

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
MONMOUTH COUNTY  
DOCKET NO. MON-L-4039-11  
APP. DIV. NO. \_\_\_\_\_

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BRIAN D. ASARNOW, :  
 :  
 Plaintiff, : TRANSCRIPT  
 :  
 vs. : OF  
 :  
 CITY OF LONG BRANCH, et : MOTION HEARING  
 al., :  
 :  
 Defendants. :

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Place: Monmouth County Courthouse  
71 Monument Park  
Freehold, NJ 07728

Date: September 28, 2012

BEFORE:

HONORABLE DAVID F. BAUMAN, P.J.S.C.

TRANSCRIPT ORDERED BY:

BRIAN ASARNOW, PRO SE  
87 B WHITE STREET  
EATONTOWN, NJ 07724

APPEARANCES:

BRIAN D. ASARNOW  
Pro Se Plaintiff

BARRY M. CAPP, ESQUIRE (Ansell, Grimm and Aaron)  
Attorney for the Defendants, City of Long Branch  
and Michael Irene

Transcriber: DEBRA L. STOREY, AD/T 494

Agency: KLJ Transcription Service, LLC  
P.O. Box 8627  
Saddle Brook, NJ 07663  
(201) 703-1670  
(201) 703-5623 (fax)

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Operator - R. Koester

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1 (Proceedings commenced at 9:12 a.m.)  
2 THE COURT: The first matter on the Court's  
3 calendar this morning is the case of Brian Asarnow --  
4 did pronounce that correctly, sir?  
5 MR. ASARNOW: Yes, sir. That's correct.  
6 THE COURT: Versus the City of Long Branch,  
7 and various other defendants. The docket number is  
8 MON-L-4039-11, and Mr. Asarnow, I note that you are  
9 representing yourself. So, consistent with our  
10 practice I'm going to ask that you please stand, place  
11 your left hand on the bible, and raise your right hand.  
12 B R I A N A S A R N O W, PLAINTIFF, SWORN/AFFIRMED  
13 THE CLERK: Please state your full name again  
14 for the record, sir?  
15 MR. ASARNOW: Brian Asarnow - Brian D.  
16 Asarnow.  
17 THE CLERK: Okay. Thank you, sir.  
18 THE COURT: Thank you, sir.  
19 Counsel?  
20 MR. CAPP: Thank you, Your Honor. Barry Capp  
21 from Ansell, Grimm and Aaron for the defendants -- Long  
22 Branch defendants, and defendant, Michael Irene for  
23 today's motion. Thank you.  
24 THE COURT: All right. And the -- the motion  
25 before the Court today is for partial summary judgment

1 only as to those claims asserted against Mr. Irene, is  
2 that correct?  
3 MR. CAPP: That's correct, Your Honor.  
4 THE COURT: All right. And Mr. Asarnow has  
5 opposed that motion.  
6 The Court, having reviewed the papers,  
7 surmises by way of background that this is a property  
8 dispute between contiguous owners of property in Long  
9 Branch, is that correct?  
10 MR. ASARNOW: Well --  
11 THE COURT: I mean, it --  
12 MR. ASARNOW: -- it also involves the public  
13 parties -- defendants. They're involved in a  
14 conspiracy, I'm alleging, --  
15 THE COURT: No, no. I under --  
16 MR. ASARNOW: -- so -- but it arises from a  
17 property dispute.  
18 THE COURT: Okay. Mr. -- Mr. Capp, having --  
19 having reviewed the papers, do you have anything you  
20 wish to highlight, or to -- to explain to the Court  
21 regarding your position?  
22 MR. CAPP: Your Honor, the -- the only thing  
23 I would like to emphasize is, in this complaint -- and  
24 it's -- it's a relatively in-depth complaint. It's  
25 very fact specific, and it took me a little while to

1 review the complaint a number of times to determine  
2 exactly what claims are being asserted against Mr.  
3 Irene in particular.

4 I do understand the claims against some of  
5 the other public officials a little better than I do  
6 against Mr. Irene, but I think what has come out of  
7 both discovery and Mr. Irene's deposition is that we  
8 are dealing with Mr. Irene's quote/unquote, involvement  
9 in three zoning board applications, and I put that in  
10 quotes because the -- what I understand to be Mr.  
11 Asarnow's claim is that Mr. Irene improperly, or  
12 unlawfully involved himself in three applications for  
13 which he should have recused himself.

14 And just to emphasize, the three  
15 applications, one was in 2000, which was dismissed for  
16 lack of prosecution, and according to the zoning map  
17 Mr. Irene had no conflict. He was not within 200 feet.  
18 He didn't recuse himself. Nevertheless, there was no  
19 relief afforded by way of that application.

20 The second one was in 2002. It was withdrawn  
21 by the applicant, who was told to go to the planning  
22 board for a subdivision. Apparently never came back.  
23 So, that one was dismissed.

24 The third one involved Seashore Day Camp,  
25 which Mr. Irene acknowledged was within 200 feet of his

1 place of employment. He recused himself. Mr. Colby --

2 THE COURT: Max -- Max Colby?

3 MR. CAPP: Max -- Max Colby was in his stead.  
4 That was in 2003.

5 So, substantively, since those are the --  
6 it's the only nexus that Mr. Irene has to any of Mr.  
7 Asarnow's claims. There can be no cause of action.

8 THE COURT: Well, let -- let -- let me ask  
9 you something.

10 MR. CAPP: Yeah.

11 THE COURT: And obviously I have to -- I have  
12 to give all reasonable inferences --

13 MR. CAPP: Okay.

14 THE COURT: -- to the opponent of a motion  
15 for summary judgment, and with respect to your statute  
16 of limitations argument, the tortuous activity, again,  
17 giving Mr. Asarnow all reasonable inferences began, in  
18 -- in 2000, and from what I understand he's alleging in  
19 his papers -- he's alleging that the civil conspiracy  
20 commenced in -- in or around 2000, and -- and it is  
21 even continuing to this day.

22 So, since it's -- since he's alleging a  
23 continuous tort, I don't know how I can possibly  
24 dismiss, or -- or grant summary judgment on statute of  
25 limitations grounds.

1 MR. CAPP: If -- one, if we look at the  
2 notice of the tort claim, one was filed in 2002, not  
3 one mention of Mr. Irene as the party against whom  
4 anything is being claimed. Not one mention of any  
5 issue regarding any of these applications, or a  
6 possible conflict.

7 The two notices of claim filed in 2010, also  
8 no mention. So, we have a tort claims issue, we have a  
9 statute of limitations issues --

10 THE COURT: All right. Well, let's --

11 MR. CAPP: -- and the -- the reason I'm --  
12 I'm alleging a statute of limitations argument is  
13 because, one, for the obvious reason that a proper  
14 challenge to a public -- a public official who -- who  
15 arguably should have recused him or herself would  
16 certainly be out of time.

17 Now, with regard to the continuing tort we  
18 are -- we just took Mr. Irene's deposition -- Mr.  
19 Asarnow just took Mr. Irene's deposition. There is not  
20 one incident, allegation, claim or proof that anything  
21 happened outside of these ears, and those ears being  
22 when the applications were filed.

23 So, it's almost as if a -- a continuous  
24 nuisance, continuous violation argument is being  
25 bootstrapped simply on to other -- other municipal

1 defendants here who have had -- again, I use  
2 involvement in -- as a -- not necessarily acknowledging  
3 there was involvement, but there has been interaction  
4 between Mr. Asarnow and public officials with regard to  
5 enforcement issues, we would acknowledge from, I mean,  
6 probably back in the 1990's, until 2010 or so. With  
7 Mr. Irene, the only events that are even alleged took  
8 place in 2000, 2002 and 2003, which would not  
9 constitute a continuous violation.

10 To have a continuous violation there has to  
11 be some pattern that continues. Here we have three  
12 separate incidents. They should have been separately  
13 pled, they should have been noticed by way of tort  
14 claim notice separately. They were separate incidents.

15 To try to make that into a continuous  
16 violation I think the law wouldn't allow it. The law  
17 says with a continuous violation it has to be a  
18 pattern. It has to exist over the course of a number  
19 of years. It can't be separate incidents. We have a  
20 separate instances here.

21 And we have taken discovery regarding Mr.  
22 Irene, and nothing else has been elicited through  
23 testimony, through depositions, through documents  
24 through discovery.

25 THE COURT: Okay. So --

1 MR. CAPP: And that's why we brought this  
2 motion -- I'm sorry, Your Honor -- when we did. Mr.  
3 Irene is -- represents half a dozen boards, and -- and  
4 is conflicted out of those because of our -- and -- and  
5 as an aside, we do have a DJ action against the  
6 insurance company going on for coverage in defense, but  
7 in the meantime, we -- we felt that having taken  
8 discovery as to Mr. Irene, having completed discovery  
9 as to Mr. Irene this -- this issue was ripe was summary  
10 judgment.  
11 THE COURT: What else -- what other discovery  
12 needs to be done with respect to the claims involving  
13 Mr. Irene?  
14 MR. CAPP: Well, we -- we --  
15 THE COURT: Maybe -- maybe -- I should be  
16 asking Mr. Asarnow that question.  
17 MR. CAPP: -- we -- we specifically adjourned  
18 the motion because Mr. Asarnow --  
19 THE COURT: Right. July --  
20 MR. CAPP: -- Mr. Asarnow had alleged I  
21 didn't get the opportunity to take his deposition.  
22 THE COURT: Right  
23 MR. CAPP: So, I said, why don't we adjourn  
24 this.  
25 THE COURT: Right.

1 MR. CAPP: Give you plenty of time to do  
2 that. We adjourned it a month, I believe.  
3 THE COURT: Okay. And when is this -- the  
4 discovery end date is, what, in about three months?  
5 MR. CAPP: The end of January.  
6 THE COURT: Yeah, about three months.  
7 MR. ASARNOW: January -- mid-January.  
8 THE COURT: Right.  
9 MR. CAPP: Yeah. Yeah. So --  
10 MR. ASARNOW: So, we're talking --  
11 THE COURT: What else do you need to do, Mr.  
12 Asarnow? What other discovery --  
13 MR. ASARNOW: In terms of the discovery, Your  
14 Honor?  
15 THE COURT: Pardon me?  
16 MR. ASARNOW: In terms of the discovery --  
17 THE COURT: Yeah.  
18 MR. ASARNOW: -- as to Mr. Irene? Well, the  
19 only other thing that I would --  
20 THE COURT: Could I ask -- could I ask you to  
21 stand when you address the Court.  
22 MR. ASARNOW: Oh, I'm sorry, Your Honor.  
23 THE COURT: Thank you.  
24 MR. ASARNOW: The only other thing that I  
25 would do is seek the original record of the court

1 stenographer, the certified shorthand reporter during  
2 the zoning board hearings to see whether the recusals  
3 actually occurred as I -- as myself and another witness  
4 contend hasn't occurred.

5 THE COURT: Did not, yeah.

6 MR. ASARNOW: They contend, or they cover up  
7 the fact that there were recusals, so they could come  
8 back another day. Now, I don't think that's going to  
9 really affect this -- they're denying that they were  
10 ever involved anyway. I mean --

11 THE COURT: Who is they?

12 MR. ASARNOW: This -- well, the defendants  
13 are denying that -- Mr. Irene is denying that he was  
14 ever at the particular -- ever recused himself in the  
15 first E&L matter, okay? If -- if -- even if the zoning  
16 -- even if the shorthand reporter's notes show  
17 otherwise, is that going to affect this -- affect this  
18 breach of duties, and the conspiracy, and the other  
19 aspects? There's plenty of other stuff here.

20 THE COURT: Like what?

21 MR. ASARNOW: Of breaches of duty and aspect  
22 now --

23 THE COURT: On -- on -- on the part of Mr.  
24 Irene?

25 MR. ASARNOW: Yes.

1 THE COURT: Okay.

2 MR. ASARNOW: And it is a continuing  
3 conspiracy.

4 THE COURT: Well, tell -- tell me -- tell me  
5 about those -- tell me about those other breaches.

6 MR. ASARNOW: Well, first of all -- first of  
7 all, regarding the notice, I believe the notice is  
8 sufficient. There's plenty of cases that the tort  
9 notice of 2000 -- I gave a little procedural history,  
10 too.

11 THE COURT: Yeah. No, your argument is,  
12 look, it -- it's -- it's --

13 MR. ASARNOW: I don't have to add -- I didn't  
14 know about Mr. --

15 THE COURT: It substantially complies with  
16 the notice requirement. That's what you're arguing.

17 MR. ASARNOW: That's what I was going to  
18 point -- try to point out, Your Honor.

19 THE COURT: Okay. Right. I understand.

20 MR. ASARNOW: I mean, I don't have to keep  
21 amending it as new people pile onto the conspiracy and  
22 the breaches.

23 Okay. Now, what -- your question was  
24 regarding?

25 THE COURT: What -- what specific acts are

1 you alleging Mr. Irene -- you -- did -- you said there  
2 were plenty of other acts --

3 MR. ASARNOW: Yes.

4 THE COURT: -- besides the three discreet  
5 acts --

6 MR. ASARNOW: Well, I'm -- I'm referring to  
7 the three applications in context of an overall  
8 conspiracy --

9 THE COURT: Okay.

10 MR. ASARNOW: -- which continues, and it  
11 breaches a duty -- continues also in this regard that  
12 Seashore Day Camp application, the third application,  
13 they included lots from another entity, which had  
14 nothing to do with that application. That's still in  
15 there, okay? That's ongoing.

16 Since the deposition, three weeks ago, Mr.  
17 Irene hasn't sent me a letter saying that he's planning  
18 on having that addressed. That's ultra vires what's  
19 occurred there. Putting somebody else's properties  
20 that you don't own, on your application is ultra vires.  
21 There's nothing in the statutes permitting that. That  
22 has continued on. Okay?

23 Now, even if I was to get a letter tomorrow  
24 from Mr. Irene, on behalf of the zoning board, saying  
25 they're planning on voiding that, I would be six years

1 before that -- the statute of limitations for property  
2 damage would apply. So, he would still be in it, okay?

3 And regarding the conspiracy, he's one part  
4 of the conspiracy. The fact that zoning minutes are  
5 missing, or selectively missing, the fact that there's  
6 nothing in the zoning minutes to record approvals of  
7 prior zoning minutes, to cover things up --

8 THE COURT: What -- what -- what specific  
9 minutes do you contend are missing?

10 MR. ASARNOW: Well, any minutes that, for  
11 example, in the Seashore Day Camp, the -- the -- the  
12 day that he first heard -- he -- he was there, okay, on  
13 the -- before Max Colby, he was there the day before.  
14 Somebody had to be there to represent the board, and  
15 take jurisdiction, and give -- and -- and -- and review  
16 the public notice, which is improper and deceptive.  
17 Okay? I didn't know that -- it doesn't say that E&L's  
18 lots are on the -- going to be considered in Mr. -- in  
19 the Seashore Day Camp applications. This was totally  
20 kept from the public, and that's why I haven't  
21 discovered this until I got this illegal permit in  
22 9/09, okay, and then I did some search of the files and  
23 found the day camp application, including these --  
24 these other lots. That's when I  
25 filed first discovery, the conspiracy. It's like



1 George Bush at the school when the second plane hit the  
2 World Trade -- Trade Center, when that illegal permit  
3 was issued I realized that this conspiracy was hatched  
4 way back, and to give him time -- E&L Paving time to  
5 try to grandfather this illegally, give him time is  
6 what they've done.

7 THE COURT: I'm not -- I'm not understanding  
8 the analogy --

9 MR. ASARNOW: Well --

10 THE COURT: -- to -- to -- to former  
11 President Bush.

12 MR. ASARNOW: -- well, I realized, an -- an  
13 illegal zoning permit was issued to allow other  
14 occupants to take over this property and continue the  
15 illegal use. The use was never permitted. Okay? No  
16 use variances, plenty of violations, previous in the  
17 file, showing that he definitely needed use variances,  
18 and that the use is -- is not permitted.

19 So, the zoning officer, nevertheless -- and  
20 she's a certified -- she -- she claims she's got  
21 certifications in zoning -- higher certifications.  
22 She, nevertheless, issues a zoning permit on her own,  
23 essentially grandfathering the use, which was never  
24 approved.

25 So, to me, I realized at that time, when I

1 got a copy of that permit -- right after that permit  
2 things started escalating. All kinds of hell broke  
3 loose, okay?

4 So, then I realized -- I got the George Bush  
5 -- you know, the second plane hitting, he realized  
6 what's going on.

7 THE COURT: Okay. I -- I understand now.

8 MR. ASARNOW: So, that's the analogy there.

9 THE COURT: All right. Fine.

10 MR. ASARNOW: And this is like Whack-A-Mole,  
11 you know, the zone -- they recused themselves in the  
12 first matter. They keep popping up. They don't want  
13 to go away. You know, they come back in the second  
14 hearing. They're taking jurisdiction. They're denying  
15 that they were there, that there was ever a hearing,  
16 even though the day camp application shows that there  
17 was a hearing prior to Mr. Colby being there, and the  
18 recusal -- the letter from Mr. Irene shows, well, it's  
19 deceptive, it -- it does show that I had recused  
20 myself.

21 They're trying to make it as if their -- he's  
22 going to recuse himself in the future, which is not  
23 according to the record. I mean, as I say the -- so,  
24 this is an ongoing conspiracy in the breach. As you  
25 have said, it is an ongoing conspiracy, and even if

1 they were to send me a letter today saying they were  
2 going to --

3 Well --

4 THE COURT: Well, I -- I haven't made a  
5 finding of that. I'm -- I'm simply -- I'm simply --

6 MR. ASARNOW: Right. Well, you -- you  
7 acknowledge that there is a continuous tort theory.

8 THE COURT: No, I'm going to go -- I'm -- I'm  
9 acknowledging that that's your position that there's an  
10 ongoing conspiracy.

11 MR. ASARNOW: Well --

12 THE COURT: I certainly made no findings in  
13 that regard.

14 MR. ASARNOW: But I referred to the two cases  
15 -- Supreme Court cases. They -- they -- they contain  
16 continuing nuisance. Instead of flooding here, we're  
17 talking about palpable -- either palpable failure to  
18 enforce the zoning ordinances, which -- which I  
19 interpret as helping someone evade the zoning  
20 ordinances, okay? And the jury could easily ascertain  
21 that also, okay? And also ultra vires acts have been  
22 committed. The adding of somebody else's lots in a  
23 site plan that doesn't -- you know, is also ultra  
24 vires, as well -- so, this is, I think, supported by  
25 the facts, and the jury could conclude -- now, whether

1 Mrs. -- Mr. Irene's damages are nominal, you know,  
2 whether he had a smaller role, or something, that's  
3 something for a jury to determine, Your Honor. But  
4 he's certainly not innocent of any wrongdoing.

5 THE COURT: All right. Thank you, sir.

6 Mr. Capp?

7 MR. CAPP: Your Honor, if -- if I can just  
8 add, I think what's being confused here by plaintiff is  
9 the role of the zoning board attorney. The zoning  
10 board attorney doesn't prepare minutes. The zoning  
11 board attorney is not the custodian of records. The  
12 zoning board attorney does not enforce the zoning  
13 ordinances, and -- and it was pretty -- it was  
14 relatively evident from the deposition that there is  
15 some question as to whether Mr. Asarnow understands the  
16 role of the zoning board attorney. What is being  
17 alleged -- at least, the continuing violation that is  
18 being alleged, as I understand is a continuing  
19 nuisance, while I can see the allegation of a  
20 continuing nuisance against certain of the defendants,  
21 again, against Mr. Irene I -- we have -- and Mr.  
22 Asarnow says, all of his discovery as to Mr. Irene is  
23 relatively completed. He doesn't -- he wants some  
24 recordings, but doesn't need them, as he said.

25 So, he acknowledges that discovery is,

1 essentially, over as to Mr. Irene.

2 Evidence of a conspiracy, which, again, I  
3 don't know if it's a continuing conspiracy he's  
4 alleging. It's very difficult to understand him, but  
5 the only con --

6 THE COURT: Well, that's what he's alleging.  
7 That's what he's alleging.

8 MR. CAPP: -- the only continuing violation I  
9 see being alleged is a continuing nuisance.

10 If there's a continuing conspiracy being  
11 alleged we are at a point where discovery is over. The  
12 -- the issues that Mr. Irene has raised is missing  
13 minutes, failure to properly notice certain properties  
14 in a notice. None of that is even done by a zoning  
15 board attorney.

16 So, while there may be allegations --

17 THE COURT: Well, isn't -- isn't -- isn't  
18 that, in itself, something that -- I mean, obviously  
19 there -- there's a question right there as to what the  
20 role is. I mean, I --

21 MR. CAPP: Well, I think it's a legal -- it's  
22 a legal issue. And Mr. Irene has certified that, "I  
23 don't enforce zoning ordinances, I don't prepare  
24 minutes, I don't keep minutes." That was in his  
25 certification. And -- and, you know, I think the Court

1 can take judicial notice that a zoning board attorney  
2 does not vote, does not -- is not a custodian of -- of  
3 zoning board or rezoning records.

4 THE COURT: Well, I can't -- I can't take --

5 MR. CAPP: Well --

6 THE COURT: -- judicial notice of that --

7 MR. CAPP: -- I understand.

8 THE COURT: -- for a variety of reasons.

9 MR. CAPP: And I understand, but it was in a  
10 certification that has not been opposed.

11 THE COURT: Right.

12 MR. CAPP: There's been no law that says the  
13 zoning board attorney is reasonable for X, Y and Z, and  
14 -- and Mr. Asarnow is attempting to place a duty on Mr.  
15 Irene where there is no such duty, as a matter of law.

16 THE COURT: Okay. No, that -- that --

17 MR. ASARNOW: May I respond?

18 THE COURT: I -- let me --

19 MR. ASARNOW: Oh, I'm sorry, Your Honor.

20 THE COURT: -- Mr. Capp, go ahead, sir. I'm  
21 sorry.

22 MR. CAPP: Okay. Thank you.

23 So, in terms of the -- the statute of  
24 limitations argument, I still believe there -- the  
25 statute of limitations would bar these claims. It's

1 not a continuing violation, because there are no  
2 incidents. There is no specific events that have  
3 occurred that Mr. Irene -- that Mr. Asaranow can point  
4 to that would -- that would amount to a continuous  
5 violation. If there -- even if there were specific  
6 events over the course of a period of time, different  
7 things going on, those are separate incidents. I think  
8 the argument Mr. Asarnow has raised regarding  
9 continuing nuisance, and continuing violation, cannot  
10 apply to Mr. Irene.

11 Again, while it may pertain to allegations  
12 against certain other defendants, we haven't had  
13 depositions of other defendants, except for one. I'm  
14 not here for that. I'm here specifically for the  
15 zoning board attorney who -- who handled, or was -- was  
16 somehow involved in three applications, two of which --  
17 first of all, three -- all three of which -- two of  
18 which there was no disposition. There -- there was no  
19 relief granted by those applications.

20 So, the -- the proper remedy would have been  
21 if you believe someone improperly involved themselves  
22 in an application as a public official is to seek to  
23 invalidate the relief that is granted by way of the  
24 application. There was none.

25 The only -- the third one there was conflict

1 counsel, and that's not -- I don't know how that can be  
2 disputed. It's been certified to. There's letters in  
3 the file that say Mr. Colby will be representing the  
4 zoning board on this application, because I have a  
5 conflict.

6 We're -- we're -- if ever there was reaching  
7 for things, but its reaching, and -- and not getting  
8 anything, and that's what we're dealing with here.  
9 It's reaching, and reaching for -- to find a  
10 conspiracy, and we're at a point now where plaintiff  
11 has to prove his case as -- or, at least, assert that  
12 there is some issue of fact based on real tangible  
13 things, and I haven't seen it yet, Your Honor.

14 MR. ASARNOW: May I --

15 THE COURT: Very, very briefly, sir. Go  
16 ahead.

17 MR. ASARNOW: No problem. Regarding the  
18 duties of the zoning board attorney, I believe it's  
19 self-evident -- it should be --

20 THE COURT: All right. You know what, we --

21 MR. ASARNOW: Well --

22 THE COURT: -- there was nothing in the  
23 papers that discussed this issue.

24 MR. ASARNOW: Okay.

25 THE COURT: And I -- I know Mr. Capp brought

1 it up. You can respond a little bit. I'm not --

2 MR. ASARNOW: Okay. I believe it's self-  
3 evident, Your Honor. There's a reason that the -- he's  
4 there is to enforce the zoning laws, whether they be  
5 the minutes -- being seen that they are done correctly,  
6 or seeing that the recusal is done accord -- that the  
7 recused attorney also follows the law. Not regarding  
8 discretion for which he's been recused because of  
9 conflicts, but the fact that he doesn't commit ultra  
10 vires acts by including other people's lots in a site  
11 plan. So, that's -- he should have discussed it with  
12 the conflicts attorney, this engineer's report.  
13 Instead he claims he's never seen it until the day of  
14 depositions, Your Honor. And this is part of the  
15 coverup. Okay?

16 THE COURT: Okay.

17 MR. ASARNOW: And regarding prerogative writs  
18 having to keep coming back, this is their standard  
19 argument for anything. All you have to file in  
20 prerogative writ. No prerogative writs were needed in  
21 the Russo Farms or in the Lyons case for continuing  
22 nuisance.

23 The Russo Farms case also had other things in  
24 there on a continuing tort theory. It's a theory of  
25 continuing tort. It covers not only the nuisance but

1 the breach of duty and conspiracy, and that's borne by  
2 the Russo case, okay, Your Honor?

3 THE COURT: Thank you very much --

4 MR. ASARNOW: Thank you.

5 THE COURT: -- I was going to call counsel.  
6 Mr. Asarnow.

7 The -- the Court is fully aware of the  
8 standards governing motions for summary judgment. They  
9 are well-established. They are set forth in -- in  
10 Brill, and its progeny. The motion judge has to  
11 consider whether the competent evidential materials  
12 presented when viewed in the light most favorable to  
13 the non-moving party -- that's the key here -- are  
14 sufficient to permit a rational fact-finder to resolve  
15 the alleged disputed issue in favor of the non-moving  
16 party.

17 Mr. Capp acknowledged that this is an  
18 extremely fact sensitive complaint involving multiple  
19 parties stretching back to 2000.

20 The -- the allegations involving Mr. Irene,  
21 according to plaintiffs, are not limited by the three  
22 zoning board applications. He's alleging, rather, a  
23 civil conspiracy among Mr. Irene, the zoning board  
24 members, and -- and others. The elements of a civil  
25 conspiracy are well-known, combination of two or more

1 persons acting in concert to commit an unlawful act, or  
2 to commit a lawful act by unlawful means. The  
3 principle of them was -- is an agreement between the  
4 parties to inflict a wrong against, or injury upon  
5 another in an overt act that results in damages. And  
6 that's from the Lobiondo case among -- among other  
7 cases.

8 I don't find, under the circumstances  
9 presented here the -- the -- the -- the factual history  
10 is outlined in this very detailed fact oriented  
11 complaint that the statute of limitations would be at  
12 bar insofar as plaintiff is alleging, and I think that  
13 the facts, although -- although, perhaps, somewhat  
14 abstruse do suggest an inference -- do create an  
15 inference of some continuous tortuous activity on the  
16 part of the zoning board, the members, and -- and --  
17 and perhaps Mr. Irene, since 2002, and the Court is not  
18 going to resolve those factual issues on a motion for  
19 summary judgment. It can't do that. The argument has  
20 been raised that the -- the notice of tort claim was  
21 not specific enough. It didn't name Mr. Irene  
22 specifically, but I do find that under the doctrine of  
23 substantial compliance that the -- the notice is  
24 sufficient.

25 What does substantial compliance mean? It

1 means, notice that has been given in such a way as to  
2 substantially satisfy the purposes for which the notice  
3 of claims are sought, even -- even if, arguendo, the  
4 notice may be technically defective.

5 I don't find that the notice of claim was  
6 defective in that regard, sufficient to bar the claims.  
7 And I -- I hear argument -- I -- I understand counsel's  
8 position, and I understand Mr. Asarnow's position, but  
9 I do find that there are genuine issues of material  
10 fact. What -- what was Mr. Irene's involvement in the  
11 zoning board decisions? Did Mr. Irene recuse himself  
12 or not.

13 I -- I understand Mr. Capp's arguments, but I  
14 also -- again, having the -- the factual -- detailed  
15 factual record in front of me, it -- it -- it can't be  
16 said, at least by this Court, that the facts, and the  
17 inferences therefrom are sufficient to permit a  
18 rational fact-finder, on this record, to resolve the  
19 elicited disputes.

20 So, for those reasons, the Court is  
21 constrained to deny the motion for partial summary  
22 judgment as to Mr. Irene.

23 MR. CAPP: Thank you, Judge.

24 MR. ASARNOW: Thank you, Your Honor.

25 THE CLERK: Wait for a copy of the order?

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Judge, do you want them to --  
THE COURT: Yeah.  
MR. ASARNOW: Thank you very much.  
(Proceedings concluded at 9:39 a.m.)

\* \* \* \* \*

CERTIFICATION

I, DEBRA L. STOREY, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 9:12:58 to 9:39:51, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings, as recorded.

<b>/s/ Debra L. Storey</b>	AD/T 494
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