BRIAN D. ASARNOW, *Pro Se*, Plaintiff, v. CITY OF LONG BRANCH, EDWARD BRUNO, E&L PAVING, INC.; 63 COMMUNITY PLACE, LLC; RAY GREICO; ATLANTIC PAVING (& Coating), LLC; JOSE A. ROSARIO, JR.; ROSARIO CONTRACTING CORP.; CUSTOM LAWN SPRINKLER CO., LLC; R. BROTHERS CONCRETE, LLC Defendant(s).	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY: LAW DIVISION DOCKET NO.: MON-L-1422-22 CIVIL ACTION **ORDER**

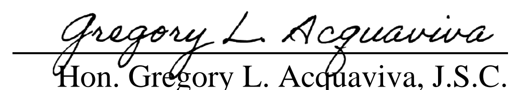
THIS MATTER having been brought before the Court on Motion by Plaintiff, Brian D. Asarnow, *pro se*, for an Order granting Partial Summary Judgment, and on Cross-Motion by Rainone Coughlin Minchello, LLC, counsel for Defendant, City of Long Branch, for an Order granting Defendant's Cross-Motion for Summary Judgment; and the Court having considered all papers submitted, having heard oral arguments of the parties, and good cause appearing:

IT IS on this 9th day of March, 2023,

ORDERED that Plaintiff Brian Asarnow's Motion for Partial Summary Judgment is hereby **DENIED**; and it is further

ORDERED that Defendant City of Long Branch's Cross-Motion for Summary Judgment is hereby **GRANTED**; and it is further

ORDERED that a copy of this order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order upon all parties not electronically served within seven (7) days of the date of this Order.



Hon. Gregory L. Acquaviva, J.S.C.

Statement of Reasons

This litigation arises out of a land use dispute between Brian D. Asarnow (Asarnow), adjacent property owners, and Long Branch. This is the third iteration of litigation between the parties over substantially similar disputes.[1]

Asarnow purchased commercial property located at 55 Community Place, Long Branch in 1995. Asarnow uses that property for light manufacturing and rental space. Asarnow's property abuts 63 Community Place (Property).

Defendants Edward Bruno, Raymond Greico, Jose Rosario, Jr., E&L Paving, Inc., Atlantic Paving & Coating LLC,[2] Rosario Contracting Corp., Custom Lawn Sprinkler Co., LLC, R. Brothers Concrete, and 63 Community Place LLC (collectively, the Private Defendants) have various connections to the Property. Bruno purchased the property in the 1960s to operate an asphalt paving business, E&L Paving, Inc. Thereafter, Bruno leased the property to other contractors. In 2009, Bruno rented the property to Greico, Rosario, and their respective companies. In 2018, 63 Community Place, LLC purchased the Property, with Bruno and E&L Paving holding the mortgage. Greico and Rosario are 63 Community Place LLC's principals. According to Asarnow, the remaining Private Defendants operate businesses on the Property.

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[1] As discussed infra, Asarnow instituted substantially similar lawsuits in 2010 and 2011 against Long Branch and the Private Defendants, among others.

Long Branch points to an additional complaint, filed by Asarnow in 1999 against Long Branch wherein Asarnow complains about zoning violations on the Private Defendants' property and asserts liability based on, among other things, Long Branch's "refusal to act."

There, Asarnow alleged such conduct amounted to "harassment and retaliation" and a violation of Asarnow's Fifth and Fourteenth Amendment rights under § 1983.

The court was not provided with any documentation regarding the disposition of the 1999 complaint and, accordingly, same is not discussed in the context of preclusionary doctrines, see infra. However, the court acknowledges same for the accuracy of the protracted procedural history.

[2] Pled as "Atlantic Paving (& Coating), LLC".

The Property is situated within Long Branch's C-2 (Commercial), I (Industrial), and R-4 (Residential) Zones. The zoning is, in a word, unique.

The genesis of Asarnow's Complaint is the issuance of a zoning permit in 2009 (Permit) to E&L Paving and Atlantic Paving. The Permit application identified the existing use of the Property as "mixed use" for "paving company [and] other contractors." The application further identified "existing businesses" as "E&L Paving and misc. contractors" and "proposed businesses" as "Atlantic Paving and misc. contractors." The Permit provided: "This certifies that an application for issuance of a zoning permit has been examined," and, as to the use of the Property, "Continued Pre-Existing, Partially Non-Conforming Use for Paving Company, for Two Buildings, Yard, and Parking Area." The zoning officer marked a check box on the Permit adjacent to "Use is permitted by Ordinance" and wrote: "commercial/industrial." The zoning officer also wrote: "previously 'E&L Paving'; New Owner 'Atlantic Paving.'"

Asarnow commenced a letter writing campaign to have the Permit revoked, to no avail.

In 2010, the City Director of Building and Development and Fire Marshal sent a "Notice of Violation" to Atlantic Paving, asserting its use of the Property exceeded the Permit's allowance.

In 2010, Asarnow filed a complaint in lieu of prerogative writ and order to show cause, Docket Mon-L-2153-10, against Private Defendants and Long Branch. Asarnow sought to invalidate the Permit as ultra vires and to compel Long Branch's enforcement of the Notice of Violation.

Judge Patricia Del Bueno Cleary granted Long Branch's motion for summary judgment, concluding Asarnow failed to exhaust administrative remedies. Judge Cleary further held Asarnow failed to comply with Rule 4:69-6 concerning prerogative writs and that the complaint

was inappropriate because "there was no clear and undisputed ministerial duty or exercise of discretion that's involved." The Appellate Division affirmed, finding the Permit reflected the zoning officer's conclusion that the use of the Property was permitted by Ordinance in the commercial and industrial zones. Asarnow v. Long Branch, N.J. Super. No. A-0999-10T4 (App. Div., May 6, 2013).

In 2011 – while the appeal of Judge Cleary's order was pending – Asarnow filed a ten-count complaint against Long Branch and the Private Defendants, including claims for nuisance, intentional infliction of emotional distress, interference with prospective economic advantage, breach of fiduciary duty, civil conspiracy, Section 1983 violations, and breach of contract, Mon-L-4039-11. Judge Jamie S. Perri granted Long Branch's motion for summary judgment, relying on myriad theories and doctrines, including the entire controversy doctrine, the Tort Claims Act (TCA), applicable statute of limitations, and Asarnow's failure to present a prima facie case for each respective claim.

As to Asarnow's remaining claims, trial began in May 2015 against the Private Defendants based on Asarnow's claims for nuisance and intentional infliction of emotional distress. The jury rendered a verdict in favor of Private Defendants. Asarnow appealed Judge Perri's summary judgment order, among others. The Appellate Division affirmed. Asarnow v. Long Branch, N.J. Super. Docket No. A-4973-14T4 (App. Div., Sept. 18, 2017).

In 2017, Private Defendants filed an application for a zoning permit seeking to expand the Property's use. The proposed site plan sought to subdivide the Property into three new lots -- two containing single family homes and one reserved for various commercial and industrial uses. The Zoning Board denied the application in 2018. The Private Defendants filed an action in lieu

of prerogative writ challenging the Zoning Board's adverse action. Judge Perri denied the prerogative writ application, Mon-L-3030-17.

In 2018, Private Defendants filed another application, this time to the Planning Board. Two points must be made about the 2018 application. First, the application was presented to the Planning Board because several Zoning Board members were recused from the matter due to litigation with Asarnow. Second, Asarnow and the Private Defendants dispute whether the 2018 application differs from the 2017 application. The Private Defendants maintain the 2018 application contained a number of differences from the 2017 application, while Asarnow describes it as "identical" to the 2017 application.

Private Defendants requested the application be adjourned indefinitely pending additional environmental work. According to July 2019 Planning Board meeting minutes, that request was granted. The transcript of that meeting was not provided. According to the Director of Zoning and Planning, Erik Brachman, the application was never refiled nor renewed by Private Defendants. Brachman explains that the Board considers the matter effectively withdrawn based on its protracted inactivity.

In 2021, Asarnow filed a complaint and order to show cause in the Chancery Division against only the Private Defendants. In May 2022, Judge Joseph P. Quinn, P.J.Ch. transferred the matter to the Law Division, based on the relief sought. Asarnow subsequently filed an amended Complaint in Lieu of Prerogative Writ (Mandamus) and Civil Rights against Long Branch and the Private Defendants.

Count One seeks declaratory judgment that: (1) the use permitted by the 2009 Permit is restricted to the inside of the garage headquarters, and not the use of a paving company; (2) that the Private Defendants are not doing paving work on the Property and appear to not be operating

at the site; (3) the current use of the Property as an "outdoor multi contractors yard" by Private Defendants is in violation of the Zoning Board's 2017 denial of Private Defendant's application; (4) parking across the street unlawful or, alternatively, that the ordinance allowing the parking is unlawful; (5) no one other than Asarnow has a right to place anything on or in front of his property; and (6) for attorney's fees, costs of suit, and such the relief as the court may deem proper.

Count Two requests injunctive relief. Specifically, Asarnow requests Private Defendants be permanently enjoined from "using [the Property] as an outdoor construction yard including removal of all equipment, materials and items placed thereon under supervision of the sheriff, and if necessary, the cost of removal to be recovered by the sheriff [through] a lien on the equipment, property, and businesses." Asarnow further requests Private Defendants be temporarily enjoined from using the Property unless and until site plan approval is obtained before a disinterested zoning board or planning board for any change in use.

In Count Three, Asarnow alleges that Long Branch's failure to enforce its land use ordinances constitutes violations of Fifth and Fourteenth Amendments.

With the foregoing as background, this court turns to the present motions.

Asarnow moves for partial summary judgment as to Counts One and Two of the Complaint. Long Branch moves for summary judgment as to all claims against it.

Summary Judgment Generally

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). A court does not act as factfinder when

deciding a summary judgment motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73 (1954).

In Brill v. Guardian Life Insurance Co. of America, the Court stated that a summary judgment motion requires the court "to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." 142 N.J. 520, 523 (1995) (quotation omitted).

A genuine issue of material fact must be substantial in nature. Id. at 529 (juxtaposing substantial to imaginary, unreal, or fanciful). Where the evidence presented "is so one-sided that one party must prevail as a matter of law," courts should not hesitate to grant summary judgment. Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quotation omitted). Said another way, the non-movant "must do more than show that there is some metaphysical doubt as to the material facts." Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quotation omitted).

The policy of the law is that each litigant be afforded the opportunity to fully air its case. Robbins v. Jersey City, 23 N.J. 229, 240 (1957). Accordingly, courts are to grant a motion for summary judgment only with extreme caution where discovery has not yet been completed. Delvin v. Surgent, 18 N.J. 148, 154 (1995); Monmouth Lumber Co. v. Indemnity Ins. Co. of N.A., 21 N.J. 438, 448 (1956). Generally, summary judgment is premature where the opposing party has not had a full opportunity to conduct discovery proceedings and develop facts on which it intends to base its claims. Empire Mutual Ins. Co. v. Melberg, 67 N.J. 139, 142 (1975).

"[S]ummary judgment is not premature merely because discovery has not been completed, unless" the non-moving party can show "with some degree of particularity the

likelihood that further discovery will supply the missing elements of the cause of action." Badiali v. N.J. Mfrs. Ins., 220 N.J. 544, 555 (2015); see also Canesi ex rel. Canesi v. Wilson, 295 N.J. Super. 354 (App. Div. 1996), aff'd in part, rev'd in part, 158 N.J. 490 (1999) (summary judgment is appropriate in absence of genuine dispute over existence of an element of the cause of action). Nor is summary judgment premature where further discovery will patently not change the outcome. See Friedman v. Martinez, 242 N.J. 449, 475-76 (2020).

Rule 4:69-2, governing prerogative writs, expressly observes that in certain circumstances – specifically, where a complaint requests the performance of a ministerial duty – summary judgment is imminently appropriate.

Moreover, any contention by Asarnow that Long Branch's motion for summary judgment is premature is inconsistent with his repeated assertions that discovery is not necessary vis-à-vis the Private Defendants, as well as his affirmative request for summary judgment as to the Private Defendants. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.3 on R. 4:46-2 (2023); Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436, 450-51 (2007).

At bottom, the foregoing draws a critical distinction – where credibility and disputed facts exist, the court must exercise caution granting summary judgment where identified discovery remains outstanding. However, there remains a limited exception to that general rule where the issues are less fact sensitive and more driven by principles of law and an inability, under any factual scenario, for a non-movant to present facts to satisfy an essential element or disputed facts that are material. That distinction is critical to the court's disposition of the two summary judgment motions here, as they rest on different theoretical footings.

Analysis

Presently before the court are cross summary judgment motions by Asarnow and Long Branch. Asarnow moves for partial summary judgment as to Counts One and Two of the Complaint, seeking declaratory judgment and injunctive relief. Long Branch moves for summary judgment as to all claims against it.

Asarnow's Motion for Partial Summary Judgment

Asarnow contends that the Private Defendants' use of the Property, following the Zoning Board's denial of Private Defendants' 2017 Permit application, is illegal. Asarnow further contends that the existing Permit, which dates back to 2009, does not absolve the alleged illegal use, as the Permit was either abandoned or its scope exceeded by Private Defendants use. Asarnow makes various other arguments concerning allegedly illegal parking, illegal dumping, and illegal improvements occurring on the Property. Asarnow contends that the Property is required to be vacated by Private Defendants, as a matter of law, until obtaining approval for the use. Moreover, Asarnow alleges that this litigation is distinct from his prior litigations involving the Property, based on the "new issue of operating a use denied by the zoning board [ ] and being granted a last minute indefinite adjournment in an identical, successive application with the planning board."

Conversely, the Private Defendants and Long Branch contend that Asarnow essentially seeks to revive previous litigation. To the extent any new claims are advanced, the Private Defendants and Long Branch submit that the motion relies on Asarnow's personal version of events and conjectural evidence.

The court turns first to the question of whether, and to what extent, Asarnow's Complaint overlaps with prior litigation against the Private Defendants.

Previously Litigated Issues

As noted supra, this is, at least, the third lawsuit involving substantially similar underlying issues.

Private Defendants argue that this action is, in essence, an attempt to revive prior litigation, pointing to the complaints filed in 2010 and 2011.

The 2010 complaint did not name the Private Defendants. There, Asarnow alleged that the Permit issued to Private Defendants was not valid and, in that regard, sought relief against Long Branch.

The 2011 complaint raised claims of nuisance, intentional infliction of emotional distress, interference with prospective economic advantage, breach of fiduciary duty, and civil conspiracy against the Private Defendants. Both the underlying facts and requests for relief in that matter were distinct from the present matter.

Here, Asarnow raises new claims related to the Zoning Board's denial of Private Defendants' 2017 permit application. Asarnow further claims that the 2009 Permit authorizing the Private Defendants' nonconforming use of the Property was either abandoned or exceeded in scope. Finally, Asarnow raises claims regarding the Private Defendants' illegal parking and illegal use of Asarnow's property, as violations of specific ordinances.

Although the underlying facts -- that is, the Private Defendants' use of the Property and alleged violations of zoning ordinances -- are substantially similar, the issues presently before the court are based on several new factual developments.

Present Claims

Fundamentally, Asarnow claims that the Private Defendants use of the Property is illegal based on the Zoning Board's 2017 denial of Private Defendant's permit application and the more

recent "indefinite adjournment" of the Planning Board application. Moreover, Asarnow contends that the Private Defendant's allegedly illegal use is not absolved by the prior, 2009 Permit as same was either abandoned or, alternatively, exceeded in scope. Asarnow further raises specific zoning ordinance violations related to parking and use of Asarnow's property.

A party moving for summary judgment is required to support its motion "with a brief" and "with a statement of those material facts which the movant asserts to be materially undisputed . . . each with precise record references." Pressler & Verniero, cmt. 1.2 on R. 4:46-2; see also Kopec v. Moers, 470 N.J. Super. 133, 156-157 (App. Div. 2022). "Summary judgment requirements . . . are not optional." Kopec, 470 N.J. at 156 (quoting Lyons v. Twp. of Wayne, 185, N.J. 426, 435 (2005)). Moreover, parties are required to make an adequate legal argument with appropriate record reference and specific legal authority. 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011) (noting requirement that parties make "an adequate legal argument" in support of claims); State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977).

Here, Asarnow argues that there is no genuine issue of material fact that: (1) the Private Defendants' use of the Property is illegal; (2) the original permittee is not using the Property; the non-conforming use was abandoned; and paving is an impermissible use; (3) if the nonconforming use has not been abandoned, it's scope has been exceeded; (4) the tree plantings and buffers used to cover up the illegal use are illegal improvements; (5) parking across the street where no curbs exists is illegal; and (6) no one other than Asarnow has a right to place anything on or in front of his property in the loading zones, including solid waste. These arguments, however, rely on several disputed factual allegations, presented based on Asarnow's perspective, and unsupported legal conclusions -- all in the absence of any meaningful discovery.

The court addresses each argument in turn.

1. Alleged Use of the Property

Asarnow asserts that "a reasonable trier of fact must find that [Private Defendants] are operating a construction yard, storing construction vehicles and construction materials thereon regardless [of] whether trucks are painted white to disguise what business owns them."

Asarnow concludes that Private Defendants are operating an "outdoor construction yard" based on a series of photographs of the Property. Most of the photographs depict vehicles marked by the Private Defendants' business emblems. Some photographs depict construction utility vehicles as well. There is no indication that the utility vehicles are operated on the Property or just housed on same.

The term "outdoor construction yard" is not defined by applicable ordinances. Moreover, Asarnow does not argue that this use is "industrial" -- a term of consequence in the context of zoning ordinances. Asarnow's statement that Private Defendants are "operating an outdoor construction yard" is an allegation, not a fact of record, where discovery has not occurred.

Summary judgment on this aspect is premature. Discovery hast not yet begun – let alone concluded. No interrogatories have been responded to. No documents demanded. No depositions conducted. As such, summary judgment is inappropriate.

2. Effect of Zoning Board Resolution

Assuming, as Asarnow asks the court to do, that the Private Defendants operate an outdoor construction yard, Asarnow contends that such use is illegal. Asarnow contends that the 2017 Zoning Board denial of Private Defendants' application is conclusive evidence of the illegal use. Asarnow further contends that "a reasonable trier of fact would conclude the foregoing means any lots applied for should be vacant until site plan approval is obtained."

Asarnow points to select language within the Resolution, quoting the Private Defendants' application, as proof that the use is illegal. The application requested a Use Variance, "required to permit a masonry / concrete use, an asphalt paving use, a contracting use, and an irrigation company use (i.e. industrial uses) which are not permitted in the [Long Branch's] C-2 Commercial Zoning District." Private Defendants further requested a Use Variance for the expansion of a non-conforming use. Based on this language, Asarnow contends the current use of the Property as an outdoor construction yard, absent site plan approval, is illegal.

The Zoning Board Resolution, read in its entirety, supports a contrary conclusion. The Zoning Board's findings of fact provide:

> A portion of the [Property] is located in each of [Long Branch's] C-2 (Commercial) Zone, the I (Industrial) Zone, and the R-4 (Residential) Zone. The [Property] is currently utilized to host various industrial, commercial uses, including a masonry / concrete use, an asphalt paving use, a contracting use, and an irrigation company use.

After detailing the specific application requests, the Zoning Board further found "such a proposal requires Site plan Approval, Use Variance Approval, Subdivision Approval, and Bulk Variance Approval." (Emphasis added.) Thus, the various approvals would be required for the new, subdivided lots.

In denying the application, the Resolution further provides:

> The Board is aware that certain portions of the site may likely constitute a pre-existing non-conforming use -- which, per New Jersey law, is allowed to continue to exist. While the Board and or Public may have issues / concerns with regard to the same, it is, nonetheless, acknowledge that lawful pre-existing non-conforming uses are allowed to continue.
>
> [Emphasis added.]

Although the application was denied, that denial does not support Asarnow's contention that the current use of the Property is illegal. A full reading of the Zoning Board Resolution indicates that the pre-existing, non-conforming uses, authorized by the prior Permit, were not affected by the denial and were specifically and expressly "allowed to continue."

Assuming, arguendo, that the Private Defendants' use absent site plan approval, is illegal, Asarnow argues same "can only mean that [the Property] is to be vacated until proper site plan approval is obtained." In support of this argument Asarnow provides a letter from Long Branch Zoning Officer, Anna R. Juska, addressed to Private Defendants. The letter, dated September 1998, advises of steps required to resolve zoning violations on "Lots 13.02, 32.02, 28.02, 39 & 40." Specifically, Officer Juska advised Private Defendants that Lot 40 is located "in a C-2 Zone, separate and distinct from [Private Defendant's] business, and nothing should be on [Lot 40], except for natural growth, until such time as [Private Defendant] is granted a site plan approval to use it for something else."

The court is not convinced that a letter, predating the Complaint by more than 20 years, predating the prior Permit by more than 10 years, dealing with zoning violations on different property, commands the extreme result of restraining Private Defendants from using the Property. And, importantly, Asarnow cites to no binding, let alone persuasive, legal authority to support his request for the requested remedy.

3. Illegal Improvements

Asarnow argues that the "buffers and associated tree plantings" on the Property, that were included in the site plan rejected by Zoning Board, are illegal. In support of this argument Asarnow submits the following evidence: (1) the Private Defendant's site plan submitted in the

application to the Zoning Board; (2) the Zoning Board Resolution denying Private Defendant's application; and (3) pictures of, what appears to be, trees along the Property line.

True, the Private Defendant's site plan provided for trees to line the Property. However, it is not clear whether the "buffers and associated tree plantings" existed prior to the Private Defendant's application. Moreover, as noted supra, and critically important here, denial of the application does not compel a finding that the use of the property is illegal -- including the alleged "improvements."

4. Abandoned Use

Asarnow further contends that the prior Permit does not absolve the alleged illegal use because the original permittee abandoned the use, which cannot restart or pass on to a subsequent user absent a certificate of non-conforming use.

In support of this contention, Asarnow cites Borough of North Plainfield v. Perone, 54 N.J. Super. 1, 48 (1959). That case presented a situation where a landowner obtained an "exception" authorizing a prohibited use of the property but later discontinued that use and resumed a use permitted under the zoning ordinance. Under those circumstances, the court concluded that "an intervening use, consonant with the existing zoning design, breaks the chain of circumstances so as to defeat the right automatically to resume the use originally sanctioned in the exception." Id. at 12. Thus, Perone stands for the proposition that "a use allowable only by virtue of an exception granted cannot, if subsequently abandoned, leave a property owner with a right to resume such use when [the owner] would not have had a similar right if the original use were a non-conforming one, the uninterrupted continuance of which is expressly protected by statute." Ibid. (Emphasis added.) Perone goes no further then to apply the law of abandonment

when the subject property enjoys a non-conforming use, to that which enjoys an "exception." Accordingly, Perone is of no application here.

A nonconforming use is defined by the Municipal Land Use Law as "a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment." N.J.S.A. § 40:55D-5. Nonconforming uses of property "may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." N.J.S.A. § 40:55D-68.

"Abandonment of a nonconforming use terminates the right to its further use." S & S Auto Sales, 373 N.J. Super. at 613 (quoting Borough of Saddle River v. Bobinski, 108 N.J. Super. 6, 16 (Ch. Div. 1969)). The issue of whether a non-conforming use has been abandoned cannot arise until the burden of establishing existence of a valid nonconforming use has been met. Ferraro v. Zoning Bd. of Borough of Keansburg, 321 N.J. Super. 288, 291 (App. Div. 1999). Thus, before addressing abandonment, the court first must consider whether the Permit conferred a valid nonconforming use. On this question, the Appellate Division, in a prior dispute between the parties here, wrote:

> It does not appear from the record that [the Private Defendants] asserted that the Permit constituted a certificate of non-conforming use issued under the authority of N.J.S.A. 40:55-D-68. N.J.S.A. 40:55-D-68 provides, in part, that "a prospective purchaser . . . or any other person interested in any land upon which a non-conforming use . . . exists may apply in writing for the issuance of certificate certifying that the use or structure existed before the adoption of the ordinance which rendered the use or structure non-conforming."
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> Such an application "may be made to the administrative officer within one year of the adoption of the ordinance which rendered the use or structure non-conforming or any time to the board of adjustment." N.J.S.A. 40:55D-68. [Private Defendants] did not

> request such a certificate. More significantly, the zoning officer had no authority to issue it, because no ordinance adopted within the previous year rendered the use non-conforming. Under those circumstances, the certificate would be of no effect.
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> To the contrary, the [Permit] purports to reflect the zoning officer's conclusion that the use of the properties "for paving company for two buildings, yard parking area" is permitted by ordinance in the commercial/industrial zone. The zoning officer had the authority to take such action.
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> [Asarnow v. City of Long Branch, et al., No. A-0999-10T4, 2013 N.J. Super. Unpub. LEXIS 1051, *12-*13 (App. Div. May 6, 2013) (citations omitted) (emphasis added).]

The appellate panel found that the Permit was not issued under the authority of N.J.S.A. 40:55-D-68. Moreover, the language of the Permit indicates the Zoning Officer's determination that the "use [was] permitted by Ordinance," rather than authorizing a "valid nonconforming use." Absent a nonconforming use, the abandonment argument is of no consequence. Ferraro, 321 N.J. Super. at 291.

Even if that prior Appellate Division conclusion is wrong and presuming, as Asarnow does, that the Permit authorized a nonconforming use, beyond that authorized by ordinance, the record contains insufficient indicia of abandonment.

Abandonment requires the concurrence of two factors: "(1) an intention to abandon, and (2) some overt act or failure to act which carries a sufficient implication that the owner neither claims nor retains any interest in the" non-conforming use. S & S Auto Sales, 373 N.J. Super. at 614 (citing Bobinski, 108 N.J. Super. at 16-17).

From the foregoing seemingly straightforward two-prong test, a variety of principles have emerged. First, and critically important here, a change in ownership or tenancy, without more, does not constitute abandonment. Arkam Machine & Tool Co. v. Lyndhurst Twp., 73 N.J. Super. 528, 533 (App. Div. 1996). Second, mere passage of time during a cessation of active

use, without more, does not constitute abandonment. S & S Auto Sales, 373 N.J. Super. at 617. Third, temporary non-use, without more, does not constitute abandonment. Children's Institute v. Verona Twp. Bd. of Adj., 290 N.J. Super. 350, 357 (App. Div. 1996).

Although none of the foregoing are the proverbial "silver bullet" in the analysis in that none are dispositive, all are factors that may properly be considered in the totality of the circumstances. To be sure, "[a]bandonment is a matter of intent." Poulathas v. Atlantic City Zoning Bd. of Adj., 282 N.J. Super., 310, 313 (App. Div. 1995). As such, it is a fact-sensitive, totality of the circumstances analysis where "[t]here is no formula." S & S Auto Sales, 373 N.J. Super. at 618 (emphasis added); accord Belmar v. 201 16th Ave., 309 N.J. Super. 663, 674 (Law. Div. 1997) ("Intent is an issue of fact.").

Here, Asarnow contends that the permittee is no longer operating on the Property and thus has abandoned the nonconforming use -- again, presuming contrary to the Appellate Division's prior conclusion that such is a pre-existing, non-conforming use. Specifically, Asarnow contends that, based on various NJ Business Entity Status Reports, the "actual permittee" was "Atlantic Paving & Coating, LLC." According to those reports, that entity had its business license revoked in 2009. Thus, Asarnow contends that because Atlantic Paving & Coating, LLC is no longer operating at the Property, the nonconforming use was abandoned, and the same cannot be used by Private Defendants without zoning board approval. Asarnow provides no citation for the proposition that revocation of a business entity's license constitutes abandonment of a nonconforming use. 700 Highway 33 LLC, 421 N.J. Super. at 238 (requiring parties make "an adequate legal argument" in support of claims).

Again, as noted above, the test is for abandonment of a nonconforming use is "use" -- not ownership or tenancy. Akram, 73 N.J. Super. at 533. Notably, Asarnow does not argue that the

Private Defendants ceased using the Property. To the contrary, Asarnow provides alleged evidence and argument to demonstrate the Private Defendants continue to operate multiple businesses on the Property.

Accordingly, Asarnow's request for declaratory judgment and injunctive relief on the grounds that the non-conforming use was abandoned must be denied.

5. Exceeded Scope of Authorized Nonconforming Use

Asarnow argues that, if the nonconforming use authorized by the Permit is not abandoned, it has been exceeded. On this point, Asarnow contends that the use of the Property "is restricted to the inside of the garage headquarters per Carl H. Turner, Jr., Assistant Director of Planning & Zoning who supervised the zoning officer [ ] who issued the [Permit.]" A partial transcript of Turner's 2013 deposition was provided to the court. Asarnow does not indicate, and the court could not locate, any definitive conclusion about the scope of the Permit therein. Asarnow makes no other argument on this point, 700 Highway 33 LLC, 421 N.J. Super. at 238; Hild, 148 N.J. Super. at 296, nor does he demonstrate how Turner's deposition in a prior litigation is conclusive in the absence of discovery in this litigation.

Accordingly, Asarnow's request for declaratory judgment and injunctive relief on the grounds that the nonconforming use authorized by the Permit was exceeded in scope is denied.

6. Illegal Parking

Asarnow seeks declaratory judgment that parking across from Asarnow's property, in the absence of curbs, site plan approval, or enabling ordinance is unlawful.

On this point, Asarnow submits a tax map of the area and photographs of parked vehicles, presumably on Community Place. Asarnow relies on Long Branch parking ordinances, designating certain areas as loading zones. § 325-3J. Long Branch Ordinance § 325-3J provides

"there shall be no parking in these areas except for the surplus of commercial loading and unloading. LOADING ZONE, NO PARKING signs shall be installed as provided therein." Ibid. A loading zone is designated on Community Place, "beginning at a point 310 feet west from the southerly curb line of South Seventh Avenue, extending 205 feet westerly therefrom."

Asarnow argues that, based on the evidence submitted, there is no genuine issue of material fact that the Private Defendants parking is illegal. This court disagrees.

Although the ordinance provides for a loading zone on Community Place, the evidence submitted does not support a finding that there has been a violation of same. It is not apparent from the few snapshots submitted whether the vehicles depicted are parked in the designated loading zone area. Moreover, there is no signage apparent, as the ordinance provides for. It is unclear from the record how long such vehicles were in these positions.

Accordingly, based on the sparse, conclusory record, Asarnow's request for summary judgment as to declaratory judgment for illegal parking is denied. To the extent that Asarnow's brief argues that Long Branch be required to terminate any parking violations, same is discussed infra.

7. Illegal Use of Asarnow's Property

Asarnow seeks declaratory judgment that Private Defendants may not place anything on or in front of his property in the loading zones, including solid waste.

Asarnow's brief refers to "Solid Waste and Recycling Ordinance 293," but does not cite a specific provision within that ordinance, and makes no argument tethering such to Private Defendants' alleged violation of same. See 700 Highway 33 LLC, 421 N.J. Super. at 238; Hild, 148 N.J. Super. at 296.

Asarnow asserts that the evidence submitted "make[s] clear the solid waste in the dead-end loading zone is from [Private Defendants] and is a problem." The court disagrees. Asarnow submits several snapshots of garbage bins and dumpsters, presumably located on or around Private Defendants or Asarnow's Property and presumably placed there by Private Defendants. There is no context provided along with the photographs to discern where the garbage is located in relation to Asarnow's or Private Defendants' properties. Asarnow also submits several emails sent by Asarnow to Long Branch officials attaching same photographs and declaring violations of relevant ordinances. Asarnow's prior, unsubstantiated legal conclusions in emails to Long Branch officials cannot serve as the basis for the legal conclusion now asserted in the absence of meaningful discovery.

Accordingly, based on the sparse, conclusory record, Asarnow's request for declaratory judgment as to the Private Defendants' alleged placement of garbage is denied. To the extent that Asarnow's brief argues that Long Branch be required to terminate any related violations, same is discussed infra.

Long Branch's Summary Judgment Motion

Long Branch argues that the Complaint fails on myriad procedural and substantive grounds. First, that the state law, equitable, and constitutional claims against Long Branch are barred by the preclusive doctrines of res judicata and collateral estoppel. Second, that the Complaint is time-barred by multiple limitations periods. Third, that Long Branch is immune for the conduct at issue. Fourth, that the complaint fails to state a claim for a writ of mandamus. Fifth, that the complaint fails to state a claim under each constitutional theory advanced.

The court considers each argument in turn.

Applicability of Preclusive Doctrines[3]

Long Branch asserts that Asarnow's prior lawsuits against it were based on precisely the same conduct now alleged. Specifically, Long Branch asserts that Asarnow previously sought not only to compel Long Branch's enforcement of zoning violations but also that Long Branch's failure to do so violated state law and Asarnow's constitutional rights. Those claims were ultimately dismissed in both the 2010 and 2011 lawsuits -- affirmed by separate Appellate Division panels. Accordingly, Long Branch argues that the present claims are barred under the preclusive doctrines of res judicata and collateral estoppel.

Res judicata serves the purpose of providing "finality and response; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness[.]" First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (alteration in original) (quoting Hackensack v. Winner, 82 N.J. 1, 32-33 (1980)). The principle "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 of Paterson, 33 N.J. 428, 435 (1960).

Application of res judicata "requires substantially similar or identical causes of action and issues, parties, and relief sought," as well as a final judgment. Culver v. Ins. Co. of N. Am. 115 N.J. 451, 460 (1989). Thus, "where the second action is no more than a repetition of the first, the first lawsuit stands as a barrier to the second." Ibid.

The Supreme Court has recognized that the test for the "identity of a cause of action for claim preclusion purposes is not simple." Id. at 461. A court must evaluate

[3] The court requested supplemental briefing regarding the entire controversy doctrine and res judicata. The entire controversy doctrine is not discussed herein as it is not dispositive.

> (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same.
>
> [Id. at 461-62 (quoting United States v. Athlone Indus. Inc., 746 F.2d 977, 984 (3d Cir.1984)) (citations omitted).]

Collateral estoppel, on the other hand, refers to the "branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Sacharow v. Sacharow, 177 N.J. 62, 75-76 (2003) (quoting Woodrick v. Jack J. Burke Real Est., Inc., 306 N.J. Super. 61, 79 (1997)). In Culver, the Supreme Court explained that collateral estoppel (also called "issue preclusion") has been defined as follows: "When an issue or fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim." 115 N.J. at 470 (quoting Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982)).

The record here establishes that Asarnow filed substantially similar lawsuits against Long Branch in 2010 and 2011. In fact, the First Count of the Amended Complaint here, wherein Asarnow sets forth the operative facts, contains no less than fifteen paragraphs which repeat verbatim the allegations in the 2011 Complaint. The remaining paragraphs go on to allege several overlapping causes of action based on the same offending conduct, while also including more recent facts.

As to the specific causes of action previously litigated, in both the 2010 and 2011 complaints Asarnow sought to compel Long Branch's enforcement of certain zoning and parking

ordinances against the Private Defendants. In the 2010 litigation, Judge Cleary determined, with respect to the request for mandamus relief, that "[Asarnow's] complaint was inappropriate because there was no clear and undisputed ministerial duty or exercise of discretion involved." Thereafter, when confronted with the same prayer for relief, Judge Perri concluded that aspect of Asarnow's 2011 complaint was barred under the doctrine of res judicata and dismissed same with prejudice.

Here, Asarnow again seeks to compel Long Branch's abatement of certain violations of zoning and parking ordinances against the Private Defendants. Thus, Asarnow complains for the third time of the same conduct and seeks the same relief against the same parties. Accordingly, Asarnow's present claim for mandamus relief is barred by the doctrine of res judicata.

Further, in the 2011 complaint, Asarnow asserted several tort claims against Long Branch based on the failure to enforce zoning violations. Judge Perri held that those theories of liability were immunized by the TCA, which grants "an unqualified or absolute immunity" to public entities "from liability for injuries caused by a failure to enforce the law." Bombace v. Newark, 125 N.J. 361, 367 (1991); N.J.S.A. 59:2-4.

Here, Asarnow does not assert a separate cause of action for any tort claims against Long Branch. Asarnow's summary judgment motion, however, refers to Long Branch's "failure to act" and "bad faith" at various points. Moreover, Asarnow filed a Notice of Tort Claim along with the Complaint. Although not a model of clarity, Asarnow's moving papers, read coterminously with the Complaint, necessarily implicate Long Branch in Counts One and Two, wherein Asarnow seeks damages for the alleged ongoing zoning violations and Long Branch's purported failure to enforce certain alleged violations.

The issue of Long Branch's tort immunity for damages stemming from the alleged failure to enforce zoning violations is an issue of law that was actually litigated and determined by a valid and final judgment between the parties. Culver, 115 N.J. at 470. Although raised in a different claim here, Judge Perri's prior ruling as to Long Branch's immunity precludes liability for damages here under the doctrine of collateral estoppel.

Finally, in the 2011 litigation, Asarnow's constitutional claims were dismissed with prejudice. There, Asarnow asserted a cause of action under § 1983, and the Fifth and Fourteenth Amendments, alleging, in part, "a history and pattern of violating [Asarnow's] right to equal protection of the laws due to [Asarnow's] challenging Defendants in seeking to vindicate his property rights." Judge Perri concluded that the basis of these claims -- Long Branch's instituting eminent domain proceedings over the course of years in accordance with the City's redevelopment plan but, refus[al] to abate blight stemming from the [Private Defendants'] properties" -- were insufficient to state an equal protection claim.

Here, Asarnow again alleges an equal protection claim under the Fourteenth Amendment based on "[Long Branch's] enforcement of zoning and parking ordinances elsewhere in town and beautification and quality of life efforts city wide," in contrast to the alleged non-enforcement of violations at the Private Defendants' property. This claim, too, is duplicative of the claim disposed of in the 2011 litigation. The claim under the equal protection clause, between the same parties, involving the same issues of fact, was subject to dismissal with prejudice by Judge Perri. Accordingly, this claim is precluded under the doctrine of res judicata.

In sum, the issues raised here that are precluded under the doctrines of res judicata and collateral estoppel are: (1) Asarnow's request for a writ of mandamus compelling Long Branch to enforce certain zoning and parking ordinances; (2) Long Branch's immunity from damages

related to alleged non-enforcement; and (3) Asarnow's equal protection claim. As discussed infra, those causes of action fail on other independent grounds, not premised on preclusionary doctrines.

Statute of Limitations

Long Branch contends that the Complaint is time barred by multiple limitations periods. Specifically, Long Branch contends that: (1) the constitutional claims are barred by the two-year limitations period in § 1983; (2) the prerogative writ claims are barred by the forty-five day limitations period under Rule 4:69-6(a); and (3) the Notice of Tort Claim was filed beyond the ninety-day statutory limit in the TCA.

Asarnow, conversely, contends that "as the drafter of the complaint[, he] has the right to determine when his cause of action accrues." Asarnow makes no other argument on the respective limitations periods raised by Long Branch, nor does Asarnow cite any law for the contention that the drafter of the complaint determines when cause of actions accrue. Such is contrary to the purpose of a statute of limitations. White v. Mattera, 175 N.J. 158, 164 (2003) ("A cause of action 'accrues' on the date when the right to institute and maintain a suit first arose. 'Accrual' is a technical term found in statutes of limitations to denote the date on which the statutory clock begins to run." (citations omitted)).

The court assesses the application of each limitations period raised by Long Branch in turn.

First, the TCA decrees that no action may be brought against a public entity unless the claim upon which it is based was presented in accordance with the procedures set forth under N.J.S.A. 59:8-1, et seq. Specifically, a claimant must file a Notice of Claim within ninety days of the accrual of a claim. N.J.S.A. 59:8-8. Further, while a claimant may move before the court

within one year for leave to file a late Notice of Claim, the request for leave must establish "extraordinary circumstances" for the failure to have filed within the ninety-day period.

The TCA clarifies that, for purposes of the statute's notice of and filing limitations, "accrual shall mean the date on which the claim accrued and shall not be affected by the notice provisions contained herein." N.J.S.A. 59:8-1. Thus, "once an injury is known, even a minor one, the ninety-day notice is triggered." Beauchamp v. Amedio, 164 N.J. 111, 118 (2000). Importantly, "worsening of that injury does not extend the time [to serve a notice] or otherwise alter the party's obligation." Ibid.; see also Maher v. Cnty. Mercer, 384 N.J. Super. 507, 528-29 (App. Div. 2016).

Here, Asarnow filed a Notice of Claim on September 17, 2021. Asarnow contends this notice was timely because his cause of action accrued in June 2021, "following the final zoom council meeting attempt to get an injunction." The court disagrees. The evidence Asarnow himself presents demonstrates his awareness of the alleged tortious conduct in 2019. This evidence includes correspondence to Long Branch on November 1, 2018; January 11 and 14, 2019; March 7, 2019; July 16, 2019; February 12, 2020; June 4, 2020; January 14, 2021; February 10, 2021; May 10 and 28, 2021. Each dating more than ninety days before filing of the Notice of Claim.

Asarnow further contends that the Notice of Claim is not untimely under the continuing tort theory. A continuing tort by its nature "involves repeated conduct" and occurs over a period of time and, thus, cannot be distilled to one discrete act giving rise to the cause of action. Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 19 (2002). The continuing tort doctrine has been applied in limited cases, such as a continuing nuisance allegation, see Lyons v. Twp. of Wayne, 185 N.J. 426, 433-34 (2006), or workplace discrimination, see Wilson v. Wal-Mart

Stores, 158 N.J. 263, 279 (1999). Asarnow's claims against Long Branch fall outside the scope of the narrowly delineated contexts in which the continuing tort doctrine is recognized.[4] Accordingly, the doctrine is inapplicable here. The untimely TCA notice is another bar to the relief sought here.

Second, "federal law determines when a § 1983 cause of action accrues." 3085 Kennedy Realty Co. v. Tax Assessor of Jersey Cty., 287 N.J. Super. 318, 325 (App. Div. 1996) (citations omitted). That is, "when the plaintiff knows or should know that [their] constitutional rights have been violated." Ibid. (Citations omitted.) Thereafter, constitutional claims brought under § 1983 follow the two-year statute of limitations governing torts. Wilson v. Garcia, 471 U.S. 261 (1985).

Here, Asarnow's § 1983 claim is based on Long Branch's alleged failure to enforce applicable zoning and parking ordinances equally. As discussed supra, this is substantially similar to the basis for the constitutional claims previously dismissed by Judge Perri. Thus, Asarnow's awareness of this claim and, accordingly, it's accrual, dates as far back as 2011 -- when this cause of action was first alleged.

Third, pursuant to Rule 4:69-6(a), "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed."

Here, the Complaint suggests two potential challenges to municipal action or inaction as the basis for the action in lieu of prerogative writ -- both untimely.

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[4] Asarnow asserts that "[he] hasn't felt a nuisance claim has yet fully accrued" and, accordingly, is not asserting a continuing nuisance. Such a theory directly contradicts Asarnow's complaint underlying the 2011 litigation in which he asserted a continuing nuisance against Long Branch. Notably, Judge Perri's 2011 opinion dismissed Asarnow's claim against Long Branch for a continuing nuisance. Accordingly, such would be subject to dismissal under additional grounds under the doctrine of res judicata.

If Asarnow seeks to challenge Long Branch's grant of a so-called "indefinite adjournment," such accrued on July 16, 2019 -- the date of the Planning Board meeting. Asarnow commenced this litigation over two years later in December 2021 and did not name Long Branch as a Defendant until nearly three years later in July 2022 -- well beyond the time permitted to bring a prerogative writ action.

If, alternatively, Asarnow challenges municipal inaction, seeking to compel enforcement of violations, such relief has been sought and denied in both the 2010 and 2011 litigations.

Long Branch's Immunity

Assuming, arguendo, that the post-2011 alleged failures to enforce by Long Branch are not collaterally estopped nor time barred, Long Branch contends that it is immune for damages occasioned by any alleged failure to enforce the law under the TCA, specifically N.J.S.A. 59:2-4.

As noted supra, Asarnow does not rebut this contention. Rather, Asarnow contends that the Complaint does not seek recourse for injury related to Long Branch's failure to abate the alleged illegal uses of the Property. Asarnow's summary judgment motion, however, refers to Long Branch's "failure to act" and "bad faith" at various points. Moreover, Asarnow filed a Notice of Tort Claim along with the Complaint. Although not a model of clarity, Asarnow's moving papers, read coterminously with the Complaint, necessarily implicate Long Branch in Counts One and Two, wherein Asarnow seeks damages for the alleged ongoing zoning violations and Long Branch's failure to enforce certain alleged violations. Accordingly, the court considers Long Branch's arguments with respect to immunity for its alleged inaction.

Under the TCA, public entities and public employees are granted immunity for failure to enforce any law pursuant to N.J.S.A. 59:2-4. In Bombace v. City of Newark, the Court held that the phrase "failure to enforce the law" within the TCA, "suggest[s] that the essential conduct

constituting failure to enforce a law could consist of a failure to act, an omission, or non-action." 125 N.J. 361, 367 (1991). Accordingly, the Court held absolute immunity applied "to non-action or the failure to act in connection with the enforcement of the law." Id. at 368.

Thus, to the extent Asarnow seeks damages from Long Branch for the alleged failure to abate violations of zoning ordinances, this conduct falls squarely within the express immunity found in N.J.S.A. 59:2-4 and, accordingly, is improper against Long Branch.

Writ of Mandamus

Long Branch further contends that Asarnow cannot establish a claim for a writ of mandamus.

A writ of mandamus directs a government official "to carry out required ministerial duties." Caporusso v. New Jersey Dep't of Health & Senior Servs., 434 N.J. Super. 88, 100 (App. Div. 2014) (citing In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 45 n.7 (1987)).

"A ministerial duty is one that 'is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion.'" Id. at 102 (quoting Ivy Hill Park Apartments v. N.J. Prop. Liab. Ins. Guar. Ass'n, 221 N.J. Super. 131, 140 (App. Div. 1987)). "In other words, mandamus is an appropriate remedy (1) to compel specific action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but not in a specific manner." Ibid. (Quotations omitted.) However:

> [m]andamus is not an available remedy if the duty to act is a discretionary one and the discretion has been exercised. Absent a showing that there was a lack of good faith or other invidious reason

> for the action or inaction, mandamus cannot be invoked to force [an] agency to prosecute.
>
> [Moss v. Shinn, 341 N.J. Super. 327, 341 (Law Div. 2000) aff'd, 341 N.J. Super. 77 (App. Div. 2001).]

Further, mandamus relief to compel municipal officials to enforce zoning ordinances is not absolute. "[B]oth the plaintiff's right to the relief requested and the defendant's duty to perform it must be 'legally clear.' Mandamus relief 'must be denied where equity or paramount public interest so dictates or there is other adequate relief available.'" Mullen v. Ippolito Corp., 428 N.J. Super. 85, 102 (App. Div. 2012) (quoting Garrou v. Teaneck Tyron Co., 11 N.J. 294, 302 (1953)). Those seeking mandamus relief to enforce a zoning ordinance must establish:

> (1) a showing that there has been a clear violation of a zoning ordinance that has especially affected the plaintiff; (2) a failure of appropriate action despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of executing the ordinance; and (3) the unavailability of other adequate and realistic forms of relief.
>
> [Mullen, 428 N.J. Super. at 103 (citing Garrou, 11 N.J. at 303) (emphasis added).]

Here, Asarnow seeks to compel Long Branch to abate the alleged illegal uses of the Property by enforcing ordinances. Specifically, Asarnow contends that, consistent with the holdings in Mullen and Garrou, Long Branch must terminate the alleged illegal use of the Property as an outdoor construction yard, the violations of the Parking Ordinance, and the violations of the Solid Waste and Recycling Ordinance.

Before addressing that tandem of cases, a different threshold question must be addressed: can Asarnow satisfy the third prong of Mullen -- that is, the unavailability of other adequate and realistic forms of relief? In a word, he cannot.

Here -- and, for that matter, repeatedly over the last decade -- Asarnow has sued the Private Defendants for their alleged violations. He has sued them seeking both monetary and

equitable relief. He sues them again now. He makes no argument alleging that, if successful in prosecuting his case against the Private Defendants, such remedies and relief would be inadequate nor unavailable. Accordingly, under Mullen, relief against Long Branch is foreclosed as a matter of law.

Nevertheless, a closer examination of Mullen and Garrou demonstrate they are distinguishable.

In Mullen, the plaintiff, owner of residential property, brought suit against the owners of an adjacent property and the municipality, seeking to compel enforcement of applicable zoning ordinances. 428 N.J. Super. at 87. Similarly, in Garrou, plaintiff, owner of residential property, sought to compel the municipality to enforce zoning ordinances against the owner of neighboring property. 11 N.J. at 296. In both cases, the Appellate Division reversed the grant of summary judgment as to the municipal defendants. Mullen 428 N.J. Super. at 104; Garrou, 11 N.J. at 304.

Several factors animating the Mullen and Garrou decisions are distinguishable from the present matter.

First, the plaintiffs in Mullen and Garrou presented evidence of a "clear violation" of a zoning ordinance by the private landowner abutting their respective properties. In Mullen, the adjacent property contained a motel and enjoyed status of a preexisting nonconforming use. 428 N.J. Super. at 90. The plaintiff presented evidence, from the "unique and clear vantage point" of its home, of the systematic, covert expansion of the motel's business activities, beyond what was permitted by the preexisting nonconforming use. Id. at 91. In Garrou, the adjacent property was a vacant lot in a residential zone, which was paved and used as a parking lot next to the plaintiff's home, in clear contradiction of the zoning ordinances. 11 N.J. at 298. Here Asarnow

has not presented clear evidence of the alleged illegal use or zoning ordinance violations. See supra.

Second, in Garrou and Mullen, the municipal defendants were made aware of clear violations but made absolutely no attempt to abate same. There, plaintiffs "were either ignored or told, in summary and dismissive fashion, that enforcement action against the [adjacent property owners] was unwarranted." Mullen 428 N.J. Super. at 103-04. Unlike the facts in Garrou and Mullen, Asarnow's complaints to Long Branch were not summarily ignored. Long Branch has not been indifferent to Asarnow's complaints as were the entities in Garrou and Mullen. Rather, Asarnow admits that there have been notices of violations issued. Likewise, Asarnow acknowledges that Long Branch denied the Private Defendants' 2017 Zoning Board application -- which was vigorously opposed by Asarnow at the public hearings. Further, Long Branch indicates additional remedial steps taken to enforce parking violations including the addition of no parking signs in prohibited areas. Thus, Asarnow concedes that his dispute is not that Long Branch has taken no action, as in Garrou and Mullen, but rather that he is dissatisfied with the extent of Long Branch's enforcement action.

Third, Asarnow presents no evidence of damages incurred as a result of the Private Defendants' alleged violations, much less that Long Branch's alleged failure to enforce these violations have "especially affected" Asarnow's use of his property. Unlike in Mullen and Garrou, Asarnow's property is commercial, not residential. There is no indication nor allegation that Asarnow or Asarnow's tenants have been unable to use the property, nor that there is a reduction in lease revenue. Asarnow claims that Private Defendants have damaged the curb and fence in front of his property, but does not contend these damages were occasioned by Long Branch's failure to enforce zoning violations. The lack of damages highlights that, unlike in

Mullen and Garrou, Asarnow has other, adequate and realistic forms of relief. Asarnow has previously filed lawsuits for nuisance against the Private Defendants, for substantially similar conduct of which he now complains.

Asarnow further contends that, because this matter was transferred from the Chancery Division to the Law Division, “the court itself determined [the Complaint] made a prima facie case of mandamus. . . . Why else would the court transfer the matter to the law division?”

Transfer the Complaint from the Chancery Division to the Law Division, contrary to Asarnow’s contention, in no way evidences the court’s endorsement of Asarnow’s claim for mandamus. Rather, Judge Quinn determined that Asarnow’s claims, challenging local government decisions or actions, were improperly before the Chancery Division. Alexander’s Dep’t Stors, Inc. v, Paramus, 125 N.J. 100 (1991) (reviewing use of traditional prerogative writs). Such claims were appropriately transferred to the Law Division pursuant to Rule 4:3-1.

As Asarnow fails to satisfy the elements for a writ of mandamus, Long Branch’s motion for summary judgment is granted.

Constitutional Claims

At the outset, the court notes Asarnow’s contention that “there is outstanding discovery” with respect to the constitutional claims. However, a party opposing summary judgment motion on the ground of incomplete discovery is obliged to specify the discovery still required. Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007); R. 4:46-2 comment 2.3.3. Comment 2.3.3 to Rule 4:46-2. “Mere conclusionary statements are inadequate.” R. 4:46-2 comment 2.3.3.

Here, Asarnow does not point to any outstanding discovery that would further develop the record or materially change the court’s analysis. Nevertheless, the court now considers what

disputed material facts remain considering Asarnow's claims and whether these facts impact the court's resolution of the pending motion for summary judgment.

Count Three alleges that the "willful conduct and acts or omissions by . . . Long Branch and Officials, under color state law and local ordinances, a class of one, to be deprived of his civil rights under the Fifth and Fourteenth Amendments of the United States Constitution and has otherwise violated 42 U.S.C. § 1983." Specifically, Asarnow alleges a pattern of discrimination based on Long Branch's non-enforcement of applicable ordinances to the Property, "while doing so elsewhere in town."

Long Branch submits arguments for summary judgment on each cause of action.

The court addresses each in turn.

1. Fifth Amendment

The Fifth Amendment restricts only federal government action and therefore "do[es] not apply to the actions of state officials." Myers v. County of Somerset, 515 F. Supp. 2d 492, 504 (D.N.J. 2007). Long Branch is a municipal public entity and not a branch of the Federal Government.

Accordingly, Asarnow's claim under the Fifth Amendment fails as a matter of law.

2. Fourteenth Amendment

Asarnow contends that Long Branch's "refusal to enforce [zoning violations] on [Asarnow's] behalf while doing so elsewhere in town" constitutes a "pattern of discrimination," violative of the Fourteenth Amendment.

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statue or by its improper execution through duly

constituted agents." Hamilton v. Prudential Ins. Co. of Am., 18 F. Supp. 3d 571, 579 (D.N.J. 2014).

To state a claim under a "class of one theory," a plaintiff must allege that: "(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." Hill v. Borough of Kutztown, 455 F.4d 225, 239 (3d Cir. 2006) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000)) (emphasis added).

In advancing a "class of one" theory, Asarnow contends his situation is similar to that of Village of Willlowbrook. The court disagrees.

In Village of Willowbrook, the plaintiffs objected to the conditioning of their property being connected to municipal water supply on the plaintiffs' grant of a 33-foot easement -- where the municipality required only a 15-foot easement from other property owners seeking access to the water supply. Id. at 663. Plaintiff alleged that the municipality's demand of an additional 18-feet of easement was "irrational and wholly arbitrary," motivated by ill will following the plaintiffs' previous filing of an unrelated lawsuit against the municipality, and that the municipality acted with the intent to deprive plaintiffs of their rights or in reckless disregard thereof. The Supreme Court of the United States held that the plaintiffs' allegation that the municipality "intentionally demanded a 33-foot easement as a condition of connecting [plaintiff's] property to the municipal water supply, while requiring only a 15-foot easement from other similarly situated property owners," when combined with the allegations that the municipality's demand was "irrational and wholly arbitrary" were sufficient to state a claim under the Fourteenth Amendment. Village of Willowbrook, however, is distinguishable from the present matter in several respects.

Village of Willowbrook did not involve a municipality's inaction, as alleged here. Rather, it involved an affirmative act to deprive plaintiff of property rights.

Moreover, and critically important, in Village of Willowbrook the plaintiff alleged that similarly situated property owners were treated differently and that there was no rational basis for the difference in treatment. "Persons are similarly situated for equal protection purposes when they are alike in all relevant aspects." Joey's Auto Repair & Body Shop v. Fayette Cty., 785 F. App'x 46, 49 (3d Cir. 2019) (emphasis added) (internal quotations omitted); see also Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

Here, Asarnow contends that there is "solid evidence" that "parking violations are strictly enforced against others in the city." Asarnow provides two images of an LED sign that reads: "Parking Regulations Strictly Enforced. Violators Will Be TOWED." The sign is located across from Pier Village -- a high-traffic, ocean-front hub of activity containing both residential apartments and numerous storefronts and restaurants, not to mention access to the boardwalk and Atlantic Ocean. According to the date stamp, the photographs were taken in July 2022 -- a heavily trafficked time of year at the Jersey Shore. The Property at issue here -- a dead-end street in a commercial and industrial zone -- is not likely to be subject to the same parking enforcement efforts as Pier Village during peak tourist season. Moreover, there is no evidence of the prevalence of illegal parking at Pier Village, nor is there evidence of the frequency at which cars are towed. These properties are far from similar, and any difference in enforcement action by Long Branch is rationally related to the differences in the properties.

Asarnow provides no evidence of disparate enforcement action involving similarly situated properties. That is, a property situated within commercial, industrial, and residential zones; on a dead-end street; with the status of a pre-existing non-conforming use.

Based on the foregoing, Asarnow cannot sustain a "class of one" claim of discrimination against Long Branch. Accordingly, Long Branch's request for summary judgment is granted.

3. 42 U.S.C. § 1983

Count Three of the Complaint includes a general claim under 42 U.S.C. § 1983.

Under § 1983, local governing bodies can be sued "for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

Additionally, a governing body may be sued "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." Ibid. "Policy is made when a decision maker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895, F.2d 1469, 1480 (3d. Cir. 1990) (internal quotations omitted). A course of conduct is considered a "custom" when the "practices . . . [are] so permanent and well-settled as to virtually constitute law." Ibid.

To plead a cause of action under § 1983 against a local governmental agency, a plaintiff must "show that the particular injury was incurred because of the execution of [a] policy." Kranson v. Valley Crest Nursing Home, 755 F.2d 46, 51 (3d Cir. 1985); see also Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981) (requiring "causal nexus between" municipal regulation and wrongful act.)

Asarnow has offered no persuasive argument or facts which would indicate that his § 1983 claim has met that threshold.

Asarnow fails to identify any policies or practices of Long Branch which having been given official sanction, nor that Long Branch's inaction is so endemic as to be "permanent and well-settled." Asarnow also fails to identify any damages incurred nor how Long Branch's inaction brought about those damages. Absent such allegations, Asarnow fails to properly assert a cause of action under § 1983.

Accordingly, summary judgment is granted to Long Branch with respect to the § 1983 claim.