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February 8, 2016

Honorable Judges of the
Superior Court of New Jersey,
Appellate Division
Hughes Justice Complex
Post Office Box 006
Trenton, New Jersey 08625

Re: **Asarnow v. City of Long Branch, et al.**,
Docket No. A-4973-14T4

Honorable Judges:

On behalf of plaintiff-appellant Brian Asarnow, please accept this letter memorandum in lieu of a more formal brief in reply to defendants/respondents' Opposition Briefs and in further support of plaintiff's appeal.

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ARGUMENT

POINT I

REPLY TO BRUNO AND THE PRIVATE DEFENDANTS

The trial court erred in precluding plaintiff from introducing before the jury evidence of prior and ongoing zoning violations by the private defendants and evidence that defendants' activities on their properties exceeded those permitted during the time in question, and in precluding other key evidence relevant to proving plaintiff's nuisance claim against the private defendants at trial below.

Defendants admit the importance of the consideration of "reasonable use" by a jury: "Most importantly, the private defendants have never used the property in a way that was unreasonable or in a way that interfered with Plaintiff's use of his own property." (Db14). Yet plaintiff was not allowed to rebut this key claim before the jury. Bruno did not testify that his prior use involved a demolition, lawn sprinkler, masonry or any other business which had obtained approval. (Db16). Yet Plaintiff was not allowed to use findings of guilt on the prior violations to refute Bruno's testimony. The trial court restricted plaintiff's visual depiction evidence (Db20, Pb8); photos from the 2006 appraisal showing external obsolescence then versus six years later, in 2012, was not

allowed in to support the appraiser's testimony (Pb9). Other photos and videos on Plaintiff's CD ROM were not admitted for the jury trial (trespass, voicemails, arson, new arson threat).

Precluding evidence of defendants' zoning violations violated plaintiff's right to prove his nuisance claim at trial below. Long Branch ordinances prohibiting the outdoor use, and Plaintiff's appraiser (A1679) as affirmed by the tax board, prove the outdoor use and restricted access by vehicles/objects is damaging and may be per se. (Db26). The "skipping of massive points" of proofs at trial below (Pb27, 6T105-110) included videos of the arson and new arson threat. The jury saw very little of available video evidence. The voicemails & website hacking by defendants (Db30-31, A9), together with the trespassing, stone throwing, and arson incidents, were an important part of the proofs showing defendants' interference with plaintiff's peaceful possession of his adjoining property. The court erred in precluding plaintiff from introducing this evidence at trial.

Defendants contend that the throwing of stones, fire and hacking of plaintiff's website "had no relation to the private Defendants' use of the land" (Db34-35), but it was a question for a jury, armed with information of the illegally expanded use, whether these acts by defendants unreasonably interfered

with plaintiff's use of his neighboring land. The jury was not given opportunity to "weigh the utility of Defendant's conduct," including conspiring with Long Branch on the permits, or to consider the "unreasonable use" of knowingly operating without site plan approval. (Db35-37). Plaintiff should have been permitted to challenge defendant's permits and submit proofs regarding the improper actions committed in conspiracy with the City of Long Branch (who was unmentionable before the jury at trial per the court's rulings).

With respect to defendants' earlier guilty pleas, these were for expanding the uses on the property without prior approval. These are the same lots still in use by the defendants that adjoin plaintiff's property. (Pb27-28). Defendant Bruno evaded prosecuting several site plans in the interim. (Pb28). Several similar violations have been outstanding since 2009. (Pb12). All of this was relevant to proving plaintiff's unreasonable use claim. The trial court erred in denying plaintiff admission of these proofs.

With respect to the trial court's rulings on the expert testimony allowed at trial (Point 4 of Appellant's Brief), an expert's methodology & testimony must not contravene professional standards. See Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992) (noting three basic requirements: "(1) the

intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.") These are issues of law to first be decided by the trial court. Here, the defendants' expert (Gagliano) did not consider the surrounding area (Db51), though he was charged with evaluating external obsolescence. (8T112:2, 131:1; 11T57:18-58:8). Gagliano's testimony was contrary to professional standards and even tax board judgments and Long Branch assessor's own values during relevant times. This testimony by defendant's expert is improper under N.J.R.E. 702, would unfairly prejudice plaintiff and confuse a jury, and therefore should be barred upon any remand for a new trial.

POINT II

REPLY TO LONG BRANCH DEFENDANTS

This Court should reverse the grant of summary judgment for the Long Branch defendants and reinstate plaintiff's claims against them because a reasonable jury, viewing the evidence in the light most favorable to plaintiff per Brill, can find in plaintiff's favor on his claims for injunctive and other relief under the Municipal Land Use Law, for civil conspiracy, violation of his civil rights, and tortious interference with plaintiff's economic and contractual relations, etc.

Statement of Facts (Pb6): The City claims that the Bruno property "was primarily used as a paving company but also for other associated uses predating Plaintiff-Appellant's purchase of the property by decades." (Db5). There is no evidence in the record to support this "associated uses" claim; the zoning permit confirms that only a paving company preexisted. (A480).

Long Branch Argument Point II: With regard to Long Branch's claim of collateral estoppel (Db12-17), the Appellate Division's statement (A123), in the prior appeal, that the zoning officer had the authority to issue the (or any) zoning permit was dictum, because the prior panel did not address the merits of plaintiff's appeal, ruling that it was procedurally improper: "Plaintiff should have appealed the zoning officer's issuance of

the permit to the (zoning) board"; "we decline to accept Plaintiff's argument, implicit and unsupported by any facts that the board would not reverse an 'ultra vires' act of its zoning officer." The prior appeal did not address the unilaterally created uses by the defendants on their property, or whether they were valid under the zoning laws. The panel said, "the precise nature of the zoning officer's actions is not entirely clear." There was not a finding "that the city did not fail to enforce its ordinances," contrary to the City's claim. (Db13).

Plaintiff's reasons for non-joinder of damages and the private defendants in the second matter was made known to the court and even footnoted in the prior appellate brief. (A1545). See Falcone v. Middlesex Cty. Med. Soc., 82 N.J. Super. 133 (Law Div. 1964) aff'd, 87 N.J. Super. 486 (App. Div. 1965) aff'd in part, rev'd in part, 47 N.J. 92 (1966)("single action should have been instituted by plaintiff to obtain both forms of relief, unless there be some overriding practical reason why both forms of relief could not have been obtained in an action in lieu of prerogative writ")(emphasis added). At this lawsuit's core, Plaintiff alleges a continuing conspiracy to help the private defendants evade the laws by engaging in a charade at enforcement and retaliating against Plaintiff for seeking to vindicate his rights and protect his investment and

business. (A819-822, Pb54; 2T70:8-16). The municipal court after two and one-half years still refuses to terminate the unlawful use on defendants' property. (Atlantic Paving is now before the zoning board for the *fourth* site plan while operating in violation thereof).

Defendants cannot claim prejudice by Plaintiff's bringing the damage action against them (8/26/11 (A1) versus 4/30/10 (A1544)). Plaintiff's damages would be the same since the conspiracy has not yet ended and Long Branch continues to cite immunity as the reason for not abating. Aside from concealing evidence (Pb37, 41) while proclaiming that plaintiff's suit on damages should have been brought earlier, Long Branch fails to provide any evidence that it has been prejudiced by Plaintiff's failure to include the damages in the second action (A1664).

Long Branch Argument Point III

A. Immunity under NJSA 59:3-5:8. Long Branch has touted its "enforcement" efforts (Db33, issuance of notice of violations and summonses) while failing to provide evidence of any good faith in this regard, such as limitation of resources, as to why the unlawful use of defendants' property has not been abated since 2002 pending proper site plan approval.

Long Branch claims it is not liable for failure to enforce under N.J.S.A. 59:3-5 as it is not an "act." (Db19) But Long

Branch is not allowed to act with deliberate indifference and discriminatorily against plaintiff with total immunity. Per N.J.S.A. 40:44D-18, "the governing body of a municipality *shall* enforce this act and any ordinance or regulation made and adopted hereunder" and "provisions of the municipal land use law are mandatory." Pop Realty Corp. v. Springfield Bd. of Adjustment of Springfield Twp., 176 N.J. Super. 441, 423 (Law Div. 1980). "A substantial public interest exists in the preservation of the integrity of a zoning ordinance." Sod Farm Associates v. Twp. of Springfield, 366 N.J. Super. 116 (App. Div. 2004). The acts of the City's employees cannot be palpably unreasonable. N.J.S.A. 59:3-2d. Nothing submitted by the Long Branch defendants shows any limitation of resources or like ground that prevented them from abating the nuisance created by the private defendants on their property since 2002.

Engaging in a conspiracy, including deliberate indifference to abating zoning violations, are affirmative acts, moreover. As affirmed by Judge Bauman below (1T24:24; Pb53), "A civil conspiracy is a combination of two or more persons ***acting*** in concert to commit an unlawful act by unlawful means or to ***commit*** a lawful act by unlawful means…" Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005) (emphasis added). Plaintiff has a right to relief under N.J.S.A. 40:55D-4 (Pb58), and the record shows

willful and deliberate indifference toward plaintiff's property rights due to malice and/or corruption by the City, which is an actionable act under the Tort Claims Act (Pb45) and 42 U.S.C.A. § 1983. Long Branch must demonstrate a legitimate state interest in failing to enforce the zoning and use violations. Long Branch has a duty not to create or contribute to a nuisance. (Pb42). Judge Perri failed to consider all of this in granting summary judgment to Long Branch below.

B. Private Nuisance "barred" by statute of limitations and Tort Claims Notice: As explained (Pb42) the reference to 1995 or 1998 as to discovery of the nuisance (Db22-25) is unsupported by the record and improperly refers to an earlier complaint by plaintiff that was dismissed without prejudice and, as such, cannot be used to try and prejudice Plaintiff in this matter. (Db57). Plaintiff's damages in this case are calculated beginning 6 years prior to filing of the Complaint in this case; this is consistent with the 6-year statute of limitations noted by Long Branch. (8T145:2-148:5, 151:14)

Long Branch claims, "Plaintiff sat on his rights by not suing earlier and cannot claim a continuing tort." (Db25-28). But the record shows Bruno/E&L filed their 3rd site plan in 2002 (A494) (the 1st was filed in 1984 (A1848); the 2nd in 2000 (A1029)). It was carried indefinitely on 4/14/03 (A1105) and

eventually withdrawn on 8/22/07 (A1109). Plaintiff did not discover this until after obtaining the zoning permit and realizing the conspiracy. (A504,505). Though Bruno/E&L were allowed to operate while in violation, moreover, their uses on their property was low compared to what it is now and has been for the past few years (plaintiff still had access to his property in general, and assumed that Long Branch was operating in good faith to resolve the zoning and use issues). (A1701-1710; A1999-2003; vs. A646-649). Plaintiff did not sleep on his rights in any manner. He acted as the illegal uses on the defendants' neighboring lands increased and began to interfere with plaintiff's possession more and more.

With regard to plaintiff's claim of nuisance due to breach of duty and the continuing conspiracy to permit the illegal uses on defendants' property, (Db26-28), Plaintiff's photos, appraisals showing ongoing and increasing depreciation, certified facts (Pb46-50), and confirmation by private defendants in the trial of their use, all evidence a continuing nuisance aided and abetted by Long Branch "acting" in a conspiracy. Even the issuance of the zoning permit evidences another instance of Long Branch attempting to help the private defendants evade the site plan process and grandfather what were always illegal and unauthorized uses in the first place. As

such the tort notice is duplicative of the 2002 notice. Even the other tort notice with the statement "Claimant will continue to hold Long Branch responsible for further palpably unreasonable conduct of its employees as a continuing tort" indicates that these are continuing torts and can be considered mere reminder notices. (A33). The instances of retaliation and humiliation together with the lack of abatement is designed to punish Plaintiff for interfering with the conspiracy and coerce him to leave. Long Branch's lack of abatement and claim that it has immunity is designed to make the external obsolescence permanent so that Long Branch can claim not a continuing nuisance (Pb42) and evade accountability. No doubt Plaintiff will have to file another prerogative writ complaint due to this following the current site plan proceedings. This is not good faith by a public entity. A reasonable jury armed with all relevant information including the violations could find in plaintiff's favor in this regard.

C. Intentional Infliction of Emotional Distress barred: First, Plaintiff was not treated for his anxiety condition, due to the arson and events leading thereto (Da22:25) (later diagnosed as PTSD by a psychologist) until his annual physical in July 2010. (A1483@15:23; A1486; Da10:22,29:23). It was not simultaneous to discovery of the zoning permit just as most

damage claims may be unknown or un-accrued when a prerogative writ action is filed. The lack of mention of this claim in Plaintiff's footnote (A1545) further confirms this fact. The footnote allows for "other damages" and also suffices as tort notice for this count.

Second, Plaintiff is not obligated to file a new tort notice for each instance in a continuing conspiracy of which part of the goal is to target, punish and humiliate Plaintiff, a logical outcome of which is emotional distress. (Pb45- willful disregard, deliberate indifference). The 2002 tort notice states, claimant's "federal constitutional rights" of equal protection are being violated, "claimant seeks costs and any other damages as allowed by law" and "retains the right to proceed in Federal Court for violation of his rights." This placed Long Branch on notice of the claim for damages due to emotional distress. The 2010 tort notices further alerted Long Branch that prospective claims will be filed in this regard. See Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 128 (App. Div. 2014)("the eventual collapse of the wall was merely a continuation of the tort plaintiffs had already described, rather than "a new tort" that needed to be raised independently").

D. Breach of Fiduciary Duty Barred by Tort Claims Act and Statute of Limitations: The main breach of fiduciary duty, the continuing conspiracy, was apparent upon obtaining the zoning permit expanding the use; Plaintiff had no knowledge of any prior site plan approval. (A836#82; A837#108). The "various applications" and "various alleged incidents" (Db30,31) were not discovered until discovery in the 2nd matter. (A504, 505). The May 24, 2010 tort notice as to the zoning permit simply noted the continuing violations.

Point VI: Elements of Various Causes of Action not Established:

A. No Nuisance (Db32): The record shows that the city's municipal offices and personnel are being used, at minimum, to create a dangerous condition pursuant to N.J.S.A. 59:4-2 and N.J.S.A. 59:2-2 by issuing palpably unreasonable permits and failing to abate the nuisance on the defendants' property. (Appellant's Brief, Point I). The trial court's finding, "plaintiff has failed to meet his burden of proving that the public entities' actions were palpably unreasonable," contravenes the New Jersey law cited in Appellant's Brief.

B. Intentional Infliction of Emotional Distress: Plaintiff alleges the issuance of the permits and refusal to abate has enabled the private defendants to carry out the outrageous acts surrounding the arson. Plaintiff seeks damages against Long

Branch for its contribution to the damages caused to plaintiff as a result. (8T95:5, 98:3). It is up to a jury to determine the percentage of proportional fault. (A1683). Plaintiff meets the Brooks standard for "permanent & substantial" psychological injury and the requirements for PTSD cited in Rocco (Db36) since his psychologist's report (A342) discloses "substantial permanent psychological injury" as a result of Defendants' acts, and plaintiff continues to be treated by both psychologist and physician for PTSD. (8T73:24, 74:14, 80:13-25, 98:14; Da29:4).

C. Tortious Interference with Economic Advantage: Similar to the emotional distress claim, Plaintiff seeks contribution by Long Branch for its acts that enabled the private defendants to carry out the arson which Plaintiff testified caused a long term tenant to leave. The "tangential argument" together with the rest of the record supporting a conspiracy and refusal to abate is sufficient to establish a cause of action under the Brill standard. The trial court erred in dismissing this claim.

D. & E., Breach of Fiduciary Duty & Civil Conspiracy barred: Plaintiff opposed Long Branch's summary judgment "facts," most of which distorted or minimized the record and failed to construe the evidence in the light most favorable to plaintiff per Brill, (A276, Db43), in his Disputed/Restated & Additional Facts (A789-827) submitted to the trial court below.

Long Branch has failed to dispute these additional facts as to the breach of duty (A793-817) and conspiracy (A793-822) including the individual actors. (A1541). Long Branch's failure to attempt to dispute Plaintiff's additional facts or provide a good faith defense renders Plaintiff's main issue – a continuing breach of duty and conspiracy to prevent or abate an unlawful use and retaliation – substantial and jury-worthy. (See *supra*, A793-817, A819-822 and Pb54-55). The officials' self-interest is being served *(supra*) by knowingly refusing to enforce the law and provide honest service under guise of total immunity. (A793-817, A837#106, A912-958). Long Branch distorts the evidence regarding the beach incident as well, which Plaintiff addressed in his 42 U.S.C.A. § 1983 claim (Pb56) as intentional targeting and harassment without probable cause.

F: 42 U.S.C.A. § 1983: Long Branch ignores that this is the 8th count of the amended complaint and re-alleges and includes all previous facts. (A819). The facts referencing "state actors" and discriminatory intent was addressed, (A793-817, A819-822), and has not been responded to. Per Village of Willowbrook v. Olech, 528 U.S. 562 (2000), prior litigation is useful in establishing a history of animus, Nardello v. Twp. of Voorhees, 377 N.J. Super. 428 (App. Div. 2005). Many separate but relatively minor instances of behavior may combine to make

up a pattern of retaliatory conduct for a Section 1983 claim. See Tomlins v. Vill. of Wappinger Falls Zoning Bd. of Appeals, 812 F. Supp. 2d 357, 375 (S.D.N.Y. 2011)("evidence that the defendant engaged in an 'ongoing course of adverse action' against the plaintiff, such action may serve as additional evidence of retaliatory intent"); cf. Beasley v. Passaic County, 873 A.2d 673, 685 (N.J. App. Div. 2005).

As to Plaintiff's alleged failure in naming others similarly situated, the Amended Complaint states at paragraph 183, "In an earlier matter Superior Court judge found that Long Branch may have violated Plaintiff's constitutional rights in the denial of street opening permit," and at paragraph 184 "In that matter the Mayor insists in deposition that only a phone call is needed to enforce the laws." (A1273). All others in Long Branch need not file prerogative writs and lawsuits in order to have the laws enforced -- only Plaintiff. Long Branch specifically created a new position of Director of Building and Development for Kevin Hayes, with the key duty of prevention of blight, yet Plaintiff's property value has been allowed to decline due to Mr. Hayes' continued refusal to abate. (See A26 @ 186). These are real people and properties in Long Branch.

A municipality's failure to act may also constitute municipal policy where the municipality has knowledge of the

need for action and the failure to act rises to the level of "deliberate indifference" which causes a constitutional injury. City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). That is the case here. A review of the record (detailed in Appellant's Brief at 56-60) further dispels Long Branch's assertions. *See* Amended Comp. @ 187 and Pb57 as to proof of targeting by Mr. Hayes thru his plumbing inspector in revoking the shower; Am. Compl.,189-193 and Pb58, A839, A966-970 documenting targeting of Plaintiff by the tax assessor compared to others similarly situated.

With regard to the beach incident, the police report indicates that no other beachgoer was chased down by a Bobcat or threatened with arrest for failing to produce identification. (Pb56, A865). Long Branch appears to lament the "good old days" by citing a 1954 case where the state police broke into a home and secretly placed a microphone in defendant's bedroom – which was not considered shocking at that time. (Db59). The 2000 case of Village of Willowbrook v. Olech (Pb60) is more helpful and shows that unequal treatment relating to property rights need not be shocking. Previous animus is the key – and a jury can find it in this case. Long Branch's citation to 1992 and 1989 cases that "when property rights are denied in the course of conventional municipal decision making" there is no

substantive due process violation (Db60) has no bearing on the far different evidence of animus over many years against plaintiff in this case (*see* Monterey v. Del Monte Dunes (Pb55)). The zoning board has knowingly been bypassed by the unilateral act of the zoning officer.

Qualified immunity, also cited by Long Branch, exists to protect state officials in the performance of their duties unless they are "plainly incompetent" or they "knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). But to establish qualified immunity, *the defendant must show*:

(1) that there was no previously established law prohibiting or restricting the conduct in question at the time it occurred; and

(2) if the law was clearly established, that a reasonable official under the circumstances would not have known the conduct was illegal. Gomez v. Toledo, *supra*.

Whether the law was clearly established is a question of law for the court. It is the defendant's, not the plaintiff's, burden to prove the status of the law. Elder v. Holloway, 510 U.S. 510 (1994). Long Branch did not prove this defense as a matter of law in the trial court below; summary judgment was thus improperly granted.

No 1983 damages proven: Plaintiff seeks damages against Long Branch going back to 2000 for emotional distress for knowing refusal to provide equal protection in enforcement, for each act of retaliation, and for contributing to Plaintiff's PTSD and dysthymia following issuance of the improper permits. Plaintiff seeks monetary damages for Long Branch's allowance, expansion, and failure to abate the nuisance. That the zoning issues caused Plaintiff's emotional distress was confirmed by Dr. Hochman (A342) and at trial (*supra*) against the private defendants and was undisputed by any medical expert at trial. The trial court erred in dismissing this claim.

Plaintiff's summary judgment (Point 2):

The Mercantile (A651) and C.O. (A260) permits are also invalid on their own (2T68:13), as the issuing officials are not authorized to change the name of the company from that on the zoning permit and include multiple companies on one permit. The name is to be simply taken off the zoning permit and is a ministerial act, subject to injunctive relief via summary judgment. These are not reviewable by a zoning board and no exhaustion of remedies is required. This Court should invalidate these permits as a matter of law. Since injunctive relief is available to prevent irreparable harm and Long Branch seeks to make the nuisance permanent in order to claim not a

continuing nuisance and evade liability, injunctive relief is warranted as to the site plan violation upon any remand.

CONCLUSION

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

Respectfully submitted,

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Dated: February 8, 2016