SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION

VINCENT A. VILLANO, JOYCE VILLANO, SANTIAGO BORJA, AND LAUREN JACOBSON BORJA,

Plaintiffs-Appellants

vs.

SAL MADISON, LLC, SAL LAROSA, JR., KENNETH J. GAMBELLA, GIGI'S OCEANPORT PIZZA, THE BOROUGH OF OCEANPORT, AND JOHN JOHNSON

Defendants-Respondents

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Appellate Docket No. A-003980-22

ON APPEAL FROM:
Superior Court of New Jersey
Law Division
Monmouth County
Docket No.: MON-L-1741-20

Sat Below:
Hon. Mara E. Zazzali-Hogan,J.S.C.

CIVIL ACTION

PLAINTIFFS'-APPELLANTS' BRIEF

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STATEMENT OF PROCEDURAL HISTORY

This action was started on June 5, 2020 by way of the filing of a Verified Complaint in Lieu of Prerogative Writ by the Plaintiffs, Vincent A. Villano (hereinafter "VV"), Joyce Villano (hereinafter "JV"), Santiago Borja (hereinafter "SB"), and LB Jacobson Borja (hereinafter "LB"), together with an Order to Show Cause for a Temporary Restraining Order and preliminary injunction shutting down Defendant Gigi's Oceanport Pizza (hereinafter "GG"). (Pa 1-16). The Order to Show Cause was supported by Certifications of SB, VV and Steven Clayton. On September 23, 2020, the relief requested was denied. (Pa 17-23).

On July 16, 2020, Defendants Sal Madison, LLC (hereinafter "SM"), Sal LaRosa, Jr. (hereinafter "Sal"), Kenneth J. Gambella (hereinafter "Gambella"), and GG filed an Answer, Affirmative Defenses and Counterclaim. (Pa 24-31). On August 6, 2020, Plaintiffs filed a Motion to dismiss Count II of the Defendants' Counterclaim. The Court below denied the Motion on September 25, 2020. (Pa 17-23)

Defendants Borough of Oceanport (hereinafter "OP") and John Johnson (hereinafter "JJ") filed their Answer and Affirmative Defenses on August 14, 2020. (Pa 17-23). Defendants OP and JJ were voluntarily dismissed with prejudice on September 22, 2021. (Pa 17-23).

On April 28, 2022, SM, Sal, Gambella, and GG filed a Motion for summary judgment. On August 3, 2022, the Court denied the Motion. (Pa 17-23). On August 9, 2022, the Court entered a Supplemental Order denying the Defendants' Motion for summary judgment (Pa 17-23), and on August 26, 2022, the Court entered a revised opinion. (Pa 17-23).

A bench trial was held on October 31, 2022, November 1, 2022 and November 2, 2022.[1] VV and JV did not appear and were dismissed from the case.[2] On August 3, 2023, the Court entered an Order for Judgment, finding no cause for either the Plaintiffs' Complaint or the Defendants' Counterclaim. (Pa 32). On August 23, 2023, Plaintiffs filed a Notice of Appeal. (Pa 33-36). The Defendants did not file a Cross-Appeal, nor did they file a Case Information Statement.

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[1] 1T Transcript of Trial October 31, 2022
2T Transcript of Trial, November 1, 2022
3T Transcript of Trial November 2, 2022
4T Transcript of Trial Decision, August 3, 2023

[2] 3T at 72-72

STATEMENT OF FACTS

This matter came on for trial before Judge Mara Zazzali-Hogan on October 31, 2022 as a "bench trial." The trial began by the parties marking forty-eight "J" Exhibits into evidence without the need for testimony to authenticate these documents.[3] Thereafter, seven witnesses testified over three days of trial. The following facts were established based upon the testimony of witnesses and the documentary evidence.

The Plaintiffs-Appellants are owners and/or residents of property immediately adjacent to 109 South Pemberton Avenue (hereinafter referred to as "PQ"). The PQ is Block 37, Lot 10. LB owns 113 South Pemberton Avenue, also known as Block 37, Lot 11. (Pa 157). These two properties are currently in the "R5-family and 2-family" zone in the Borough of Oceanport. (Pa 158). A commercial take-out restaurant use is not permitted in the zone. (Pa 159-162).

The lots in question were created by the filing of a map on 12/20/30 by John Canevari (hereinafter referred to as "Canevari"). Canevari had acquired title to the property on August 27, 1925. (Pa 48-53).

[3] Five of these Exhibits have not been included in Appellants' Appendix, as they relate to issues not raised on appeal.

The first zoning ordinance in OP was adopted on February 2, 1933. (Pa 37-47). The PQ (109 South Pemberton Avenue) was in the "dwelling zone." It did not permit a take-out Italian restaurant.

Canevari sold the PQ to Fred Zito (hereinafter referred to as "Zito") and his wife on August 5, 1944. (Pa 55-59). Zito ran a "general grocery store" on the PQ. The date the use started is unknown. He built the structure "on the corner" where the use in dispute is located. The Zito food use could not have started before August 5, 1944 (Pa 66-68; Pa 69-75).

In 1969 the "grocery store use" ceased operating and the commercial building was used by Port TV, Inc., which bought, sold and repaired televisions, radios and stereos. (Pa 66-68).

In 1984 Vincent Renzo (hereinafter referred to as "Renzo") applied to the Oceanport Board of Adjustment for an "interpretation" to be able to install a "pizza oven" and sell pizza to the public for take-out only. It was called "Oceanport Pizza." (Pa 69-75).

The Zoning Board file did not have proof of service or publication. The attorney for the applicant no longer had her file. No proof that notice of the hearing on this application was sent to property owners within two hundred feet of the PQ was produced at trial. In addition, no proof that notice of the hearing was published in the Asbury Park Press or anywhere else was produced at trial. (Pa 79-86). The

Board adopted a Resolution on June 27, 1984. It found as a fact that the PQ "has almost exclusively been used as a food store since 1932." It concluded as a matter of law that "the use of the premises constitutes the pre-existing non-conforming use." It also concluded as a matter of law that the "installation of a pizza oven and the sale of pizzas to the general public not for consumption on the premises does not constitute a change or expansion of said pre-existing non-conforming use." The resolution "resolved" that Renzo could install a pizza oven and sell take out pizzas. (Pa 76-78).

The Resolution required the applicant to publish a notice of the Board's decision in the newspaper within ten days. No proof of this notice was produced at trial. (Pa 79-86).

Oceanport Pizza operated with a limited menu of pizzas and subs. (Pa 87; T3 at 29:6-11)). Renzo closed in 2010. (T1 at 107:8-108:1; T2 at 137:12-25). The Cottons operated the pizza parlor periodically from 2010 to 2014. (T2 at 137:12-25). The hours of operation were chaotic. (T2 at 140:22-141:3). The structure was vacant for three years, from 2014 to 2017. (T2 at 125:17-126:20).

LB acquired the property immediately adjacent to the PQ on January 25, 2008. She resides there with her son and husband, SB (Pa 62-65; T1 at 40:20-41:8).

PQ is owned by SM. It was acquired on October 1, 2015. (Pa 60-61). When SM acquired the property, it did not obtain a "Certificate of Nonconformity"

pursuant to N.J.S.A. 40:55D-68 from the Board of Adjustment. It also did not obtain a C.O. for the commercial structure. It also did not obtain a C.O. for the two-family house. It only obtained a TOT, "Transfer of Title," certificate for the two-family house and not the commercial structure. (Pa 88-90; T2 at 87:10-91:4; 96:15-98:2).

The commercial structure did not even have electric service from 2014 until January 19, 2017. No zoning permit was obtained for the work to restore power to the building in 2017, only a construction permit was obtained. (Pa 79-86; T2 at 125:17-126:20; 126:23-24).

SM did work on the food building, including moving the gas line and replacing the HVAC system without any permits in late 2019 and/or early 2020. (Pa 94; Pa 95-96; T2 at 144:9-145:1; 145:7-13; 145:5-6; 146:21-147:9). GG did electrical work without permits. (T2 at 147:10-149:1; 63:2-21). SB complained to municipal officials, including the Construction Official, Zoning Officer and Borough Clerk, about the construction and proposed use of GG in December 2019 and January 2020. (T1 at 48:6-49:24). On January 23, 2020, he had a lawyer write to the Zoning Officer/ Construction Official formally complaining about the proposed "pizza business." (Pa 95-96; T1 at 53:11-17-).

When municipal officials failed to act, SB filed municipal court complaints on February 6, 2020, contending that the use was not permitted and that work was done without permits. (T1 at 53:23-54:16). In spite of being put on notice of the

neighbors' questions as to the use and lack of permits on February 6, 2020, the zoning officer issued a zoning permit on March 12, 2020 that the proposed use was "preexisting nonconforming use complies as per resolution." (Pa 122).

On May 12, 2020 GG opened for business. (T1 at 55:1-2; 172:1-5). SB made multiple complaints to the police in May of 2020 about delivery trucks. (Pa 97-101; Pa 102-105; T1 at 55:7-11). This action was filed on June 5, 2020. Neither the Zoning Permit (Pa 122) nor the Zoning Board Minutes and Resolution (Pa 69-75; Pa 76-78) were ever produced to SB prior to the litigation, in spite of multiple OPRA Requests by him. (T1 at 52:21-53:10).

Although the Defendants took the position on the return date of the Order to Show Cause that no permits were required for the work done to the restaurant, months later applications were in fact filed for the gas line work, the signs and the electrical work. (Pa 123-135). When inspections were performed by the Construction Official months later, the electrical work was deemed improper and the signs were not all permitted. This process of applying for permits, inspections, denials, repairs, and final inspections and approvals went on for months, all while GG was in operation. (Pa 124-136; T1 at 169:3-9; 171:1-6; 171:24-183:19; T2 at 61:8-62:21; 144:9-146:6;146:21-149:1).

GG's menu is substantially more expansive with food choices then Renzo's and includes appetizers, soups, dinners and desserts. (Pa 106-117; T1 at 102:1-

106:11; 144:8-149:10). The hours of operation for GG are Monday, Wednesday, Thursday and Sunday from 10:30 a.m. to 9:00 p.m. and Friday and Saturday from 10:30 a.m. to 9:30 p.m. That is a total of ten and a half hours per day for four days and eleven hours per day for two (2) days, for a total of sixty-four hours per week. (T2 at 143:22-144:1).

Renzo's hours of operation were Thursday to Saturday from 1:00 p.m. to 9:00 p.m. That's eight hours per day for three days, for a total of twenty-four hours per week. (T3 at 33:19-34:1).

GG is open forty (40) hours more per week than Renzo's.

Renzo had no deliveries of any product. (T3 at 31:21-32:9; T1 at 101:6-12). GG has large trucks, including eighteen-wheelers, delivering food products and supplies and soft drinks. (Pa 145; Pa 146; Pa 147; Pa 148; Pa 150; Pa 151; Pa 152; T1 at 56:6-57:20; 59:3-5; 60:6-9; 61:9-25; 63:25-64:3; 102:1-106:11; 187:19-189:8; T3 at 20:24-21:14; 60:5-61:6).

There are refrigerator diesel trucks that deliver food product to the PQ and leave their engines idling for extended time periods while delivering to the restaurant. (Pa 154; T1 at 57:8-59:16). Deliveries occur before 5:00 a.m., waking up SB, LB and their child. (T1 at 57:8-59:16; 69:12-71:7; 102:1-106:11). Bread deliveries leave food outside the store. (T1 at 69:12-71:7). Trucks back up with a loud beeping sound. (T1 at 103:18-24). There is much more truck and car traffic

than when Renzo operated and obviously when there was no food operation at all. It is dangerous to children, as there are no sidewalks. The delivery vehicles illegally park too close to the stop sign and park in the crosswalk. Cars and trucks trespass on Plaintiffs' and a neighbor's property in order to make K turns. (Pa 150; T1 at 62:1-63:22; 105:22-106:11; 187:19-188:15).

The equipment in GG's store is substantially different from when Renzo ran it. (Pa 136-154). There is much more equipment in GG than in the Renzo operation. (T3 at 30:20-31:20).

The quality of life of SB and LB and of the immediate neighborhood has been substantially negatively impacted by GG's operation, including increased traffic, noise, odors, hours of operating, deliveries, and safety. The use is incompatible with a residential zone. (T1 at 69:12-71:7; 94:18-22; 101:18-23; 102:1-106:11; 108:17-24; 187:19-189:8). This has been the view of OP since February 2, 1933, or over approximately ninety years.

People still eat food on the premises, by eating on the benches provided by GG on the sidewalk outside its front door. (T1 at 108:10-16).

SB moved into his wife's property "around 2013." It is adjacent to the PQ. (T1 at 41:8; 42:18-20). There were times when no one was operating any business in the food structure and at that time the neighborhood was "an extremely quiet area." (T1 at 45:18). The activity by GG began in December 2019. There were lots

of trucks delivering equipment, there was construction going on in the building. There were vehicles double parked in the middle of the street. There were no permits posted on the building and when he went to the town to see if any permits had been issued he learned that no permits had been issued for any of the work going on in the building. (T1 at 48:6-49:24). When SB asked the town if GG had the right to operate no one gave him the 1984 Resolution. On January 23, 2020 counsel for the Borjas put the Zoning Officer on notice of the contention that GG did not have the right to operate that use at the PQ. (Pa 95-96; T1 at 53:11-17). When the municipality failed to act, in response to the Borjas' attorney's letter of January 23, 2020, in early February, SB filed Municipal Court complaints alleging that work was being done without permits that were required and that the proposed use was not permitted. (T1 at 53:23-24; 54:13-16). SB testified at trial to trucks parked in the crosswalk. (T1 at 57:19-20). He also testified that the sounds from the refrigerated trucks that were parked for a substantial period of time were annoying and that he could hear those noises at his home. (T1 at 57:21-58:11; 58:25-59:5). He testified that some of these trucks that were parked for extended periods of time were diesel trucks and the smell from the diesel trucks was "everywhere." (T1 at 58:12-24). He testified that all of the above issues were still going on "today." (T1 at 59:3-4). He also testified that there were truck deliveries as early as 4:46 a.m. and that those deliveries woke him up "all the time." (T1 at 59:6-16). He testified that tractor

trailer trucks making deliveries to the restaurant park in front of a stop sign on a crosswalk and that that has been going on for the entire time that GG has been in business and continues today. (Pa 146; T1 at 60:6-9-61:22-25). Further he testified that delivery trucks including ones with tractor trailers make U-turns on South Pemberton in front of his house and that many times they use his driveway coming onto his property in making these U or K turns. (Pa 147; Pa 149; T1 at 62:1-23; 63:1-5 and 11-22) and that this activity is ongoing today. (T1 at 64:4-66:14). Finally, SB testified that his quality of life has been detrimentally impacted by GG's operation including the idling of cars and delivery trucks, turns into the driveway and K-turns on the street, deliveries early in the morning, noise from the trucks waking everyone up and food left outside and people eating on benches. (T1 at 69:12-71:10).

LB testified that the Renzo operation had no delivery trucks ever. (T1 at 101:11-13). She said that GG's operation is "different." The menu is more expansive now, as it is not just pizzas. The amount of truck traffic from deliveries is scary. There is no sidewalk and her son has to walk in the street to friends' houses and the K and U-turns by trucks on her street are dangerous. Many times garbage is left out and is overflowing and GG's operation also dumps fluid in the street. The hours of operation are much more from GG and the number of days in the week is much greater. It is as if there is never a break from this operation next to her. There

is definitely more noise now than when Renzo was operating it. This is from trucks that idle, many of them refrigeration trucks, and trucks backing up and the beeping sound when they back up. These noises occur early in the morning. The diesel smell from the diesel trucks she can smell in her house and is objectionable. There are definitely safety issues with children, including hers as well as the children from the school trying to walk across the crosswalk where trucks are parked in front of the stop sign and many times on the crosswalk and also with the trucks making K and U-turns. Her quality of life with GG's operation is one hundred percent different than it was with the Renzo operation. (T1 at 101:18-23; 102:1-5; 101:6-12; 101:13-22; 103:1-15; 103:16-24; 103:25-104:1; 104:16-21; 104:22-24; 105:16-106:11; 108:17-25). Finally, LB testified that there is a bench on the PQ outside of the building in the front facing Wolfhill Avenue. People purchase food inside the building and come out and sit on the bench and eat their food on the premises instead of taking it off-premises. (T1 at 108:10-16; 111:10-11).

Next to testify was Gambella, the owner/operator of GG. He admitted that he caters from the Oceanport facility and does so in order to "expand his area to do business." (T1 at 129:13-24). He further admitted that there are other different appliances that he brought onto the premises and uses as part of his operation that were not there when Renzo merely had a pizza oven. (T1 at 153:2-5). He admitted that he had cooktops, an air fryer, a food warmer, steam table, slicer, refrigerators

all that were added by him and were not present when Renzo ran his operation. (T1 at 153:20-24; 155:1-6; 157:21-22). Finally, he admitted that work was done on the premises without permits and it was not until after suit was filed on June 5, 2020 that he went to the municipality to obtain permits and it took a number of months to finally get those permits for work that had previously been done. (T1 at 178:13-180:25).

Next to testify was Barbara Gasparini, a neighbor who lives at 114 South Pemberton Avenue. Her residence is across the street from the Borjas and GG's operation. (T1 at 186:10-25). She testified that GG's operation is different from Renzo's. It is open more days and it has more hours of operation than Renzo, who had a limited number of days and hours. (T1 at 187:17-25). She further testified that she saw GG's employees dumping soup in the street. (T2 at 6:21-7:8).

Next to testify was Sal, the owner of SM, the property owner. He admitted that the hours of operation of GG was Monday, Wednesday, Thursday, and Sunday from 10:30 a.m. to 9:00 p.m. and Friday and Saturday from 10:30 a.m. to 9:30 p.m. (T2 at 143:16-144:1).

Next to testify was the Police Chief of Oceanport, Michael Kelly. He testified that the operation at GG has definitely increased the volume of traffic in the area. (T3 at 8:6-8; T3 at 13:25-14:14). He testified that the police received complaints from SB and another resident in the area regarding trucks and the fact that they were

idling for a long time. (T3 at 8:11-17). He testified that the mere fact that summonses were not issued by responding officers (he never responded to a complaint) does not mean that there was no violation of motor vehicle laws. (T3 at 12:24-13:4; 17:11-22). He stated that Wolfhill Avenue was not a heavily traveled street and that South Pemberton Avenue was even less well-traveled. (T3 at 13:19-24). He testified that one must park twenty-five feet back from a crosswalk and one is not allowed to park in it, even if making deliveries, under the motor vehicle statutes in the State of New Jersey. (T3 at 16:13-23). He further testified that one must park fifty feet back from a stop sign in order to be compliant with motor vehicle laws. (T3 at 16:25-17:10). He reviewed the photograph marked J-30 (Pa 145) and indicated that that reflected a violation of the motor vehicle laws since the truck depicted in that photograph was not fifty feet back from the stop sign and was in fact parked in a crosswalk. (T3 at 20:8-21:14). He again reiterated that the fact that a summons was not issued does not mean that there were not times when motor vehicle violations were observed by officers, however, officers may have chosen to deal with the violation other than with the issuance of a summons.

Next to testify was Mr. Mazza, who was Mr. Renzo's son-in-law, and who worked for Mr. Renzo in the pizza parlor while he operated it. It should be noted that he was a totally objective person who had no "skin in the game." He reviewed the photograph marked J-23 (Pa 136) and indicated that Renzo had no appliances

like GG as reflected in that photograph. Renzo had no induction cooktops, no microwave and GG had more refrigeration. In addition, Renzo had no food deliveries and no bread deliveries because he picked up whatever he needed for his operation himself. (T3 at 30:20-32:9). Mr. Mazza then reviewed Exhibit J-19 and testified that GG's menu was much more expansive than Renzo's. (Pa 106-117). Renzo had no soups and salads, he had less sandwich selections, he had no dinner options (like the chicken and seafood offered by GG), he had no desserts and he had no catering. (T3 at 32:10-33:18). He further testified that Renzo's hours of operation were Thursday to Saturday from 1:00 p.m. to 9:00 p.m. Finally, he testified that the Renzo operation was only pickup and delivery and that there was no eating on premises, either inside the building or outside. (T3 at 34:8-14).

TRIAL COURT ERRORS

Plaintiffs-Appellants contend that the trial court erred as follows:

1) In ignoring uncontested facts in the record.

2) In making factual findings that are not supported by the record.

3) In failing to follow the law with regards to preexisting non-conforming uses, which is that courts should look to extinguish preexisting non-conforming uses where the entitlement to same is based on "sparse evidence" (as the Court so found).

4) In improperly placing the burden of proof on the Plaintiffs to prove that the 1984 Resolution was invalid, rather than requiring the Defendants to prove that the Board of Adjustment had jurisdiction to hear the application through proper notice to property owners, publication pre-hearing and after the approval.

5) Even assuming that the 1984 Resolution was valid and binding, in failing to conclude as a matter of law that the "use" approved in 1984 had not been expanded.

6) In failing to find that there had been an abandonment of the "purported preexisting non-conforming use" in 1969 when the "food use" terminated and was replaced by a TV sales and service shop.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

An Appellate Court's review of rulings of law and issues as to the law's applicability are "de novo." Matter of Ridgefield Park Board of Education, 244 N.J. 1, 17 (2020). A trial court's interpretation of law and the legal consequences that flow from established facts, however, are not entitled to any special deference. Rowe v. Bell & Gossett Company, 239 N.J. 531, 552 (2019).

Findings of fact by a trial court sitting without a jury are accorded deference. Balducci v. Cige, 240 N.J. 574, 595 (2020). However, these findings of fact must be supported by "sufficient credible evidence" in the record. State v. Mohammed, 226 N.J. 71, 88 (2016). If there exists a mixed question of law and fact, then the Appellate Court will give due deference to the fact-finding, if it is supported by sufficient credible evidence in the record, and will review the legal aspects of that mixed question on a de novo basis. State v. Pierre, 223 N.J. 560, 576 (2015).

POINT II

THE TRIAL COURT BELOW ERRED IN IGNORING UNCONTESTED FACTS IN THE RECORD
(Pa 66-78; 95-96; 122; T1 at 53:11-17; 69:12-71:10; 101:6-23; 102:1-5; 103:1-104:1; 104:16-24; 105:16-106:11; 108:10-25; 111:10-11; 186:10-25; 187:17-25; T2 at 143:16-144:1; T3 at 8:6-8; 13:14-14; T4 at 4:16; 12:1-2; 13:10; 22:5-7; 23:23-24:3; 24:18-25; 25:4-7; 25:23-26:19)

The Court below made numerous "findings" that are directly contradicted by uncontested facts in the record. In its oral decision, the Court states that the zoning permit was issued on July 2, 2020. (T4 at 12:1-2). A review of J-21 in evidence (Pa 122) clearly shows that that is the incorrect date and that the date on the zoning permit is March 12, 2020.

The Court below also states that there was "no proof of eating on the premises" and suggests that photographs were necessary in order to establish that. (T4 at 13:10; 23:23-24:3). The proofs regarding this factual allegation are contained in the testimony of LB and SB (T1 at 108:10-16; 69:12-71:10; 111:10-11) and the factual allegation was uncontested at trial. There is a bench that is just outside the front door of the building and that bench was used by patrons of the restaurant to sit and eat the food that they purchased inside the building. That is on-premises consumption of food which is a direct violation of the 1984 Resolution. (Pa 76-78)

The Court states that Plaintiffs' allegation that the Zoning Officer was on notice of the Plaintiffs' challenge to whether the Defendants' restaurant use was permitted was "unsupported." (T4 at 22:5-7). However, J-16 in evidence (Pa 95-96) and T1 at 53:11-17 clearly establishes that the Zoning Officer received just such a letter from Plaintiffs' counsel on January 23, 2020. That fact in evidence is uncontested.

The Court also stated that the "Defendants admit working 32 ½ hours a week." The Court then stated that there was no testimony on the hours that Renzo's operation was open. (T4 at 24:18-25). These facts are highly significant to the legal issues in this case. Sal testified that GG is open Monday, Wednesday, Thursday, and Sunday from 10:30 a.m. to 9:00 p.m. and on Friday and Saturday from 10:30 a.m. to 9:30 p.m. (T2 at 143:16-144:1). That is a total of sixty-four hours per week. Mr. Mazza, Renzo's son-in-law who worked in his pizza parlor, testified that he was open Thursday to Saturday from 1:00 p.m. to 9:00 p.m. That is twenty-four hours per week. That testimony is uncontested. GG is open forty more hours per week than Renzo. In addition, GG is open on Monday and Wednesday, days that Renzo was not open at all.

The Court said that there was insufficient proof on "increased traffic" in the record. (T4 at 4:16). The testimony of LB, SB, Mrs. Gasparini, and Captain Kelly all stated that there was increased traffic on both Wolfhill Avenue as well as South

Pemberton Avenue as a result of GG's restaurant operation. (T1 at 69:12-71:10; 101:18-23; 102:1-5; 101:6-12; 101:13-22; 103:1-15; 103:16-24; 103:25-104:1; 104:16-21; 104:22-24; 105:16-106:11; 108:17-25; 186:10-25; 187:17-25; T3 at 8:6-8; 13:25-14:14).

The Court found that the "evidence was sparse" on just exactly what the preexisting non-conforming use was when the zoning ordinance came into effect. (T4 at 25-5). The Court then went on to state that the only evidence in the record was the 1984 Resolution and the meeting minutes that the structure was "always operated as a food store." (T4 at 25:4-7). The Court has ignored the article written by Zito. He is the individual who provided the testimony in 1984 before the Board of Adjustment and he is also the individual in 1969 who wrote the article. (Pa 66-68). It would certainly be logical to conclude that Zito recalled facts from the 1930s more clearly in 1969 than he did in 1984. In addition, in his 1969 article, he states that the commercial structure was then being used for a TV sales and repair shop. Obviously, his article written contemporaneously with the then-use of the building should be given greater credence than Zito's testimony some fifteen years later in 1984. Somehow, in 1984, when Zito had a motive because he had a tenant that wanted to rent his building, he forgot about the interruption of the food use in 1969 and, we would submit, falsely testified under oath to the Board that the structure was always used for a food use. (T4 at 25:4-7; 25:23-26:19; Pa 66-68; Pa 69-75). The

Court erred in accepting the 1984 testimony and in ignoring the 1969 article by the same individual that contradicted that which was testified to. It should also be noted that the minutes do not reflect that Zito was placed under oath. And, finally, since Zito was deceased the Court did not make these fact-findings based upon observations of a witness.

These defective findings of fact have caused the Court to make erroneous conclusions of law with regards to the issues before it.

POINT III

THE TRIAL COURT BELOW ERRED IN MAKING FACTUAL FINDINGS THAT ARE NOT SUPPORTED BY THE RECORD
(T1 at 57:21-58:11; 58:25-59:5; 59:11-16; 60:6-9; 61:22-25; 62:1-23; 64:4-66:14; 85:408; 101:6-12; 103:16-104:1; 105:16-106:11; 153:2-5; 153:20-21; 154:23-24; 155:1-6; 157:21-22; T3 at 16:13-23; 16:25-17:10; 20:8-21:14; 30:20-33:18; T4 at 25:2-4)

The Court below found that GG use was "similar to Renzo." (T4 at 25:2-4). That finding is not supported in any way by the testimony below. It is uncontested that Renzo had no deliveries of food product from purveyors because he himself went shopping, got whatever he needed and brought it to the store himself. (T3 at 30:20-32:9; 16:13-23; 16:25-17:10; 20:8-21:14; T1 at 101:6-12; 105:16-106:11). GG has delivery trucks. Those trucks, including tractor trailers, illegally park on the street, within fifty feet of a stop sign, within twenty-five feet of a crosswalk, and make dangerous U-turns and K-turns trespassing on the property of the Borjas and Gasparini. (T1:60:6-9; 61:22-25; 62:1-23; 64:4-66:14). There was uncontested testimony that GG operation creates more noise than Renzo's. Obviously, there are two days of the week that GG is open that Renzo's was not, which are days that noise is created from the business operation. In addition, it is uncontested that the hours of operation are greater at GG, which adds additional noise during hours when there was quiet for the Renzo operation. Some of the delivery trucks for GG are

refrigerated and some are diesel and they are left idling for a substantial period of time creating noise that was not present during the Renzo operation. (T1 at 57:21-58:11; 58:25-59:5; 59:11-16; 85:4-8; 103:16-24; 103:25-104:1). In addition, the smells generated by the business are greater/different under GG than under Renzo. No one contested the testimony that the diesel fumes from delivery trucks are present in GG operation that were not present in Renzo's. The appliances for the preparation of food are substantially different in GG than in Renzo's. Renzo only had a pizza oven. (T3 at 30:20-32:9; T1 at 153:2-5; 153:20-21; 154:23-24; 155:1-6; 157:21-22). GG has induction cooktops, microwave and more refrigeration. At no time did GG ever apply to the Board of Adjustment for permission to add these additional appliances like Renzo did. It is to be remembered that Renzo in fact in 1984 went to the Board for permission to install a pizza oven. Finally, the GG menu is substantially more expansive than Renzo's. (T3 at 32:10-33:18).

Appellants submit that the Court's factual conclusion that GG operation is "similar" to the Renzo operation is patently incorrect and is unsupported by the uncontradicted uncontested evidence in the record.

POINT IV

THE TRIAL COURT BELOW FAILED TO FOLLOW THE LAW WITH REGARDS TO PREEXISTING NON-CONFORMING USES (Pa 37-47; 55-59; 66-75; 158-162; T4 at 21:7-9; 21:17-22:4; 25:5; 27:3-7)

Plaintiffs had the burden of showing that the current use of the property is in violation of the current zoning ordinance. Heagen v. Borough of Allendale, 42 N.J. Super. 472, 478 (App. Div. 1956). A review of J-47 (Pa 158) and J-48 (Pa 159-162) clearly shows that the PQ is in the R5 zone and that the commercial restaurant take-out business is not a permitted use in the zone. Therefore, the Plaintiffs have satisfied their burden of proof.

Once Plaintiffs establish that, it is the Defendants' burden to prove that their current use is preexisting and non-conforming. Id. That means that the Defendants must prove that the quality and character of the current use is one that predated the first zoning ordinance in Oceanport that was adopted on February 2, 1933. Bonaventure Intern., Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 422 (App. Div. 2002). The Defendants did not even attempt to do that. The Defendants relied solely on the 1984 Resolution of the Board of Adjustment to establish their preexisting non-conforming use status. However, the Court did not require the Defendants to prove that the Board had jurisdiction to even hear that application. It improperly shifted the burden to the Plaintiffs to prove that the 1984 Resolution is

void. Plaintiffs had to prove a negative fifty years later. Defendants produced nothing regarding the jurisdictional issue. Plaintiffs proved that no notice was published in the Asbury Park Press of the application and the meeting at least ten days before the hearing. Without proof of notice and publication, the Zoning Board of Adjustment did not have jurisdiction to entertain the application. Township of Stafford v. Stafford Tp. Zoning Bd. of Adjustment, 154 N.J. 62 (1998). In addition, the Resolution adopted required a notice of decision to be published within ten days of the Resolution. No proof was provided by the Defendants of such notice of decision. Therefore, the public and the surrounding property owners never had notice of the application nor of the action taken by the Board and therefore the time period within which to challenge that action or to appear and to present contradictory evidence never accrued. Lizak v. Faria, 96 N.J. 482 (1984).

The evidence also clearly shows that Zito lied at the 1984 hearing, when he said that he owned the property and ran the "grocery store" before the first Zoning Ordinance of February 2, 1933. (Pa 69-75; Pa 37-47). He did not own the property until over ten years after the Ordinance came into effect. (Pa 55-59). He also failed to mention the cessation of the food use in 1969. (Pa 66-68).

J-7 (Pa 66-68) clearly shows that in 1969, the food use was terminated and a television sales and repair shop occupied the commercial building, thus amounting to an abandonment of any contention that there was preexisting non-conforming

food use from 1933 until 1984. Villari v. Zoning Bd. of Adjustment of Deptford, 277 N.J. Super. 130 (App. Div. 1994).

The Court should remember that in dealing with an issue regarding the legitimacy of a preexisting non-conforming use, the rule is "when in doubt, rule against the claim of a preexisting non-conforming use." Bonaventure, 350 N.J. Super. at 432; Cos-Lin, Inc. v. Spring Lake Bd. of Adjustment, 221 N.J. Super. 148 (App. Div. 1987); Hantman v. Randolph Tp., 58 N.J. Super. 127 (App. Div. 1959); Heagan, 42 N.J. Super. at 480-81; Weber v. Pieretti, 72 N.J. Super. 184 (Ch. Div. 1962).

The Trial Court improperly shifted the burden in this case to the Plaintiffs. (T4 at 27:3-7; 21:7-9; 21:17-22:4). In addition to improperly shifting the burden, the Court criticized the Plaintiff for not calling people to "explain the notice issue." (T4 at 21:17-22:4). It was not the Plaintiffs' job to "explain that issue." The case law is clear that in order for the Board to have jurisdiction to hear the interpretation, that prior notice to property owners within two hundred feet and publication of the public hearing was required. Township of Stafford v. Stafford Tp. Zoning Bd. of Adjustment, 154 N.J. 62 (1998). The fact that the Defendants did not produce the attorney for the applicant or that person's file, or a publication in any newspaper regarding the application and the meeting, or any witnesses that would have testified that they received notice, is a failing on the part of the Defendants and not the

Plaintiffs. That failure is a failure of proof where the burden is on the Defendants. As such, the Court was required to conclude that there was a failure of proof on the part of the Defendants to establish their valid preexisting non-conforming use status.

As such, the Court below failed to follow the law with regards to proof of valid preexisting non-conforming use status, and especially since the Court concluded that the evidence was "sparse." (T4 at 25:5).

POINT V

THE TRIAL COURT BELOW ERRED IN CONCLUDING THAT THE USE APPROVED IN THE 1984 RESOLUTION HAD NOT BEEN EXPANDED
(T4 at 24:11)

The Court below said that it used a "qualitative test" in evaluating whether the changes from Renzo to GG amounted to an illegal expansion of Renzo's pretexting non-conforming use. (T4 at 24:11).

The Court should use a "qualitative test" and look at the impact of the change on the area. Avalon Home and Land Owners Ass'n v. Borough of Avalon, 111 N.J. 205 (1988); Town of Belleville v. Parillo's, Inc., 83 N.J. 309 (1980); Grundlehner v. Dangler, 29 N.J. 256 (1959); Conselice v. Borough of Seaside Park, 358 N.J. Super. 327 (App. Div. 2003); Shire Inn, Inc. v. Borough of Avon-By-The-Sea, 321 N.J. Super. 462 (App. Div. 1999).

It is clear that the quality and character of the use has changed since 1984. The menu choices no longer make this a "pizza parlor" like that run by Renzo. It is now a full take-out Italian restaurant. In addition, the hours of operation have increased from twenty-four to sixty-four hours per week, or an increase of forty hours or almost 170%. Food is now consumed on the premises. Large truck deliveries are made multiple times during the week beginning at 5:00 a.m., where no deliveries at all were made under Renzo. Traffic has increased under GG. The

appliances necessary to produce GG's menu have increased. Noise and odors from the trucks and traffic to the store has also increased. The negative impact of GG's use is substantially greater than the Renzo operation. It is beyond doubt that the quality and character of GG is substantially different from Renzo's.

As such, the Court below erred in concluding as a matter of law and fact that the use approved in 1984 had not expanded.

POINT VI

THE TRIAL COURT BELOW ERRED IN FAILING TO CONCLUDE THAT THE "FOOD STORE USE" THAT WAS PURPORTEDLY ESTABLISHED IN 1932 BY FRED ZITO WAS NOT ABANDONED IN 1969 WHEN SAID USE WAS REPLACED BY A TV SALES AND SERVICE SHOP
(Pa 66-68; T4 at 25:14-27:7)

The facts in this case are not one where there was a cessation of use for a period of time and a dispute as to whether that cessation of use alone amounted to an abandonment. The language used by the Court shows that it is confused with the manner in which this issue presents itself and how it should be addressed. (T4 at 25:14-27:7). This is a case where the preexisting non-conforming use was actually replaced by a totally different use. The food store use no longer existed in 1969, as it was replaced by a TV sales and service use. Parenthetically, that substituted use was also not permitted in the zone. Nevertheless, the replacement of that food store use by another use, as a matter of law, is deemed to be an abandonment. Villari v. Zoning Bd. of Adjustment of Deptford, 277 N.J. Super. at 135.

The Court rejected the document in evidence that was created by Fred Zito. (T4 at 26:2-19; Pa 66-68). This document was created in 1969. Instead, the Court accepted minutes from a meeting where Fred Zito testified in 1984. The acceptance and rejection are not based upon the Court's observation of a live witness. The Court's ruling makes no sense. Mr. Zito had every reason to want to fudge the truth

in 1984 because he had a prospective tenant that wanted to rent his building. He had to tell the Board that the building had always been used for a food use in order not to have to get a variance. In 1969, on the other hand, Mr. Zito had no reason to fudge the truth. He was writing an article for a historical book on the history of Oceanport. Clearly, that article which specifically stated that at that time a non-food use was operating out of the structure in question is much more reliable than the testimony of the same individual, Mr. Zito, fifteen years later. And Zito never testified at trial because he was deceased.

As such, this Court is not required to give due deference to this evidence ruling by the Trial Court and should conclude that the Court below erred in its conclusion. There is no question but that any non-conforming food use that existed in this structure prior to 1969 was abandoned.

POINT VII

THE TRIAL COURT BELOW ERRED IN NOT ISSUING AN INJUNCTION RESTRAINING AND ENJOINING THE FOOD USE AND GG CURRENT OPERATION
(T4 at 19:10-21:2)

It has been proven that the current food use is not a preexisting non-conforming use. It is also clear that even if a food use existed before the adoption of the first zoning ordinance, that use was abandoned in 1969. Plaintiffs have also established that the 1984 Resolution is void for lack of notice, as the Board did not have jurisdiction to entertain the application. As a result, the food use in that structure without the property owner having obtained a variance from the Board of Adjustment is a continuing violation of the zoning ordinance for which the Court below should have issued an injunction. Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953); Morris v. Borough of Haledon, 24 N.J. Super. 171 (App. Div. 1952).

It is respectfully requested that the Court remand the case to the Trial Court for the issuance of an injunction, as this illegal use has been in operation since May 12, 2020, almost four years.

POINT VIII

THE DEFENDANTS' OPERATION OF GG HAS BEEN AND CONTINUES TO BE A NUISANCE SINCE THE DAY IT OPENED IN MAY 2020 AND THE TRIAL COURT BELOW ERRED IN NOT SO RULING
(T4 at 27:8-32:7)

Plaintiffs are entitled to an injunction and damages as a result of the nuisance that has existed on its neighbor's property since May 2020. The Court below erred in failing to issue that injunction and this Court should remand the matter to the Trial Court in order to award the Plaintiffs damages.

A nuisance is a "unreasonable interference with the use and enjoyment of the Plaintiff's "property". The Plaintiffs' property is in a residential zone. The PQ is also in that zone. The only uses permitted in the zone are one- and two-family residences. The Defendants' current Italian take-out restaurant has created obnoxious noise, odors, and traffic that has clearly unreasonably interfered with the Plaintiff's residential use of their property and the quality of their life for almost four years.

"The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959). To establish a private nuisance, a complaining party must prove by clear and convincing evidence: (1) injury to the comfort of ordinary people to an

unreasonable extent, and (2) unreasonableness under all the circumstances, particularly after balancing the needs of the maker to the needs of the complainant. Traetto v. Palazzo, 436 N.J. Super. 6, 12 (App. Div. 2014). A "mere annoyance" is insufficient to establish an actionable injury. An objective standard is used to determine whether the complained of activity by the defendant is sufficiently unreasonable to plain people of simple tastes. Sans, 29 N.J. at 134. Once a plaintiff establishes the first prong, the court then moves to an analysis of the defendant's use of its property and whether same is in fact "unreasonable." Relevant factors for the court to consider include "the character, volume, frequency, duration, time, and locality of the complained of activity. Lieberman v. Saddle River Tp., 37 N.J. Super. 62, 67 (App. Div. 1955). Also relevant, though not dispositive, is whether the conduct complies with controlling government regulations. Traetto v. Palazzo, 436 N.J. Super. 8, 13 (App. Div. 2014); *see also* Rose v. Chaikin, 187 N.J. Super. 210 (Ch. Div. 1982).

Here, it is submitted that the Plaintiffs have established that the Defendants' continued operation is an unreasonable interference with the use and enjoyment of their property. In addition, they have shown that the activities carried on by the Defendants would objectively cause an ordinary person to be discomforted to an unreasonable extent. Since the activity carried on is illegal (in violation of the zoning

ordinance) the balancing of the needs of the Defendants carry no weight at all since those "needs" are to continue an illegal activity.

As such, not only are the Plaintiffs entitled to an injunction as a result of this nuisance, they are also entitled to be awarded money damages to compensate them for having to live next to this non-permitted restaurant from May of 2020 up to and including the present date. *See* Rose v. Chaikin, 187 N.J. Super. 210 (Ch. Div. 1982).

The Court below erred in not issuing an injunction and, further, erred in not awarding the Plaintiffs damages for this nuisance that they have had to live with since May 2020. It is respectfully requested that this Court remand the matter to the Trial Court for the issuance of an injunction and to award Plaintiffs damages.

POINT IX

DEFENDANTS CANNOT RELY UPON THE INVALIDLY ISSUED ZONING PERMIT IN MARCH 2020
(Pa 88-90; 95-96; 118-122; T1 at 53:23-54:13-16)

Defendants cannot rely on the invalidly issued zoning permit in 2020. (Pa 122). It needs to be stressed that prior to 2020 there was no zoning permit issued for any occupancy of the commercial structure on the PQ for a food use. Work was done on the property without permits. Work was done on the property with only construction permits, but no zoning permit. (Pa 118-121). The only thing that resembles a "zoning determination" on this property is the 1984 Resolution of the Zoning Board that was issued to Renzo. It has already been shown that the Resolution is void because the Zoning Board did not have jurisdiction.

It is also clear that SM did not rely on anything that was given to it in writing by the municipality regarding the food use when it purchased the property in 2015. The only written documents relate to the two-family house. (Pa 88-90). There is nothing whatsoever in writing dealing with the food use or the commercial structure at the time that SM purchased the property. SM had every opportunity at that time to go to the Board of Adjustment and to obtain a zoning certificate outlining exactly what it could or could not do on the property. N.J.S.A. 40:55D-68. It chose not to do that.

In addition, as of January 23, 2020, the zoning officer was on notice that the neighbor was challenging GG's right to operate a restaurant out of the commercial building on the PQ. (Pa 95-96). Under those circumstances, the zoning officer should have refused to issue the permit because there was doubt as to whether the applicant was entitled to it and should have referred the matter to the Board of Adjustment. See William M. Cox & Stuart R. Koenig, New Jersey Zoning & Land Use Administration § 12–1.4 at 2065 (2021). Not only was the zoning officer on notice, but the property owner and the applicant were on notice that the neighbor was contesting their rights to operate under a preexisting non-conforming use status. Either GG or the property owner could have gone to the Board of Adjustment at that time and established just exactly what their rights were. (T1 at 53:23-54:13-16). They chose not to do that and to move ahead. No equity whatsoever flow to them to rely upon what is clearly an invalid permit. See Town of Belleville v. Parillo, 83 N.J. 309 (1980); VF Zahodiakin Engineering Corp. v. Zoning Bd. of Adjustment of City of Summit, 8 N.J. 386 (1952); Irvin v. Township of Neptune, 305 N.J. Super. 652 (App. Div. 1997); Auciello v. Stauffer, 58 N.J. Super. 522 (App. Div. 1959); Borough of Rockleigh v. Astral Industries, 29 N.J. Super. 154 (App. Div. 1953); Adler v. Bergen County Department of Parks & Public Property, Town of Irvington, 20 N.J. Super. 240 (App. Div. 1952); Frizen v. Poppy, 17 N.J. Super. 390 (Chancery

Div. 1952); Jantausch v. Verona, 41 N.J. Super. 89 (Law Div. 1956), aff'd, 24 N.J. 326 (1957);

Clearly, the Defendants cannot rely on an invalid zoning permit nor establish any equities that would support an estoppel argument against the Plaintiffs, who filed suit within thirty days of the Defendants' opening of this business, having never before been given a copy of the 1984 Resolution nor the supposed March zoning permit.

The Court below erred in failing to conclude that the Defendants could not rely upon that invalidly issued zoning permit.

CONCLUSION

For all of the above set forth reasons, it is respectfully submitted that the Trial Court erred in concluding that GG could continue its current operations. GG is not a validly existing preexisting non-conforming use. This Court should reverse the Trial Court's judgment and remand the case back to the Trial Court for the entry of an injunction and for an award of damages to the Plaintiffs.

Respectfully submitted,

s/GARY E. FOX
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VINCENT A. VILLANO, JOYCE VILLANO, SANTIAGO BORJA, and LAUREN JACOBSON BORJA, Plaintiffs - Appellants, vs. SAL MADISON, LLC, SAL LAROSA, JR., KENNETH J. GAMBELLA, GIGI'S OCEANPORT PIZZA, THE BOROUGH OF OCEANPORT, and JOHN JOHNSON, Defendant-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003980-22 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT, LAW DIVISION MONMOUTH COUNTY DOCKET NO.: MON-L-1741-20-PW SAT BELOW: HON. MARA E. ZAZZALI-HOGAN, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

When a factual presentation solely references allegations of facts supportive of the Appellant's position, it can seem, at first blush, that there may be a basis for the appeal. But when other facts are presented, or the spin on the presented facts is unspun, the Trial Court's factual ruling below becomes not only more apparent, but the only logical outcome.

Here, the factual background, as recounted by the Borja Appellants in their sworn testimony, was littered with a great deal of hyperbole, i.e. falsehoods. Thus, for example, Santiago Borja testified that he observed diners sitting and eating at tables inside the subject pizza parlor ("Gigi's") (T.1 at 75:1-76-16), which would be a violation of its approval to have takeout and delivery service only. Dining inside, however, is a physical impossibility. In the 560 square foot building, which was estimated to be about a quarter of the size of the courtroom, there is only room for one or two standing customers at a time. The only table was one used to make pizza boxes. There never was, nor could there be, inside dining. (T.1 at 118:1-119:13).

Similarly, Santiago Borja in his trial testimony insisted that the reopening of the pizza parlor in May of 2020 resulted in a "3,000 percent increase in traffic." (T.1 at 76:17-77:15) Yet, when Michael Kelly, the Oceanport Police Chief, was asked if his understanding concurred with Mr. Borja's contention, he responded "I believe

not." While there may have been some increase in the volume of vehicles "nothing that [had] been brought to [his] attention of any significance." (T.3 at 7:25-8:10).

There was a complaint by the Borjas of there being too many trucks continually servicing Gigi's and multiple pictures were presented into evidence, which are found in pages 145-153 of the Plaintiffs' Appendix. All the pictures, however, were from late 2019 and 2020, when Gigi's was first being refitted and restocked to reopen. No pictures were presented from 2021 or 2022. (T.1 at 79:8-80:1), and the purported "18 wheelers" do not service Gigi's tiny facility. (T.1 at 123:21 – 124:14).

Significantly, despite the alleged increase in traffic and other annoyances, only the Borjas, the owners of one neighborhood residence, both brought suit and testified at trial. If the conditions were so terrible, where were the others?

The presentation of the Appellants' legal position regarding the two zoning issues was similarly skewed. They are: Is Gigi's a proper non-conforming use? Was that use improperly expanded?

Sal Larosa, the managing member of Sal Madison, LLC ("Sal Madison") and Kenneth Gambella, the respective owner of the subject property and the operator of Gigi's, relied upon the representations of Oceanport officials that the pizzeria was a non-conforming use before Sal Madison purchased the property and leased it to an operator for Nicky's Pizzeria in 2017 and Gambella opened Gigi's in 2020.

Appellants would put the onus upon Larosa and Gambella to have second guessed the Oceanport officials and have performed an independent historical investigation of the accuracy of their advice before purchasing and operating. If that requirement is held to apply to Larosa and Gambella, that onerous requirement would necessarily apply to every applicant for land use permits anywhere in the State.

In asserting that the use was abandoned through its conversion into a television store in 1969, Appellants focus on a pamphlet which makes that very vague assertion. They, however, gloss over the statement by the Attorney to the Oceanport Board of Adjustment, who said on the record in 1984 that "this store has sold food for the past 52 years." Judge Zazzali-Hogan properly rejected the pamphlet to be significant evidence. (T.4 at 26:2-20).

With regard to the claimed expansion of use, Appellants cite several cases regarding improper expansion, but cite none in which there is just a change in the menu to keep up with the times. Change in a menu is not equivalent to an expansion of use.

Judge Zazzali-Hogan properly rejected the Appellants' factual and legal claims, and her decision ought to be affirmed by this Court.

STATEMENT OF FACTS

In 1984 Vincent Renzo, the owner/operator of a food store located at 18 ½ Wolfhill Road in the Borough of Oceanport, applied to the Borough's Board of Adjustment to allow him to install a pizza over with a stainless-steel hood, exhausting to the street. He would further purchase two dough mixers and retarders for making pizzas. (PA-70).

In response the Board's attorney advised the members that:

> "[S]ince this store has sold food for the past 52 years that …there has been no change in the operation of this business and the sale and making of pizzas is not necessarily a change in the type of business it's still food….it was not necessary for Mr. Renzo to obtain a variance." (Pa – 71).

The Board, presumably made up of members familiar with the town, accepted that advice and, at the next meeting unanimously voted in favor of a resolution that the non-conforming use continued and that the changes sought by Mr. Renzo did not require a variance. (Pa – 76-78).

Thereafter Mr. Renzo continued to operate the pizzeria until 2010, with its ownership and operation for the next four years being taken over by people named Cotton. (T.3 at 38:16-39:10)

In 2015 Sal Larosa ("Sal"), the managing member of Sal Madison, LLC ("Sal Madison"), considered purchasing the pizzeria and a neighboring two-family house which was in a run- down state. Before he did so, he visited the Municipal Building and spoke with the appropriate officials to ascertain whether the restaurant facility could still be operated as a pizzeria and that the two-family home could remain a two-family residence. He was given those assurances and he, thus, caused Sal Madison to purchase the properties. (T.2 at 29:13 – 30:11; 35:5-250)

He first was going to operate the pizzeria as Sal's Pizza and obtained licensure to do that, but a family problem prevented him from doing so. Instead, he leased it for two years to an operator who opened Nicky's Pizza. (T.2 at 45:11 – 46:15) In 2019, after the Nicky's lease ended, Sal leased it to its current operator, Kenneth Gambella, who, at the time owned and operated pizzerias in Long Branch and Sea Bright. (T.1 at 117:12-18)

Before Gambella executed the lease, he too did his homework and checked with Oceanport officials to make sure the use of the building as a pizzeria was still permitted. He received such assurances (T.1 at 121:5-22), and he thus signed a lease and proceeded to prepare the building to reopen as Gigi's Oceanport Pizza ("Gigi's"). The Borough provided him with a Retail License (Pa – 94) and a Zoning Permit, with the latter stating that it was a "valid nonconforming use. (Pa-122).

While getting the building in condition to reopen, Gambella and his family took what was supposed to be a short vacation in Florida. The Covid pandemic, however, stranded him and his family in Florida. Gigi's thus, didn't open until May, 2020. (T.1 at 122:5-22).

It was when Gigi's was preparing to open, that objections were made regarding its opening and operation by Santiago Borja. Indeed, he embarked on a campaign of harassment against Gambella, his family, employees and suppliers. (T.1 at 130:11 – 131:14).

Santiago Borja had moved into a neighboring house in 2013, upon his marriage to the house's owner, Lauren Jacobson, now Lauren Borja. Lauren had lived at that house since 2008, never complaining about the zoning or the operation of the pizzeria. (T.1 at 110:19 – 112:24).

Santiago asserted he had made complaints to Borough officials when Nicky's was operating, and that they had agreed with him that the operation of a pizzeria in a residential zone was illegal (T.1 at 49:24 -52:6), but no such official was called upon to testify and, indeed, the Borough was dismissed as a defendant.[1]

[1] Much is made by the Appellants about work being done at Gigi's without appropriate construction permits. (See, e.g., pages 6-7). That issue is moot inasmuch as the appropriate permits were eventually obtained and the Borough, which is entity which enforces construction requirements, not only did not bring any complaints against either Sal Madison or Gigi's, but was dismissed from this action and neither the zoning official nor the construction official was called upon to testify. Indeed, the only Borough official who was called upon to testify was the Police

Among the complaints the Borjas had were claims that as a result of the pizzeria being open traffic had increased "3,000 percent", there was delivery truck noise, exhaust and illegal parking, and violations of the limitation upon the pizzeria to be for take-out and delivery only as a result of there being indoor dining. (T.1 at 55:18-71:10; 75:11-78:1).

As the Trial Court found, none of these complaints amounted to an actionable nuisance.

First, with regard to the indoor dining claim, it not only did not happen, it was a physical impossibility for it to happen. As Kenneth Gambella testified, the entire facility was about a quarter of the size of the courtroom. The available room allowed one or two standing customers who were picking up their food. (T.1 at 118:2-25).

Unbelievably, the Borjas, who complained, among other things, about the inside operation of Gigi's, both testified that had they never set foot inside of it. That includes when Gigi's predecessors were operating the pizzeria as well as Gigi's.

The pictures showing large trucks making deliveries, found at Pa- 145-153, were all taken in 2019 and 2020, when Gigi's was preparing to open. Thus, a large Coca-Cola truck delivered a cooler for soda to replace an old one that had been there.

Chief, who was subpoenaed by defendants, and who testified that the traffic complaints by the Borjas was a gross exaggeration.

As Kenneth Gambella testified, the pizzeria's volume was too small for any large deliveries and he went to either Shop-Rite or Restaurant Depot to purchase soda for the business. (T.1 at 124:2-125:19)

As for the traffic complaint, not only was it minimized by the Borough's Police Chief, but, as Gambella testified, it has been diminished by the advent of delivery services such as Door Dash and Uber Eats, which lessened the need for separate individuals to pick up their orders. (T.1 at 127:11-128:11).

Gambella, further, was attuned to neighborhood concerns, so he personally brought many of its supplies from his Sea Bright store and he provided a key to the bread deliverer so that bread, which was delivered very early in the morning, would not be sitting outside the door. (T.1 at 127:11 – 128:11).

Most significantly, only the Borjas both signed the complaint and testified. Certainly, there was no evidence of an outcry from the neighbors as to the alleged nuisance caused by Gigi's.

POINT I

THIS COURT SHOULD DEFER TO THE FACTUAL FINDINGS OF THE TRIAL COURT

It is an established rule that an appellate court's review of a trial court's fact finding is very limited. As the Supreme Court held in Seidman v. Clifton savings Bank, S.L.A., 205 N.J. 150, 169 (2011): "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence."

While that restriction does not apply to a trial court's interpretation of the law, much of the case below centered upon the Borjas' claims regarding alleged nuisance, i.e., the impact of the reopening of the pizzeria upon them and the neighborhood.

Thus, by way of example, the Court's rejection of Santiago Borja's contention that traffic increased "3,000 percent" as not having any evidential support, and which was countered by the Oceanport Police Chief, was a proper factual finding.

Similarly, the Court made a finding of fact that the alleged nuisances from trucks and traffic was nothing more than an annoyance, nothing rising to the level of an actionable nuisance.

As the Judge noted:

> "[U]nder all of the circumstances, and balancing the need for the pizzeria to operate against plaintiffs' desire to be free from noise and traffic, the property has been used as a pizzeria for 50 years. Although

> the volume and traffic, as well as the menu may have expanded, plaintiffs did not make any complaints, even though Lauren [Borja] testified that she had similar concerns when Renzo (a prior operator) operated the pizzeria.
>
> In other words, they did not make prior to complaints. And to point out that the pizzeria was operating when they moved in. In short, it's not unreasonable for a pizzeria to have trucks delivering beverages, meat, or produce or anything else for that matter. Therefore, the plaintiffs have not met their burden."
>
> (T.4 at 31:17-32:7)

That was a finding of fact which should not be disturbed.

POINT II

GIGI'S IS A PROPER NON-CONFORMING USE

Sal LaRosa testified that before Sal Madison purchased the property which contained both the pizza parlor and a residence that was in a two-family zone, he went to the Oceanport Borough Hall, spoke with the appropriate officials, and was satisfied as to the zoning and that the pizza parlor could operate as such. Sal Madison then purchased the property. (T.2 at 29:13 – 32:17).

Although Sal LaRosa originally planned to operate the pizza parlor as Sal's Pizza, a family problem prevented him from doing that. He then rented it to an operator who, in 2017, opened it as Nicky's Pizzeria. It operated without problems or interference for two years. (T.2 at 45:10 -47:22).

When Nicky's lease ended Sal Madison entered into a lease with Kenneth Gambella who operated pizzerias in Long Branch and Sea Bright. He went with Gambella to the Borough Hall to "get all the paperwork he needed." (T.2 at 51:4-19).

Gambella did his own investigation and got all the permits he needed to operate what became known as Gigi's. (T.1 at 121:5-122:4).

As part of the basis for the Borough officials' determinations that the pizzeria was a valid non-conforming use was a 1984 determination by the Borough's Board of Adjustment to that effect. (Pa-69-78). Once the Borough officials gave their

opinions and both Sal Madison and Kenneth Gambella acted pursuant to those opinions, that should be sufficient for a non-conforming use designation. Appellants, frankly, nonsensically, would have not only the Respondents here, but every applicant for land use approvals, not only investigate and second guess current municipal officials, but also prior rulings by town boards.

No statutory or case law puts that onus upon a permit applicant. Indeed, the applicable case law is contrary to that position. In Hill v. Board of Adjustment, 122 NJ Super 156 (App. Div. 1972), the court considered a case in which Eatontown residents, named Ceran, built an addition onto their home. The addition came to within 4 feet of the property line between their home and that of their neighbors. The neighbor sued claiming that the ordinance required a structure to be a minimum of seven feet from the property line. The Borough's code official had, admittedly, made a mistake in not advising the Cerans that they needed a variance because of the restrictions of the ordinance. Then when the Cerans sought the variance, it was granted. The neighbors argued, and then appealed when they lost the argument, that the ordinance was clear. No interpretation was needed.

The Appellate Division affirmed. In doing so the Court noted that when a permit is mistakenly issued by an official "within the purview of his jurisdiction" an estoppel may apply. As the court held "the Cerans had a right to rely on the validity of the permit issued to them by the building inspector, who had the ostensible power

to issue it. Realistically, and in practical recognition of what an ordinary citizen would do in this circumstance, is that not so?" Id. at 163.

Sal Madison and Kenneth Gambella had a similar right to rely upon the opinion of the Oceanport Zoning Officer that the intended use of the 18 1/2 Wolfhill Avenue building as a takeout and delivery pizza parlor was a valid non-conforming use. Whereas, moreover, the official in the Hill case had, in fact, erred, there is no evidence that the Oceanport official in this matter erred. Just as the Cerans were entitled to rely upon the opinion given to them by the Eatontown official, Sal Madison and Gambella had a right to rely upon the opinion of the Oceanport Zoning Official. They both, furthermore, had a right to rely upon the determination of the Zoning Board of Adjustment in 1984.

The Appellate Division in Hill analogized the matter before it to a municipal contract. When a municipality has the power to make a contract but there is an "irregular exercise" of that power by the municipality, the person contracting with the municipality can recover against the municipality as that person "is not obliged to scrutinize, at his peril, the corporate proceedings and cases cited therein." Id.

Neither Sal Larosa nor Kenneth Gambella was required to conduct his own investigation as to whether the Borough's Zoning Officer was correct or not, nor necessarily, as to whether the Zoning Board of Adjustment in 1984 properly

determined that the intended use of the subject property was in fact a valid non-conforming use. They could and did rely upon the official's determination.

When equitable estoppel is sought to be applied against a municipality, there must be a balancing between the interests of the municipality and the permittees' interests. Gruber v. Mayor and Township Committee of Raritan, 39 NJ 1, 15 (1962). Indeed, the holding in Hill regarding equitable estoppel has been criticized by a later Appellate Division panel. See, Jesse A. Howland & Sons, Inc. v. The Borough of Freehold, 143 NJ Super 484 (App. Div. 1976). Here, however, the Respondents did not seek to apply equitable estoppel against the municipality. They were on the same side. Nor in the Jesse A. Howland case was there an on point, unanimous decision by the Borough's Board of Adjustments followed by Freehold's building inspector. Respondents are not asserting that the Oceanport Borough official made a mistake, nor did the Borough when it was a party in this case. Only the Appellants herein are engaged in second guessing.

Based on the Borough's authorization, Respondents proceeded to prepare the building for its new tenant and then proceeded to conduct an ongoing business. It was an appropriate reliance and resulting conduct.

Thus, inasmuch as the Borough's zoning officer had the right to make the determination whether the intended use was a non-conforming use, and he made that determination, and the Respondents relied upon that determination, the existence of

Gigi's Oceanport Pizza as a valid non-conforming use should be deemed incontrovertible.

If there is to be an estoppel, it should be applied against the Borjas. Lauren Borja, before she was married to Santiago, moved into her current residence in 2008. The pizzeria was operating then and continued to operate with different operators until 2014. After Lauren and Santiago were married Santiago moved into Lauren's South Pemberton Avenue residence in 2013. In 2015, Sal Madison purchased the pizzeria and the neighboring two-family residence. Nicky's pizza opened in 2017 and was in business for two years. After Nicky's lease terminated Sal Madison leased the pizzeria to Kenneth Gambella, who was delayed in opening Gigi's as a result of the Covid pandemic. Gigi's eventually opened in May of 2020. It wasn't until Gigi's was in the process of opening that the Borjas first brought a formal complaint alleging that it was both a nuisance and an improper non-conforming use.

The equitable estoppel doctrine is invoked in the interests of justice, morality and common fairness. It prevents a party from repudiating a course of action on which another party has relied to his detriment. Knorr v. Smeal, 178 N.J. 169 (2003). The Borjas did nothing from 2008 to 2020 to in any way put Sal Larosa or Kenneth Gambella on notice that they considered the pizzeria to be an illegal non-conforming use. Although Santiago claims to have made complaints to Borough officials at one point, they did nothing more. And, as Judge Zazzali-Hogan points out, they not only

dismissed the Borough from the trial , they didn't call any of the Borough officials as a witness.

In the case of Summer Cottagers Association v. Cape May, 19 NJ 493 (1955) the court considered a complaint by members of an association of property owners regarding the sale of neighboring municipally owned property upon which a motel was built. The plaintiffs contended that the sale of the municipal property was not properly made and, thus, should be to be declared null and void. Among other claims by the plaintiffs was that they did not receive proper notice of the sale. The plaintiffs, however, did not make their claim until the construction of the motel was completed.

The Supreme Court rejected the plaintiffs claim, noting that despite the fact that the plaintiffs were not given formal notice, "the planned structure was a matter of common notoriety from the outset." The Court then went on to rule that the plaintiffs were estopped to make their claims as a result of their failure to act timely. The Court's estoppel discussion, which is often repeated in later reported cases, follows:

> "The essential principle of the policy of estoppel here is invoked is one that may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct … An estoppel by matter in pais may arise by silence or omission where one is under

> a duty to speak or act… It has to do with the inducement of conduct to action or nonaction. One's act or acceptance may close his mouth to allege or prove the truth. .. The doing or forbearing to do an act induced by the conduct of another may work an estoppel to avoid wrong or injury ensuing from reasonable reliance upon such conduct. The repudiation of one's act done or position assumed is not permissible where that course would work an injustice too another who, having the right to do so, has relied thereon… An estoppel arises where a man is precluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth."

19 NJ at 503-504 (Internal citations omitted).

The Borjas should be deemed to be estopped to assert their claims.

POINT III

GIGI'S DID NOT IMPROPERLY EXPAND THE EXISTING NON-CONFORMING USE

When Vincent Renzo applied to the Oceanport Zoning Board of Adjustment in 1984 to be allowed to install a pizza oven and to sell pizzas from 4 p.m. to 10 p.m., with the store to close by 11 p.m., the Board followed the advice of its attorney who said: "[T]he sale and making of pizzas is not necessarily a change in the type of business it is still food." The Board then voted unanimously that no variance was needed.

The installation of a pizza oven with a stainless-steel hood exhausting to the street (Pa-70) that Vincent Renzo brought into the shop in 1984, was a far more significant change than Kenneth Gambella bringing into Gigi's induction cook tops to boil water, an air fryer, a steam table, a slicer and a microwave oven. (T.1 at 152:20 – 155:6).

Just as Vincent Renzo wanted to make and sell pizzas in 1984 to keep up with the times, Gigi's menu similarly evolved to keep up with the times. Nothing in the Board of Adjustment's 1984 decision focused upon the type of food served, but merely that sale of food is a continuous non-conforming use.

Appellants disingenuously claim that catering occurs out of the Gigi's facility, as if it is or could be a catering hall. Gambella testified that he may take orders for

catering from Oceanport customers, but the cooking occurs at his much larger facility in Sea Bright. (T.1 at 129:13-24).

There has been no illegal increase in Gigi's use of the pizzeria facility. Compare its usage with cases in which an illegal increase was found.

One such case is Bonaventure Intern. Inc. v. Borough of Spring Lake, 359 N.J. Super 420 (App. Div. 2002).

Bonaventure involved the Sandpiper restaurant in Spring Lake. It was part of the Atlantic Hotel and was a conforming use until 1975 when the area was rezoned strictly residential. At that time meals were served solely to occupants of the hotel. In 1982 the restaurant was open to the public with 40 seats. The zoning officer felt that a restaurant, even though it was now serving the public, was grandfathered. Between 1982 and 1985 it expanded from 40 seats to 60 seats. In 1987 it expanded to 88 seats. In 1992 it expanded to 96 seats and in 1994 it acquired a liquor license. It also started taking bookings for weddings, showers and christenings. Objectors sought to have the zoning officer issue a cease and desist order and then appealed his denial to the Planning Board. Bonaventure then filed a verified complaint and order to show cause claiming that the objectors did not have standing and the Planning Board did not have jurisdiction. That application was rejected and the matter proceeded to a hearing before the Planning Board. The record was developed as to the impact on the neighborhood of the banquets in particular, with multiple cars

coming at nearly the same time. Further, there was off-premise catering from the restaurant generating traffic from delivery trucks and vehicles associated with catering. Despite the increased use the Planning Board rejected the request for a cease and desist order.

The issue then went before the court. Hon. Patrick McGann ruled that the expansion into banquets was too much of an expansion of a non-conforming use. He allowed, however, the continuation of the 96-seat restaurant. The Appellate Division then affirmed Judge McGann's ruling, thus regarding what had been a 40-seat restaurant that only served hotel guests to one consisting of 96 seats and serving the public as not an expansion of the nonconforming use.

In Town of Belleville v. Parillo's Inc., 83 NJ 309 (1980) the defendant was found to have wrongfully extended its non-conforming use when it changed its operation from a restaurant to a discotheque.

Contrary to the facts in the above cases, Gigi's has not expanded its facility, nor has it changed it changed the nature of its operation. It just serves food for take-out and delivery. It's a continuation of the use that was recognized by the Board of Adjustment in 1984, as its attorney said: "Since this store has sold food for the past 52 years…there has been no change in the operation of this business and the sale and making of pizzas is not necessarily a change in the type of business, it is still food."

Gigi's has just continued that same business. There has been no wrongful expansion of the non-conforming use.

CONCLUSION

For the foregoing reasons, the judgment of the Trial Court in this matter should be affirmed.

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Sal Madison LLC, Sal LaRosa, Jr., Kenneth J. Gambella and Gigi's Oceanport Pizza

By: */s/ Joel N. Kreizman*
JOEL N. KREIZMAN

Dated: April 17, 2024

SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION

VINCENT A. VILLANO, JOYCE VILLANO, SANTIAGO BORJA, AND LAUREN JACOBSON BORJA,

Plaintiffs-Appellants

vs.

SAL MADISON, LLC, SAL LAROSA, JR., KENNETH J. GAMBELLA, GIGI'S OCEANPORT PIZZA, THE BOROUGH OF OCEANPORT, AND JOHN JOHNSON

Defendants-Respondents

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Appellate Docket No. A-003980-22

ON APPEAL FROM:
Superior Court of New Jersey
Law Division
Monmouth County
Docket No.: MON-L-1741-20

Sat Below:
Hon. Mara E. Zazzali-Hogan,J.S.C.

CIVIL ACTION

PLAINTIFFS'-APPELLANTS' REPLY BRIEF AND APPENDIX VOLUME II (Pa 163-164)

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RESPONSE TO DEFENDANTS'-RESPONDENTS' PRELIMINARY STATEMENT

Defendants-Respondents (hereinafter "Defendants") have failed to respond to Plaintiffs'-Appellants' (hereinafter "Plaintiffs") clearly outlined and documented in the record material uncontested facts that were ignored by the trial court. Instead, they have misdirected this Court's attention to "facts" that are not material to this appeal (i.e., inside dining; the percentage of increase in traffic vs. that there was in fact an increase in traffic).

Defendants try to minimize Plaintiffs' complaints by saying "where are the other people from the neighborhood?" In doing so, they ignore two important facts: (1) Plaintiffs are the people most affected by the Defendants' operation, as they are immediately adjacent to where truck deliveries, illegal parking and U-turns and K-turns occur and have had their lives affected the most; and (2) Barbara Gasparini, who lives on South Pemberton Avenue across the street from Plaintiffs, also testified and complained about the operation of Gigi's (hereinafter "GG").

Plaintiffs disagree with Defendants' Preliminary Statement that there are "only two issues on this appeal." The two issues they set forth clearly are issues on the appeal, but Plaintiffs' Brief has outlined the other issues.

Defendants' Preliminary Statement contains factual statements without a citation to the record (Page 2, reliance on representations by Sal LaRosa, Jr. (hereinafter "Sal") from unnamed municipal officials. This is hearsay and it ignores

N.J.S.A. 40:55D-68 and the right of prospective purchaser to obtain a certificate of nonconformity when Sal Madison, LLC (hereinafter "SM") bought the property. Sal never called Borough officials to testify to these hearsay statements. Sal testified that he was given the 1984 Resolution before he bought the property in 2015. (Pa 60-61). This testimony is incredible because his lawyer's letter (Pa 163) never mentions it nor provides a copy. The trial court would not let Plaintiffs' counsel pursue that credibility issue on cross-examination (T2 at 72:1-81:8). In fact, the court questioned whether that testimony "mattered." After that comment, Plaintiffs' counsel moved on. The court clearly signaled that it did not matter if SM was given a copy of the 1984 Resolution before it purchased the property, and therefore that line of questioning was not further pursued to show that the witness was lying, for if SM had been given the Resolution before it bought the property, its lawyer's letter (Pa 163) sent just after the municipal court complaints were filed on February 6, 2020 challenging the use would have specifically mentioned the 1984 Resolution and would have attached it. Instead, Defendants' lawyer's letter had vague general language in it. It says:

> You either are aware or, with reasonable diligence should be aware that our clients' occupation and usage of the property … is long established and fully comports with the laws of … New Jersey and the ordinances of … Oceanport.

Nowhere in the trial court's decision do the Defendants refer this Court to an actual finding that there is legal or equitable estoppel that should be applied against the Plaintiffs, who only moved next to 109 South Pemberton Avenue (hereinafter referred to as "PQ") in 2008 and 2013.

Defendants also mistakenly believe that a "statement" by the Zoning Board attorney is of some evidential significance. The attorney for the Board was not sworn, was not a witness, was not subject to cross-examination, did not provide any foundation to support his statements and therefore they were and are of no legal significance, which is why the Plaintiffs ignored them.

The trial court abused its discretion in rejecting the "historical text" that was over thirty years old (1969). The pamphlet was on display in the Oceanport Borough Hall. It was a series of articles by residents setting forth Borough history and was produced by Defendants. One of the articles was by Fred Zito, the person who bought the PQ in 1944 and built the commercial building where GG is now located. He wrote in 1969 that the use of the building at that time was not a "food store" use, but a television sales and repair shop. The article was marked into evidence as a joint exhibit. Thus, it went into evidence without the need for authentication under N.J.R.E. 803. Even if it had required authentication, N.J.R.E. 803(c)(16) would have allowed its admission as an "ancient document." The fact that it went in as a joint exhibit amounts to a "stipulated fact" under N.J.R.E. 101(a)(5). Parties are bound

by their stipulations. Kurak v. A.P. Green Refractories Co., 298 N.J. Super. 304, 325 (App. Div.), certif. den., 152 N.J. 10 (1997). There was no legitimate basis to ignore this evidence.

Defendants misrepresent that the only expansion of the food use is the change in menu. First, a change in menu alone, it is submitted, could support the finding of an illegal expansion of a non-conforming use. Here, the prior use was a takeout shop that only sold pizza and subs. (T3 at 27:5-34:24). Now, the menu looks like a complete Italian restaurant, with appetizers, soups, pasta, entrees, sandwiches, and desserts. (Pa 106-117; T1 at 102:1-106:11, 144:8-149:10). Clearly, the reason for such a change is to have more business, and more business will change the character of the business and the number of pickups and deliveries, thus negatively impacting the very quiet residential neighborhood of the Plaintiffs. However, here, the expansion is not just the menu, the expansion includes the hours of operation, the days of the week operating, the addition of a catering business, deliveries of food product beginning at 5:00 a.m., deliveries by eighteen-wheel tractor-trailers, delivery vehicles that use the Plaintiffs' and another neighbor's driveways to make K-turns and U-turns and an increase in traffic. (T2 at 143:22-144:1; T3 at 33:19-34:1, 31:21-32:9; T1 at 101:6-12; Pa 145-148; 150-152; T1 at 56:6-57:20, 59:3-5, 60:6-9, 61:9-25, 63:25-64:3, 102:1-106:11, 187:19-189:8; T3 at 20:24-31:14, 60:5-

61:6; Pa 154; T1 at 57:8-59:16, 69:12-71:7, 102:1-106:11, 103:18-24, 62:1-63:22, 105:22-106:11, 187:19-188:15).

As such, the Defendants' Preliminary Statement seeks to misdirect and misconstrue the nature of this appeal.

RESPONSE TO DEFENDANTS'-RESPONDENTS' STATEMENT OF FACTS

Defendants, in their Statement of Facts, have misrepresented the actual facts of this case.

There is no evidence in the record that in 1984, Renzo was the "owner/operator" of a food store. The owner of the property was Zito. Zito wanted to lease the building to Renzo and get rent. Renzo wanted to operate a pizza parlor. (Pa 55-59, 69-75).

Zito actually testified before the Board of Adjustment that he purchased the property in 1932. Plaintiffs have shown that to be a lie. (Pa 55-59). Thus, Zito's testimony that the property was used as a food store use prior to the first ordinance in Oceanport was also a lie. (Pa 37-47). This did not permit a food store use on the PQ. In addition, Zito's testimony that it was "always a food store" was also a lie. His article in 1969 said that at that time, the PQ was used as a business that "buys, sells, and repairs televisions, radios and stereos." (Pa 67-68).

The true and accurate recitation of the facts in this case is in the Plaintiffs' Brief. The food use did not pre-date the ordinance. The food use was not started

until 1944 at the earliest. The use stopped and was replaced with another illegal use in 1969. Then, in 1971, the food use resumed. (Pa 70). Then, in 1984, Renzo went to the Zoning Board of Adjustment, which had a public hearing on whether he could operate a takeout pizza parlor. The Board did not have jurisdiction to hear the application, as no notice to property owners within two hundred feet nor publication in a newspaper was effectuated at least ten days before the hearing. Thus, the Board's Resolution was invalid and void. In 2015, SM bought the property. It did not get a certificate of non-conformity from the Zoning Board. It did not get a zoning permit or a certificate of occupancy for the food use prior to purchase. It got nothing in writing from the Borough with regards to its ability to utilize the property in any way for a commercial food use.

Plaintiff Lauren Jacobson Borja (hereinafter "LB") has lived there since 2008. Prior to 2014, the food use was sporadic and not a problem. In 2013, Plaintiff Santiago Borja (hereinafter "SB") moved there. From 2014 to 2017, there was no food use in the building whatsoever. In 2017, a pizza parlor opened. SB complained to Borough officials who told him that they would address it and thereafter the use stopped. In 2019, GG began work on the premises without required permits. SB complained about that and the proposed new takeout restaurant in December 2019 and January 2020. When Borough officials did nothing and provided no documents in response to OPRA requests supporting the proposed construction and land use,

Plaintiffs hired counsel who put the Zoning Officer and Construction Official on notice of the Plaintiffs' claims that permits were needed and the proposed use was illegal. When the Borough did not in any way respond to that letter and did nothing to issue stop work orders, SB filed municipal court complaints which raised those issues. While the Borjas awaited a trial date on the municipal court complaints, and fully expecting that the Defendants would stop moving ahead with their construction and plans to open, they awoke on May 12, 2020 to GG's opening with a full Italian restaurant menu with illegal signs, no permits, and a massive increase in the operation that was previously put to the premises by Renzo. It was at that time, when the mysterious 1984 Resolution was finally produced to the Borjas and counsel. Within twenty days, the Borjas filed suit and sought an injunction.

The Borough took the Defendants' side on the return of the Order to Show Cause and said no permits were needed and for the first time they produced an unsigned zoning permit from March 2020. The Court denied the injunction and Defendants have been profiting from an illegal use since May 2020, over four years. In addition, in spite of the fact that the Borough said that no permits were necessary, multiple permits were applied for after the return date of the Order to Show Cause, not all of them were granted, and some of them were rejected outright.

In opposition to this appeal the Defendants have misrepresented facts in the record, misstated the law and have raised an estoppel argument on appeal where no

cross-appeal was filed, which the trial court did not address and where the proofs in the record are so woefully inadequate that neither this Court nor the trial court could do the careful weighing of the equities that would allow this Court to give to the Defendants the ability to continue an illegal restaurant use in a quiet residential neighborhood.

RESPONSE TO DEFENDANTS'-RESPONDENTS' POINT I (Pa 37-47, 55-59, 66-75, 95-96, 145-148, 150-152, 154; T1 at 48:6-49:24, 53:11-17, 53:23-54:16, 56:6-57:20, 57:8-59:16, 60:6-9, 61:9-25, 62:1-64:3, 69:12-71:7, 99:25-101:13, 102:1-106:11, 105:5-7, 105:22-106:11, 187:19-189:8; T2 at 143:22-144:1; T3 at 20:24-21:14, 60:5-61:6; T4 at 30:7-10, 31:14-17)

Deference is generally given by Appellate Courts to fact-finding by trial courts whether it is based upon testimonial or documentary evidence. State v. S.S., 229 N.J. 360 (2017). However, that does not mean Appellate Courts give "blind deference" to those fact-findings.

> Appellate courts have an important role to play in taking corrective action when factual findings are so clearly mistaken–so wide of the mark–that the interests of justice demand intervention. (citation omitted). Deference ends when a trial court's factual findings are not supported by sufficient credible evidence in the record. (citation omitted).
>
> [Id. at 381.]

Here, the following facts are not supported by sufficient credible evidence in the record:

1) The property being legally used as pizzeria for fifty years. (Pa 37-47; Pa 55-59; Pa 66-75).

2) Plaintiffs did not make any complaints. (T1 at 48:6-49-24; Pa 95-96; T1 at 53:11-17, 53:23-54:16).

3) LB had complaints about the Renzo operation. (T1 at 99:25-101.13; 105:5-7)

All of these facts are patently wrong. In addition, the trial court concluded that this illegal operation of a restaurant in a residential use was just "an annoyance" as a matter of law. (T4 at 30:7-10, 31:14-17). This legal conclusion was made in spite of the record showing its operation six days per week (T2 at 143:22-144:1), delivery trucks including eighteen-wheel tractor-trailers as early as 5:00 a.m. (Pa 145-148; 150-152; 154; T1 at 56:6-57:20, 59:3-5, 60:6-9, 61:9-25, 63:25-64:3, 102:1-106:11, 187:19-189:8, 57:8-59:16, 69:12-71:7, 102:1-106:11; T3 at 20:24-21:14, 60:5-61:6), the idling of diesel refrigeration trucks for substantial periods of time with offensive noise and odor (Pa 154; T1 at 57:8-59:6), the illegal parking of delivery vehicles close to stop signs and crosswalks, U-turns and K-turns in the street and into the Plaintiffs' driveway of delivery vehicles. (Pa 150: T1 at 62:1-63:22, 105:22-106:11, 187:19-188:15). In spite of this massive amount of undisputed evidence, the court below incorrectly concluded as a matter of law that those facts amounted only to "an annoyance" and not a nuisance.

Each one of us should consider such a commercial establishment moving next door to our home in a quiet residential neighborhood and whether we would just be annoyed by the obnoxious effects it would have on the quality of our residential life. The Plaintiffs submit that the trial court's fact-finding and legal conclusions were so wide of the mark that justice demands the intervention of this Court to correct these findings and conclusions.

RESPONSE TO DEFENDANTS'-RESPONDENTS' POINT II (Pa 37-47, 55-59, 66-75, 158-162; T4 at 21:7-9, 21:17-22:4, 25:5, 27:3-7)

Plaintiffs' Brief already established at Point IV that GG was not proven by the Defendants to be a legally valid pre-existing non-conforming use. As at trial, the Defendants do not even attempt to contest that here. They do not argue with the fact that they are an illegal use that has been in existence since the 1940s improperly generating money to the property owner and business operator for over eighty years.

They seek to have this Court give them permission to continue that illegal restaurant use in a residential zone based on the equitable principle of "estoppel." Of course, the court below did not even address this argument legally or factually in rendering its decision. In addition, the record created by the Defendants is totally devoid of the kind of facts that would be necessary to a fact-finder in being able to weigh the equities of this illegal operation against a homeowner who filed suit within twenty days of its opening and who put the operator on notice months before the opening of this business. It was the Defendants' burden to create a record to support their estoppel argument. They failed to do so and that is why the trial court and this Court are unable to grant the Defendants any relief on that basis. Hilton Acres v. Klein, 35 N.J. 570 (1961); Sautto v. Edenboro Apartments, Inc., 84 N.J. Super. 461 (App. Div. 1964); Universal Holding Co. v. North Bergen Tp., 55 N.J. Super. 103 (App. Div. 1959); Adler v. Irvington Park Dept., 20 N.J. Super. 240 (App. Div.

1952); Ianieri v. Zoning Bd. of Adjustment of East Brunswick Tp., 192 N.J. Super. 15 (Law Div. 1983).

RESPONSE TO DEFENDANTS'-RESPONDENTS' POINT III (T4 at 24:11)

Plaintiffs have clearly shown how the court below erred in concluding that the GG operation was not an illegal expansion of a non-conforming use. (Of course, this assumes that the Renzo use was actually legal, which the Plaintiffs have shown it was not). (*See* Point IV).

Plaintiffs will further rely upon their Brief at Point V and will not repeat same.

RESPONSE TO DEFENDANTS'-RESPONDENTS' POINT IV

Defendants failed to respond to Point VI, VII and IX of the Plaintiffs' Brief. The Plaintiffs would argue that, therefore, the Defendants do not oppose the position taken by the Plaintiffs in their Brief on these points and should be precluded at oral argument from addressing same.

CONCLUSION

For all of the above set forth reasons, it is respectfully submitted that the Trial Court erred in concluding that GG could continue its current operations. GG is not a validly existing preexisting non-conforming use. This Court should reverse the Trial Court's judgment and remand the case back to the Trial Court for the entry of an injunction and for an award of damages to the Plaintiffs.

Respectfully submitted,

s/*GARY E. FOX*
GARY E. FOX, ESQ.
Attorney for Plaintiffs-Appellants

Dated: May 10, 2024

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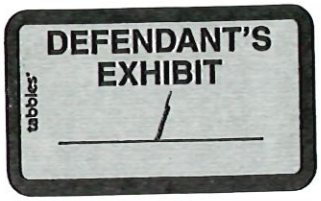
PLAINTIFFS'-APPELLANTS' REPLY APPENDIX



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February 13, 2020

Mr. Santiago Borja
Ms. Lauren Borja
113 South Pemberton Avenue
Oceanport, NJ 07757

Dear Mr. and Ms. Borja:

Please be advised that this firm represents Sal Madison, LLC and Salvatore LaRosa. We also represent the interests of the tenants of 412 Milton Avenue, Oceanport.

You have caused frivolous and malicious claims to be filed against our clients and our clients' tenants. You either are aware or, with reasonable diligence should be aware that our clients' occupation and usage of the property located at 412 Milton Avenue is long established and fully comports with the laws of the State of New Jersey and the ordinances of the Borough of Oceanport.

You have, moreover, harassed our clients and their tenants and engaged in defamatory conduct.

Should you persist in these behaviors, including the prosecution of your meritless municipal complaints, we will seek redress for our clients as we deem appropriate, to include without limitation, injunctive relief, compensatory and punitive damages, attorneys' fees and costs of suit.

I strongly suggest you retain legal counsel before damages mount.

Lastly, as you are aware, your driveway trespasses on our clients' property. Mr. LaRosa, in an effort to be neighborly, did not pursue remedies for that improper usage of his entity's property. I must inform you that as a result of your non-neighborly behavior, that willingness to accommodate your trespass has terminated. You are to have your driveway removed from our clients' property within the (10) days from the date of this letter. Should you not do so, I have been instructed to bring an action in the Superior Court of New Jersey, Chancery Division for relief.

Be guided accordingly.

Very truly yours,

JOEL N. KREIZMAN
For the Firm
JNK/br