PREPARED BY THE COURT

BRIAN D. ASARNOW, Plaintiff(s), vs. CITY OF LONG BRANCH; EDWARD BRUNO; E&L PAVING INC.; 63 COMMUNITY PLACE, LLC; RAY GRIECO; ATLANTIC PAVING (& COATING) LLC; JOSE A. ROSARIO; ROSARIO CONTRACTING CORP.; CUSTOM LAWN SPRINKLER CO. LLC; R BROTHERS CONCRETE LLC, Defendant(s).	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY Docket No: MON-L-1422-22 Civil Action **ORDER**

THIS MATTER having been brought before the Court by way of a Motion for Summary Judgment, filed Paul Edinger, Esq., appearing on behalf of Defendants 63 Community Place, Ray Greico, Atlantic Paving (& Coating) LLC, Jose A. Rosario, Rosario Contracting Corp., and Custom Lawn Sprinkler Co. LLC, and a Cross-Motion for Summary Judgment, filed by Plaintiff Brian D. Asarnow, appearing self-represented, and the court having considered the pleadings submitted, having heard oral argument, and for good cause shown;

IT IS on this **28th** day of **AUGUST,** 2024;

ORDERED that,

1. The Private Defendants' motion for summary judgment is **GRANTED, in part.** All reliefs sought by Mr. Asarnow that relate to municipal action, enforcement of ordinance and/or permit, and/or relate to violations of governing municipal permits, ordinance, etc., and/or challenge the proprietary of municipal action are barred. Mr. Asarnow's private nuisance cause of action seeking monetary and declaratory relief may proceed. However, Mr. Asarnow is barred from introducing any evidence regarding alleged nuisance activity/conduct prior to June 11, 2015 – the date of a prior jury verdict.
2. Mr. Asarnow's cross motion for summary judgment is **DENIED.**

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.

/s/_____

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

Statement of Reasons

This litigation is the latest episode in an on-going feud between, on one side, Plaintiff Brian Asarnow, and on the other, his neighbors, Defendants Ray Greico, Jose A. Rosario, Atlantic Paving & Coating LLC (Atlantic), Rosario Contracting Corp. (Rosario Contracting), Custom Lawn Sprinkler Co., LLC (Custom Lawn), and 63 Community Place LLC (63 Community Place) (collectively, the "Private Defendants") and the City of Long Branch.

Put simply, Mr. Asarnow owns a commercial property at 55 Community Place. The Private Defendants own an abutting property at 63 Community Place (the Property). The Property is unique in that it is situated within three zones – commercial, industrial, and residential.

Boiled to its core, since at least 2009, Mr. Asarnow has taken umbrage with Long Branch's issuance of a permit to the Private Defendants and the Private Defendants' use of the Property. When Mr. Asarnow's letter writing campaign at the time of this permit failed to achieve his desired result, he filed a prerogative writ action in Superior Court against Long Branch that was dismissed. The Appellate Division affirmed.

While his appeal was pending, he filed a serial action against Long Branch and the Private Defendants in Superior Court. Although Long Branch was dismissed from the case, his claims for nuisance against the Private Defendants

went to a jury. The Private Defendants prevailed. The Appellate Division again affirmed.

Nevertheless, tensions continued to simmer. Now, the third iteration of this on-going, near two-decade dispute is before this court.

In March 2023, this court granted summary judgment to Long Branch finding that those claims were barred by a variety of preclusive doctrines and applicable statutes of limitations, as well as on substantive grounds.

What remains is Mr. Asarnow's claims against the Private Defendants which, at bottom, is a nuisance claim seeking monetary and injunctive relief.

The Private Defendants now move for summary judgment, asserting preclusive doctrines. Mr. Asarnow cross-moves for summary judgment, contending the Private Defendants fail to appropriately counter his case.

At day's end, and for the reasons that follow, Mr. Asarnow's private nuisance cause of action may proceed to a jury. However, the Private Defendants' alleged, unreasonable, offending conduct must be limited to actions that post-date the June 11, 2015 jury verdict. Serial litigation on private nuisance is allowed; do-overs are not.

In addition, although Mr. Asarnow may seek monetary and injunctive relief against the Private Defendants for alleged nuisance, he is barred by the doctrine of laches from collaterally or indirectly seeking relief from the Private Defendants

that falls within the ambit of municipal authority. Thus, to the extent he seeks to have the use of 63 Community Place deemed impermissible or that the use is in violation of permit or ordinance, such are municipal functions and, due to Mr. Asarnow's delay in filing this action following his actual or constructive knowledge of the alleged conduct, such are time barred.

Statement of Facts

This litigation spans decades. A recounting of the past is warranted.

In 1995, Mr. Asarnow purchased commercial property located at 55 Community Place in Long Branch. Mr. Asarnow uses that property for light manufacturing and to rent to similar businesses. Mr. Asarnow's property abuts 63 Community Place (Property).

Community Place "dead-ends" at the Property. The Property is uniquely zoned, situated within Long Branch's C-2 (Commercial), I (Industrial), and R-4 (Residential) Zones.

Greico, Rosario, Atlantic Paving & Coating LLC (Atlantic)[1], Rosario Contracting Corp. (Rosario Contracting), Custom Lawn Sprinkler Co., LLC (Custom Lawn), and 63 Community Place LLC (63 Community Place) (collectively, the "Private Defendants") have various connections to the Property. Edward Bruno purchased the Property in the 1960s to operate an asphalt

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

paving business, E&L Paving, Inc. (E&L). Thereafter, Bruno leased the Property to other contractors.

In 2009, Bruno rented the Property to Greico and Rosario. Greico operated Atlantic and Rosario operated Rosario Contracting and Custom Lawn on the Property.

In 2018, 63 Community Place purchased the Property, with Bruno and E&L holding the mortgage. Greico and Rosario are 63 Community Place's principals. According to Mr. Asarnow, the remaining Private Defendants operate businesses on the Property.

Heavy machinery including pavers, rollers, backhoes, tractors, dump trucks, and excavators are used and stored at the Property. While Rosario parks his trucks on the Property, other employees at the Property park on the street.

Procedural History

Much of Mr. Asarnow's case focuses on a 2009 zoning permit (2009 Permit) issued to E&L and Atlantic. The 2009 Permit application identified the Property's then-existing use as "mixed use" for "paving company [and] other contractors." (Emphasis added). 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 2009 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.'"

Based on the 2009 Permit, Mr. Asarnow commenced a letter writing campaign to have the 2009 Permit revoked, albeit 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 2009 Permit's allowance.

In 2010, Mr. Asarnow filed a complaint in lieu of prerogative writ against the Private Defendants, the City of Long Branch, and others.[2] Mr. Asarnow alleged that Long Branch improperly issued zoning and construction permits to E&L and failed to enforce its ordinances.

The complaint was dismissed with prejudice. Judge Patricia Del Bueno Cleary concluded Mr. Asarnow failed to join indispensable parties and failed to exhaust administrative remedies. Judge Cleary further held Mr. Asarnow failed to

[2] Asarnow v. City of Long Branch, E&L Paving, et al., MON-L-2153-10.

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 Property's use was permitted by ordinance in the commercial and industrial zones.[3] Further, the Appellate Division noted that according to Mr. Asarnow, E&L had a history of zoning violations at its property dating back to 1985. The record showed that Long Branch had enforced the ordinances and issued numerous violations to E&L, despite Mr. Asarnow's contentions to the contrary.

In 2011 – while the appeal of Judge Cleary's order was pending – Mr. 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.[4]

In October 2014, 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 Mr. Asarnow's failure to present a prima facie case for each respective claim.

---

[3] Asarnow v. City of Long Branch, No. A-0999-10T4, 2013 N.J. Super. Unpub. LEXIS 1051 (Super. Ct. App. Div. May 6, 2013).
[4] Asarnow v. City of Long Branch, et al., MON-L-4039-11.

Due to the entry of summary judgment, a large part of Mr. Asarnow's complaint dissipated. Any of the issues involving the issuance of the zoning permit which permitted the Private Defendants to operate at the Property were resolved as, in essence, the use was deemed permitted. Judge Perri stated:

> The zoning permit purports to reflect the zoning office's conclusion that the use of the property is for a paving company for two buildings, yard and parking area permitted by the ordinance in the commercial/industrial zone. The Zoning Officer had the ability to take this action. [Mr. Asarnow] should have appealed the Zoning Officer's issuance of the permit to the Board.

Trial began in May 2015 against the Private Defendants as to Mr. Asarnow's remaining claims of nuisance and intentional infliction of emotional distress. Judge Thomas F. Scully presided. Among other ruling, Judge Scully barred testimony related to "notices of violations" Mr. Asarnow sought to introduce to his witness appraiser. Judge Scully held that, because the witness was "offered to provide testimony as to present valuation and the existence of 'external obsolescence,'" documents referring to 17-year-old zoning and municipal code violations were irrelevant. The jury rendered a verdict in favor of the Private Defendants on all counts.

Mr. Asarnow appealed both Judge Perri's summary judgment order, Judge Scully's evidentiary ruling, and the jury verdict. The Appellate Division affirmed in all respects.

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 application.

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 Mr. Asarnow. Second, Mr. Asarnow and the Private Defendants dispute whether the 2018 application differs from the 2017 application. The Private Defendants maintain the 2018 application contained several differences from the 2017 application, while Mr. Asarnow describes it as "identical" to the 2017 application. The record on this point is unclear.

Nevertheless, Private Defendants requested the application be adjourned indefinitely pending additional environmental work. The application was never refiled nor renewed by Private Defendants. Due to inactivity, the matter was effectively withdrawn.

In 2021, Mr. Asarnow filed this complaint as an 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. Mr. Asarnow subsequently filed an amended Complaint in Lieu of Prerogative Writ against Long Branch and the Private Defendants.

In March 2023, this court granted Long Branch's motion for summary judgment. Mr. Asarnow's request for a writ of mandamus and his equal protection claim were precluded under the doctrines of res judicata and collateral estoppel, among other grounds.

The only active defendants remaining are the Private Defendants.

Mr. Asarnow now asserts three counts against the Private Defendants – but only one of the three is a cause of action. The other two counts are better viewed as prayers for relief.

Count One seeks declaratory judgment: (1) that 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) that the current use of the Property as an "outdoor multi contractors yard" by the Private Defendants is in violation of the Zoning Board's 2017 denial of the Private Defendant's application; (4) that parking across the street is unlawful or, alternatively, that the ordinance

allowing the parking is unlawful; (5) that no one other than Mr. 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 relief as the court may deem proper.

Count Two requests injunctive relief. Specifically, Mr. Asarnow requests the 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." Mr. Asarnow further requests the 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, Mr. Asarnow alleges that the Private Defendants' use of the Property constitutes nuisance and interferes with his quiet enjoyment and use of his property. He requests compensatory, consequential, and punitive damages, as well as costs and attorney's fees.[5]

At bottom, Mr. Asarnow asserts a claim of nuisance and requests legal (i.e., monetary) and equitable/injunctive relief.

---

[5] To this point, Mr. Asarnow has been self-represented.

Private Defendants moved for summary judgment of all claims. Mr. Asarnow cross-moved for partial summary judgment as to Counts One and Two of the amended complaint.

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).

Summary Judgment Procedural Issues

On a motion for summary judgment, a court must review "the pleadings, depositions, answers to interrogatories, and admissions on file." R. 4:46-2(c). Pursuant to that well-developed standard, a summary judgment motion requires a searching review of the record by the court to ascertain whether there is a genuine issue of material fact. See Housel v. Theodoridis, 314 N.J. Super. 597, 598 (App. Div. 1998). Obviously, all discovery, of whatever nature, is relevant to a summary judgment determination. Cf. Rankin v. Sowinski, 119 N.J. Super. 393, 399-400 (App. Div. 1972); Bilotti v. Accurate Forming Corp., 39 N.J. 184, 206 (1963); Slohoda v. United Parcel Serv., Inc., 193 N.J. Super. 586 (App. Div. 1984).

Subsection (a) of the rule requires a motion for summary judgment be accompanied by a statement of material facts with citation to the record. There is no dispute here that the Private Defendants' motion does not comply. Subsection (b) of the rule provides that in opposition, a non-movant must similarly have a counterstatement of material fact that cites the record. Again, there is no dispute that Private Defendants' opposition is deficient.

Nevertheless, caselaw abounds that even though subsections (a) and (b) are stated in mandatory language, summary judgment may nevertheless be granted even if these requirements are not met where there is a single, critical, undisputed, dispositive issue. See Kenney v. Meadowview Nursing Ctr., 308 N.J. Super. 565, 569-70 (App. Div. 1998); Housel v. Theodoridis, 314 N.J. Super. 597, 602 (App. Div. 1998); Concerned Citizen v. Mayor, 370 N.J. Super. 429, 450 (App. Div. 2004).

Here, the existence of and prior results of the record cannot gainfully be disputed. The Appellate Division's decisions and prior records speak for themselves. They are matters this court may take judicial notice of. N.J.R.E. 201.

As to Mr. Asarnow's contention that the Private Defendants' opposition was so inadequate as to warrant the granting of his motion, this court disagrees. As discussed infra, the sin que none of a private nuisance is reasonableness. That word is a clarion call for a factfinder analysis. See Davidson Bros v. D. Katz & Sons, Inc., 121 N.J. 196, 215 (1990). And this court does not sit as factfinder on a motion for summary judgment. Brill, 142 N.J. at 536 ("[t]here is in the process of finding judgment as a matter of law, a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials . . . not the same kind of weighing that a factfinder . . . engages in when assessing the preponderance or credibility of evidence.").

Even taking Mr. Asarnow's allegations as undisputed, this court cannot conclude that the facts of record demonstrate entitlement to recovery. Scheckel v. State Farm Mut. Auto. Ins. Co., 316 N.J. Super. 326, 334 (App. Div. 1998) (reasonableness of party efforts should ordinarily be left to the fact-finder to resolve) (citation omitted); see also Parks v. Rodgers, 176 N.J. 491, 502 (2003) (where questions of fact depend primarily on credibility evaluations, summary judgment is inappropriate).

Lack of opposition (in general or, as here, deficient opposition) does not equate to granting of a dispositive motion, as Mr. Asarnow contends. Even where a motion for summary judgment is unopposed, the court "must still correlate [the] facts to legal conclusions. The court rules do not provide any exception from this obligation where the motion is unopposed." Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 300 (App. Div. 2009).

Previously Litigated Issues

Again, this is at least the third litigation involving substantially similar facts and issues.

The Private Defendants were not named in the 2010 complaint. In that iteration of the litigation, Mr. Asarnow only sought relief against Long Branch for what he asserted was an invalid zoning board permit issued to Private Defendants.

The Private Defendants were brought into the litigation after Mr. Asarnow filed the 2011 complaint. In that litigation, Mr. Asarnow alleged nuisance, intentional infliction of emotional distress, interference with prospective economic advantage, breach of fiduciary duty, and civil conspiracy against the Private Defendants.

Although the underlying facts are substantially similar, the issues now before this court are based on several new factual developments.

Here, Mr. 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, its 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 Mr. Asarnow has a right to place anything on or in front of his property in the loading zones, including solid waste.

Boiled to its core, the record revels an immutable truth: Mr. Asarnow has known or should have known of all of the Private Defendants' alleged and purported violations of zoning and ordinances for many years. That actual and constructive knowledge is critical to this court's analysis.

Alleged Use of the Property

Although the municipal zoning officer is normally the proper local authority to institute actions to review violations of the Municipal Land Use Law (MLUL) or local zoning ordinances, Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 53 (1998), "interested parties" – such as neighboring property owners like Mr. Asarnow – may seek one of two pathways to cure an alleged zoning violation – a prerogative writ against the municipality – as here – or a private cause of action against the offending property owners. See N.J.S.A. 40:55D-4.

Here, Mr. Asarnow chose the second path. This private cause of action under the MLUL effectively continues common law actions for nuisances that might stem from a consequence of the land use processes under the MLUL. See Cox & Koenig, New Jersey Zoning and Land Use Administration, cmt. 7-2.2, pg. 88-90 (GANN, 2024); N.J.S.A. 40:55D-18; Garrou v. Teaneck Tyron Co., 11 N.J 294, 294 (1953). Therefore, such actions are limited to parties who can show that their use, ability to acquire, or enjoyment of their property has been harmed by the violation.

Regardless of the option involved, a litigant seeking to enforce a zoning ordinance and/or challenge municipal action or inaction cannot sit on their rights. The clock begins to run from the date an interested party knew or should have known about the violation. See Harz v. Borough of Spring Lake, 234 N.J. 317, 322 (2018). In Harz, the Supreme Court found that even if a permit has issued, because

only the applicant receives notice from the zoning officer as to the permit's issuance, the "knew or should have known" standard applies. Ibid. Once the litigant knew or should have known about the violation, the litigant will be held to the time limits for appeals to the zoning board, to the courts in an action in lieu of prerogative writs, or to a laches or estoppel defense in actions seeking injunctive relief and damages. See Marini v. Wanaque, 37 N.J. Super. 32, 38 (App. Div. 1955).

"Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is 'an unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417-418 (2012) (quoting Cty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)). The Appellate Division held that "a cause of action is deemed to accrue when facts exist which authorize one party to maintain an action against another." Marini, 37 N.J. Super. at 38.

The doctrine of laches denies a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. In re Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000). "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in

good faith believing that the right had been abandoned." Knorr v. Smeal, 178 N.J. 169, 181 (2003).

"Whether laches should be applied depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Fox, 210 N.J. at 418 (alteration in original) (quoting Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004)). The time constraints for laches "are not fixed but are characteristically flexible." Lavin v. Bd. of Educ., 90 N.J. 145, 151 (1982). Courts consider the length of the delay, the reasons for the delay, and the changing conditions of the parties during the delay when deciding whether to apply the doctrine. Knorr, 178 N.J. at 181. "The core equitable concern in applying laches is whether a party has been harmed by the delay." Ibid.

The Appellate Division has held that time periods of as little as three or four years are sufficient to trigger laches. Atl. City v. Civil Serv. Com., 3 N.J. Super. 57 (App. Div. 1949) (three-year period sufficient); Chance v. McCann, 405 N.J. Super. 547 (App. Div. 2009) (four-year period sufficient).

Here, Private Defendants argue that they operate a paving business – and have done so on the property since the early 2000s – and that Mr. Asarnow had knowledge of the use since at least 2009. As such, Private Defendants assert the doctrine of laches bars Mr. Asarnow from bringing this action. Mr. Asarnow, in turn, argues that Private Defendants' use has expanded or been abandoned,

rendering the doctrine of laches inapplicable to the facts here. On this point, the Private Defendants are right.

In a word, other than private nuisance, Mr. Asarnow's requested reliefs are woefully late. The 2009 Permit authorized a mixed use of the Property for a paving company and other contractors. It permitted a continued, pre-existing, partially non-confirming use for a "[p]aving [c]ompany, for [t]wo buildings, [y]ard, and [p]arking [a]rea" – a use "commercial/industrial" in nature. The use of the Property in such way has existed prior to the 2009 Permit. In fact, the Property has been used as an asphalt paving business since the 1960s – almost six decades. Since the 2009 Permit's issuance, Mr. Asarnow has appeared before the Long Branch Zoning Board and other municipal officials to complain about activities on the Property. He observed the use and activities going on at the Property for years. The parties have engaged in ongoing litigation surrounding activities on the Property since 2009, two of which were litigated at the Appellate Division.

Laches bars Mr. Asarnow's pathway on his collateral zoning challenge. This court is satisfied that he knew of the Private Defendants' alleged use of the Property as late as 2009 and "withheld his legal fire during a period in which he knew or had every reason to know that a substantial sum of money" was being invested in the Property. See Marini, 37 N.J. Super. at 41. This court is aware that laches should be invoked with hesitation against a taxpayer and citizen vindicating

a public right. Ibid.; see also Garrou, 11 N.J. at 306-307. However, the application of laches is plainly applicable here where Mr. Asarnow has known about the activities on the Property since before 2009 and has litigated related issues before the trial courts and the Appellate Division twice in the last dozen years.

Further, "the doctrine of laches . . . may be interposed in the absence of the statute of limitations." Lavin, 90 N.J. at 151. Here, laches applies as to the reliefs requested as to the Private Defendants. However, the relief Mr. Asarnow requests – Long Branch's enforcement of zoning and municipal ordinances – is nevertheless barred by statutes of limitation.

As described in detail in the court's statement of reasons supporting the March 2023 grant of summary judgment as to Long Branch, and incorporated therein by reference, various time limitations periods precluded relief. Mr. Asarnow's constitutional claims were barred by the two-year limitations period in section 1983; the prerogative writ claims were barred by the forty-five-day limitations period under Rule 4:69-6(a); and Mr. Asarnow's Notice of Tort Claim was filed beyond the ninety-day statutory limit in the TCA. Indeed, it would be perverse to allow Mr. Asarnow to seek relief against the Private Defendants under the MLUL where similar if not identical relief is time-barred as to Long Branch.

Assuming arguendo that laches and statute of limitations do not bar a substantial part of the relief sought by Mr. Asarnow, a number of the reliefs

nevertheless fail on independent grounds. Mr. Asarnow asserts that a reasonable trier of fact must find that the 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."

Mr. Asarnow concludes that Private Defendants are operating an "outdoor construction yard" based on photographs of the Property. Some of the photographs depict vehicles emblazed with the Private Defendants' business logos. Other photographs show construction utility vehicles. Based on the photographs – snapshots of moments in time – there is no indication the utility vehicles are operated on the Property or are merely stored there.

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

Regardless, this court is not the appropriate venue to determine whether Private Defendants are operating an "outdoor construction yard" in violation of zoning ordinances. The appropriate party to hear such argument is the Long Branch Zoning Board.

The board of adjustment has the authority, pursuant to the Municipal Land Use Law (MLUL), to "[h]ear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance." N.J.S.A. 40:55D-70(a) (emphasis added). The board of adjustment is also authorized to interpret the zoning ordinance. N.J.S.A. 40:55D-70(b). These powers are exclusive to the board of adjustment. N.J.S.A. 40:55D-20. "Therefore, the board of adjustment must hear and decide any claim that a zoning officer has misinterpreted or failed to enforce [a] municipal zoning ordinance." Nouhan v. Bd. of Adj. of City of Clifton, 392 N.J. Super. 283 (App. Div. 2007) (emphasis added).

If a litigant wants to direct a government official to "carry out required ministerial duties[,]" they must obtain a writ of mandamus. Caporusso v. New Jersey Dep't of Health & Senior Servs., 434 N.J. Super. 88, 100 (App. Div. 2013) (citing In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 45 n.7 (1987)).

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).]

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, 11 N.J. at 302)).

To obtain mandamus relief to enforce a zoning ordinance, once 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, once again, Mr. Asarnow seeks to compel Long Branch to enforce various zoning ordinances. Although Long Branch is no longer an active party to this present litigation, Mr. Asarnow seeks relief the Long Branch Zoning Board may provide – termination of the alleged illegal use of the Property as an outdoor

construction yard. And, again, to the extent the MLUL allows Mr. Asarnow a second pathway by litigating directly against the Private Defendants, such is barred by laches.

In Mullen, the plaintiff, owner of residential property, sued 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, Mr. Asarnow has not presented clear evidence of the alleged illegal use or zoning ordinance violations.

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, Mr. Asarnow's complaints to Long Branch were not ignored. Long Branch has not been indifferent to Mr. Asarnow's complaints. Rather, Mr. Asarnow admits that there have been notices of violations issued. Likewise, Mr. Asarnow acknowledges that Long Branch denied the Private Defendants' 2017 Zoning Board application – which Mr. Asarnow vigorously opposed at the public hearings. Thus, Mr. 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.

Effect of Zoning Board Resolution

Mr. Asarnow asks the court to conclude Private Defendants operate an outdoor construction yard illegally. He contends that the 2017 denial of Private

Defendants' application concludes the use is illegal. He also 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." Even ignoring laches, this argument fails.

That 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 C-2 Commercial Zoning District." Private Defendants requested such use variance for expansion of a non-conforming use. Based on this language, Mr. Asarnow continues to contend the current use of the Property as an outdoor construction yard – without site plan approval – is illegal.

But, as this court stated in the March 2023 order granting partial summary judgment, the Zoning Board Resolution 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, and an irrigation company use.

The Zoning Board further found "such a proposal requires Site Plan Approval, Use Variance Approval, Subdivision Approval, and Bulk Variance

Approval" (emphasis added). Read plainly, the various approvals would be required for new, subdivided lots.

In denying the application, the Resolution 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, acknowledged that lawful pre-existing non-conforming uses are allowed to continue.
>
> [Emphasis added.]

So, yes, the application was denied – but that denial does not support Mr. Asarnow's contention that the Property's current use is illegal. The Zoning Board Resolution's plain language indicates that the pre-existing, non-conforming uses authorized by the prior Permit were not affected by the denial and were specifically permitted to continue.

Here, Mr. 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, Mr. 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, Mr. 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.

The test is for abandonment of a nonconforming use is "use" – not ownership or tenancy. S&S Auto Sales, Inc. v. Zoning Bd. of Adj. for Borough of Stratford, 373 N.J. Super. 603, 614 (App. Div. 2004). Notably, Mr. Asarnow does not argue that the Private Defendants ceased using the Property. To the contrary, Mr. Asarnow provides alleged evidence and argument to demonstrate the Private Defendants continue to operate multiple businesses on the Property.

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

Exceeded Scope of Authorized Use

Mr. Asarnow argues that, if the nonconforming use authorized by the 2009 Permit is not abandoned, it has been exceeded. On this point, Mr. 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. Mr. Asarnow does not indicate, and the court could not locate, any definitive conclusion about the 2009 Permit. Mr. Asarnow makes no other argument on this point, 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 requested relief). Nor does he demonstrate how Turner's deposition in a prior litigation is conclusive. Further, as discussed supra, application of laches is plainly applicable where Mr. Asarnow knew about the alleged exceeded scope as early as 2013.

Accordingly, Mr. 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.

Illegal Improvements

Mr. Asarnow again argues that the "buffers and associated tree plantings" on the Property – included in the site plan rejected by the Zoning Board – are illegal. To support his argument, Mr. Asarnow again submits: (1) the Private Defendants' site plan submitted in the Zoning Board application; (2) the Zoning Board Resolution denying Private Defendants' application; and (3) photographs of what appears to be trees along the property line.

It remains unclear whether the "buffers and associated tree plantings" Mr. Asarnow references existed prior to the Private Defendants' application. And, as previously stated, denial of the application does not compel a finding that the use of the Property is illegal.

Abandoned Use

Mr. Asarnow – again – contends the 2009 Permit does not remedy the Property's alleged illegal because the original permittee abandoned the use and, because of that abandonment, the use cannot restart or pass on to a subsequent user without a certificate of non-conforming use.

This time, Mr. Asarnow cites to S&S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford, 373 N.J. Super. 603 (App. Div. 2004) to support his argument.

The court in S&S referenced a two-pronged, "traditional" and "subjective" test to determine whether a use is abandoned. Id. at 613, 614. Both: (1) an intent 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 subject matter of the abandonment" must be present. Id. at 613-14. Mr. Asarnow focuses on this test in his argument, claiming the S&S panel held that abandonment is "a matter of intent" and the property owner must show such intent is "continuing and definite."

However, "[a] nonconforming use is a valuable property right." Id. at 614 (citing Scavone v. Mayor and Council of Totowa, 49 N.J. Super. 423, 428 (App. Div. 1958)). "Temporary nonuse does not constitute abandonment" and "[a] change in ownership or tenancy does not terminate a nonconforming use." Id.

Courts have identified situations where facts negated an owner's expressed intent to continue a nonconforming use. See, e.g., Belleville v. Parrillo's, Inc., 83 N.J. 309, 316 (1980) (change in use from restaurant to discotheque terminated nonconforming use); see also Beyer v. Mayor and Council of Baltimore City, 182 Md. 444 (1943) (disposal by slaughter house operator of all necessary machinery, removal of smokestack, and use of building for storage terminated nonconforming use); Brown v. Gambrel, 358 Mo. 192 (1948) (lease of premises for a use different from nonconforming use constitutes abandonment).

In S&S, the Appellate Division held that removal of ramps, placement of concrete bumpers in front of the driveway, peeling of letters on signs, termination of telephone service, and lapse of a yellow pages ad were not enough to indicate the property owners abandoned a nonconforming automobile shop use. More significant were the owner's ongoing efforts to resume sales activities (hiring employees, taking on a partner, and continuing to pay the lease) and the owner's lack of efforts to terminate the use (no effort to use or sell the property for any other purpose, no physical or structural changes, and keeping dealership signage up and necessary furniture and equipment on the premises). Id. at 616-17.

This court need not even consider whether Private Defendants abandoned the unauthorized use – this is, once again, a question barred by the equitable doctrine of laches. Accordingly, such requested equitable relief is denied.

Preclusive Doctrines

Private Defendants request dismissal of all claims against them. They point to the preclusive doctrines of res judicata and collateral estoppel in support of their argument.

Res judicata provides "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

> (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)).

Collateral estoppel has been defined as follows: "[w]hen 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." Culver, 115 N.J. at 470 (quoting Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982)).

Based on the foregoing, the only remaining cause of action is for private nuisance. As discussed infra, preclusive doctrines do not preclude this second lawsuit to the extent new offending actions are alleged.

Nuisance

A private nuisance is an "unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959) (emphasis added). Inevitably, such cases focus on conflicting property interests. That conflict must be resolved through a consideration of "the reasonableness of the defendant's mode of use of his land," and "[t]he utility of the defendant's conduct" balanced "against the quantum of harm" to the plaintiff arising from the neighbor's "unreasonable use" and whether the plaintiff's "comfort[] or existence" is disturbed to an unreasonable extent. Id. at 449 (emphasis added).

Mr. Asarnow alleges that the Private Defendants' parking on Community Place constitutes a nuisance. No curbs exist on Community Place, and parking on the street restricts egress of trucks from Mr. Asarnow's main parking lot. In addition, Private Defendants place machinery and vehicles in a marked loading zone abutting Mr. Asarnow's property, hindering trucks from making deliveries. Mr. Asarnow also asserts that the Private Defendants place their garbage for collection in front of his property, sometimes in the marked loading zone.

A breach of local government ordinances may inform a determination that the property owner is maintaining a nuisance. See Traetto v. Palazzo, 436 N.J. Super. 6, 13 (App. Div. 2014). Although not dispositive on the question of private nuisance, regulatory violations may at times illuminate, amplify, or even support a finding that a property use unreasonably burdens neighboring properties. Monzolino v. Grossman, 111 N.J.L. 325, 328 (E & A 1933).

Mr. Asarnow cites to Long Branch Solid Waste & Recycling Ordinance 293-3(O) and 293-3(Q), which state that "[a]ll municipal . . . waste . . . shall be stored, prior to collection, in such a manner as not to become a nuisance . . . to the occupants of any adjacent . . . property." Despite the ordinances, Mr. Asarnow alleges the Private Defendants continuously place trash, bins, and other objects on his property and in his loading zone. Mr. Asarnow does not cite to any specific parking ordinances.

Mr. Asarnow has operated his business on Community Place since 1995. The Private Defendants moved to 63 Community Place thereafter and engaged in behavior – placing garbage and other objects in his loading zone and permitting employees to park within the loading zone – which Mr. Asarnow claims disturbs his quiet enjoyment of his property. As a result, Mr. Asarnow alleges that trucks cannot make deliveries to his property, burdening his property.

Can Private Defendants' parking habits on the Property or a public street rise to nuisance levels? Depending on the nature and frequency of such habits, it is cognizable. Even if Private Defendants parked in such a way that constituted a legal use of the Property, such may still rise to the "unreasonable interference" level.

Mr. Asarnow provides evidence that suggests the Private Defendants violate local government regulations pertaining to garbage and waste collection. This must be presented to the factfinder to determine whether the Private Defendants created and maintained a private nuisance – the test ultimately being a factual one grounded in reasonableness. Davidson Bros,121 N.J. at 215 ("[t]he fact-sensitive nature of a 'reasonableness' analysis makes resolution of [a] dispute through summary judgment inappropriate."); accord Scheckel, 316 N.J. Super. at 334 (App. Div. 1998) (reasonableness of party efforts should ordinarily be left to fact-finder) (citation omitted).

Considering these elements collectively or separately, Mr. Asarnow presents enough evidence to avoid entry of summary judgment and for the matter to be presented to a jury. In short, whether the Private Defendants' operations rose beyond the level of a mere annoyance is ultimately a question for the factfinder. A "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J.

at 540. As such, the Private Defendants' motion for summary judgment on the nuisance claim is denied.

As discussed, Private Defendants point to the preclusive doctrines of res judicata and collateral estoppel in support of their argument. However, such principles do not apply here, at least to new occurrences.

Private Defendants argue that Mr. Asarnow requested identical claims for declaratory and injunctive relief in his 2010 and 2011 complaints. This is true, but Private Defendants ignore the new, more recent facts supporting nuisance claims.

For instance, in the 2011 action's trial, the jury – based on the facts presented to them then – returned a verdict for Private Defendants, determining the Private Defendants' use of the Property did not rise to the level of nuisance. Since that verdict, Mr. Asarnow and Private Defendants remain neighbors on Community Place. Mr. Asarnow cannot be precluded from ever bringing an action against his neighbors merely because a jury returned a verdict for him before. Many moons have passed since the last iteration of this litigation. It is cognizable that the Private Defendants may have parked or dumped garbage in such a way after the last jury verdict as to hinder deliveries to Mr. Asarnow's property. The Private Defendants may have used the Property in a way that unreasonably burdened Mr. Asarnow's property interests.

As such, Mr. Asarnow's nuisance claim is not precluded under the doctrines of res judicata and collateral estoppel as to post-jury verdict facts. Plaintiffs who bring subsequent, serial suits for successive instances of nuisance may plead similar circumstances. Lawlor v. National Screen Service Corp., 349 U.S. 322, 327-28 (1955) ("[t]hat both suits involved 'essentially the same course of wrongful conduct' is not decisive. . . . [A]n abatable nuisance . . . may frequently give rise to more than a single cause of action."). However, because a jury has spoken on nuisance before, Mr. Asarnow is barred from introducing evidence of alleged nuisances predating the last jury verdict on June 11, 2015. See id.

Mr. Asarnow is, however, foreclosed, as a matter of law, from seeking redress from Long Branch based on the preclusive results of the prior litigations, the previously entered dispositive order in this litigation, and laches. To the extent the reliefs sought by him in this litigation compel municipal action or fall within the purview of municipal action, such cannot proceed and he cannot garner those reliefs through litigation with the Private Defendants who remain.

He may, however, recover monetary recompense and/or equitable relief vis-à-vis the Private Defendants here if he can carry his burden of proof to demonstrate a private nuisance, premised on conduct occurring after the jury verdict rendered in the prior litigation.