C.**

# BRIEF AND APPENDIX OF PLAINTIFF-APPELLANTS, WILLIAM E. TAYLOR, IV and RACHEL TAYLOR

**LAW OFFICES OF JAMES T. HUNDLEY, ESQ. LLC**
**Attorney: James T. Hundley, Esq.**
**Attorney ID: 025511976**
**Attorneys for Plaintiff-Appellants**
**William E. Taylor, IV. and**
**Rachel Taylor**
**35 Pilgrim Pathway**
**Ocean Grove, NJ 07756**
**Office: 732-775-3100**
**Fax: 732-775-3103**
**Email: jth@jthundleylaw.com**

James T. Hundley
*Of Counsel*

James T. Hundley
*On the Brief*

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## Complaint Exhibits



## Township of Neptune Land Development Ordinance

## PROCEDURAL HISTORY

On March 15, 2019, the Neptune Township Zoning Officer swore out the following Neptune Township Municipal Court Complaints against plaintiff-appellant (Municipal Court defendant below) William E. Taylor, IV:

- Complaint 1334-SC-016065 charging a November 26, 2018 violation of Ordinance Section 1102 by constructing walkways on the Property without obtaining zoning approval.
- Complaint 1334-SC-016066 charging a November 26, 2018 violation of Ordinance Section 413.02 by constructing structures in the Historic Flared Avenue Open Space Area without obtaining Zoning approval.
- Complaint 1334-SC-016067 charging a November 26, 2018 violation of Ordinance Section 900 by failing to obtain a CofA from the HPC.

On March 5, 2020, the Township Municipal Court dismissed Complaint 1334-SC-016065 and 1334-SC-016066 both charging failure to obtain prior Zoning approval for the walkway work.

On March 5, 2020, the Neptune Township Municipal Court Judge directed plaintiff (defendant below) William E. Taylor, IV to contact the Neptune Township Historical Preservation Commission, (HPC), and attempt to resolve the remaining Complaint 1334-SC-016067 charging failure to obtain a Certificate of Appropriateness. (CofA)

Neptune Township Municipal Court proceedings on Complaint-Summons 1334-SC-016067 were stayed pending disposition of this appeal.

On December 12, 2020, plaintiffs made application to the HPC for CofA approval of the three (3) previously installed concrete unit paver walkways at the Property.

On January 12, 2021, the HPC adopted Resolution HPC2020-226 denying CofA approval of the three (3) unit paver walkways at the Property. Complaint Exhibit 1; Pa 130a. The HPC "found the applicants' removal of the concrete walkways within the flare amounted to a destruction of a preexisting non-conforming walkway, which once destroyed, could not be replaced. Second, the Commission found the walkways proposed by the applicant were inconsistent with the size limitations of Section R of the Design Guidelines, and that hardscape in the flare in [sic] discouraged under all circumstances. Third, the Commission found that the concrete pavers were not historically consistent with respect to form, shape or color." Pa 20a.

On March 3, 2021, plaintiffs filed an appeal of the HPC's denial of CofA approval to the Neptune Township Zoning Board of Adjustment, (ZBA). On March 2, 2022, the ZBA memorialized Resolution ZBA 22/09 denying plaintiffs' appeal of HPC Resolution HPC 2020-226. Complaint Exhibit 2; Pa 24a.

On April 19, 2022, plaintiffs filed their Complaint in Lieu of Prerogative Writs. On November 16, 2022, defendants filed their Answer to plaintiffs' Complaint.

On January 4, 2023, plaintiffs filed their Motion for Summary Judgment. On March 23, 2023, defendants filed their Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment.

On April 11, 2023, both plaintiffs' Motion and defendants' Cross-Motion for Summary Judgment were heard before the Honorable Lourdes Lucas, J.S.C. On April 28, 2023, Judge Lucas entered an Order denying both Summary Judgment Motions and setting May 31, 2023 as the date for trial of this matter. Pa 73a. On May 18, 2023, Judge Lucas entered an Amended Order correcting the due date for filing defendants' trial brief. Pa 75a.

On May 31, 2023, a trial was conducted in the matter below before the Honorable Lourdes Lucas, J.S.C. On June 20, 2023, Judge Lucas entered a Trial Order upholding the HPC's and ZBA's actions below and dismissing plaintiffs' Complaint. Pa 77a.

On August 3, 2023, plaintiffs-appellants filed their Notice of Appeal, Pa 79a and Civil Case Information Statement, Pa 83a. On August 31, 2023, plaintiffs-appellants filed their Amended Notice of Appeal. Pa 89a.

Plaintiffs-appellants now file their initial brief and appendix.

## STATEMENT OF FACTS

Plaintiffs-Appellants are the owners of a leasehold interest in real property known as 9 Broadway, Ocean Grove, Neptune Township, Monmouth County, New Jersey 07756; Block: 247, Lot: 13, on the Tax Map of the Township of Neptune. (Property) The Property is located in the Ocean Grove Historic Zone District and is occupied by a single-family residential dwelling. Hearing Exhibit 10, Pa 10a.

The Property is contiguous with the Historic Flared Open Space defined in Section 201 of the Neptune Township Land Development Ordinance, hereinafter Ordinance, as "an unobstructed area located between the curb line and the front leasehold line at particular properties within the Historic Zone District." Pa 29a and Pa 70a.

The only means of ingress to and egress from the Property was by way of two (2) concrete walkways. The first walkway ran from the public sidewalk, across the Historic Flared Avenue Open Space, to the front entrance of the dwelling. The second walkway ran from the public sidewalks, across the Historic Flared Avenue Open Space, to a second entrance located on the westerly side of the dwelling. Hearing Exhibit 10, Pa 11a and Hearing Exhibit 11, Pa 12a.

In 2012, both concrete walkways were damaged as a result of Superstorm Sandy and required repair. 2T16 – 7 to 16[1] In the Fall of 2018, plaintiffs-appellants removed the broken concrete from both walkways and replaced the concrete with concrete unit pavers. Plaintiffs-appellants installed a third concrete unit paver walkway which ran parallel to the front lot line of the property and connected the front and side entrance walkways. The dimensions of the two (2) existing walkways remain the same. 2T19 – 14 to 15. All three walkways were no greater than six (6') feet in width. Hearing Exhibit 4; Pa 4a; Hearing Exhibit 5, Pa 5a; Hearing Exhibit 6, Pa 6a; Hearing Exhibit 7, Pa 7a; Hearing Exhibit 8, Pa 8a; Hearing Exhibit 9, Pa 9a; and Hearing Exhibit 10, Pa 10a.

The only current access to the Property from the public street is across the Historic Flared Open Space Area by way of the concrete unit paver walkways. Trial Exhibit 10, Pa 11a.

[1] The January 12, 2021 Transcript of Proceedings before the HPC is designated as IT; the January 19, 2022 Transcript of Application before the ZBA is designated 2T; the March 2, 2022 Transcript of Application before the ZBT is designated 3T. The April 11, 2023 Transcript of Motion is designated 4T; the April 28, 2023 Transcript of Motion is designated 5T; the May 31, 2023 Transcript of Trial is designated 6T and the June 20, 2023 Transcript of Decision is designated 7T.

# LEGAL ARGUMENT

## Point One

### NEPTUNE TOWNSHIP ORDINANCE SECTIONS 900B AND 902A, AS AMENDED, ARE NOT AUTHORIZED BY THE MUNICIPAL LAND USE LAW, ARE ULTRA VIRES AND VOID (5T14 – 1 to 25; 5T15 – 1 to 8)

The Municipal Land Use Law (MLUL) authorizes municipalities, by ordinance, "to designate and regulate historic sites or historic districts and provide design criteria and guidelines therefore". N.J.S.A. 40:55D-65.1. The MLUL further authorizes municipalities to create a historic preservation commission. N.J.S.A. 40:55D-107. Historic preservation commissions are tasked with, among other duties, reviewing permit applications for properties in historic districts and issuing a written report to the administrative officer or planning board "on the application of the zoning ordinance provisions concerning historic preservation to any of those aspects of the change proposed", together with recommendations regarding the issuance or denial of permits. N.J.S.A. 40:55D-111.

Defendant-Respondent Township of Neptune (Township) established a Historic Preservation Commission (HPC) in accordance with the MLUL. Township of Neptune Land Development Ordinance (Ordinance) Sec. 604. Pa 56a. Ordinance Sec. 605 sets forth the HPC's powers and responsibilities, which include "E. To provide written reports and Certificates of Appropriateness, pursuant to N.J.S.A. 40:55D-111, in a manner herein described, on the application

of the Zoning Ordinance provision concerning historic preservation to applications for the issuance of permits pertaining to properties in a historic district." Pa 58a.

Ordinance Sec. 900, "establishes the circumstances, conditions and procedures to obtain a Certificate of Appropriateness from the Historic Preservation Commission as it pertains to exterior architectural features..." Sec. 900B of the Ordinance tasks the Zoning Officer with the duty to submit to the HPC "all plans for the construction, alteration, repair, restoration or demolition of structures located in any Historic District Zone..." Pa 63a.

Ordinance Sec. 905A provides a Certificate of Appropriateness constitutes a final approval under Article IX of the Ordinance. A denial of a CofA precludes an applicant from undertaking the activity that was the subject of the application. Ordinance Sec. 905B. Pa 65a.

In 2002, the Township adopted Ordinance 02-41 which amended Ordinance Sec. 900B and 902A to require HPC review for CofA approval of "any exterior alteration on existing structures or buildings or other improvements on their sites..." that did not otherwise require the issuance of a construction or demolition permit. Pa 63a and Pa 64a.

The expansion of the HPC's CofA review procedures to include exterior alterations not requiring construction or demolition permits runs contrary to the mandatory language of N.J.S.A. 40:55D-111.

"Municipalities do not possess the inherit power to zone and they possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the Legislature." Riggs v. Township of Long Beach, 109 N.J. 601, 610 (1985), "A zoning ordinance is insulated from attack by a presumption of validity, which may be overcome by a showing the ordinance is clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principals of zoning or the [zoning] statute." Id at 610-11.

In Riggs, the Court set forth a four-part test for evaluating a zoning ordinance's general validity. The present case focuses on the fourth criteria, which requires "the ordinance must be adopted in accordance with statutory and municipal procedural requirements." Id at 611-12.

The Township's 2002 Amendments to Ordinance Sec. 900B and 902A expanded the HPC's permit review procedures beyond the scope of review authorized by N.J.S.A. 40:55D-111. See. Cox & Koenig. New Jersey and Land Use Administration (GANN, 2022), Sec. 4-1.5 Commission role with regard to permit applications. "[M]unicipalites are not free to add to the [MLUL's] requirements where the Legislature has utilized mandatory language." Northgate Condo Ass'n v. Borough of Hillsdale Planning Board, 2014 N.J. 120, 137 (2013). Municipalities may not bypass the mandatory procedures set forth at N.J.S.A.

40:55D-111 and create their own process. Berardo v. City of Jersey City, 476 N.J. Super. 341, 359 (App. Div. 2023).

The Township's 2002 Amendments to Ordinance Sec. 900B and 902A were not authorized by the MLUL and were inconsistent with the mandatory procedures established by N.J.S.A. 40:55D-111. Amended Ordinance Sec. 900B and 902A are ultra vires on their face and void as an invalid exercise of the municipal zoning power. See. Berardo, 476 N.J. Super. at 359.

On Motion, defendants did not allege plaintiffs required construction permits for the work. Rather, defendants argued plaintiffs required a zoning permit, independent of a construction permit, to commence work on the walkways. 4T46 – 19 to 25; 47 – 1 to 8. Defendants' position is not supported by the zoning permit review procedures established by the Ordinance.

Plaintiffs-appellants did not require a construction permit for the work performed on the Property's walkways. Regulations for the New Jersey Uniform Construction Code, N.J.A.C. 5:23-2.2 and 2.7. A zoning permit is not required for work not requiring the issuance of a construction permit.

A zoning permit is a mandatory component of the Ordinance's construction permit review procedures. It is a document issued by the Zoning Officer "which is required by ordinance as a condition precedent to the commencement of a use or

the erection, construction, reconstruction, alteration, conversion or installation of a structure or building...” Ordinance Sec. 201, Definitions. Zoning Permit, Pa 29a.

Zoning Permit requirements for properties located in the Township, inclusive of properties located in the Ocean Grove Historic District, are governed by Ordinance Sec. 1102. Pa 68a. The submission requirements for applications for the issuance of zoning permits are applicable to applications for construction permits and applications for development for site plan and subdivision approval. Ordinance Sec. 1102B, C, D and E. Pa 68a and 69a. The Zoning Permit application submission requirements clearly do not apply to work not requiring a construction permit.

Applications for construction permits for properties located outside of Ocean Grove are referred to the Zoning Officer for zoning permit plan review. The Zoning Officer can either approve or deny the issuance of a zoning permit. Ordinance Sec. 1102C. Pa 68a. Applications for development and applications for the issuance of construction permits for properties located in Ocean Grove are likewise referred to the Zoning Officer for the issuance of a zoning permit. The zoning officer, in turn, refers Ocean Grove applications for development and construction permit applications to the HPC for CofA review. Ordinance Sec. 900B and C. Pa 63a.

The MULU authorizes the HPC to recommend to the zoning officer in favor the issuance of a permit, against the issuance of a permit or to recommend conditions to the permit to be issued. If the HPC recommends "against the issuance of a permit or recommends conditions to the permit to be issued, the [zoning officer] shall deny issuance of a the permit or include the conditions in the permit, as the case may be." N.J.S.A. 40:55D-111.

The provisions of N.J.S.A. 40:55D-111 are incorporated into Ordinance Sec. 904B. Pa 65a.

Plaintiffs-appellants required neither a construction permit nor zoning permit for the walkway work performed at the Property. Absent a requisite permit, the HPC lacked CofA permit review authority under N.J.S.A. 40:55D-111. The Law Division erred in denying plaintiffs-appellants' Motion for Summary Judgment seeking an order declaring Ordinance Sections 900B and 902A, as amended by Ordinance 02-41, ultra vives and void.

## Point Two

NEPTUNE TOWNSHIP ORDINANCE SECTION 906 AUTHORIZING A DIRECT APPEAL OF HISTORIC PRESERVATION COMMISSION DETERMINATIONS TO THE ZONING BOARD OF ADJUSTMENT IS NOT AUTHORIZED BY THE MUNICIPAL LAND USE LAW, IS ULTRA VIRES AND VOID (5T20 – 8 to 15)

Defendants-respondents allege Ordinance Sec. 906, Pa 65a, authorized a direct appeal to the ZBA of HPC Resolution HPC 2020-226 denying CofA

approval for the three (3) unit paver walkways installed at the Property without the Zoning Officer's subsequent denial of the issuance of a zoning permit for the walkway work.

In its April 28, 2023 decision denying plaintiffs'-appellants' Motion for Summary Judgment, the Court recognized "there is no explicit grants of authority under the MLUL granting Zoning Boards appellate authority over determinations made by the Historic Preservation Commission without an accompanying action taken by an administrative officer pursuant to Commissioner's determination." 5T17 – 7 to 12. However, the Court went on to hold that the provisions of N.J.S.A. 40:55D-70 authorizing zoning boards of adjustment to decide request for interpretation of the zoning map or ordinance and to grant variances, did not preclude the Township from providing for such direct appeal of HPC determinations. "While direct appeal from determinations of the Historic Preservation Commission may not be expressly provided by the MLUL, absent some subsequent Government action, a Township is not necessarily foreclosed upon from providing that right of appeal." 5T18 – 4 to 8.

Section 906 of the Ordinance states in pertinent part "any decision by the Historic Preservation Commission to deny a Certificate of Appropriateness... may be appealed to the Zoning Board of Adjustment in the manner set forth in Section 706 (Appeals and Applications to the ZBA) of the Zoning Ordinance."; Pa 65a.

Section 706A of the Ordinance states in pertinent part "Appeals to the Zoning Board of Adjustment may be taken by an interested party affected by any decision of the Administrative Officer of the municipality based or made in the enforcement of the Ordinance or a duly adopted official map."; Pa 61a. Section 201 of the Ordinance defines "administrative officer" as "The Neptune Township Zoning Officer, or the Zoning Officer's designee."; Pa 29a.

N.J.S.A. 40:55D-70(a) authorizes boards of adjustment to "(a) hear and decide appeals where it is alleged by the applicant that there is error in any order, requirement, decision or referral made by an administrative officer based on or made in the enforcement of the zoning ordinance."

N.J.S.A. 40:55D-70.2 extends ZBA appellate authority under N.J.S.A. 40:55D-70(a) to include action of an administrative officer taken "pursuant to a report submitted by the historic preservation commission or planning board in accordance with Section 25 of P.L. 1985, C. 216 (C. 40:55D-111)..." Direct appeal to the ZBA of HPC determinations is not authorized by either statute.

Under the MLUL, N.J.S.A. 40:55D-111, the HPC lacks decision making power and may only make recommendations regarding the issuance or denial of permits to the appropriate administrative officer or planning board. See, also; Cox & Koening Supra. Ch. 4, Sec. 4-1.6, Appeals from permit application decisions.

Section 906 of the Ordinance providing for a direct approval of HPC determinations and recommendations to the ZBA is not authorized by the MLUL, N.J.S.A. 40:55D-80(a) and N.J.S.A. 40:55D-70.2. Section 906 of the Ordinance authorizing a direct appeal of HPC determinations to the ZBA is ultra vires and void.

## Point Three

THE LAW DIVISION ERRED IN HOLDING THE TOWNSHIP OF NEPTUNE LAND DEVELOPMENT ORDINANCE LIMITED TO ONE THE NUMBER OF WALKWAYS PERMITTED IN THE HISTORIC FLARED OPEN SPACE AREA (7T15 – 1 to 6)

At the January 12, 2021 hearing below, the HPC interpreted Ordinance Sec. 413.02B, Pa 52a, as limiting to one (1) the number of walkways permitted in the Historic Flared Open Space Area. IT12 – 2 to 12. The HPC's interpretation of Ordinance Sec. 413.02B was the basis of the HPC's finding of fact 4. "...that the applicant's removal of the concrete walkway within the flare amounted to a destruction of a preexisting non-conforming walkway, which once destroyed could not be replaced." and the HPC's conclusion of law "that once a non-conforming structure within the flare is removed, it shall not be replaced." HPC Resolution HPC 2020-226; Pa 20a.

On appeal, the ZBA did not render an interpretation of Ordinance Sec. 413.02B nor make an independent conclusion of law that the removal of concrete from the two (2) existing walkways constituted a destruction of a non-conforming

structure. The ZBA's finding of fact on the issue was limited to an acknowledgement that "[t]he HPC argued that the destruction of the pre-existing walkway, once destroyed, could not be replaced..." ZBA Resolution #22-09, Pa 24a.

In its June 10, 2023 Decision, the Court below rejected plaintiffs'-applicants' argument that the singular term "walkway" as used in Ordinance Sec. 413-02B should be interpreted pursuant to Ordinance Sec. 200, Pa 139a, to include the plural "walkways". 7T23 – 21 to 25; 24 – 1. The Court held Ordinance Sec. 413-02B "is a limiting or restricting provision, again to restrict the use of those flared areas in order to preserve their historical uniqueness." 7T25 – 1 to 3. "A reading of the term "walkway" to include the plural "walkways" would be contrary to what this Court finds to be the clear intention of [Ordinance Sec. 413.02B]. Which is to restrict the structures that are installed or built upon the flared area." 7T25 – 9 to 12.

The Court concluded "that replacement of those existing walkways with the stone pavers is violative of the principles outlined here and that in fact the replacement and removal of the preexisting concrete slab walkways discontinued the ability of the plaintiff to use those existing nonconforming structures." 7T20 – 25; 21 – 1 to 5.

Ordinance Section 413.02B states in pertinent part "ORNAMENTION: Aside from an access walkway and sidewalk no greater than six feet (6') in width, shrubbery, flowers and other similar ornamentation installed and maintained at a height of less than thirty (30) inches, no structures may be placed within, or may project into the area defined as the Historic Flared Avenue Open Space Area."; Pa 52a.

Ordinance Sec. 413.02A sets forth the purpose of the Flared Open Space Area. "HD-O Zone District is subject to special setback provisions dating to the late 1870's, providing for a flared setback that widens towards the ocean from Central Avenue to Ocean Avenue. This flared setback is a unique and invaluable resource that is recognized within planning, urban design and historic preservation circles as one of the first evidences of this type of streetscape treatment in the Country." In the decades prior to the 1927 Amendment to the New Jersey Constitution authorizing zoning, the flared front lot line setback scene afforded Ocean Grove lots fronting east-west streets on the first two (2) blocks from the ocean an unobstructed ocean view.

With the advent of the MLUL and modern zoning ordinances, the flared front lot line setback planning scheme has been replaced by the zoning ordinance setback line planning scheme. See. Ordinance Sec. 201, Definitions, Setback line. "setback line – That line that is established at the required minimum distance from

any lot line and that establishes the area within which the principal structure must be erected or placed." Pa 46a

The Ordinance Sec. 413.02B thirty (30) inch maximum height restriction for shrubbery and structures located in the flare confirms the purpose of the Historic Flared Open Space Area was to afford properties fronting the flare an unobstructed ocean view. The unobstructed ocean view purpose of the flare explains why access walkways and sidewalks are excluded from the Ordinance Sec. 413.02B restrictions on structures in the flare.

Access walkways, by their nature, do not obstruct the ocean view across the flare. The flared front lot line planning scheme is not advanced by restricting to one (1) the number of walkways permitted in the flare. The singular term "walkway" as used in Ordinance Sec. 413.02B should be interpreted pursuant to Ordinance Sec. 200 to include the plural "walkways"; thus rendering the second access walkway across the flare adjacent to the property a conforming structure.

Assuming, arguendo, Ordinance Sec. 413.02B limits to one (1) the number of access walkways permitted in the flare, rendering the second access walkway to the Property a non-conforming structure, plaintiffs'-appellants' removal of the broken concrete from the second walkway and replacing the concrete with concrete unit pavers did not constitute either the destruction or abandonment of the second walkway.

The MLUL contains provisions protecting landowners from losing property rights that predate the enactment of municipal land use ordinances. The MLUL permits qualifying, pre-existing, nonconforming uses and structures to co-exist with an ordinance that, on its face, prohibits them. N.J.S.A. 40:55D-68 provides, in pertinent part, that "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so assigned and any such structure may be restored or repaired in the event of partial destruction thereof."

The "test of whether a nonconforming use or structure may be restored or repaired is whether there has been some quantity of destruction that surpasses mere partial destruction." Motley v. Seaside Park Zoning Board, 430 N.J. Super. 132, 148 – 149 (App. Div. 2013); Certif. den. 215 N.J. 458 (2013). The test also requires a determination of the owner's intent to abandon.

In S&S Auto Sales, Inc. v. Zoning Board of Adjustment for Borough of Stratford, 373 N.J. Super 603 (App. Div. 2004), the Court held that the objective test for abandonment without regard to the owner's intent was not authorized under New Jersey Law. The Court citied, with approval, the Law Division's decision in Borough of Belmar v. 201 16th Ave Belmar, 309 N.J. Super. 663, 674 (Law Div. 1997), holding that any confusion about the test for abandonment was put to rest by the "terse statement of law" in the case of Pavlanthas v. Atlantic City Zoning

Board of Adjustment, 282 N.J. Super. 310, 313 (App. Div. 1995) "[a]bandonment is a matter of intent."

The access walkways at the Property are composed of two (2) components, the excavation and the surfacing material. Plaintiffs-Appellants replaced the damaged surface material but the excavations of both walkways remained the same. 2T19 – 14 to 15. The clear intent of the plaintiffs-appellants was to repair both walkways, not to abandon them.

## Point Four

THE LAW DIVISION ERRED IN HOLDING THAT THE DESIGN CRITERIA AND GUIDELINES INCORPORATED INTO THE TOWNSHIP OF NEPTUNE LAND DEVELOPMENT ORDINANCE LIMITED THE SIZE, SHAPE AND COLOR OF CONCRETE UNIT PAVERS (7T38 – 8 to 17; 7T39 – 16 to 21)

Ordinance Section 413.02B limits the width of walkways in the flare to a maximum of six (6') feet; Pa 52a. Section 413.02B does not address the types of materials used to surface the walkways.

Ordinance Section 508C provides "The Design Criteria and Guidelines, also known as the Preservation Guidelines is an integral part of this Ordinance and is incorporated in the Ordinance as if set forth at length in the body of the Ordinance." The designed guidelines are contained in the Ocean Grove Historic District Architectural Guidelines for Residential Structures; Pa 53a. Section R of the Guidelines addresses Architectural Landscape Treatments. "Pathways and

existing driveways may be surfaced with natural slate (bluestone) slabs, concrete or cut stone unit pavers, or be concrete paved."; Pa 72a. The Guidelines do not address the size, shape nor color of the permitted concrete unit pavers.

In her testimony before the ZBA, HPC Chairperson Deborah Osepchuk stated that concrete unit "pavers must be the size and shape, and coloration of brick so that they at least closely resemble what was the historical material that was used," to be approved by the HPC. 2T69 – 8 to 10. Chairperson Osepchuk acknowledged that the HPC's concrete unit paver criteria are not contained in the Design Guidelines. 2T71 – 21 to 25; 2T72 – 1 to 9.

The HPC's findings that the concrete pavers were not historically consistent with respect to form, shape or color was arbitrary, capricious and unreasonable.

The ZBA made no findings of the whether the concrete unit pavers at the Property were consistent with the Design Criteria and Guidelines. ZBA Resolution ZBA # 22-09. Pa 24a.

The Law Division's finding that the Design Criteria and Guidelines applied by the HPC to limit concrete unit pavers" to the size and shape, and coloration of brick" was in error. 7T38 – 18 to 25; 7T39 – 1.

## CONCLUSION

For the foregoing reasons, it is respectfully requested the Court Order as follows:

1. Reversing the Law Division's April 28, 2023 Order denying plaintiffs'-appellants' Motion for Summary Judgment and entering an Order declaring Sections 900B and 902A of the Township of Neptune Land Development Ordinance, as amended, are not authorized by the Municipal Land Use Law, are ultra vires and void.

2. Reversing the Law Division's April 28, 2023 Order denying plaintiffs'-appellants' Motion for Summary Judgment and entering an order declaring the provisions of Section 906 of the Township of Neptune Land Development Ordinance authorizing a direct appeal of Historic Preservation Commission determinations to the Zoning Board of Adjustment are not authorized by the Municipal Land Use Law, are ultra vires and void.

3. Reversing the Law Division's June 10, 2023 Decision and Order declaring the Section 413.02B of the Township of Neptune Land Development Ordinance does not limit to one (1) the number of walkways permitted in the Historic Flared Open Space Area.

4. Reversing the Law Division's June 10, 2023 Decision and Order and entering an order declaring that the Design Criteria and Guidelines incorporated into the Township of Neptune Land Development Ordinance could be interpreted by the Historic Preservation Commission to limit concrete unit pavers to a specific size, shape or color.

Respectfully submitted,

Law Offices of
James T. Hundley, Esq., LLC
Attorneys for Plaintiffs-Appellants
William E. Taylor, IV and Rachel Taylor

Dated: November 15, 2023 By: _____
James T. Hundley
A Member of the Firm

**LAW OFFICES OF MONICA C. KOWALSKI, LLC**
**MONICA C. KOWALSKI, ESQ.**
601 State Route 35 North
Neptune, New Jersey 07753
Tel.: 732-774-7447
Fax: 732-774-7418
Attorney ID#: 19031991
MCKowalskiEsq@gmail.com
Attorney for the Defendants

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| WILLIAM E. TAYLOR IV and RACHEL TAYLOR,<br><br>Plaintiffs,<br><br>vs.<br><br>ZONING BOARD OF THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH AND THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION<br><br>**APPELLATE DOCKET: A-003709-22**<br><br>**CIVIL ACTION**<br><br>ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH CO. DOCKET NO.: MON-001080-22<br><br>SAT BELOW:<br><br>HON. LOURDES LUCAS, J.S.C. |

# APPELLATE BRIEF FOR RESPONDENTS ZONING BOARD OF THE TOWNSHIP OF NEPTUNE AND TOWNSHIP OF NEPTUNE

Respectfully Submitted,

MONICA C. KOWALSKI, ESQ.
On The Brief

# INDEX TO BRIEF

## CASES CITED

## PROCEDURAL HISTORY

On March 15, 2019, the Neptune Township Zoning Officer filed Neptune Township Municipal Court Complaints against plaintiff-appellant William E. Taylor, IV, to wit:

- Complaint 1334-SC-016065 charging a November 26, 2018 violation of Ordinance Section 1102 by constructing walkways on the Property without obtaining zoning approval.
- Complaint 1334-SC-016066 charging a November 26, 2018 violation of Ordinance Section 413.02 by constructing structures in the Historic Flared Avenue Open Space Area without obtaining Zoning approval.
- Complaint 1334-SC-016067 charging a November 26, 2018 violation of Ordinance Section 900 by failing to obtain a Certificate of Appropriateness (CofA) from the Historic Preservation Commission (HPC).

On or about March 5, 2020, the parties, upon information and belief (there is no Municipal Order/Judgment or Settlement on the record below) allegedly consented to dismiss Complaint 1334-SC-016065 and 1334-SC-016066. In turn, the Neptune Township Municipal Court Judge allegedly directed William E. Taylor, IV to attempt to resolve the remaining Complaint

1334-SC-016067 charging failure to obtain a Certificate of Appropriateness (CofA) and to proceed with the Municipal process to obtain same for the installation of paver sidewalks in violation of Municipal Ordinances in the Historic Flare, among other things. Neptune Township Municipal Court proceedings on Complaint-Summons 1334-SC-016067 were stayed pending disposition of this appeal.

On December 12, 2020, Appellant made an application to the HPC for CofA for approval of the three (3) previously installed concrete unit paver walkways at the Property. At no point in time did Appellant apply for a zoning permit which was also required.

On January 12, 2021, the HPC adopted Resolution HPC 2020-226 denying CofA approval of the three (3) unit paver walkways at the Property. (Exhibit 1; Pa 130a.) The HPC "found the applicants' removal of the concrete walkways within the flare amounted to a destruction of a preexisting non- conforming walkway, which once destroyed, could not be replaced. Second, the Commission found the walkways proposed by the applicant were inconsistent with the size limitations of Section R of the Design Guidelines, and that hardscape in the flare in [sic] discouraged under all circumstances. Third, the Commission found that the concrete pavers were not historically consistent with respect to form, shape or color." Pa 20a.

On March 3, 2021, plaintiffs filed an appeal of the HPC's denial of CofA approval to the Neptune Township Zoning Board of Adjustment, (ZBA). On March 2, 2022, the ZBA memorialized Resolution ZBA 22/09 denying plaintiffs' appeal of HPC Resolution HPC 2020-226. Pa 24a.

On April 19, 2022, plaintiffs filed their Complaint in Lieu of Prerogative Writs. On November 16, 2022, defendants filed their Answer to plaintiffs' Complaint.

On January 4, 2023, plaintiffs filed their Motion for Summary Judgment. On March 23, 2023, defendants filed their Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment.

On April 11, 2023, both plaintiffs' Motion and defendants' Cross-Motion for Summary Judgment were heard before the Honorable Lourdes Lucas, J.S.C. On April 28, 2023, Judge Lucas entered an Order denying both Summary Judgment Motions and setting May 31, 2023 as the date for trial of this matter. Pa 73a. On May 18, 2023, Judge Lucas entered an Amended Order correcting the due date for filing defendants' trial brief for a typographical error. Pa 75a.

On May 31, 2023, a trial was conducted in the matter below before the Honorable Lourdes Lucas, J.S.C. On June 20, 2023, Judge Lucas entered a Trial Order upholding the HPC's and ZBA's actions below and dismissing plaintiffs' Complaint. Pa 77a.

On August 3, 2023, appellants filed their Notice of Appeal, Pa 79a. On August 31, 2023, appellants filed their Amended Notice of Appeal which was revised to improperly include an appeal of the Summary Judgment Decision which had been rendered on April 28, 2023. Pa 89a.

Respondent has filed a separate Motion to Dismiss the Amended Notice of Appeal which is pending before this Court. The Motion also includes a provision to dismiss or strike Points One and Two of Appellant's Brief for relating directly to the Summary Judgment Motion decided on April 28, 2023 per the Rules of Appellate Practice cited in the Motion.

Respondents now file their initial brief and appendix.

## STATEMENT OF FACTS

Plaintiffs William E. Taylor IV and Rachel Taylor are the record owners of the improvements only located on Block 247, Lot 13, otherwise known as 9 Broadway, in Ocean Grove, Neptune Township, New Jersey which area has been registered as a National Historic District in the National Register of Historic Places, noted for abundant examples of Victorian architecture.

Plaintiffs lease the underlying land located at 9 Broadway, by Assignment of Lease (in perpetuity) under Original Jurisdiction of the Ocean Grove Camp Meeting Association.

Appellant's conducted work on the lot adjacent to their lot (Lot 1), which lot was owned by the Ocean Grove Camp Meeting Association and commonly known as "The Historic Flare" by fully removing and abandoning two pre-existing, non-conforming undamaged concrete walkways (Pa122a) and installing multiple paver (3) walkways (Pa 111a-113a) (where only ONE walkway in the Historic Flare is allowed by Ordinance) without a zoning permit or a Certificate of Appropriateness from the Historic Preservation Commission, which Commission regulates architectural features on the exterior of every property located in Ocean Grove in order maintain the designation on the National Historic Register. As a result of the unauthorized work, municipal court violations were issued. Upon information and belief, Appellant was advised in Municipal Court proceeding to go through the

process to obtain a Certificate of Appropriateness prior to the determination of Complaint 1334-SC-016067.

The Appellant upon application and hearing, was denied relief for the installation of the multiple paver walkways by the Historic Preservation Commission on March 3, 2021 (Pa20) and the party appealed, pursuant to the procedure designated by Ordinance, to the Neptune Township Zoning Board of Adjustment. The Zoning Board of Adjustment denied Plaintiff's appeal of the HPC resolution on March 2, 2022. (Pa24)

During the course of the Zoning Board (ZBA) hearing, Plaintiff William E. Taylor IV testified that paver work installed in the Historic Flare was mistakenly conducted on under a prior Certificate of Appropriateness which related to 9 Broadway (Appellant's improved lot). The work which is the subject of this appeal was in fact, performed on the adjacent Lot 1 owned by the Ocean Grove Camp Meeting Association, known as the "Historic Flare" which is an area subject to designation on the National Historic Register and is defined in the Neptune Township Land Development Ordinance (NLDO) as "an unobstructed area located between the curbline and the front leasehold line at particular properties with the historic zone district. This area is also known as the "flared setback area". (Pa148a)

During the ZBA hearing which was an appeal of the HPC denial of a Certificate of Appropriateness, Plaintiff testified and relied upon the PRIOR

settlement agreement for Lot 13 (9 Broadway) wherein Plaintiff testified that it was his understanding that Plaintiffs were "not required to obtain additional zoning permit, HPC approvals, or zoning board variances or approvals to complete both interior and exterior renovations, improvements and repairs to the property performed in accordance with the terms of this Agreement." (3T:25-34)

However, a survey dated 07/30/2013, provided to the Zoning Board clearly identified the property as "Block 15, Lot 764" now known as Block 247, Lot 13, known as "9 Broadway" as being adjacent to the Historic Flare. (Pa121a) The adjacent property where the reconstructed walkways were located were clearly not part of any prior agreement by the Appellant as set forth on the record of the ZBA Hearing.

In the survey (Ra1) as well as by photographs, there were two concrete walkways depicted as located in the Historic Flare which were not deteriorated in any manner. (Pa 122a) The Plaintiffs at no time had an ownership interest in Block 247, Lot 1 (the Historic Flare), adjacent to their improved lot at 9 Broadway.

Sometime after the alleged October 18, 2016 Settlement Agreement as discussed at the ZBA hearing, Plaintiffs chose to remove the pre-existing, non-conforming concrete walkways on Adjacent Lot 247, Lot 1 and installed a "u-shaped" paver design in the Historic Flare. (1T:4-6) which became the subject matter of this litigation.

Plaintiff received 3 violations for said installation and despite dismissal/consolidations of two of the violations, "decided as a way of settling the matter we would apply for a Zoning Permit. The Zoning Permit was merely to get the matter before the HPC. And we then applied to the HPC for approval of the walkway" (1T5:7-9). It should be noted that there is no directive or Order provided from the Municipal Court to stipulate as to what the actual intent of the Court was, but it was clearly to go through the municipal process to obtain a Certificate of Appropriateness which would have been INCLUSIVE of a Zoning Permit.

As a result of the municipal court agreement, a Zoning Permit as referenced was dated December 17, 2019, and had ID number 551944379. (Pa123a) The Zoning permit clearly states on Page 2 (under Zoning Review Notes dated 12/17/2019) the "applicant has submitted this zoning permit application to remediate a zoning violation." (Id.)

The Zoning Permit indicates three violations, to wit: Construction of walkways on the property without first acquiring zoning approval, Construction of structures in the Flared Avenue Open Space Area without first acquiring zoning approval and Failure to acquire a Certificate of Appropriateness from the Historic Preservation Commission. (Id at page 2). The Zoning Permit clearly indicates on Page three that Plaintiff was "denied zoning." (Id.)

However, despite the Zoning Permit denial, Plaintiff clearly circumvented MLUL and NLDO procedures and rather than seek variance relief for the zoning violations or a determination as to the appropriateness of the non-permitted installation, Plaintiff directly submitted an Application to the Historic Preservation Commission for a Certificate of Appropriateness by Letter from Mr. Hundley on December 2, 2020 for Block 247, Lot 13: 9 Broadway. (Ra4-7)

The application on Page Two, references the Zoning Permit as "ID551944379" dated December 17, 2019. (Ra7) Page Two of the HPC Application provides a question "Do you have Zoning Department approval for this project?" (Id.) Plaintiff responded next to the question on Page Two of the Application "N/A" or "Not applicable." (Id.) In point of fact, Zoning Approval was not granted to Plaintiff on December 17, 2019 and was DENIED Zoning Approval. (Pa123a-125a).

Plaintiff was denied approval of installed pavers as, among other things, the "visual elements are not historically appropriate to this house." 1T 20:17-22. The HPC issued a Resolution of Denial dated January 12, 2021 which was transmitted to all parties (municipal and applicant) which stated the paver material was "historically inappropriate and violates the Design Guidelines that provide that once a non-conforming structure within the flare is removed, it shall not be replaced." A Certificate of Appropriateness was denied. (Pa130-a).

Plaintiff's then appealed the denial of the HPC decision to the Zoning Board by way of application dated March 2, 2021. Plaintiff advised that "it specifically said in that settlement that we did not need any more HPC zoning approval or any building, or other department approval for anything. That was part of the settlement." (2T 25:14-19) The walkways were not included in the 2016 Settlement Agreement plan or survey, contrary to Plaintiff's testimony. (2T 51:8-14)

Per Ordinance 412.22 (C) which directs specifically to 413.06 (F) "Yard Requirements" "All buildings and porches shall be so located that the roofs, steps *or extensions of the same* shall not extend upon or overhand any public street, public avenue, public sidewalk, ***or any other lot unless permission is granted by that lot owner***." (Ra2-3) Any applications on Block 247, Lot 1 required the Consent of the Landlord by Ordinance 413.06 (F). (Id.) Appellant denied obtaining same. (2T: 25-26).

Plaintiff's application to the Zoning Board was for the appeal of the HPC Denial and contained no plea for alternative relief or relief from zoning, interpretation of ordinance or variance request. The Resolution of Denial from the Zoning Board of Adjustment was memorialized on March 2, 2022 and provided to Plaintiff (Pa134a). The Resolution specifically noted the appeal of the Decision of the Historic Preservation Commission was denied. (Id.) The Resolution noted that

no Applicant made no claim for alternative relief by application or public notice which was undisputed through the course of the litigation. (Id.)

More specifically, the Resolution noted the Plaintiff failed to request an Interpretation of Zoning Ordinance by the Board in order to establish the location, width, or number of proposed walkways for installation. *Id.* The Resolution likewise noted the material to be used for installed pavers would be solely within the discretion of the Historic Preservation Commission for this "key structure" under the Design Guidelines and must look like "brick" per Section R. (**Id**. paragraph 13, 15, 16 ZBA Resolution).

Lastly, at no time was there a request made by Plaintiff to seek Zoning Approval via "c" variance or waiver for the installation of not one but THREE walkways in the Historic Flare which installation is specifically prohibited under Section 413.02 of the NLDO entitled "Flared Avenue Open Space Areas" which advises the purpose of the Historic Flare is a "unique and invaluable resource that is recognized within planning, urban design and historic preservation circles ***as one of the first evidences of this type of streetscape treatment in the country***". (Pa162a, emphasis added).

The referenced ordinance also provides for "an" (ONE) access walkway, no greater than six feet in width. (Id.) This provision, given the critical nature of the

Historic Flare and its significance in the United States for Historic Designation on the National Historic Register, is strictly and consistently enforced by Ordinance.

Applicant, by and through his attorney, created his own interpretation of this Ordinance before the HPC stating, "It is somewhat a, in our opinion, a stretch of the literal reading of that ordinance to say that limits walkways to one walkway. I think you really have to stretch the definition. It was not a limitation on the number of walkways." (1T: 7:6-10) Applicant's attorney was immediately advised that he was incorrect and that because this is the Historic Flare, he should be aware that "this is a consistent thing". (1T:13:12-25).

Further, the HPC had issues with not only the installation and number of access walkways installed as being violative of historic guidelines, but the materials used which were not consistent with the design guidelines and formed the basis of the HPC denial. This Court has already settled, per the Nadelman case in summary judgment, that the HPC has specific knowledge related to type and consistency of materials allowed for preservation purposes. The HPC found that the materials utilized were not historically appropriate as they did not maintain the "rhythm and feel of the 1800s and were historically inconsistent with the key structure with respect to form, shape or color and were architecturally inappropriate. (Pa134a)

This position with regard to design materials was reiterated during the appeal of the HPC decision to the Zoning Board of Adjustment. Further, the zoning provision as to one walkway per Historic Flare lot was underscored by Board Planner Jennifer Beahm during the ZBA Hearing. As Ms. Beahm testified, "restoring it (walkway) is one this, adding is something else. So, you know, leaving aside the restoration of the two sidewalks…my problem is that connection. Number one, it's in the flare. We don't allow it. Number two, we have zoning separate and apart from the HPC that doesn't allow it. So that's a violation of our zoning ordinance separate and apart from what your settlement is. And third, you know, there's one walkway permitted per lot….But in no uncertain terms does restoration mean because I don't want to cut across the grass, I get to put in another sidewalk, which is not permitted under, regardless of HPC's review, it's not permitted by zoning." 1T:28 – 29 (lines 7 through 6 inclusive).

Further, the Court, in direction to counsel at the end of the Summary Judgment Motion, directed Briefs to be submitted with regard to specific items, such as the Standard of Review for a review of decision under a prerogative writ, which is the "arbitrary, capricious and unreasonable" standard. The Court directed litigants that the trial briefs would "only be based on the hearing below for arbitrary and capricious issues and the documentation provided." 4T:32:10-18 with no objection from Mr. Hundley. At no time did Appellant, by and through

their counsel, request the opportunity to file an Interlocutory Appeal of the Summary Judgment Decision or request Judge Lucas to advise if said Decision was a Final Order for purposes of appeal. In point of fact, Appellant's agreed to the Briefing Schedule on specified issues. (4T:31). With a Summary Judgment decision rendered on April 28, 2023, an Amended Notice of Appeal filed on August 31, 2023 to include the Summary Judgement disposition on April 28, 2023 is clearly filed out of time, requiring dismissal.

The Appellant filed a Complaint in lieu of Prerogative Writs against the Zoning Board of Adjustment which TRIAL and decision for the Zoning Board of Adjustment is the subject of this appeal, NOT the decision of the HPC. Further, Appellant at no time in their trial brief or decision, referenced Ordinances as being void, ultra vires. The record is absent those decisions as they were dealt with during Summary Judgment and waived by Appellant, having failed to file appropriate, timely Notice of Appeal on a Final or Interlocutory Order dated April 28, 2023. Therefore, the decision which is the subject of the appeal is not that of the Historic Preservation Commission, is not related to the Summary Judgment Motion ***but is SOLELY BASED on the decision of the Trial Court in upholding the decision of the Zoning Board of Adjustment*** in its denial of a Certificate of Appropriateness by the Historic Preservation Commission. (emphasis added).

## LEGAL ARGUMENT

## POINT 1

## IN THE TRIAL BRIEF AND HEARING BEFORE JUDGE LUCAS APPELLANT FAILED TO RAISE ANY ARGUMENT RELATING NEPTUNE TOWNSHIP ORDINANCE SECTION 900B AND 902A. OR SECTION 906 RELATING TO THE DIRECT APPEAL OF THE HISTORIC PRESERVATION COMMISSION TO THE ZONING BOARD, AS SUCH, SAME ARE NOT SUBJECT TO APPEAL AS THEY ARE NOT PART OF THE RECORD BELOW

With regard to whether or not Ordinance Section 900B and 902A as amended are ultra vires, or Section 906 of the NLDO authorizing a direct appeal to the HPC, said issues were not set forth in Appellant's Trial Brief, nor were they the subject matter of the trial below or the Trial Court's decision. In fact, there is no record of this argument before the lower court during the course of trial on May 31, 2023. (6T and Plaintiff Taylor's Trial Brief as Ra8-23)

In point of fact, those arguments were espoused in the Appellant's prior Summary Judgment Motion Brief which decision was rendered and concluded on April 28, 2023. Appellant did not file a timely Notice of Appeal on these issues and did not raise them again for reconsideration in their Trial Brief, nor were those issues raised at trial. Id. The issues referenced were therefore abandoned and not subject to appeal from the decision rendered on June 20, 2023.

As stated, Respondent has filed a Motion to Dismiss Appellant's Amended Appeal for failure to timely file same and as part of the Motion, has filed to dismiss

Appellant's Brief Points One and Two as both relate back to the Summary Judgment Motion decision and NOT the underlying trial or trial court decision.

However, should the Appellate Court choose to address either of these arguments, then Respondent advises that Appellant's arguments (Brief Points 1-2) regarding the authority of the HPC and the zoning board power to review an HPC decision based on the Neptune land development ordinance are disingenuous, incorrect interpretations in order to substantiate improper and illegal work performed in the National Historic District without proper approvals and are without merit.

Per N.J.S.A. (hereinafter MLUL) 40:55D-65-1, a "zoning ordinance MAY designate and regulate historic sites or historic districts and provide design criteria and guidelines therefor. *Designation and regulation pursuant to this section shall be in addition to such designation and regulation as the zoning ordinance may otherwise require*." (emphasis added.) The remedy is not wholly exhaustive and Plaintiff's interpretation once again, is designed to mislead the Court as to the powers to be exercised by the Zoning Board and the ability of the Historic Preservation Commission to provide appropriate advice and regulation in the Historic District to preserve its place on the National Historic Register.

Plaintiff then shifts to MLUL 40:55-D-111 to discuss the proper referral for issuance of permits pertaining to historic sites and advises that per this directive, the HPC reports are to be made directly to the Zoning Officer who is bound by the HPC

report. Plaintiff argues that this interpretation is correct while the Defendant points out that this perhaps WOULD have been the correct method had Plaintiff even bothered to go through a proper permitting process. In this instance, Plaintiff failed to obtain a Zoning Permit prior to moving to the HPC for advice, both before the work was installed and then even AFTER the violations occurred and plaintiff was forced to file for a zoning permit.

Per the Statement of Facts above, Plaintiffs sought a zoning permit on December 17, 2019 in consideration of municipal court violations. The zoning permit was DENIED. Despite the denial, Plaintiff did not seek a zoning application at that time in order to obtain zoning approval (permit) which would have then permitted them to move forward to the Historic Preservation Commission for advice on historically appropriate materials. Instead, Plaintiff filed a direct HPC application noting on the application that a Zoning Determination was "Not Applicable.' (supra).

Clearly members of the HPC knew differently as one member pointed out, "It sounds like you an argument that you have not with us but with the zoning or the enforcement board." 1T:19:21-23. The plaintiff again, circumvented the process by failing to apply for zoning permit approval which would then have triggered this matter to move to the HPC for advice on material. Per NLDO §900A, a C of A from the HPC cannot issue until an additionally required "approval has been

granted by the appropriate Neptune Township Planning Board *or Zoning Board*." Once received, "detailed information" to provide a clear and comprehensive understanding for the Historic Preservation Commission in its determination of the compatibility of the proposal" is required per Paragraph E(11) of the Ordinance, specifically relating to "Garages, carports, driveways, *sidewalks*, patios and curbs/curb cuts". (Pa173a).

Further, per Section 902, the HPC can review applications other than those which have been approved by the Planning or Zoning Board, as the case may be, as follows:

"A. Any exterior alteration on existing structures or buildings *or other improvements on their sites*….

C. Applications for construction permits to demolish a structure in any historic zone district….

E. The *construction of new sidewalks* or changes to existing sidewalks within the public right of way. (Pa174a)

Thus it can clearly be seen that the HPC had the authority to review the matter under the Design Guidelines, and establish appropriate materials for inclusion into the site had the matter proceeded properly with a Zoning Permit.

Plaintiff's argument that the Design Guidelines were devoid of mention regarding the type of pavers to be utilized are specious at best in consideration of

the facts of the matter. The home located at 9 Broadway was identified as constructed in 1880 which is a "key structure" for purposes of the Ocean Grove's Designation on the National Historic Register of Historic Places. Further, another key component of that designation is the protected Historic Open Flare Space which is key to Ocean Grove's design and development as an ocean front community in the Historic Designation. Inappropriate encroachments into the Historic Flare severely compromise the historic designation of Ocean Grove.

*Nadelson v. Township of Millburn*, 297 N.J. Super 549 (Law Div., Essex 1996) addresses any potential vagueness in design guidelines for a Historic District and Historic Preservation Commission and accepted the Zoning Board as an appropriate body to review the HPC decisions.

In Nadelson, Plaintiff's argued on Summary Judgment that the ordinance was vague because it failed to provide sufficient guidelines so that an **historic district** property owner may reasonably know what limitations are placed upon his rights of expansion, alteration and the like. Plaintiffs argued that the (HPC) Commission could not make a rational determination based on the vague language.

The Defendants in the case argued that the ordinance must be sustained because its design criteria and guidelines are sufficiently clear and not impermissibly vague. Defendants asserted that there are multiple layers of design criteria and guidelines surrounding, included in and supporting the ordinance.

The Court found that, "The adequacy of standards governing the application of historic preservation ordinances to proposed land use and development is a question of first impression in New Jersey. "Article IV, section VII, paragraph 11 of the New Jersey Constitution provides that 'any law concerning municipal corporations formed for local government ... shall be liberally construed in their favor.' " *515 Associates v. City of Newark,* 132 *N.J.* 180, 185, 623 *A.*2d 1366 (1993).

The Nadelson Court referenced cases from various jurisdictions, analyzed same and then confirmed that in determining the sufficiency of the standard, defined the standard of incongruity as a contextual standard, "one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied." *Id.* at 454 (citing Turnbull, *Aesthetic Zoning,* 7 *Wake Forest L.Rev.* 230, 242 (1971)). Nadelson at 559.

The court went on to state, the standard of "incongruity" must derive its meaning, if any, from the total physical environment of the Historic District. That is to say, the conditions and characteristics of the Historic District's physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the Historic District Commission in applying the "incongruity" standard. [*Id.* at 454]

The court went on to hold that "[t]he architectural guidelines and design standards incorporated into the ... Ordinance ... provide an analysis of the structural elements of the different styles and provide additional support for our conclusion that the contextual standard…is a sufficient limitation on the Historic District Commission's discretion." *Id.* at 454.

In rendering its decision, Nadelson relied other findings and concurred that the makeup of the (HPC) Commission and the procedural safeguards also helped limit the discretion of the Commission. The ordinance required that a majority of the members of the Historic District Commission shall have demonstrated special interest, experience, or education in history or architecture. The ordinance further provided for procedural safeguards as an additional check on potential abuse of the Commission***. First, there was a provision for appeal to the Board of Adjustment from an adverse decision of the Commission. Second, there was a provision which afforded the property owner a right to appeal a decision of the Board of Adjustment to the Superior Cou***rt. **Second, there was a provision which afforded the property owner a right to appeal a decision of the Board of Adjustment to the Superior Court. (*Nadelson at 560, quoting Turnbull, Aesthetic Zoning, 7 Wake Forest L. Rev. 230, 454-455 (1971)).***

Per Nadelson, the Court found that Design Guidelines provide the essential design characteristics of the building. The Commission and applicants can use the

guidelines to determine which design characteristics and elements are essential to preserve and/or recapture the qualities that make a building distinctive **and, when taken as a whole, contribute to the unique character of the district**. Id. at 561. (emphasis added). Summary Judgment was granted and it was found that the Ordinances "vague" design criteria and guidelines were sufficiently intelligible to provide adequate notice as to what was lawful. Plaintiff failed on their summary judgment motion to invalidate an Ordinance and Defendant's Summary Judgment Motion was granted. Id.

More importantly, even assuming arguendo, that Appellant is incorrect in their failure to obtain zoning approval before moving to HPC Application, it is Respondent's contention based on the Ordinance Sections cited above, that the HPC had sufficient authority to determine the TYPE of pavers to be utilized, if not the quantity and connection (installation of U-shape) which violates Zoning.

It is further underscored that not only did the HPC have the ability to determine materials per Nadelson, but in fact, the ability to make a determination which was subject to appeal by the Zoning Board as the applicant then had an avenue to Superior Court, if necessary. Nadelson at 560. Appellant's interpretation of the MLUL is substantially the same as set forth in Nadelson. Per 40:55D-109 b, d and e, the historic preservation commission has as duty to advise the board of adjustment on applications for development and provide written reports on zoning ordinance

provisions.

Per 40:55D-70, the Zoning Board may hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance. NJSA 40:55D-70 (b). Further per section (c), the Zoning Board may act "by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon…." NJSA 40:55D-70(c).

Appellant chooses to focus on what he deems to be the limitations of the power of the Historic Preservation Commission while Defendant supports the Historic Preservation Commission in their powers granted not only by the MLUL and Ordinances, but by the power statutorily invested in the Zoning Board of Adjustment to answer special questions relating to properties, provide interpretation an act in extraordinary and exceptional situations. Clearly, that path is supported not only by the MLUL, but by Nadelson (supra.) as it does allow for direct review by the Superior Court. ***Plaintiff's argument that the HPC's determination on the utilization of incorrect paver materials as being outside the design guidelines for installation, supporting the denial of a Certificate of Appropriateness rendering the decision "arbitrary and capricious", fails on all levels***.

Lastly, as noted, Appellant failed to request an interpretation of any ordinance to the Zoning Board of Adjustment as to the number of walkways and size of walkways to be permitted in the Flare and failed to request alternative relief from the Zoning Board. The matter filed by Plaintiff to the Zoning Board was solely limited to an appeal of the HPC decision. (Pa134a)

The Court should further note that the Neptune Zoning Board of Adjustment had ***every authority*** to review this matter for zoning appropriateness and it should be noted that the *Zoning Board of Adjustment DID have the power to make a determination as to the number of walkways to be installed in the flare, along with a decision as to whether or not walkways that were removed were abandoned, and did so by upholding the decision of the Historic Preservation Commission, per its powers established in the MLUL* ***which directly refutes Points 1 and 2 of Plaintiff's submission***. The Court must keep in mind that the Prerogative Writ action is focused on the determination of the Zoning Board for purposes of appeal, and whether or not the Zoning Board was arbitrary, capricious or unreasonable in their determination to uphold a denial of a Certificate of Appropriateness with independent findings of fact placed on the record and memorialized in the Resolution of Denial.

Further, it has been suggested that *N.J.S.A 40:55D-70(b)* provides a "wholly independent path to local determination of what is or is not a permitted use or

structure….the developer SHOULD SEEK INTERPRETATION WITHIN THE APPEAL PERIOD before the court will entertain an action in lieu of prerogative writ. *Cox, 2019 New Jersey Zoning and Land Use Administration*, Section 26;1.1, pp. 558.

In the case at bar, Appellant failed to seek interpretation and moved SOLELY under the procedural remedy of appeal of the HPC decision to the Zoning Board. There was no alternative remedy, interpretation, or alternative relief per 70(b) sought, or noticed. Therefore, there cannot be a determination of historical use nor a determination of a permitted use or non-conforming structure. The Zoning Board was entitled to apply the Ordinance under its grant of power.

Again, "if an appellant seeking to reverse the action of an official fails to ask for alternative relief by way of variance and fails as well to give all required notice, ***he will be bound on his appeal to the question of whether the administrative officer erred***. If the board finds no error in the action…the action of the officer is ***SIMPLY AFFIRMED***." Id. at pp. 559.

## POINT TWO

**THIS APPEAL IS LIMITED TO THE TRIAL COURT DECISION ON THE COMPLAINT IN LIEU OF PREROGATIVE WRITS WHICH IS FOUNDATIONALLY DETERMINED BY WHETHER OR NOT THE ZONING BOARD ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER IN RENDERING ITS DECISION TO UPHOLD THE HISTORIC PRESERVATION COMMISSION DETERMINATION. THE COURT DID NOT SUBSTITUTE IT'S JUDGMENT BY MAKING A DETERMINATION ON A ZONING ORDINANCE AS TO A NUMBER OF WALKWAYS OR WHETHER THE NLDO LIMITED THE SIZE AND SHAPE OF CONCRETE UNIT PAVERS, BUT AFFIRMED THE DECISION OF THE ZONING BOARD AS SAID DECISION WAS NOT ARBITRARY, CAPRICOUS OR UNREASONABLE**.

With regard to Appellant's Point Three and Four of their Brief, it is best to be reminded of the Zoning Board hearing. As Zoning Board Planner Jennifer Beahm so eloquently stated, Appellant essentially improperly installed historically inappropriate pavers in the Historic Open Flare of a District which is a key designation for Ocean Grove's place on the National Historic Register on a lot he did not own or lease, without Landlord consent; installed additional walkways where only one is permitted in contravention of the ordinance, without proper municipal approvals, without obtaining an approved zoning permit and without HPC approval for appropriate materials despite being a 4th generation owner in Ocean Grove and having dealt with the HPC and municipal processes throughout the course of their ownership. (2T:28-29 and 41-43)

It was the Appellant who failed to seek all appropriate approvals prior to the improper installation of expanded walkways in the Historic Flare Open Area in violation of the zoning ordinances and historic design guidelines.

The Plaintiff upon receipt of the violation notices, agreed to file for a Zoning Permit and received a denial. Rather than moving to the Zoning Board for a zoning determination which would finalize an appropriate permit which would push the matter to the HPC to review installation of appropriate materials, Plaintiff instead mislead the HPC by filing an application indicating that a zoning permit was "n/a" (not applicable) yet provided the permit which indicated a zoning denial.

Once the HPC heard the matter and noted there was a zoning issue and denied the application for impropriety in construction and materials, Plaintiff appealed to the Zoning Board. The Zoning Board, per the MLUL, DID have all authority to hear the matter and reviewed same as an appeal ONLY per Plaintiff's application and notice.

A zoning permit must be acquired to assure that the proposed use, construction, or alteration will be in accordance with the provisions of the zoning ordinance. (*NJ Zoning and Land Use Administration, Cox and Koenig, 2023*, pp175-176 Section 12-1 and 12-1.2) Plaintiff was obligated to apply a zoning permit and chose not to, ignoring that his zoning application had been "denied" (Pa123a). It is well settled that if the improvement was constructed without

appropriate approvals, and those approvals were later denied, the structure must be rebuilt to conform with zoning requirements. *Sherman v. Zoning Board of Adjustment* 242 NJ Super 421 (App. Div.); cert. den. 122 NJ 404 (1990).

The Board found that the plaintiff had acted inappropriately and the HPC was well within their rights to deny the application based on materials and issues presented. It is well settled that an HPC may deal with the question of whether a particular proposed alteration blends aesthetically with existing buildings in the vicinity in order to retain the character of the particular street scape (*Cox and Koenig, supra*, at Section 4-1.8, pp.50)

Further, "it must be emphasized that the jurisdiction of the Commission (HPC) does not depend upon whether or not an applicant is obliged to submit an application for development to the planning board OR the zoning board of adjustment. NJSA 40:55D-111 indicates the jurisdiction arises whenever an application is made for a permit affecting any building which has been designated as a landmark or is located in a historic district."

This same chapter allows for a written determination being sent to the administrative officer as well as appeal to the zoning board which triggers the implementation of the ***'arbitrary and capricious standard" in the event of litigation***. *Cox and Koenig, 4:1.5-6 (emphasis added).* The actions of the HPC under the ordinance and MLUL, despite Plaintiff's contravention of the municipal

ordinance and assertions to the contrary of their determination, were proper and appropriate for an appeal of the HPC decision to the Zoning Board.

Having appealed to the Zoning Board, it must be stated AGAIN that Plaintiff filed for no alternative relief (variance or otherwise) or ***interpretation of Ordinance***. As Board Planner Jennifer Beahm stated, "You put a structure in the Flare which we do not allow, period." (2T: 42:2-3) The third connecting walkway is "on someone else's property." Id. at ln 7. "You do not have permission from the Camp Meeting Association to put it there, nor do you have permission from the Township. That would have required a variance." Id at ln 8-11.

" I understand it's not what you are looking to hear, but at the end of the day, what has transpired here is that you did whatever you wanted. The HPC, who in our opinion and in my experience having worked here for over a decade, is responsible for design elements, look, color, materials, etc., denied the application because they felt it wasn't in keeping with their guidelines, which is what their charge is in the Township of Neptune for a key structure, no only did you not comply with them, but you're not compliant with the Township of Neptune either." (Zoning Transcript 41:19-25 and 42:13-25)

The matter as presented is neither insubstantial nor immaterial. Plaintiff simply disregarded every Ordinance and procedure disingenuously in order to obtain an approval they were not entitled to. As for the Trial Court, Judge Lucas

reiterated all of the points made by Plaintiff throughout the transcript and addressed them independently, to acknowledge the Board decision. However, Judge Lucas did not err in the application of the Standard of Review for a Zoning Board determination on a Prerogative Writ trial.

Judge Lucas clearly stated that Plaintiff's contention that the ZBA "denial of the appeal" by the Historic Preservation Commission to not provide a CofA was arbitrary and capricious, was "unsubstantiated by the record." 7T:35-36. The Court noted that "***The issue being that ultimately the Historic Preservation Commission and the Zoning Board of Adjustment ultimately agreed, that the walkways that were constructed even if constructed with concrete pavers, were not of a character that were consistent with the character of the historical flared a****rea*….**they are not appropriate**…There is no visible record or historical photograph that suggests the sort of paving was ever used." 7T:36-37 (emphasis added).

The Court recognized the clear issue in that the pavers were NOT historically appropriate, the Plaintiff did NOT meet their burden of proof to carry litigation and the Zoning Board of Adjustment did NOT act in an arbitrary and capricious manner which was the Standard of Review for the prerogative writ action in upholding the HPC decision, not just the violation of the land development ordinance, which had Plaintiff requested additional relief, perhaps

could have been discussed during the hearing. Since there were no further requests, only the appeal of the HPC decision was heard and forms the basis of this action, despite Appellant's numerous attempts to direct the court's attention elsewhere.

## POINT THREE

### THE PLAINTIFF BEARS THE BURDEN OF ESTABLISHING THAT THE DECISION OF THE ZONING BOARD OF ADJUSTMENT WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND FAILED TO DO SO AT THE TRIAL LEVEL. THE STANDARD OF REVIEW AT THE APPELLATE LEVEL IS ONE OF DEFERENCE.

The appropriate standard of review used by Trial Courts in any challenge to a decision by a planning or zoning board is very limited. "A board's decision should be sustained if it is "founded on adequate evidence." Burbridge v. Twp. Of Mine Hill 117 NJ 376, 385 (1990). "The factual determination of a board is presumed to be valid. It's exercise of its discretionary authority based on such determinations will not be overturned unless arbitrary, capricious or unreasonable and the burden of proof that the action of the board was arbitrary, capricious or unreasonable is upon the plaintiffs." Dunbar Homes, Inc. v. Zoning Board. 233 NJ 546, 558 (2018).

In this instance, the Board was charged with reviewing the decision of the HPC and making factual findings based on their investigation of the decision. Findings of fact indicating the basis for the Board's decision are made which

directly correlate to the application, not the interpretation of the law by the Zoning Board (keeping in mind no interpretation was requested). As such, deference is required.

The Court should remember that under Statute and cases to be discussed, the Board of Adjustment is given the exclusive jurisdiction to hear the appeal of the finding of the HPC (Nadelson and MLUL grant of powers to Zoning Board). The appeal was based on the submission of a permit denial which went to the HPC where the applicant advised the zoning denial was "not applicable". Ultimately, the Zoning Board did have jurisdiction over all issues regarding the walkways and improper installation. The HPC would have retained jurisdiction over the type of materials to be utilized.

It would behoove the Court to remember that "so long as there is substantial evidence to support it, the Court may not interfere with or overturn the decision of a municipal board. Even when doubt is entertained as to the wisdom of the Board's action, there can be no judicial declaration of invalidity ***absent a clear abuse of discretion by the Board***." Pullen v. South Plainfield 291 N.J. Super 303, 312 (Law Div. 1995) aff'd 291 N.J. Super. 1 (App. Div., 1996). Courts must affirm the Board's decision unless it was arbitrary, capricious and unreasonable. Kramer v. Board of Adjustment Sea Girt 45 NJ 268, 296 (1965).

Under *Chicalese*, "Board decisions, when factually grounded, are cloaked with a presumption of validity, which presumption attached to both the acts and the motives of its members." 334 N.J. Super 413, (Law Div. 2000) citing Pullen v. South Plainfield 291 N.J. Super 303 (Law Div. 1995) aff'd 291 N.J. Super. 1 (App. Div., 1996)

Where there is a correct application of the law to facts found on sufficient evidence in the record, the board decision will be upheld, and the approval will not be deemed arbitrary and capricious. Lang v. Zoning Board of Adjustment**,** 160 N.J. at 60-61**;** Burbridge v. Township of Mine Hill**,** 117 N.J. 376, 385 (1990). It should be remembered that Judicial Review is intended to be a determination of the validity of the agency's action, not substitution of the court's judgment therefor. CBS Outdoor v. Lebanon Plan Bd. 414 N.J. Super 563, 578 (App. Div. 2010).

As the Court is aware, per N.J.S.A. 40:55D-70,

*"The Board of Adjustment shall have the power to:* ***(b)*** *Hear and* ***decide requests for interpretation*** *of the zoning map or ordinance* ***or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance****, in accordance with this act;" (emphasis added)*

The Board listened to the arguments, reviewed the underlying ordinances, the provision of documents from the HPC and testimony of the appellant as well as the HPC Chair to understand the process and rationale for determination of denial

and to investigate whether or not "error" had occurred in the decision. The Board, based upon the discussion and review of all documentation and testimony, could not find error and upheld the determination of the HPC for all of the reasons set forth in the Zoning Resolution.

Since the appellant failed to request alternative relief, there was no opportunity to take additional testimony for a variance or other potential relief. In fact, *Cox & Koenig* clearly states that "if an appellant seeking to reverse the action of an official ***fails to ask for alternative relief by way of variance and fails as well to give all required notice of such fact***, **he will be bound on his appeal to the question of whether the administrative officer erred**. If the Board finds no error in the action of the administrative officer, **the action of the officer is simply affirmed**. (*Id*. at 559, emphasis added.)

The Court should further note that at no time did Plaintiff seek an interpretation of the Zoning Ordinance under ***N.J.S.A. 40:55-70(b)*** nor did Plaintiff seek alternative relief in their application. There was no request for a Variance, Ordinance interpretation or any other relief, so the Board was left to the determination on the record provided and the testimony taken during the course of the Public Hearing

The Prerogative Writ Procedure is established in order to provide appeals from local land use decisions. Plaintiff sought an appeal of the HPC determination

and was denied by the Zoning Board. To overturn the decision of the Zoning Board summarily, without review of the entire record, circumvents the process which is central to the MLUL. Local Boards have unique perspectives on local conditions and are in the best position to alleviate the hardships that arise under an otherwise legitimate zoning ordinance in particular cases and pertaining to particular properties. Interposing a court's judgment on this process is an arrogation of power the legislature has delegated. Griepenburg v. Township of Ocean, 220 N.J. 239 260-263 (2015).

Applicants are encouraged to exhaust administrative remedies, even those challenging the decision of the administrative officer, such as a zoning officer so that the applicant can avail itself of proper channel and the Board of Adjustment, as a policy making body may be called upon to exercise its statutory authority to review and pass upon the challenged decisions of local land use officers. 21st Century v. D'Allesandro, 257 N.J.Super 320, 323 (App.Div. 1992). The approach ensures judicial deference where there are legal and factual disputes. (Id.)

Conversely, exhaustion of remedies is not required where administrative review is futile, there is a need for prompt decision based on public interest, only if a question of law is involved and where irreparable harm will occur from denial of injunctive relief. Brunetti v. Borough of New Milford. 68 N.J. 576, 589 (1975). None of those issues are present herein.

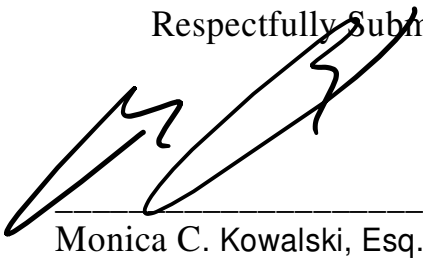
Under Appellate Review, the standard of review is one of deference. "Considering first the scope of our appellate review of judgment entered in a non-jury case, as here, we note that our courts have held that the findings on which it is based should not be disturbed unless "they are so wholly insupportable as to result in a denial of justice…" Rova Farms Resort v. Investors Ins. Co, 65 N.J. 474, 483 (1974).

## CONCLUSION

Based on the record below, the transcript and hearing materials provided as well as subsequent submission, Defendant seeks Dismissal of Plaintiff's Complaint, with prejudice, under the factual evidence, law and standard of review and provided.

Dated: December 15, 2023

Respectfully Submitted:



Monica C. Kowalski, Esq.

# SUPERIOR COURT OF NEW JERSEY
## APPELLATE DIVISION – DOCKET NO. A-003709-22

**WILLIAM E. TAYLOR, IV. and RACHEL TAYLOR**

**vs.**

**ZONING BOARD OF THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH**

**and**

**THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH**

**CIVIL ACTION – On Appeal from an April 28, 2023 Order Denying Plaintiffs' Motion For Summary Judgment and a June 20, 2023 Trial Order Dismissing Plaintiffs' Complaint Entered in the Superior Court of New Jersey, Law Division, Monmouth County.**
**Sat Below: Lordes Lucas J.S.C.**

# REPLY BRIEF OF PLAINTIFFS-APPELLANTS, WILLIAM E. TAYLOR, IV and RACHEL TAYLOR

**LAW OFFICES OF JAMES T. HUNDLEY, ESQ. LLC**
**Attorney: James T. Hundley, Esq.**
**Attorney ID: 025511976**
**Attorneys for Plaintiff-Appellants**
**William E. Taylor, IV. and**
**Rachel Taylor**
**PO Box 488**
**Ocean Grove, NJ 07756-0488**
**Office: 732-775-3100**
**Fax: 732-775-3103**
**Email: jth@jthundleylaw.com**

James T. Hundley
*Of Counsel*

James T. Hundley
*On the Brief*

# INDEX TO REPLY BRIEF

# Table of Contents

## Cases Cited



## Statutes and Codes

# LEGAL ARGUMENT

## Point One

### PLAINTIFFS-APPELLANTS WERE NOT REQUIRED AT TRIAL TO RELITIGATE LEGAL ISSUES PREVIOUSLY DECIDED ON MOTION FOR PARTIAL SUMMARY JUDGMENT

In Point One of their Brief, plaintiffs-appellants argue Neptune Township Ordinance Sections 900B and 902A expanded the HPC's permit review authority beyond the scope of review authorized by N.J.S.A. 40:55D-111. Pb8. As such, Ordinance Sections 900B and 902A were ultra vires and void. Pb11. Plaintiffs-appellants raised the issue below on their Motion for Summary Judgment. 5T14 – 1 to 25; 5T15 – 1 to 8.

In Point Two of their Brief, plaintiffs-appellants argue Neptune Township Ordinance Section 906 authorizing a direct appeal to Zoning Board of Adjustment (ZBA) of an Historic Preservation Commission (HPC) decision denying a Certificate of Appropriateness (CofA) is violative of N.J.S.A. 40:55D-70.2 and N.J.S.A. 40:55D-70a. Pb13. Plaintiffs-appellants raised this issue below on their motion for summary judgment. 5T20 – 8 to 15.

On April 28, 2023, the Court below entered an Order denying Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. Pa73a.

In Point 1 of their Brief, defendants-respondents acknowledge plaintiffs-appellants raised the issues of the validity of Ordinance Sec. 900B, 902A and 906 below on Motion for Summary Judgment. Db19. Defendants-respondents argue, however, that plaintiffs-appellants were required to raise those issues a second time in their subsequent trail brief and in the May 31, 2023 trial below. Db19. Defendants'-respondents' argument is without merit.

The April 28, 2023 Order entered below was not rendered upon the whole action. Such partial summary judgment orders are authorized by R. 4:46-3. "The judgment remains "partial" insofar as the life of the litigation is concerned." Applestein v. United Board and Carton Corp., 35 N.J. 343, 352 (1961). Such interlocutory order may be reconsidered by motion brought pursuant to R. 4:42-2. Lombardi v. Masso, 207 N.J. 517, 534 (2011).

There are no requirements under our Court Rules to relitigate at trial legal issues previously decided on motion and order for partial summary judgment. To the contrary, R. 4:46-3(a) provides that, upon trial, material facts established on motion for partial summary judgment "shall be deemed established." The same rational applies to legal issues previously decided on motion for partial summary judgment.

Plaintiffs-appellants were not required at trial to relitigate legal issues previously decided on their motion for partial summary judgment.

Point 1 of defendants'-respondents' brief references their December 13, 2023 Motion to Dismiss Appeal. Db 19 to 20. On January 4, 2024, the Court entered an Order denying defendants'-respondents' Motion.

## Point Two

THE ISSUANCE OF A ZONING PERMIT IS NOT A PREREQUISITE FOR APPLICATION TO THE HISTORIC PRESERVATION COMMISSION FOR ISSUANCE OF A CERTIFICATE OF APPOPRIATENESS

Defendants-respondents argue plaintiffs-appellants failed to obtain Zoning Department approval (permit) which they characterize as a prerequisite for application to the HPC for CofA approval. Db13, Db21. The argument is contrary to the provisions of Ord. Section 900A. which states, "No zoning permit where such is required shall be issued unless a Certificate of Appropriateness has been issued previously by the Historic Preservation Commission and when additionally required an approval has been granted by the appropriate Neptune Township Planning Board or Zoning Board." Pa63a. The issuance of a zoning permit by the Zoning Department is not a prerequisite for application to the HPC for issuance of a CofA.

## Point Three

DEFENDANTS-RESPONDENTS ARE BARRED ON APPEAL FROM RAISING THE ISSUE OF THE OCEAN GROVE CAMP MEETING ASSOCIATION'S CONSENT

Defendant-respondents argue plaintiffs-appellants failed to obtain the consent of the Ocean Grove Camp Meeting Association for walkway work performed at the Property. Db14, Db33. Defendants-respondents initially raised the issue in support of their Cross-Motion for Summary Judgment contesting plaintiffs'-appellants' standing to bring the actions below. 5T21 – 24 to 25; 5T22 – 1 to 4; 5T24 – 10 to 14.

On April 28, 2023, the Court below entered an Order denying defendants'-respondents' Cross-Motion for Summary Judgment. Pa 73a.

Defendants-respondents failure to cross-appeal the denial of their cross-motion below for summary judgment bars defendants-respondents from raising the issue of the Ocean Grove Camp Meeting Association's consent in their brief on appeal.

## Point Four

THE DECISIONS OF THE LAW DIVISION RENDERED MOOT ANY ISSUES ARISING FROM PLAINTIFFS-APPELLANTS NOT SEEKING AN ORDINANCE INTERPRETATION FROM THE ZBA

Defendants-respondents argue plaintiffs-appellants failed to apply to the ZBA for an interpretation of the zoning ordinance as authorized by N.J.S.A. 40:55D-70b. Db14, Db15, Db27, Db37, Db38. The issue was rendered moot by the rulings of the Law Division below.

Point One of plaintiffs'-appellants' Brief argues that sections 900B and 902A of the Township of Neptune Land Development Ordinance were not authorized by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-111, Pb6. The issue was decided by the Court below in the Court's April 28, 2023 Decision on Motion. 5T15 – 9 to 19.

Point Two of plaintiffs'-appellants' Brief argues Section 906 of the Township of Development Ordinance was not authorized by the MLUL, N.J.S.A. 40:55D-70(a) and N.J.S.A. 40:55D-70.2. Pb13. This issue was also decided by the Court below in the Court's April 28, 2023 Decision on Motion. 5T18 – 4 to 13.

Point Three of plaintiffs'-appellants' Brief argues Section 413.02B of the Township of Neptune Land Development Ordinance did not limit to one (1) the number of walkways permitted in the Flared Open Space Area. Pb14.

The Court below interpreted Ordinance Section 413.02B and concluded the Ordinance permitted only one (1) walkway in the flare. 7T24 – 25; 7T25 – 1 to 6; 7T25 – 9 to 20.

Point Four of plaintiffs'-appellants' brief argues that the Ocean Grove Historic District Architectural Design Guidelines for Residential Structures, Pa72a, incorporated into the Township's Land Development Ordinance, do not address the size, shape or color of concrete unit pavers permitted in the Historic District. Pb19 The Court below interpreted the Guidelines as permitting the HPC to require

concrete unit paver walkway surfacing be the shape and color of brick. 7T38 – 18 to 25; 7T39 – 1.

The decisions of the Law Division below rendered moot any issue arising from plaintiffs'-appellants' not seeking the ZBA's interpretation of various sections of Township's Land Development Ordinance.

## CONCLUSION

For the foregoing reasons, it is respectfully requested the Court Order as follows:

1. Reversing the Law Division's April 28, 2023 Order denying plaintiffs'-appellants' Motion for Summary Judgment and entering an Order declaring Sections 900B and 902A of the Township of Neptune Land Development Ordinance, as amended, are not authorized by the Municipal Land Use Law, are ultra vires and void.

2. Reversing the Law Division's April 28, 2023 Order denying plaintiffs'-appellants' Motion for Summary Judgment and entering an order declaring the provisions of Section 906 of the Township of Neptune Land Development Ordinance authorizing a direct appeal of Historic Preservation Commission determinations to the Zoning Board of Adjustment are not authorized by the Municipal Land Use Law, are ultra vires and void.

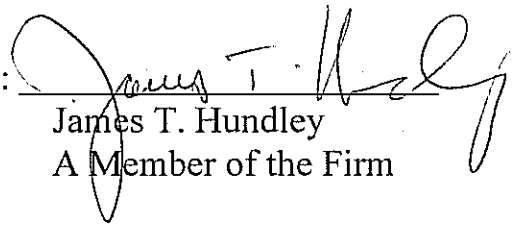
3. Reversing the Law Division's June 20, 2023 Decision and Order and entering an Order declaring the Section 413.02B of the Township of Neptune Land Development Ordinance does not limit to one (1) the number of walkways permitted in the Historic Flared Open Space Area.

4. Reversing the Law Division's June 20, 2023 Decision and Order and entering an order declaring that the Design Criteria and Guidelines incorporated into the Township of Neptune Land Development Ordinance could not be interpreted by the Historic Preservation Commission to limit concrete unit pavers to a specific size, shape or color.

Respectfully submitted,

Law Offices of
James T. Hundley, Esq., LLC
Attorneys for Plaintiffs-Appellants
William E. Taylor, IV and Rachel Taylor

Dated: January 23, 2024

By: 
James T. Hundley
A Member of the Firm