Mr. Brian Asarnow
55 Community Place
Long Branch, NJ 07740

732-870-2570

April 11, 2023

Civil Division, Clerk
Superior Court of NJ
Monmouth County Courthouse
71 Monument Park
Freehold, NJ 07728-1266

Ref: Motion for Reconsideration
Docket MON-L-1422-22

Dear Clerk:

Please file my hardcopy of the above and forward to the attention of Judge Acaquaviva, I have filed on JEDS and paid the fee. Certification of service appears on the first page of the Motion.

Very Truly Yours,

Mr. Brian D. Asarnow,
Plaintiff

BRIAN D. ASARNOW
55 Community Place
Long Branch, NJ 07740
732-870-2570

BRIAN D. ASARNOW,

Plaintiff,

vs.

City of Long Branch, A Municipal Corporation;
Edward Bruno and E&L Paving, Inc.;
63 Community Place, LLC;
Ray Grieco & Atlantic Paving (& Coating), LLC;
Jose A. Rosario, Jr. & Rosario Contracting Corp.,
Custom Lawn Sprinkler Co., LLC.;
R. Brothers Concrete, LLC

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY

Docket No. MON. L-1422-22

Civil Action

NOTICE OF MOTION FOR RECONSIDERATION (R. 4:49-2)

To:

Civil Div.Clerk, Monmouth County Superior Court, 71 Monument Park, Freehold, NJ 07749
Paul R. Edinger Esq, 211 Monmouth Road, Suite C, West Long Branch, NJ 07764
John F. Gillick, Esq., Rainone, Coughlin, Mincello, LLC, 555 Route 1 South, Suite 440, Iselin, NJ 08830

PLEASE TAKE NOTICE that the undersigned on the 28th day of April, 2023 at 9:00 a.m. in the forenoon or as soon thereafter as may be heard, will move before the Monmouth County Superior Court, Freehold, NJ for an order granting Plaintiff's motion for reconsideration and vacating some or all parts of the court's March 9, 2023 Order of summary judgment pursuant to R. 4:49-2

PLEASE TAKE FURTHER NOTICE that at the date and place of hearing to be fixed by the court, the undersigned shall rely up his Statement of Material Facts, and Brief in support. Oral argument is not requested unless requested by Defendants or the Court. No trial date has yet been set and no discovery has commenced.

PLEASE TAKE FURTHER NOTICE that a proposed form of order is submitted hereto.

CERTIFICATION OF SERVICE

I hereby certify that the original of the within motion has been filed with the Clerk of the Superior Court at Monmouth County Courthouse, 71 Monument Park, Freehold, NJ via hand delivery on April 21, 2023 and also uploaded on JEDS for use by counsel same day..

Date: 4/11/23

Mr. Brian D. Asarnow, Plaintiff

BRIAN D. ASARNOW
55 Community Place
Long Branch, NJ 07740
732-870-2570

BRIAN D. ASARNOW,

Plaintiff,

vs.

City of Long Branch, A Municipal Corporation;
Edward Bruno and E&L Paving, Inc.;
63 Community Place, LLC;
Ray Grieco & Atlantic Paving (& Coating), LLC;
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Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY

Docket No. MON. L-1422-22

Civil Action

BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION

Dear Judge Acquaviva:

Please accept my letter brief in support of my motion for reconsideration of your Order of March 9, 2023. I refer to and rely on the existing record in lieu of a separate Appendix to prevent duplication and save resources. Oral argument is not requested unless requested by Defendants or the Court.

Respectfully,

Mr. Brian D. Asarnow, Plaintiff

Dated: April 11, 2023

STANDARD OF REVIEW

Rule 4:49-2

"The time prescription of this rule applies to final judgments and orders. A motion to amend or reconsider interlocutory orders may be made at any time until final judgment in the court's discretion and in the interests of justice." See *Johnson v. Cyklop Strapping Corp.*, 220 NJ Super. 250 (App. Div. 1987) , certif. den, 110 NJ 196 (1988 and other cases under comments to this Rule.

"This rule is particularly useful where an opinion or order deals with unlitigated or unargued matters" See Calcaterra v. Calcatera, 206 NJ Super. 398 (App. Div. 1986). These motions have been funneled into that "narrow corridor" where either: (1) the Court has expressed its decision based upon a palpably incorrect or irrational basis; or (2) it is obvious that the Court did not consider, or failed to appreciate the significance of probative, competent evidence (3). or that there was good reason to consider new information. *Cummings v. Bahr*, 295 N.J. Super. 374, 384, 685 A.2d 60 (1996) (*citing D'Atria, supra*). Certainly, "if repetitive bites at the apple are allowed, the core will swiftly suffer." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401, 685 A.2d 60 (Ch. Div. 1990).

The Plaintiff brings this motion as the court has relied upon incorrect facts, omitted key points and expressed its decision based upon a palpably incorrect or irrational basis including contradicting public policy and flat out refusing to apply the Brill standard in denying all aspects of Plaintiff's motion and granting the City's Cross Motion to dismiss. Plaintiff provides and relies upon his below Statement of Misstated and Corrected Facts as basis for reconsideration of the court's Order and Reasons. Plaintiff refers to the prior record and exhibits thereto.

Statement of Misstated and Corrected Facts

1. Page 2, As to "Complaints substantially similar" the 2010 and 2011 matters and decisions thereto stem from challenging the 2009 zoning permit in both matters. The 2nd matter was dismissed with prejudice due to the same issue raised of the zoning permit and other permits - It says so in the Orders. See 2/6/23 supplemental brief exhibits pages 78-84. Judge Perri's entire decision is narrow and stems from that. (See 10/3/14 Perri Decision, City Exhibit C @ 112; 15-20: "Thus Plaintiff's claims against the city in this matter are duplicative of the claims previously dismissed by Judge Cleary on motions for summary judgment. And those claims, together with other claims or causes of action which arise out of those facts and findings, cannot be resurrected in this litigation" She recognized the unlawful expansion of use due to exceeding the conditions of the zoning permit and the numerous outstanding notices of violations and summonses as a separate matter to be heard in the municipal court . (See 10/3/14 Perri Decision, City Exhibit C @ 14, 70-74 and Plaintiff's Supplemental Brief Appendix pgs. 49-69 for violations and summonses outstanding in municipal court as of 10/4/17) It was damages, not a mandamus matter and no limitation of resources was considered as to why no abatement occurred for the discretionary acts of issuing the violations. The current complaint for mandamus stems from operating a contractors yard despite site plan rejection of same though the paving use again exceeds the conditions of the 8/3/09 zoning permit due to the presence of other businesses not on the zoning permit and as no other approvals exist. The footnote alleging "harassment and retaliation" due to long branch's refusal to act is false. No such count or allegation appears in remaining Counts 4-16 of that 1999 complaint (Privates Exhibit A) Harassment was due to other reasons, affirmative acts.

2. On page 4, (Pg 24) the holding "there was no clear and undisputed ministerial duty or exercise of discretion that's involved" lacks any context or citation to the record. Judge Cleary's Decision is absent from the record so not clear what it pertains to. Her dismissal was with prejudice based on failing to exhaust administrative remedies as to the zoning permit.

3. On page 4, in last paragraph, in 2017 Private defendants filed an application for "preliminary and final site plan approval and use variance", which was subsequently rejected, not a zoning permit (summary judgment fact 4a) The fact it was rejected is proof positive that they are operating the same use described in the zoning board Resolution of Rejection without site plan approval which is not as evident otherwise. As briefed, Ord 345-14, (Exhibit. A. pg. 10) requires site plan approval for any change or expansion of use, so the use is illegal and photos at various dates show the lots being used illegally, i.e. Exhibit I, Pages 108-117.

4. On page 5, as to the 2018 filing with the Planning Board due to recusal of zoning board members, Plaintiff disputed this stating the reasons are to get a better deal as the mayor sites on the planning board, and in fact an indefinite adjournment was obtained at the first hearing. As to a dispute whether the 2018 application differs from the 2017 zoning board application" per Plaintiff's 2/6/23 supplemental brief Point 1 and referenced Exhibit A, pgs 9-11 there's no dispute the planning board engineer report said the plans are identical if use is the same as for zoning board application and if so could not be heard. At page bottom, as to "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", the phrase "and not the use of a paving company" does not appear. Wherefore (A) states "That use permitted by zoning permit #080309-3 is for Atlantic Paving for use inside of the garage headquarters at 63 Community Place for a paving business …."

5. On page 6, 1st para fails to mention the appeal was rejected/dismissed. Also, as to "alternatively that the ordinance allowing the parking is unlawful" there is no such ordinance allowing the parking and no such statement. Plaintiff argued parking is unlawful in absence of curbs, siteplan approval or enabling ordinance. Plaintiff also had provision for contempt in Count Two. In Count Three Plaintiff alleges discrimination in enforcement constitute violations of Fifth and Fourteenth Amendments, not failure to enforce.

6. On page 8, para 3, As to "inconsistency" in not needing discovery as to the neighbors but required for the City, Plaintiff argued ones got nothing to do with the other. The fact neighbors operate without site plan approval contrary to ordinance is undisputed (see fact 3 above) as are others, a reasonable fact finder would find. On page 9, pp 2, there was also an appeal dismissal.

7. On page 10, para 4 the court admits "both the underlying facts and requests for relief in that (2011) matter were distinct from the present matter" which contradicts its position the lawsuits are substantially similar involving substantially similar underlying issues.

8. On page 11, at bottom, the court omits Point 1 of Plaintiff's brief as to how and why it's a new complaint and Point II that no limitation of resources was ever claimed for the failure to abate the zoning, code and parking issues following notices of violations or other meager enforcement attempts. As to (5) "parking across the street where no curbs exists is illegal", the 10/10/22 opra response (12/9/22 Reply Cert., Exhibit B) shows no parking ordinance or site plan was received or obtained and no disputing evidence was received in response to Plaintiff's undisputed SJ Fact 14 so the parking is not legal on that basis and the standard should be applied.

9. On page 12 para 2, as to "there is no indication that the utility vehicles are operated on the property or just housed on same" its still a yard. they are not on any zoning permit, no site plan approval per ord. and shouldn't be there at all . In para 2, as to "outdoor construction yard" not defined by ordinance, the term "yard" appears on the 8/3/09 zoning permit (SJ Fact 10A, Exhibit O pg 187) and appears in the zoning board resolution . See fact 4c: "the application sought "variance/site plan approval to utilize new lot 19.02 as a construction yard, storing construction vehicles and construction materials in areas designated for a paving company" It can be called anything. The use, and occupants is what matters. The same 4 companies mentioned in the Resolution are operating their businesses outside on lot 19.02. As to the term "industrial" not argued, see fact 4d. "Companies doing masonry, asphalt, contracting and irrigation work are industrial uses not permitted in the City's C-2 Commercial zone District and require use variance for that as well as for expanding a non-conforming use" Plaintiff's allegation of "operating an outdoor construction yard" is not an allegation but undisputed fact ripe for summary judgment. Discovery will not change that.

10. On page 13, bottom , as to recognition of the paving company use in the Resolution, as reason the lot cannot be cleared, the statement is not definitive , uses the word "may", does not define the extent of the use and generally states that "lawful pre-existing non-conforming uses are allowed to continue" As such it in no way replaces the deposition testimony of Carl Turner, former assistant planning director who oversaw the issuance of the zoning permit, that the paving company use is to be contained inside the original garage. As briefed, (2/6/23 supplemental brief Point 1) two distinct uses are operating - the paving company and the outdoor contractors yard with other businesses. Private Defendants allege the paving use has somehow morphed into a legal multi contractors yard. See also Fact 14 infra.

11. On page 14 para 3, as to "Asarnow cites no binding let alone persuasive, legal authority to support his request for the requested remedy" of vacating the lots pending site plan approval, the 8/3/09 zoning permit lists only Atlantic Paving and as briefed (Points V, VI , fact 10 supra) that use is either abandoned or to be contained inside and the multi contractor yard use was rejected, so the lot should be empty. The zoning officer was relying on injunctive relief afforded under NJSA 40:55D-18 of the MLUL which is still in effect today. Injunctive relief means abatement which means the illegal use is discontinued and the lots therefore cleared. Black's Law dictionary defines abatement of a nuisance as "the term used when a nuisance has been removed"

12. On page 15, para 2, as to "not clear whether the "buffers and associate tree plantings existed prior to the Private Defendant's application" the cited Exhibit X photos, pg 229 show installation 10/11/19 - 10/18/19 on Community Place. The Resolution Denial was 7/10/17 and the planning board adjournment 7/16/19 so the buffer is illegal and should be removed along with the illegal use.

13. On pg. 18, para 3, as to no abandonment of the paving company use, the official NJ business status of the business since 1/16/2009 is "revoked license" and no records were otherwise provided responsive to summary judgment facts 10a-10d showing the business operating. The court failed to apply the Brill standard and grant summary judgment on that basis. As to "mere passage of time during a cessation of active use, without more, does not constitute abandonment" the lack of submission provides the "more.". Furthermore, the court fails to consider a zoning permit is needed by a successor paving company in order to obtain a certificate of occupancy and no other paving company or application exists. (Supplemental Brief Point I)

14. On page 19, para 1, as to "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" the court fails to consider 2 uses exist on the lot and appears to reason incorrectly that the paving use has somehow morphed into the multi contractors use. See fact 10 supra. In para 3, as to "Asarnow does not indicate, and the court could not locate, any definitive conclusion about the scope of the (zoning) permit therein" pg 220, Exhibit V of the transcript of the deposition of Mr. Turner former assistant director of planning and zoning, states he doesn't know why all the lots are on the zoning permit and on pg 225 states "that the business, the conducting of the business was specifically restricted to the operation being contained within the building" As to "nor does he demonstrate how Turner's deposition in a prior litigation is conclusive in the absence of discovery in this litigation" R.4:46-2c **Proceedings and Standards on Motions** states "The judgment or order sought shall be rendered forthwith 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." No further discovery is required on this point. The conditions of use on the zoning permit have not changed since the prior matter. Defendants had opportunity to appear and cross examine Mr. Turner.

15. On page 19, in last para, as to the illegal parking, the court notes its across from Asarnow's property but there's no mention whatsoever by Plaintiff of loading zones in that point VII or "across" from Plaintiff's property which explains why no loading zone signs there. Point VII heading states "No genuine issue of material fact that parking across street where no curbs exist is illegal" Per the court's reference to the loading zones ordinances, the loading zones are on Plaintiff's side of the street and covered in Point VIII. (See 16 infra)

Verified complaint says blk 237 lot 22 is Plaintiff. Tax map (Exhibit W, pg 227) shows Plaintiff's location and photos pg 229-231 clearly show the **area across is without curbs** and cars parking there obstruct egress.

16. On Pg 20 @ bottom, as to garbage and things on and in front of Plaintiff's property in the dead end loading zone, "Asarnow's brief refers to "Solid Waste Recycling Ordinance 293," but does not cite a specific provision within that ordinance" however see Brief Pt VIII "Per material fact 15, property owners also may not place their garbage for collection in front of someone else's property under sections O and Q of Solid Waste & Recycling Ordinance 293. The end of the street in front of Plaintiff's property is also a marked loading zone per ordinance #21-20 so no parking of vehicles or placement of equipment is allowed there either though occurring." This, along with Plaintiff's 5th amendment right to peaceful possession should, respectfully, be enough to make at least a declaration prohibiting same. Furthermore, the code official on 5/10/21 was given a copy of same ordinance sections (Exhibits, Page 124)

Further, on Pg. 21, as to "no context to where garbage located" photos pg 110, 111, 115 shows wall in front of of Plaintiff's property and garbage in front of same wall. Tax map also provided (Exhibit W, pg 227) shows the dead end. Photos 167, 232 show the loading zone sign & garbage in front and on property and also poles on the ROW. Photos on 5/25/21 (pgs. 158,159), 9/30/21 (pg 167 per letter) and 6/17/22, 7/25- 8/26/22 (Pg. 110, 111) 10/9/22 (pg 115), 10/23/22 (pg. 232) shows vehicles garbage and things is continuous problem. The privates failed to respond to/dispute Material Fact 15d which includes Exhibit J pg 121 mentioning photos and videos of a mega pallet placed 3/18/21 in the loading zone by Rosario's guy and Pg 126 documenting the removal of large tires and pallet of batteries following the 2/5/10 Notice of violation (City's Exhibit A) to Rosario for dumping same and preventing removal of Plaintiff's branches though noting Rosario immediately placed trash cans in the same area contrary to aforementioned solid waste ordinances. Clearly the solid waste issue is emanating from Rosario a reasonable trier of fact would find. Why would Plaintiff place such trash there and make complaint about his own trash?

17. On page 23/24, as to Plaintiff seeking enforcement in the 2010 and 2011 complaints of "parking Ordinances", no enforcement of any parking ordinances was sought. Plaintiff sought the no parking zone areas delineated on Plaintiff's approved site plan to be enforced with painting of yellow lines which is not the same as abating illegal parking across street where no curbs exist. (Opinion A-0999-10T4 pages 16, 17 in Private's Appendix A, "Opinion on Appeal" At bottom of pg 24, as to "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", nowhere in Plaintiff's briefs or Counts One and Two of the Complaint which are for declaratory and equitable relief respectively are damages mentioned at all. Fact 26 of the Complaint seeks "equitable" relief pursuant to the MLUL and local ordinance. Point II of Plaintiff's briefs entitled "no lack of resources preventing termination of violations , bad faith evident" simply states that immunity is lost if discretionary and ministerial acts such as enforcement are palpably unreasonable under NJSA 59:2-2d of the tort claims act. Under 59:3-14, actual malice or willful misconduct will cause immunity to be lost. Plaintiff was denied any discovery on this or anything else due to the hasty dismissal of Long Branch and the court made only quick mention if any of this entire Point in its Order/Reasons.

18. On page 28, para 3, as to Asarnow's claim falling outside the scope of the narrowly delineated contexts (of nuisance and workplace discrimination) in which the continuing tort doctrine is recognized, the court fails to add mandamus cases such as *Mullen v. Ippolito* and *Garrou v. Teaneck Tryon Corp*. Mullen's action was filed 13 years after first seeking enforcement. In Mullen, the court in its decision used phrases such as "plaintiff's repeatedly complained"; "laws have gone unaddressed by those responsible for their enforcement over an extended period of time"; " over the years , plaintiff's saw these alleged unlawful activities continue unabated" indicating a continuous tort though not expressly calling it that.

19. On page 32 @ bottom unlike Mullen and Garrou "Asarnow has not presented clear evidence of the alleged illegal use or zoning violations" See, i.e. Fact 3, 15, 16 supra . On page 33, as to Long Branch's so called

enforcement efforts unlike Mullen, the zoning board denial cannot be construed as enforcement and zoning boards don't enforce and are theoretically independent from the local government. The loading zones and no parking therein were installed due to and following the 2011 complaint. As briefed, only 2 de minimus notices of violations issued since the 2017 zoning board rejection and did not result in summonses and fines and failed to abate the issue of ongoing garbage and zoning violations. Nothing whatsoever was attempted or done about the illegal parking.
The 2/5/10 Notice of Violation issued for dumping large tires and debris which prevented collection of Plaintiff's leaves and branches as well as a pallet of batteries. (City's Exhibit A). It mentions Defendant's dormant zoning board application but issues no warning or violation for same.
A 3/27/20 Notice of Violation (2/10/23 Supplemental Brief Addendum) followed which pertains to the Morris Ave. portion of lot 19.01. It requests the indefinitely dismissed planning board app. be reinitiated to prevent enforcement, though the app is identical to the zoning board app. and would not be heard. See Fact 4 supra. Defendants are to remove all outdoor storage from Morris Ave. and restore a sidewalk (which never existed and was subsequently added by the City under guise of the train station improvements) and install a live tree berm which is actually an illegal buffer as showing on the rejected site plan (See Fact 12 supra and Complaint @ 42), all evidence of collusion and willful misconduct by Long Branch as is the indefinite adjournment.

Once discretion is exercised, it must be done correctly and completely or may be palpably unreasonable, as determined by a jury, if no limitation of resources exist. See *Fitzgerald v. Palmer*, 47 NJ 106, 109, 219 A2d 512 1966) and successive cases. See *Coyne v. State Dept. of Transportation*, 182 NJ 481 (2005). At page bottom as to no damages, Plaintiff noted the property damage, and appraisals used by the zoning and tax boards as to the ongoing depreciation. Regardless whether leases have been affected, appraisals and common sense evidence that a buyer would pay more for Plaintiff's property were a beneficial as opposed to a detrimental use present on the neighbor's lot, including a cul de sac at the end of a dead end street in an industrial zone.

Plaintiff's Motion for Partial Summary Judgment:

Plaintiff has provided the true facts supra juxtaposed with the court's provided facts and simply asks the court to reconsider all the points using these as it assuredly would result in a totally different outcome, This is contemplated in the first 2 prongs of the R.4:49-2. At least one well seasoned attorney has consulted on Plaintiff's summary judgment submissions.

POINT I
NO GENUINE ISSUE OF MATERIAL FACT THAT PLAINTIFF BRINGS A NEW COMPLAINT FREE FROM LACHES

Plaintiff relies on Facts 1-16 supra which are absent from prior Complaints and notes that as to Fact 7, on page 10, para 4 the court admits "both the underlying facts and requests for relief in that (2011) matter were distinct from the present matter" which contradicts its position the lawsuits are substantially similar involving substantially similar underlying issues. (Pg 10, para 6) The former statement is correct. The 2011 complaint sought damages invoking the tort claims act and stems from the issue of challenging the 8/3/09 zoning permit. Plaintiff's current complaint seeks equitable relief as to the privates due to rejection of the outdoor use by the zoning board as well as again exceeding the conditions of the 8/3/09 zoning permit. Mandamus is sought as to

the City as well as damages under sec 1983 for discrimination in enforcement. See Fact 1 supra.

The claim that its nothing new should not suffice as operating despite the site plan rejection is a new and serious matter which violates the public interest.

POINT 111
NO GENUINE ISSUE OF MATERIAL FACT THAT THE USE IS ILLEGAL AND TO BE TERMINATED AND LOT 19.01 CLEARED PENDING SITE PLAN APPROVAL

Plaintiff refers the court to facts 3, 4, 9, 10, 11, 14, 19 supra and respectfully requests the Point be reconsidered using these true facts of record.

POINT 1V
NO GENUINE ISSUE OF MATERIAL FACT THAT THE BUFFERS AND TREE PLANTINGS ON COMMUNITY PLACE & MORRIS AVENUE USED TO COVERUP THE ILLEGAL USE, ARE ILLEGAL IMPROVEMENTS

Plaintiff refers the court to fact 12 supra and respectfully requests the Point be reconsidered using these true facts of record.

POINT V
NO GENUINE ISSUE OF MATERIAL FACT THAT ATLANTIC PAVING WHICH OBTAINED THE 8/3/09 ZONING PERMIT AND MADE ZONING & PLANNING BOARD APPLICATION IS NOT OPERATING AND ABANDONED THE USE. LOT 19.01 SHOULD BE VACANT PENDING SITE PLAN APPROVAL

Plaintiff refers the court to fact 13 supra and respectfully requests the Point be reconsidered and the Brill standard applied. Since the multi contractors use is illegal and the paving use is abandoned or at least not currently operating, the lot should, respectfully, be vacated forthwith pending site plan approval.

POINT VI
IF THE PAVING COMPANY USE IS NOT ABANDONED, IT IS RESTRICTED TO THE INSIDE OF THE GARAGE HEADQUARTERS

Plaintiff refers the court to facts 10, 11 supra and respectfully requests the Point be reconsidered using these true facts of record.

POINT VII
NO GENUINE ISSUE OF MATERIAL FACT THAT PARKING ACROSS STREET WHERE NO CURBS EXISTS IS ILLEGAL

Plaintiff refers the court to facts 5, 8, 14, 15, 17 supra and respectfully requests the Point be reconsidered using these true facts of record.

POINT VIII
NO GENUINE ISSUE OF MATERIAL FACT THAT NO ONE OTHER THAN PLAINTIFF HAS A RIGHT TO PLACE ANYTHING ON OR IN FRONT OF HIS PROPERTY IN THE LOADING ZONES INCLUDING SOLID WASTE

Plaintiff refers the court to fact 16 supra and respectfully requests the Point be reconsidered using these true facts of record.

Long Branch's Summary Judgment Motion:

Preclusive Doctrines Inapplicable:

Res Judicata Absent:

The city and court admit Plaintiff has added more recent facts (Reasons page 23) and also maintain that the current complaint has "the same conduct, seeks same relief and has the same parties as the 2011 complaint " and is barred by the doctrine of res judicata (Reasons page 24). The court has failed to consider Point II of Plaintiff's 2/6/23 Supplemental Brief wherein the US Supreme Court explained more than 60 years ago in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), res judicata does not bar a suit, even if it involves the same course of **wrongful conduct**, so long as the suit alleges **new facts** or a **worsening** of the earlier conditions. The new facts of wrongful conduct stemming from operating a rejected use on an ongoing basis and contrasting with issues and claims in prior cases, and the fact that the wrongful conduct continues on an ongoing basis has most certainly caused a worsening condition of further harm and interference with Plaintiff's operations and loss of peaceful possession a reasonable trier of fact could find. As to the court's holding that Plaintiff's sec. 1983 claim is barred (Pg. 25) as similar to that of 2011 which was immunized under the tort claims act, see infra. The issue of immunity was not fully adjudicated and if, arguendo the claim and relief sought is similar, the situation has certainly gotten worse since 2011 based on the new facts of discriminatory enforcement and length of time involved.

Also, the conditions of the zoning permit are permanent and again being exceeded and as briefed, res judicata cannot pertain for even the same continuing violations. Nothing in judge Perri's decision prevents this. See Facts 1, 10, 11, 14 supra. Only Atlantic Paving should be operating there and in the garage.

Collateral Estoppel Absent, Discretion Excercised, Failure to Abate Palpably Unreasonable or due to actual Malice or Willful Misconduct:

The city and court initially used the same conduct argument as to collateral estoppel though conduct is in the realm of res judicata. As briefed, collateral estoppel pertains to relitigating of issues. Plaintiff noted how the 2010 and 2011 matters stem from issuance of the zoning permit and the current complaint from continuing to operate a contractors yard despite rejection by the zoning board and on appeal. The dismissal with prejudice by judge Cleary was due to failure to exhaust administrative remedies, the dismissal with prejudice by Judge Perri was due to raising the permits issues again (despite that damages had not accrued in the earlier matter) The rest of Judge Perri's reasons flowed from that narrow issue. See facts 1& 2 supra. The permits are not at issue in the current matter.

Unlike the 2011 Complaint, Plaintiff has not implicated the tort claims act as of yet in the pleadings in the current matter. Fact 17 supra. As briefed, Plaintiff provided tort notice to document the accrual of the cause of action, when it appeared nothing was going to be done by Long Branch to abate the trifecta of violations, and to preserve options. Plaintiff initially brought the matter in Chancery against only the neighbors seeking equitable relief but that was not forthcoming and the matter transferred to the law div. as the court "wanted to hear from Long Branch" though now claiming only the neighbors should again be involved in a nuisance matter as the "adequate remedy". The U.S. Supreme Court in *Wallace v. Kato, 549 U.S. 384, 388 (2007)*, stated that a claim accrues "when the plaintiff has a complete and present cause of action." not when a court imposes one to enable dismissal.

Plaintiff did not bring a complaint for damages against Long Branch under the tort claims act and "immunity provided governmental entities under Tort Claims Act is limited to tort based liability" per *Pinkowski v. Township of Montclair*, 299 NJ Super 557, 691 A2d 837 9AD 1997)

Nevertheless, as the court has imputed a claim for damages invoking the tort claims act (Fact 17 supra) and used it to dismiss Long Branch citing laches, res judicata and collateral estoppel, Plaintiff raised the issue of bad faith in Point II and should have been entitled to determine thru discovery whether Long Branch's failure to abate on behalf of Plaintiff is palpably unreasonable or due to actual malice or willful misconduct.

NJSA 59:2-3d provides " A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. "The exercise of discretion is a high level policy making decision". *L.S. v. Mount Olive Bd. Of Ed*, D. NJ 2011, 765 F.Supp. 2d 648. Plaintiff approached the mayor and entire city council who refused to abate the violations as nothing new. However two notices of violations, though de minimus had issued regarding the zoning and solid waste issue and use of Plaintiff's property but the issues were not abated/ended.

Discretionary acts, such as issuing even a notice of violation in name only, not meant to abate anything, Once undertaken must be done correctly and completely. See fact 19 supra. This principle was considered by the appellate div. in the appeal of the 2010 matter as to the 2010 notice of violation which Plaintiff sought corrected and enforced. See, A-0999-10T4, Private's Exhibit A @ II, wherein

"In the second count of his complaint, plaintiff sought a court order compelling the City to enforce its violation notice. Significantly, the City's Director of Building and Development and Fire Marshall issued the violation because Atlantic Paving had expanded the use of the property beyond the zoning permit that had been issued to it in August 2009. Plaintiff did not allege that the violations for which Atlantic Paving was noticed existed after the February26, 2010 inspection referenced in the notice. And, as the trial court implied, plaintiff had not sought any relief, including injunctive relief,against the non-municipal defendants." However the court earlier in the opinion acknowledged *"Photographic evidence of the E&L or Atlantic Paving properties indicate that the violations still existed on April 29, 2010"* and Plaintiff included the issue in his brief, so it should have been acted upon in good faith

N.J.S.A. 59:3-14 provides, "Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct." Also, per NJSA 59:2-2a, the public entity could likewise be liable due to the employee being liable. Plaintiff seeks interrogatories and depositions of city officials on what prevented abatement. Collusion is willful misconduct a jury could find. See Facts 17, 19 supra. If found to be so, the City loses immunity so dismissal was premature on that basis. Also, as per Plaintiff's Reply Brief, Point I, nowhere in Judge Perri's transcript decision does she consider that no limitations of resources was ever claimed by Long Branch and that bad faith may exist as the reason for no enforcement in accordance with the above so the issue of immunity was not fully adjudicated and cannot be used as a basis to preclude liability for damages or relief

using collateral estoppel as the court holds at top of pg 25. It unfortunately appears common practice for the courts to ignore this exception which enables such conduct by public entities like Long Branch.

In addition, in some states, damages incidental to Mandamus are recognized. *Eichenlaub v. Township of Indiana* 385 F.3d 274 (3d Cir. 2004 citing *Stoner v.Township of Lower Merion*, 587 A2d 879, 885 (1991)

Also, as to dismissal of the sec 1983 claim based upon immunity, per *Mancini v. Lester, C.A.* 630 F2d 990 (1980) "provisions of NJ tort claims act, excusing municipalities and their officials from liability with respect to discretionary acts, could not provide immunity as respects an alleged violation of plaintiff's federal constitutional rights" so Judge Perri's narrow ruling does not alone immunize the current 1983 claim which must be freshly considered. Furthermore, as briefed, (Reply Point I) Plaintiff obtained an Order of summary judgment in the 1999 complaint which was not immunized by the tort claims act and evidences this very fact. Judge Perri's ruling did not undo *Mancini v. Lester* or the supremacy clause of the US Constitution.

Statute of Limitations – Mandamus not Precluded:

As to time limited laches and relation to Mandamus and Mullen and Garrou see facts 18 and 19 supra. Mullen's action was filed 13 years after first seeking enforcement. The only difference between that matter and Plaintiff's is Mullen involved a residence and Plaintiff a business property upon which taxes are paid and peaceful possession and enforcement of laws is similarly expected. Also Mullen alleges absolutely nothing done to enforce in order to utilize mandamus, though perhaps telephone calls to superiors and other measures can be construed as enforcement efforts, while Plaintiff argues de minimus notices meant to evade Mandamus were issued. not meant to abate the trifecta of issues but rather to evade Mandamus – a charade at enforcement. if you will.

Considering the close similarities of the matters but for residential versus commercial property, the imposition of the strict accrual period to the 2019 indefinite adjournment accords automatic bad faith to the planning board's action while the TCA is based upon conduct taken in good faith so this is irrational, contrary to public policy and subject to reconsideration per R. 4:49-2. Plaintiff argued he allowed for covid and assumed the plan was being worked on in good faith though it was subsequently deemed withdrawn for lack of prosecution as had occurred 3 times prior over the years. Plaintiff acted when it became clear no action would

be taken by Long Branch similar to Mullen. Imposing an accrual period back to the 2011 complaint is even more disturbing and contrary to Mullen. In imposing the 45 day period used for prerogative writs, the court fails to consider that Plaintiff is not appealing an adverse decision of a zoning or planning board or other local agency. Nevertheless per Mullen, a relaxation of the time restrictions is warranted "where it is manifest that the interest of justice so requires" Plaintiff's action also serves a public purpose and members of the public including from Long Branch expressed an interest and attended the oral argument and wonder how a public entity can get away with not enforcing its laws for many years.

Per Garrou @ VI "*If, as his showing indicates, there was a clear violation of the zoning ordinance, his proceeding to eliminate the unlawful use serves not only his private interests but those of the entire community as well and, under such circumstances, the equitable doctrine of laches should be hesitatingly invoked. See Stokes v. Jenkins, supra. 107 N.J. Eq. 318 (N.J. 1930) 152 A. 383.* See also Auciello v. Stauffer, 156 A.2d 732 (N.J. Super. Ct. App. Div. 1959)

The court failed to consider this in dismissing based upon time laches and should reconsider this aspect.

Further as to Mandamus, the court finds Plaintiff's complaint against Long Branch is barred due to res judicata and collateral estoppel and presumably too against the neighbors for res judicata (Pg, 24 "same conduct, same relief, same parties" – though its not actually – see res judicata supra) who did not file summary judgment but simultaneously claims Plaintiff has other adequate remedy in a nuisance complaint which therefore bars Mandamus. Why would res judicata apply to Long Branch and not the neighbors based upon the same facts? Can the court have it both ways? Is Plaintiff to engage in futility and file a nuisance complaint only to find its dismissed by directed verdict or otherwise at or after trial due to res judicata or collateral estoppel?? That is irrational and subject to reconsideration per R.4:49-2. Plaintiff also mentioned that *Mullen v. Ippolito* sought both compensatory damages and mandamus relief and the mandamus was nevertheless ultimately granted. On that basis dismissal of Long Branch is also in error. Nevertheless, Plaintiff is seeking leave to amend his complaint to add the new continuing nuisance.

"Relying primarily on Garrou v. Teaneck Tryon Co., 11 N.J. 294, 94 A.2d 332 (1953), plaintiffs argue (in Mullen) that the trial court should not have dismissed their complaint against the municipal defendants because they have shown that: (1) there have been clear violations of local zoning and public safety laws, (2) the violations have particularly and adversely affected their right to the quiet enjoyment of their home, and (3) the violations have remained ***unabated*** *despite having been duly brought to the attention of the relevant municipal officials."* Per fact 11 supra, Black's Law dictionary defines abatement of a nuisance as "the term used when a nuisance has been removed"

A review of the 2 notices of violations issued to the neighbors, Fact, 19 supra, evidences Plaintiff's de minimus contention. Fact 16 and pg 126 evidences that the single enforcement effort was short lived and Rosario immediately thereafter placed garbage cans and then other things in place of the removed items. No other violations notices were obtained in regards to abating the ongoing solid waste **issue** of which Plaintiff provided numerous photos on many dates. See Fact 16 supra and Material Fact 15d. There's absolutely no documentation in the record that Rosario and 63 Community Place, LLC were even issued a notice of violation to abate the illegal parking **issue** across from Plaintiff's driveway. There was no evidence or argument by the city that Plaintiff was continuously calling or writing about the violations every time he took a photo to justify the city and court's position "its the amount of enforcement that's at issue" (pg. 33) and that Plaintiff "may need his own police department" for all the violations. (oral argument)

Plaintiff distinguishes between charades at enforcement, temporary abatement of incidents and abatement of long standing ordinance violation **issues**. Mandamus should be applicable to abating the **issue** of the continuing violations when no serious abatement efforts are undertaken after repeated attempts.

The court properly asked at oral argument whether any fines were paid to abate the violations. Plaintiff argued how if the city enforced its ordinances thru summonses and fines of up to $2000 per day that would **abate** the **issues** and there would be no concern of limitation of resources. It could be fairly stated that no serious effort was undertaken to abate the ongoing zoning and code issues which are ongoing and continuous and that Mandamus is in order per Mullen and Garrou.

POINT 11
NO LACK OF RESOURCES PREVENTING TERMINATION OF VIOLATIONS. BAD FAITH EVIDENT

It may be seen that either the City exercised its discretion in issuing two notices of violations and also in refusing to take action after the 3 zoom council hearings, and must therefore in good faith abate the ongoing zoning and zoning violations/issues thereto (See fact 19 supra and Point I preceeding) or, more realistically as per Point 1, they did essentially nothing about any of the 3 issues and are subject to mandamus as per Mullen and Garrou. If the former, a jury gets to determine if palpably unreasonable or even actual malice or willful misconduct for which immunity is lost and dismissal improper. If the latter, dismissal is again,

respectfully improper and in error as to the first 2 counts on that basis.

Plaintiff's sec 1983 Claim:

As to Plaintiff's 1983 class of one claim, Plaintiff's opposition certification, Exhibit A shows a notice of violation was issued to at least one other business property in Long Branch, Gabriels Towing & Recovery for zoning and code violations including outdoor storage. Discovery would indicate whether further violations or summonses resulted and whether it was abated and if other business properties have been similarly violated, especially for outdoor storage. Outdoor storage is generally prohibited by Ordinance and enforced except around Plaintiff it appears. All the Notices of Violations in Plaintiff's Opposition Brief Appendix complain of outdoor storage. Even residential properties with similar zoning and code violations could be considered similarly situated by a jury. The court's holding that the properties must be similar in all respects to Plaintiffs is harsh and can never be met anywhere by anyone and therefore conflicts with the intent of the caselaw. Under the court's standard, a pink house may not be similarly situated to a blue one though identical in all other respects. Plaintiff alleges and documents (Complaint @ 40-44) some of the collusion and corruption behind the City's refusal to abate any of the 3 issues since the 6/19/18 zoning board appeal or at least since the 7/16/19 indefinite adjournment which a jury would find "shocks the conscience and meet the requirements of a "class of one" claim. See, i.e. Eichenlaub supra.

CONCLUSION

For all the reasons stated prior and herein in support of this motion, Plaintiff's motion for reconsideration should be granted on all Points .

Respectfully Submitted,

Mr. Brian D. Asarnow, Plaintiff

Date: 4/11/23