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In support of plaintiff's motion for partial summary judgment

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Plaintiff's Opposition to Municipal Defendants' Motion for Summary Judgment (6/17/14)

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Procedural History[1]

This case arises from willful and continuous violations of law in the City of Long Branch that have caused grave damage to property owner, plaintiff Brian Asarnow. In the Law Division below, plaintiff sued the private defendants who owned and originally operated on the adjoining properties -- E&L Paving and its owner Edward Bruno, as well as the tenants leasing and currently operating on the properties -- Ray Greico and Atlantic Paving and Coating LLC, Joe Rosario and Rosario Contracting Corp., d/b/a/ Rosario Mazza Demolition and Recycling Co., and Custom Lawn Sprinkler Company, LLC. Plaintiff sought declaratory, injunctive, and monetary relief primarily on grounds of continuing nuisance. (A1).

Plaintiff also sued the City of Long Branch and its employees in his complaint, charging that the City employees knowingly permitted uses and other activities on the defendants'

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[1] References to the transcripts are as follows:

1T 9/28/12 (motion)
2T 10/3/14 (motion)
3T 5/6/15 (pretrial)
4T 5/7/15 (trial)
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properties that, the employees knew, exceeded the uses permitted on the properties under zoning and related regulations – enabling the private defendants to continue and, in fact, escalate their nuisance, harming plaintiff on his adjoining lot. Plaintiff charged that the City's employees both abetted and failed to abate the private defendants' zoning and related occupancy violations, and then issued an August 2009 zoning permit to attempt to grandfather and expand the already existing but, in fact, non-permitted use that had been ongoing on the defendants' property without needed, prior site plan approval, for which defendants Bruno/E&L were found guilty three times prior. Plaintiff sought damages against the City employees for willful and knowing torts, and against the City for *respondeat superior* liability, asserting claims for tortious interference with economic advantage and contractual relations, intentional infliction of emotional distress, breach of fiduciary duty, civil conspiracy, and violation of his civil rights. (A1).

Following discovery, the Honorable Jamie Perri, J.S.C. denied plaintiff's motion for partial summary judgment but granted summary judgment in favor of Long Branch and its employees. (A148, 151, 155; 2T132:1-25). The court ruled that plaintiff's claims were barred by the entire controversy doctrine and *res judicata*, because plaintiff should have asserted his claims against the City and its employees in an

earlier prerogative writ action that plaintiff had filed and was concluded in 2010. (2T107:1-113:15). The court ruled that the Appellate Division, in plaintiff's appeal of the prior prerogative writ action, "already ruled" that Long Branch's issuance of the August 2009 permit to the private defendants was "not an illegal act." Judge Perri said that the issuance of the permit thus "can't constitute the overt act necessary to establish civil conspiracy." (2T132:1-25). Plaintiff's claims were barred also because the City and its employees were immune under the Tort Claims Act, the court ruled, as well as by statute of limitations. The court thus dismissed all of plaintiff's claims against Long Branch and its employees. (2T113:1-25, 120:15-25).

The matter continued against the private defendants. In 2014, the trial court granted a motion to vacate default that had been entered against defendants Ray Greico and Atlantic Paving and Coating LLC, Joe Rosario and Rosario Contracting Corporation, d/b/a/ Rosario Mazza Demolition and Recycling Co., and Custom Lawn Sprinkler Company, LLC. (A157)(see Argument, Point 3, infra).

Trial then commenced before the Honorable Thomas Scully, J.S.C. and a jury on plaintiff's primary claim of nuisance (plaintiff also asserted infliction of emotional distress). The jury returned a verdict for defendants, stating that none of the

defendants had committed the torts of nuisance or infliction of emotional distress. (11T105:1-108:25; A1681, 1683). The verdict was memorialized by final order of June 11, 2015. (A159)

Plaintiff's appeal now follows here. (A161). For the following reasons, plaintiff respectfully requests that this Court vacate the jury's verdict in favor of the private defendants, reverse the trial court's grant of summary judgment in favor of Long Branch and its employees, grant injunctive relief, and remand this matter for a new trial on plaintiff's nuisance, conspiracy, and related claims against all defendants.

Statement of Facts

Plaintiff is a chemical engineer. Since 1995, he has owned property at 55 Community Place in Long Branch. (A1694). After buying the property, plaintiff acquired zoning permits enabling him to turn an existing auto shop into a two-story building for light industrial use. (A1111, 1744). Plaintiff uses his property as an office, lab, and light manufacturing facility for his business (the production of environmentally friendly coatings and adhesives). Plaintiff also leases space to other businesses who operate on the property. (6T40:1-47:25).

Plaintiff's case against the private defendants

Defendant Edward Bruno owns lots adjacent to and near plaintiff's property. Plaintiff charged that Bruno and his company, E&L Paving, and then its tenants, Ray Greico and

Atlantic Paving and Coating LLC, and Joe Rosario and Rosario Contracting (a demolition company) and Custom Lawn and Sprinkler Company, have used the lots to operate heavy equipment, stockpile equipment and materials, and conduct other activities that were improper per the zoning laws as lacking site plan approvals during various times in question and, ultimately, were unreasonable uses of the land that interfered with plaintiff's own use and enjoyment of his neighboring lot. (A2, 9).

Plaintiff detailed his nuisance claim in his trial testimony below. As plaintiff explained to the jury, when he first moved onto the property in 1995, plaintiff did not pay much attention to defendants' neighboring properties. By 1997-1998, however, plaintiff found that E&L's use of their lots was causing plaintiff problems. (6T52:1-25). Plaintiff began noticing 40-50 foot trucks carrying municipal waste showing up; heavily congested parking on the narrow street of Community Place (at the end of which plaintiff's property was located); and "beat up trailers that E&L had across the street." "I was going to be spending significant money in my building, and I was getting concerns that it would be a negative effect on my property," plaintiff explained. (6T51:1-52:25,55:1-56:25; A644).

The nuisance did not abate, however. By 2009, Bruno and his E&L Paving Company – the original offender – had leased the lots to defendant Grieco and his paving company, and to

defendant Rosario and his demolition and lawn sprinkler companies. These new tenants, Grieco and Rosario, early on, prior to issuance of the zoning permit, approached plaintiff and spoke with him in an attempt to get plaintiff to acquiesce to the ongoing and proposed expansion of activities being conducted on the defendants' lots. Plaintiff did not simply acquiesce or "go away," however. He continued objecting to the improper uses of the adjoining lots. (6T58:1-25). So the defendants continued. By September 2009, "a bunch of different containers started showing up…" Plaintiff subsequently learned that a zoning permit had been issued the month before, in August 2009, (A1864), permitting Atlantic Paving to operate a paving company and expand the use on the entire property and attempting (apparently) to "grandfather" the prior improper uses that had been ongoing on the property despite the zoning laws and certificate of occupancy and later site plan requirements that said they should not be. (6T62:1-63:25). Plaintiff noted several complaints issued by the City of Long Branch over the years that noted "dangerous condition" and lack of prior required approvals on defendants' property, yet these conditions and improper uses of the lots did not stop. (6T67:1-68:25).

Plaintiff described for the jury below how the defendants' uses of the properties exceed those permitted and authorized. Defendant Rosario, for instance, operated "Rosario Mazza

Demolition," which involved demolition jobs. This far exceeded the limited zoning permit that had been issued to Atlantic Paving in August 2009. (6T72:1-25). Rosario's other business, Custom Lawn and Sprinkler, likewise exceeded the limited use permitted even as of 2009. (6T73:1-25).

Plaintiff described how the defendants' activities on the properties interfered with plaintiff's enjoyment and use of his own neighboring land, noting, "you can't get a more dirty, noisy, unsightly business than scrap – recycling scrap with a crane, and having containers, putting them anywhere you want, and parking your big trucks even on the street." (6T73:15-74:25). This had been continuous since 2009. (6T75:1-25). The Custom Sprinkler business infringed plaintiff's use of his own property as well: "there's no parking spaces delineated. There's no buffers… They are parking these trucks on the street… They're blocking me up … it's just jam packed with equipment and everything… it's not planned. There's no planning." (6T77:1-78:25).

Defendants trespassed on plaintiff's property too. Defendant Rosario and his companies trespassed on plaintiff's property with "huge trucks filled with demolition waste." This occurred several times, plaintiff affirmed, (6T69:1-24), and damaged the concrete apron at the entrance to the parking lot on

plaintiff's property. The huge trucks were meant to "intimidate" plaintiff as well. (6T69:1-70:10).

Defendants' trucks also "blockaded" the entrance to plaintiff's property. (6T71:1-72:25). This caused plaintiff to have problems with "getting deliveries and getting trucks in" for his business on his property. "So I had to actually unload and load trucks in the middle of the street. The tractor-trailers eventually had to back down the street, and we had to go out in the forklift and unload (chemicals) in the street." (6T70:20-71:15, 79:1-80:25).

Rocks and bricks were thrown at plaintiff several times. (6T80:1-81:25; A1914-24; A2067A - "other property damage" file). Plaintiff told the jury that defendant Rosario threw the rocks, hitting plaintiff's building and his car (damaging the windshield). (6T81:1-83:25). In another incident, Rosario sped down the narrow street of Community Place "and tried to run" over plaintiff while he was taking photos. (6T85:1-25). (Plaintiff wanted to introduce at trial a multitude of video evidence confirming the defendants' physical intrusions onto plaintiff's neighboring property (A2067A-RM trespass, file) and tried to slow down the media player as it defaulted to fast play mode but was frustrated by the court and played only one short one at high speed). (6T124:14-127:5).

Plaintiff affirmed that his property had diminished in value as a result of the ongoing nuisance on the defendants' neighboring lots. Plaintiff had lost a tenant on his property, (A1941), and sustained other losses, he testified below, because of the continuing and ever-present nuisance and other wrongful actions committed by his neighbors. Expert Appraiser Mark Matsikoudis testified for plaintiff below. Matsikoudis conducted several appraisals of plaintiff's property since 2000 (A1991-2004) and told the jury that without the nuisance the defendants had maintained over the years, plaintiff's property in the 2012 appraisal was worth $600,000. With the defendants' ongoing nuisance, however, the property had diminished in value by 25 percent, having a value at time of trial of only $450,000. (6T89:1-90:25).[2]

[2] Defendant Raymond Grieco affirmed renting the property from defendant Bruno in 2009 in order to run an asphalt paving business on the property (under Atlantic Paving). (8T172:1-15, 192:1-25). Defendant Rosario was also a tenant on the Bruno-owned properties, he affirmed. (8T173:1-25). Rosario ran the Contracting/Demolition business and the Custom Lawn and Sprinkler business on the properties. (8T173:1-25; 9T203:1-25). But both Grieco and Rosario denied having created any nuisance or committing any other wrongs. (8T, 9T).

The owner and original operator on the lots, Edward Bruno of E&L Paving, also testified at trial below. (10T). Before retiring around 2008, Bruno operated the E&L asphalt paving company from the properties. (10T5:1-25). He began this business around 1960, without a certificate of occupancy. (10T7:1-25, 26:17). Bruno acquired several of the lots during the 1960s and 70s. (10T8:1-11:25). Bruno affirmed his rental of the properties to defendants Grieco and Rosario and their operations conducted on

Plaintiff's case against Long Branch and its employees

Plaintiff charged that the City's employees failed to terminate/abate the private defendants' clear violations of zoning and other laws, instead choosing to engage in a charade at enforcement with regard to defendants' improper use of and activities conducted on their properties. Plaintiff charged in his submissions below that this was due to bad faith and willful misconduct by the City employees in question.

Among other things, the Long Branch defendants allowed the original operator, owner Edward Bruno and his company, E&L Paving, to operate and expand their paving business on the defendants' lots without prior site plan approval,(they failed to prosecute three site plan applications seeking use and other variances), which was contrary to New Jersey statute and section 20 and successor 345 of the zoning ordinances and despite E&L having been cited for such violations by Long Branch's zoning officer and found guilty three times prior. (A1848, 1856, 1858). As plaintiff detailed in his submissions opposing summary judgment below, Long Branch's employees knowingly and willfully refused to abate the site plan violations since at least 1998.

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the lots. (12:1-26:25). Bruno claims he obtained a C.O. in 1968 when he built a garage on the property. (27:1-25). Bruno did not recall having obtained a zoning permit, however, to change the previous and existing use permitted on the property, a dry cleaner, to a paving company.(30:1-25). Bruno is aware of but denies the *cul de sac* and general access requirements, (17:23-18:1)(see footnote *infra* regarding requirements).

(November 14, 2012 Transcript of Deposition of Brian D. Asarnow ("Asarnow Dep. I") annexed to the Capp Cert, as Exhibit G, 34:7—34:16 ("I have made many complaints with Long Branch to have the zoning ordinances enforced and have this abated"), 37:3-37:10). Though the City and its officials pursued various enforcement actions against the private defendants and their properties over the years, these were a charade. None of the enforcement actions contained or terminated the unlawful use pending site plan approval as required by law.[3]

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[3] Pursuant to Chapter 19-8 of Ordinance 284, adopted 1970 in accordance with laws of 1953, (A1787), as well as current subdivision Ordinance 300, adopted 1991 (Long Branch Online Codes), section 14k, Dead End Streets, "The subdivider shall observe the following requirements and principles of land subdivision in the design of each subdivision or portion thereof:"

k. Dead-end streets (cul-de-sac) shall not be longer than 600 feet and shall provide a turnaround at the end with a radius of not less than 50 feet on the property line and a minimum of a thirty-six-foot cartway radius and tangent whenever possible to the right side of the street. If a dead-end street is of a temporary nature, a similar turnaround shall be provided and provisions made of future extension of the street and reversion of the excess right-of-way to the adjoining properties…

Pursuant to Chapter 20 (Zoning) of Ordinance 284, 20-5.4, Other Provisions: "a. Preservation of Natural Features. No structure shall be built within 100 feet of the top of the bank of a flowing body of water. Structure is defined under 20-3.105 to include stabilized parking areas." (A1796)

Pursuant to Long Branch Zoning Ordinance 345-14, Site Plan Review (A1844), "A. Any application for a building permit for other than a single- or two-family home for new construction or for **a change, addition or expansion of a new or existing use** shall require site plan approval." Subsection (4) requires

The sham enforcement actions included one zoning officer citing E&L and owner Bruno for improper use of the property; a Violation Notice issued March 15, 2002 for improper parking of vehicles, dumping and stockpiling of soil on the property; and other notices of violation and summonses issued against the private defendants in 2010, 2013, and 2014. (Asarnow Dep. I, 61:23-61:25, 63:23-64:4, 76:8-76:11, A1962, 239, 2042-2067). The 2013 and 2014 summonses, (A1962, 2039, 2042-2067), remain un-adjudicated, further reflecting the City's willful refusal to terminate the zoning violations involving defendants.

In addition to the failure to terminate or even contain the zoning site plan violations over the years pending approvals, plaintiff charged that Long Branch employees issued an illegal zoning permit to the defendants in August 2009, in a knowing and willful attempt to "grandfather" and expand the already existing but non-permitted uses that were ongoing on the defendants' properties -- all of which was being conducted without prior site plan approval as was required. (Asarnow Dep. I, 38:23-

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submission of information including tractor trailer access, number of employees per shift, vehicular access, off street parking, loading & unloading, buffers, screening and effect on traffic congestion.

Pursuant to Ordinance 345-75, "Zoning Officer; powers and duties (A1847), "E(3). Enforcement Procedure: Termination of violation. All violations shall be terminated within 30 days or shall be deemed a separate violation for each day following and subject to fines as set forth within."

39:24; A1962, 2039, 2042-2067). This not only failed to abate the defendants' nuisance on the properties, it enabled defendants to escalate their activities and uses -- causing plaintiff additional harm. (A1941, 2004, 2067A*).* Plaintiff charged that the City's issuance of the August 2009 zoning permit to Atlantic Paving permitted and expanded a unilaterally created non-permitted use on defendants' property. Though the 2009 zoning permit purported to authorize defendant and tenant Atlantic Paving to operate a paving company on the properties, this paving company use was already a preexisting illegal use that had existed on the defendants' lots for decades without ever having been approved. Plaintiff argued below that, by law, such unilateral uses cannot become non-conforming permitted uses subject to grandfathering (see Argument, Point 1, infra). Though issuance of the (or any) zoning permit was found not to be an *ultra* vires act by the Appellate Division in the prior appeal, (A123), the permit *prima facia* expanded the use to all lots without prior site plan approval and despite conditions of use thereon stating "no stockpiling or expansion of use." The use of all of defendants' lots remained unauthorized due to this and the lack of site plan approval as evidenced by the subsequent summonses. Plaintiff charged that Long Branch's employees had engaged in a knowingly unlawful civil conspiracy with the private defendants permitting the defendants to carry

out activities on their lots that, the public defendants knew, were not permitted on the defendants' properties. (A789).

Argument

Point 1

The trial court erred in precluding plaintiff from introducing before the jury at trial evidence of prior and ongoing zoning violations by the private defendants and evidence that defendants' activities on their adjoining properties exceeded those permitted during the time period in question, and in precluding other key evidence relevant to proving plaintiff's nuisance claim against the private defendants. Precluding this evidence at trial deprived plaintiff of a fair trial on his nuisance claim and warrants reversal and remand for a new trial.

Nuisance is established when a plaintiff has presented evidence of "unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959). The overriding principle is that all people are required to use their property in such manner as to not injure the property or other rights of their neighbor, as all people possess the correlative right to the enjoyment of their property. Sans, supra, 29 N.J. 438. Private nuisance can exist even when there is compliance with governmental regulations. S. Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 254 F. Supp. 2d 486, 504 (D.N.J. 2003) (citing Rose v. Chaikin, 187 N.J. Super. 210, 217 (Ch. Div. 1982)). As the Supreme Court summarized, the legal theory of nuisance

> usually deals with the conflicting interests of property owners and the question of the reasonableness of the defendant's mode of use of his land. The process of adjudication requires recognition of the reciprocal right of each owner to reasonable use, and a balancing of the conflicting interests. The utility of the defendant's conduct must be weighed against the quantum of harm to the plaintiff. The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business. [Sans, supra, 29 N.J. 449]

"A nuisance may be created or maintained with the best or highest degree of care, and even though the most approved appliances and methods of production have been adopted." A defendant is liable for nuisance regardless of the care taken by the defendant. See, e.g., Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 396 (1962) (nuisance predicated on vibrations); Sans, supra, 29 N.J. 438, (location of golf tees created actionable nuisance justifying injunctive relief); Kosich v. Poultrymen's Serv. Corp., 136 N.J. Eq. 571 (Ch. 1945) (noise and vibrations caused by old grain cleaning machine constituted actionable nuisance).

Here, the trial court improperly precluded plaintiff from introducing evidence and argument before the jury showing prior and ongoing zoning violations by the private defendants and that defendants' activities on their adjoining properties exceeded those permitted on their land during the time period in question. The court precluded plaintiff from showing and

arguing to the jury that the actions the defendants were taking on their lots during the relevant years that plaintiff owned his neighboring property –- operating heavy equipment, stockpiling of equipment and materials -– were activities that were not permitted due to lack of prior site plan approval.

Precluding this evidence and argument deprived plaintiff of a fair trial because this evidence and argument was relevant to proving plaintiff's nuisance claim. As the Model Charge for nuisance confirms, "The word 'nuisance,' as used here, means an unreasonable interference with the use and enjoyment of one's land which results in material interference with the ordinary comfort of human existence, *i.e.*, annoyance, inconvenience, discomfort or harm to the person or property of another. An owner of property has the right to the reasonable use of his/her land. In determining what is reasonable, you must weigh the utility of defendant's conduct against the extent of the harm suffered by plaintiff. The question is not simply whether a person, here plaintiff, is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of defendant's land." Whether defendants' use of their lots was in accordance with the use permitted on the property by the zoning and other laws and regulations in effect was relevant to the jury's assessment of whether defendants' activities were both "an unreasonable use of defendant's land" and "an unreasonable

interference" with plaintiff's own use and enjoyment of his land, and was relevant to whether defendants, as owner and lessees of the neighboring lots, were within their "right to the reasonable use of" their land. The propriety of defendants' activities vis-à-vis the applicable zoning laws and site plan and other regulations was relevant to the jury's determination of "what is reasonable" –- of the jury's charge to "weigh the utility of defendant's conduct against the extent of the harm suffered by plaintiff. The question is not simply whether a person, here plaintiff, is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of defendant's land." Plaintiff charged at trial that operating in knowing and continuous violation of zoning, use, and occupancy laws is unreasonable, and that any permitted use on defendants' properties is restricted to inside the original garage. Plaintiff also charged that Defendant Rosario and companies, who admit to having no valid permits of their own, are not entitled to *any* use of the properties, let alone a reasonable use.

The trial court precluded the jury from considering this evidence and argument throughout plaintiff's trial below. When plaintiff tried to explain why defendants' use of their properties created a nuisance for plaintiff, defendants' counsel objected, and the trial court precluded plaintiff from answering the question. (6T52:1-25). The court precluded plaintiff from

answering whether he "investigated" if defendant E&L Paving was doing anything illegal on their property. (6T53:1-25). The court permitted plaintiff to testify that he made an inquiry of the zoning officer, but precluded plaintiff from telling the jury about the "details of what occurred." (6T54:15-25, 55:15-56:10). The court directed plaintiff not to get into "specifics" of what occurred prior to 2009. (6T59:1-25).

For instance, plaintiff testified that he lost a tenant as a result of defendants' activities on their neighboring properties. (6T92:1-25). When plaintiff attempted to tell the jury that this was because of an arson (A1934, 2067A – arson files) that occurred on plaintiff's property, however, the court refused to permit plaintiff "any reference to an arson." (6T93:1-96:25, 100:20-101:5, 103:1-104:25). Though the police report itself identifies that an "arson" occurred, (A1933), the trial court reasoned it was not prosecuted or tried so could not be used in the trial below. But this arson incident and events leading thereto, (A1908-1924, A2067A), was directly relevant to the jury's consideration of whether defendants' activities were "an unreasonable interference" with plaintiff's own use and enjoyment of his neighboring land.

This evidence that the jury was precluded from seeing would have been damaging to defendants' claim of reasonable use and non-interference with plaintiff's land. Video and other

evidence, (Trial Exhibits 67-71, 105,118; A1927-1937, A2067A – arson files, A2083), showed defendant Raymond Greico driving a black Lincoln MKX (A1927, 1931), the same vehicle seen at plaintiff's premises in A2067A (item 13 "pre arson & arson videos" in the "pre arson folder" at 7:38:14, camera 6). Greico's vehicle appears to drop off the perpetrator (the arsonist at 20:34:14 - Arson file, A1937). The fire is set. The same vehicle is seen backing up immediately thereafter to pick up the arsonist at 20:41:37. (See accompanying DVD, A2067A, for playing instructions) Other vehicles are utilized (A1937). Plaintiff's counsel objected to the preclusion of this evidence. The trial court erred in ruling that this evidence was inadmissible because the arson was not prosecuted or tried criminally. (6T92:24-110:9, 6T95:1-3).

The trial court precluded plaintiff from introducing evidence of a subsequent, more recent arson threat by co-defendant Rosario as well. Video and audio evidence identified below (A2067A, files 14, 15 and VM1 (move slider 60% to right to access this portion)), showed defendant Rosario present (around 9:14:02) when plaintiff arrived at his property; contractors were repairing a wall from the first arson damage (9:14-9:21). Rosario makes a veiled threat to plaintiff that a Mexican is going to burn down plaintiff's building. Plaintiff gets his tape recorder (pretends it's a phone) and walks over toward

Rosario (9:23:52). Words are exchanged. Rosario says he does not care that he's being recorded. The video evidence shows Rosario bringing out fire extinguishers and placing them in the street outside plaintiff's building (11:09:47, cameras 2 and 6). Rosario is seen bringing out a gas can and blow torch and leaving these in the street as well. The trial court erred in precluding this evidence, which was relevant to whether defendants' activities were "an unreasonable interference" with plaintiff's own use and enjoyment of his land. (9T234:2-235:2).

The trial court committed similar error in precluding evidence of voicemails, and of website hacking preceding the arson. (A2067A –VM1, VM2). The first voicemail (VM1, left 12/13/09) followed the trespassing incidents, petition and letter to mayor and administrator, and immediately preceded the stone throwing incident (where defendants threw stones at plaintiff and his vehicle)(A1914). The voice mail message mentions Plaintiff's "fairtrialnj" van, which was a subsequent target of the arson, as a "problem." A second voicemail by the same caller on the same day, who plaintiff charged was defendant Rosario, mentions Plaintiff's name. The trial court erred in ruling that these voice mails were precluded from evidence because they were not professionally "authenticated." Evidence is authenticated when there is "evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E.

901. Furthermore, Rosario self authenticates as his voice in the new arson threat recording matches that on the initial voicemails, (A2067A, VM1). Plaintiff's testimony about the manner and date of the recording, and how it was preserved, was sufficient to satisfy the authentication requirement. The court similarly erred in precluding evidence of website hacking of plaintiff's "fairtrialnj" website. (A1911). This hacking followed the stone throwing incident, (A1914), and contained messages similar to those left on plaintiff's voicemails by Rosario and another unknown person. (A2067A – VM1, VM2).

Other evidentiary rulings by the trial court further handcuffed plaintiff in proving his nuisance claim to the jury below. The court precluded plaintiff and his expert appraiser (who also testified at trial) from testifying or submitting photos mentioning "legal or illegal" or even nonconforming uses on the defendants' property as well. (8T17:1-18:20, A1701, A1729). When plaintiff attempted to introduce into evidence deposition testimony from a zoning officer (Michelle Bernich), noting that Bernich had discussed with her boss, Carl Turner, "that there should be no stockpiling or expansion of use" on defendants' properties, the court said, "this is a nuisance case, this isn't a zoning case." Defendant's counsel said it was already determined that the Long Branch zoning officer was entitled to issue the 2009 zoning permit to defendants.

(10T35:1-37:25). The court said, “the zoning case has already been adjudicated.” (10T38:1-10). Plaintiff’s counsel argued that the stockpiling and expansion of use on defendants’ lots noted by the zoning officials showed that defendants had expanded the use beyond the zoning permit conditions without site plan approval. (10T39:1-25). But the court precluded such evidence and argument, stating that Judge Perri had adjudicated the legality of the 2009 zoning permit. (10T42:1-44:25).

The trial court made the same ruling in precluding deposition testimony of zoning official Carl Turner. (10T46:1-52:25). The court said “there has been nothing … presented that would establish a *per se* violation of the nuisance statute by virtue of [an] … inappropriate use, zoning use … of the property.” (10T51:1-25). The court said that it would not charge the jury about any “zoning issues,” only about the “tort of nuisance.” (10T52:1-10). The court likewise precluded evidence, via deposition testimony of Assistant Planning Director Turner, that E&L Paving’s use of the property “was restricted to inside of [the] original garage” on the defendants’ property. “That’s a zoning determination,” the court said. (10T55:1-25). The trial court erred because this evidence was relevant to whether defendants’ use of their lots was in accordance with the use permitted on the property by the zoning and other laws and regulations in effect, which in turn

was relevant to the jury's assessment of whether defendants' activities were both "an unreasonable use of defendant's land" and "an unreasonable interference" with plaintiff's own use and enjoyment of his land; and whether defendants, as owner and lessees of the neighboring lots, were within their "right to the reasonable use of" their land. The court also misapplied N.J.R.E. 803(b)(1), which provides, a "statement offered against a party which is ... the party's own statement, made either in an individual or in a representative capacity," is not excluded by the hearsay rule. Parker v. Poole, 440 N.J. Super. 7, 18 (App. Div. 2015).

These issues arose again during the final charge conference, before summations. Defendants' counsel objected to any evidence or argument by plaintiff of lack of site plan approvals on defendants' lots, arguing, "the existence or lack thereof [of] a site plan is a zoning issue" that was not relevant to plaintiff's nuisance claim. (11T20:1-10). The trial court agreed, ruling that the failure to obtain site plan, occupancy, or zoning approvals by the defendants was not relevant to any element of plaintiff's claims and would not be admitted before the jury. (11T20:1-21:5).

Because of the trial court's rulings, the jury was thus not apprised at trial that the uses of and activities conducted on defendants' lots were not, in fact, all in accordance with

applicable zoning, sub division, regulations in effect during various time periods in question. Because of this, defendants' counsel was able to argue to the jury, during summation, that defendants' actions on and uses of their lots was proper and part of the "industrial zone" -- "clearly an area that is devoted to business."

> So you understand and have been told that the property is located in Long Branch off of the area of Broadway, 7th Avenue, Morris Avenue. It's in a zone which is characterized as a commercial zone, industrial zone, and -- and one part is by a residential zone.
>
> And you can see the context as indicated by D-l as to where the property is.
>
> The significant item that I think that you should consider is the Community Place area where it impacts on Mr. Asarnow's property, the property occupied by -- by the defendants, and then the context of the -- the Long Branch -- the -- the railroad line, the Town Hall, the police department, Seashore Day Camp, and all those other businesses around there.
>
> My point in saying that to you and in mentioning it to you again is that this is clearly an area that is devoted to business. And with all the different things that one would expect that would be associated with business, business is being done down there. It's being done by the defendants, and it's done by -- by Mr. Asarnow, you know, after a fashion, and everybody is down there working.
>
> You've heard testimony in regard to the work that's being done on the property that's really the subject matter of this 63 Community Place, and you understand what type of work is being done there.
>
> That's been made very clear.

> The reason why that is -- that is important in the context of this case is that it is all something that one might expect to be done down there. It's nothing that's -- that is unusual or unreasonable in any context or is -- may be otherwise, you know, according to the common usage of that word. [11T25:1-26:25]

Defendants' counsel told the jury that the operations on defendants' lots were "noisy" but stressed that these were "industrial activities" that were permitted on defendants' lots:

> Okay. And I will grant you that industrial activities probably could be noisy.
>
> But then so could -- so could my lawnmower. But the fact is that, yes, it can be noisy, and, in fact, it would be noisy. Cars, trucks, lifts, things like that, they operate on engines, gas engines, and they make noise.
>
> Insofar as the particular other activities going on over there, Mr. Asarnow says well, you know, there -- there -- well, we -- we can't -- that's not something that can be done. When you -- when you work sometimes you create -- you might create dirty conditions, and sometimes it may not be something that a neighbor would want to see. But the fact of the matter is that Mr. Asarnow is not living down there.
>
> He is operating a business down there devoted to industrial uses in the same zone that the defendants are -- are located in. So that is not a valid area for him to complain about.
>
> So noise, his characterization as to what may be unsightly, again those are not something that a reasonable person should say the context of the property is a -- something that he should reasonably object to. [11T28:1-25]

Defense counsel continued by noting for the jury the history of the uses conducted on the defendants' lots – which, because of the trial court's rulings, the jury had <u>not</u> been told

contravened the zoning/site plan, subdivision and occupancy laws in effect during the years in question:

> Now, at the time he purchased this property, Mr. Bruno had been in that property for almost 30 years. So there's no secret stuff about what -- what was occurring on the property here at 63 Community. Mr. Asarnow, when he was here, was well aware that there was paving activities going on there, there were trucks going down there, there were machinery that Mr. Bruno indicated, there were pavers that would go there, and that's the main entrance into that property.
>
> Mr. Bruno indicated that there were other individuals who -- who used, associated contractors that used that property to -- to put machinery back there. You know, they were going in and out. And nothing's changed on this street since he -- he purchased it. [11T34-35]
>
> ***
>
> Mr. Asarnow's main objection is that he doesn't like the way the property is being used. And that's -- that's unfortunate. We can't help that. And reasonably we can't be expected to change that because he doesn't like the way things are going on down there. **There is nothing in the law that says that we have to**.
>
> Mr. Bruno operated that property since 19 -since the 1960s and up through to 2007. Mr. Rosario and Mr. Grieco then took over in 2000 -- 2009. And you can see -- you can see the photographs what -- you know, what they're doing on the property. You've seen the -- some of the paperwork that they have indicating that they're entitled to use the property that way and that there are documents there with their name on it. There's Mr. Rosario's name on it, there's Mr. Grieco's name on it.
>
> The -- this they're entitled to use the property in the way that they're using it. **There's nothing in any of the evidence to indicate that they're not entitled to do so. There's not a shred of evidence**.

[11T47-48 (emphasis added)]

Because of the trial court's improper rulings, the jury never heard the long history of ongoing zoning violations and numerous evasions of site plans and findings of guilt at the defendants' properties (see 9T66:1-10, plaintiff's counsel noting to judge that because of rulings counsel "was skipping massive points" that would have been elicited from plaintiff on direct examination). In January 1984, the zoning officer issued a letter to the City Attorney concerning E&L's improper storage of vehicles and equipment, and moving of soil, on Lots 19, 20, 21 and 40 and stated Bruno had been found guilty of same. (A1848). In January 1987, the City as plaintiff, and E&L, Bruno, and Long Branch Asphalt Company, terminated litigation by entering into a permanent restraining order prohibiting E&L from stockpiling dirt on Lot 40. (A1849). In September 1998, the City zoning officer sent a letter concerning multiple violations by defendants Bruno and E&L on Lots 32.01, 37.01, 38.02, 40 and 52 for violations of the permanent restraining order, parking tractor trailers (containing municipal waste) on certain of the lots, and various other violations, including "expansion of a non-conforming use." (A1852, 1853). In October of 1998, the Long Branch zoning officer issued to Bruno and E&L Paving a complaint-summons for expansion of a non-conforming use, and for using certain of the lots for storage without prior approval

from the City for which he was found guilty January 27, 2000 (A1854, 1856). Another summons issued on November 10, 1999 for failing to obtain prior approval to expand the use after demolition of the house on lot 32.01 across from Plaintiff. (A1857). On November 27, 2000, the Zoning Board of Adjustment dismissed an application by E&L for a "[u]se variance and/or approval for expansion of a non-conforming use, along with related bulk variance relief and site plan approval and/or waiver of same" relating to Lots 32.01 and 37.01. (A484). A finding of guilt was entered on January 30, 2000 on the aforementioned summons, (A1830), but no ejection/ termination from the lot ensued then or since. A subsequent site plan for multiple lots seeking use and other variances was filed in 2002, (A494), but was withdrawn on August 27, 2007, (A1109). In the interim, Bruno/E&L was permitted to use the lots while stealthily seeking variances via a neighbor’s application. (A1119-1158).

A Certificate of Occupancy was required when E&L Paving began using lots l3B and 39, purchased in or around 1965 on Community Place. This was pursuant to Section 12.l and 12.2 of Long Branch Zoning Ordinance 235 (eff. 5/31/55). (Trial exhibit l1, A1773, also not permitted into evidence). Defendant Bruno admitted that he had no C.O. (10T:26-28). A zoning permit was required beginning in 1970 pursuant to section 20-11.2 of Long

Branch Ordinance 284. (Trial exhibit 13, A1815). None was found through Plaintiff's Document Demand (A169) or OPRA Request (A503) in order to construct the garage.

In addition, Commercial Certificates of Occupancy in Long Branch are issued pursuant to the BOCA National Property Maintenance Code and the Uniform Fire Code, N.J.A.C. 570. (A676). The application (under item 10) requires the prior approved zoning permit to be attached. (A679) The certificate of occupancy applies only to the tenant for whom it is issued. DeFazio Dry Cleaners pre-existed E&L Paving on residential lots 19-21 (the site of the existing Morris Avenue garage) when acquired by E&L in 1972. (A174, A1521). E&L failed to obtain a C.O. or zoning permit to change the existing use. None was found through Plaintiff's Document Demand (A169) or OPRA Request (A503, 1829, 1835). The trial court erred in ruling that this evidence was not admissible in support of plaintiff's claim.

The trial court erred in ruling that evidence and argument about the defendants' improper uses of the lots was not admissible on the ground that the trial below was not a "zoning case." As argued above, whether defendants' use of their lots was in accordance with the use permitted on the property by the zoning and other laws and regulations in effect was relevant to the jury's assessment of whether defendants' activities were "an unreasonable use of defendant's land" or "an unreasonable

interference" with plaintiff's own use and enjoyment of his land, and to whether defendants, as owner and lessees of the neighboring lots, were within their "right to the reasonable use of" their land. The propriety of defendants' activities vis-à-vis the applicable zoning laws and site plan and other regulations was relevant to the jury's determination of "what is reasonable" –- of the jury's charge to "weigh the utility of defendant's conduct against the extent of the harm suffered by plaintiff. The question is not simply whether a person, here plaintiff, is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of defendant's land." Operating activities on a property in knowing and continuous violation of zoning, occupancy, and use laws is unreasonable, the jury could certainly have found below.

The trial court also erred to the extent it relied upon Judge Perri's prior grant of summary judgment for the Long Branch defendants. As argued under Point 2 below, Judge Perri's grant of summary judgment was improper. Even if the summary judgment was proper, this summary judgment ruling should not have precluded plaintiff from introducing evidence and arguing to the jury that the defendants' activities on and uses of their neighboring lots was unlawful and improper based upon site plan, subdivision, mercantile license and certificate of occupancy requirements. Nothing in Judge Perri's grant of summary

judgment for the Long Branch (public) defendants precluded plaintiff from so arguing in his nuisance trial against the private defendants below. Except for the possible use of the inside of the original garage on the defendants' lots, none of the business being conducted on defendants' lots was permitted, as is evidenced by the multitude of violations and summonses issued by Long Branch zoning officials and prior findings of guilt for expansion outside of the original garage. Likewise, that the zoning officer might have had authority to issue the 2009 zoning permit to Atlantic Paving did not authorize the paving business and other businesses and activities that defendants conducted on all of the lots. As plaintiff argued below, the 2009 zoning permit, even if not *ultra vires,* improperly expanded an already existing and ongoing use of the defendants' lots that was unlawful and was without prior site plan approval. Even if the 2009 zoning permit authorized the defendants' paving activities, the permit was issued to "Atlantic Paving," moreover, not the other defendants at trial below. Nothing in the zoning permit authorized operation of a "demolition" or "lawn sprinkler" business on the lots. Also, Judge Perri made no determination that all zoning issues were adjudged lawful. Judge Perri recognized the need for site plan approval, a zoning violation (2T15:1-25). Judge Perri notes expansion beyond the zoning permit, ongoing lack of site plan

approval. (2T69-76, 69:20-70:6, 73:14-74:18). Judge Perri acknowledged that the Municipal court was addressing expansion without prior site plan approval on the defendants' lots, and that expansion is a separate issue from the validity of the permit itself. (2T75:19-76:10).

In sum, plaintiff was entitled to have the jury hear and consider all this evidence and argument in support of his nuisance claim against the private defendants at trial below -- that the defendants' use of their properties was an unreasonable use of their neighboring land and unreasonably interfered with Plaintiff's own use. By precluding the evidence and argument, the trial court simultaneously enabled defendants' counsel to argue, falsely, that the activities on and uses of the lots by defendants was all in accordance with the zoning, site plan, use, occupancy, and other regulations in effect during the time periods in question. Precluding this evidence and argument deprived plaintiff of a fair jury trial on his nuisance claim against the private defendants and warrants a new trial here.

Point 2

The trial court erred in granting summary judgment to the City of Long Branch and its public officials and denying Plaintiff's summary judgment for injunctive relief.

In deciding a summary judgment motion, the trial court must view the evidence in the light most favorable to the plaintiff. The court must deny the motion if a reasonable jury hearing the evidence could find in the plaintiff's favor on his claim. The Appellate Division reviews a trial court's grant of summary judgment *de novo*. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), holding modified by, Schneider v. Simonini, 163 N.J. 336 (2000).

Plaintiff's claims against the City and its employees are not barred by the entire controversy doctrine, *res judicata*, or statutes of limitation

The entire controversy doctrine "embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591, 605 (2015). The purposes of the doctrine are "'(1) the need for complete and final disposition through the avoidance of piecemeal decisions; (2) fairness to parties to the action and those with a material interest in the action; and (3)

efficiency and the avoidance of waste and the reduction of delay." Id. (quoting DiTrolio v. Antiles, 142 N.J. 253, 267 (1995)); R. 4:30A ("[non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine").

"In determining whether a subsequent claim should be barred under [the entire controversy] doctrine, 'the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions.'" Wadeer, supra, 220 N.J. 605 (quoting DiTrolio, supra, 142 N.J. 268). "'It is the core set of facts that provides the link between distinct claims against the same parties ... and triggers the requirement that they be determined in one proceeding.'" Id. (quoting DiTrolio, supra, 142 N.J. 267–68). Importantly, however, the entire controversy "doctrine 'does not apply to unknown or unaccrued claims.'" Wadeer, supra, 220 N.J. 606 (quoting DiTrolio, supra, 142 N.J. 274).

The doctrine of *res judicata* "contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." Lubliner v. Bd. of Alcoholic Beverage Control for City of Paterson, 33 N.J. 428, 435 (1960). Application of the *res judicata* doctrine requires substantially similar claims and issues, parties, and

relief sought. Eatough v. Bd. of Med. Examiners, 191 N.J. Super. 166, 173 (App. Div. 1983); Walker v. Choudhary, 425 N.J. Super. 135, 150-51 (App. Div. 2012).

The trial court erred in ruling that plaintiff's claims against the City and its employees were barred by the entire controversy doctrine. The court said that plaintiff should have asserted his claims in the earlier prerogative writ action that plaintiff filed in 2010. (2T107:1-113:15).

In Joel v. Morrocco, 147 N.J. 546 (1997), however, an action in lieu of prerogative writs led to a settlement, which required the partnership developing a condominium project to pay periodic sums to a neighboring property owner. Id. at 551. In supplementary proceedings, the neighbor's successor learned the identity of the partnership's members and filed suit against the individual partners because, as had been determined in Seventy-Three Land, Inc. v. Maxlar Partners, 270 N.J. Super. 332 (App. Div. 1994), a judgment against a partnership alone, in an amount in excess of the partnership's assets, would not reach its individual partners. Joel, supra, 147 N.J. 552–53. The Joel Court ruled that the second suit against the individual partners was not barred by the failure to include them in the first suit not only because of fundamental fairness, but because what was viewed as the first suit -- the controversy concerning the condominium project -- was not a suit by a creditor of the

partnership; accordingly, the Court found there was no "commonality of facts undergird[ing] each set of claims." Id. at 553; see also Alpha Beauty Distributors, Inc. v. Winn-Dixie Stores, Inc., 425 N.J. Super. 94, 104-05 (App. Div. 2012) (entire controversy doctrine did not require that seller's claims against buyers be joined with claims in federal action).

The Entire Controversy Doctrine does not apply in this case for similar reason. As in Joel, supra, 147 N.J. 546, the first prerogative writ action was a limited action only challenging Long Branch's approval of the 2009 zoning permit, seeking to invalidate it on the ground that it was an *ultra vires* municipal action. Plaintiff's lawsuit below, in contrast, was for damages and injunctive relief against the City and its employees primarily because of their willful and knowing failure or refusal to abate/terminate the zoning/site plan and occupancy violations that were in place on the defendants' properties, and for conspiring with the private defendants to aid and abet and allow the, in fact, unlawful actions on and use of the defendants' neighboring lots. The prerogative writ action and this action, therefore, do not share the same set of core facts. This is a tort action against the City and its employees, not a lawsuit seeking to invalidate a permit as was the first action. Plaintiff is seeking vindication of his rights pursuant to 42 U.S.C.A. § 1983 (West) as well; the non-assertion of 1983 in the

previous prerogative writ action cannot be held to bar the 42 U.S.C.A. § 1983 claim.

As stated above, moreover, the entire controversy "doctrine 'does not apply to unknown or unaccrued claims.'" Wadeer, supra, 220 N.J. 606 (quoting DiTrolio, supra, 142 N.J. 274). Mandatory claim joinder should not be interpreted as encouraging or requiring the filing of premature or unaccrued claims. K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 74 (2002). Claims that are separate and discrete from those dealt with in a previous proceeding should not be barred by the entire controversy doctrine in a subsequent suit. Hillsborough Twp. Bd. of Educ. v. Faridy Thorne Frayta, P.C., 321 N.J. Super. 275, 285 (App. Div. 1999).

Even if there are some facts common to both suits, the trial court erred by failing to recognize that preclusion is the remedy of last resort. Alpha Beauty Distributors, Inc., supra, 425 N.J. Super. 105-06. There are key issues and claims asserted against the City and its employees which were not adjudicated in the previous prerogative matter and which, indeed, only came to light *after* the prerogative writ action was concluded. As Certified by plaintiff below (on September 28, 2010) in support of his motion for reconsideration, the mercantile license application and CCO 09-102 were discovered on August 16, 2010. (A1571). This issue was not adjudicated in the

prior prerogative writ action. The disputed mercantile license was not obtained until after plaintiff filed his lawsuit in the court below. Defendants only provided the document on March 23, 2012 in response to item 21 of plaintiff's December 29, 2011 initial document demand and only upon threat of a motion to compel. (A1583-1587). An unsigned CO covering up the CO application was first obtained following Plaintiff's initial Document Demand (A1580, 15811, item 21). A clean copy of the CO application was not obtained until after 2/27/13. (A1588).

As plaintiff argued below, the City and its employees sought to hinder and delay plaintiff's access to these and other key documents, including a summons and finding of guilt imposed on defendant January 30, 2000, wherein the house on lot 32.01 of the defendants' property was demolished and the use illegally expanded. (A1592-1597). The concealment evidences another instance of breach of fiduciary duty by Long Branch and its officials that should have precluded these public defendants from relying on the entire controversy or res judicata. Indeed, Judge Bauman of the Law Division court below ruled that plaintiffs' claims in this lawsuit were part of a continuing civil conspiracy between the public and private defendants that involved multiple parties "stretching back to 2000." (1T24:1-26:24). Judge Bauman noted that plaintiff was alleging

"continuous tortuous activity on the part of the zoning board, the members … since 2002." (1T25:1-25).

Damages that occurred to plaintiff as a result of the improper August 2009 zoning permit that the Long Branch defendants issued had not yet fully accrued when plaintiff filed his prerogative writ action in April 2010. Plaintiff's tort notices were filed on May 24, 2010 (A32); the second one sought enforcement of a recent notice of violation and mentions the palpable lack of an arson investigation, which may or may not be considered similar to claims of continuing tort made in his 2002 tort notice. Plaintiff was required to wait to sue until 6 months passed (until November 24, 2010). See N.J.S.A. 59:8-8 (suit precluded until 6 months after notice filed). Plaintiff attempted to follow the Tort Claims Act. He should not have been punished by the court below for adhering to the 6 month waiting period.

The trial judge's decision to dismiss plaintiff's claims against the Long Branch defendants failed to account for the doctrine's equitable underpinnings. Joel, supra, 147 N.J. 555; Hobart Bros. Co. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 241 (App. Div. 2002). As our Supreme Court has recognized, the entire controversy doctrine rests on the "'twin pillars' [of] fairness to the parties and fairness to the system of judicial administration." Joel, supra, 147 N.J. 555 (quoting

Prevratil v. Mohr, 145 N.J. 180, 197 (1996)). Because not every successive suit imperils those concerns, and some only in varying degrees, it has been recognized that "preclusion is a remedy of last resort." Vision Mortgage Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 584 (1999) (quoting Olds v. Donnelly, 150 N.J. 424, 446–47 (1997)). The continuation of the suit against Long Branch and its employees below would have been neither unfair to the defendants nor prejudicial to the efficient administration of justice.

The trial judge also failed to consider the fairness to plaintiff of dismissing his claims -- whether plaintiff "had a fair and reasonable opportunity" to assert his claims against the City and its officials in the prior, prerogative writ action. He did not. The first prerogative writ action was a limited action only challenging Long Branch's issuance of the 2009 zoning permit, seeking to invalidate it on the ground that it was an *ultra vires* municipal action. Plaintiff's lawsuit below, in contrast, was for damages and injunctive relief against the City and its employees primarily because of their willful and knowing failure or refusal to abate the zoning/site plan, subdivision and occupancy violations/requirements that were in place on the defendants' properties, and for conspiring with and aiding and abetting the private defendants to allow the, in fact, unlawful actions to continue and expand onto all

the defendants' neighboring lots. (See zoning permit, A1865). Many of the wrongs that plaintiff charged in this lawsuit occurred after the prerogative writ action was concluded -– in 2010-2014; many are still ongoing. (A1947, 1962, 2039, 2042-2067). A separate complaint would be needed to address at least the other permits which contributed to the escalation of the nuisance and damages caused to plaintiff as a result.

With respect to *res judicata*, only the issuance of the August 2009 zoning permit and the January 27, 2010 notice of violation and enforcement of no parking zones delineated on Plaintiff's site plan was adjudicated in any manner in the prior prerogative writ action. The court made no rulings or findings on any other issues. New Jersey requires for the application of *res judicata* identity of causes, of parties or their privies, and of issues. Eatough, supra, 191 N.J. Super. 173; Walker, supra, 425 N.J. Super. 150-51. This standard was not demonstrated in the court below.

Plaintiff's claims are not barred by statute of limitations either. Judge Perri said, "The record before the Court shows that the plaintiff knew of the alleged nuisances as far back as 1998, and that he cannot rely on the theory of continuing injury which would toll the Statute of Limitations." (2T119:17-120:15). This is unsupported by the record. (See Defendants' Statement of Material Facts (Capp), Fact 6 (A279); Plaintiff's

Opposition Facts, at 5, 17 (A790, 817); Plaintiff's Answer to Second Amended Interrogatories, No. 45, (A833 - Nuisance "occurred" since 2000). The nuisance was realized in 2002, not 1998. It takes at least 2 incidents, or in this case 2 appraisals (of plaintiff's property), to realize something is continuing and damaging. Judge Perri's statement as to when the nuisance began contradicts her own acknowledgement of this fact: "He refers to the private non-defendant's use, which he claims began in 1965, *but which he did not become aware of until 2002."* (2T97:19-21). The escalation of the nuisance and charged conspiracy/breach of duty and civil rights violations began after September 2009, moreover, well within any statute of limitations. (A837 - #108).

Moreover, Judge Bauman, in his September 28, 2012 ruling in this litigation, found a continuing tort based on the 2002 tort notice and rejected any statute of limitations defense for the Long Branch defendants. (1T). Judge Perri disregarded that defendants have a duty to abate a continuing nuisance that they helped create then escalate. Plaintiff does not have a duty to provide continual tort notices. See Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 103 (1996)(nuisance is continuing when it is the result of a condition that can be physically removed or legally abated but has not been); Lyons v. Twp. Of Wayne, 185 N.J. 426, 434 (2005) ("When analyzing a

nuisance … wrongful conduct is not limited to the creation of the condition. Rather, a failure to physically remove or legally abate that condition, resulting in the physical invasion of another's property, also constitutes wrongful conduct. If plaintiffs' water problems are subject to abatement, then, to the extent that those problems qualify as a nuisance for which the Township is responsible, a subject discussed below, they also are a continuing nuisance”). Plaintiff seeks damages beginning 6 years prior to his complaint in accordance with Russo and Lyons. The claim for continuing nuisance is not barred by statute of limitations.

The City is not immune under the Tort Claims Act

Plaintiff sued the City and its employees for tortious interference with economic advantage and contractual relations because of plaintiff’s loss of peaceful possession in conducting business on his property (count 6), and for breach of fiduciary duty in failing to abate the known and obvious zoning violations and aiding and abetting same thru issuance of questionable permits (count 7). Plaintiff sued for civil conspiracy, in conspiring since at least 2000 to help the private defendants evade the zoning laws (count 8). He realized the conspiracy upon obtaining a copy of the zoning permit in September 2009. (A837 - #108). Plaintiff sued Long Branch and its employees for violations of his civil rights (count 9), and for intentional

infliction of emotional distress (count 6). Plaintiff incorporates by reference his Statement of Material facts (contained on pages A440-456, 789-823, 1538-1541 of the accompanying Appendix) setting forth in detail all of the proofs supporting his claims.

The trial court erred in ruling that Long Branch's employees and the City itself were immune from plaintiff's claims as a matter of law.

Public employees are liable under the Act in the same manner as private individuals, N.J.S.A. 59:3–1a, unless there is an immunity "provided by law" (including the Act); the public employee's liability is "subject to any defenses that would be available" were he a private person. N.J.S.A. 59:3–1b. The only limitation on section 5–2b(2) immunity is that found in the Act itself. N.J.S.A. 59:3-14 provides, "Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment *or constituted a crime, actual fraud, actual malice or willful misconduct*." (emphasis added).

In Foldi v. Jeffries, 93 N.J. 533 (1983), the Supreme Court noted that a willful misconduct standard is "[an] intermediary position between simple negligence and the intentional infliction of harm." Id. at 549. Although it is clear that willful misconduct is something more than mere negligence,

"[t]here is no simple formula which will describe with exactness the difference between negligence and willful and wanton misconduct. The concept of misconduct ranges in a number of gradations from slight inadvertence to malicious purpose to inflict injury." McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970); Fielder v. Stonack, 141 N.J. 101, 123-24 (1995). Some decisions have suggested that to show willful misconduct, it must appear that the defendant, with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result to the plaintiff. Id. at 305. Although willful misconduct need not involve the actual intent to cause harm, there must be some knowledge that the act is wrongful. New Jersey cases indicate that the requirement may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences. Berg, supra, 37 N.J. 414; Fielder, supra, 141 N.J. 124.

Here, plaintiff's claims against the Long Branch employees fell within the willful misconduct clause of the Tort Claims Act. Plaintiff alleged a "palpable failure" "to prevent or abate" the nuisance that E&L Paving and the subsequent lessees

carried on the property. Plaintiff charged that the City employees knowingly failed or refused to abate the nuisance. Though the defendants pursued enforcement actions against the private defendants over the years, these were a charade, plaintiff charged. No real effort was made to terminate the defendants' ongoing zoning, site plan, and occupancy violations and consequent nuisance visited upon the neighboring plaintiff. (A7). In Count Two, plaintiff charged that "Despite knowledge" of the illegal activities by the private defendants "Long Branch zoning officer Bernich unlawfully granted a zoning permit to Bruno/EL and successor tenant/prospective owner Atlantic Paving to continue pre-existing partially non-conforming use for Paving company for two buildings yard and parking area thereby grandfathering the illegal use No other companies or uses are listed." (A9). All E&L lots are included in the zoning permit, despite knowledge that the use, if any, should be contained within the original garage and despite 3 prior findings of guilt for expansion of use without prior approval -- all part of the conspiracy and charade that plaintiff charged below.

Plaintiff detailed his claims against the Long Branch defendants in his opposition to their motion for summary judgment below, verifying all of the facts he had detailed in his Amended Complaint. (see Cert. of Asarnow, "I certify as to the allegations of the amended complaint being the true facts in

this matter as of its filing with the following exceptions found during discovery," (A824). When increasing intensity and detrimental use of the defendants' properties occurred in 2009, plaintiff called the Long Branch zoning office and was informed that a zoning permit had been issued to "Bruno/E&L" and "Atlantic Paving" to continue the existing use. Upon obtaining a copy of the permit at the end of September 2009 in response to his OPRA request (A1864), plaintiff visited the zoning officer then delivered a letter to the Mayor and Administrator, but no action was taken by the Long Branch defendants. (A428).

Plaintiff detailed the subsequent trespasses and nuisance visited upon him by the private defendants and the knowing and willful failure of the Long Branch employees to enforce the laws and abate the nuisance of the private defendants:

45. On October 12, 2009, Plaintiff reported that his neighbors were using their vehicles to trespass on his property. A police report was taken.

46. The mayor and administrator would not respond so Plaintiff circulated a petition in December to adjoining neighbors and environmental groups.

47. Immediately thereafter, a website of Plaintiff's was hacked, information stolen, and obscene and intimidating messages left. Similar voice mail messages followed with stones thereafter being thrown at Plaintiff on several occasions and

his vehicle and building being damaged by Joe Rosario and employees of Rosario-Mazza.

48. The police took one hour to respond and falsified this in the police report

49. On January 12, 2010 an arson occurred consuming 2 of Plaintiff's vehicles including construction equipment contained therein, and damaging a wall of Plaintiffs building, all since occupation by these tenants.

50. Plaintiff thereafter presented these petitions and facts to the City Council on Jan. 26, 2010 and Feb. 9 and Feb. 23, 2010.

51. At the Jan. 26 meeting, the city attorney thanked Plaintiff and said a notice of violation was being issued to Atlantic Paving as Rosario Mazza was not on the illegal permit, and had established a demolition and recycling yard across from Plaintiff.

52. The city attorney failed to mention that a certificate of occupancy was issued to same Defendants one week prior …

53. On January 27, 2010, Defendant issued a notice of violation to Atlantic Paving which states "you have expanded the use of the property beyond the scope of your approved zoning permit dated 8/3/09. You must comply with the following:

1) The demolition /disposal business must be removed from the property. All trucks, equipment, dumpster

containers and any other items related to this business must be removed.

2) You must remove all piles of construction material, firewood, and dirt/soil that is being stockpiled on the site. A re-inspection will be made on or about February 26, 2010. Failure to comply will result in a summons being issued in Municipal Court."

54. Yet no summons or fines … issued. Rosario Mazza Demolition & Recycling and the owner's other business, Custom Lawn and Sprinkler, and other tenants and uses not listed on the zoning permit remain. Containers of demolition waste are still being processed by Rosario-Mazza and dirt and other materials continue to be stockpiled by occupants. …

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68. "Following a review by Long Branch Officials, a letter sent March 13,2010 from the City Attorney refuses to rescind the permit, claiming a CO was not needed at inception, and instead targets and threatens retaliation against Plaintiff who has already obtained permits following two administrative reviews, (including site plan approval) (A1289)

69. Plaintiff's permits have previously never been an issue.

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71. An obviously contrived Certificate of Occupancy issued to Rosario-Mazza under auspices of Kevin Hayes, was subsequently discovered by Plaintiff and is also *ultra vires* as they are not listed on the zoning permit, a necessary prerequisite. Its purported date of issuance of Jan. 19, 2010 follows the zoning permit by 6 months, the arson by one week and precedes the notice of violation by one week and contradicts same.

72. As confirmation of the contrivance, an email dated March 5,2010 from Kevin Hayes to Michele Bemich with copy to Howard Woolley mentions a new abatement date of 3/15/10 for the Notice of Violation (NOV) of 1/27/10. Why enforce the NOV if a valid Certificate of occupancy exists?" [all part of the conspiracy and charade, plaintiff charged below]

73. An "ultra vires mercantile license also was previously issued at same time as the unlawful zoning permit to 'Atlantic Paving and Misc. Contractors' and the application lists Edward Bruno as landowner and Raymond Greico and Joe Rosario as 'principals in the business. This is novel even for Long Branch as mercantile licenses are to be issued to one business per application. This further demonstrates to what lengths Long Branch will go to continue and escalate the nuisance use while purporting to seek abatement of same." (A12).

The trial court erred in granting summary judgment to the City of Long Branch and its employees. As the Supreme Court stressed in Fielder, supra, 141 N.J. 128-30,

> Although we are satisfied that Officer Jenkins is entitled to immunity under N.J.S.A. 59:5–2b(2) as a matter of law, in order to justify summary judgment, he must establish that there is no genuine issue of material fact of whether his conduct constituted willful misconduct as we have defined it today. More specifically, Officer Jenkins must prove that there is no genuine issue of material fact with regard to any of the elements of the willful misconduct standard: whether there was a direct order not to engage in the pursuit or not to continue the pursuit, whether Officer Jenkins knew of such an order, and whether he knowingly and willfully violated that order. When viewed in the light most favorable to the parties opposing summary judgment, we conclude that a genuine issue of material fact may exist with respect to Officer Jenkins' apparent violation of an internal department policy when he left his designated zone of patrol to participate in the pursuit of the McGhee motorcycle…

As the Tort Claims Act affirms, a public employee is not immune from liability "if it is established that his conduct … constituted a crime, actual fraud, actual malice or willful misconduct." The facts set forth by plaintiff in his submissions below, construed in the light most favorable to him per Brill, permit a reasonable jury to find that the Long Branch employees' actions constituted, at least, willful misconduct.

In addition, the City failed to dispute Plaintiff's Additional Undisputed Facts as to the individuals in the 7th and 8th counts; the City's answers "neither admitted nor denied" are

not valid to dispel the facts asserted by plaintiff. (A1541). Defendants are not entitled to summary judgment on this basis as well. Judge Bauman's prior September 28, 2012 ruling that a continuing tort, including conspiracy, may exist, further affirms willful misconduct and bad faith on the defendants' part and provided further grounds to deny summary judgment for defendants.

A reasonable jury, viewing all of the evidence in plaintiff's favor per Brill, can find in plaintiff's favor on his claims for injunctive and other relief under the Municipal Land Use Law, for civil conspiracy, violation of his civil rights, and tortious interference with economic and contractual relations. N.J.S.A. 40:55D-18 of the Municipal Land Use Law entitles any "interested party" to secure an injunction against a zoning ordinance violation. The proofs submitted by plaintiff below permitted a reasonable jury to find in plaintiff's favor. A jury could find the defendants' violation of the zoning/site plan, subdivision, occupancy, and mercantile license laws applicable to the defendants' neighboring lots during the time that plaintiff owned the neighboring property. For the purposes of the Municipal Land Use Law an "interested party" is in the case of a civil proceeding in any court "any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action

taken under this act, or whose rights to use, acquire, or enjoy property under this act, ... have been denied, violated or infringed by an action or failure to act under this act." N.J.S.A. 40:55D-4. A jury could find that the failure of Long Branch and its employees to terminate the zoning, site plan, and use violations by the private defendants since 2002 constitutes a "failure to act" under the Municipal Land Use Act. The jury could find that plaintiff's property rights were "denied, violated or infringed" and that he suffered special damages distinct from the community at large due to his proximity to the defendants' neighboring lots. Morris v. Borough of Haledon, 24 N.J. Super. 171, 179–80 (App. Div. 1952); Rose, supra, 187 N.J. Super. 220-22.

A civil conspiracy is combination of two or more persons acting in concert to commit an unlawful act by unlawful means, the principal element of which is an agreement between the parties to inflict wrong against or injury upon another and an overt act that results in damage. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005). Direct evidence of an unlawful agreement is not required as it is axiomatic that the nature of conspiracy is such that more often than not the only type of evidence available is circumstantial in nature. Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364-65 (App. Div. 1993). A civil conspiracy claim should therefore go

to the jury where there is possibility that the jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and reached an understanding to achieve the conspiracy's objective. The evidence submitted by plaintiff viewed in his favor per Brill, which was not even refuted by defendants, permit a reasonable jury to so find.

Plaintiff has a related claim for breach of fiduciary relationship. Elected officials stand in fiduciary relationship with the people they have been elected or appointed to serve. They must exercise their discretion reasonably and above all with good faith, honesty, and integrity:

> They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves and discharge their duties, their actions are inimicable to and inconsistent with the public interest, and not only are they individually deserving of censure and reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties *** The enforcement of these obligations is essential to the soundness and efficiency of our government which exists for the benefit of the people who are its sovereign. The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief. It is the potential for evil and not the actual financial loss or other injury incurred that renders transaction illegal because of an abuse of discretion…
>
> [Jersey City v. Hague, 18 N.J. 584, 590 (1955)]

The Long Branch defendants' activities detailed in plaintiff's submissions below qualify as substantial factors proximately causing plaintiff's damages. As per the conspiracy, defendants have failed to refute plaintiff's additional undisputed facts on this related claim.

42 U.S.C.A. § 1983 creates upon a public defendant the duty to refrain from interference with the plaintiff's federal rights and provides money damages and injunctive relief for violation thereof. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 723 (1999) (Scalia, J., concurring). The claim is shown where the conduct complained of was committed by defendant acting under color of law and the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution. W. v. Atkins, 487 U.S. 42, 48-49 (U.S. 1988). 42 U.S.C.A. § 1983 is designed to protect citizens from abuse of power by officials cloaked with governmental authority. Montgomery v. De Simone, 159 F.3d 120, 125 (3d Cir. 1998). Peaceful possession and enjoyment of one's property and equal protection of the laws are some of those rights.

In this case, a reasonable jury could find that the Long Branch Defendants repeatedly violated plaintiff's constitutional rights and caused him damages. City of Monterey, supra, 526 U.S. 722. These are issues for the jury that should not have been dismissed on summary judgment. Defendants' conduct cannot

be characterized as anything other than intentional and shocking, a jury could find, when considering the length of time and various departments and employees involved in the aiding and abetting, charade at enforcement, and retaliation suffered by Plaintiff for vindicating his property rights. Plaintiff's 1983 claim seeks to remedy the continuing violation of his federal rights mentioned in his 2002 tort notice.

In addition to the above facts, plaintiff detailed in his submissions below the history and pattern of the Long Branch defendants' violation of plaintiff's rights. (A641, 837, 790, 854). In one instance, Long Branch Police Officer Springer stalked plaintiff in a bobcat as he was jogging on the beach, demanding his ID. He claimed several witnesses called about an alleged public exposure. Several other officers were called and threatened arrest if the ID was not produced, and a large crowd of onlookers gathered on the boardwalk. (A825). This outrageous incident was completely unfounded and humiliating for plaintiff. It lacked any probable cause, as evidenced by the lack of incoming or outgoing police dispatches to the bobcat which approached from more than one mile away. (A862-882). Judge Perri refused to consider this evidence, (2T93:21:42), or why no other local beachgoer witnesses were questioned or sought by police at the scene. Plaintiff's I.D. was the focus of the "investigation" and the basis for threat of arrest made, though

the defendants admit that there is no law requiring that an I.D. be carried. (A883-885). A reasonable jury could consider this beach incident to have been shocking, harassing, and in retaliation for plaintiff's assertion of his legal rights. (See Amended Complaint, para. 196, A27; 6/6/14 Certification of Plaintiff, A825; Second Amended Interrogatory Answer, No. 110-2, A867, A791 detailing additional facts).

The knowing violation of plaintiff's rights was reflected also, plaintiff affirmed below, in an incident involving construction on plaintiff's property of his new offices, where a shower was approved for his new private bathroom (Plaintiff was also installing handicapped bathrooms throughout his building when none existed previously due to lack of sewer service). The approval was subsequently revoked by a new plumbing official after defendant Kevin Hayes became Director of Building and Development. Plaintiff charged that this too was in retaliation for plaintiff's assertion of his land use rights. Judge Perri said that "voidance of the construction permit for a shower in the private office bathroom was not appealed," (2T94:2-20), but this fails to consider the evidence in plaintiff's favor per Brill. As plaintiff affirmed below, the building official claimed that the revocation was due to an ADA organization threatening lawsuits for increased handicap access. But no such documentation was produced, supporting plaintiff's charge that

this was another instance of targeting and retaliation against plaintiff for assertion of his rights. Comments made by the plumbing official in question also indicated bad faith as the reason for the revocation. (See A826 & Plaintiff's Opposition Facts A791 & Exhibit 11 thereto @ A886-898). Plaintiff documents how he was discriminated against by the tax assessor as well, (Plaintiff's Am. Compl., 189-93 (A27); Second Amended Interrogatory Answers, No. 112, 114, A839, Opposition Facts 14a @ A793 and Exhibit 14 thereto at A956-970). Defendants sought to double Plaintiff's assessed value/taxes while failing to provide equal benefit of enforcement as evidenced by one of the rock throwing incidents where police took more than one hour to arrive at the scene of the incident. (See opposition facts 11 at A792, A824 and Exhibit 12 thereto at A899). This was humiliating and dangerous to Plaintiff. A police officer also refused to return and take a report on the damage to Plaintiff's curbs which he claims were broken by Rosario using a forklift. (2nd Amended Interrog. Answer 110(3), A838).

Relatedly, a plaintiff has the right to relief under the Municipal Land Use Law as one whose property rights have been denied, violated, or infringed by failure to act by government officials in charge (here, the Long Branch zoning officers and other employees in question). Rose, supra, 187 N.J. Super. 210 (citing N.J.S.A. 4055D-4). A public employee's knowing,

deliberate refusal to stop known zoning violations constitutes a failure to act under the MLUL, and violates Plaintiff's constitutional rights, a reasonable jury can find.

Judge Perri said, "no reasonable jury could find that these anecdotal claims shock the conscience." (2T118:14-119:3). This fails to view the proofs in the light most favorable to plaintiff as Brill requires. Judge Perri said, "The Long Branch Defendants correctly point out that plaintiff has failed to specifically identify the State actors, what substantive rights have specifically been violated. He has failed to show any discriminatory intent on behalf of the Long Branch defendants and has raised no allegations that he is a member of a protected class." (2T115:24-116:5). But the facts detailed in plaintiff's Amended Complaint, at 180-199, verified by plaintiff in opposition to summary judgment below (A825), affirm that "Long Branch and Officials have a previous 'history and pattern of violating Plaintiff's right to equal protection of the laws due to Plaintiff's challenging Defendants in seeking to vindicate his property rights.'" Plaintiff details continuing incidents, (see Am. Compl. para. 200), and that these are willful and intended to humiliate and retaliate against Plaintiff. (See Opposition Facts at 2-5, A789; Second Amended Interrogatory Answers, at 109-118, A837). The identity and roles of all the state actors is further detailed in Plaintiff's

Additional Undisputed Facts in Opposition (A795-817) and are not disputed (no facts changed since the Irene summary judgment motion was decided, A731, 1011). Long Branch is responsible for its police -- for the most shocking incidents regarding the beach and palpably unreasonable response to the stone throwing, as well as failing to abate the nuisance. Plaintiff is in a protected class of one for which arbitrary, invidious discrimination due to ill will, is actionable. Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (Olech's complaint of a 33 foot versus 15 foot easement in order to obtain water as retaliation for a previous lawsuit would seem hardly shocking in comparison to the continuous deprivations and retaliation suffered by Plaintiff in this case due to vindicating his rights). The Amended Complaint, verified by plaintiff in opposition to summary judgment below, and the additional facts submitted on summary judgment below, are permeated by ill will and involving possible corruption. No limitation or lack of resources argument has ever been advanced by Long Branch to support its palpably unreasonable acts or omissions regarding their claimed "enforcement." Plaintiff's 1983 claim should not have been dismissed as a matter of law in the court below.

The Long Branch defendants also have engaged in tortious interference with prospective economic advantage or contractual relations of plaintiff, a reasonable jury can find. The

determination of whether the Long Branch Defendants have engaged in constitutional violations has no bearing on their liability for tortious interference. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848-49 (1998). An action for tortious interference is designed to protect the right to pursue one's business, calling, or occupation free from undue influence or molestation. Lamorte Burns & Co. v. Walters, 167 N.J. 285, 305 (2001) citing Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 750 (1989). A reasonable jury can find that the Long Branch defendants tortuously interfered with plaintiff's prospective economic advantage and contractual relation with his tenant by enabling the use to expand and failing to thereafter terminate it. Plaintiff certified that he never had all these problems before the zoning permit was issued. (See Fact 27 opposing summary judgment (A818) and Int. #77 (A835) and A792, Fact 12). Judge Perri downplayed this as a "tangential argument," contrary to the Brill standard, (2T128:10-18), and found "no causal link for loss of tenant due to palpable lack of investigation." This disregarded the record showing that plaintiff's tenant left *because of* the arson. (A1941). The Court should reverse the grant of summary judgment for the Long Branch defendants.

Point 3

The trial court erred in granting the motion to vacate default by defendants Raymond Greico, Atlantic Paving Coating LLC, Joe Rosario, Rosario Contracting Corp., and Custom Lawn and Sprinkler Company.

The decision whether to vacate a default judgment "is left to the sound discretion of the trial court," but will be reversed when there has been an "abuse of discretion." Mancini v. EDS on Behalf of New Jersey Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993). An abuse of discretion amounts to an act that "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

The trial court abused its discretion in granting the defendants' motion to vacate default below. Defendants' motion was filed (literally) on the eve of trial -– the return date was actually beyond when the trial was scheduled to begin. The motion should have been denied as untimely.

There was insufficient good cause demonstrated to warrant granting the motion, moreover. Default was entered against the defendants nearly three years before (on November 23, 2011). The record (A1633) showed that the defendants were served with the Complaint between September 13, 2011 and September 20, 2011. Defendants did not contest service of process. Given this, the

three year delay in even seeking vacation of default should have precluded granting the defendants' motion. US Bank Nat. Ass'n v. Guillaume, 209 N.J. 449, 466-67 (2012). Whether good cause exists often hinges on whether the default was willful or culpable, whether the granting of relief would prejudice the opposing party, and whether the defaulting party has a meritorious defense. Nothing in the submissions by defendants below demonstrated these elements. The proffered reason for the default was defendants' belief that their interest was adequately covered by the pleading filed on behalf of the defendants Bruno and E&L Paving. This does not constitute good cause for a three year delay in seeking relief. Defendants were able to remain on the sideline during the entire discovery period of the litigation below, then suddenly re-appear and defend themselves at trial without having been subjected to pretrial discovery as a party. The defendants' nonparticipation in discovery was unfair to the plaintiff. Jugan v. Pollen, 253 N.J. Super. 123, 135 (App. Div. 1992).

Finally, defendants did not present a meritorious defense. Defendant Grieco's Certification claimed that he had complied to the best of his ability with the City of Long Branch's requirements with regard to the use of the property and had done nothing to interfere with the rights of plaintiff. But the defendants avoided discovery. This conclusory assertion by the

defendants did not demonstrate a meritorious defense to the factual charges of nuisance that plaintiff lodged against them. The untimeliness of defendants' motion to vacate combined with the prejudice to plaintiff and lack of a demonstrated factual answer to the nuisance charged leveled by plaintiff should have warranted denying the defendants' motion to vacate the default. Earlier Bruno/E&L sought to evade discovery by misleading the court that Plaintiff had been served its motion to vacate default, knowing that Plaintiff would oppose same as no good cause existed. (A140, A161-242). This was discovered as discovery was ending. (A461). These procedural tactics should be rejected by this Court which evidenced the importance of procedure in the prerogative writ appeal. The trial court abused its discretion in granting relief for defendants.

Point 4

The trial court erred in allowing the opposition appraiser's methodology which prejudiced Plaintiff's damages claim; defendants should not be permitted to violate caselaw and professional standards upon any remand.

"[P]roperties are to be appraised in fee simple based on fair rental value, or market rent, not the lease in place or contract rent"; "valuations of properties for local taxation cannot vary with the managerial success or failure of the owners." City of New Brunswick v. State Div. of Tax Appeals,

Dep't of Treasury, 39 N.J. 537, 544 (1963). Plaintiff testified how he mitigated. (6T76:7-9). Mr. Gagliano admitted he is not disputing Plaintiff's market value, which Plaintiff's appraiser derived from market rents applied to Plaintiff's square footage. MGM's deduction for external obsolescence and methodology was twice affirmed by the tax board, (A1861, 1862), and the assessed value has remained virtually unchanged, (A2013)Badische Corp. (BASF) v. Town of Kearny, 288 N.J. Super. 171 (App. Div. 1995). Yet defendants' appraiser used Plaintiff's in-place rents to argue the value was unchanged; "no external obsolescence" This Court should correct this upon any remand ordered here.

Conclusion

The Court should reverse the grant of summary judgment and reinstate plaintiff's claims against Long Branch and its employees, and vacate the jury's verdict for the private defendants, remanding for a new trial on all of plaintiff's claims against the defendants as set forth in his Amended Complaint, with direction that the trial court provide declaratory and injunctive relief to plaintiff should the zoning, occupancy, and use violations not have been terminated pending proper site plan approval during this appeal.

Respectfully submitted,

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Dated: October 26, 2015