EXHIBIT V

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JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action **NOTICE OF CROSS MOTION TO DISMISS PLAINTIFF-INTERVENOR'S COMPLAINT FOR FAILURE TO STATE A CLAIM AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	Before: Peter F. Bariso, Jr., P.J.S.C. Motion Date: August 31, 2018

To: Philip J. Espinosa, Esq.
Deputy Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 114
Trenton, New Jersey 08625
Attorney for the State of New Jersey
Department of Transportation, Plaintiff/Intervenor

On Notice To:

Jacqueline Rosa, Esq., Plaintiff
Seigel Law Firm LLC
505 Goffle Road
Ridgewood, New Jersey 07450

PLEASE TAKE NOTICE that on August 31, 2018 at 9:00 a.m., Defendant, Borough of Leonia, will oppose the Motion for Summary Judgment filed by Plaintiff-Intervenor and Cross-move before the Superior Court of New Jersey, Law Division, Hudson County, for an Order dismissing Plaintiff/Intervenor's Complaint with prejudice pursuant to R. 4:6-2(e).

PLEASE TAKE FURTHER NOTICE that the within application is being made pursuant to R 1:6-2, and R. 1:6-3, and in support of same, Defendant will rely on the attached Brief, Appendix, Certification of Counsel, Certification of Tom Rowe with exhibits, Certification of Judah Zeigler with exhibits, and that a proposed form of Order is also submitted herewith;

PLEASE TAKE FURTHER NOTICE that oral argument is requested on this motion, and that,

IN COMPLIANCE WITH RULE 1:6-4, the undersigned further certifies that the original of the within Notice of Motion is this day being filed with the Clerk of Hudson County Superior Court, Law Division, and as such, is being simultaneously served to all counsel of record via ecourts.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant

Dated: August 21, 2018

By: *s/ Ruby Kumar-Thompson*
RUBY KUMAR-THOMPSON, ESQ.

Discovery End Date: May 24, 2019

CERTIFICATION OF FILING AND SERVICE

The undersigned hereby certifies that the original of the within Notice of Motion Certification of Tom Rowe with exhibits, Certification of Judah Zeigler with exhibits, and Brief and proposed form of Order were e-filed on today's date with the Clerk of the Superior Court, Hudson County, and that copies of these papers have been simultaneously served via e-courts to counsel of record to all of the parties; and that a courtesy copy of said papers is this day being submitted to the managing judge assigned to hear this matter as follows:

Hon. Peter F. Bariso, Jr., P.J.S.C.
Hudson County Courthouse
Administration Building
595 Newark Avenue
Jersey City, NJ 07306

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant

By: *s/ Ruby Kumar-Thompson*
Ruby Kumar-Thompson, Esq.

Dated: August 21, 2018

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JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action **ORDER DENYING SUMMARY JUDGMENT AND DISMISSING PLAINTIFF-INTERVENOR'S COMPLAINT FOR FAILURE TO STATE A CLAIM**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	

This matter being brought before the Court by Brian M. Chewcaskie, Esq. of the firm of Gittleman, Muhlstock & Chewcaskie, and Ruby Kumar-Thompson, Esq. of the firm of Cleary Giacobbe Alfieri Jacobs, LLC as attorneys for Defendant, Borough of Leonia ("Defendant"), on a Cross-Motion to dismiss Plaintiff/Intervenor's Complaint pursuant to R. 4:6-2(e), and the Court

having considered the papers and arguments submitted in support of and in opposition to this motion, and argument of counsel, and good cause having been shown:

It is on this ____ day of _____ 2018:

ORDERED that Plaintiff/Intervenor's Motion for Summary Judgment is denied; and

IT IS FURTHER ORDERED, that Defendant's motion to dismiss is granted and that Plaintiff/Intervenor's Complaint be and is hereby dismissed in its entirety with prejudice.

_____
Hon. Peter F. Bariso, Jr., P.J.S.C.

[ ] OPPOSED

[ ] UNOPPOSED

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JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES I-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO. HUD-L-607-18 Civil Action **CERTIFICATION OF RUBY KUMAR-THOMPSON, ESQ. IN SUPPORT OF OPPOSITION AND CROSS-MOTION TO DISMISS PLAINTIFF/INTERVENOR'S MOTION FOR SUMMARY JUDGMENT**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	Before: Peter F. Bariso, Jr., P.J.S.C. Motion Date: August 31, 2018

I, Ruby Kumar-Thompson, Esq., being duly sworn upon my oath, do hereby certify as follows:

1. I am a member of the Bar of the State of New Jersey, and a Partner of the law firm of Cleary Giacobbe Alfieri Jacobs, LLC, attorneys for Defendant. I make this Certification in

support of Defendant's Motion pursuant to Court Rule 4:6-2(e) to Dismiss Plaintiff-Intervenor's Complaint.

2. In the Brief in Opposition to Plaintiff/Intervenor's Motion for Summary Judgment and in Support of Defendants' Cross-Motion to Dismiss the Complaint, counsel for Defendants have cited the following unpublished cases attached to the Brief in the Appendix:

Exhibit 1: Martell's Tiki Bar, Inc. v. Governing Body of Pt. Pleasant Beach, 2015 WL 132559 (D.N.J. 2015)

Exhibit 2: Roberts v. New Jersey Turnpike Authority, 2016 WL 6407276 (App. Div. 2016)

3. Pursuant to Rule 1:36-3, I hereby certify that in reliance upon same, 1 am not aware of any contrary unpublished opinions.

4. I hereby certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant, Borough of Leonia

Dated: August 21, 2018

By: *s/ Ruby Kumar-Thompson*
RUBY KUMAR-THOMPSON, ESQ.

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff-Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	Before: Peter F. Bariso, Jr., P.J.S.C. Motion Date: August 31, 2018

BRIEF IN OPPOSITION TO PLAINTIFF/INTERVENOR DEPARTMENT OF TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS MOTION TO DISMISS

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PRELIMINARY STATEMENT

As a result of inability, inactivity or lack of concern of the Port Authority of New York and New Jersey ("Port Authority") and the Department of Transportation ("DOT"), and due to serious concerns regarding safety in the Borough in recent years, the Borough of Leonia ("the Borough" or "Leonia") established a traffic initiative program in 2017 to address significant commuter traffic issues that cripple Leonia during certain hours of the day as a result of excessive traffic utilizing Leonia streets to access the George Washington Bridge. Leonia was forced to take these actions as a result of the aforementioned inaction and inattention after many crippling traffic jams on local streets and serious public safety incidents, and determined to enact the traffic initiative to address this significant and serious public safety concerns.

Leonia enacted several ordinances in 2017 as part of a comprehensive traffic initiative program. The Ordinance that is most germane to Plaintiff's motion for Summary Judgment is Ordinance 2018-05, adopted on March 5, 2018 which amends Leonia's Municipal Traffic Code, Sections 194-25.1 and 194.49, and which supersedes the prior Ordinance 2017-19. This Ordinance provides for the regulation of traffic as follows:

> "No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§194-49) attached to and made part of Chapter 194 during the times of the days indicated in said Schedule unless that person
>
> (a) Is a resident of said street needing access to his home or can demonstrate a documented need to access a resident on the street or parts of the streets as described; or
> (b) Is traveling to and/or from a Leonia destination.

As this Brief will demonstrate, Leonia had ample legislative grant to enact the Ordinances at issue under its broad discretion to enact traffic regulations for the health, safety and welfare of its residents, that nothing contained within N.J.S.A. 39:4-8(a) limits the manner in which the

Borough has chosen to exercise its police powers through the passage of the aforementioned Ordinance, and that there exists a narrowly tailored need for distinguishing between residents and other persons having a need to access locations in the Borough and non-residents who are merely using Leonia's quiet residential streets as a cut-through to the George Washington Bridge, especially during the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m. Accordingly, Intervener's motion for Summary Judgment seeking to invalidate said Ordinances must be denied.

PROCEDURAL HISTORY

As part of a comprehensive traffic initiative program, the Borough of Leonia (hereinafter referred to as "the Borough" and sometimes as "Leonia") enacted a series of ordinances beginning in 2017 to address growing significant traffic issues in the Borough for the health safety and welfare of its residences. The Ordinances enacted as part of the Borough's comprehensive traffic initiative program are as follows:

Ordinance No. 2017-19, adopted on December 4, 2017 is entitled "An Ordinance Amending and Supplementing Chapter 194 "Vehicles and Traffic" of the Code of the Borough of Leonia by Adding to Article XI "Temporary Closing of Streets" §194-25.1 "Closing of Certain Streets" and Article XIV by the Addition Thereof of Schedule XVII "Streets Closed to Traffic," adopted December 4, 2017" (see DOT Exhibit "B").

Ordinance No. 2018-2, adopted on January 17, 2018 amends and supplements Chapter 194 of Leonia's Municipal Code to add a new section establishing a $200 penalty for any person convicted of violating Section 194.25.1 (see DOT Exhibit "C").

Ordinance 2017-19 was subsequently amended by Ordinance No. 2018-5 on March 5, 2018. Ordinance No. 2018-5 is entitled: "An Ordinance Amending and Supplementing Chapter

194 Vehicles and Traffic" of the Code of the Borough of Leonia by Amending Ordinance 2017-19, Article XI "Temporary Closing of Streets" §194-25.1 "Closing of Certain Streets" and §194-49 Schedule XVII, adopted March 5, 2018" (see DOT Exhibit "D").

On January 30, 2018, Plaintiff Jaqueline Rosa ("Rosa") filed a Complaint in Lieu of Prerogative Writ in Superior Court in the County of Bergen naming the Borough of Leonia, Borough Council of Leonia, Tom Rowe, and Judah Ziegler ("Defendants") challenging the amendments made to Borough Code §194-25.1 and §194-25.2 through adoption of Ordinance No. 2017-19 and presumably 2018-2. On February 5, 2018, the case was then transferred *sua sponte* from Bergen County to Hudson County vicinage. On February 12, 2018, Plaintiff then filed an Amended Complaint in Bergen County vicinage.

On February 28, 2018, Defendants filed an Answer and Affirmative Defenses to the Initial Complaint. Then, on March 27, 2018, an Answer and Affirmative Defenses on behalf of Defendants was filed to the Amended Complaint that was filed by Rosa in Bergen County Superior Court on February 12, 2018, after the case had already been transferred to Hudson County.

On or about May 4, 2018, Plaintiff applied for an Order to Show Cause seeking a preliminary injunction against enforcement of Borough Code §194.25.1 and .2 as amended by Ordinance No. 2018-5. The Court denied Plaintiff's Order to Show Cause motion seeking a preliminary injunction on May 25, 2018.

On or about June 8, 2018, a Consent Order permitting the DOT (hereinafter sometimes referred to as Intervenor") to intervene in this action was filed by Deputy Attorney General Philip

J. Espinoza, and a Complaint for Declaratory Judgment and Action in Lieu of Prerogative Writs was filed on behalf of the DOT against the Leonia on June 11, 2018. [1]

On or about July 2, 2018, an Answer was filed by Leonia to the Complaint filed by the DOT.

Before any discovery could take place, on July 11, 2018, DOT filed a motion for Summary Judgment. On July 16, 2018 Rosa also filed a motion for Summary Judgment.

The Borough now oppose both the DOT's and Rosa's motions for Summary Judgment and Cross-move to dismiss those Complaints.

STATEMENT OF FACTS

Leonia is a small community in Bergen County with limited resources, including a Police Department consisting of a total of nineteen (19) members (see Certification of Thomas Rowe (hereinafter "Rowe Cert.,"), ¶5). The Borough contains 89 municipal roads, one County Road and One State Highway (Rowe Cert., ¶4). Being situated approximately a half mile from the George Washington Bridge ("GWB"), for many years, the Borough has been negatively impacted by congestion on its local streets from excessive motor vehicle traffic traveling towards the GWB on both weekdays and weekends; Sunday nights can be especially bad due to the fact that EZ Pass usage drops by approximately 10% and there are not enough toll lanes opened by Port Authority for cash paying drivers (Rowe Cert., ¶6 and ¶10). To avoid traffic, vehicles often travel through

[1] A Copy of the DOT's Complaint is attached hereto as Exhibit 3 for the Court's ease of reference

the streets of the Borough, rather than on the intrastate and interstate highways leading to the GWB, causing major traffic congestion on the narrow Borough streets (Rowe Cert., ¶7).

Traffic congestion has caused serious safety problems throughout the Borough. One significant example occurred on August 7, 2014, when there was a 90-minute delay at the GWB. A woman by the name of Leyla Kahn was crossing Broad Avenue at Fort Lee Road (a county highway). A school bus hit her and dragged her seventy-five feet (75') down Broad Avenue. At that time, there was bumper-to-bumper traffic throughout the Borough. The Borough had only two (2) officers on patrol, who were responding to a domestic violence incident. The Borough had to call mutual aid, as there was no one else on duty to respond to this incident. Unfortunately, it took over six (6) minutes to respond to this incident, which is totally unacceptable, and the victim died. Traffic was a major contributor to the accident which occurred (Rowe Cert., ¶8).

In response, starting in 2014, the Chief of Police had directed the officers in the Police Department to close streets on a short-term basis as necessary by utilizing traffic officers and temporary orange traffic signs. However, those temporary closings apparently did not appear on any of the navigational applications. On one occasion during a temporary closure of Irving Street, 54 summonses were issued to drivers stuck in traffic and jumping a curb in order to get onto Irving Street. In fact, road closures with temporary signage were useless in addressing the traffic impact on the Borough as the result of congestion on the GWB (Rowe Cert., ¶9).

Recently, due to use of navigational applications, such as Waze, Google Maps, Apple Maps, etc. more commuters have been using residential streets in Leonia as a cut-through in order to avoid traffic on federal, state and county roadways abutting the Borough (Rowe Cert., ¶11). As a result, weekend traffic is no better than commuter traffic. In fact, on Mother's Day in 2017, the Borough experienced what we characterized as a Level 5 traffic jam, in which there was a several

hour backup at the GWB. There was double-stack traffic throughout the Borough, no one could move in or out of their homes, and the Borough was, in fact, paralyzed. Due to the fact that there were only two officers on patrol, the Chief of Police had to come into work solely to direct traffic on his day off (Rowe Cert., ¶10).

In addition to the fact that the department is lacking in manpower to patrol all of the streets that become congested during rush hour, the overflow traffic also creates problems for medical emergency services in the Borough, as well as for emergency services from neighboring and nearby communities, namely Fort Lee to the east and Palisades Park and Ridgefield to the south, that travel through the Borough to get to area hospitals, including Englewood Hospital, Holy Name Hospital and Hackensack Medical Center. Sirens and lights directing drivers to move their vehicles are rendered useless when there are traffic jams, causing delays in response times and delivery of those emergency services (Rowe Cert., ¶12). Also on the subject of emergency services, it is important to note that the Borough has a volunteer Fire Department, whose members respond to fires directly from their homes and must rush to the Fire House with the aid of a blue light. Even with the blue lights, with traffic congesting the local streets, the volunteers cannot maneuver out of their driveways to respond to a fire call (Rowe Cert., ¶13).

The Borough has made several attempts with the Port Authority and the DOT for assistance in addressing the Borough's concerns about safety due to traffic from those state and county roadways that is impacting the Borough in a negative manner (Rowe Cert., ¶14). Most recently, the Borough applied for discretionary funding from the Port Authority to fund the hiring of four (4) civilian traffic officers to assist with addressing the increase in traffic in the Borough, but no aid was forthcoming (Rowe Cert., ¶18).

Weekend traffic is unfortunately not any better than commuter traffic in the mornings and evenings (Rowe Cert., ¶10). This is because on Sunday evening, EZpass usage decreases by 10%which causes a tremendous impact on traffic as the Port Authority does not have sufficient cash lanes open to handle the increase in non-EZ pass drivers (Rowe Cert.¶10). As a result, On Mother's Day 2017, the Borough experienced what the Police Chief characterizes as a Level 5 traffic jam due to a several hour backup on the GWB. There was double-stack traffic throughout the Borough and no one could move in or out of their homes, and the Borough was in fact paralyzed (*Id*).

As a result of not receiving any assistance or funding from the Port Authority or the DOT, the Chief of Police of the Borough of Leonia developed a Safe Street Initiative to address safety within the Borough as a result of increased traffic going to and traveling over the GWB (Rowe Cert., ¶15). The Safe Streets Initiative was developed shortly after the aforementioned incident that occurred on Mother's Day 2017 (*Id*).

The Traffic Initiative drafted by the Chief of Police in 2017 recommended the closure of forty-four (44) streets within the Borough from the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m. for resident use only, a fine of at least $200 for violations, and the permanent change of five (5) streets to one-way streets (see Exhibit "D" attached to the Certification of Tom Rowe). The Traffic Initiative was presented to the Council on October 16, 2017. (Rowe Cert., ¶16). Ordinance 2017-19 incorporating the recommendations of the Traffic Initiative by the Chief of Police was drafted by the Borough Attorney for consideration by the Council, introduced by the Council on November 20, 2017, and adopted by unanimous vote of the Council on December 4, 2017 (Rowe Cert., ¶16). Prior to the adoption of the Ordinance, notice of the proposed Ordinance was given to the public in accordance with N.J.S.A. 40:49-2 and N.J.A.C. 19:26.18 (see

Certification of Judah Ziegler (hereinafter "Ziegler Cert.") ¶9). In addition, the Leonia Chief of Police spoke to other Chiefs in neighboring municipalities about Leonia's proposed traffic measures and the Safety Initiative before the Ordinance was adopted by the Borough Council (Rowe Cert., ¶17).

Ordinance 2017-19, which amends Municipal Traffic Code 194-25.1 reads in pertinent part as follows:

> "No Person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§194-49) attached to and made a part of this Chapter during the times of the day indicated in said Schedule unless that person is a resident of the said street needing access to his home or can demonstrate or document a need to access a residence on the street or parts of streets as described."

The Schedule attached to the Ordinance identifies entry onto forty-four (44) streets be limited during the times of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m. seven days a week (see Defendant's "Exhibit E" attached to the Rowe Cert.)

Public Notice of the adoption of Ordinance No. 2017-19 was provided on or about December 15, 2017 (Ziegler Cert, ¶10). Subsequently, that Ordinance was then amended on March 5, 2018 by Ordinance 2018-5. Ordinance 2018-5, was initially introduced on February 21, 2018 and duly published in the newspaper prior to its adoption on March 5, 2018 (Zeigler Cert, ¶11). Thus, at the present time, the Borough Municipal Code provides for the regulation of traffic as follows:

"No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§194-49) attached to and made part of Chapter 194 during the times of the days indicated in said Schedule unless that person

(a) Is a resident of said street needing access to his home or can demonstrate a documented need to access a resident on the street or parts of the streets as described; or
(b) Is traveling to and/or from a Leonia destination. (see Defendant's "Exhibit G" attached to the Rowe Cert.).

The streets that are subject to such restrictions by the adoption of Ordinance 18-5 during the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m. are delineated in Schedule XVII, and incorporated into Borough Code §194-49, effective on March 5, 2018 (see Defendant's "Exhibit G," attached to Rowe Cert). Forty-four (44) out of eighty-nine (89) streets in Leonia are restricted to non-residents and persons traveling to and/or from a Leonia destination as a result of the adoption of Ordinance 2018-5 (Rowe Cert., ¶19). Furthermore, the streets in Leonia have not been closed to traffic. Borough residents and their visitors have access to all municipal streets 24 hours a day/seven days a week; all others can utilize all municipal streets not affected by the Ordinance 24 hours a day/seven days a week, and can also access 44 of the 89 streets affected by the Ordinance,15 hours a day, every day (Rowe Cert., ¶19).

As a result of the passing of these Ordinances, traffic in the Borough has improved significantly (Rowe Cert, ¶20). Additionally, as reported by the Chiefs of Police in other municipalities, there has been no negative impact on traffic in any of the surrounding communities, including in Englewood, Fort Lee, or Palisades Park with regard to the Safe Street Initiative implemented by the Borough (Rowe Cert., ¶25). In fact, the Police Chief in Fort Lee has reported that traffic in that neighboring municipality has improved as a result of the Borough's Safe Streets Initiative (*Id*). Furthermore, the Borough has issued 34% fewer traffic summonses in 2018 compared to the previous year as the result of the significant reduction of traffic on local streets (Rowe Cert., ¶36). As such, the Borough's revenue from said summonses has significantly decreased from the traffic measures in place presently, and which the Borough is prepared to absorb so as to preserve the safety and character of its residential neighborhoods (*Id*).

Despite the fact that Leonia's traffic regulations at issue in this matter have been effective at alleviating all of the adverse conditions that were noted to exist as the result of increasing GWB

traffic throughout the Borough and have made the Borough's streets safer, the Attorney General sent a letter to the Borough Attorney dated March 16, 2018 expressing a concern about the legal validity of such restrictions on the basis of residency and requesting the Borough to refrain from enforcing same (Rowe Cert., ¶26). Although the Borough disagrees that the restrictions are illegal, or that approval is needed from the DOT, the Borough has refrained from writing any summonses to any driver violating the Ordinances at issue in the matter at bar (Rowe Cert., ¶36). Less than one week after receipt of the Attorney General's letter, the Mayor and other Leonia officials met with the DOT representatives and representatives from the Attorney General's office at the DOT's offices in Trenton on March 22, 2018 to discuss the traffic regulations approved in the Ordinances 2017-19, and 2018-5 (Rowe Cert. ¶27).

On April 4, 2018, DOT traffic engineering staff visited Leonia to meet again with Leonia Officials (Rowe Cert., ¶28). However, at the time that DOT officials visited the Borough, there was no peak-hour traffic, and those representatives from the DOT also confirmed that the DOT has no specific individuals who are familiar with navigational applications and do not participate in community programs that are sponsored by those applications (*Id*). Nonetheless, without conducting a proper investigation into the traffic conditions that had been plaguing Leonia, and without stating whether the Commissioner would approve the Ordinances as adopted, DOT made suggestions in a letter dated May 8, 2018 for alternative traffic control options for Leonia's consideration (Rowe Cert., ¶29). Nowhere in the DOT's letter dated May 8, 2018, did the DOT inform the Borough that the options proposed therein still required investigation and/or the approval of the Commissioner, the County, and/or potentially adjacent municipalities (see Defendant's "Exhibit L" attached to the Rowe Cert.). The DOT's proposed alternative traffic controls also represents a change in the position that the Attorney General originally took in his

letter dated March 16, 2018, that is that the traffic controls implemented by the Borough were possibly illegal. Indeed, the traffic controls suggested by the DOT would not have any less impact on the lone state highway in the Borough than the restrictions put in place by the Borough (Rowe Cert., ¶29).

On May 10, 2018, the Mayor responded to the DOT's letter dated May 8, 2018 by addressing the balance of the traffic control options proposed by the DOT (Rowe Cert., ¶30). On that same date, all signs posted by the Borough on NJ Route 93 at the intersections of Moore Avenue and Route 93 and Route 93 and Christie Heights Street were removed by the Borough (see Defendant's "Exhibit M," attached to the Rowe Cert.). On or about June 7, 2018, Mayor Ziegler attempted to contact the Chief of Staff to the DOT Commissioner to follow up regarding the DOT's failure to address the traffic impact on local roads in their May 8, 2018 correspondence (see Ziegler Cert., ¶16). On June 8, 2018, Kevin Israel from the DOT advised Mayor Ziegler by telephone that his letter of May 10th is still under review by the DOT (Ziegler Cert., ¶17). To date, the Borough has not received a response from the DOT to the Mayor's May 10th letter (Ziegler Cert., ¶18). More than three (3) months has elapsed since the Borough's last communication with the DOT and attempts to discuss the traffic control measures in place with the DOT have been met with silence (*Id*).

LEGAL ARGUMENT

POINT I

THE DOT IS NOT ENTITLED TO A DECLARATORY JUDGMENT AGAINST THE BOROUGH'S ORDINANCES

The New Jersey Declaratory Judgment Act ("DJA") "expressly confers standing on a person whose legal rights have been affected by a municipal ordinance." Bell v. Stafford Tp., 110

N.J. 384, 390 (1988). N.J.S.A. 2A: 16-53. However, the DJA is not permitted to be used to secure court decisions that are merely advisory. Id. at 391. Furthermore, the DOT has not been granted the right by the Legislature to relief requested thereunder because the DJA has omitted the State of New Jersey (or its entities) in its definition of a "person." See N.J.S.A. 2A:16-50.

The DJA authorizes only "persons" to bring a claim for declaratory relief:

> A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. N.J.S.A. 2A:16-53 (emphasis added).

In Roberts v. New Jersey Turnpike Authority, 2016 WL 6407276 (App. Div. 2016), the Appellate Division considered whether an employee of the Turnpike Authority could pursue her claims against that entity under the New Jersey Civil Rights Act ("CRA") because it referred only to persons in the statute (see Exhibit 1 attached in the Appendix hereto). The Appellate Division first analyzed the purpose and the language contained in the CRA for a private cause of action, which was to provide "citizens of New Jersey with a state remedy for deprivation of or interference with the civil rights of an individual" by another "person." Id at *3, citing Brown v. State, 442 N.J. Super. 406, 426 (App. Div. 2015), reversed on other grounds, 230 N.J. 84 (2017). The Roberts court then considered whether the State should be considered "a person" under the Act. The Appellate Division opined that the Authority is "an instrumentality" established within the Department of Transportation, and is an agency of the State. *Id* at *4. Therefore, it held, because sovereign immunity would apply otherwise, it does not meet the definition of a person under the Civil Rights Act. *Id* at *4.

Similarly, in Didiano v. Balicki, 488 Fed. Appx. 634 (3d Cir. 2015), the Third Circuit also rejected a claim that the State of New Jersey should be included in the definition of a "person" under the CRA. It reasoned that, although the CRA does not define the word "person," New Jersey has provided its own definition of the word "person," in N.J.S.A. 1:1-1, and that definition does not include the State or agencies which are the functional equivalent of the State." Id at 638. In so holding, the Third Circuit did not reach the merits of whether the state was entitled to assert sovereign immunity as an additional defense to the plaintiff's claims. Id. at n. 5. Rather, the Third Circuit came to the same conclusion as the Appellate Division in Roberts, supra, based solely on statutory construction.

Likewise, the definitions section of the DJA expressly defines "person" as "any person, partnership, joint stock company, unincorporated association or society, and municipal or other corporation of any character." N.J.S.A. 2A:16-50. It does not specifically include the State in its definition of a "person," nor does it authorize the Attorney General to file suit to obtain a declaratory judgment on behalf of anyone. Cf. N.J.S.A. 10:5-5(e) (including "state" in its definition of employer, making the LAD applicable to the State and its agencies and departments); and N.J.S.A. 10:5-14.1 (expressly permitting Attorney General to proceed in a summary manner in Superior Court to compel compliance with the LAD). Thus, as a matter of law, Intervenor, the Department of Transportation, which is a state-created entity, does not have standing to be entitled to a declaratory judgment regarding any of Leonia's Ordinances at issue in this case because it is not a person entitled to such relief under the DJA.

For these reasons, DOT's Motion for Summary Judgment must be denied and Defendant's Cross-Motion to Dismiss the Complaint of Intervenor, DOT should be granted.

POINT II

THE DOT IS NOT ENTITLED TO INJUNCTIVE RELIEF AGAINST THE BOROUGH PURSUANT TO AN ACTION IN LIEU OF PREROGATIVE WRITS.

"The prerogative writ clause of the 1947 New Jersey Constitution was intended to streamline and strengthen the traditional prerogative writs which were available in the pre-1947 Supreme Court." Application of LiViolsi, 85 N.J. 576, 593 (1981). Significantly, Article VI, Section V, paragraph 4 of the New Jersey Constitution "did not change the substance of prerogative writ appeals when it created a new action in lieu of prerogative writs." Id. Rather, the New Jersey Constitution "guarantees the petitioner the same rights to appeal as were provided by those writs." Accordingly, "actions in lieu of prerogative writs lie only in those cases where a remedy was available under a traditional prerogative writ." Id. at 594. Those traditional pre-1947 prerogative writs were: certiorari, mandamus, prohibition and *quo warranto*. Id. In light of the foregoing principles, a plaintiff must show that the prerogative writ action could have been brought under one of the common-law prerogative writs. Alexander Dep't Stores of N.J., Inc., v. Borough of Paramus, 125 N.J. 100, 107 (1981).

Here, the State does not seek to compel the performance of a ministerial or discretionary function on the part of any government official, and therefore, the writ of mandamus is not applicable. Loigman v. Twp. Comm. Of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997). Nor are the writs of prohibition or *quo warranto* applicable in the matter at bar, since those writs were historically used to, respectively, block a judgment of an inferior court where it is acting manifestly beyond its jurisdiction and to challenge the right of an individual to hold a public office. See LiViolsi, supra, at n.18.

Insofar as the common law writ of certiorari is recognized to have "long been available in New Jersey to afford judicial review of administrative agency actions in general and of municipal

ordinances in particular," that writ has historically been available solely to individual citizens and taxpayers of the State of New Jersey. Alexander Dep't Stores v. Paramus, 125 N.J. at 107 (*citing* Hills Development Co. v. Bernards Tp. In Somerset County, 103 N.J. 1, 44-45 (1955)). See also, Jordan v. Borough of Dumont, 105 N.J.L. 197**,** 198 (Err. & App. 1928) (*citing* West Jersey Traction Co., v. Board of Public works of Camden, 58 N.J.L. 362 (Err. & App., 1896)), where the court inferred standing existed to bring an action in certiorari where the plaintiff was a citizen and a tax payer). In fact, in order to have standing to invalidate an ordinance as a non-citizen or non-taxpayer, a plaintiff must, at a minimum, demonstrate beyond question that the ordinance would affect him or her personally in a negative manner. See Gurland v. Town of Kearny, 128 N.J.L. 22, 26 (Sup. Ct. 1942).

Here, the DOT is a state-created entity with certain limited authority granted to it by the Legislature. Nowhere within that legislative grant is there authority for the DOT to bring a lawsuit against a municipality for alleged violations of Title 39. Cf. N.J.S.A. 10:5-14.1 (expressly permitting Attorney General to proceed in a summary manner in Superior Court to compel compliance with the LAD). Nor can the DOT establish beyond question that the regulation of passage of traffic through the Borough has had any affect upon it or on the State highways it oversees. Indeed, our research has not revealed a single instance where the State has been permitted to use the writ of certiorari to enjoin municipal action on behalf of all citizens of New Jersey. Thus, the filing of an action in lieu of prerogative writ by another legislatively-created entity is a misapplication of the common law writ of certiorari, as the DOT is neither an individual citizen nor a taxpayer, and since it has not been proven that the Ordinances have had any effect on the DOT's rights in any manner. And even if same can be established, the DOT's right to limited

oversight of the Borough's Ordinances has not been impaired. In fact, the Ordinances at issue are apparently still under review by the DOT (Ziegler Cert., ¶¶17-18).

For these reasons, the DOT's Motion for Summary Judgment must be denied and Defendant's Cross-Motion to Dismiss the Complaint should be granted.

POINT III

THE BOROUGH'S LEGAL AUTHORITY TO ENACT ORDINANCES REGULATING TRAFFIC WITHIN ITS BORDERS IS DERIVED FROM ITS GENERAL POLICE POWERS AND THE TRAFFIC REGULATIONS AT ISSUE CANNOT BE SET ASIDE IN AN ACTION IN LIEU OF PREROGATIVE WRITS AS THEY ARE NOT ARBITRARY OR UNREASONABLE.

The DOT requests that this Court render the Borough's Ordinances amending its municipal traffic code so as to close certain streets during delineated hours "null and void." The DOT's primary argument in support of that request is that the Borough did not have "legal authority" to adopt said Ordinances. In so arguing The DOT relies almost exclusively upon N.J.S.A. 39:4-8 (a) and a 1955 Opinion by the Attorney General. The authority of a municipality to regulate traffic within its borders is not, however, derived from N.J.S.A. 39:4-8 (a) or the Attorney General. The legislative grant which gives a municipality legal authority to regulate traffic is contained within N.J.S.A. 40:48-2. Pursuant to the broad grant of police powers in N.J.S.A. 40:48-2, a municipality has the sole exclusive authority to control and regulate use of municipal street by motor vehicles, subject only to limited oversight by the DOT in the approval or disapproval of certain enumerated traffic regulations, if adopted by the municipality. Viera v. Town Council of Parsippany-Troy Hills, 56 N.J. Super 19, 22 (App. Div. 1977) (citations omitted) (emphasis added).

Indeed, where a municipality acts properly within its broad discretion to regulate motor vehicles on particular streets, "even to their complete exclusion therefrom, when deemed necessary in the public interest, is within the police power delegated to municipalities, and even though such

regulation may seem drastic in its operation, a court is not at liberty to substitute its judgment for that of a municipality as to the best and most feasible manner of curing traffic evils and traffic congestion in a specified area, in the interests of the welfare of the inhabitants and the persons who use the highway…" Garneau v. Eggers, 113 N.J.L. 245, 248-49 (Sup. Ct. 1934) (emphasis added). Thus, in 1958 and contrary to the 1955 Opinion of the Attorney General, the New Jersey Supreme Court held that an Ordinance enacted under N.J.S.A. 39:4-197 to regulate traffic will not be set aside unless "such regulation bears a direct relationship to the public safety and is reasonable and not arbitrary." Samuel Braen, Inc. v. Mayor and General Council of Borough of Waldwick, 28 N.J. 476, 481 (1958) (holding that an ordinance excluding trucks weighing over 15 tons under then-existing N.J.S.A. 39:4-197 was a valid exercise of a municipality's police power because it was difficult to police the street properly and alternative routes to state highway Route 17 were available). See also Berdan v. Passaic Valley Sewerage Commissioners, 82 N.J. Eq. 235 (Ch. 1913), aff'd. 83 N.J. Eq. 340 (E&A, 1914) (holding that the court will not issue "relief by injunction against action of municipal bodies in matters properly resting within their jurisdiction, in the absence of fraud); and Grogan v. DeSapio, 15 N.J.Super. 604, 611-12 (Law Division 1951) (holding that the remedy for municipal actions that comport with the law in either substance or form, and in the absence of bad faith or fraud, is at the polls and not the courts).

Here, the DOT does not argue that the Ordinances at issue are arbitrary, or unreasonable. Nor would such an argument be successful since the Ordinances at issue clearly have obtained the legitimate objectives it was designed to achieve, including but not limited to stemming the tide of traffic onto residential streets, increasing safety for all residents and drivers, creating unfettered access for emergency services to and from the Borough to hospitals, etc., conserving limited police resources, and preserving the residential character of the neighborhood on the streets impacted.

Since there is no argument or evidence that the Ordinances at issue were not properly enacted by the Borough in the first instance and through notice by publication of said Ordinances to the public, nor any evidence of fraud or bad faith, then there is no legal justification for the voiding of these Ordinances by the Court pursuant to R. 4:46-2. See Cedar Grove Township v. Sheridan, 209 N.J. Super. 267, 278-79 (1986) (holding that where a governmental entity, pursuant to its legislative authority, "makes a determination as to the best interest and most feasible manner of curing traffic evils and traffic congestion in a specific area, and such regulation bears a direct relationship to the public safety," such legislation will not be altered by the court in an action in lieu of prerogative writ).

For all of the foregoing reasons, DOT's Motion for Summary Judgment should be denied and Defendant's cross-motion to dismiss the Complaint be granted.

POINT IV

THE DOT IS NOT ENTITLED TO A DECLARATION THAT THE ORDINANCES AT ISSUE ARE "NULL AND VOID" SINCE THE ORDINANCES AT ISSUE WERE VALIDLY ENACTED BY THE BOROUGH AND IN ACCORDANCE WITH N.J.S.A. 39:4-8, AS AMENDED

Despite the fact that a municipality has broad authority to control the passage and flow of traffic under the broad grant of police powers given to it by the Legislature, DOT, nonetheless, argues that the Ordinances are "null and void" because the Borough did not submit the Ordinances to the Commissioner for DOT approval. In so arguing, the DOT fails to recognize that N.J.S.A. 39:4-8 cannot be read in part, but must be read as a whole, and in conjunction with other statutes. See Oches v. Township of Middletwon Police Dept., 155 N.J. 1, 5 (1998) ("When considering statutory provisions that relate to the same or similar subject matter, we will make every effort to reconcile those laws that appear to be in conflict and attempt to interpret them harmoniously").

A. N.J.S.A. 39:4-8 Excepts Approval By The Commissioner For Those Traffic Measures Contained In N.J.S.A. 39:4-197.

The section upon which the DOT relies upon to argue that the Borough's enactment of its Ordinances violates N.J.S.A. 39:4-8, as amended in 2008 states, in relevant part, as follows:

> Except as otherwise provided in this section, no ordinance, resolution, or regulation concerning, regulating, or governing traffic or traffic conditions, adopted or enacted by any board or body having jurisdiction over highways, shall be of any force or effect unless the same is approved by the commissioner, according to law. Id. (emphasis added).

Prior to 2008, N.J.S.A. 39:4-8 did not expressly permit municipalities to act in a certain manner to control traffic or the passage of motor vehicles on a street without first obtaining approval from the Commissioner of the DOT. In 2008, N.J.S.A. 39:4-8 was expressly amended to remove DOT oversight, including but not limited to those matters that previously required Commissioner approval pursuant to N.J.S.A. 39:4-197. See N.J.S.A. 39:4-8(b)(1). N.J.S.A. 39:4-8(b)(1), as amended in 2008, now excepts certain traffic regulations that previously required Commissioner approval, pursuant to N.J.S.A. 39:4-197. The exceptions to Commissioner approval in N.J.S.A. 39:4-197 include "regulating the passage or stopping of traffic at certain congested street corners and designated points…" N.J.S.A. 39:4-197(1)(e). The only limitation on the regulation of the passage of traffic is that it must be effected through an Ordinance, and cannot be implemented merely through a resolution or regulation. Id. Thus, the fatal flaw in The DOT's arguments is that Commissioner approval is no longer required for those enumerated traffic regulations in N.J.S.A. 39:4-197.

The term "regulating" is not defined in the Act; nor is the term "passage" of traffic defined anywhere in Title 39. Absent a clear indication that the language in the statute is to be interpreted otherwise, it is to be read in accordance with its plain and ordinary meaning. Diprospero v. Penn,

183 N.J. 477, 492-93 (2005). "Regulating" is defined in relevant part by Webster's Dictionary as: "a) to govern or direct according to rule; b) to bring under control of law or constituted authority." "Passage" is defined, in relevant part, by Webster's Dictionary as: "the act or process of passing from one place, condition, or stage to another." By virtue of the meaning of the plain language in N.J.S.A. 39:4-197, it is clear that there is no longer any DOT oversight required in order for a municipality to bring under control the conditions under which an individual in a motor vehicle may pass through its borders from one place to another.

The Senate Transportation Committee Statement also supports the conclusion that no limits on a municipality's legal authority to enact an Ordinance regulating traffic exist in the current version of N.J.S.A. 39:4-8, as amended. The Committee statement, in relevant part, states:

> Under current law, the commissioner is required to approve certain municipal ordinances and resolutions concerning traffic management on local roads. This bill would provide municipalities and counties with the authority to make traffic engineering decisions in keeping with the provisions of the Manual on Uniform Traffic Control Devices for Streets and Highways, based upon the expertise of their municipal or county engineer, without obtaining prior approval of the Department of Transportation. (emphasis added). Senate Transportation Committee Statement, No. 2731, L.2008 c.110 (October 6, 2008).

Accordingly, it is clear that amendments to N.J.S.A. 39:4-197 and N.J.S.A. 39:4-8 have divested virtually all oversight by the Commissioner over local traffic legislation. Thus, contrary to the arguments submitted by Rosa and the Deputy Attorney General in support of their motions for summary judgment, there are no limits on the Borough's broad authority, pursuant to its police powers, to make a variety of decisions with respect to traffic control, and to now unilaterally regulate the "passage or stopping of traffic at certain congested street corners or other designated points."

B. The Failure To Obtain Commissioner Approval For Traffic Regulations Which Allegedly Have An "Impact On A State Highway" Does Not Invalidate The Borough's Ordinances.

Ignoring said legislative intent to remove oversight by the DOT of municipal traffic regulation before same is enacted, the DOT also argues that the Ordinances at issue should be deemed not to have any force or effect pursuant to N.J.S.A. 39:4-8 because said Ordinances allegedly have an "impact on a state highway" as that term is defined by N.J.A.C. 16:27-2.1. Aside from the fact that the DOT is not entitled to a declaratory judgment for the reasons set forth in Point One and Three of this Brief, Intervener's argument is flawed because 1) the Ordinances do not require pre-approval from the Commissioner; and 2) Intervener has not shown any valid reason that voiding of the Ordinances should be the result, under these circumstances, as a matter of law.

The section upon which the DOT relies upon to argue that the Borough was required to submit the Ordinances for approval states as follows:

> [A]ny municipal or county ordinance, resolution or regulation which places any impact on a State roadway shall require the approval of the commissioner."

Unlike the vague notice requirement to neighboring municipalities in the preceding paragraph, nowhere in this section of the Statute does it state that approval must be obtained from the commissioner prior to the adoption of any municipal or county ordinance. Ibid. In fact, the next paragraph governing the procedure by which Commissioner's approval is to be obtained appears to require that the Ordinance be submitted for Commissioner approval after it has been adopted. The following paragraph reads as follows:

> Where Commissioner approval is required, a certified copy of the adopted ordinance, resolution, or regulation shall be transmitted by the clerk of the municipality or county as applicable to the commissioner within 30 days of the adoption. Ibid.

Thus, under the plain language of the statute, the requirement for Commissioner approval in certain demonstrated circumstances was not intended to place any prior restraints on a municipality's legal authority pursuant to N.J.S.A. 40:48-2 to pass any Ordinances regulating the passage of traffic. Rather, under the plain language of this portion of the statute, pre-approval of a municipality's traffic ordinances, even one that fits the statutory definition of "impact" on traffic, is not required.

Assuming arguendo that DOT approval is required, it is significant that the amended statute also provides that it is only where the Commissioner finds that the regulations are inconsistent with the Manual on Uniform Traffic Control Devices for Streets and Highways, inconsistent with engineering standards, not placed on results of accurate traffic and engineering survey, or place an undue traffic burden or impact on the State highway system or affect the flow of traffic on the State highway system that the provisions of the ordinance may be invalidated. N.J.S.A. 39:4-8. Here, the DOT has not argued that the traffic controls implemented by the Borough in Ordinance 2018-5 are inconsistent with the Manual on Uniform Traffic Control Devices nor have they argued that they were not based upon an accurate traffic conditions that exist in the Borough. On the contrary, the DOT seemingly has agreed with the Borough that controls to prevent traffic on the streets impacted by the Ordinance are in fact necessary and appropriate (see Defendant's "Exhibit L," letter attached to the Rowe Cert.).

Nor can the DOT rely solely upon the statutory definition of "impact on a state highway" contained in N.J.A.C. 16:27-2.1 to invalidate the Borough's ordinances. The addition of the word "undue" in N.J.S.A. 39:4-8(a) in that section of the Statute providing a list of reasons for withholding approval is a qualifier to the word "impact" Thus, only impact that is "undue" will

support withholding of approval by the Commissioner.[2] Here, the DOT has failed to present even one iota of evidence of an undue burden or impact on the State highway system. Nor has there been any statement of reasons given to the Borough as to why its Ordinances designed to stem the flow of traffic on residential streets should not be approved. Thus, it is not the Borough that has overstepped its legal authority here, but it is the Attorney General's Office in bringing this legal action against the Borough to invalidate its traffic ordinances based upon the fiction that the Borough requires DOT approval to regulate traffic in the manner set forth in Ordinances 2017-19 and 2018-5, and even though the DOT was divested of responsibility for such oversight in 2008.

In fact, any contrary interpretation requiring pre-approval of traffic ordinances as suggested by the Deputy Attorney General Espinoza so as to divest a municipality's broad grant of its police powers by the legislature would yield to an absurd result. If the DOT is deemed to have retained pre-approval of the delineated traffic regulations by virtue of the language contained solely in the first paragraph of N.J.S.A. 39:4-8(a), then the amendments to the remainder of the Statute, requiring an adopted Ordinance to be submitted to the Commissioner for approval following the adoption of same, and adding the word "undue" to qualify the type of impact necessary to invalidate a municipal act would have no effect at all to remove municipal traffic regulations designed to address congestion from Commissioner oversight. Certainly, this is not the result that the Legislature intended when it expressly amended the statute to also except those traffic conditions contained in N.J.S.A. 39:4-197 from the oversight of the Commissioner. See N.J.S.A. 39:4-8(b).

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[2] "Undue" is defined in Black's Law Dictionary, 2nd Ed. (2001) as: excessive or unwarranted.

For all of the foregoing reasons, it is clear that the Borough had the sole legal authority to enact the Ordinances at issue regulating traffic at congested points in the Borough, and that nothing contained within N.J.S.A. 39:4-8 limits the Borough's legal authority to stem the flow of traffic in the manner it has done, including but not limited to the reference in the statute for Commissioner approval post-adoption. In other words, the Ordinances at issue are not lacking in legal authority, and cannot be deemed *void ab initio* as argued by the DOT. Rather, it is respectfully submitted that the Ordnances cannot and should not be voided by this Court for all of the reasons set forth herein by Defendant.

POINT V

THE ATTORNEY GENERAL'S OPINION FROM 1955 IS NO LONGER VALID AS THE STATUTES RELIED UPON HAVE BEEN AMENDED TO REMOVE DOT OVERSIGHT OVER THE TRAFFIC REGULATIONS AT ISSUE

In addition to arguing that the Borough did not have the legal authority to regulate the "passage or stopping of traffic at certain congested street corners or other designated points," without any citation to any legal authority, The DOT also argues that the Borough did not have the legal authority to establish "no through streets." In this respect, the Attorney General appears to be relying upon a 1955 opinion interpreting N.J.S.A. 39:4-197 as a limitation on the general police power of a municipality by which it may legally restrict the right of the public to the free use of streets and roads. It should be noted that, although a formal statutory interpretation of the Attorney General, who as legal advisor to most state agencies has the duty of interpreting statutes pursuant to N.J.S.A. 52:17A-4(e), may be considered "strongly persuasive," a formal opinion of the Attorney General with respect to such an interpretation is in no way binding on the courts. Clark v. Degnan, 163 N.J. Super. 344, 371-72 (Law Div. 1978), modified on other grounds and affirmed, 83 N.J. 393(1980) (internal citations omitted). Here, the Attorney General Opinion from 1955

cannot even be considered strongly persuasive because, as explained in Point Three of this Brief the statutes relied upon therein have since been amended to expressly permit municipalities to enact regulations governing the passage of traffic at congested street corners and other designated points, without any oversight by the DOT.

More specifically, the 1955 Opinion of the Attorney General had relied upon a prior version of N.J.S.A. 39:4-202 entitled "Approval of resolutions, ordinances or regulation by commissioner" to conclude that an ordinance designating "no through" streets to designations located in the Borough cannot be effective until approved by the Commissioner. N.J.S.A. 39:4-202, also amended in 2008, now states:

> No resolution, ordinance or regulation passed, enacted or established under authority of this article shall be effective until submitted to and approved by the Commissioner of Transportation, as provided in R.S. 39:4-8, except as otherwise provided therein." (emphasis added).

Likewise, according to the 2008 amendments to N.J.S.A. 39:4-8, several exceptions are contained therein which shift responsibility of making traffic control decisions to local governments rather than to the DOT. As stated earlier, N.J.S.A. 39:4-8(b) now exempts those actions contained in N.J.S.A. 39:4-197 that previously required Commissioner approval. Furthermore, as amended, N.J.S.A. 39:4-197 now states: "a municipality may pass without the approval of the commissioner and consistent with the current standards prescribed by the Manual on Uniform Traffic Control Devices for Streets and Highways, ordinances or resolutions, or by ordinances or resolutions may authorize the adoption of regulations by the board, body, or official having control of traffic in the public streets, regulating special conditions existent in the municipality on the subjects and within the limitations following…" And for those traffic regulations that still require minimal oversight by the Commissioner, such as those deemed to have an impact on state highways, the amendments to N.J.S.A. 39:4-8 also make clear that pre-approval

of a municipality's adopted Ordinances is no longer required.

Furthermore, contained within N.J.S.A. 39:4-8(c), as an additional exception, is express authority for a municipality to pass by ordinance, resolution or regulation, without first obtaining Commissioner approval, approval for "street closings for periods up to 48 continuous hours." The only restriction on such street closures, either continuously or during certain hours over a period of 48 hours or longer, appears to be a requirement that the municipality erect signs 72 hours in advance. N.J.S.A. 27:3A-2 (requiring municipality to erect signs 72 hours in advance of a street closure, either continuously or during certain hours over a period of 48 hours or longer). Thus, the erection of signs to notify the public with respect to the restrictions on passing through certain streets during certain hours in Leonia was lawful exercise of its municipal authority, and not an abuse of discretion which requires invalidation of these actions. The fact that N.J.S.A. 39:4-8(c)(6) expressly authorizes a municipality to be able to close its streets without commissioner approval for less than 48 hours, and is further authorized by the Legislature to close its streets during certain hours over 48 hours or longer, so long as it erects signs, clearly establishes that the Legislature did not intend to limit the right of a municipality to limit the flow of traffic onto certain designated streets during certain hours in light of the amendments made to N.J.S.A. 39:4-8 and N.J.S.A. 39:4-202 in 2008.

For all of the foregoing reasons, it is clear that the amendments to N.J.S.A. 39:4-202 and N.J.S.A. 39:4-8 wholly supersede the 1955 opinion of the Attorney General, that was issued more than 55 years prior to the December 4, 2008 effective date of N.J.S.A. 39:4-8 and N.J.S.A. 39:4-202, and that said Opinion is clearly inapplicable to the matter at bar.

POINT VI

THE BOROUGH OF LEONIA HAS THE LEGAL AUTHORITY TO DIFFERENTIATE BETWEEN RESIDENTS AND NON-RESIDENTS IN DECIDING HOW TO REGULATE TRAFFIC UNDER ITS POLICE POWERS GRANTED TO IT BY THE STATE LEGISLATURE.

The DOT also argues that the Borough did not have the legal authority to enact traffic regulations that limit access to certain streets depending on whether the driver is a resident or based on whether a person is traveling to a destination within the Borough. This argument too should be rejected in *toto*.

In Arlington County Board of Va., v. Richards, 434 U.S. 5 (1977), the Supreme Court held that the Constitution is not offended due to distinctions made by a local governing body in an ordinance between residents and non-residents as it pertained to the manner in which they may and may not use streets designed to "stem the flow of traffic from commercial and industrial districts into adjoining residential neighborhoods." Id. at 6. It was also recognized by the Supreme Court that municipal police powers are appropriately exercised where a decision to place restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing pollution, noise, traffic hazards, and litter, as well as preserving property values. Id. at 7. Similarly to Richards, courts in New Jersey recognize that a municipality is given a large amount of discretion even where the Ordinance treats residents and non-residents differently for the purpose of regulating traffic and to achieve the objective of using police resources more efficiently and reducing negative quality of life issues associated with the summer season and increased tourism, in addition to ensuring residents had sufficient overnight parking. See Martell's Tiki Bar, Inc. v. Governing Body of Pt. Pleasant Beach, 2015 WL 132559, at *12 (D.N.J. 2015) (see Exhibit 2 attached to the Appendix hereto).

In New Jersey, a municipality's police power is broad enough to encompass regulations

designed to reduce the quantity of vehicular traffic into residential areas. Viera v. Town Council of Parsippany-Troy Hills, supra, 56 N.J. Super at 22. It is also broad enough to encompass restrictions based upon hours of operation of a private business to protect the character of peace and quiet in a neighborhood. Quick Check Food Stores v. Springfield Twp., 83 N.J. 438, 448 (1980). Similarly, the Third Circuit has held that even a blanket prohibition on driving repetitively in a loop in certain congested areas in a city is a valid exercise of police power where the stated purpose for an anti-cruise ordinance was to combat safety and congestion problems caused by such "cruising." Lutz v. City of York, Pa., 899 F.2d 255, 270 (3d Cir. 1990).

In the matter at bar, the traffic regulations at issue restrict non-residents, but also those who do not have business in the Borough, from using certain streets during delineated hours in the morning and in the evening hours when traffic congestion is at its highest. The power to make these distinctions for the purpose of reducing GWB traffic on residential streets, thereby improving the quality of life of the Borough's residents, ensuring access to emergency services, and making efficient use of limited police resources is derived from the Legislature's broad grant to municipalities to enact legislation for the health, safety and welfare of the public. See N.J.S.A. 40:48-2. Due to the broad nature of this legislative grant, no other express authority in any other statute to make such distinctions is needed. Cf. A.A. Mastrangelo, Inc. v. Commissioner of Dept. of Environmental Protection, 90 N.J. 666, 684 (1982) (holding that "the absence of an express statutory authorization will not preclude an agency from acting where "by reasonable implication, that action can be said to promote or advance the policies and findings that served as a driving force for the enactment of that legislation.") In fact, it is submitted that N.J.S.A. 39:4-8 was never intended to curtail a municipality's police powers, and furthermore, as enacted currently, merely instructs the DOT as to its limited oversight role with respect to traffic conditions on state highways

alone. If it were otherwise, as the DOT has argued, the Borough would not be able to make a myriad of other determinations for the health, safety and welfare of the public not expressly contained within other legislation, including but not limited to the DOT's proposed alternatives contained within its letter dated May 10, 2018 to the Mayor. Nor would any of the other 566 municipalities in the State, including the Borough of Fort Lee who also limits street access near the GWB exclusively to residents and business owners at all different times of the day.

Accordingly, DOT's contention that the Borough does not have the legal authority to regulate traffic on its local streets on the basis of whether the driver is a resident or a non-resident because Title 39 does not expressly give the Borough that specific authority is without any merit and must be rejected.

POINT VII

THE FAILURE TO PROVIDE NOTICE TO ADJOINING MUNICIPALITIES IS NOT FATAL TO THE ADOPTION OF THE ORDINANCES AMENDING MUNICIPAL CODE §194-25.1

Intervener also appears to be arguing that the failure to provide notice to adjoining municipalities of the Ordinances at issue in this case prior to their adoption is fatal to the adoption of the adoption of the Ordinances themselves. However, nowhere in Title 39 is there contained a definition of the type of notice that is required to an adjoining municipality of the Borough's Ordinances, nor is there a definition of what constitutes an impact on a neighboring municipality.[3] Furthermore, due to the fact that there has been absolutely no evidence submitted by anyone of

[3] The ordinary meaning of the word "impact" according to the Oxford Dictionary online is: A marked effect or influence. To date absolutely no evidence of such an effect on any neighboring municipality has been submitted by anyone. In fact, Fort Lee has reported a decrease in traffic since the Ordinances went into effect (see Rowe Cert., ¶25). https://en.oxforddictionaries.com/definition/impact

any negative effect from the adoption of the Ordinances at issue, and the fact that the Borough of Fort Lee has reported a decrease in traffic since the Ordinances went into effect, it is submitted that no prior adoption notice was required under the Statute. And if the Court does not accept this argument, then it is submitted that there was nonetheless substantial compliance with the objective of the notice requirement to municipalities by virtue of the newspaper accounts cited in the DOT's Brief, as well as through the Borough's public notice of the pending adoption of the Ordinances and following adoption as required by N.J.S.A. 40:49-2 and N.J.A.C. 19:26.18. See Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. 129, 169-170 (1977). (holding that "substantial compliance" with a statutory requirement is normally sufficient and occurs whenever, as a practical matter, it is reasonable to conclude that partial compliance has fully attained the objective of the statute as though there had been complete and literal compliance).

Furthermore, it is well settled that procedural irregularities in the adoption of an Ordinance do not necessarily warrant invalidation of same. Id at 158-159 (holding that, as opposed to an act that is *void ab initio*, a voidable act is one which may be avoided, but until this is done, in the regular course of judicial proceedings, the action stands in full force and effect). In fact, New Jersey courts have consistently held that where a public body has the power and authority to enter into an agreement, but has failed to follow proper procedures in exercising that authority, it may subsequently ratify the agreement. Id at 160. Thus, where an ordinance is found to be deficient for failure to proceed in a proper manner as it pertains to notice, the court should permit the municipality to cure said defects pursuant to its common law right to ratify its actions, rather than to void the ordinance altogether. Id at 173 (dismissing plaintiff's complaint seeking to void an ordinance for procedural defects under the Open Public Meeting Act pertaining to notice).

For all of the foregoing reasons, Intervener's Complaint seeking to invalidate the Borough's Ordinances on the basis that prior notice was not given to neighboring municipalities should be dismissed.

POINT VIII

ASSUMING *ARGUENDO* THAT THE COURT DENIES THE BOROUGH'S CROSS-MOTION TO DISMISS BASED ON THE PLEADINGS AND REJECTS THE BOROUGH'S ARGUMENTS IN OPPOSITION TO THE MERITS OF THE DOT'S MOTION, IT MUST, NONETHELESS, DENY THE MOTION BECAUSE THE MATERIAL FACTS HAVE NOT BEEN ESTABLISHED AND BECAUSE THE BOROUGH HAS NOT BEEN AFFORDED THE OPPORTUNITY TO OBTAIN DISCOVERY.

R. 4:46-2(c) provides that summary judgment may only be entered if there are no material facts in dispute and the movant has established that it is entitled to judgment as a matter of law. "An issue of fact is genuine … if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. A motion for summary judgment should be denied when there are genuine issues of material facts. See Parks v. Rogers, 176 N.J. 491, 502 (2003); Gilhooley v. County of Union, 164 N.J. 533, 545-546 (2000).

As an initial matter, assuming *arguendo* that N.J.S.A. 39:4-8 has been implicated, the DOT has not established by any facts, let alone uncontroverted facts, that the Ordinance places any impact on roadways in an adjoining municipality or an undue impact or burden on a state highway to support of its motion, as required by R. 4:46; and, thus, summary judgment is not appropriate.

Secondly, the Certifications of Thomas Rowe and Judah Zeigler raise issues of fact as to the DOT's authority to regulate the traffic on the municipal roads in the Borough and the extent of action or inaction by the DOT to "coordinate the transportation activities of State agencies … and

other public agencies with transportation responsibilities within the State" in accordance with the Transportation Act of 1966. And, for that additional reason, summary judgment is not appropriate.

Thirdly, the Borough has not been afforded the opportunity to conduct discovery in connection with its defenses to Plaintiffs' claims. This action has been assigned to Track IV with a discovery period of 450 days and ends May 24, 2019. The Borough has not had the opportunity to conduct any discovery thus far. It is well established law that summary judgment should not be granted on a meager record when the ruling sought would have a broad-reaching social and legal effect. Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969). Where discovery on material issues is not complete, the respondent must be given the opportunity to take discovery before disposition of the motion. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001).

For any or all of the foregoing reasons, the DOT's motion for summary judgment should be denied.

CONCLUSION

In conclusion, it is respectfully requested that the DOT's Motion for Summary Judgment be denied and that Defendant's cross-motion to dismiss the DOT's Complaint for the failure to state a claim be granted.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant, Borough of Leonia

By: *s/ Ruby Kumar-Thompson*
Ruby Kumar-Thompson, Esq.

Dated: August 21, 2018

APPENDIX

EXHIBIT 1

2015 WL 132559
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

MARTELL'S TIKI BAR, INC., Plaintiff,
v.
GOVERNING BODY OF BOROUGH OF POINT PLEASANT BEACH, et al., Defendants.

Civil Action No. 13–5676.
|
Signed Jan. 9, 2015.

Attorneys and Law Firms

Alexis Leigh Gasiorowski, Robert S. Gasiorowki, Gasiorowski & Holobinko, Red Bank, NJ, for Plaintiff.

Angelica Guzman, Arthur M. Peslak, Gertner Mandel & Peslak, LLC, Lakewood, NJ, for Defendants.

PINION

PISANO, District Judge.

***1** Plaintiff, Martell's Tiki Bar, Inc. ("Plaintiff" or "Martell's"), has brought this action, in which it challenges ordinances adopted by the Borough of Point Pleasant Beach (the "Borough"). These ordinances impose public parking restrictions within designated areas in the Borough during certain months of the year.

At issue is the Borough's current Ordinances 2013–26 and 2013–29, both of which regulate and restrict non-metered parking in areas of those districts in close proximity to the Borough's beach, boardwalk, and boardwalk commercial attractions. Specifically, the ordinances provide that, from May 15th to September 15th of each year, only those people who qualify as residents and residential taxpayers within District Four and a portion of District Three of the Borough are permitted to park in non-metered spaces between the hours of 12:30 a.m. and 4:00 a.m.

The parties agree that resolution of this dispute depends on a determination of two issues: whether the ordinances violate the Equal Protection Clause of the United States Constitution, and whether the ordinances violate the Public Trust Doctrine.[1] Before the Court are two corresponding motions for summary judgment, brought by Plaintiff and Defendants, the Governing Body of the Borough of Point Pleasant Beach and the Borough of Point Pleasant Beach (together, the "Defendants"). The Court decides these motions without oral argument pursuant to Fed.R.Civ.P. 78. For the reasons set forth below, Defendants' motion is granted in part and denied in part and Plaintiff's motion is denied.

I. Background[2]

A. ***Background of Parking Ordinances in the Borough***

The Borough of Point Pleasant Beach is a town on the New Jersey Shore, and occupies land providing access to and adjoining the Manasquan River and Inlet, its tributaries and branches, as well as the Atlantic Ocean. Starting in or about 2001, the Borough began considering a nonresident parking ban. *See, e.g.,* Point Pleasant Beach Parking Committee Meeting, October 25, 2001, *located at* Certification of Sean D. Gertner ("Gertner Cert") Ex. C ("Defs.' Ex. C"). The increasing popularity of the Borough as a premier New Jersey shore destination led to increasing problems for the quality of life in the Borough; as traffic and lack of parking in the Borough worsened, these conditions began "to affect resident's quality of life." *See* Report of Stan Slachetka, P.P ., dated May 3, 2013, at 8 (citing to a 2007 Reexamination Report), *located at* Gertner Cert. Ex. VVV ("Defs.' Expert Rep."). The overall influx of tourists, as well as the existing residents, "create[d] a severe shortage of parking" in the Borough. *Id.* at 9 (quoting the 2007 Reexamination Report at 29). Accordingly, the Borough felt that a nonresident parking ban would work to relieve problems with access to the beach, beach-related facilities, and businesses. They also believed it would help generally with certain "quality of life" problems in the Borough, such as loud parties at "animal houses," disorderly conduct, public intoxication, and public urination. *See generally* Defs.' Ex. C (discussing various parking proposals); *see also id.* at 22:24–23:5; 29:13–32:13, 42–48. Apparently, the Borough failed to garner public support for such a parking ordinance.

***2** In November 2011, the Borough sent a proposal to the voters of the Borough with the following question: "Shall the Governing Body of the Borough of Point Pleasant Beach institute by the appropriate action regulations

limiting parking on public streets to residents and taxpayers of the Borough of Point Pleasant Beach?" *See* Sample Election Ballot, dated November 8, 2011, *located at* Gertner Cert. Ex. EEE. The explanatory statement provided: "This overnight parking program would restrict parking town-wide for only taxpayers and residents. This program would run from Memorial Day to Labor Day. Hours of enforcement from midnight until 8:00 a.m. with five free transferrable passes to be distributed to each eligible reference." *Id.* This referendum was defeated by the voters of the Borough. *See* Pl.'s Statement of Material Facts not in Dispute ("Pl.'s SMF") at ¶ 9; Transcript of March 20, 2012 Borough of Point Pleasant Beach Council Meeting at 36:12–19, *located at* Gerner Cert. Ex. N ("Defs.' Ex. N").

B. ***Enactment of Ordinances 2012–12 and 2012–20: the Pilot Program***

The governing body of the Borough continued to study and review street parking limitations. The Borough believed that helping facilitate parking for residents and employees of local businesses would also help address the incessant quality of life issues in the Borough during the summer months when tourism was at its peak, while making overnight parking available to the residents of a certain designated area of the Borough, known as District Four. *See, e.g.,* Defs.' Expert Rep. at 1; Defs.' Ex. C at 5:13–6:13, 22:24–23:5; 29:13–32:13, Defs' Ex. N at 109–55. During these months, District Four experienced numerous problems with intoxicated patrons after midnight, loud profanity, littering, noise violations, and disorderly conduct, including but not limited to simple assault, theft, resisting arrest, public urination, defiant trespassing and drunk driving. *See, e.g.,* Transcript of June 12, 2012 Borough of Point Pleasant Council Meeting at 67:11–69:19, *located at* Gertner Cert. Ex. I ("Defs.' Ex. I"); Defs.' Expert Rep. 3; Copy of S.N.A.P. Slides at 2 (describing how 58% of all police responses in the Borough occurred in District Four), *located at* Gertner Cert. Ex. GGG.

Accordingly, the governing body of the Borough decided to move forward with a trial parking plan for District Four. *See* Minutes of January 24, 2012 Borough of Point Pleasant Beach Council Meeting at 9, *located at* Gertner Cert. Ex. Q (Defs.' Ex. Q); Minutes of March 6, 2012 Borough of Point Pleasant Beach Council Meeting at 7, *located at* Gertner Cert. Ex. O ("Defs.' Ex. O"). Apparently, motivation for developing such a parking plan came from the residents of District Four, which voted in favor of the 2011 parking referendum that had been defeated. The Council also expressed that a similar ordinance had already been passed in a different area of town. *See* Defs.' Ex. O at 7; Defs.' Ex. N at 131.

***3** This first ordinance was Ordinance 2012–12, entitled "Pilot Parking Program for District Four." *See* City of Borough of Point Pleasant Beach Ordinance 2012–12, *located at* Gerner Cert Ex. DD ("Defs' Ex. DD"). The ordinance restricted overnight parking in District Four to vehicles displaying residential parking placards between the hours of 12:00 a.m. and 6:00 a.m. during the summer season, defined as the Monday before Memorial Day until the Monday after Labor Day. The ordinance also provided that no more than five placards would be issued for each property in District Four. Only people who qualified as a resident or a residential taxpayer, as defined by the ordinance, would be permitted to apply for a placard. Other residents or taxpayers of the Borough that lived outside District Four would be permitted to apply for and obtain one placard. Within the ordinance, District Four is defined as "that area of the Borough bordered on the east by the Atlantic Ocean, on the west by the New Jersey Transit Railroad tracks, on the north by the Manasquan River and Inlet, and on the south by the north side of Arnold Avenue." *Id.* at 1. The preamble to Ordinance 2012–12 explained that it was necessary to establish regulation and parking on these residential streets during these hours and months of the year "for the good and welfare of its citizens ...." *Id.* By its terms, Ordinance 2012–12 contained a sunset provision that repealed the ordinance in its entirety on December 31, 2012, unless the date of the repeal was extended by ordinance of the Council. *Id.* at 3.

Thereafter, the Borough conducted several public hearings on the ordinances. The first of these meetings occurred on March 20, 2012, when the initial ordinance was introduced. In describing the Ordinance, Councilman Michael Corbally explained that:

> The parking plan will hopefully give some quality of life after midnight back to the taxpayers and residents of District 4.... And listen, this isn't just a District 4 problem. Because the folks that live in Districts 1, 2, and 3, when we do a reval or a reassessment, and we will in the

> next two or three years—guaranteed it'll be done by then—the property expense, the taxes are going to go up substantially in the other districts if District 4 continues to slide. It's a fact of life. If property values go down in District 4, because right now it's, it's the heaviest tax, it's just going to move.

Ex. N. at 38:15–18, 40:15–24. Mayor Vincent Barrella indicated that the nature of the ordinance was directed at the deteriorating quality of life in District Four:

> [T]he problem is not so much about the parking. This is not about parking. This is not about somebody looking to find a parking space in or about their house. This is about people who don't know how to behave themselves and come into point pleasant beach acting out in a Jersey, with a Jersey Shore mentality, screaming, yelling, throwing things around at two, three in the morning, cursing at the top of their lungs when they can't find their car keys, okay, and basically urinating and defecating on people's lawns. That's what this is about.

***4** *Id.* at 130:1–11. When opened to the public, residents were split on their positions on the ordinance. Those who supported the parking restriction emphasized that the deterioration of the quality of life in District Four made it "imperative" that something be done to ameliorate the situation. *See id.* at 109:22–110:25. Other residents supported the ban because they believed that the ordinance would (1) alleviate parking issues in the area for the homeowners; (2) help with criminal/mischievous activity, including fights, noise disturbances, urination and defecation on residents' lawns, and littering; and (3) reduce the number of policeman that are currently required to be present in residential areas to monitor the area. *See id.* at 147–55. Opponents of the ordinance, however, objected to and took issue with: (1) the limited number of parking placards that would be granted for each tax bill; (2) the possibility of charging for placards if the pilot program passed; (3) potential overflow and negative impact on the other districts, particularly when the other districts voted down such plans in the past; (4) the ordinance would not adequately resolve the problems in the District; (5) the potential negative effect on tourism, revenue, taxes, and businesses in the Borough; (6) costs associated with the placards and replacing placards; (7) availability of enough parking for guests of residents or residential taxpayers; and (8) possibility of increased drinking and driving. *See id.* at 112:17–25, 116, 132:13–135, 151:15–23, 147:11–148:8. At the close of the hearing, the Board voted to introduce the ordinance for adoption at the next public hearing.

On April 17, 2012, Ordinance 2012–12 was opened for a second reading. At the close of the hearing, the Council voted on and approved Ordinance 2012–12. Those members voting in favor of it emphasized that it was a pilot program attempting to alleviate the issues with the quality of life in District Four, and that it could be improved later if the program did not work. *See id.* at 175:10–197:6, 182:19–183, 184–85:11.

Thereafter, on May 15, 2012, the Council introduced Ordinance 2012–20 to amend Ordinance 2012–12. The ordinance, as amended, extended the placard privilege to employees of commercial entities within District Four, in order to "promote the vitality of businesses in, and the economy of, District Four." *See* Ordinance 2012–20, Amending 2012–12, at 1 *located at* Gerner Cert. EE. This allowed business owners to obtain placards that would permit their employees to park in non-metered spaces in District Four during the restricted period. The proposed amendment also eliminated fees at the parking meters and pay machines at Silver Lake Parking Lot, a municipal parking lot, between the hours of 11:00 p.m. and 6:00 a.m. The Borough decided to do this in order to "foster better use of its parking resources." *Id.* at 1, 7. Silver Lake is located directly across the street from the Point Pleasant boardwalk and its various attractions and bar and restaurant facilities. The amendment also prohibited the sale of placards, and authorized the Borough Administer to adjudicate any dispute by a resident relating to the issuance or failure to issue a placard, and granted the Administer with the discretion to issue more placards to residential taxpayers where there are multiple dwelling units on one property. *See id.* at 3; *see also* Transcript of May 15, 2012 Borough of Point Pleasant Beach Meeting at 32:4–33:16, *located at* Gerner Cert. Ex. J ("Defs.' Ex. J"). Finally, pursuant to the amendment, all placards would now include the homeowner's address and make

them transferable. Pursuant to its sunset provision, the amended ordinance was to be automatically repealed on December 31, 2012. At the meeting, the Council also confirmed that Ocean County had not approved the parking restrictions on County roads that went through District Four, apparently because of concern that parking would adversely affect county taxpayers and tourism to the area. *See id.* at 38–39. Therefore, County roads in District Four would be unregulated, meaning anyone could park on these roads at any time.

***5** When the amendment was opened to public comment, one resident thanked the Council for passing the ordinance, commenting that it "means a great deal to the residents of the Fourth District" and that he thought it would "be a terrific asset in restoring civility and peaceful evenings in Fourth District." *Id.* at 91:2–10. Another resident noted that he went door to door about the parking ordinance, and "everyone [he] spoke to was absolutely in favor of the ordinance for parking ...." *Id.* at 112–13. Those in opposition to the amendment, and the ordinance generally, felt that the Council was being disingenuous with its motive for enacting the ordinance. One resident commented that she did not "think that [the Borough] was doing this for the quality of life," but was doing it to generate more revenue from tourists and other non-residents. Such opposition indicated that they believed there was a "vendetta" between some Council members and the businesses on the boardwalk. *Id.* at 114:9–22. Another commented that it was her belief that the ordinance would cause tourists to stop going into the Borough, resulting in less revenue. *Id.* at 122. The Council voted to adopt the amendment at the close of the meeting.

On June 12, 2012, the Council held another hearing, in part to discuss the amendments to the ordinance and their practical effects. Specifically, business owners had questions regarding how to obtain placards for their employees, and the procedure for receiving said placards was explained. *See* Defs.' Ex. I at 64–65. When the amended ordinance was opened to the public for comment, several residents and business owners expressed the same concerns that had been raised at earlier hearings. One resident raised the issue of the appropriateness of creating a parking ordinance for District Four when the residents had voted down the referendum for a town-wide ordinance. *See id.* at 88:17–89:16. Residents also raised the issue of having certain personal information, such as their address, displayed on the placard. During the hearing, a resident also took issue with the possibility of lost revenue in the Borough by allowing free parking in Silver Lake. Other opponents of the ordinance emphasized that there was not going to be enough parking spots in District Four to allow all the residents with placards to park. *See id.* at 104. Another resident brought up a similar point, commenting that "[o]riginally, when [the Borough] came up with this parking plan, [it] said that it was going to help the quality of life by freeing up parking spaces and that it would also force the tourists to go into Silver Lake." Councilman Corbally responded to this comment by explaining that he "never said it would free up parking spaces .... The plan was just to have the nightclub crowd not walk back into the residential areas." *See id.* at 117:17–118:2. Likewise, Mayor Barrella indicated that the parking regulation was "a quality of life issue. It's a quality of life parking plan that was actually part of a, part of a, a larger attempt to address quality of life and public safety issue that might have avoided some of the actions that have already been—some of the things that this Council has been put in a position of having to do." *Id.* at 130:3–9. The Council also explained the theory behind making parking free in Silver Lake at certain hours:

> ***6** By making it free, hopefully, it will concentrate, concentrate people in the municipal lot ... so that it's easier for the police department. And the other thing is by making this lot free, it should alleviate the pressure on, on areas adjacent to District Four because people now, instead of having to look in Three for free parking, can go right to the municipal lot for free.

Id. at 197:9–22. The Council then moved and adopted the amended ordinance, Ordinance 2012–20.

C. *Enactment of Ordinances 2013–02 and 2013–14: the Permanent Program*

Because the terms of Ordinances 2012–12 and 2012–20 contained sunset provisions that automatically repealed the ordinances on December 31, 2012, the Borough began to take efforts to reestablish the parking restrictions as the 2013 summer season approached. At a February 5, 2013 hearing, the Council addressed concerns about vacant houses in and around District Four as a result of Hurricane Sandy. Several Council members felt that the

parking plan should go into effect to alleviate concerns with all the potential summer vacancies and increased vandalism. *See* Transcript of February 5, 2013 Borough of Point Pleasant Beach Council Meeting at 151, *located at* Gertner Cert. Ex. H ("Defs.' Ex. H"). The Council also resolved that the parking plan would be amended to provide free parking in the Silver Lake municipal lot from 11 p.m. to 6 a.m. They also discussed and then confirmed including certain parts of District Three into the regulated area. According to one councilman, he spoke to nineteen residents in District Three that would now be affected. He said that, of those nineteen, nine were against the regulation applying to them, five were for the regulation, and four were undecided. Overall, however, the Council believed that the parking program worked in District Four last year, and that the residents of District Four were pleased with the results. *See generally id.* at 144–79. As one councilman said:

> I'm just amazed that the Councilpeople are even debating the fat of whether this worked or not last year. I mean it's just-it's mindboggling to me that people that live there will tell you they can sleep at night with their windows open at two o'clock, there wasn't the garbage on the street, there wasn't the law-breaking going on. And now, with the houses being empty, not having that is really ludicrous. But even with the houses full, the quality of life improved. And you guys are sitting up here like making a decision that it didn't. It as positive from a cash flow.

Id. at 173–74. Thereafter, a councilman moved to introduce the new ordinance, Ordinance 2013–02, with an additional amendment that changed the hours of restriction to 12:30 a.m. to 4:00 a.m. The Council then voted and approved Ordinance 2013–02.

On March 19, 2013, the Borough held a hearing on Ordinance 2013–02, which, due to a necessary ministerial change, was now titled Ordinance 2013–14. *See* Transcript of March 19, 2013 Borough of Point Pleasant Beach at 84–85, 110–12, *located at* Gertner Cert. Ex. F ("Defs.' Ex. F"). In the preamble to the ordinance, the Borough Council states its intent "to improve the quality of life of residents of the Borough," and concluded that it needed to adopt permanent regulations in recognition of the need to limit parking in certain designated areas of the Borough between the hours of 12:30 a.m. and 4:00 a.m. from May 15th of the calendar year to September 15th of the calendar year. *See* City of Borough of Point Pleasant Beach Ordinance 2013–02, *located at* Gerner Cert Ex. FF ("Defs' Ex. FF"). The Borough Council also states that, as a result of the prior parking regulation, they "received far fewer complaints of unruly and disorderly behavior from residents in the affected districts during the periods governed by those regulations," and they therefore found that "for the good and welfare of its citizens it is necessary and advisable to establish regulations that improve the quality of life for residents." *See id.* The ordinance continued free parking at Silver Lake Lot between the hours of 11:00 p.m. and 6:00 a.m. during the time of the regulated parking. It also made it illegal to reproduce, sell, or transfer any placard for profit, and allowed multi-family properties to obtain multiple placards. A violation of the parking ordinance could result in a $250.00 fine and "community service as permitted by statute." *See id.* Ordinance 2013–14 also extended the area covered by the parking regulation to a portion of District Three, specifically "that area of the Borough bordered on the North by the south side of Arnold Avenue, on the West by the west side of St. Louis Avenue, on the South by the south side of Forman Avenue and on the East by the Atlantic Ocean, with the exception that no portion of either Arnold Avenue or Ocean Avenue shall be subject to this Ordinance." *See* City of Borough of Point Pleasant Beach Ordinance 2013–14, *located at* Gerner Cert Ex. GG ("Defs' Ex. FF"). Under the parking regulation, the several county roads that transverse the covered area would not be subject to the ordinances, because the County had formally advised the Borough that it did not wish to impose any parking regulations on its roads and therefore would not approve of the ordinance. *See* Defs.' Ex. F at 87:20–88:7.

***7** When Ordinance 2013–14 was opened for public comment, several residents spoke on the positive experience the pilot program ordinance had been for them. As one resident stated:

> I am vigorously and passionately in favor of this ordinance.... It's been years of begging and pleading for something like this to happen. It amazes me there is still so

> much resistance and so much doubt. I've heard every member of this Council on at least one occasion acknowledge that the plan did make the neighborhood quieter....It was a pilot program. It worked. There were those who said it's going to lose tourist revenue. It proved it did not. There were those who said that it was going to stop people from coming to Point Pleasant Beach. It did not. One of the biggest corporations on the boardwalk publically acknowledged that it did not affect their bar business. I don't know why this resistance continues.... It's not a revenue loss. It actually produced more revenue than it cost for the plan, so I ask you for the sake of residents of at least District 4, please pass this ordinance. I walk through a neighborhood of gutted-out homes on a daily basis, and I'm terrified of what the thought is going to be if somebody is staggering down the street at 1:00 or 2:00 in the morning and what they might do at those home. If nothing else, those people could be contained at the Silver Lake parking lot, which protects the residential area and also makes it a lot easier for our police to do their jobs.

Defs.' Ex. F at 97:24–99. Another resident commented, "It was wonderful last year. The pilot program worked very well where people were able to wake up and not see their lawns littered with liquor bottles or other unmentionable items in the streets and got a little more sleep. So I would urge the Council to please vote for this ordinance." *Id.* at 101:11–20. Those that spoke out against Ordinance 2013–14 did not object to or question District Four's pilot program and its permanent adoption, but rather opposed the extension of the parking regulation into District Three. *Id.* at 102:16–103:19.

Next, when questioned by the Council about whether the pilot program had alleviated any of the quality of life issues, Chief Kevin O'Hara stated:

> The information I received from my supervisors that work the night shifts and supervise the boardwalk and bicycle patrols is that they did see a reduction in incidents back in those neighborhoods that were effected. I don't have the statistical numbers to quote percentages, but all in all, the feel from the officers was that there was a reduction in some of the quality of life issues that we've dealt with in prior years.

Id. at 105:16–24. He also found that the use of free parking at Silver Lake helped, explaining that the free parking helped "keep the majority of the people going to one area" making it easier for the Borough police "to control it and have officers in just one general area instead of being spread out thinner elsewhere. So if everybody is parking in the Lake lot, as opposed to all the residential streets, it is easier for us to control." *Id.* at 106:3–9.

***8** At the close of the hearing, a vote was taken on Ordinance 2013–14 by the Council, which resulted in a tie. Two of the three councilman who voted against the ordinance commented that they were voting no based only on the extension into District Three. *See id* . at 107. Before providing the tie-broker vote to approve the ordinance, Mayor Barrella explained that the ordinances were affecting only a "very small area" of District Three. He then proceeded to explain his vote:

> So, and in looking at it and weighing it, it did work. Jenkinsons[3] has gotten onboard with it. They have indicated that it was not a problem for them. We have made Little Silver lot free between 11:00 and 6:00, even though the hours of restriction are only 12:30 to 4:00, that making Little Silver lot free, some on this Council, last year, expressed concern that it would affect our revenue, and it did effect our revenue. Our parking revenue was never higher. It was the highest it's been in history. The situation was controlled. People were funneled into Little Silver lot. It worked.

> Okay. I still, for the life of me, don't understand, other than the politics of it, why anybody would oppose this. So, and for that reason, my vote is yes.

Id. at 109–110:6. Accordingly, Ordinance 2013–14 was adopted, making the parking regulations in District Four, and part of District Three, permanent.

D. ***Legal Challenges and Introduction of Ordinances 2013–26 and 2013–29***

Thereafter, several prerogative writ suits were filed in New Jersey Superior Court challenging the adoption of Ordinance 2013–14. These lawsuits challenged the restricted parking ordinances as violating the Public Trust Doctrine,[4] violating New Jersey common law, and violating the New Jersey Constitution in various ways. These lawsuits also alleged that one councilman had a disqualifying conflict of interest that rendered the adoption of Ordinance 2013–14 void. On June 17, 2013, the Court found that the ordinance did not violate the equal protection clause, did not violate the Public Trust Doctrine, and did not violate any claims brought under New Jersey common or statutory law. However, the Court found that one of the councilmen had a disqualifying conflict of interest, and therefore Ordinance 2013–14 was invalid. *See Speroni, et al. v. Borough of Point Pleasant Beach, et al.,* Docket No. OCN L–3135–12 PW, 2013 N.J.Super. Unpub. LEXIS 1872, 2013 WL 3878558 (Law Div. June 17, 2013). Plaintiff Martell's Tiki Bar also filed a lawsuit challenging Ordinance 2013–14 on the same grounds; Defendants removed that lawsuit to federal court on June 6, 2012.

After Ordinance 2013–14 was found invalid due to the conflict of interest, the Council introduced and passed on reading Ordinance 2013–26, entitled "An Ordinance of the Borough of Point Pleasant Beach, County of Ocean and State of New Jersey, Regulating Parking in Designated Areas of the borough and Amending Chapter X to Provide Free Parking in Silver Lake Parking Lot During Limited Hours." *See* City of Borough of Point Pleasant Beach Ordinance 2013–26, *located at* Gerner Cert Ex. WWW ("Defs' Ex. WWW"). While substantively similar to Ordinance 2013–14, Ordinance 2013–26 is exclusive to District Four in its application. *See id.* In the preamble to Ordinance 2013–26, the Borough Council states that, "as a result of certain litigation in the Superior Court of New Jersey, Ocean County, Vincent Grasso, A.J.S.C., determined that such regulations are a valid exercise of the police power in that the distinctions drawn by this Ordinance are rationally related to a legitimate governmental interest ...." *Id.* The Borough Council reiterates that, as a result of the prior parking regulations, it "received far fewer complaints of unruly and disorderly behavior from residents in the affected districts during the periods governed by those regulations," and that the ordinance "addresses quality of life issues within the Borough associated with parking by facilitating parking restrictions for residents and employees in the district and prevents the disruption caused by intoxicated patrons after 12:30 a.m., loud profanity, littering and disorderly conduct ...." *Id.* The Council stated that it recognized "the concerns of commercial enterprises located within those areas designated in this Ordinance, but is not stopped from enacting a parking ordinance deemed necessary to safeguard public health, safety and morals ...." *Id.* The second reading and subsequent adoption of Ordinance 2013–26 took place on July 9, 2013. *See* Pl.'s SMF at ¶ 24.

***9** Finally, on July 9, 2013, the Council also introduced for first reading and passed Ordinance 2013–29, entitled "An Ordinance of the Borough of Point Pleasant Beach, County of Ocean and State of New Jersey, Regulating Parking in Designated Areas of the Borough." *See* City of Borough of Point Pleasant Beach Ordinance 2013–29, *located at* Certification of Alexis L. Gasiorowski ("Gasiorowski Cert.") Ex. I. Ordinance 2013–29 extends the parking regulations set forth in Ordinance 2013–26 to another area within the Borough identified as "a portion of District 3," *id.,* defined in the same way as under Ordinance 2013–14. The Borough Council explains in the preamble that they found and determined "that for the good and welfare of its citizens it is necessary and advisable to establish regulations and provide for the enforcement of certain residential parking regulations affecting a limited portion of District 3 within the Borough...." *Id.* Ordinance 2013–29 was considered for second reading and adopted on July 30, 2013. *Id.* The parking restrictions set forth in Ordinance 2013–26 for District Four were accordingly applied to that area of District Three.

Currently pending in the New Jersey Superior Court Appellate Division are the appeals of the June 17,

2013 Opinion and Order upholding the validity 2012 Ordinances. After passing Ordinance 2013–26, additional prerogative writs were filed in the Superior Court. In that case, Judge Grasso once again issued an Opinion upholding the validity of Ordinance 2013–26. In his opinion, he noted that the "ordinance in question is substantially similar to Ordinance 2013–14, whose validity was upheld by the court in its written opinion dated June 17, 2013." *See* Feb. 26, 2014 Order, *Purple Jet Fishing Charters, at al. v. Borough of Point Pleasant Beach,* Docket No. L–2417–13, at 1, *located at* Certification of Arthur M. Peslak ("Peslak Cert.") Ex. A. Accordingly, in that case, counsel for both parties agreed that the Court could rely on its June 17, 2013 Opinion regarding the plaintiffs' legal challenges to Ordinance 2013–14 as a basis to deny plaintiffs' substantive relief to Ordinance 2013–26. *See id.* at 1–2. The sole remaining issue left for that Court to decide was whether Ordinance 2013–26 was procedurally improper. The Court found that it was not, thereby finding Ordinance 2013–26 valid.

II. Standard of Review

Federal Rule of Civil Procedure 56(a) provides that "a court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A material fact raises a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict" for the non-moving party. *Healy v. N.Y. Life Ins. Co.,* 860 F.2d 1209, 1219 n. 3 (3d Cir.1988).

***10** The Court must consider all facts and their logical inferences in the light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir.1986). The Court shall not "weigh the evidence and determine the truth of the matter," but need determine only whether a genuine issue necessitates a trial. *Anderson,* 477 U.S. at 249. While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." *Id.* at 250. If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, ... there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Katz v. Aetna Cas. & Sur. Co.,* 972 F.2d 53, 55 n. 5 (3d Cir.1992) (quotation omitted). If the non-moving party fails to demonstrate proof beyond a "mere scintilla" of evidence that a genuine issue of material fact exists, then the Court must grant summary judgment. *Big Apple BMW v. BMW of N. Am.,* 974 F.2d 1358, 1363 (3d Cir.1992).

III. Discussion

On August 21, 2013, Plaintiff filed this action in the New Jersey Superior Court, alleging eleven causes of action against the Borough based on Ordinance 2013–26 and 2013–29 (together, the "Ordinances"). The Borough then removed the action to this Court pursuant to 28 U.S.C. § 1441(b), "on the grounds that Plaintiff's complaint asserts a federal claim under claimed violations of the equal protection and due process clauses of the United States Constitution." *See* Notice of Removal, ECF No. 1–2 (filed Sept. 23, 2013). At the time of removal, the New Jersey Superior Court had already entered judgment in favor of the Borough regarding the general legal validity of Ordinance 2013–14, the substantively identical predecessor of the Ordinances at issue here.[5] The sole federal claim in this action—and the only basis for this Court's jurisdiction—is whether the Ordinances violate the Equal Protection Clause of the Fourteenth Amendment.

A. ***Equal Protection Claim***

Generally, Plaintiff argues that the Ordinances should be invalidated because their enactment constitutes an invalid, arbitrary, and unreasonable exercise of police power, thereby violating the Equal Protection Clause. Defendants, not surprisingly, assert that the Ordinances represent a reasonable and legitimate exercise of police power, rationally related to legitimate government purposes and goals, and in no way offends Plaintiff's right to equal protection.

The Court notes that the New Jersey Legislature has enabled municipalities to enact and amend zoning ordinances through the exercise of the police power. *See Manalapan Realty v. Twp. Committee,* 140 N.J.

366, 380, 658 A.2d 1230 (1996). In accordance with this power, municipalities are authorized to "prohibit or restrict general parking." N.J. Stat. Ann. § 39:4–8(c)(1). Such zoning ordinances "come[ ] to the courts clothed with every presumption of validity." *Bass River Assoc. v. Mayor of Bass River Twp.,* 573 F.Supp. 205, 213 (D.N.J.1983) (quoting *City of Ann Arbor, Michigan v. Northwest Park Constr. Corp.,* 280 F.2d 212, 223 (6th Cir.1960)). Indeed, "[u]nless it is based upon a suspect classification or impinges on a fundamental right ... zoning legislation may be held unconstitutional only if it is shown to bear no possible relationship to the State's interest in securing the health, safety, morals or general welfare of the public and is, therefore, manifestly unreasonable and arbitrary." *Id.* (quoting *City of Highland Park v. Train,* 519 F.2d 681, 696 (7th Cir.1975)).

***11** The Ordinances at issue here deal with a distinction between two classes of people, residents and non-residents. Such a classification is not suspect; accordingly, the Ordinances "may be held violative of equal protection only if they bear no rational relationship to the legitimate interests of the [Borough] and are therefore arbitrary and unreasonable." *Id.* at 215; *see also County Bd. of Arlington Cnty. v. Richards,* 434 U.S. 5, 7, 98 S.Ct. 24, 54 L.Ed.2d 4 (1977) (holding that ordinances based on a distinction between resident and non-resident need only "rationally promote the regulation's objective"). In *Richards,* the municipality in issue enacted an ordinance directing the county manager to determine residential areas that were especially crowded with parked cars from outside the neighborhood. Free parking permits would then be issued to residents of the designated area, to persons doing business with residents there, and to some visitors for use between 8 a.m. and 5 p .m. on weekdays. Parking in a designated area without a permit during the designated hours was a misdemeanor. *See Richards,* 434 U.S. at 5–6. The purpose of the ordinance was

> to reduce hazardous traffic conditions resulting from the use of streets within areas zoned for residential uses for the parking of vehicles by persons using districts zoned for commercial or industrial uses ...; to protect those districts from polluted air, excessive noise, and trash and refuse caused by the entry of such vehicles; to protect the residents of those districts from unreasonable burdens in gaining access to their residences; to preserve the character of those districts as residential districts; to promote efficiency in the maintenance of those streets in a clean and safe condition; to preserve the value of the property in those districts; and to preserve the safety of children and other pedestrians and traffic safety, and the peace, good order, comfort, convenience and welfare of the inhabitants of the County.

Id. at 6. In reviewing the ordinance, the Virginia Supreme Court found that "the ordinance on its face offends the equal protection guarantee of the 14th Amendment" because the "ordinance's discrimination between residents and nonresident bears no reasonable relation to [the regulation's] stated objectives." *Id.* at 6–7. The Supreme Court disagreed, explaining that the Constitution does not "presume distinction between residents and nonresidents of a local neighborhood to be invidious." *Id.* at 7. Rather, "Equal Protection Clause requires only that the distinction drawn by an ordinance ... rationally promote the regulation's objectives." *Id.* Significantly for this case, the Supreme Court explained that a "community may ... decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter. By definition, discrimination against nonresidents would inhere in such restrictions." *Id.* Such social objectives are not outlawed by the Constitution, and the Supreme Court held that, "on its face," the discrimination against nonresidents rationally promoted the objectives of the ordinance and accordingly did not violate the Equal Protection Clause.

***12** The reasoning in *Richards* compels a similar finding in this case. As shown both by the record of the public hearings and the language of the Ordinances themselves, the Borough Council was concerned with certain quality of life issues within the Borough associated with the summer season and the rise of tourism. Specifically, the Borough Council intended to improve the quality of life for residents in certain designated areas of the Borough by ensuring adequate overnight parking to the residents of the districts at issue, and to prevent the deteriorating conditions of the residential areas of these districts, where early mornings were relegated to

intoxicated individuals and incidents of criminal activity and other types of disorderly conduct, including public urination and defecation, loud and raucous behavior, littering, fighting, trespassing, and drunk driving. The facts of these problems were clearly established on the public record. Further, the public record demonstrates how containment of non-residential overnight parking to the Silver Lake lot allowed the Borough police to concentrate their forces on one area, as opposed to spreading out all over the covered areas. As the exhibits provided by both parties shows, Silver Lake is not in close proximity to any residential neighborhood and is bordered by a lake on the south. The record also establishes that the quality of life issues that were plaguing the affected areas were reduced. It is axiomatic that the decrease in early morning pedestrian traffic through the residential areas, combined with the ability of the Borough police to concentrate on one area, allowed for the improvement in the quality of life in the affected areas. Further, the record of the public hearings and committee meetings throughout the years shows that the Borough was also interested in ensuring sufficient overnight or early morning parking for those who resided in or rented in the affected areas.

The Court finds that, in this case, drawing a distinction between residents and non-residents rationally promoted the Borough's objectives. The justifications for the distinction between residents and non-residents—a desire to help alleviate some of the major parking problems in the relevant districts and to improve the quality of life during early mornings hours in the relevant districts—are clearly legitimate, and certainly not "manifestly unreasonable and arbitrary." *See Bass River,* 573 F.Supp. at 213, 219. Further, the Borough Council tailored the Ordinances to address the specific problems it was seeking to ameliorate; the parking regulation is only in effect in the summer months—the peak of tourist season when the most out-of-towners come into the Borough—and during the limited hours of 12:30 a.m. to 4:00 a.m. Presumably to address any inadequate parking, the Borough Council also mandated that parking in the Silver Lake lot would be free of charge during the hours when the Ordinances are in effect; in fact, the lot is actually free of charge for an extended period of time, from 11:00 p.m. to 6:00 a.m.

***13** In its attempt to show that the ordinance is not rationally related to its objectives, Plaintiff speculates—but cites to no actual evidence—that the Ordinances fail to accomplish the purpose articulated by the Borough Council, because the residents and residential taxpayers in the covered areas receive five placards that are transferrable. *Id.* This is pure speculation, and it ignores the evidence before the Court, in which both residents and the chief of police personally found that the parking regulation worked to improve the quality of life of the area. Mere speculation as to reasonableness is not enough to overcome the presumption of validity that is attached to zoning ordinances such as the ones at issue here. *See Bass River,* 573 F.Supp. at 213. Further, New Jersey courts have upheld "ordinances banning overnight parking as a valid exercise of local power." *Spring Lake Hotel & Guest House Ass'n v. Spring Lake,* 199 N.J.Super. 201, 209, 488 A.2d 1076 (App.Div.1985). Notably, in these cases, court stress that, when reviewing ordinances for constitutional validity, they are not passing judgment on the value or wisdom of the specific legislative enactments. Rather, "[t]he political process and the deliberations of elected representatives are better suited to contend with the complex questions of public policy and competing social interests." *Spring Lake Hotel,* 199 N.J.Super. at 209, 488 A.2d 1076 (quotation omitted). This Court does not review the wisdom of the Borough Council; rather, the Court is constrained to determine whether the Ordinances represent a legitimate and constitutional exercise of the Borough's police power. The Borough Council is in a unique position of balancing apparently competing public policy concerns: the promotion of the Borough's economic base and the protection of its residential neighborhoods. The Court is not in a position to second-guess the decisions the Borough Council makes in addressing and balancing these concerns, and instead feels that issues concerning the effectiveness of the Ordinances are better suited for "the political, and not the judicial, forum." *Id.* at 210–11, 488 A.2d 1076.

Overall, "[a] community may ... decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter. By definition, discrimination against nonresidents would inhere in such restrictions." *Richards,* 434 U.S. at 7. As the Supreme Court has made clear, however, this inherent discrimination is not invidious unless it fails to rationally promote the regulation's objectives. *Id.* Just as the parking regulations in *Richards* were a permissible and reasonable exercise of the municipality's police power, the Court finds that the Ordinances here are rationally related to a

legitimate government interest and do not violate the Equal Protection Clause of the Fourteenth Amendment.

B. *Public Trust Doctrine*

***14** As discussed above, when Defendants removed this action to the Court, the Amended Complaint contained both federal and state claims. Accordingly, the Court had jurisdiction over Plaintiff's federal claim under 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367. Now that judgment has been entered for Defendants on the single federal claim that provided the basis for this Court's jurisdiction, the Court must determine whether it should retain jurisdiction over the remaining state law claims, in which Plaintiff advances violations of New Jersey's Public Trust Doctrine.

A district court has discretion to "decline to exercise supplemental jurisdiction over a claim ... if ... [it] has dismissed all claims over which it has original jurisdiction ...." 28 U.S.C. § 1367(c)(3). In fact, under Third Circuit law, "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must* decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Hedges v. Musco,* 204 F.3d 109, 123 (3d Cir.2000) (quoting *Borough of W. Mifflin v. Lancaster,* 45 F.3d 780, 788 (3d Cir.1995)); *see also Annulli v. Panikkar,* 200 F.3d 189, 202–03 (3d Cir.1999) (affirming decision of the district court to decline to exercise pendent jurisdiction after granting summary judgment to the defendants on the claims arising under federal law), *abrogated on other grounds by Rotella v. Wood,* 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000).

There are pending state court actions addressing the same ordinances pending in the very court from which Defendants removed this action.[6] The parties' briefs reveal that the crux of this case is New Jersey's Public Trust Doctrine and its application to the ordinances at issue. Considering that New Jersey courts have developed and shaped the Public Trust Doctrine, the Court believes that New Jersey's interest in applying its own law when making a decision determining the applicability of the Public Trust Doctrine is greater, particularly considering the particular facts of this case. *See e.g., Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d 716, 727–28 (7th Cir.1998) ("At that point [when all federal claims have been dropped from the case before trial], respect for the state's interest in applying its own law, along with the state court's greater expertise in applying state law, become paramount concerns.") (internal quotations omitted). Comity concerns strongly support declining to exercise supplemental jurisdiction over the remaining state-law issues. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims and remands the pending claims to the Superior Court of New Jersey, Law Division, Ocean County, where Plaintiff originally filed.

IV. Conclusion

***15** For the foregoing reasons, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted in part and denied in part. Judgment is entered in favor of Defendants on the equal protection claim. The remainder of the Amended Complaint, consisting of state law claims, is remanded to the Superior Court of New Jersey, Law Division, Ocean County. An appropriate Order accompanies this Opinion.

All Citations

Not Reported in F.Supp.3d, 2015 WL 132559

Footnotes

1 Because there is another lawsuit pending between the parties based upon the 2012 Ordinances, Defendants had initially filed their summary judgment motion in that docket and had raised issues that are not relevant to the current matter. Accordingly, and pursuant to the agreement with the parties, the Court will only address the two issues in this matter regarding the 2013–26 and 2013–29 Ordinances. To the extent that Defendants assert that the issue of a potential conflict of interest with Councilman Corbally, a claim Plaintiff asserts in its other lawsuit in this Court, Plaintiff has made clear that any alleged conflict is irrelevant to the validity to Ordinances 2013–26 and 2013–29. Accordingly, because Plaintiff makes clear in its briefs that any potential conflict of interest with Councilman Corbally is not an issue here, the Court will not address it.

2 The Court is compelled to comment on Defendants' counsel's lack of specificity in citations to the record in this motion. The record in this case is extensive, and a citation to, for example "Exhibits c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, t, u, v, w, x, y, z, aa, bb, cc, and ppp" to the Certification of Sean D. Gertner, Esq., *see* Defs.' Statement of Material Facts ¶ 4, requires the Court to treasure hunt through hundreds of transcript pages for the appropriate materials—a difficult and time-consuming ordeal. The Court reminds counsel that "[j]udges are not like pigs, hunting for truffles buried in the record." *Doeblers' Pennsylvania Hybrids, Inc. V. Doebler,* 442 F.3d 812, 820 n. 8 (3d Cir.2006). Counsel are advised that, for future briefings, *all* citations to exhibits and other supporting materials should include specific page numbers rather than simply general references to exhibits that consist of hundreds of pages.

3 "Jenkinsons" refers to Jenkinson's Boardwalk, a business that operates on the boardwalk of Point Pleasant Borough. It operates a series of boardwalk facilities, including boardwalk rides, an aquarium, and a nightclub. *See* Jenkinson's Boardwalk, http://jenkinsons.com (last visited December 20, 2014).

4 The public trust doctrine is a right "deeply engrained in [New Jersey's] common law." *Van Ness v. Borough of Dea,* 78 N.J. 174, 178, 393 A.2d 571 (1978). The public trust doctrine is derived from the ancient principle of English law that land covered by tidal waters belonged to the sovereign, but for the common use of all the people. *Borough of Neptune City v. Borough of Avon–by–the–Sea,* 61 N.J. 296, 303–04, 294 A.2d 47 (1972). The public trust doctrine has been only recognized by common law, and has not been recognized as a right flowing from the Constitution. *See, e.g., Bubis v. Vill. of Loch Arbour,* Civil Action No. 06–2921(FLW), 2008 U.S. Dist. LEXIS 32868, at *16–18, 2008 WL 1809179 (D.N.J. Apr. 22, 2008).

5 While the New Jersey Superior Court made clear that it found Ordinance 2013–14 valid against the legal arguments raised against it, it found that the potential conflict of interest that disqualified Councilman Corbally's vote rendered the ordinance invalid.

6 The Court notes that the issue of *res judicata,* particularly of issue preclusion, was not raised by either party and accordingly not addressed by the Court.

EXHIBIT 2

2016 WL 6407276
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Dawn ROBERTS, Plaintiff–Appellant,
v.
NEW JERSEY TURNPIKE AUTHORITY and Joseph Lentini, Defendants–Respondents.

Submitted September 15, 2016
|
Decided October 31, 2016

Synopsis

Synopsis

Background: Employee of the Turnpike Authority brought action against Authority and her supervisor alleging violations of the New Jersey Civil Rights Act. The Superior Court, Law Division, Essex County, dismissed. Employee appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] Authority was not a "person" under the Act, giving it sovereign immunity;

[2] supervisor was immune in his official capacity from employee's action;

[3] supervisor did not act under color of law; and

[4] supervisor did not infringe on protected conduct under State Constitution.

Affirmed.

West Headnotes (5)

[1] Appeal and Error
Immunity

The Superior Court, Appellate Division, would review de novo the issue of whether employee of Turnpike Authority could pursue her claims of civil rights violations against Authority and supervisor under the New Jersey Civil Rights Act; the issue, which involved immunity, was a legal one. N.J. Stat. Ann. §§ 10:6-1, 10:6-2.

Cases that cite this headnote

[2] Civil Rights
Employment practices

Turnpike Authority was not a "person" under the New Jersey Civil Rights Act, and thus it had sovereign immunity from employee's action against it for alleged civil rights violations, notwithstanding the remedial purpose of the Act; Authority was a state agency, and there was no clear and unambiguous expression by the legislature consenting to the state's inclusion in the Act's liability provisions. N.J. Stat. Ann. § 10:6-2(c).

Cases that cite this headnote

[3] Civil Rights
Employment practices

Employee's supervisor at the Turnpike Authority was immune in his official capacity from employee's action for alleged civil rights violations under the New Jersey Human Rights Act, because of the Authority's sovereign immunity from employee's suit under the Act. N.J. Stat. Ann. §§ 1:1-2, 10:6-2(c).

1 Cases that cite this headnote

[4] Civil Rights
Employment practices

Employee's supervisor at Turnpike Authority did not act under color of law, as required for a suit against him in his personal capacity for violations of New Jersey Civil Rights Act, when he allegedly failed to act on employee's concerns about workplace corruption and misconduct and then allegedly treated her unfavorably after she expressed concerns; facts bespoke of a workplace action, not suppressed protected activity, even if employee felt aggrieved by supervisor's actions, which included not inviting employee to a meeting, changing her work responsibilities, moving her office to a trailer, and expressing anger and pounding a table during a meeting. N.J. Stat. Ann. § 10:6-2.

Cases that cite this headnote

[5] **Public Employment**
Protected activities
Turnpikes and Toll Roads
Establishment by public authorities

Employee's supervisor at Turnpike Authority did not infringe on protected conduct under State Constitution when he did not include employee in a meeting, did not reimburse her mileage in one instance, gave her clerical rather than managerial assignments, and moved her office to a trailer after she expressed concerns about workplace corruption and misconduct. N.J. Stat. Ann. § 10:6-2.

Cases that cite this headnote

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L–5478–14.

Attorneys and Law Firms

Law Offices of Louis A. Zayas, attorneys for appellant (*Louis A. Zayas* and *Alex Lee*, on the briefs).

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for respondents (*Thomas C. Bigosinski*, of counsel and on the brief; *Melanie D. Lipomanis*, on the brief).

Before Judges Lihotz and Hoffman.

Opinion

PER CURIAM

***1** Plaintiff Dawn Roberts appeals from a December 11, 2014 order dismissing, with prejudice, her two-count complaint alleging defendants, the New Jersey Turnpike Authority (the Authority) and Joseph Lentini, the Authority's Director of Maintenance, both in his official and individual capacities, violated the New Jersey Civil Rights Act (the Act), *N.J.S.A.* 10:6–1 to –2. The Law Division judge concluded plaintiff failed to state a claim upon which relief could be granted, *see R.* 4:6–2(e), because neither the Authority nor its officials were persons subject to the provisions of the Act, as defined by *N.J.S.A.* 10:6–1. Further, she concluded Lentini, individually, was not acting under color of law, as required by the statute to sustain a private civil rights action.

On appeal, plaintiff, drawing on federal jurisprudence applying the provisions of 42 *U.S.C.A.* § 1983, argues the Authority, as a state agency, is akin to a municipality, a designated "person" governed by the Act. We disagree. For the reasons discussed, we conclude the Authority is immune from suit and not a "person" covered by the Act, and affirm.

Rule 4:6–2(e) specifically limits a trial court to consider only the complaint under review when determining whether it fails to state a claim upon which relief can be granted. We apply the same standard in our review of the order granting the motion. *Seidenberg v. Summit Bank*, 348 *N.J. Super.* 243, 250 (App. Div. 2002). Accordingly, we first recite the facts stated in plaintiff's complaint, which we afforded "every reasonable inference" and "determine whether the allegations suggest a cause of action." *Major v. Maguire*, 224 *N.J.* 1, 26 (2016); *In re Reglan Litig.*, 226 *N.J.* 315, 324 n.5 (2016). *See also Printing Mart–Morristown v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 746 (1989) (stating a reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary" (quoting *DiCristofaro v. Laurel Grove Mem'l Park*, 43 *N.J. Super.* 244, 252 (App. Div. 1957))).

The Authority is responsible for the day-to-day operations of two public toll roads: the New Jersey Turnpike (the Turnpike) and the Garden State Parkway (the Parkway). Each year, approximately 8,000 motor vehicle accidents occur on the Turnpike and the Parkway, and the Authority operates separate recovery procedures to seek reimbursement for Authority property damaged by motorists in accidents, known as "MVA recoveries." These MVA recovery efforts entail reviewing accident information, identifying damaged Turnpike or Parkway property, and collecting invoices evincing the monetary recovery sought, which are then transmitted to the Authority's legal department for collection.

Plaintiff worked as a "Senior Secretary assigned to the Maintenance Department" of the Authority. Lentini was her supervisor.

In her complaint, plaintiff described her position. She stated, despite her title, she "was doing the job of an administrator, responsible for budgets expenses, inventory, requisitions, files, purchasing quotes, and other administration duties." Among plaintiff's responsibilities were processing MVA recoveries for the Parkway and later supervising MVA recoveries for the Turnpike.

***2** The Parkway manually performed recovery efforts, while the Turnpike used a system referred to as "SPEARS." Plaintiff "immediately recognized [the Turnpike]'s software, 'SPEARS,' was susceptible to fraudulent activity, at wors [t], or deficiencies, at best." She voiced her concerns to Lentini, the Authority's senior management and the law department, explaining

> SPEARS was deficient because it did not provide for (1) User Identification or Tracking of Users using the system, enabling fraudulent or misleading invoices to be generated; (2) SPEARS described accidents without any corroboration such as reliance on New Jersey State Police Reports; (3) anyone had access to SPEARS; (4) anyone could close a claim without complete documentation and verification; (5) claims could be closed without final invoicing from all departments involved, thereby minimizing MVA Recovery; and (6) the Legal Department and Finance Department were not notified upon completion of MVA Recovery concerning any particular claim.

Plaintiff also complained of "numerous incidents of potential fraud; lane closing overcharging, wage discrimination, and selective enforcement of rules and policies of the [Authority]," including identifying those she believed perpetrated fraudulent schemes.

No action was taken by the Authority's management or legal department to modify SPEARS or otherwise address plaintiff's points demonstrating problems. Instead, plaintiff experienced numerous instances of "harassment, threats, intimidation tactics and retaliation" by Lentini and others. Further, she was stripped of her supervisory responsibilities and her work area was relocated.

On July 1, 2013, federal agents arrested the Authority's claims manager, Geraldo Blasi, on fraud charges relating to his use of the SPEARS system. He pleaded guilty to defrauding the Authority of $1,500,000.

[1] The question presented for review is whether plaintiff may pursue her alleged claims against Lentini and the Authority for alleged civil rights violations under the Act. The issue is a legal one, subject to our de novo review. *See State ex rel. K.O.*, 217 *N.J.* 83, 91 (2014) ("Because statutory interpretation involves the examination of legal issues ... [we apply] a de novo standard of review." (citation omitted)); *Murray v. Plainfield Rescue Squad*, 210 *N.J.* 581, 584 (2012) ("In construing the meaning of a statute, our review is de novo.").

When examining issues of "statutory interpretation, a court's role 'is to determine and effectuate the Legislature's intent.'" *K.O.*, *supra*, 217 *N.J.* at 91 (quoting *McGovern v. Rutgers*, 211 *N.J.* 94, 107–08 (2012)). The first step in this process considers the plain language of the statute.

> We begin by "read[ing] and examin[ing] the text of the act and draw[ing] inferences concerning the meaning from its composition and structure." 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:1 (7th ed. 2007). That common sense canon of statutory construction is reflected also in the legislative directive codified at *N.J.S.A.* 1:1–1:

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.

***3** [*State v. Hupka*, 203 *N.J.* 222, 231–32 (2010).]

The Act "was enacted in 2004 for the profound purpose of 'provid[ing] the citizens of New Jersey with a State remedy for deprivation of or interference with the civil rights of an individual.' " *Perez v. Zagami, LLC*, 218 *N.J.* 202, 212 (2014) (alteration and emphasis in original) (quoting *S. Judiciary Comm. Statement to S. No. 1158*, 211th Leg. 1 (May 6, 2004)). Subsection (c) sets forth "a private cause of action" to anyone "subjected to a deprivation of or interference with" his or her substantive protected rights. *Id.* at 212–13.

More specifically, *N.J.S.A.* 10:6–2(c) provides, in pertinent part:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.

Plaintiff correctly identifies the Act is modeled after the federal Civil Rights Act, 42 *U.S.C.A.* § 1983. Certainly, the Act stands as the State analogue to § 1983, and provides "a remedy for the violation of substantive rights found in our State Constitution and laws." *Brown v. State*, 442 *N.J. Super.* 406, 425 (App. Div. 2015), *certif. granted*, 225 *N.J.* 339 (2016). *See also Tumpson v. Farina*, 218 *N.J.* 450, 474 (2014).

However, the United States Supreme Court has determined § 1983 does not apply to the states. *See Will v. Mich. Dep't of State Police*, 491 *U.S.* 58, 67, 71, 109 *S.Ct.* 2304, 2310, 2312, 105 *L.Ed.* 2d 45, 55, 58 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983"). Moreover, New Jersey courts "have long recognized that an essential and fundamental aspect of sovereignty is freedom from suit by private citizens for money judgments absent the State's consent." *Allen v. Fauver*, 167 *N.J.* 69, 73–74 (2001). These principles embody the doctrine of qualified immunity, which shields government officials from suits for damages. *Gormley v. Wood–El*, 218 *N.J.* 72, 113 (2014) (citing *Mitchell v. Forsyth*, 472 *U.S.* 511, 526, 105 *S.Ct.* 2806, 2815, 86 *L.Ed.* 2d 411, 425 (1985)). "Qualified immunity balances two important interests -- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Ibid.* (quoting *Pearson v. Callahan*, 555 *U.S.* 223, 231, 129 *S.Ct.* 808, 815, 172 *L.Ed.* 2d 565, 573 (2009)). Thus, "[g]iven their similarity, our courts apply § 1983 immunity doctrines to claims arising under the Civil Rights Act." *Brown*, *supra*, 442 *N.J. Super.* at 425.

***4** Understanding the State, as the sovereign, must consent to legal actions filed against it, our review of the Act reveals no support to suggest the Legislature's intent to waive its sovereign immunity and authorize civil actions against the State, its departments or agencies for alleged violations of constitutional or statutory rights. Indeed, by its terms, the Act only permits the filing of a private cause of action against "persons" acting under color of law. *N.J.S.A.* 10:6–2(c). "Given that the Legislature did not choose to include an express waiver of sovereign immunity in the Civil Rights Act and that the State enjoys immunity under the analogous § 1983, we conclude that the State is immune from a suit for damages under the Civil Rights Act." *Id.* at 426.

In *Brown*, we examined the propriety of suing the State for civil rights violations based upon alleged unconstitutional conduct by State Troopers. *Id.* at 410. The State asserted immunity from suit under the Act. We agreed, concluding "the State is not a 'person' under the Civil Rights Act"

and, therefore, remained immune from suit for damages. *Id.* at 426 (citing *Kentucky v. Graham*, 473 *U.S.* 159, 167 n.14, 105 *S.Ct.* 3099, 3106 n.14, 87 *L.Ed.* 2d 114, 122 n.14 (1985) (noting that "a State cannot be sued directly in its own name regardless of the relief sought" unless its sovereign immunity is affirmatively waived or validly abrogated by Congress)).

[2] Citing *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 *U.S.* 658, 690, 98 *S.Ct.* 2018, 2035, 56 *L.Ed.* 2d 611, 635 (1978), plaintiff argues the Authority must be viewed as a distinct entity, separate from the State and akin to a municipality, because it is a public corporation and a "quasi-government agency." We disagree.

The Authority is established within the Department of Transportation and constitutes "an instrumentality exercising public and essential governmental functions," whose activities in the exercise of its authority "shall be deemed and held to be an essential governmental function of the State." *N.J.S.A.* 27:23–3(a) ("There is hereby established in the State Department of Transportation a body corporate and politic, with corporate succession, to be known as the 'New Jersey Turnpike Authority.'"). The Authority is comprised of three members appointed by the Governor with the advice and consent of the Senate. *Ibid.* Finally, the Governor has power to remove for cause the members of the Authority. *N.J.S.A.* 27:23–3(b).

Plaintiff's reliance on *Monell* is misplaced. *Monell* does not suggest any public corporation is exposed to liability under § 1983. Rather, *Monell* circumscribed instances when a municipal employee's conduct triggered the local government's liability as a "person" under § 1983. *Monell* 436 *U.S.* at 694, 98 *S.Ct.* at 2037–38, 56 *L.Ed.* 2d at 638 (stating a municipality is liable under § 1983 for the violation of a plaintiff's constitutional rights resulting from a municipal "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy"). *See also Besler v. Bd. of Educ. of W. Windsor–Plainsboro Regional School Dist.*, 201 *N.J.* 544, 565 (2010) ("Under 42 *U.S.C.[A].* § 1983, a municipality may be accountable for the action of an official who 'possesses final authority to establish municipal policy with respect to the action ordered.' " (quoting *Stomel v. City of Camden*, 192 *N.J.* 137, 146 (2007))).

Here, the Authority is neither a local government body nor a municipal corporation. The Authority and its employees have been recognized as a State agency. *See McCabe v. N.J. Turnpike Auth.*, 35 *N.J.* 26, 31 (1961) ("The general rule in the United States is that state highway or turnpike authorities are agencies of the state and are therefore entitled to the protection of the rule of sovereign immunity."); *Safeway Trails, Inc. v. Furman*, 41 *N.J.* 467, 483 (1964), ("These Authorities have been designated as instrumentalities and agencies of the State by the statutes creating them. In effect, they are arms of the State government operating certain highways for the State."), *cert. denied*, 379 *U.S.* 14, 85 *S.Ct.* 144, 13 *L.Ed.* 2d 84 (1964); *N.J. Turnpike Employees v. N.J. Turnpike Auth.*, 200 *N.J. Super.* 48, 52–53 (App. Div. 1985); *Garden State Pkway. Emp. v. N.J. Highway Auth.*, 105 *N.J. Super.* 168, 170–71 (App. Div. 1969); *Goldberg v. Hous. Auth. of Newark*, 70 *N.J. Super.* 245, 251 (App. Div. 1961) ("[O]ur Supreme Court held [in *McCabe*] that the Turnpike Authority is an agency of the State and is entitled to the protection of the rule of sovereign immunity, so that an action for negligence will not lie against such an agency unless there has been a waiver of immunity."), *rev'd on other grounds*, 38 *N.J.* 578 (1962); *N.J. Turnpike Auth. v. Twp. of Monroe*, 28 *N.J. Tax* 158, 161–62 (Tax 2014) ("[T]he turnpike is considered as an agency or instrumentality of the State, being created in but not of the New Jersey Department of Transportation.").

***5** As we noted in *Brown*, the Legislature's omission of a "clear and unambiguous" expression consenting to the State's inclusion of the statute's liability provisions requires we reject plaintiff's broad construction seeking such a result. *Brown*, *supra*, 442 *N.J. Super.* at 425. We affirm neither the State nor its officials acting in their official capacities are "persons" under the Act. *Id.* at 426. *See also Didiano v. Balicki*, 488 *Fed.Appx.* 634, 638 (3d Cir. 2012) (rejecting the plaintiff's argument to interpret "person" under the Act differently than in § 1983).

Plaintiff also suggests the judge "implicitly" applied the Eleventh Amendment immunity to conclude the Authority was not a person under the Act. The argument is unfounded and lacks merit. *R.* 2:11–(3)(e)(1)(E).

Next, plaintiff advances a public policy argument, urging "to accept that a state agency, such as the [Authority], could not be liable under the [Act] would undermine the remedial purpose underpinning the enactment of the

[the Act].” We decline the request to expand the Act's interpretation, which ignores the principle undergirding our conclusion: unless sovereign immunity is affirmatively waived by a statute's provisions, action for damages against the State and its agencies are barred.

When adopting the Act, the Legislature was aware it could allow actions against the State for claimed civil rights violations, as was expressly stated in other remedial statutes. *See N.J.S.A.* 10:5–5(e) (including the State as a liable employer under the New Jersey Law Against Discrimination); *N.J.S.A.* 34:19–2(a) (including “all branches of State Government” as a liable employer under the New Jersey Conscientious Employee Protection Act); *N.J.S.A.* 59:1–2 (providing a limited scheme modifying the doctrine of sovereign immunity for tort claims against public entities to allow liability as permitted under the statutory provisions). The absence of a similar provision in the Act is not inadvertent, it was purposeful and persuasive.

We also note no definition of “person” was included in the Act, which allows reliance on *N.J.S.A.* 1:1–2, stating:

> The word “person” includes corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals, unless restricted by the context to an individual as distinguished from a corporate entity or specifically restricted to one or some of the above enumerated synonyms and, when used to designate the owner of property which may be the subject of an offense, includes this State, the United States, any other State of the United States as defined infra and any foreign country or government lawfully owning or possessing property within this State.
>
> [(Emphasis added).]

“[The Legislature] is presumed to [be] ‘thoroughly conversant with its own [prior] legislation and the judicial construction of its statutes.’ ” *State v. Goodwin*, 224 *N.J.* 102, 113 (2016) (alterations in original) (quoting *In re Expungement Petition of J.S.*, 223 *N.J.* 54, 75 (2015)). Accordingly, the omission of the State within the definition of person (except with respect to limited actions involving real property) controls and binds this court. *See also GE Solid State v. Dir., Div. of Taxation*, 132 *N.J.* 298, 308 (1993) (“Under the established canons of statutory construction, where the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.”).

***6** **[3]** We turn our examination to whether Lentini was liable under the Act. “Personal-capacity suits seek to impose personal liability upon a governmental official for actions he [or she] takes under color of state law.” *In re Petition for Review of Op. 552 of Advisory Comm. on Prof'l Ethics*, 102 *N.J.* 194, 199 (1986) (quoting *Kentucky v. Graham*, 473 *U.S.* 159, 165, 105 *S.Ct.* 3099, 3105, 87 *L.Ed.* 2d 114, 121 (1985)); *Wood–El*, *supra*, 218 *N.J.* at 85 n.3. The suit against an official in his or her official capacity is an action against the office. *Printz v. United States*, 521 *U.S.* 898, 930–31, 117 *S.Ct.* 2365, 2382, 138 *L.Ed.* 2d 914, 941 (1997). (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. ... As such, it is no different from a suit against the State itself. And the same must be said of a directive to an official in his or her official capacity.” (quoting *Will*, *supra*, 491 *U.S.* at 71, 105 *L.Ed.* 2d at 45, 58, 109 *S.Ct.* at 2312)). Therefore, because the Authority is excluded from the Act's definition of “person,” a suit against Lentini in his official capacity is barred.

Private actions, such as a suit against Lentini individually, “may only be brought against persons who are ‘acting under color of law.’ ” *Perez*, *supra*, 218 *N.J.* at 215–17 (quoting *N.J.S.A.* 10:6–2). Private persons can act “under color of” state law when they are “willful participant[s] in joint action[s] with the State or its agents.” *Dennis v. Sparks*, 449 *U.S.* 24, 27, 101 *S.Ct.* 183, 186, 66 *L.Ed.* 2d 185, 189 (1980).

> The “under color of state law” requirement is identical to the “state action” requirement of the fourteenth amendment. *Lugar v. Edmondson Oil Co. Inc.*, 457 *U.S.* 922, 102 *S.Ct.* 2744 (1982), 73 *L.Ed.* 2d 482; *Krynicky v. Univ. of Pittsburgh*, 742 *F.*2d 94 (3d Cir. 1984). Thus, a showing that actions were “under color of state law,” like a showing of the presence of “state action,” does not require that the challenged action be pursuant to a state statute. Rather, the question is “whether there is a sufficiently close nexus between the State and the challenged action,” *Jackson v. Metropolitan Edison Co.*, 419 *U.S.* 345, 351, 95 *S.Ct.* 449 (1974), 42 *L.Ed.* 2d 477, or whether the State “has so far insinuated itself into a position of interdependence” that there is a “symbiotic relationship” between the actor and the state such that

the challenged action can "fairly be attributed to the state," *Krynicky*, *supra,* at 99.

[*Johnson v. Orr*, 780 *F.*2d 386, 390 (3d Cir. 1986).]

See also Adickes v. S.H. Kress & Co., 398 *U.S.* 144, 211, 90 *S.Ct.* 1598, 1631, 26 *L.Ed.* 2d 142, 184 (1970) ("[T]he word 'color,' as in 'color of authority,' 'color of law,' 'color of office,' 'color of title,' and 'colorable,' suggests a kind of holding out and means 'appearance, semblance, or simulacrum,' but not necessarily the reality.") (Brennan, J., concurring in part and dissenting in part).

[4] In her brief, plaintiff alleges Lentini used his position as her supervisor to transfer her to unfavorable work assignments, deny her promotions and salary increases, create a hostile work environment and retaliate against her for complaining about the corruption and misconduct. The recitals in her complaint include: she related concerns about the "SPEARS" program but Lentini and others "failed to take corrective action"; a single incident of not being invited to a meeting; an instance of not being reimbursed for mileage in June 2013 for use of her personal vehicle; Lentini's expressions of anger and pounding a table during a meeting; moving her office to a trailer; and giving her clerical rather than managerial assignments.

Plaintiff's identification of SPEARS's vulnerabilities and her belief other Authority employees were committing fraud equates to her workplace responsibilities, reported to her supervisors. The supervisor's failure to act on her concerns may have caused her to feel aggrieved, but these facts bespeak a workplace action, not suppressed protected activity. *See In re Disciplinary Action Against Gonzalez*, 405 *N.J. Super.* 336, 346–47 (App. Div. 2009); *Spinks v. Twp. of Clinton*, 402 *N.J. Super.* 465, 477–78 (App. Div. 2008). Plaintiff was not espousing a matter of public concern to another and the State then acted to thwart or suppress her conduct.

***7** **[5]** We also cannot agree the incidents of not including her in a meeting, reimbursing her mileage, or changing her work assignment and location present a prima facie case of infringement of protected conduct under the New Jersey Constitution. *See Grimes v. City of E. Orange*, 285 *N.J. Super.* 154, 164 (App. Div. 1995) (stating the plaintiff had no constitutional or statutory right to specific workplace conditions or positions); *Greenberg v. Kimmelman*, 99 *N.J.* 552, 573 (1985) ("The right to a particular job, unlike the right to work in general, has never been regarded as fundamental.").

Although Lentini is connected to the State by his employment, plaintiff's allegations, as set forth her complaint, do not state he acted under color of state law. Further, based on *Grimes* and *Greenberg*, the claims noted do not equate to deprivation of plaintiff's civil rights.

Consequently, because her complaint states no basis for relief and discovery would not provide one, dismissal under *Rule* 4:6–2 is appropriate. *County of Warren v. State*, 409 *N.J. Super.* 495, 503 (App. Div. 2009), *certif. denied*, 201 *N.J.* 153 (2010). Additional arguments not specifically discussed in our opinion have been reviewed and found to lack sufficient merit to warrant discussion. *R.* 3:11–3(e)(1)(E).

Affirmed.

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EXHIBIT 3

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO.: HUD-L-607-18

JACQUELINE ROSA,

Plaintiff,

v.

BOROUGH OF LEONIA, ET AL.,

Defendants.

Civil Action

STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION,

Plaintiff-Intervenor,

v.

BOROUGH OF LEONIA, NEW JERSEY,

Defendant.

COMPLAINT FOR A DECLARATORY JUDGMENT AND FOR AN ACTION IN LIEU OF PREROGATIVE WRITS

The State of New Jersey Department of Transportation ("DOT") brings this action against the Borough of Leonia ("Leonia"), New Jersey, for an order declaring that Leonia's recently adopted traffic ordinances, Ordinance Nos. 2017-19, 2018-2 and 2018-5 (hereinafter collectively referred to as "the ordinances"), are legally invalid as a matter of law and permanently enjoining Leonia from enforcing the ordinances.

THE PARTIES

1. The DOT maintains its headquarters at the David J. Goldberg Transportation Complex, 1035 Parkway Avenue, Trenton, in the County of Mercer, New Jersey. Pursuant to N.J.S.A. 27:1A-1, the DOT is responsible for promoting the "efficient, fully integrated and balanced transportation system" throughout New Jersey, including the review and approval of local traffic ordinances on municipal or county roads.

2. Leonia is incorporated under the borough form of government. N.J.S.A. 40A:60-1 to -8.1. The governing body of Leonia consists of the mayor and six council members, all of whom are elected at-large. N.J.S.A. 40A:60-2. According to Leonia's website, the borough is comprised of multiple departments, including a police department.

3. Leonia is located within close proximity to the George Washington Bridge and to several state and county highways, including but not limited to, the New Jersey Turnpike, and State Routes 4, 46 and 80. In addition, a portion of State Route 93, also known as Grand Avenue, is within the municipal boundaries of Leonia.

4. Leonia is adjacent to several other municipalities within Bergen County, including Fort Lee, Englewood, Ridgefield Park, Palisades Park, and Teaneck. A portion of Bergen County Route 503, also known as Degraw Avenue and Fort Lee Road, is within Leonia.

THE DOT's LEGAL AUTHORITY TO REGULATE TRAFFIC

5. The Legislature's purpose and intent in passing the "Transportation Act of 1966" ("Transportation Act") was:

> to establish the means whereby the full resources of the State could be used and applied in a coordinated and integrated matter to solve or assist in the solution of the problems of all modes of transportation; to promote an efficient, fully integrated and balanced transportation system for the State; to prepare and implement comprehensive plans and programs for all modes of transportation development in the State; and to coordinate the transportation activities of State agencies, State-created public authorities, and other public agencies with transportation responsibilities within the State.
>
> [N.J.S.A. 27:1A-1.]

6. The Transportation Act authorizes the Commissioner of Transportation (the "DOT Commissioner") to develop and promote efficient transportation services and coordinate the activities of the DOT with other public agencies and authorities. N.J.S.A. 27:1A-5.

7. Pursuant to N.J.S.A. 39:4-8(a), the Commissioner is not required to approve any ordinance, resolution, or regulation, unless, after investigation by the Commissioner the same shall appear to be "in the interest of safety and the expedition of traffic on the public highways."

8. The Legislature in N.J.S.A. 39:4-8(b) and (c) permits municipalities to adopt traffic ordinances without the DOT Commissioner's approval only for the traffic measures listed in N.J.S.A. 39:4-8(c), subject to the provisions of N.J.S.A. 39:4-138, and N.J.S.A. 39:4-197.

9. For example, the Legislature in N.J.S.A. 39:4-197 permits municipalities to alter speed limitations; limit the use of streets to certain classes of vehicles; designate one way streets; and regulate street parking.

10. Pursuant to N.J.S.A. 39:4-8(a), prior to the adoption of any municipal or county ordinance, resolution, or regulation, which places any impact on roadways in an adjoining

municipality or county, the governing board or body of the municipality must provide appropriate notice to the adjoining municipality or county.

11. Pursuant to N.J.S.A. 39:4-8(a), notwithstanding any other provision of N.J.S.A. 39:4-8 to the contrary, any municipal or county ordinance, resolution, or regulation which places any impact on a State highway shall require the approval of the DOT Commissioner. Impact on a State highway is defined by N.J.A.C. 16:27-2.1 to mean "any traffic control device on a non-State highway that is proposed for installation: 1. At a State highway intersection; 2. Within 500 feet of a State highway; or 3. At a distance greater than 500 feet from a State highway but has a resultant queue that extends within 500 feet or less from a State highway" and "any traffic regulation applicable to a non-State highway: 1. At a State highway intersection; 2. Within 500 feet of a State highway; or 3. At a distance greater than 500 feet from a State highway but has a resultant queue that extends within 500 feet or less from a State highway."

12. The Legislature has not established authority under Title 39, or elsewhere, for a municipality to limit access to certain streets depending on whether a person is classified

as a resident or is a person seeking to conduct business within a municipality.

13. The Legislature has not established authority in Title 39, or elsewhere, for a municipality to establish "no through" streets.

14. The Attorney General opined in 1955 that the power to designate so-called "no through" streets is not among the powers granted to a municipality by N.J.S.A. 39:4-197, nor is such power granted by any other provision of our statutes. As the Attorney General opined, "There is no inherent power vested in a municipality by which it may legally restrict the right of the public to the free use of streets and roads. Any right of the municipality to pass ordinances and resolutions regarding the flow of traffic over its streets and highways can arise only by legislative grant; and there has been none." (DOT Exhibit A)

15. This Attorney General opinion remains legally valid because, while the Legislature has amended Title 39 several times, most recently in 2008 to extend certain additional traffic regulation powers to municipalities and counties, the Legislature has never extended to municipalities the authority to adopt "no through" street ordinances, or to

limit access to municipal streets based on a residency classification or on whether a person was seeking to access a destination within the municipality.

LEONIA'S INVALID TRAFFIC ORDINANCES

16. The Mayor and Council of Leonia adopted the ordinances between December 4, 2017 and March 5, 2018.

17. The ordinances restrict traffic on certain municipal streets during certain hours, to its residents, with certain exceptions, including persons who can demonstrate a documented need to access a residence on a Leonia street and persons traveling to destinations within Leonia.

18. On or about December 4, 2017, the Mayor and Council of Leonia adopted Ordinance Number 2017-19, which amended and supplemented Chapter 194 of Leonia's Municipal Code and added two new provisions, Sections 194-25.1 and 194-49.

19. Section 194-25.1 of Leonia's Municipal Code, identified as Ordinance 2017-19, provides: "Closing of Certain Streets. No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§ 194-49) attached to and made a part of this Chapter during the times of the days indicated in said Schedule unless that person is a resident of the said street needing access to his home or can

demonstrate or document a need to access a residence on the street or parts of streets as described."

20. Section 194-49 of Leonia's Municipal Code, identified as Ordinance 2017-19, provides a list of travel restrictions and road closures affecting approximately 70 roads and intersections during the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m.

21. On or about January 17, 2018, the Mayor and Council of Leonia adopted Ordinance Number 2018-2, which amended and supplemented Chapter 194 of Leonia's Municipal Code, and added a new provision, Section 194-25.2.

22. Section 194-25.2 of Leonia's Municipal Code, identified as Ordinance Number 2018-2, provides for a $200 penalty for any person convicted of violating Section 194-25.1 "or imprisonment for a term of not exceeding 15 days, or both."

23. On or about March 5, 2018, Leonia adopted Ordinance Number 2018-5, which amends Sections 194-25.1 and 194-149 of Leonia's Municipal Code.

24. Section 194-25.1 of Leonia's Municipal Code, as amended in its entirety by Ordinance 2018-5, provides: "Closing of Certain Streets. No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§

194-49) attached to and made part of Chapter 194 during the times of the days indicated in said Schedule unless that person (a) Is a resident of said street needing access to his home or can demonstrate a documented need to access a residence on the street or parts of streets as described; or (b) [i]s traveling to and/or from a Leonia destination."

25. Section 194-49 of Leonia's Municipal Code, as amended by Ordinance 2018-5, provides an amended list of travel restrictions and road closures affecting more than 75 roads and intersections during the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m.

26. The ordinances, which "close" or restrict non-residents or those not having business in Leonia from turning onto a long list of streets, have in effect made these streets "no through streets" during the hours specified in the ordinances for individuals who do not have a residence on the street or need to access a residence on the street or parts of the streets described in the ordinances.

27. The ordinances have an impact on a State highway as defined by N.J.A.C. 16:27-2.1, and were not submitted to the DOT Commissioner for approval.

28. The ordinances have an impact on adjoining municipalities and Leonia did not provide notice to the adjoining municipalities as required by N.J.S.A. 39:4-8(a) (second unnumbered paragraph).

29. According to published news reports, the purpose of the ordinances was to induce navigational apps to remove Leonia streets from their algorithms. Lisa W. Foderaro, Navigation Apps Are Turning Quiet Neighborhoods Into Traffic Nightmares, N.Y. TIMES (Dec. 24, 2017), http://www.nytimes.com/2017/12/24/nyregion/traffic-apps-gps-neighborhoods.html.

30. According to published news reports and Leonia's website, Leonia has been offering residents yellow hang tags in order to identify their vehicles for purposes of accessing the Leonia roads with restricted access pursuant to the ordinances. John Surico, What Happens When a City Bans Non-Resident Drivers,? CITYLAB (Apr. 18, 2018), http://www.citylab.com/transportation/2018/04/the-small-town-that-took-on-waze/558215; see also Leonia Safe Streets, Borough of Leonia, http://www.leonianj.gov/depts/leonia_safe_streets_information.htm (last visited May 15, 2018).

31. According to published news reports, the Mayor of Leonia has indicated that drivers without yellow tags may be stopped and questioned by Leonia's police department. Dave Carlin, Leonia, New Jersey: Town wants residential streets removed from GPS apps, may fine drivers $200, WCBS-TV/CNN (Jan. 10, 2018, 5:41 AM), http://www.wptv.com/news/local-news/water-cooler/leonia-new-jersey-town-wants-residential-streets-removed-from-gps-apps-may-fine-drivers-200.

32. According to one published news report, Leonia's mayor stated, "The first thing the officer is going to say is, 'Do you have business in Leonia?'" Dave Carlin, Leonia, New Jersey: Town wants residential streets removed from GPS apps, may fine drivers $200, WCBS-TV/CNN (Jan. 10, 2018, 5:41 AM), http://www.wptv.com/news/local-news/water-cooler/leonia-new-jersey-town-wants-residential-streets-removed-from-gps-apps-may-fine-drivers-200.

33. According to published news reports, for purposes of enforcing the ordinances, Leonia posted "Do Not Enter" signs with the words "Residents Exempt" printed below. Svetlana Shkolnikova, 'Residents and Leonia Destinations Only' to replace 'Do Not Enter' signs barring commuters, NORTHJERSEY.COM (Feb. 22, 2018 10:23 PM),

http://www.northjersey.com/story/news/bergen/leonia/2018/02/21/leonia-drafts-new-traffic-signage-help-businesses/359675002.

34. According to published news reports, Leonia later proposed posting amended signs in order to appeal to Leonia's businesses. Leonia To Get Friendlier Signs Banning GWB Shortcut Seekers, CBS NEW YORK/AP (Feb. 15, 2018), http://newyork.cbslocal.com/2018/02/15/leonia-new-road-signs; Svetlana Shkolnikova, Leonia amends controversial road closure ordinance to boost business, NORTHJERSEY.COM (March 5, 2018 11:31 PM), http://www.northjersey.com/story/news/bergen/leonia/2018/03/05/leonia-amends-controversial-road-closures-law-boost-business/390951002.

35. According to published news reports, traffic-restricting signs remain posted on Leonia's roads and Leonia's police department continues to enforce the ordinances. Anthony Johnson, Road signs in Leonia causing rift between town, state of New Jersey, WABC-TV (May 3, 2018), http://abc7ny.com/traffic/road-signs-causing-rift-in-new-jersey-town/3424745.

36. On March 16, 2018, the Attorney General's Office wrote to Leonia's Counsel explaining the applicable Title 39

statutes, the 1955 Attorney General opinion, and that they render the Leonia ordinances invalid. The Attorney General's Office directed Leonia to "immediately refrain from enforcing the above referenced ordinances" and offered to facilitate a meeting between Leonia and the DOT officials to discuss other, appropriate measures to address Leonia's traffic concerns.

37. DOT traffic engineering staff and Leonia met on April 4, 2018 to discuss appropriate traffic controls in Leonia that would not violate Title 39.

38. On information and belief, Leonia continues to enforce the ordinances, through traffic control devices (signage) and municipal police enforcement efforts.

FIRST COUNT
(Declaratory Judgment)

39. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

40. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

41. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they purport to create "no-through streets," even though pursuant to Title 39, and as further interpreted by the Attorney General's 1955 opinion, Leonia has no such authority, along with awarding to the DOT reasonable attorney's fees and costs.

SECOND COUNT
(Declaratory Judgment)

42. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

43. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

44. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they

purport to regulate traffic based on residency classification for which Leonia has no authority, along with awarding to the DOT reasonable attorney's fees and costs.

THIRD COUNT
(Declaratory Judgment)

45. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

46. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

47. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they create an impact on a State highway (State Route 93) and Leonia did not submit the ordinances to the DOT Commissioner for approval, along with awarding to the DOT reasonable attorney's fees and costs.

FOURTH COUNT
(Declaratory Judgment)

48. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

49. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

50. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they create impact on roadways in one or more adjoining municipalities and Leonia did not provide notice of the ordinance to the adjoining municipalities, along with awarding to the DOT reasonable attorney's fees and costs.

FIFTH COUNT
(Action in Lieu of Prerogative Writs)

51. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

52. Leonia does not have legal authority within one of the enumerated exceptions under Title 39 to restrict traffic as it has done in the ordinances.

53. Because the ordinances at issue are legally invalid, Leonia should be enjoined from further enforcing the ordinances at issue, including but not limited to the use of signage, traffic stops by police officials notifying motorists about the ordinances at issue, and the issuance of traffic citations.

54. The DOT's claim for relief is based upon an established legal right.

55. This matter involves overriding public interest considerations that call out for judicial intervention by this court through the issuance of an injunction that permanently enjoins Leonia from further enforcing the ordinances, including but not limited to the use of signage regarding the ordinances, municipal police officials notifying motorists about the ordinances, and the issuance of traffic citations based on the ordinances.

WHEREFORE, the DOT demands judgment against Leonia enjoining and restraining Leonia from further enforcement of the ordinances, including but not limited to the use of signage

regarding the ordinances, police officials notifying motorists about the ordinances, and the issuance of traffic citations based on the ordinances, along with awarding to the DOT reasonable attorney's fees and costs.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Philip J. Espinosa
Philip J. Espinosa
Deputy Attorney General
Attorney ID No.: 030311988

Dated: June 11, 2018

CERTIFICATION PURSUANT TO RULE 4:69-4

I, Philip J. Espinosa, Deputy Attorney General, certify pursuant to Rule 4:69-4, that upon information and belief, because the ordinances are already publicly available on the internet, there are no necessary transcripts of Leonia proceedings that must be ordered in these circumstances.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Philip J. Espinosa
Philip J. Espinosa
Deputy Attorney General
Attorney ID No.: 030311988

Dated: June 11, 2018

CERTIFICATION PURSUANT TO RULE 4:5-1

I, Philip J. Espinosa, Deputy Attorney General, certify pursuant to Rule 4:5-1 that the matter in controversy is the subject of an action entitled Jacqueline Rosa v. Borough of Leonia, et al., pending in the Superior Court of New Jersey, Law Division, Hudson County, Docket No. HUD-L-000607-18. In addition, there is no other non-party who should be joined in this action or who is subject to joinder at this time because of potential liability as to any party on the basis of the same transactional facts.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Philip J. Espinosa
Philip J. Espinosa
Deputy Attorney General
Attorney ID No.: 030311988

Dated: June 11, 2018

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Attorneys for Defendant, Borough of Leonia

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action **DEFENDANT'S RESPONSE TO STATEMENT OF MATERIAL FACTS OF THE DEPARTMENT OF TRANSPORTATION AND COUNTERSTATEMENT**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff-Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	Before: Peter F. Bariso, Jr., P.J.S.C. Motion Date: August 31, 2018

Pursuant to R. 4:46-2, Defendants bereby submit the following response to Plaintiff/Intervenor's Statement of Material Facts:

1. Admitted.

2. Denied that Leonia has prohibited "through" traffic regarding streets. Access is from a designated point in the Borough to a destination outside of the local zone is still permitted at all other hours.

3. Objection is made to Paragraph 3 as being vague since the term "close proximity" is not defined.

4. Admitted.

5. Admitted.

6. Admitted.

7. Denied.

8. Admitted.

COUNTER STATEMENT OF MATERIAL FACTS

Defendants rely upon and incorporate herein by reference the Certifications of Tom Rowe and Judah Ziegler in lieu of setting forth a more formal Counter Statement of Material Facts in Opposition to Plaintiff's and Intervenor's Motions for Summary Judgment.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendant, Borough of Leonia

s/ Ruby Kumar-Thompson
RUBY KUMAR-THOMPSON, ESQ.

DATED: August 21, 2018

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JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES I-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO. HUD-L-607-18 Civil Action **CERTIFICATION OF THOMAS ROWE**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	

I, Thomas Rowe, of full age, hereby certify and state as follows:

1. I am the Chief of Police of the Borough of Leonia (the "Borough") and have served in that capacity since September 2013. I have personal knowledge of the facts set forth herein.

2. I have been with the Borough's Police Department for almost 28 years, having started in December 1990.

3. Based on my experience as the Chief of Police and as a police officer in the Borough, I am fully familiar with the traffic conditions in the Borough, along with traffic impact on local streets.

4. There are 23.02 miles of roadways that course through the Borough, with 89 municipal roads accounting for 19.53 miles or 85% of the roads; one county road totaling 1.12 miles (5%); one state highway for 1.56 miles (7%); with the balance of 0.81 miles including portions of U.S. Routes 1/9, U.S. Route 46 and Interstate 95.

5. Leonia's Police Department is a relatively small police department consisting presently of 19 members. At any given time, there are a minimum of two (2) officers on patrol serving the 9,000 residents in the roughly 3,300 households spread throughout the 23.02 total miles of roads. The officers on duty also serve and protect numerous businesses and the three (3) public schools.

6. Being situated approximately a half mile from the George Washington Bridge ("GWB"), for many years, the Borough has been negatively impacted by congestion on its local streets from excessive motor vehicle traffic traveling towards the GWB on both weekdays and weekends; Sunday nights can be especially bad.

7. To avoid traffic, vehicles often travel through the streets of the Borough, rather than on the intrastate and interstate highways leading to the GWB, causing major traffic congestion on the narrow Borough streets. Attached hereto as **Exhibit A** are true and accurate copies of photographs depicting typical traffic on two (2) Borough streets.

8. Traffic congestion has caused serious safety problems throughout the Borough. One significant example occurred on August 7, 2014, when there was a 90-minute delay at the GWB. A woman by the name of Leyla Kahn was crossing Broad Avenue at Fort Lee Road. A school bus hit her and dragged her seventy-five feet (75') down Broad Avenue. At that time, there was bumper-to-bumper traffic throughout the Borough. The Borough had only two (2) officers on patrol, who were responding to a domestic violence incident. The Borough had to call mutual aid, as there was no one else on duty to respond to this incident. Unfortunately, it took over six (6) minutes to respond to this incident, which is totally unacceptable, and the victim died. Traffic was a major contributor to the accident which occurred.

9. In response, starting in 2014, I directed the officers in the Police Department to close streets on a short-term basis as necessary by utilizing traffic officers and temporary road signs. However, these temporary closings would not appear on any of the navigational applications and the road closings became ineffective to address the traffic issues. I recall one specific incidence in which there was a temporary closing of Irving Street, and a traffic officer issued 54 tickets as a result of people jumping a curb in order to get onto Irving Street. It, thus, became apparent to me tbat temporary road closures with temporary signage would not address the traffic impact on the Borough.

10. Unfortunately, weekend traffic is no better than commuter traffic. In fact, on Mother's Day in 2017, the Borough experienced what we characterized as a Level 5 traffic jam, in which there was a several hour backup at the GWB. There was double-stack traffic throughout the Borough, no one could move in or out of their homes, and the Borough was, in fact, paralyzed. Part of the reason for the congestion was various events occurring in New York City that day. However, on Sunday evening, EZPass usage at the GWB drops by 10%, which

causes a tremendous impact on traffic. I came into work that evening solely for the purpose to direct traffic because of the impact on the Borough and its residents. Attached hereto as **Exhibit B** is a true and accurate copy of the Record article explaining same.

11. Recently, with the advent of navigational applications in the past few years, such as Waze, Google Maps, Apple Maps, etc., the traffic has become even more problematic and extremely dangerous. Attached hereto as **Exhibit C**, is a true and accurate copy of the New York Times article explaining same.

12. The overflow traffic also creates problems for emergency services in the Borough, as well as for emergency services from neighboring and nearby communities, namely Fort Lee to the east and Palisades Park and Ridgefield to the south, that travel through the Borough to get to area hospitals, including Englewood Hospital, Holy Name Hospital and Hackensack Medical Center. Sirens and lights directing drivers to move their vehicles are rendered useless when there are traffic jams, causing delays in response times and delivery of those emergency services.

13. Also on the subject of emergency services, it is important to note that the Borough has a volunteer Fire Department, whose members respond to fires directly from their homes and must rush to the Fire House with the aid of a blue light. Even with the blue lights, with traffic congesting the local streets, the volunteers cannot maneuver out of their driveways to respond to a fire call.

14. Over the years, the Borough has made several requests to the Port Authority of New York and New Jersey ("Port Authority") and the New Jersey Department of Transportation ("DOT") for assistance in alleviating traffic conditions. No help had been forthcoming.

15. Thus, the Borough determined to tackle the problem itself to address the negative impact of the traffic congestion on the safety and welfare of the residents and, toward that end, I

prepared a Safe Streets Initiative shortly following the Mother's Day incident. A true and accurate copy of the Safe Streets Initiative is attached hereto as **Exhibit D**.

16. On October 16, 2017, I presented that initiative to the Mayor and Council at a work session meeting. The Council then directed the Borough Attorney to draft an ordinance for discussion by the Council and introduction at the next Council Meeting.

17. The initial ordinance for the Safe Streets Initiative, Ordinance No. 2017-19, was introduced by the Mayor and Council on November 20, 2017, adopted on December 4, 2017 and published on December 15, 2017. A true and accurate copy of the Ordinance and advertisement are attached hereto as **Exhibit E**. In addition to the advertisement, I discussed the Safe Streets Initiative with the Police Chiefs in the neighboring towns before the Ordinance implementing same was adopted.

18. On November 27, 2017, before the Ordinance was adopted, the Mayor wrote to the Port Authority to formalize prior requests for discretionary funding for four civilian traffic offices to assist with addressing the serious safety issues caused by the traffic conditions that had existed in the Borough for several years. A true and accurate copy of the letter from Judah Zeigler, Mayor, to Kevin O'Toole, Chairman, dated November 27, 2017 is attached hereto as **Exhibit F**. That funding request was not granted.

19. Shortly thereafter, on February 21, 2018, an amended ordinance, Ordinance 2018-5, was introduced to address some residents' and business owners' concerns. That Ordinance was adopted on March 5, 2018 and was published on March 8, 2018. A true and accurate copy of the Ordinance and public notice of passage are attached hereto as **Exhibit G**. The amended ordinance restricts access between the hours of 6:00 to 10:00 a.m. and 4:00 to 9:00 p.m. on 44 or the 89 municipal streets for non-residents and persons not traveling to or from a destination in

the Borough. Borough residents and their visitors have access to all municipal streets 24 hours a day/ seven days a week; all others can utilize the other unaffected 45 roads 24 hours a day/seven days a week and 44 of the affected 89 streets 15 hours a day, every day.

20. Needless to say, as a result of this Initiative and the restrictions being reflected in navigational applications, the traffic in the Borough has decreased significantly allowing safe passage to residents, school children, and emergency service vehicles.

21. This Initiative does with signage what the Borough of Fort Lee does with traffic officers and road barricades, which is only possible given the size of its Police Department -- 97 officers including 8 officers in the Traffic Division -- and significant assistance from the Port Authority for traffic control. The Borough's traffic restrictions are just as effective as those employed by Fort Lee, with less impact on residents in terms of cost and non-residents in terms of predictability. Fort Lee, at times, closes streets with direct access to State highways by erecting barricades that are often ineffective to control traffic. Attached hereto as **Exhibit H**, is a true and accurate copy of a picture depicting a barrier erected by the Borough of Fort Lee on North Avenue at Route 46, showing a vehicle disregarding the barricade.

22. Fort Lee also uses traffic pass permits for residents and employees who work in Fort Lee to restrict access into town during heavy traffic days. Attached hereto as **Exhibit I** is an excerpt from Fort Lee Police Department website – Traffic Bureau and **Exhibit J**, which are sample Fort Lee Parking Passes.)

23. As I indicated, the Borough has a very small Police Department, as opposed to the Borough of Fort Lee, which has 97 officers and 8 officers in the Traffic Division. In addition, Fort Lee receives assistance from the Port Authority for Police Department traffic control. The Safe Streets Initiative that I have provided permits traffic to flow through local streets for

Borough residents and Borough destinations and prohibits cut-through/commuting traffic during the specified hours of 6:00 to 10:00 a.m.

24. I find it quite unusual that, although Fort Lee has been restricting traffic and issuing traffic passes for at least 15 years, the State of New Jersey now has an issue with Leonia. In my conversations with the Fort Lee Police Chief, I have never been advised that there was an issue with the DOT or the Attorney General's Office with Fort Lee's response to traffic congestion. As I have indicated, not only does Fort Lee protect its local streets, it precludes access to County and State highways.

25. Prior to and after the implementation of the Traffic Safety Initiative, I communicated with the Police Chiefs of surrounding communities. These include the Police Chiefs of Fort Lee, Englewood and the Officer in Charge for Palisades Park. There has been no negative impact on traffic with surrounding communities with regard to the Safe Street Initiative and, in fact, the Fort Lee Police Chief has indicated that traffic has improved.

26. Notwithstanding, neither the DOT nor State Attorney General's Office took interest in the Borough's Traffic Safety Initiative until March 16, 2018, when the Borough received a letter from the Attorney General concerning the implementation of the Safe Streets Initiative. (See **Exhibit K** attached hereto).

27. Less than one week later, on March 26, 2018, the Borough met with DOT representatives at DOT offices in Trenton to review the Borough's Ordinances. I attended that meeting, at which time the DOT indicated that it would work collaboratively with the Borough to achieve the desired results of addressing the traffic impact of the GWB on local streets.

28. Furthermore, on April 4, 2018, various representatives of the DOT visited the Borough. Unfortunately, at the time they visited, there was no peak-hour traffic, and DOT

representatives took a half-hour drive around the Borough. In my discussions with these representatives, they confirmed that DOT has no specific individuals who are familiar with navigational applications and do not participate in community programs that are sponsored by those applications. Their lack of knowledge of navigational apps and the impact of same shocked me.

29. Thereafter, on May 8, 2018, the Borough received correspondence from the DOT acknowledging the need for traffic controls in the Borough to address the issues, and which controls would not have any less impact on the lone state highway in the Borough than the restrictions in place currently. A true and accurate copy of said correspondence is attached hereto as **Exhibit L**.

30. Two (2) days later, on May 10, 2018, Mayor Zeigler responded to the DOT providing a comprehensive response to the May 8, 2018 correspondence and seeking to continue a dialogue. A true and accurate copy of said correspondence is attached hereto as **Exhibit M**.

31. Although Mayor Zeigler responded within two (2) days of receipt of the letter from the DOT, no response to Mayor Zeigler's letter was ever received from the DOT. More than three (3) months have elapsed since the issuance of that letter, and attempts to discuss same with DOT have been met with silence.

32. Unfortunately, although DOT indicated that it wanted to work collaboratively with the Borough and to the extent it claims it has been given specific authority by the State to address traffic conditions on its state roads, it is evident that DOT lacks the commitment to do same, by not addressing or anticipating the impact of current technology on traffic conditions and its resultant actions with motorists. Indeed, it has done nothing to alleviate the impact of

traffic on Interstate 95 including the three (3) exits that permit commuters to cut through the Borough - Exit 68 (Overpeck Park), Exit 70A (Fort Lee Road), and Exit 71 (Broad Avenue).

33. I also would like to specifically address navigational apps, such as Waze and the application's algorithm. The Borough was able to provide the Ordinances enacted not only to Waze, but to Tom-Tom, Apple maps, and Garmin. As a result of providing this information, the algorithm is changed and now indicates that the local Borough roads are unavailable during the specified hours. At all other times, the streets are available, and the apps are programmed in a manner that identify these roads are available. In fact, on Sundays, there is a distinct difference with traffic on local streets on non-restricted hours.

34. As indicated previously, DOT has no specific individuals or representatives that are familiar with or participate in community programs with navigational applications, something that I find completely astounding. For example, Waze has a Connected Citizens Program in which there is participation by various public entities in order to share information to address issues, traffic closure, etc. Although the Alabama Department of Transportation is part of this program, the most densely populated state in the country, New Jersey, is not. Attached hereto as **Exhibit N** is a true and accurate copy of the description of the Waze Connected Citizens Program.

35. Receiving no assistance from the DOT, the Borough exercised its police powers and took necessary steps to address the problems. After the restrictions in the amended ordinance became effective in March of 2018, I provided the amended ordinance to the various navigational applications including Waze, Tom-Tom, Apple maps, and Garmin, who changed their algorithms to indicate the local Borough roads that are unavailable during the specified hours and that, at all other times, all streets are available.

36. Since the implementation of this program, the Borough's Police Department has not issued any summons to any individual for violation of the Ordinance; while summonses for other motor vehicle violations have decreased by 34% in the first six (6) months in 2018 as compared to the first six (6) months in 2017 due to the reduced traffic flow in the Borough. (See **Exhibit O** attached hereto.) Revenue from those summonses is also down significantly, but that is a small price to pay for the restoration of public safety to the Borough by elimination of clogged streets prohibiting the safe flow of traffic, including emergency service vehicles, in the Borough.

37. Although some would like to believe that the streets in the Borough are closed, nothing is further from the truth. There is no impediment to traveling or accessing state or county highways. All streets remain through, with the limitation that 44 of the local streets are limited to those who are Borough residents or traveling to Borough destinations, between the hours of 6:00 to 10:00 a.m. and 4:00 to 9:00 p.m.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Tom Rowe

Thomas Rowe

Dated: August 16, 2018

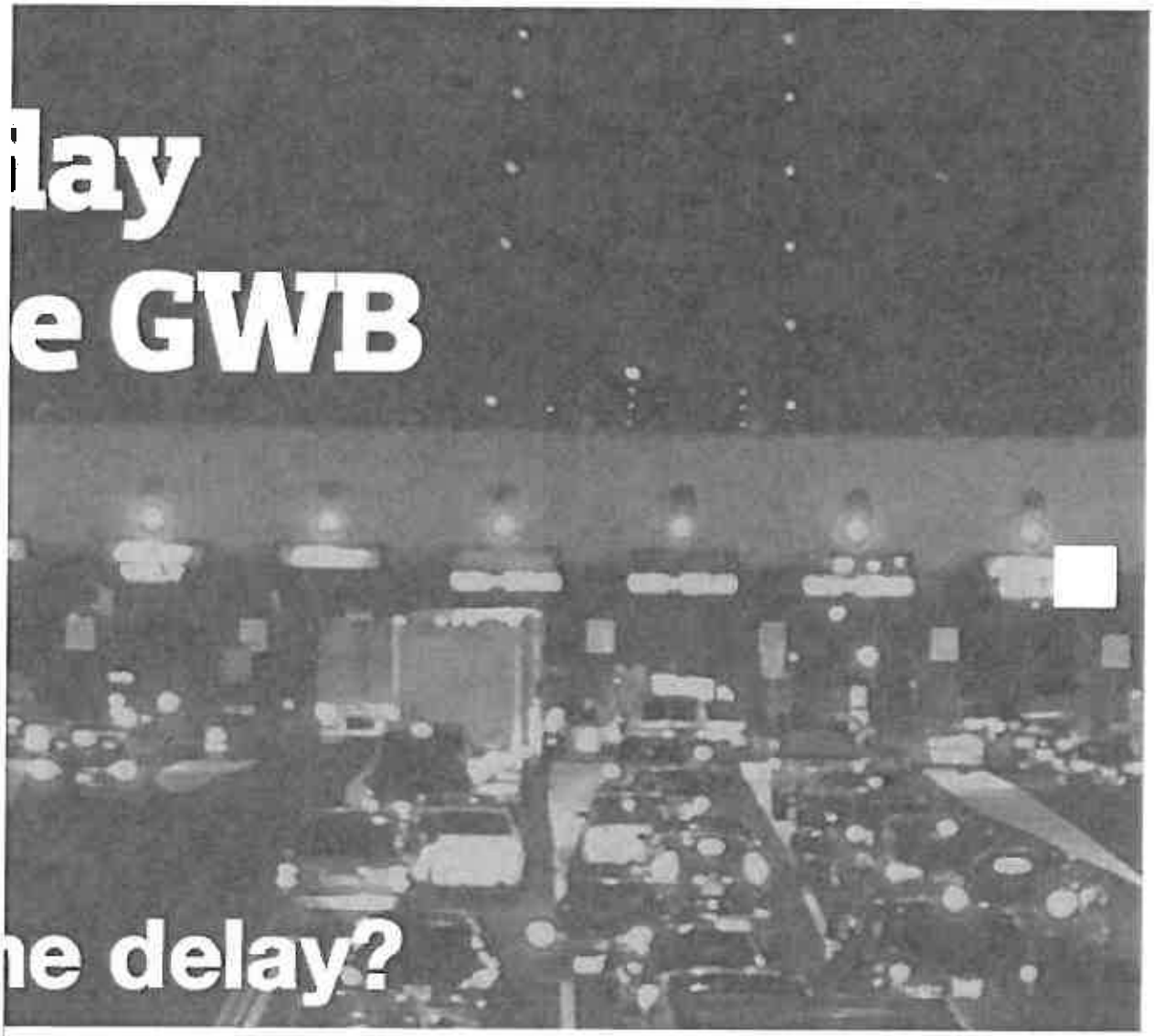
EXHIBIT A

Chestnu

EXHIBIT B

Why George Washington Bridge traffic is so miserable on Sunday nights

Updated on Sep 30, 2015 at 01:37 PM EDT



Sunday traffic at the George Washington Bridge is often worse than during the morning rush on weekdays. While the hourly volumes are comparable, fewer Sunday drivers use E-ZPass than do weekday commuters. (Steve Strunsky | NJ Advance Media)

By Steve Strunsky | NJ Advance Media for NJ.com

FORT LEE -- Martin Robbins, emeritus director of the Alan M. Voorhees Center for Transportation at Rutgers University, is a regular witness to the Sunday night traffic jam at the inbound George Washington Bridge, which typically backs up for miles on I-95 East in Bergen County.

"I see it myself from the westbound lanes when I'm coming home from visiting my son in Larchmont, (N.Y.)," said Robbins. "It's something that makes my son hesitant about visiting me in New Jersey, because he doesn't want to get stuck in it going back."

On any given Sunday, eastbound traffic headed over the GWB into New York is clogged with motorists on their way home from weekends at the Jersey Shore or the Pocono Mountains, dinner at Grandma's house, or a Jets or Giants game.

While not a big work day, Sunday is still busy for the busiest bridge in the world, with inbound traffic volumes comparable to the flow of weekday morning commuters.

A sampling of September data provided by the Port Authority of New York and New Jersey put the average bridge volume during the Sunday peak period at 9,032 vehicles per hour, compared to the 9,300 vehicles per hour during the weekday morning rush. Sunday's heaviest hour sees 10,169 vehicles over the bridge in an hour, versus a weekday morning peak hour of 10,880.

Experts say the biggest difference between Sundays and weekdays at the bridge is the much higher percentage of weekend drivers who pay the toll in cash, which means having to stop at the both, hand over a bill, wait for change or a receipt, roll their window back up, and then step on the gas.

"The time of the transaction is substantially greater than an E-ZPass transaction," when the vehicle usually doesn't even stop, said Robbins.

According to the Port Authority sample data, among Sunday drivers this month, 22.8 percent paid in cash. That's in contrast to the 13.1 percent of weekday morning drivers who stopped to hand over hard currency to a toll taker.

"These are people who don't use the bridges and tunnels that frequently, and they haven't done E-ZPass, and they subject themselves to (long cash lines)," Robbins said.

The result is often Sunday cash toll lanes that stretch back enough to block the way for E-ZPass and cash customers alike.

Port Authority figures on average vehicle speeds along certain stretches of I-95 clearly illustrate how much slower peak Sunday traffic can move than the commuters at rush hour.

For example, between 3 and 4 p.m. on Sundays last July, vehicles averaged 9.4 miles per hour on the 1.9 mile stretch of I-95 between Martha Washington Way in Fort Lee and Amsterdam Avenue in Manhattan. Weekday commuters drove at nearly twice that clip, or 16.9 mph, even during the slowest hour of the day, 7 and 8 a.m., indicating traffic was not nearly as bad.

"I'd rather walk," said Michael Brozowski, 28, of Fort Lee, who was dropping off his girlfriend at a bus stop below the LaMoine Avenue overpass Sunday night so he wouldn't have to drive her home across the congested bridge.

RELATED: The Port Authority hopes these projects will improve bridge traffic

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And while opening up more cash toll lanes might seem like a logical fix, neither Robbins nor the head of the Port Authority toll takers union could say for sure that it would work.

"I don't necessarily know if that would be a solution or not," said Jerome LaFragola, president of Local 1400 of the Transportation Workers Union.

Lafragola said analyzing traffic data and deciding whether to pay more of his members to work on Sunday was Port Authority management's decision and its responsibility, not his and other toll takers'.

"The men and women who do that tough job -- and it is a tough job -- we just carry out our assignment as best we can and as fast as we can," Lafragola said.

The Port Authority said it was constantly evaluating traffic volumes and toll lane dedication at the bridge for "an optimal balance" between EZ-Pass-only lanes and those that accept cash or EZ-Pass.

"Too many cash lanes can slow down EZ-Pass customers, who represent approximately 75 percent of drivers on Sundays," the agency said in a statement. "Too many EZ-Pass only lanes can slow down cash customers. We routinely increase the number of cash lanes for holidays and major events such as Yankees

games, and can reevaluate the number of cash lanes on Sundays if there appears to be an imbalance in the ways the lanes are dedicated on those days."

The agency added that Sunday congestion is caused not only by the combination of high volume and a high proportion of cash payments, but even by factors beyond the bridge. Heavy heavy traffic on the Cross Bronx Expressway, a stretch of I-95, sometimes backs up over the bridge and into GWB toll plaza, a situation that can render the cash v. E-ZPass equation moot.

The agency is also spending millions on new technology to reduce bridge traffic at all times. In June, the Port Authority Board of Commissioners approved a $65 million electronic messaging system featuring variable message and speed limit signs; radar; traffic surveillance cameras; equipment to gauge traffic flow; and lane closure signals.

Robbins suggested that demands on the agency's bridges, tunnels and terminals department in recent years, including major projects to raise the Bayonne Bridge roadway , replace the Goethals Bridge and the Port Authority Bus Terminal , and replace the upper deck and suspender ropes of the GWB , may have been distractions, or simply priorities.

Robbins said there could be other factors apart from volume and cash transactions contributing to the persistent Sunday delays, including the bridge's multiple feeder highways and vehicular cross-currents generated by a bi-level network of entrance and exit ramps.

"Certainly this is a complex place and it requires an appropriate traffic analysis," said Robbins.

Steve Strunsky may be reached at **sstrunsky@njadvancemedia.com** . *Follow him on Twitter* **@SteveStrunsky** . *Find* **NJ.com on Facebook.**

Comments

EXHIBIT C

The New York Times

Navigation Apps Are Turning Quiet Neighborhoods Into Traffic Nightmares

By Lisa W. Foderaro

Dec. 24, 2017

LEONIA, N.J. — It is bumper to bumper as far as the eye can see, the kind of soul-sucking traffic jam that afflicts highways the way bad food afflicts rest stops.

Suddenly, a path to hope presents itself: An alternate route, your smartphone suggests, can save time. Next thing you know, you're headed down an exit ramp, blithely following directions into the residential streets of some unsuspecting town, along with a slew of other frustrated motorists.

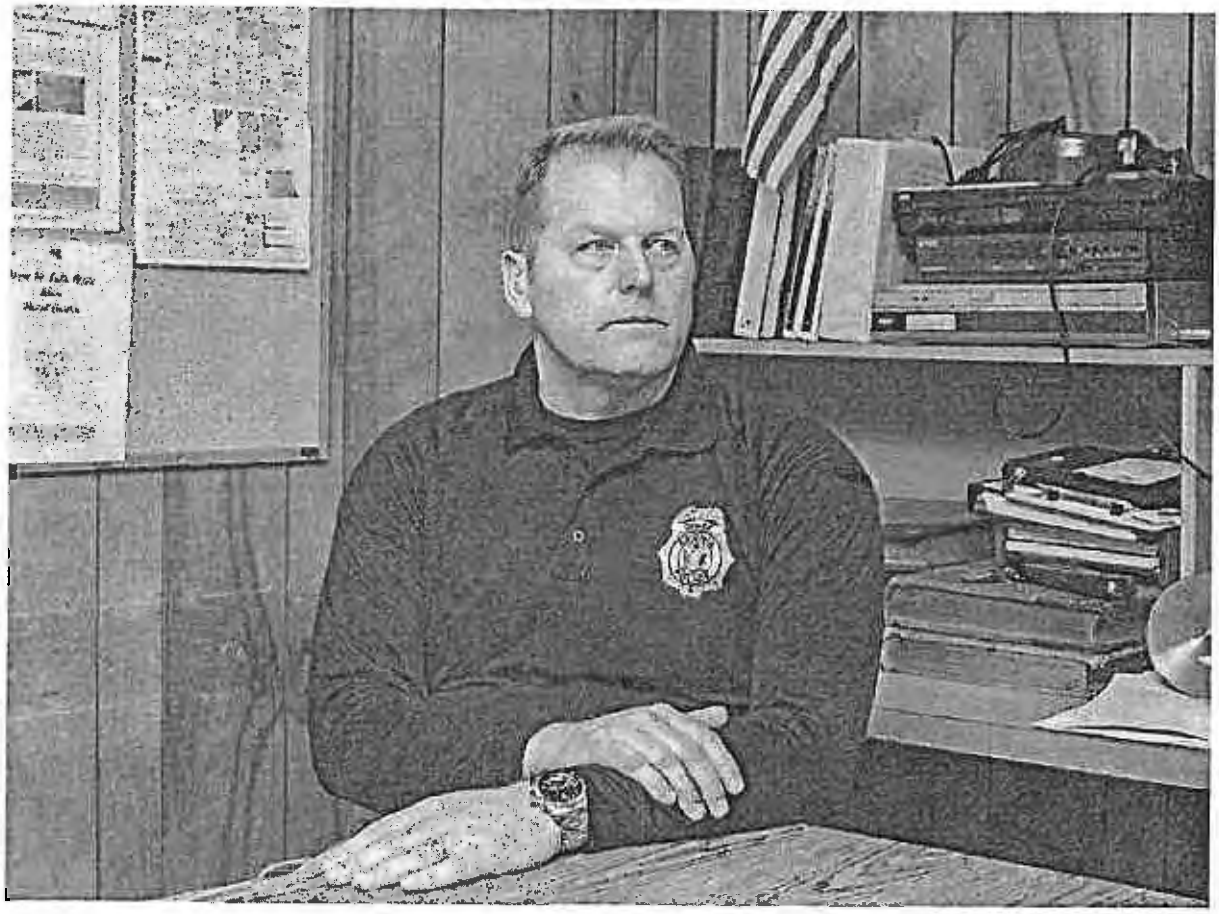
Scenes like this are playing out across the country, not just in traffic-choked regions of the Northeast. But one town has had enough.

With services like Google Maps, Waze and Apple Maps suggesting shortcuts for commuters through the narrow, hilly streets of Leonia, N.J., the borough has decided to fight back against congestion that its leaders say has reached crisis proportions.

In mid-January, the borough's police force will close 60 streets to all drivers aside from residents and people employed in the borough during the morning and afternoon rush periods, effectively taking most of the town out of circulation for the popular traffic apps — and for everyone else, for that matter.

"Without question, the game changer has been the navigation apps," said Tom Rowe, Leonia's police chief. "In the morning, if I sign onto my Waze account, I find there are 250,000 'Wazers' in the area. When the primary roads become congested, it directs vehicles into Leonia and pushes them onto secondary and tertiary roads. We have had days when people can't get out of their driveways."

Even before the proliferation of navigation apps, Leonia was no stranger to traffic. Ringed by Interstate 95, and in the shadow of the George Washington Bridge, Leonia sits next to some of the most congested roadways in the country.



"We have had days when people can't get out of their driveways," said Tom Rowe, Leonia's police chief. Bryan Anselm for The New York Times

But Leonia is not alone. From Medford, Mass. to Fremont, Calif., communities are grappling with the local gridlock caused by well-intentioned traffic apps like Waze, which was purchased by Google in 2013 for $1.15 billion.

Since Waze uses crowd sourcing to update its information, some people — frustrated at the influx of outside traffic — have taken to fabricating reports of traffic accidents in their communities to try to deter the app from sending motorists their way. One suburb of Tel Aviv has even sued Waze, which was developed by an Israeli company.

Waze defends its practice of rerouting motorists from congested highways through residential streets in nearby communities. And the company says it shares free traffic data with municipal planners nationwide who might, for instance, want to monitor the effectiveness of a new time sequence for a traffic signal.

Terry Wei, a spokeswoman for Waze, said the app benefited from a community of local volunteer editors who ensure that the maps stay up-to-date and reflect the local law. "If a road is legally reclassified into a private road," she said, "our map editors will make that change. It is our goal to work holistically with our community of drivers, map editors and city contacts to improve the driving experience for all."

While a number of communities have devised strategies like turn restrictions and speed humps that affect all motorists, Leonia's move may be the most extreme response.

Leonia plans to issue residents yellow tags to hang in their cars, and nonresidents who use the streets in the morning and afternoon will face $200 fines. Its police department has already alerted the major traffic and navigation apps to the impending changes, which will take effect on Jan. 22 from 6 a.m. to 10 a.m., and from 4 p.m. to 9 p.m., seven days a week.

Chief Rowe said the borough had tried closing only a handful of streets in the past, posting temporary signs and alerting the navigation apps, but with little success. Traffic either got pushed onto nearby streets or drivers simply disregarded the signs.

"It's basically all or nothing," Chief Rowe said. "It's a very extreme measure for very extreme traffic. Would I prefer not to do this? Of course. But I would rather try something and fail than not try anything."

Traffic on Irving Street. Melissa Soesman, who lives on the street, said she has had to plead with motorists to make room for her to pull out of her driveway. Nanci Makroulakis

Borough officials say their measure is legal, although it may yet get tested in court. Some traffic engineers and elected officials elsewhere say the move may set a precedent that could encourage towns to summarily restrict public access to outsiders.

"It's a slippery slope," said Samuel I. Schwartz, the former traffic engineer for New York City known as Gridlock Sam, and the author of the early 1990s book "Shadow Traffic's New York Shortcuts and Traffic Tips." "Waze and other services are upsetting the apple cart in a lot of communities. But these are public streets, so where do you draw the line?"

Leonia's council, which voted unanimously this month in favor of the new ordinance, was careful to keep open three major roadways that are controlled by either the county or state.

Some residents outside Leonia have chafed at the impending street closings, posting variously snarky and incredulous comments on news sites like NJ.com: "Terrible, shortsighted idea. How about the rest of N.J. fines Leonia residents for using all the other roads in the state?"

Mr. Schwartz pointed out that the state has ultimate authority over local roads. "I'd rather they put up temporary barriers," he said. "To give people summonses who might be lost or might be frantic trying to get to an appointment on time — I do worry about this type of strategy. Every town can decide that we don't want certain people to come through our community."

There is also concern from neighboring communities like Fort Lee, whose place in traffic lore has been cemented by the so-called Bridgegate scandal, where members of Gov. Chris Christie's administration deliberately worsened traffic by the George Washington Bridge, famously saying, "Time for some traffic problems in Fort Lee."

Fort Lee's mayor, Mark Sokolich, warned Leonia that its traffic-fighting strategy better not make things worse in his town. "If their initiative visits gridlock upon Fort Lee and, in particular, creates problems with our emergency service vehicles getting to and from where they need to go, they will hear from us," he said.

But for residents like Melissa Soesman, a 44-year-old native of Leonia, the change cannot happen soon enough. The slender road she lives on, Irving Street, becomes a parking lot at least two or three times a week during the morning rush. On Tuesday, her son was a half-hour late to his college class because his car, which was parked on the street, was hemmed in by traffic.

Some mornings, Ms. Soesman has to plead with drivers to make room for her to pull out of her driveway onto Irving Street. "It's horrific, and it's all the time," she said. "They will see that you are trying to get out, but they won't let you. People are cranky; it's the morning. By the time they are up here, who knows how long they have been sitting in traffic."

A version of this article appears in print on Dec. 25, 2017, on Page A1 of the New York edition with the headline: Choked by App-Driven Traffic, A Community Closes Its Roads

EXHIBIT D

"Operation Take Back Our Streets"

For almost a decade, the residents of Leonia have had to deal with dangerously high levels of traffic volume in the Borough whenever there is an incident on the George Washington Bridge or the roadways that abut the George Washington Bridge. The primary reason our Borough becomes inundated with significant traffic is due to the increased use of crowdsourcing GPS traffic navigation apps used by motorists. When the highways leading to the George Washington Bridge become congested with traffic, the GPS traffic apps direct motorists to leave the highway to traverse our local roads as a short-cut to the bridge. When one of our surface roads grind to a halt, the algorithm used by the GPS apps direct cars to another nearby street. Eventually all of our roads become congested with traffic.

The most popular crowdsourcing traffic navigation app is WAZE. WAZE is owned by Alphabet/Google. In 2013, WAZE reported that they had over 50 million subscribers (last time they publicly reported the number of subscribers). While WAZE claims to be sympathetic to towns that are inundated with traffic on a regular basis caused by their GPS app, the evidence suggests otherwise. WAZE's official position is that public roads are intended to be used by all citizens, including to alleviate gridlock. Julie Mossler, the head of brand and global marketing for WAZE stated in an article in USA Today the following; "We use the streets within reason. We find the open road and spread cars across the grid, which lowers the risk of unsafe driving behavior."

I could not disagree more with Ms. Mossler. Having vehicles leave major highways to use local roads does not lower the risk of unsafe driving. Without question, it increases unsafe, reckless and dangerous driving. Motorists who leave the highways to find a quicker route have already been significantly delayed to their final destination. To make up for lost time, motorists leave the highway and drive on our roads without regard for our residents, the speed limit, pedestrians and other motorists. This was never more apparent than on Mother's Day/Derek Jeter Day at Yankee Stadium. There were significant delays at the George Washington Bridge and thousands of motorists left the highways to use Leonia as a bypass to the bridge. On that day, I personally witnessed numerous vehicles speeding, driving recklessly and going around the portable road closed signs causing havoc in our town.

The traffic congestion that occurs on a regular basis degrades the quality of life for our residents and jeopardizes public safety. It takes first responders at least twice as long to respond to a call for service. Doubling the response time to a working house fire, a cardiac arrest or a domestic violence call could mean the difference between life and death.

Furthermore, the increased traffic volumes compromise our understaffed police department by generating many more calls for service. Every time we have significant traffic delays, we have an increase in motor vehicle accidents, disputes amongst motorists, vehicle breakdowns, the increased need for traffic enforcement and the to keep our three major intersections free of gridlock. With a patrol minimum of only two officers, there are many times when we do not have any available personnel to respond to an emergency because of the extra burden caused by the bridge traffic. This is precisely what occurred on August 7, 2014 when Leyla Khan was killed by a bus at the Broad Avenue and Fort Lee Road intersection. On that day, there were delays of 90 minutes at the George Washington Bridge. When the call came in at 8:19am, the two patrol officers who were working were on another call for service. Due to the serious nature of the call, they were unable to break from the call. We had to call neighboring police department to respond to the scene. This delayed the response to this serious incident by several minutes.

Public safety is further compromised as our three primary roads are conduits to the three area hospitals, one of which is a trauma center. The high volume of traffic delays the response to these hospitals for ambulances/paramedics and increases the time it takes for medical personnel to get back to their respective towns. First responders cannot activate their lights and sirens unless they are responding to a call. If they are not responding to an emergency, they must sit in traffic like any other vehicle.

Since 2015, we have been placing temporary road closed signs on some of the surface roads that are commonly used as a shortcut by motorists travelling to the George Washington Bridge. These signs have been nominally effective. The reason they are not more effective is because the temporary road closures are not programmed into the algorithm used by WAZE. In order for these road closures to be entered into the WAZE algorithm, we would need to enact an ordinance that would restrict access to a majority of our surface roads for non-residents and other classifications of motorists for certain periods of time daily and to change a handful of streets to one-way only. By enacting an ordinance, we could have WAZE, through its **Connected Citizens Program**, enter our daily road closures and one-way streets into their database. So, when an incident occurs on the George Washington Bridge or one of the roadways that abuts the bridge between the hours of 6-10am and 4-9pm, the WAZE app will not direct motorists to leave the highways and use Leonia as a bypass to the bridge as all of our surface roads that lead to the bridge will be closed to motorists seeking a quicker way to the bridge.

The manipulation of the WAZE algorithm has been done by a few other jurisdictions. Fremont California enacted ordinances in early 2017 to influence the WAZE program so traffic would not be directed from the nearby highways onto their surface roads. The person responsible for this

initiative was Noe Veloso. Noe is the Principal Traffic Engineer for Fremont. Noe and I spoke at the length about Fremont's traffic initiative. Noe informed me that the initiative has worked well and has kept many motorists on the highway who in the past would have left the highway to use his town as a shortcut to their end destination. Noe also told me that their initiative would have been received better by their community if there was an exemption was provided for residents. The Fremont Police Department would not agree to an exemption for residents.

For this initiative to be successful, my recommendation is that we provide an exemption to residents, visitors of residents, employees of businesses located in Leonia, patrons of Leonia businesses and businesses making deliveries or working in Leonia. In order for our officers to quickly discern whether a vehicle is exempt, we will need to issue a rearview mirror "traffic pass" hangar that is bright in color and easily identifiable. The current sticker used by residents is difficult to spot and slows down the process of allowing motorist to enter a closed street.

The NJ State statute we currently issue to motorists who disobey our portable road closed signs has a fine of $54. A fine of only $54 with no motor vehicle points is not a deterrent. Therefore, my recommendation is that the fine for disobeying the Do Not Enter & Restricted Turn Ordinance be at least $200. This would act as a deterrent and would also allow us to call in officers on overtime to enforce this ordinance.

The number of streets to be included in this traffic safety initiative is without question significant and to some may seem extreme. However, in order to gain control over the traffic issues which endangers the lives of our residents on a daily basis, our response must be extremely comprehensive. We must do everything in our lawful authority to ensure that the incident that occurred on August 7, 2014 at the intersection of Broad Avenue and Fort Lee Road never occurs again.

In the attached table I've listed the streets I am recommending be incorporated in to an ordinance that would restrict turns and access to our surface roads from 6:00 - 10:00am and 4:00 - 9:00pm, seven days a week. I am also recommending that five streets be changed permanently to one-way streets.

Road Name/ Direction of Road	Prohibited Entry
Broad Avenue - Eastbound from Broad Ave	
Vreeland Avenue	Do Not Enter
Woodland Place	Do Not Enter
Beechwood Place	Do Not Enter
Magnolia Place	Do Not Enter
Elm Place	Do Not Enter
Allaire Avenue	Do Not Enter
Westview Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Ave	Do Not Enter
Moore Ave	Do Not Enter
Oakdene Ave	Do Not Enter
Broad Avenue - Westbound of Broad Ave	
Overlook Avenue	Do Not Enter
Van Orden Ave	Do Not Enter
Vreeland Ave	Do Not Enter
Christie Heights Street	Do Not Enter
Harrison Street	Do Not Enter
Fort Lee Road - Southbound of Fort Lee Road	
Leonia Avenue	Do Not Enter
Gladwin Avenue	Do Not Enter
Oaktree Place	Do Not Enter
Paulin Boulevard	Do Not Enter
Irving Street	Do Not Enter
Fort Lee Road - Northbound of Fort Lee Road	
Linden Terr	Do Not Enter
Hawthorne Terr	Do Not Enter
Leonia Avenue	Do Not Enter
Grand Avenue - Eastbound of Grand Ave	
Lakeview Avenue	Do Not Enter
Longview Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Harrison Street	Do Not Enter
Cottage Place	Do Not Enter
Hillside Avenue	Do Not Enter
Palisade Avenue	Do Not Enter
Prospect Steet	Do Not Enter
Maple Street	Do Not Enter
Christie Street	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Bergen Boulevard - Westbound of Bergen Blvd	
Christie Lane	Do Not Enter
Hazlitt Avenue	Do Not Enter
Washington Terrace	Do Not Enter
Lester Street	Do Not Enter
Glenwood Avenue - Northbound of Oakdene Ave	
Glenwood Ave	Do Not Enter
Glenwood Avenue - Eastbound of Glenwood Ave	
Hillside Ave	Do Not Enter
Woodland Place	Do Not Enter
Allaire Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Intersections with Traffic Control Devices		
Broad Ave/Hillside Ave	**Eastbound from Broad Ave**	No Right & Left Turn
FLR EB /Glenwood Ave	**North & Southbound from FLR**	No Right & Left Turn
FLR EB/Station Parkway	**Southbound from FLR**	No Right Turn
Grand Ave/Christie Hts	**Eastbound from Grand Ave**	No Right & Left Turn
Grand Ave/ Moore Ave	**Eastbound from Grand Ave**	No Right & Left Turn

One-Way Streets	
Lakeview Avenue	West to East - Eastview to Broad Avenue
Palmer Place	North to South - Highwood Avenue to Oakdene Avenue
Irving Street	North to South - Fort Lee Road to Christie Lane
Chestnut Street	East to West - Irving Street to Fort Lee Road
Edgewood Road	South to North – Ridgeland Terr to Ridgeland Terr

EXHIBIT E

ORDINANCE NO. 2017-19
BOROUGH OF LEONIA
COUNTY OF BERGEN

AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA BY ADDING TO ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS" AND ARTICLE XIV BY THE ADDITION THEREOF OF SCHEDULE XVIII "STREETS CLOSED TO TRAFFIC"

WHEREAS, the Mayor and Council of the Borough of Leonia have determined that it is in the best interests of the Borough of Leonia to revise Chapter 194 of the Borough of Leonia Ordinance concerning Vehicles and Traffic; and

Section 1.

WHEREAS, the Mayor and Council of the Borough of Leonia desire to amend and supplement §194 "Vehicles and Traffic" of the Code of the Borough of Leonia by adding to Article XI "Temporary Closing of Streets" §194-25.1 "Closing of Certain Streets":

§194-25.1 Closing of Certain Streets.

No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§194-49) attached to and made a part of this Chapter during the times of the days indicated in said Schedule unless that person is a resident of the said street needing access to his home or can demonstrate or document a need to access a residence on the street or parts of streets as described.

Article XVIII. Streets Closed to Traffic.

§194-49. Schedule XVIII Streets Closed to Traffic.

In accordance with the provisions of §194-25.1, the following streets or parts of streets shall be closed to traffic between the hours listed on the days indicated:

Between 6:00 to 10:00 a.m. and 4:00 to 9:00 p.m., the following streets will have the restrictions listed below:

Road Name/Direction of Road	Prohibited Entry
Edgewood Road- Southbound from Ridgeland Ter. to Ridgeland Terrace	Do Not Enter
Broad Avenue – Eastbound from Broad Avenue	
Vreeland Avenue	Do Not Enter
Woodland Place	Do Not Enter

Beechwood Place	Do Not Enter
Magnolia Place	Do Not Enter
Elm Place	Do Not Enter
Allaire Avenue	Do Not Enter
Westview Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highway Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Broad Avenue – Westbound of Broad Avenue

Oakdene Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Park Avenue	Do Not Enter
Christie Street	Do Not Enter
High Street	Do Not Enter
Crescent Avenue	Do Not Enter
Harrison Street	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Christie Heights Street	Do Not Enter
Harrison Street	Do Not Enter

Fort Lee Road – Southbound of Fort Lee Road

Leonia Avenue	Do Not Enter
Gladwin Avenue	Do Not Enter
Oaktree Place	Do Not Enter
Paulin Boulevard	Do Not Enter
Irving Street	Do Not Enter

Fort Lee Road – Northbound of Fort Lee Road

Linden Terrace	Do Not Enter
Hawthorne Terrace	Do Not Enter
Leonia Avenue	Do Not Enter

Grand Avenue – Eastbound of Grand Avenue

Lakeview Avenue	Do Not Enter
Longview Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter

Vreeland Avenue	Do Not Enter
Harrison Street	Do Not Enter
Cottage Place	Do Not Enter
Hillside Avenue	Do Not Enter
Palisade Avenue	Do Not Enter
Prospect Street	Do Not Enter
Maple Street	Do Not Enter
Christie Street	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Grand Avenue – Westbound of Grand Avenue

Maple Street	Do Not Enter
Schor Avenue	Do Not Enter

Bergen Boulevard – Westbound of Bergen Boulevard

	Do Not Enter
Christie Lane	
Hazlitt Avenue	Do Not Enter
Washington Terrace	Do Not Enter
Lester Street	Do Not Enter

Glenwood Avenue – Northbound of Oakdene Avenue

Glenwood Avenue	Do Not Enter

Glenwood Avenue – Eastbound of Glenwood Avenue

Hillside Avenue	Do Not Enter
Woodland Place	Do Not Enter
	Do Not Enter

Allaire Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Intersections with Traffic Control Devices

Broad Ave/Hillside Ave: West and Eastbound from Broad Ave	No Right and Left Turn
FLR EB/Glenwood Avenue: North and Southbound from FLR	No Right and Left Turn
FLR EB/Station Parkway: Southbound from FLR	No Right Turn
Grand Avenue/Christie Heights: Eastbound from Grand Avenue	No Right and Left Turn
Grand Avenue/Moore Avenue: Eastbound from Grand Avenue	No Right and Left Turn

Section 2.

All other provisions of Chapter 194 "Vehicles and Traffic" of the Code of the Borough of Leonia are hereby ratified and confirmed.

Section 3. Severability.

If any article, section, sub-section, sentence, clause, or phrase of this Ordinance is for any reason deemed to be unconstitutional or invalid by any court of competent jurisdiction, such decision shall not affect the remaining portions of this Ordinance.

Section 4. Effect.

This Ordinance will take effect upon publication as required by law.

Judah Zeigler, Mayor

ATTEST:

Tom Rowe
TOM ROWE
ACTING Borough Clerk

INTRODUCED: 11/20/17
ADOPTED: 12/4/17
APPROVED: 12/4/17

PUBLIC NOTICE OF ADOPTION
BOROUGH OF LEONIA
ORDINANCE NO. 2017-19

PLEASE TAKE NOTICE THAT ORDINANCE NO. 2017-19 ENTITLED "AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA BY ADDING TO ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS" AND ARTICLE XIV BY THE ADDITIONS THEREOF OF SCHEDULE XVIII "STREETS CLOSED TO TRAFFIC" was given its final reading with e public hearing and was adopted et a meating of the governing body on tha 4th day of December, 2017.

Barbara Rae, RMC,CMC
Borough Clerk

Introduced: November 20, 2017
Adoptad: Decamber 4, 2017
Approved: December 4, 2017
December 15, 2017
Fee: $24.75(30) 4224550

EXHIBIT F

JUDAH ZEIGLER
Mayor

BOROUGH of LEONIA settled 1668

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November 27, 2017

Hon. Kevin O'Toole, Chairman
Port Authority of New York and New Jersey
4 World Trade Center
150 Greenwich St.
New York, NY 10007

Dear Chairman O'Toole:

First and foremost, I would like to thank you for the courtesies you have already extended to the Borough of Leonia with regard to addressing the traffic and pedestrian safety issues caused by the increasing traffic flowing to the George Washington Bridge. The purpose of this letter is to follow up on our ongoing discussions, and to formally request that the Port Authority of New York and New Jersey ("Port Authority") provide discretionary funding to the Borough of Leonia, in order to allow us to ensure that the safety of our residents, most importantly, our children, is protected. This letter will provide the details to support this important request.

Problem Summary

The Borough of Leonia is located approximately one half mile from the George Washington Bridge, and is bordered by Route 95 to the West and North, and Route 46 to the East and South. The Borough shares its eastern border with the Borough of Fort Lee.

During a typical rush-hour, approximately 4,000 vehicles utilize Fort Lee Rd as an alternative method to get to the George Washington Bridge. When there is congestion at the Bridge, that number increases three-fold, to an average of 12,000 vehicles. Unfortunately, due to the advent of smartphone-based traffic apps, traffic is being directed onto not only Fort Lee Rd. (a main thoroughfare), but also the side streets throughout our municipality.

The Borough of Leonia is a 1.25 square mile municipality with narrow streets typical of an older town. When vehicles utilize these streets in an attempt to find an alternative method to access the George Washington Bridge, they put in danger both the children who are walking to school, as well as all pedestrians and the residents who are traveling throughout the Borough. These drivers are often distracted as they look at their traffic app, and are also frustrated by the volume of traffic. As a result, they are frequently very aggressive; I get, on a regular basis, complaints from our residents regarding drivers of vehicles with out-of-state license plates who utilize their horns without regard for the residential neighborhoods they are traversing, and also frequently scream at residents when residents ask the drivers to stop this behavior.

This is a situation that occurs approximately 4 - 5 times per week, including both weekend days. In the last five years we have had approximately ten accidents involving pedestrians and non-resident drivers attempting to find an alternative route to the Bridge. This includes one fatality, wherein a female pedestrian was struck by a vehicle and dragged approximately 75 feet, perishing at the scene.

Leonia is a municipality with a largely residential tax base, and our 9,200 residents are served by a 17-member police force. While our Chief and officers do an outstanding job, there are simply not enough of them to be able to effectively address the traffic during the heavy days described above. The situation continues to worsen and thus, we reached out to Senator Weinberg, who in turn contacted you to request assistance.

Request from Borough of Leonia

Our request to you is relatively simple: In order to allow us to effectively address the traffic issues that are caused by our proximity to the George Washington Bridge and the Borough of Fort Lee, we respectfully request that you allocate the sum of $200,000 per year to the Borough of Leonia, to be spent on traffic officers

The Solution

Your confirmation of our request will allow the Borough of Leonia to hire and train three full-time and one part-time traffic officer to supplement our current Police Department staff.

The funding to hire three full-time civilian traffic officers would significantly enhance public safety, as it would allow us to keep our four critical intersections free of gridlock and traffic flowing safely when there are delays at the George Washington Bridge. When there are delays at the George Washington Bridge, it is not uncommon for numerous traffic cycles to pass without vehicles being able to move in any direction at all four intersections. Due to our limited staffing levels, we are incapable of keeping all of these intersections free of motor vehicle congestion. Three of the four intersections are, during school hours, staffed with school crossing guards. The constant gridlocking of these intersections makes it much more difficult for our crossing guards to ensure the safety of our Borough's youngest residents, as they have to navigate the children around vehicles stopped in the intersections and on the crosswalks. Additionally, these four intersections are conduits to our three area hospitals, one of which is a trauma center. The inability to transport patients quickly to these hospitals due to our four critical intersections being regularly gridlocked with traffic also impacts our surrounding communities of Fort Lee, Edgewater, Cliffside Park, Palisades Park, Ridgefield and Fairview.

Furthermore, the civilian traffic officers would be used to free up our regular police officers, allowing them to handle emergency calls for service as well as the ability to enforce motor vehicle violations that are a direct result of the high volume of vehicles using Leonia as a bypass to the George Washington Bridge. There are many occasions when our department cannot conduct any traffic enforcement because we are committed to calls for service that are associated with bridge traffic (e.g. disabled vehicles, motor vehicle accidents, road rage, etc.). The inability to address egregious and dangerous motor vehicle violations increases the chances of a serious motor vehicle accident, and also creates a sense of lawlessness in our community.

The annual salary and benefits for our current civilian traffic officer is approximately $67,000. Three full-time officers would result in an incremental annual cost of approximately $201,000, which we are requesting from the Port Authority.

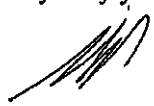
Summary

The Borough of Leonia is in desperate need of assistance from the Port Authority of New York and New Jersey, in order to allow us the ability to substantively address the worsening traffic and related issues associated with the worsening and more frequent congestion at the George Washington Bridge. Thus, we are submitting this request for $201,000 in annual discretionary funding to you for you consideration, in order to allow us to hire three additional civilian traffic officers to deal with the traffic issues, thus freeing up our sworn officers to handle calls for emergency services as well as more serious motor vehicle violations.

Your approval of this request will serve to dramatically increase the safety of every Leonia resident, especially the children of our Borough. On behalf of all of our 9,200 residents, I would like to thank you for your consideration of this request, as well as the time you have already spent to better understand the challenges we are facing. Should you have any questions or require additional information, please don't hesitate to contact me directly at (201) 446-4603, or by email at jzeigler@leonianj.gov.

Thank you again for consideration; I look forward to receiving your favorable response in the near future.

Very truly yours,



Judah Zeigler
Mayor
Borough of Leonia

Cc: Hon. Loretta Weinberg, Senator, District 37
Tom Rowe, Chief, Leonia Police Department

EXHIBIT G

ORDINANCE NO. 2018-5
BOROUGH OF LEONIA
COUNTY OF BERGEN

AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA BY AMENDING ORDINANCE 2017-19, ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS" AND §194-49 SCHEDULE XVIII

WHEREAS, the Mayor and Council of the Borough of Leonia adopted Ordinance No. 2017-19 on December 4, 2017; and

WHEREAS, the Mayor and Council have reviewed the impact of the Ordinance and have determined to revise same to provide for access to certain streets for those individuals traveling to Leonia destinations.

NOW THEREFORE, BE IT ORDAINED by the Mayor and Council of the Borough of Leonia, as follows:

Section 1.

§194-25.1 "Closing of Certain Streets" is amended in its entirety as follows:

§194-25.1 Closing of Certain Streets.

No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§194-49) attached to and made part of Chapter 194 during the times of the days indicated in said Schedule unless that person

(a) Is a resident of said street needing access to his home or can demonstrate a documented need to access a residence on the street or parts of streets as described; or

(b) Is traveling to and/or from a Leonia destination.

Article XVIII. Streets Closed to Traffic.

§194-49. Schedule XVIII Streets Closed to Traffic.

In accordance with the provisions of §194-25.1, the following streets or parts of streets shall be closed to traffic between the hours listed on the days indicated:

Between 6:00 to 10:00 a.m. and 4:00 to 9:00 p.m., the following streets will be closed:

Lakeview Avenue	West to East – Eastview to Broad Avenue
Palmer Place	North to South – Highwood Avenue to Oakdene Avenue
Irving Street	North to South – Fort Lee Road to Christie Lane
Chestnut Street	East to West – Irving Street to Fort Lee Road
Edgewood Road	South to North – Ridgeland Terrace to Ridgeland Terrace

Between 6:00 to 10:00 a.m. and 4:00 to 9:00 p.m., the following streets will have the restrictions listed below:

Road Name/Direction of Road	Prohibited Entry
Broad Avenue – Eastbound from Broad Avenue	
Vreeland Avenue	Do Not Enter
Woodland Place	Do Not Enter
Beechwood Place	Do Not Enter
Magnolia Place	Do Not Enter
Elm Place	Do Not Enter
Allaire Avenue	Do Not Enter
Westview Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter
Broad Avenue – Westbound of Broad Avenue	
Oakdene Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Park Avenue	Do Not Enter
Christie Street	Do Not Enter
High Street	Do Not Enter
Crescent Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter

Vreeland Avenue	Do Not Enter
Christie Heights Street	Do Not Enter
Harrison Street	Do Not Enter

Fort Lee Road – Southbound of Fort Lee Road

Leonia Avenue	Do Not Enter
Gladwin Avenue	Do Not Enter
Oaktree Place	Do Not Enter
Paulin Boulevard	Do Not Enter
Irving Street	Do Not Enter

Fort Lee Road – Northbound of Fort Lee Road

Linden Terrace	Do Not Enter
Hawthorne Terrace	Do Not Enter
Leonia Avenue	Do Not Enter

Grand Avenue – Eastbound of Grand Avenue

Lakeview Avenue	Do Not Enter
Longview Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Harrison Street	Do Not Enter
Cottage Place	Do Not Enter
Hillside Avenue	Do Not Enter
Palisade Avenue	Do Not Enter
Prospect Street	Do Not Enter
Maple Street	Do Not Enter
Christie Street	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Grand Avenue – Westbound of Grand Avenue

Maple Street	Do Not Enter
Schor Avenue	Do Not Enter

Bergen Boulevard – Westbound of Bergen Boulevard

Christie Lane	Do Not Enter

Hazlitt Avenue	Do Not Enter
Washington Terrace	Do Not Enter
Lester Street	Do Not Enter

Glenwood Avenue – Northbound of Oakdene Avenue

Glenwood Avenue	Do Not Enter

Glenwood Avenue – Eastbound of Glenwood Avenue

Hillside Avenue	Do Not Enter
Woodland Place	Do Not Enter
Allaire Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Intersections with Traffic Control Devices

Broad Ave/Hillside Ave: **West and Eastbound from Broad Ave**	No Right and Left Turn
FLR EB/Glenwood Avenue: **North and Southbound from FLR**	No Right and Left Turn
FLR BB/Station Parkway: **Southbound from FLR**	No Right Turn
Grand Avenue/Christie Heights: **Eastbound from Grand Avenue**	No Right and Left Turn
Grand Avenue/Moore Avenue: **Eastbound from Grand Avenue**	No Right and Left Turn

Section 2.

All other provisions of Chapter 194 "Vehicles and Traffic" of the Code of the Borough of Leonia are hereby ratified and confirmed.

Section 3. Severability.

If any article, section, sub-section, sentence, clause, or phrase of this Ordinance is for any reason deemed to be unconstitutional or invalid by any court of competent jurisdiction, such decision shall not affect the remaining portions of this Ordinance.

Section 4. Effect.

This Ordinance will take effect upon publication as required by law.

Judah Zeigler, Mayor

ATTEST:

Barbara Rae, RMC, CMC
Borough Clerk

Borough of Leonia
Office of the Municipal Clerk

PROOF OF PUBLICATION AFFIDAVIT

Date: 3/8/18

As the duly appointed Municipal Clerk for the Borough of Leonia, County of Bergen, State of New Jersey, I hereby certify that a Public Notice, of which a copy is attached hereto, was published in the Record Newspaper, in the 3/8/18 issue of said newspaper.

Barbara Rae, RMC, CMC
Barbara Rae
Borough Clerk

PUBLIC NOTICE OF ADOPTION
BOROUGH OF LEONIA
ORDINANCE NO. 2018-5

PLEASE TAKE NOTICE THAT ORDINANCE NO. 2018-5 ENTITLED "AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA BY AMENDING ORDINANCE 2017-18, ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS; AND §194-49 SCHEDULE XVIII was given its final reading with a public hearing and was adopted at a meeting of the governing body on the 5th day of March, 2018.

Barbara Rae, RM,CMC
Borough Clerk.

Introduced: February 21, 2018
Adopted: March 5, 2018
Approved: March 5, 2018
March 8, 2018
Fee: $20.63 (25) 4246235

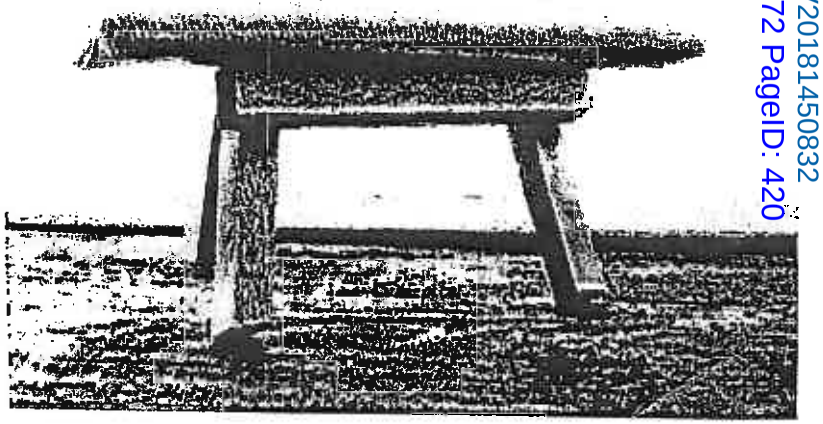


EXHIBIT H

Carol Janelli

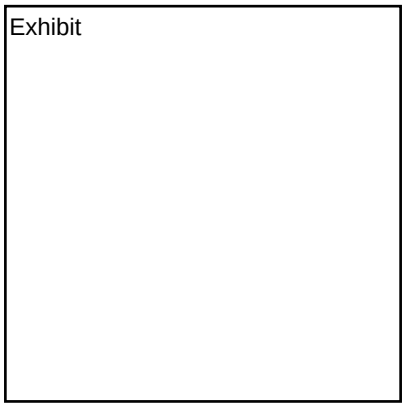
From: Brian Chewcaskie
Sent: Tuesday, May 08, 2018 11:34 AM
To: Carol Janelli
Subject: FW: North Ave - Rt. 46 East /Ft Lee

Please print

From: Greg Makroulakis <gmakroulakis@leonianj.gov>
Sent: Monday, May 07, 2018 9:10 PM
To: Brian Chewcaskie <brian@gmcnjlaw.com>
Subject: North Ave - Rt. 46 East /Ft Lee

Sent from my iPhone

EXHIBIT I



Brian Chewcaskie

From: Brian Chewcaskie
Sent: Sunday, August 12, 2018 11:21 AM
To: Brian Chewcaskie
Subject: Fort Lee Police Department Traffic Bureau

http://fortleepd.org/about-the-flpd/traffic-bureau

Traffic Bureau

The Fort Lee Police Traffic Division handles daily traffic problems within the Borough. Most traffic congestion is caused by the George Washington Bridge. On an average day, over 287,000 vehicles cross over the bridge. During road congestion, the Traffic Division assists in keeping specific roadways open and intersections free from grid-locking to enable emergency vehicles to move throughout town.

The Traffic Division is equipped with a fleet of 12 motorcycles, several four wheel drive SUVs with towing capacity and push bumpers, many message boards and several utility trailers equipped with water barriers, pedestrian gates and traffic cones, ready to be deployed on a moment's notice. All of the equipment was purchased with confiscated funds and was at no cost to the residents of Fort Lee. Our traffic officers are some of the most highly trained in the state. Certified in accident reconstruction, investigating some of our more serious accidents; certified motorcycle officers, who are also instructors and teach at the Bergen County Police Academy and advanced traffic engineering, certified from Rutgers University. The Traffic Division on a day-to-day basis handles morning commuter traffic, road closures, traffic engineering of city streets, handicap parking spots, municipal tows, school crossing guards, accident reconstructions, departmental fleet maintenance, and traffic-related borough ordinances.

To receive alerts of local emergencies, go to Nixle.com and register or TEXT your ZIP CODE to 888777.

Residents and employees who work in the town of Fort Lee are encouraged to respond to the Parking Authority (201) 592-3500 Ext. 1518, located at 309 Main Street, and apply for a borough traffic pass hang tag to allow you access into town during heavy traffic days.

Citizens are encouraged to contact the Traffic Bureau Supervisor, Lieutenant Ricky Mirkovic, at 201-592-3516 with any concerns or questions.

- < Prev
- Next >

Brian M Chewcaskie
Gittleman Muhlstock & Chewcaskie
2200 Fletcher Avenue

Fort Lee, NJ 07024
201-944-2300
brian@gmcnjlaw.com

EXHIBIT J


DISPLAY ON REARVIEW MIRROR
TRAFFIC PASS
BOROUGH
OF
FORT LEE
38385
Expires December 31, 2014

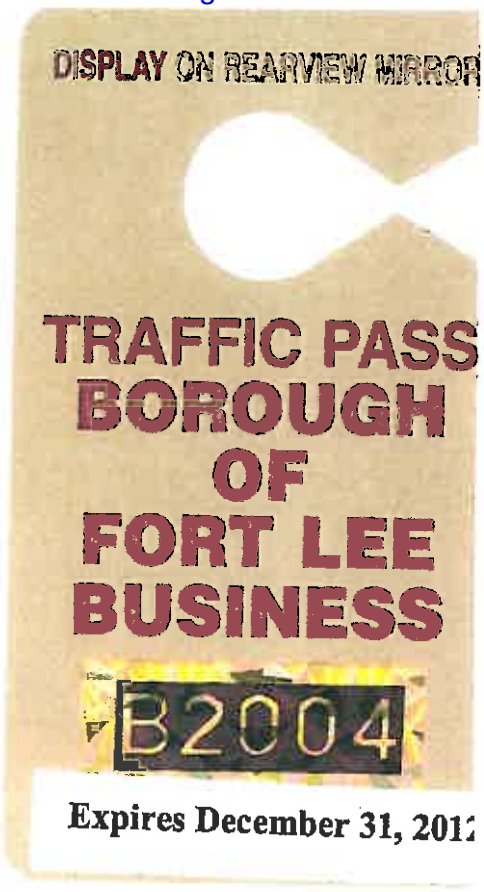

DISPLAY ON REARVIEW MIRROR
TRAFFIC PASS
BOROUGH
OF
FORT LEE
BUSINESS
B2004
Expires December 31, 201

EXHIBIT K

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 114
TRENTON, NJ 08625-0114

GURBIR S. GREWAL
Attorney General

March 16, 2018

Via Email and Regular Mail
Brian Chewkaskie, Esq.
Gittleman, Mulstock & Chewcaskie, LLP
Counsel for the Borough of Leonia
2200 Fletcher Avenue, Fifth Floor
Fort Lee, NJ 07024

Re: Borough of Leonia Ordinance ORD-2018-5:
Amending Ordinance 2017-19 - Section 194-25.1
Closing of Streets; Borough of Leonia Ordinance
2017-19

Dear Mr. Chewkaskie:

I write to follow up on our recent conversation and reiterate that the above referenced ordinances recently passed by your client, the Borough of Leonia ("Leonia"), restricting certain traffic from streets within the Borough are legally invalid and the Borough should immediately refrain from enforcing them.

Pursuant to N.J.S.A. 39:4-8(a), with limited exceptions that are not applicable here, the New Jersey Commissioner of Transportation (the "Commissioner") must approve any municipal ordinance, resolution or regulation concerning, regulating or governing traffic or traffic conditions. Moreover, the Commissioner is not required to approve any such ordinance, resolution, or regulation, unless, "after investigation by the

Commissioner, the same shall appear to be in the interest of safety and the expedition of traffic on the public highways." Additionally, "Where the Commissioner's approval is required, a certified copy of the adopted ordinance, resolution, or regulation shall be transmitted by the clerk of the municipality or county, as applicable, to the Commissioner within 30 days of adoption, together with: a copy of the municipal or county engineer's certification, a statement of the reasons for the municipal or county engineer's decision, detailed information as to the location of streets, intersections, and signs affected by the ordinance, resolution, or regulation, and traffic count, crash, and speed sampling data, when appropriate."

Furthermore, in Formal Opinion No. 5, issued in 1955, the Attorney General addressed a question concerning the power of municipalities to designate "no through" streets that prohibited traffic other than those motorists whose destination was on the closed street. After analyzing the standards established in Title 39, the Attorney General concluded that "There is no inherent power vested in a municipality by which it may legally restrict the right of the public to the free use of streets and roads. Any right of the municipality to pass ordinances and resolutions regarding the flow of traffic over its streets and highways can arise only by legislative grant; and there has been none."

Leonia's ordinances have not been presented to Transportation Commissioner as required for her to make any determination under applicable law. Thus, for the reasons discussed above, Leonia lacked the authority to enforce the ordinances that restrict traffic on its roadways without authority from the Legislature or approval from the Commissioner pursuant to N.J.S.A. 39:4-8(a). We therefore direct that you advise the Borough to immediately refrain from enforcing the above referenced ordinances or the Attorney General will be required to take appropriate action to enforce the law.

We encourage Leonia officials to meet with the New Jersey Department of Transportation (DOT) to discuss a lawful resolution of whatever traffic problems may exist in Leonia as the result of commuters traveling through Leonia to use the George Washington Bridge.

The Attorney General's office is willing to facilitate and participate the meeting. Please contact me to advise whether Leonia is willing to participate in such a meeting.

Respectfully yours,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Kevin R. Jespersen
Chief Counsel to the Attorney General

EXHIBIT L

State of New Jersey

DEPARTMENT OF TRANSPORTATION
P.O. Box 600
Trenton, New Jersey 08625-0600

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

DIANE GUTIERREZ-SCACCETTI
Acting Commissioner

May 8, 2018

The Honorable Judah Zeigler
Mayor, Borough of Leonia
Borough Hall
312 Broad Ave
Leonia, NJ 07605

Dear Mayor Zeigler,

I am following up on the April 4, 2018 meeting between Leonia officials and NJDOT staff to address the traffic issues affecting Leonia Borough. As you know, traffic safety is one of NJDOT's top priorities. Commissioner Gutierrez-Scaccetti wants to work with municipalities throughout the state by offering the resources of the Department to ensure that our motorists and our residents are kept safe.

At the meeting with your staff, we discussed techniques the town can legally employ to control commuter traffic through Leonia during peak traffic hours. NJDOT's recommendations included:

1. AM and PM peak hour turn prohibitions onto Fort Lee Road eastbound (toward the GW Bridge/Turnpike) from all intersecting side streets.
2. Advance signing on other streets leading to Fort Lee Road warning of the turn prohibitions.
3. Changing some streets that intersect Fort Lee Road to one-way to help minimize the number of officers stationed at the Fort Lee Road intersections.
4. Removal of all other "resident only" signing including those on Route NJ 93 traffic signal mast arms.
5. Part-time (peak hour) turn prohibitions from Route NJ 93 onto certain municipal streets (Subject to an investigation by the Bureau of Traffic Engineering).

We appreciated the opportunity to sit with your staff to work on an amenable outcome that promotes the safety of Leonia residents while ensuring the ease of passage for motorists in one of the state's most highly trafficked regions. Please let us know if you need further details on any of these recommendations or if you have any questions. I can be contacted at 609-530-2600. We look forward to hearing from you and continuing to provide Leonia assistance to address these issues.

Sincerely,

Jaime Marie Oplinger

Jaime Marie Oplinger, P.E.
Executive Manager, Bureau of Traffic Engineering

EXHIBIT M

JUDAH ZEIGLER
Mayor

BOROUGH of LEONIA settled 1668

312 BROAD AVENUE, LEONIA, NEW JERSEY 07605-0098
(201) 592-5780
FAX (201) 592-5746
www.leonianj.gov | jzeigler@leonianj.gov

May 10, 2018

Jaime Marie Oplinger, P.E.
Executive Manager, Bureau of Traffic Engineering
New Jersey Department of Transportation
P.O. Box 600
Trenton, NJ 08625-0600

Dear Ms. Oplinger:

This letter is in response to your letter of May 8, 2018 concerning "the traffic issues affecting Leonia Borough." Please note that I am replying to the letter, I have yet to receive it from you or your office in any form; rather, it was provided to me by the Leonia Borough Attorney, who in turn received it from the Attorney General's Office. In the interest of continuing to move this issue forward to a mutually satisfactory solution, I am replying nevertheless.

You wrote that the purpose of your letter was to provide a recap of the meeting which took place on April 4, 2018 between various representatives of the New Jersey Department of Transportation ("NJDOT") and Leonia Borough Administrator Alex Torpey and Police Chief Thomas Rowe. However, the correspondence neglected to include a number of significant discussion points reviewed at that time. Therefore, I have taken the liberty of providing, in this response, a more comprehensive recap.

Both Leonia Borough and NJDOT representatives agreed verbally, both during the April 4 meeting and at the preceding meeting on March 22, 2018 in Trenton (in which I participated), on a number of important points, including:

1. That one of NJDOT's main objectives with regard to traffic is, to the greatest extent possible, limit traffic on local roads only to local traffic;
2. That highway traffic using local roads as commuter cut-through routes goes against NJ foundational traffic planning and NJDOT goals, as such activities result in an unsafe and more costly transportation environment;
3. That significant highway traffic attempting to use I-80 and I-95 to get to the GWB backs up onto Leonia local roads when highway/bridge traffic becomes congested;
4. That a majority (but not all) of that traffic exiting at Interstate 95 exit 70A uses Ft. Lee Road as the entrance point into the rest of Leonia; and;
5. That moving commuter traffic back to the highways from which it originated is a high priority and aligns with the goals of both Leonia Borough and NJDOT

The fundamental concern raised by the Leonia officials was that the "techniques" proposed by the NJDOT team did not sufficiently;

- ensure the safety of our residents and those traveling on our roadways (to whom we respond in the event of an emergency; and
- contemplate traffic solutions that in any way address the unique traffic challenges of this region's traffic flows as well as the behavior of drivers who use navigational apps such as Waze or Google Maps. It is worth noting that the NJDOT representatives indicated during the meeting that none of them had any experience with navigational apps, nor were they familiar with the traffic in the area in and around Leonia Borough.

In addition to the foundational concern described above, several specific concerns regarding the "techniques" being proposed by the NJDOT were, during the April 4 meeting, proffered by Leonia. Although none of these concerns were resolved at the meeting, it was Leonia Borough's hope that the NJDOT would, in their follow-up communications, provide additional guidance and/or resolutions that substantively addressed each of these areas. As your letter of May 8, 2018 did not include any of the concerns that were discussed, I have taken the liberty of restating them here, as follows:

1. **The NJDOT "techniques" limit the rights and travel ability of 100% of motorists, including residents who live on, and pay for, the identified roads, needlessly impacting, in a negative way, the ability of thousands of additional New Jersey residents from efficiently traveling on public roads.** This is a multi-pronged concern; each specific "sub-issue" is delineated below separately, as follows:

   1A. The NJDOT "techniques" would likely increase vehicle traffic on local roads. For example, residents would be legally prevented from making a turn out of their driveway onto Fort Lee Road EB or WB, and would be required, even to travel one block east in the morning hours, a series of 3-5 additional turns to get back to the main road, in order to avoid violating the "no-turn restriction." This includes taking these drivers through a school zone, active during the time in which the restrictions would be in place. Leonia Borough believes that, by requiring these 'roundabout' routes, the total number of miles driven by motorists on local roads would increase, exacerbating the same safety problems that the NJDOT claims will be mitigated by the proposed "techniques." No data, justification, evidence, prior case-study or any other existing information has been provided by NJDOT to suggest this wouldn't happen. During our meeting of April 4, NJDOT agreed that the described negative outcome "is possible;" however, no resolution or alternative was proposed.

   1B. The NJDOT "techniques" involve overly broad law/rule-making, unnecessarily affecting the rights of too many people. During the April 4, meeting, the attendees briefly discussed, from a legal perspective, the impact of the NJDOT "techniques" on motorists. Specifically, we reviewed the fact that the NJDOT "techniques," in stark contrast to the solution which Leonia Borough has implemented, impacts all motorists, regardless of whether their use of the road violates the goals and priorities agreed to both by NJDOT and Leonia Borough. NJDOT agreed that this was true, and admitted that the impact of their "techniques" is broader (in fact, the broadest possible), as the turn restrictions would apply to every vehicle. NJDOT suggested that there are no mechanisms which allow for them to differentiate between types of traffic on the impacted roads (for example, residents vs. non-residents). Leonia Borough officials suggested that in fact there are these mechanisms in place, (for example, weight limits on local roads, where vehicles over a certain weight limit are prohibited from using the road). NJDOT responded that this distinction is only allowed because it is

easily observable, and that no other distinctions could be easily observed. Borough officials responded that the hang tags already issued to residents, and the employees of public and private entities employing workers in Leonia, were just as easily observed, and are common for traffic or parking enforcement throughout New Jersey. NJDOT responded that they did not believe that the hang tags were visible from the exterior by a police officer. Leonia Borough officials reiterated that the use of such hang tags was in fact already a generally accepted practice, and that the solution had been vetted with and approved by both the Leonia Municipal Court Judge and Borough Prosecutor prior to their implementation. In addition, the Leonia Borough officials indicated that, since the implementation of the hang tag solution, no complaints about these hang tags had been received either from law enforcement authorities in other jurisdictions or from any individual in general, in particular regarding the visibility of the hang tag. Additional ways of providing observable insight into traffic types were also proffered by the Leonia Borough officials, including both hang tags and window stickers (like inspection stickers, used currently to differentiate legally inspected vehicles from those that are not. NJDOT did not refute the efficacy of the hang tag solution, and provided no alternative methodology.

1C. The NJDOT "techniques" rely on highly discretionary police enforcement, with the potential for real or perceived discrimination. When Leonia officials raised the concern that the implementation of the NJDOT "techniques" would render illegal previously acceptable uses of local roads (i.e. parents carpooling children to school, a local business making a delivery, etc), the response from the NJDOT officials in attendance at the meeting was "you choose how you want to enforce it." In other words, the NJDOT officials were suggesting that the Leonia Police Department engage in "selective enforcement tactics." Leonia Borough does not believe that it has the legal right to direct its law enforcement professionals to behave in such a manner; furthermore, as expressed during the meeting, Leonia Borough believes that if such tactics were employed, they would result in significant risk of claims of discrimination, as it would be virtually impossible for the Leonia Police Department to properly describe the methodologies through which eoforcement was being executed. This is in stark contrast to Leonia's resident/nonresident distinction, which is clearly and factually observable by the issuance of a yellow hang tag based on the production of residential documentation. Although NJDOT officials in attendance claimed to understand the concern, no resolution was offered.

1D. The NJDOT "techniques" place an undue inconvenience on the taxpayers who fund nearly 100% of the cost of local roads. The "techniques" recommended by the NJDOT would prevent a resident who lives one house down from Fort Lee Road, and who commutes into New York City by utilizing the George Washington Bridge, to turn onto the road that takes them on their route of travel. Leonia Borough attendees explained that a significant number of Leonia residents in Leonia drive New York City to get to their places of employment. NJDOT officials agreed with Leonia Borough's assessment that local roads are funded almost entirely by local taxpayers; however, the NJDOT officials offered no solution to this concern.

2. **The NJDOT "techniques" are effectively impossible to enforce in Leonia Borough, and create a number of major safety and logistical problems.** These were explained during the meeting, and are as follows:

2A. The NJDOT "techniques" require enforcement logistics that are practically impossible to implement. Currently, the Leonia ordinance is "enforced" at key choke points, where traffic is narrowed before it spreads out. Prior to Leonia Borough's solution, traffic was leaving Interstate 95 and then driving onto ~60 side streets; this is a fact that was agreed to by all parties in attendance. Currently, Leonia Borough is able to implement enforcement at the exact point *before* drivers are able to get to the residential side streets; in other words, there is, effectively, one major point of enforcement. The NJDOT "techniques" eschews this more effective Do Not Enter restriction at *the beginning of a road* for a No-Turn Restriction *at the end of the road, relying on the hope that this would prevent people from entering the side streets* **The NJDOT "techniques" would effectively require 60 separate points of enforcement, or 120 total law enforcement professionals, in order to achieve the same level of enforcement efficacy.** Even if we Leonia Borough attempted to enforce these "techniques" with only one officer at each checkpoint, the requirement would be for 60 officers, for than three times the current total headcount of the Leonia Police Department. **Because even the theoretical ability to enforce the "techniques" on all side streets at any given time does not exist, the "techniques" could easily be avoided by motorists.** Under the NJDOT "techniques," commuters could simply travel on roads without police enforcement. Again, no solution to this concern was offered by the NJDOT.

2B. The NJDOT "techniques" ignore the feature within navigational apps that allow users to report the specific location of police enforcement details. Since the NJDOT representatives in attendance were not familiar with the functionality of navigational apps, they were unaware of the functionality that allows drivers to report in the applications themselves the locations of police officers; this results in voice warnings being given to other drivers as they approach areas these areas, and these warnings can also be viewed on live, dynamic maps. The Leonia representatives have spoken with the app companies about this, and have been advised that there is no way to effectively solve this. No solution was offered by the NJDOT.

2C. The NJDOT "techniques" present significant safety risks for police and motorists alike. Borough Officials raised the concern that, at the point on Fort Lee Rd. at which enforcement would have to occur (if the NJDOT "techniques" were implemented), police officers would have to either, a) turn vehicles around on one or two lane width roads on which congested traffic conditions would already exist, or, b) have these vehicles turn in the opposite direction of most traffic on Fort Lee Rd, during rush hour, only to have to make a U-turn and come back in the direction in which they were originally traveling. **Leonia Borough Officials expressed the concern that both options present the potential for a major increase in vehicle/vehicle and/or vehicle/pedestrian accidents.** DOT officials in attendance admitted that this concern too was both possible and legitimate, but did not during the meeting offer a solution.

3. **The proposed NJDOT "techniques" do not adequately address commuter traffic on residential side streets and emanating from NJ Route 4 -> Jones Road.** The DOT attendees agreed that the recommended "techniques" did not substantively address any area other than exit 70A from Interstate 95; however, they offered no alternative solutions.

The NJDOT "techniques" are not based on any research, professional studies or research, statistical model or any other type of data, and are completely untested. In addition to the specific concerns outlined herein, the "techniques" rely on the following basic and incorrect assumptions:

1. That preventing people from turning off a local road onto a main road at the very end of that road will prevent those same motorists from turning onto local side roads. Leonia Borough has proven beyond all reasonable doubt that this assumption is false.
2. That Waze and other navigational apps won't easily find a way around the DOT "techniques." The NJDOT officials attending the April 4, 2018 meeting admitted that they had no data or studies to support the effectiveness of the "techniques" they presented to Leonia Borough. They also admitted that it had not been implemented anywhere else, and that, because they had no familiarity with navigational apps, they could not in any way determine if the "techniques" would solve the very problem that Leonia Borough had already solved with the very reasonable solution Leonia Borough had already implemented.

During the April 4, 2018 meeting, Leonia Borough officials attempted to review with the NJDOT officials in attendance the solution that Leonia Borough had already implemented, in order to invite an open comparison between the Leonia Borough solution and the NJDOT "techniques." Leonia Borough officials also reiterated the position of Leonia Borough that legislation is a product of what lawmakers consider to be best practices, and that these best practices change over time. The Leonia Borough officials reiterated the position of Leonia Borough that the unanimous 1977 U.S. Supreme Court decision in *Arlington County Board vs.* Richards, as well as the 2008 Title 39 statutory revision combine to give Leonia Borough the right to enact legislation governing streets under its jurisdiction without seeking the approval of the Commissioner of the NJDOT.

NJDOT officials admitted during the meeting that they had no ability to have a conversation about whether or not the implementation of the new local ordinance was effective in addressing the commuter cut-through issue, and indicated that they did not wish to review Leonia Borough's findings in this regard. Rather, the NJDOT officials advised the Leonia Borough officials that the meeting was designed to be a "one-way conversation" during which the NJDOT's goal was only to distribute information to Leonia Borough. They also indicated that they were not "empowered by their bosses" to take any information provided by Leonia Borough back to the NJDOT for additional study, discussion or potential collaborative exploration.

During the March 22 meeting in Trenton at which Leonia Borough representatives (including myself), NJDOT representatives and representatives from the NJ Attorney General's office participated, NJDOT indicated that it was very interested in "working collaboratively" to find a solution that effectively addressed both the concerns of Leonia Borough as well as the issues raised by the Attorney General's office.

Unfortunately, as evidenced by the comprehensive meeting recap presented herein, the subsequent meeting of April 4, 2018, rather than being collaborative, consisted only of the NJDOT presenting "techniques" that have neither been implemented elsewhere, nor have any evidentiary, scientific or other reasonable backup information to support the recommendations. In addition, the "techniques" presented fail to address the legitimate concerns which prompted Leonia Borough to legally and properly enact the ordinances which are the subject of this ongoing discussion. Further, in contrast with the fact that Leonia Borough enacted these ordinances only after thorough research, legal review and thoughtful consideration, the "techniques" put forward by the NJDOT representatives during the meeting of April 4, 2018 seemed to have been hastily constructed with little thought as to their construct, safety implications, enforcement ability, or efficacy. Candidly,

the "techniques" the NJDOT has offered to Leonia Borough are not representative of the seriousness New Jersey residents have the right to expect from professionals within the government of the State of New Jersey.

In spite of the lack of substantive, reasonable recommendations from the NJDOT, the Borough of Leonia continues to be willing and interested in working with the NJDOT, the NJ Attorney General's Office, the office of Governor Murphy, and any other appropriate state agency or leader, to define a solution that is both as effective in enhancing public safety through the substantive reduction of commuter traffic on narrow residential side streets and which does no harm to other communities, as the one that Leonia Borough has already implemented. Perhaps the NJDOT, rather than trying to force untested, ineffective "techniques" on Leonia Borough, should instead, as I suggested during our March 22, 2018 meeting in Trenton, approach this issue with an open mind and;

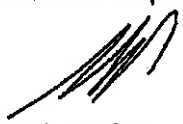
- applaud Leonia Borough for its proactive, innovative approach to Leonia Borough's unique commuter traffic/public safety challenges;
- concur with Leonia Borough's very reasonable position that Leonia Borough, by virtue both of existing U.S. Supreme Court case law and NJ statutory citation, has the right to enact the ordinances which have been implemented; and;
- agree that the continued use of these ordinances advances both the basic goals of the NJDOT (as stated at the beginning of this correspondence) and the safety of Leonia residents and those who do business within Leonia Borough.

Please note that we have always recognized and never contested the fact that NJ Route 93 (referred to, within Leonia Borough's borders, as "Grand Avenue") is a road under NJDOT's jurisdiction. As such, we are removing any signs we previously placed on NJ Route 93 that relate to the new ordinance; these signs (currently located at the intersection of Moore Ave. and NJ Route 93, as well as the intersection of Route 93 and Christie Heights St.) will be removed by the close of business on May 10, 2018.

Once you and the leadership of the NJDOT have had the opportunity to review this complete review of the April 4, 2018 meeting between the NJDOT and representatives from Leonia Borough, I would welcome the opportunity to talk further with you or any other appropriate State representative, in order to determine how best to effect the recommendations above.

Until that time, should you have any questions, please do not hesitate to contact me directly.

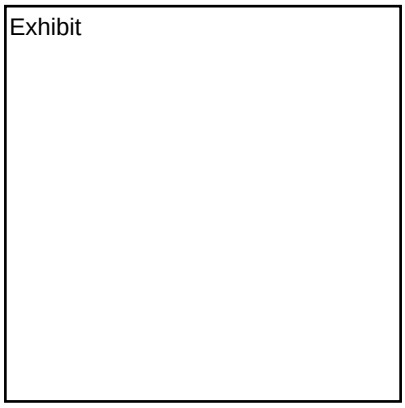
Very truly yours,



Judah Zeigler
Mayor
Borough of Leonia

Cc: Hon. Philip D. Murphy, Governor, State of New Jersey
Hon. Diane Gutierrez-Scaccetti, Commissioner, NJ Department of Transportation
Jay Jimenez, Chief of Staff, NJ Department of Transportation
Brian Chewcaskie, Borough Attorney, Borough of Leonia
Thomas Rowe, Chief of Police, Borough of Leonia
Hon. Council Members, Borough of Leonia

EXHIBIT N



Connected Citizens Program

From waze

*This page was nominated to be a Wazeopedia **Global** page. Forum to discuss nomination (//www.waze.com/forum/viewtopic.php?t=146145).*

The Waze Connected Citizens program, also known as CCP brings cities and citizens together to answer the questions "What's happening, and where?" We exchange publicly available incident and road closure reports, enabling our government partners to respond more immediately to accidents and congestion on their roads. In turn, we aggregate our partners' data on the Waze platform, resulting in one of the most succinct, thorough overviews of current road conditions today.

With the addition of city data, Wazers will be even safer on the roads and more knowledgeable about construction, marathons, floods or anything else that can cause delays. And for our government partners, publicly-available Waze data is a powerful tool to build more efficient cities. Real-time information from drivers is essential; no one knows more about what's happening in a city than the people who live there. In an era with smart phones, smart cars and smart homes, isn't it about time we start building smarter cities?

Contents

Details

The mission of Waze Connected Citizens is to help Wazers, cities and citizens collaborate to improve their community and answer the question "What's happening on our roads right now, and whcre?" The program promotes more efficient traffic monitoring by sharing crowdsourced incident reports from Wazc drivers. Established as a two-way data share, Waze reccives partner input such as feeds from road sensors, adds publicly available incident and road closure reports from the Waze traffic platform and returns one of the most succinct, thorough overviews of current road conditions today.

With the addition of city data, Wazers will be even safer on the roads and more knowledgeable about construction, marathons, floods or anything else that can cause dclays. And for cities, real-time information from drivers is essential; no one knows more about wbat's happening in a city than the people who live there.

The Connected Citizens Program is an ongoing partnership between Waze and various international government agencies to share publicly-available data in order to accomplish two goals:

- Improve the quality of the Waze App
- Utilize Waze data to improve city planning, inform infrastructure decisions and increase the efficiency of day-to-day operations

Waze exchanges publicly available incident and road closure reports, enabling our government partners to respond more immediately to accidents and congestion on their roads. In turn, Waze aggregates the partners' data on the Waze App platform, resulting in succinct and thorough overviews of current road conditions.

Existing Partners

The first ten partners in the program, called the "W10" by Waze, are Rio de Janeiro, Brazil; Barcelona, Spain; Jakarta, Indonesia; Tel Aviv, Israel; San Jose, Costa Rica; Boston, Massachusetts; Los Angeles County, California; as well as the New York Police Department and the states of Utah and Florida.

Current Connected Citizen Partners, by Region:

Here is list of Partners as of October 2016

North America – 72 Partners

1. Alabama – Department of Transportation
2. California – Caltrans
3. California – City of Cupertino City Hall
4. California – City of Los Angeles
5. California – City of Sacramento
6. California – City of San Francisco
7. California – Los Angeles Metropolitan Transportation Authority
8. California – Paramedics Plus (Genesis Pulse)

9. California – Town of Los Gatos
10. Canada – Ville de Montreal
11. Colorado – City of Colorado Springs
12. Colorado – Douglas County
13. District of Columbia – D.C. Department of Transportation
14. Florida – City of Miami Beach
15. Florida – City of Tampa
16. Florida – Florida Department of Transportation
17. Florida – Paramedics Plus (Genesis Pulse)
18. Florida – Miami-Dade County
19. Florida – Sunstar EMS (Genesis Pulse)
20. Georgia – Bartow County
21. Georgia – City of Atlanta
22. Georgia – City of Johns Creek
23. Georgia – City of West Jackson
24. Georgia – Georgia Department of Transportation
25. Georgia – Georgia Emergency Management & Homeland Security Agency
26. Illinois – City of Evanston
27. Illinois – City of Naperville
28. Indiana – City of Bloomington
29. Indiana – Paramedics Plus (Genesis Pulse)
30. Indiana – Three Rivers Ambulance Authority (Genesis Pulse)
31. Iowa – Iowa Department of Transportation
32. Kentucky – City of Louisville
33. Kentucky – Kentucky Transportation Cabinet
34. Louisiana – City-Parish of Baton Rouge
35. Louisiana – Louisiana Department of Transportation and Development
36. Maine – Maine Department of Transportation
37. Maryland – University of Maryland
38. Maryland – St. Mary's Emergency Services and Technology
39. Massachusetts – City of Boston
40. Massachusetts – City of Cambridge (Kleinfelder East)
41. Massachusetts – Capital Strategic Solutions
42. Massachusetts – Massachusetts Department of Transportation
43. Missouri – CoxHealth (Genesis Pulse)
44. Missouri – Mercy EMS (Genesis Pulse)
45. Missouri – Taney County Ambulance Directory (Genesis Pulse)
46. National – SeeClickFix (nonprofit partner)
47. National – United States Department of Transportation
48. Nebraska – Nebraska Department of Roads
49. Nevada - Regional Transportation Commission of Southern Nevada (RTCSVN)

50. New Hampshire – New Hampshire Department of Transportation
51. New Jersey – City of Jersey City
52. New Jersey – Jersey City EMS (Genesis Pulse)
53. North Carolina – City of Charlotte
54. North Carolina – City of Greensboro
55. North Carolina – City of Raleigh
56. Ohio – Town of Dublin
57. Oregon – Oregon Department of Transportation
58. Pennsylvania – Pennsylvania Department of Transportation
59. Pennsylvania – Pennsylvania Turnpike Authority
60. Pennsylvania – Wilkes-Barre Township Police Department
61. Rhode Island – City of Providence
62. Rhode Island – Rhode Island Turnpike & Bridge Authority
63. South Dakota – Paramedics Plus (Genesis Pulse)
64. Tennessee – Tennessee Department of Transportation
65. Texas – CareFlite (Genesis Pulse)
66. Texas – Champion EMS (Genesis Pulse)
67. Texas – ETMC EMS (Genesis Pulse)
68. Texas - City of Fort Worth
69. Texas – LifeNet EMS (Genesis Pulse)
70. Utah – Utah Department of Transportation
71. Vermont – Vermont Department of Transportation
72. Virginia – City of Arlington
73. Virginia – Portsmouth Police Department

Latin America - 11 Partners

1. Brazil – City of Petropolis
2. Brazil – City of Vitoria
3. Brazil – Juiz de Fora Secretary of Transport and Transit Secretaria de Transporte e Transito
4. Brazil – Rio de Janeiro Center for Traffic Operations (COR)
5. Colombia – Bogotá Instituto de Desarrollo Urbano (IDU)
6. Colombia – Medellín Alcaldía de Medellín
7. Costa Rica – Ministry of Transport
8. Mexico – City of Puebla
9. Mexico – Delegacion Miguel Hidalgo (Mexico City)
10. Mexico – La Sultana de Norte (Monterrey)
11. Perú – Muncipalidad de Miraflores

Europe - 14 Partners

1. Belgium – City of Ghent
2. Estonia – Tarktee (Smart Roads)
3. Francc – Department of Var
4. France – Northern France, Tollway Authority
5. Hungary – BKK Center for Budapest Transport
6. Latvia -- City of Riga
7. Latvia – Latvia State Roads
8. Lithuania – Lithuania Road Administration
9. Netherlands – National Data Warehouse for Traffic Information
10. Poland - Municipal Strcet and Bridge Administration of Chorzow (Miejski Zarząd Ulic i Mostów w Chorzowie)
11. Portugal – Brisa/Via Verde (Portugal Tollway Authority)
12. Rome – Rome Center for Mobility
13. Spain – City of Barcelona
14. Spain – Government of Catalonia
15. United Kingdom – Transport for London

Middle East - 2 Partners

1. Israel - City of Tel-Aviv
2. Israel - Holon Municipality

Asia-Pacific - 2 Partners

1. Indonesia - City of Jakarta
2. Australia - Transportation Management Centre of New South Wales

How to Join

Currently Waze offers data exchange programs with government entities and private road owners and operators. Please fill out the Waze Data Exchange Interest Form (http://docs.google.com/a/penthion.nl/forms/d/19BGX1zD6HCLvx5nNMQnfrSRS3ZiVft_Q6G2GPiRMVqE/viewform) to share data with Waze and to apply for participation in Waze's Connected Citizens program.

Who can Join

Local Government Agencies, Municipalities, Cities, States, Departments of Transportation, Departments of Public Works, Utility Companies, 911 Emergency Dispatch Centers and Police Departments

Several qualifications:

- Waze aims to work with partners who have additional sources of data, such as road closures, street cameras or road sensors, not found within the Waze app
- Geographical diversity
- Technical capability
- Eagerness and readiness to innovate
- Waze needs in the market (need more data or want to grow focus markets)

References

Word Doc: Connected Citizens Program Summary (http://docs.google.com/document/d/1msH86f0Uh9DoRT0srC1a-MMYjhwF8hTqHiR4-AeS72U/edit)

Waze CCP Homepage:Waze Connected Citizens Program (http://www.waze.com/ccp)

Waze CCP Blog post: Waze Connected Citizens Program Blog Post (http://www.waze.com/connectedcitizens)

Waze Data CCP: Introducing the W10 And The New Connected Citizens Platform (http://data-waze.com/2014/10/01/introducing-the-w10-and-the-new-connected-citizens-platformprogram/)

Video: Waze Connected Citizens Launch Highlights | Waze (http://www.youtube.com/watch?v=YmRW47XJfhQ) (1:25)

Video: Waze W10 10/1/14 Launch Event Panel, hosted by Baratunde Thurston (http://www.youtube.com/watch?v=AMqbh3rqZRs) (46:44)

Video: NYPD Partners with Waze for Road Safety (http://launch.newsinc.com/share.html?trackingGroup=69017&siteSection=ndn&videoId=27379259) (1:13)

Video: Waze navigation app teams up with cities, states to share traffic data (http://www.cbsnews.com/videos/waze-navigation-app-teams-up-with-cities-states-to-share-traffic-data/) (4:11)

Article: Waze Launches Connected Citizens Program, Debuts Inaugural "W10" (http://www.prnewswire.com/news-releases/waze-launches-connected-citizens-program-debuts-inaugural-w10-277867931.html)

Press Release: Kentucky Transportation Cabinet among first partners with Waze (http://transportation.ky.gov/Pages/PressReleasePage.aspx?&FilterField1=ID&FilterValue1=113)

Press Release:FDOT, The Waze Connection (http://www.dot.state.fl.us/trafficoperations/Newsletters/2014/2014-Aug.pdf)

Press Release:The Genesis Group Joins Waze CCP (http://pulsesite.genesisworld.com/2015/10/06/the-genesis-group-joins-waze-connected-citizens-program/,)

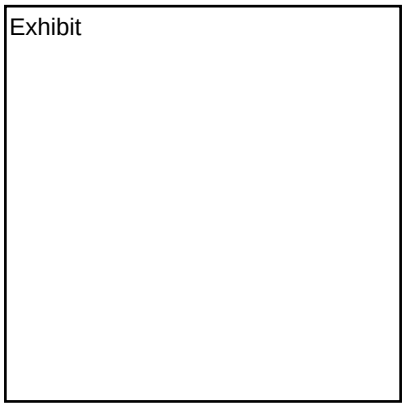
Forum: CCP Forum Post (http://www.waze.com/forum/viewtopic.php?f=129&t=120169)

Forum: Canned CCP Template (http://www.waze.com/forum/viewtopic.php?f=129&t=120169#p1038875)

Message format: CIFS: Connected Citizens Partner Feeds Specs (http://wazeblogs-en.blogspot.ie/p/connected-citizens-partner-feeds-specs.html)

Retrieved from "https://wiki.waze.com/wiki/index.php?title=Connected_Citizens_Program&oldid=162357"
Category: Wazeopedia Global Page

EXHIBIT O



Brian Chewcaskie

From: trowe@leonianj.gov
Sent: Thursday, August 09, 2018 8:56 AM
To: 'Brian Chewcaskie'
Subject: Municipal Court Revenue. 2017 vs 2018
Attachments: 2018 Revenue Breakdown (3).docx

Brian,

This attachment is the fines and penalties realized by the Borough for all of 2017 and the first 7 months of 2018. As you can see, our revenue is down every single month. This is due to the fact we have much less traffic and traffic violations occurring because vehicles are not cutting through our town like they used to. For the first 6 months of 2017, we issued 3,698 summonses. For the first 6 months of 2018, we issued 2,431 summonses.

Judge
John R. DeSheplo

Court Administrator
Cherron Gil CMCA

Leonia Municipal Court

(201) 592-5780
Office and Mailing Address: 312 Broad Avenue, Leonia NJ 07605
Courtroom: 305 Beechwood Place, Leonia NJ 07605

To: Tom Rowe /Police Department

Re: Monthly Revenue from December 2017 through Dec 2018

Listed below is a monthly revenue breakdown from Dec 2017 to Dec 2018.

Monthly Totals - include fines, costs, State 39 split, criminal fines, costs, local Parking, contempt, criminal bail forfeitures, add penalties, general fees, un-refunded overpayments, plaintiff costs, spinal municipal, D.W.I surcharges, uc codes.

	Year 2017	
Jan-	2017	27,336.57
Feb -	2017	27,655.76
Mar-	2017	27,584.73
Apr-	2017	24,082.20
May-	2017	27,966.01
June-	2017	30,530.81
July-	2017	26,649.86
Aug-	2017	21,983.66
5ept-	2017	19,532.34
Oct-	2017	27,390.48
Nov-	2017	29,244.51
Dec-	2017	18,794.55
Total	**$ 308,751.48**	

	Year 2018	
Jan-	2018	21,230.07
Feb-	2018	20,143.77
Mar-	2018	23,270.02
Apr-	2018	20,281.58
May-	2018	18,546.12
June-	2018	19,192.23
July-	2018	18,934.78
Aug-	2018	
Sept-	2018	
Oct-	2018	
Nov-	2018	
Dec-	2018	
Total	**$141,598.57**	

Please note City and Local cost summary reports are attached for the months of December 2016 through December 2017. Those reports are available and are stored in our system for a three months period. The court could supply these reports to the municipality on monthly basics.

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Ruby Kumar-Thompson, Esq. (Attorney ID No. 044951999)
169 Ramapo Valley Road
Upper Level – Suite 105
Oakland, New Jersey 07436
(973)845-6700

Gittleman Muhlstock & Chewcaskie
Brian M. Chewcaskie, Esq. (Attorney ID No. 021201984)
2200 Fletcher Avenue
Fort Lee, New Jersey 07024
(201)944-2300
Attorneys for Defendants

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES I-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO. HUD-L-607-18 Civil Action **CERTIFICATION OF JUDAH ZEIGLER**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	

I, Judah Zeigler, of full age, hereby certify and state as follows:

1. I am the Mayor of the Borough of Leonia (the "Borough") and have served in that capacity since January 1, 2016. I am a lifelong resident of the Borough and previously served as Mayor in 1996 through 2000 and as a Councilman from 1993 through 1996.

2. I make this Certification on my personal knowledge. I also have reviewed the Certification of Tom Rowe and agree with all of the statements contained therein.

3. The Borough contains 89 municipal roads, one County Road and one State highway.

4. The major traffic impact on the Borough and its local streets is as a result of commuter traffic traveling towards the George Washington Bridge ("GWB"). If the GWB backs up, Borough streets have been used as a cut-through in order for people to avoid traveling on federal, state and county roadways.

5. These traffic conditions have existed for the past 20 years, but have been extremely exacerbated by the use of navigational applications, such as Waze, Google Maps, Apple Maps, etc.

6. The Borough has, on several occasions, requested assistance from the Port Authority of New York and New Jersey ("Port Authority") and the New Jersey Department of Transportation ("DOT") for assistance in alleviating traffic conditions.

7. Most recently, I, on behalf of the Borough, applied for discretionary funding from the Port Authority to fund four (4) civilian traffic officers to assist with addressing the traffic conditions in the Borough. Unfortunately, this grant never materialized, and assistance from either the Port Authority or the DOT has never materialized.

8. With my agreement and encouragement, the Chief of Police Thomas Rowe developed a Safe Street Initiative as a result of not receiving any assistance from the agencies which are responsible to manage the traffic going to and traveling over the GWB.

9. Based on the Chief's Presentation at a Council Work Session Meeting, on October 16, 2017, the Council introduced an Ordinance designed to implement that Initiative with restricted access to 44 of the 89 municipal streets in the Borough for four (4) hours in the morning and five (5) hours in the evening. The introduction of Ordinance 2017-19 was published in The Record on November 24, 2017 with notice of the date scheduled for the second reading. A true and correct copy of the Public Notice is attached hereto as Exhibit Q.

10. Said Ordinance was adopted on December 4, 2017, signed by me and duly published.

11. Shortly thereafter, on February 21, 2018, an amended ordinance, Ordinance 2018-5, was introduced to address some residents' concerns. The introduction of Ordinance 2018-5 was published in The Record on February 26, 2018 with notice of the date scheduled for the second reading. A true and correct copy of the Public Notice is attached hereto as Exhibit R. That Ordinance was adopted on March 5, 2018, signed by me and notice of adoption was published in The Record on March 8, 2018.

12. Thereafter, on March 26, 2018, the Borough conducted a meeting with DOT representatives at DOT offices. I attended that meeting, at which time DOT indicated that it would work collaboratively with the Borough to achieve the desired results of addressing the traffic impact of the GWB on local streets.

13. On April 4, 2018, various representatives of the DOT visited the Borough. Unfortunately, at the time they visited, there was no peak-hour traffic, and the representatives took a half-hour drive around the Borough.

14. Thereafter, on or after May 8, 2018, I received a letter from the DOT.

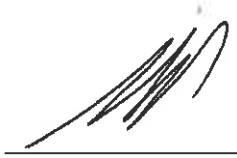
15. I promptly responded to that letter on May 10, 2018 providing a comprehensive response to the May 8, 2018 correspondence.

16. On or about June 7, 2018, I attempted to contact Jay Jimenez, the Chief of Staff to the DOT Commissioner, regarding the DOT's failure to address the traffic impact on the Borough's municipal streets in its May 8th letter. I received no response.

17. On June 8, 2018, Kevin Israel telephoned and advised me that my letter of May 10th was still under review by the DOT, and that I would receive a call back from Jay Jimenez, Chief of Staff to the DOT Commissioner. I received no return call.

18. As of today, I have not received any response from the DOT to my letter dated May 10, 2018. In my opinion, this has unfortunately become a political issue, as the DOT is being silenced by the State Attorney General's Office. My letter indicated that the DOT should accept the Borough's response and, to the extent that permission is required from the DOT, to grant that permission. More than three (3) months have elapsed since the issuance of that letter, and attempts to discuss same with DOT have been met with silence.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Judah Zeigler

Dated: August 20, 2018

EXHIBIT P

PUBLIC NOTICE
BOROUGH OF LEONIA
INTRODUCTION OF
ORDINANCE NO. 2017-19

The following, "AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA BY ADDING TO ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS" AND ARTICLE XIV BY THE ADDITION THEREOF OF SCHEDULE XVIII "STREETS CLOSED TO TRAFFIC" was introduced on the 20th day of November, 2017 and does now pass its first reading, and that said ordinance will be scheduled for public hearing/final passage at a meeting of the Borough of Leonia Mayor and Council to be held on the 4th day of December, 2017 at 7:30 p.m. or as soon thereafter as the matter may be reached in the Borough of Leonia Annex, 305 Beechwood Place, Leonia, NJ and that at such time and place all persons interested will be given an opportunity to be heard concerning the same.

Barbara Rae, RMC, CMC
Borough Clerk

ORDINANCE NO. 2017-19
BOROUGN OF LEONIA
COUNTY OF BERGEN

AN GRDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA BY ADDING TO ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS" AND ARTICLE XIV BY THE ADDITION THEREOF OF SCHEDULE XVIII "STREETS CLOSED TO TRAFFIC"

WHEREAS, the Mayor and Council of the Borough of Leonia have determined that it is in the best interests of the Borough of Leonia to revise Chapter 194 of the Borough of Leonia Ordinance concerning Vehicles and Traffic; and

Section 1.

WHEREAS, the Mayor and Council of the Borough of Leonia desire to amend and supplement §194 "Vehicles and Traffic" of the Code of the Borough of Leonia by adding to Article XI "Temporary Closing of Streets" §194-25.1 "Closing of Certain Streets":

§194-25.1 Closing of Certain Streets.

No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§194-49) attached to and made a part of this Chapter during the times of the days indicated in said Schedule unless that person is a resident of the said street needing access to his home or can demonstrate or document a need to access a residence on the street or parts of streets as described.

Article XVIII. Streets Closed to Traffic.

§194-49. Schedule XVIII Streets Closed to Traffic.

In accordance with the provisions of §194-25.1, the following streets or parts of streets shall be closed to traffic between the hours listed on the days indicated: Between 8:00 to 10:00 a.m. and 4:00 to 9:00 p.m., the following streets will have the restrictions listed below:

Road Name/Direction of Road	Prohibited Entry
Edgewood Road- Southbound from Ridgeland Ter. to Ridgeland Ter	
Broad Avenue – Eastbound from Broad Avenue	
Vreeland Avenue	Do Not Enter
Woodland Place	Do Not Enter
Beechwood Place	Do Not Enter
Magnolia Place	Do Not Enter
Elm Place	Do Not Enter
Altaire Avenue	Do Not Enter
Westview Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highway Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Oakdene Avenue	
Broad Avenue – Westbound of Broad Avenue	
Oakdene Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Park Avenue	Do Not Enter
Christie Street	Do Not Enter
High Street	Do Not Enter
Crescent Avenue	Do Not Enter
Harrison Street	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Christie Heights Street	Do Not Enter
Harrison Street	Do Not Enter
Fort Lee Road – Southbound of Fort Lee Road	
Leonia Avenue	Do Not Enter
Gladwin Avenue	Do Not Enter
Oaktree Place	Do Not Enter
Paulin Boulevard	Do Not Enter
Irving Street	Do Not Enter
Fort Lee Road – Northbound of Fort Lee Road	
Linden Terrace	Do Not Enter
Hawthorne Terrace	Do Not Enter
Leonia Avenue	Do Not Enter
Grand Avenue – Eastbound of Grand Avenue	
Lakeview Avenue	Do Not Enter
Longview Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Harrison Street	Do Not Enter
Cottage Place	Do Not Enter
Hillside Avenue	Do Not Enter
Polisade Avenue	Do Not Enter
Prospect Street	Do Not Enter
Maple Street	Do Not Enter
Christie Street	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter
Grand Avenue – Westbound of Grand Avenue	
Maple Street	Do Not Enter
Schor Avenue	Do Not Enter
Bergen Boulevard – Westbound of Bergen Boulevard	
Christie Lane	Do Not Enter
Hazlitt Avenue	Do Not Enter
Washington Terrace	Do Not Enter
Lester Street	Do Not Enter
Glenwood Avenue – Northbound of Oakdene Avenue	
Glenwood Avenue	Do Not Enter
Glenwood Avenue – Eastbound of Glenwood Avenue	
Hillside Avenue	Do Not Enter
Woodland Place	Do Not Enter
Altaire Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Intersections with Traffic Control Devices

Broad Ave/Hillside Ave: West and Eastbound hem Broad Ave	No Right and Left Turn
FLR EB/Glenwood Avenue: North and Southbound from FLR	No Right and Left Turn
FLR EB/Station Parkway: Southbound from FLR	No Right Turn
Grand Avenue/Christie Heights: Eastbound from Grand Avenue	No Right and Left Turn
Grand Avenue/Moore Avenue: Eastbound from Grand Avenue	No Right and Left Turn

Section 2.

All other provisions of Chapter 194 "Vehicles and Traffic" of the Code of the Borough of Leonia are hereby ratified and confirmed.

Section 3. Severability.

If any article, section, sub-section, sentence, clause, or phrase of this Ordinance is for any reason deemed to be unconstitutional or invalid by any court of competent jurisdiction, such decision shall not affect the remaining portions of this Ordinance.

Section 4. Effect.

This Ordinance will take effect upon publication as required by law.

Judah Zeigler, Mayor

ATTEST:
Barbara Rae, RMC, CMC
Borough Clerk
November 24, 2017 - Fee: $293.70 (356) 4218896

Borough of Leonia
Office of the Municipal Clerk

PROOF OF PUBLICATION AFFIDAVIT

Date: 11/24/17

As the duly appointed Municipal Clerk for the Borough of Leonia, County of Bergen, State of New Jersey, I hereby certify that a Public Notice, of which a copy is attached hereto, was published in the Record Newspaper, in the 11/24/17 issue of said newspaper.

Barbara Rae
Borough Clerk

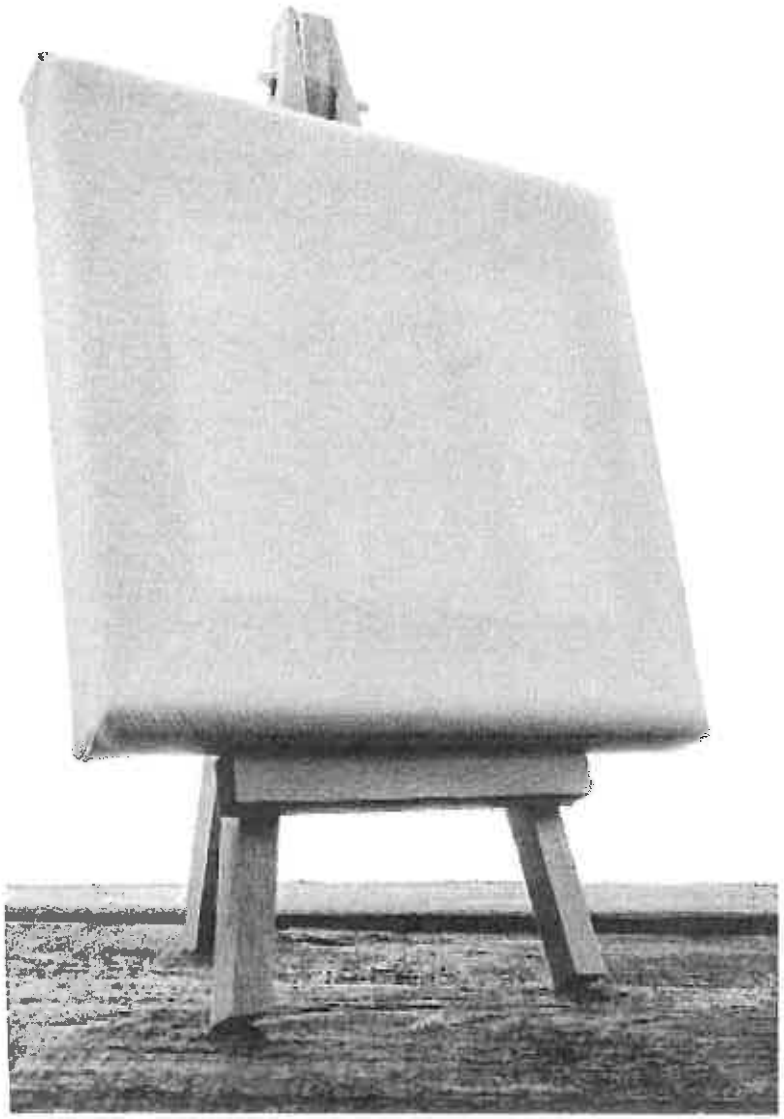


EXHIBIT Q

PUSLIC NOTICE
SOROUGH OF LEONIA
INTRODUCTION OF
ORDINANCE NO. 2018-5

The following 'AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BORDUGH OF LEONIA BY AMENDING ORDINANCE 2017-19, ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25 1 "CLOSING OF CERTAIN STREETS' AND §194-49 Schedule XVIII was introduced on the 21st dav of February, 2018 and does now pass its first reading, and that said ordinance will be considered for final passage at a meeting of the Borough of Leonia Mayor and Council on the 5th day of March, 2018 at 7:30 p.m or as soon thereafter as the matter may be reached in the Borough Annex located at 305 Beechwood Place, Leonia, NJ and that at such time and place all persons interested will be given the opportunity to be heard concerning the same.

ORDINANCE NO. 2018-5
SOROUGH OF LEONIA
COUNTY OF BERGEN

AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 194 "VEHICLES AND TRAFFIC" OF THE CODE OF THE BOROUGH OF LEONIA SV AMENDING ORDINANCE 2017-19, ARTICLE XI "TEMPORARY CLOSING OF STREETS" §194-25.1 "CLOSING OF CERTAIN STREETS" AND §194-49 SCHEDULE XVIII

WHEREAS, the Mayor and Council of the Borough of Leonia adopted Ordinance No. 2017-19 on December 4, 2017, and

WHEREAS, the Mayor and Council heve reviewed the impact of the Ordinance and have determined to revise same to provide for access to certain streets for those individuals traveling to Leonia destinations

NOW THEREFORE, SE IT ORDAINED by the Mayor and Council of the Borough of Leonia, as follows

Section 1
§194-25 1 "Closing of Certain Streets" is amended in its entirety as follows

§194-25 1 Closing of Certain Streets
No person shall operate a vehicle on those streets or parts of streets as deecnbed in Schedule XVIII (§194-49) attached to and made part of Chapter 194 during the times of the days indicated in said Schedule unless that person
(a)Is a resident of said street needing access to his home or can demonstrate a documented need to access a residence on the street or parts of streets as described, or
(b)Is traveling to and/or from e Leonia destination

Article XVIII Streets Closed to Traffic
§194-49 Schedule XVIII Streets Closed to Traffic
In accordance with the provisions of §194-25 1, the following streets or parts of streets shall be closed to traffic between the hours listed on the days indicated
Between 6:00 to 10:00 a.m and 4:00 to 9:00 p m , the following streets will be closed

Lakeview Avenue	West to East – Easiview to Broad Avenue
Palmer Place	North to South – Highwood Avenue to Oakdene Avenue
Irving Street	North to South – Fort Lee Road to Christie Lane
Chestnut Street	East to West – Irving Street to Fort Lee Road
Edgewood Road	South to North – Ridgeland Terrace to Ridgeland Terrace

Between 6:00 to 10:00 e m and 4:00 to 9:00 p m , the following streets will have the restrictions listed below

Road Name/Direction of Road	Prohibited Entry
Broad Avenue – Eastbound from Broad Avenue	
Vreeland Avenue	Do Not Enter
Woodland Place	Do Not Enter
Beechwood Place	Do Not Enter
Magnolia Place	Do Not Enter
Elm Place	Do Not Enter
Allairs Avenue	Do Not Enter
Westview Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Oakdene Avenue	
Broad Avenue – Westbound of Broad Avenue	
Oakdene Avenue	Do Not Enter
Moore Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Park Avenue	Do Not Enter
Christie Street	Do Not Enter
High Street	Do Not Enter
Crescent Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Christie Heights Street	Do Not Enter
Harrison Street	Do Not Enter
Fort Lee Road – Southbound of Fort Lee Road	
Leonia Avenue	Do Not Enter
Gladwin Avenue	Do Not Enter
Oaktree Place	Do Not Enter
Paulin Boulevard	Do Not Enter
Irving Street	Do Not Enter
Fort Lee Road – Northbound of Fort Lee Road	
Linden Terrace	Do Not Enter
Hawthorne Terrace	Do Not Enter
Leonia Avenue	Do Not Enter
Grand Avenue – Eastbound of Grand Avenue	
Lakeview Avenue	Do Not Enter
Longview Avenue	Do Not Enter
Overlook Avenue	Do Not Enter
Van Orden Avenue	Do Not Enter
Vreeland Avenue	Do Not Enter
Harrison Street	Do Not Enter
Cottage Place	Do Not Enter
Hillside Avenue	Do Not Enter
Palisade Avenue	Do Not Enter
Prospect Street	Do Not Enter
Maple Street	Do Not Enter
Christie Street	Do Not Enter
Park Avenue	Do Not Enter

Highwood Avenue	Do Not Enter
Sylvan Avenue	Do Not Enter
Ames Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter
Grand Avenue – Westbound of Grand Avenue	
Maple Street	Do Not Enter
Schor Avenue	Do Not Enter
Bergen Boulevard – Westbound of Bergen Boulevard	
Christie Lane	Do Not Enter
Hazlitt Avenue	Do Not Enter
Washington Terrace	Do Not Enter
Lester Street	Do Not Enter
Glenwood Avenue -- Northbound of Oakdene Avenue	
Glenwood Avenue	Do Not Enter
Glenwood Avenue – Eastbound of Glenwood Avenue	
Hillside Avenue	Do Not Enter
Woodland Place	Do Not Enter
Allaire Avenue	Do Not Enter
Summit Avenue	Do Not Enter
Park Avenue	Do Not Enter
Highwood Avenue	Do Not Enter
Oakdene Avenue	Do Not Enter

Intersections with Traffic Control Devices
Broad Ave/Hillside Ave West and Eastbound from Broad Ave
No Right and Left Turn
FLR EB/Glenwood Avenue North and Southbound from FLR
No Right and Left Turn
FLR EB/Station Parkway Southbound from FLR
No Right Turn
Grand Avenue/Christie Heights Eastbound from Grand Avenue
No Right and Left Turn
Grand Avenue/Moore Avenue Eastbound from Grand Avenue
No Right and Leh Turn

Section 2
All other provisions of Chapter 194 "Vehicles and Traffic" of the Code of the Borough of Leonia are hereby ratified and confirmed

Section 3 Severability
If any article, section, sub-section, sentence, clause, or phrase of this Ordinance is for any reason deemed to be unconstitutional or invalid by any court of competent jurisdiction such decision shall not affect the remaining portions of this Ordinance

Section 4 Effect
This Ordinance will take affect upon publication as required by law
Judah Zeigler, Mayor ATTEST , Barbara Rae, RMC, CMC, Borough Clerk
February 28, 2018, Fee $272 25 (330) 4243894

EXHIBIT W

Cleary Giacobbe Alfieri Jacobs, LLC
Ruby Kumar-Thompson, Esq. (Attorney ID No. 044951999)
169 Ramapo Valley Road
Upper Level – Suite 105
Oakland, New Jersey 07436
(973)845-6700

Gittleman Muhlstock & Chewcaskie
Brian M. Chewcaskie, Esq. (Attorney ID No. 021201984)
2200 Fletcher Avenue
Fort Lee, New Jersey 07024
(201)944-2300
Attorneys for Defendants

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action **NOTICE OF CROSS MOTION TO DISMISS PLAINTIFF ROSA'S COMPLAINT FOR FAILURE TO STATE A CLAIM AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	Before: Peter F. Bariso, Jr., P.J.S.C. Motion Date: August 31, 2018

To: Jacqueline Rosa, Esq., Plaintiff
Seigel Law Firm LLC
505 Goffle Road
Ridgewood, New Jersey 07450

On Notice To:

Philip J. Espinosa, Esq.
Deputy Attorney General of New Jersey

R.J. Hughes Justice Complex
25 Market Street
P.O. Box 114
Trenton, New Jersey 08625
Attorney for the State of New Jersey
Department of Transportation, Plaintiff/Intervenor

PLEASE TAKE NOTICE that on August 31, 2018 at 9:00 a.m., Defendants, Borough of Leonia, Borough of Leonia Council, Tom Rowe, and Judah Zeigler, will oppose the Motion for Summary Judgment filed by Plaintiff and cross-move before the Superior Court of New Jersey, Law Division, Hudson County, for an Order dismissing Plaintiff's Amended Complaint with prejudice pursuant to R. 4:6-2(e).

PLEASE TAKE FURTHER NOTICE that the within application is being made pursuant to R 1:6-2, and R. 1:6-3, and in support of same, Defendant will rely on the attached Brief and Appendix; and that a proposed form of Order is also submitted herewith;

PLEASE TAKE FURTHER NOTICE that oral argument is requested on this motion, and that

IN COMPLIANCE WITH RULE 1:6-4, the undersigned further certifies that the original of the within Notice of Motion is this day being filed with the Clerk of Hudson County Superior Court, Law Division, and as such, is being simultaneously served to all counsel of record via ecourts.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendants

Dated: August 21, 2018

By: *s/ Ruby Kumar-Thompson*
RUBY KUMAR-THOMPSON, ESQ.

Discovery End date: May 24, 2019

CERTIFICATION OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that the original of the within Notice of Motion Certification of Tom Rowe with exhibits, Certification of Judah Zeigler with exhibits, and Brief and proposed form of Order were e-filed on today's date with the Clerk of the Superior Court, Hudson County, and that copies of these papers have been served via e-courts to counsel of record to all of the parties; and that a courtesy copy of said papers is this day being submitted to the managing judge assigned to hear this matter as follows:

Hon. Peter F. Bariso, Jr., J.S.C.
Hudson County Courthouse
Adminsitration Building
595 Newark Avenue
Jersey City, NJ 07306

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendants

By: *s/ Ruby Kumar-Thompson*
Ruby Kumar-Thompson, Esq.

Dated: August 21, 2018

Cleary Giacobbe Alfieri Jacobs, LLC
Ruby Kumar-Thompson, Esq. (Attorney ID No. 044951999)
169 Ramapo Valley Road
Upper Level – Suite 105
Oakland, New Jersey 07436
(973)845-6700

Gittleman Muhlstock & Chewcaskie
Brian M. Chewcaskie, Esq. (Attorney ID No. 021201984)
2200 Fletcher Avenue
Fort Lee, New Jersey 07024
(201)944-2300
Attorneys for Defendants

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action **ORDER DENYING SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	

This matter being brought before the Court by Brian M. Chewcaskie, Esq. of the firm of Gittleman, Muhlstock & Chewcaskie, and Ruby Kumar-Thompson, Esq. of the firm of Cleary Giacobbe Alfieri Jacobs, LLC attorneys for Defendants, the Borough of Leonia, Borough of Leonia Council, Tom Rowe, and Judah Zeigler ("Defendants"), on Cross-Motion to Dismiss

Plaintiff's Complaint pursuant to R. 4:6-2(e), and the Court having considered the papers and arguments submitted in support of and in opposition to this motion, and argument of counsel, and good cause having been shown

It is on this ____ day of _____ 2018:

ORDERED that Plaintiff's Motion for Summary Judgment is denied; and

IT IS FURTHER ORDERED, that Plaintiff's Complaint is hereby dismissed in its entirety with prejudice.

_____
Hon. Peter F. Bariso, Jr., J.S.C.

[ ] OPPOSED

[ ] UNOPPOSED

Cleary Giacobbe Alfieri Jacobs, LLC
Ruby Kumar-Thompson, Esq. (Attorney ID No. 044951999)
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Attorneys for Defendants

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO. HUD-L-607-18 Civil Action **CERTIFICATION OF RUBY KUMAR-THOMPSON, ESQ. IN SUPPORT OF MOTION TO DISMISS PLAINTIFF ROSA'S COMPLAINT**
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff/Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	

I, Ruby Kumar-Thompson, Esq., being duly sworn upon my oath, do hereby certify as follows:

1. I am a member of the Bar of the State of New Jersey, and a Partner of the law firm of Cleary Giacobbe Alfieri Jacobs, LLC, attorneys for Defendants. I make this Certification in support of Defendants' Motion pursuant to Court Rule 4:6-2(e) to Dismiss Plaintiff's Complaint.

2. Attached hereto in support of Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross-Motion to Dismiss the Complaint, counsel for Defendants have cited the following unpublished cases:

Exhibit 1: New Jersey State League of Master Plumbers, Inc. v. New Jersey Natural Gas Co., 2010 WL 3720301 (App. Div. 2010);

Exhibit 2: Lanin v. Borough of Tenafly, No. 12-2725 (KM) 2014 WL 31350 (D.N.J. Jan. 2, 2014);

Exhibit 3: Martell's Tiki Bar, Inc. v. The Governing Body of Point Pleasant Beach, Civil Action 13-5676 (D.N.J. 2015);

Exhibit 4: Travasano v. Board of Chosen Freeholders for Union County, 2012 WL 256382 (N.J. App. Div. January 27, 2012); and

Exhibit 5: State of New Jersey v. Ramos, 2017 WL 2730243, fn.3 (App. Div. 2017).

3. Pursuant to Rule 1:36-3, I hereby certify that in reliance upon same, I am not aware of any contrary unpublished opinions.

4. I hereby certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendants

Dated: August 21, 2018

By: *s/ Ruby Kumar-Thompson*
Ruby Kumar-Thompson, Esq.

Exhibit 1

2010 WL 3720301 (N.J.Super.A.D.)
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

NEW JERSEY STATE LEAGUE OF MASTER PLUMBERS, INC., and Gary Italiano, New Jersey Licensed Plumber, Plaintiffs–Appellants,
v.
NEW JERSEY NATURAL GAS COMPANY and its affiliate New Jersey Resources Corporation; NJR Holdings Corporation; NJR Home Services Company; NJR Plumbing Services, Inc., Defendants–Respondents.

Argued Sept. 14, 2010.
|
Decided Sept. 24, 2010.

West KeySummary

1 **Action**
Statutory rights of action

Licenses
Penalties and forfeitures and actions therefor

Plumbing Law did not provide an implied private right of action whereby trade association for licensed master plumbers and licensed plumber could sue natural gas utility and utility's parent company for engaging in unauthorized plumbing activities. Association and plumber were not members of the class for whose special benefit the Plumbing Law was enacted. The purpose of the Plumbing Law was to protect members of the public from unscrupulous practices and unskilled practitioners, not to limit competition for the benefit of plumbing licensees. N.J.S.A. 45:1–18.1, 45:14C–12.3b.

Cases that cite this headnote

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L–2103–09.

Attorneys and Law Firms

Kenneth A. Porro argued the cause for appellants (Wells, Jaworski & Liebman, LLP, attorneys; Mr. Porro and Sylvia Hall, on the brief).

Kevin H. Marino argued the cause for respondents (Marino, Tortorella & Boyle, P.C., attorneys; Mr. Marino and John A. Boyle, on the brief).

Before Judges CARCHMAN and WAUGH.

Opinion

PER CURIAM.

***1** Plaintiffs New Jersey State League of Master Plumbers, Inc. (League), and Gary Italiano appeal the dismissal with prejudice of their suit against defendants New Jersey Resources Corporation (NJR), and its subsidiary or related entities New Jersey Natural Gas Company (NJNGC), NJR Holdings Corporation, NJR Home Services Company, and NJR Plumbing Services, Inc. We affirm.

I.

We discern the following factual and procedural background from the record.

The League is a non-profit trade association made up of master plumbers licensed in New Jersey pursuant to the State Plumbing License Law of 1968 (Plumbing Law), *N.J.S.A.* 45:14C–1 to –33. Italiano, who resides in Ocean County, is a member of the League and a licensed master plumber in New Jersey.

NJR is a publicly traded corporation that provides natural gas in certain areas of New Jersey through its subsidiary NJNGC, which is regulated by the New Jersey Board of Public Utilities (BPU). NJR and NJNGC provide plumbing related services to their natural gas customers and others through the affiliated defendant entities. The League contends that defendants' advertising and billing practices with respect to those activities were criticized in

an audit report submitted to the BPU. It further contends that the BPU ordered one or more of them to take certain corrective action as a result of the audit report.

In June 2009, the League and Italiano filed a complaint in the Law Division against NJR, NJNGC, and their related companies. The complaint alleges that defendants have (1) engaged in unauthorized plumbing activities in violation of the Plumbing Law; (2) circulated improper plumbing advertisements in violation of *N.J.S.A.* 45:14C–2(h) and –12.3 and their implementing regulations; and (3) violated the New Jersey Consumer Fraud Act (CFA), *N.J.S.A.* 56:8–1 to –184. Plaintiffs seek injunctive relief and damages, as well as counsel fees.

In July 2009, defendants filed a motion to dismiss pursuant to *Rule* 4:6–2(e), arguing that the League and Italiano lacked standing to sue and that, in any event, they failed to state a claim upon which relief could be granted. Plaintiffs opposed the motion, which was argued on September 25, 2009.

The judge explained his reasons for granting the motion in a letter opinion dated September 28, 2009. With respect to the first two counts, he determined that, although the League and Italiano would probably have standing, there is no private cause of action to enforce the provisions of the Plumbing Law, because the Legislature conferred enforcement power solely on the State Board of Examiners of Master Plumbers (Board), the Director of the Division of Consumer Affairs, and the Attorney General. *See N.J.S.A.* 45:1–25. He also concluded that plaintiffs could not sue under the CFA because they could not demonstrate an "ascertainable loss." *See N.J.S.A* . 56:8–19. Consequently, he dismissed the complaint with prejudice in an order of the same date. [1] This appeal followed.

II.

***2** On appeal, the League and Italiano argue that (1) they have standing; (2) that there is a private cause of action under the legislative scheme creating the professional and occupational licensing laws; (3) they have suffered an ascertainable loss; and (4) they should have been permitted to amend the CFA count to clarify their claim to an ascertainable loss and "issues of third-party beneficiaries." Defendants argue, in response, that the motion judge correctly decided the legal issues before him and that any amendment of the complaint would have been futile.

In reviewing the dismissal of a complaint for failure to state a claim on which relief can be granted, *Rule* 4:6–2(e), we are bound by the same standard that governed the motion judge. *Indep. Dairy Workers Union v. Milk Drivers Local 680,* 23 *N.J.* 85, 89, 127 A.2d 869 (1956). We are obligated to accept the allegations of the complaint as true and afford plaintiff all reasonable factual inferences. *Ibid.* The complaint must be "searched in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement." *Seidenberg v. Summit Bank,* 348 *N.J.Super.* 243, 250, 791 A.2d 1068 (App.Div.2002) (citing *Printing Mart–Morristown v. Sharp Elecs. Corp.,* 116 *N.J.* 739, 746, 563 A.2d 31 (1989)). "If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." *F.G. v. MacDonell,* 150 *N.J.* 550, 556, 696 A.2d 697 (1997). A motion to dismiss should be granted " 'in only the rarest of instances.' " *NCP Litig. Trust v. KPMG LLP,* 187 *N.J.* 353, 365, 901 A.2d 871 (2006) (quoting *Printing Mart, supra,* 116 *N.J.* at 772, 563 A.2d 31). *See also County of Warren v. State,* 409 *N.J.Super.* 495, 503, 978 A.2d 312 (App.Div.2009), *certif. denied,* 201 *N.J.* 153, 988 A.2d 1176, *cert. denied,* —— U.S. ——, 130 *S.Ct.* 3508, —— *L.Ed.*2d —— (2010).

Under our standard of review, therefore, we must assume the truth of plaintiffs' allegations that one or more of the defendants (1) have engaged in unauthorized plumbing activities and (2) have engaged in advertising or business practices that violate either the Plumbing Law and its implementing regulations or the CFA and its implementing regulations, or both. The questions before us are whether there is a private cause of action to enforce the Plumbing Law and whether plaintiffs have stated a claim under the CFA.

III.

We turn first to the issue of whether there can be a private cause of action concerning violations of the Plumbing Law and its implementing regulations, or whether such enforcement is limited to actions brought by the Board, the Consumer Affairs Director, or the Attorney General

under the statutory scheme for regulating professional and occupational activities, including plumbing.

The Plumbing Law established a comprehensive scheme for the regulation of plumbing in New Jersey, including plumbing contractors. *See In re Pub. Serv. Elec. & Gas Co.,* 325 *N.J.Super.* 477, 482–83, 739 A.2d 991 (App.Div.1999). As we observed in *Public Service,*

> ***3** under *N.J.S.A.* 45:14C–12.3b and –2(h), a person or entity is prohibited from "engag[ing] in the business of plumbing contracting or advertis [ing] in any manner as a plumbing contractor" if not licensed or owned 10% by a licensed plumber. Thus, an unlicensed plumber, or entity not owned 10% by a licensed plumber, cannot operate a plumbing business and cannot advertise that business.
>
> [*Id.* at 484–85, 739 A.2d 991.]

In enacting the Plumbing Law, however, the Legislature did not include a specific provision governing enforcement.

Instead, the Legislature allocated the enforcement provisions for the Plumbing Law, as well as other professional-and-occupational statutes, to the Uniform Enforcement Act (UEA), *N.J.S.A.* 45:1–14 to –27. The UEA was enacted because the Legislature determined that "effective implementation of consumer protection laws and the administration of laws pertaining to the professional and occupational boards ... require uniform investigative and enforcement powers and procedures and uniform standards for license revocation, suspension and other disciplinary proceedings by such boards." *N.J.S.A.* 45:1–14.

The UEA specifically authorizes the Consumer Affairs Director, the various boards and commissions, and the Attorney General to take enforcement action. Available remedies include revocation or suspension of licenses, orders to cease and desist from engaging in unlicensed or improper activities, and the imposition of fines and related costs. *See N.J.S.A.* 45:1–21 and –22 (suspension or revocation of licensure and other remedies with respect to licensees); *N.J.S.A.* 45:1–23 (injunctive relief and civil penalties for unlicensed practice).

In January 2010, after finding that "[t]he regulation of certain professions or occupations ... is necessary to protect the health, safety and welfare of the residents of this State" and that "[t]he unauthorized practice of a regulated profession or occupation inures to the detriment of the public," the Legislature acted "to protect the health, safety and welfare of the residents of this State" by conferring on the Director, the boards and commissions, and the Attorney General "additional investigative and enforcement powers and enhanced procedures to more effectively deter individuals from engaging in the unauthorized practice of a regulated profession or occupation." *N.J.S.A.* 45:1–18.1.

Like the Plumbing Law itself, the UEA does not specifically provide for a private enforcement action. Plaintiffs acknowledge that fact, but argue that there is an implied right to bring such a private action. As the Supreme Court observed in *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.,* 168 *N.J.* 255, 271, 773 A.2d 1132 (2001), however, "New Jersey courts have been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for such action."

Borrowing from standards articulated by the United States Supreme Court, our courts apply the following test in deciding whether there is an implied private right of action.

> ***4** To determine if a statute confers an implied private right of action, courts consider whether: (1) plaintiff is a member of the class for whose special benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) it is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy. Those factors were established by the United States Supreme Court in *Cort v. Ash,* 422 *U.S.* 66, 95 *S. Ct* . 2080, 45 *L. Ed.*2d 26 (1975) and adopted by our Court in *In re State Comm'n of Investigation,* 108 *N.J.* 35, 41, 527 A.2d 851 (1987). Although courts give varying weight to each one of those factors, "the primary goal has almost invariably been a search for the underlying legislative intent." *Jalowiecki v. Leuc,* 182 *N.J.Super.* 22, 30, 440 A.2d 21 (App.Div.1981).
>
> [*Gaydos, supra,* 168 *N.J.* at 272–73, 773 A.2d 1132.]

With respect to the first factor, we conclude that the League, as a representative of licensed plumbers, and

Italiano, as a licensed plumber, are not "member[s] of the class for whose special benefit the statute was enacted." The purpose of the Plumbing Law is not to limit competition for the benefit of plumbing licensees, but rather to protect members of the public from unskilled practitioners and unscrupulous practices. *See N.J.S.A.* 45:1–18.1 ("The regulation of certain professions or occupations ... is necessary to protect the health, safety and welfare of the residents of this State.").

Plaintiffs also assert that Italiano, in his capacity as a New Jersey resident and consumer, is a member of the class for whose benefit the statute was enacted. We will assume solely for the purpose of our analysis that he is a member of the class in his personal capacity.

With respect to the second factor, we find nothing in the language or history of the applicable statutes that would support a finding that the Legislature "intended to create a private right of action." Certainly, it would have been easy for the Legislature to have said so.

> For example, in *Miller v. Zoby,* 250 *N.J.Super.* 568, 576, 595 A.2d 1104 (App.Div.), *certif. denied,* 127 *N.J.* 553, 606 A.2d 366 (1991), [we] ruled that the Legislature did not intend to confer a private cause of action in enacting the Casino Control Act (CCA). [We] determined that the Legislature did not confer a private cause of action permitting players to seek damages based on a casino's violation of the extension of credit provisions of the CCA because "[i]f the Legislature had so intended, we think that it specifically would have created the right to sue expressly in the [Casino Control] Act [and] ... not leave the matter to the happenstance of future judicial construction." *Id.* at 577, 595 A.2d 1104.[We] added that "when [the Legislature] wanted members of the public to have access to the civil courts for violations of remedial statutes," *id.* at 576, 595 A.2d 1104, the Legislature has expressly conferred a private cause of action. To support that proposition, [we] cited *N.J.S.A.* 56:9–12a (Antitrust Act of 1970), *N.J.S.A.* 56:8–19 (Consumer Fraud Act of 1971), *N.J.S.A.* 13:1K–13a (Environmental Cleanup Responsibility Act of 1983), *N.J.S.A.* 2A:35A–4a (Environmental Rights Act of 1974), and *N.J.S.A.* 55:13B–21 (Rooming and Boarding House Act of 1979) as examples of statutes in which the Legislature expressly provided for private causes of action. *See Campione v. Adamar of New Jersey, Inc.,* 155 *N.J.* 245, 266, 714 A.2d 299 (1998) (declining to imply cause of action for money damages for plaintiff because Casino Control Act contains elaborate regulatory scheme and no such cause of action existed at common law).
>
> ***5** [*Gaydos, supra,* 168 *N.J.* at 274–75, 773 A.2d 1132.]

Plaintiff points to the legislative mandate that the UEA be given a "liberal construction" because it is "remedial" legislation, *N.J.S.A.* 45:1–14, and argues that the liberal-construction provision evidences the required intent that there be a private cause of action. We find that argument unpersuasive because the language upon which they rely is found in the section of the UEA in which the Legislature stated that "effective implementation of consumer protection laws and the administration of laws pertaining to the professional and occupational boards ... require *uniform* investigative and enforcement powers and procedures and *uniform* standards for license revocation, suspension and other disciplinary proceedings by such boards." *Ibid.* (Emphasis added).

The language just quoted implicates the third factor outlined in *Gaydos,* which is whether a private cause of action would be "consistent with the underlying purposes of the legislative scheme." *Gaydos, supra,* 168 *N.J.* at 272, 773 A.2d 1132. The UEA's structure calls for a "uniform" approach to investigation and enforcement through the regulatory process it establishes. In addition, the UEA allows the Attorney General, but not individuals, to commence actions in the Superior Court for injunctive relief and the imposition of penalties with respect to unlicensed activities. It is clear to us that private causes of action would be patently inconsistent with the approach embodied in the UEA.

Even if Italiano in his personal capacity is viewed as someone protected by the Plumbing Law, the second and third factors outlined in *Gaydos* preclude our finding any "implied private cause of action." *Ibid.* Consequently, we affirm the dismissal of the first and second counts of the complaint.

IV.

We now turn to the third count of the complaint, which sought to state a claim under the CFA. Here, it is clear that, in addition to enforcement by the Attorney General pursuant to *N.J.S.A.* 56:8–3 to –18, the right to bring

a private action is limited because the plaintiff must be a "person who suffers any ascertainable loss of moneys or property, real or personal." *Ibid.; Weinberg v. Sprint Corp.,* 173 *N.J.* 233, 249–50, 801 A.2d 281 (2002) (noting that a private plaintiff cannot bring an action for purely injunctive relief and that the right to sue is limited to those who have suffered an ascertainable loss).

The motion judge concluded that neither plaintiff set forth a sufficient basis to support their assertion that they suffered an "ascertainable loss" and dismissed the third count of their complaint. On appeal, the League and Italiano argue that the League's members and Italiano have suffered such a loss because of business lost through the unlicensed and improper plumbing activity conducted by defendants.

We note first that the CFA is intended to protect "consumers," although consumers can be individuals and or entities, such as corporations. *See City Check Cashing, Inc. v. The Nat'l State Bank,* 244 *N.J.Super.* 304, 309, 582 A.2d 809 (App.Div.), *certif. denied,* 122 *N.J.* 389, 585 A.2d 391 (1990). In *Papergraphics Int'l, Inc. v. Correa,* 389 *N.J.Super.* 8, 13, 910 A.2d 625 (App.Div.2006), we held that, "notwithstanding a broad and liberal reading of the statute, the CFA does not cover every sale in the marketplace" and that "CFA applicability hinges on the nature of a transaction, requiring a case by case analysis."

***6** In this case, there has been no "transaction" between plaintiffs and defendants, other than the coincidental fact that Italiano is apparently a natural gas customer of NJNGC. Plaintiffs fail to identify any transaction with any defendant involving the provision of plumbing services, but only assert that Italiano and other League members have lost business because of defendants' activities. They seek damages arising from allegedly unfair competition, not from a consumer transaction to which they were a party. We hold that that they fail to state a claim under the CFA.

In addition, as determined by the motion judge, plaintiffs are unable to point to any set of facts, including disputed facts, that could be interpreted as "an ascertainable loss." Such a loss must be "a definite, certain and measurable loss, rather than one that is merely theoretical." *Bosland v. Warnock Dodge, Inc.,* 197 *N .J.* 543, 558, 964 A.2d 741 (2009)(citing *Thiedemann v. Mercedes–Benz U.S., LLC,* 183 *N.J.* 234, 248, 872 A.2d 783 (2005)). Their general allegations of income lost through unfair competition are too theoretical to qualify as an "ascertainable" loss for the purposes of the CFA.

Consequently, we affirm the motion judge's dismissal of the third count of the complaint.

V.

In summary, we have concluded that the motion judge correctly dismissed the complaint for failure to state a claim under *Rule* 4:6–2(e). We find no merit and need not comment further on plaintiffs' argument that it should have been permitted to amend the complaint. *R.* 2:11–3(e)(1)(E).

Affirmed.

All Citations

2010 WL 3720301

Footnotes

1 We understand the dismissal with prejudice to signify only that plaintiffs are not free to file another complaint, and not that there has been a decision on the merits of their allegation that one or more of the defendants has engaged in conduct contrary to the Plumbing Law, the CFA, or related regulations.

Exhibit 2

KeyCite Yellow Flag - Negative Treatment
Distinguished by Galicki v. New Jersey, D.N.J., September 15, 2016

2014 WL 31350
Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Scott LANIN and Lisa Lanin, Plaintiff,
v.
The BOROUGH OF TENAFLY and the Tenafly Board of Education, Defendants.

Civ. No. 2:12–02725 (KM)(MCA).
|
Jan. 2, 2014.

Attorneys and Law Firms

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MEMORANDUM OPINION

KEVIN McNULTY, District Judge.

***1** The Plaintiffs, Scott and Lisa Lanin of Tenafly, New Jersey, brought this 32–count Amended Complaint against the Borough of Tenafly ("Tenafly") and the Tenafly Board of Education ("BOE") regarding local ordinances passed limiting access to Downey Drive, the road adjacent to their home. This matter comes before the Court on the motion of BOE to dismiss the Amended Complaint ("Am.Compl.") for failure to meet the pleading requirements of Fed.R.Civ.P. 8; lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1); and failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). (Docket No. 39). For the reasons set forth below, this motion will be **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

Downey Drive is a public street running generally east and west. The Plaintiffs' home is located on the "lower Downey Drive" portion of the street, which runs from Engle Street to Smith School. Am. Compl. ¶¶ 94, 109–10. The Plaintiffs' property is on the north side of the street. *Id.* ¶¶ 112, 115. The back yard of their property borders the Smith School parking lot. *Id.* ¶ 51.

The majority of the claims in the Amended Complaint relate to the effects of the traffic patterns and parking practices established by Tenafly Ordinances; the presence of students and vehicles on and around the Plaintiffs' property; flooding on their property from the Smith School Parking lot; and the construction of sidewalks on Lower Downey Drive.

Tenafly has adopted several traffic and parking measures related to Smith School. Traffic Ordinance 10–19, adopted in September 2010, made lower Downey Drive one-way during school hours (from 8am to 4pm). Am. Compl. ¶ 3. Ordinance 10–20 eliminated parking on the upper portion of Downey Drive. *Id.* ¶ 14. Ordinance 10–22 allowed a sidewalk to be constructed on the south side of Downey Drive in August 2010, creating a "Student Drop–Off Pick–Up Zone." *Id.* ¶¶ 34, 121. At the time the Amended Complaint was filed, a second sidewalk on the north side of the street was planned (it has since been completed). [1] Def. Br. (Docket No. 39–3) at 5.

The Plaintiffs also challenge the procedures by which the Ordinances and School Board Resolution were adopted. They allege that the Ordinances and Resolution were adopted after notice by publication in a newspaper, without "direct or actual" notice to the Plaintiffs. *Id.* ¶ 35. They further allege that the Defendants illegally conduct public business in secret by email or in closed session. *Id.* ¶ 50. The Plaintiffs allege that they have petitioned the Defendants under the New Jersey Open Public Records Act ("OPRA") for their emails concerning "the traffic, 'carpool', 'sidewalk' issues and related matters." *Id.*

Plaintiffs further allege that the BOE had a conflict of interest that tainted the official procedures. *Id.* ¶ 39. One of the BOE members, John Teall, owns a home on Downey Drive. *Id.* Teall was allowed to participate in and vote on matters related to the street, even though he had a "direct personal and pecuniary interest." *Id.* Plaintiffs also object to the role of the Tenafly Mayor and Council in adopting the Ordinances because they did not follow their "usual procedures and standards." *Id.* ¶ 40.

***2** In the process of considering options for the traffic flow around Smith School, the Plaintiffs allege, Tenafly rigged the solicitation of traffic consultant proposals and dictated the conclusions of the selected consultant, Urbana Consulting. *Id.* ¶ 41. BOE and Tenafly then conducted a "quasi-judicial hearing" at a public meeting to review Urbana's recommendations. *Id.* ¶ 42. The Plaintiffs attended the meeting and opposed the recommendations favored by the Defendants. *Id.* The Plaintiffs object to the form of the hearing, alleging that evidentiary rules and judicial procedures were not followed, and that the evidence and witnesses were not disclosed beforehand. *Id.* ¶ 44. The Mayor and Council allegedly considered unsworn testimony at the hearing and did not allow objections, voir dire of experts, or cross-examination. *Id.*

Finally, the Plaintiffs challenge Tenafly's snow removal and sidewalk repair ordinances, General Ordinances 12–3.1 and 12–3.2. *Id.* ¶ 46. When the plaintiffs purchased their home, there were no sidewalks adjacent to it. *Id.* ¶ 49. Under those Ordinances, Plaintiffs are now allegedly "solely responsible" for the expense of removing snow, ice, and debris from the sidewalk that now abuts their property. *Id.*

II. DISCUSSION

The BOE seeks dismissal of the Amended Complaint for failure to meet the pleading requirements of Fed.R.Civ.P. 8, lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), and failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). I **DENY** the motion to dismiss the entire Amended Complaint as presented. I will however, **GRANT** the motion to dismiss as to Counts 4, 6, 15, 16, 18, 20, 21, 22, 23, 25, 26, and 29.

A. Failure to Meet Pleading Requirements of Fed.R.Civ.P. 8

The BOE argues that the Amended Complaint should be dismissed in its entirety for violating the "short and plain" pleading requirements of Fed.R.Civ.P. 8. Def. Br. at 1, 16. Rule 8 requires that a pleading contain "a short and plain statement" of (1) the grounds for the court's jurisdiction, and (2) the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a).

BOE's argument is not without merit. The Amended Complaint is 203 pages long, not including exhibits, and it contains 32 counts. The "Background" section alone comprises 126 pages. It would be difficult to call this Complaint "short" or "plain," and courts in this Circuit have dismissed such prolix complaints on Rule 8 grounds. *See In re Westinghouse Secs. Litig.,* 90 F.3d 696, 702 (3d Cir.1996); *Tillo v. Northland Group,* 456 Fed. App'x. 158 (3d Cir.2012); *Jackson v. Rohm & Hass Co.,* 2008 U.S. Dist. LEXIS 117402, *4, 2008 WL 5669729 (E.D.Pa. Dec. 17, 2008). Nevertheless, the complaint has already been amended once, further amendment might serve only to delay matters, and some of the counts adequately allege causes of action. I will therefore exercise my discretion to deny the BOE's motion on this ground and proceed to consider the legal sufficiency of the various causes of action.

B. Dismissal Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b) (6)

***3** The BOE moves to dismiss the Amended Complaint for lack of subject matter jurisdiction, or because it does not state a claim upon which relief can be granted. Def. Br. at 20. Those Rule 12(b) (1) and 12(b)(6) grounds will be considered together, count-by-count. [2]

Federal Rule of Civil Procedure 12(b)(1) permits a party to bring a motion to dismiss for lack of subject matter jurisdiction, including lack of standing. *Ballentine v. U.S.,* 486 F.3d 806, 810 (3d Cir.2007); *Coastal Outdoor Advertising Group, LLC v. Twp. of Union N.J.,* 676 F.Supp.2d 337, 343 (D.N.J.2009). Rule 12(b) (1) challenges may be either facial or factual attacks. See 2 MOORE'S FEDERAL PRACTICE § 12.30[4] (3d ed.2007); *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir.1977). A facial challenge asserts that the complaint does not allege sufficient grounds to establish subject matter jurisdiction. *Iwanowa v. Ford Motor Co.,* 67 F.Supp.2d 424, 438 (D.N.J.1999). A court considering such a facial challenge assumes that the allegations in the complaint are true, and may dismiss the complaint only if it nevertheless appears that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction. *Cardio–Med. Assoc., Ltd. v. Crozer–Chester Med. Ctr.,* 721 F.2d 68, 75 (3d Cir.1983); *Iwanowa,* 67 F.Supp.2d at 438. A factual challenge, however, attacks subject-matter jurisdiction by challenging the truth (or completeness) of the jurisdictional allegations set forth in the complaint. *Mortensen,* 549 F.2d at 891. Thus a factual jurisdictional proceeding may not occur until the plaintiffs

allegations have been controverted. *Id.* at 891 n. 17. For purposes of this motion to dismiss, the Defendants' jurisdictional arguments will be treated as facial attacks.

In a challenge to a complaint pursuant to Fed.R.Civ.P. 12(b) (6), the defendant, as the moving party, bears the burden of showing that no claim has been stated. *Hedges v. United States,* 404 F.3d 744, 750 (3d Cir.2005). In deciding a Rule 12(b)(6) motion, a court must take the allegations of the complaint as true and draw reasonable inferences in favor of the Plaintiff. *Phillips v. County of Allegheny,* 515 F.3d 224, 231 (3d Cir.2008). Although a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus the factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, such that it is "plausible on its face." *See id.* at 570; *see also Umland v. PLANCO Fin. Serv., Inc.,* 542 F.3d 59, 64 (3d Cir.2008). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly,* 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' ... it asks for more than a sheer possibility." *Iqbal,* 556 U.S. at 678.

1. The Motion to Dismiss is Denied as to Counts 2, 3, 10, 17, and 32.

***4** The Amended Complaint alleges claims against the BOE and Tenafly for violations of the Fourteenth Amendment procedural due process clause (Counts 2 and 3); conspiracy under 18 U.S.C. § 1983 (Count 10); breach of fiduciary duty (Count 17); and *ultra vires* action (Count 32). When all reasonable are inferences drawn in favor of the Plaintiffs, *Phillips,* 515 F.3d at 231, these counts of the Amended Complaint set forth sufficient allegations to state a claim. *See Iqbal,* 556 U.S. at 678. Whether such claims can be established, of course, remains to be seen.

***a.* Fourteenth Amendment Procedural Due Process (Counts 2 and 3)**

The Plaintiffs allege that Tenafly and the BOE violated their Fourteenth Amendment procedural due process rights to adequate notice (Count 2) and a fair hearing (Count 3). Am. Compl. ¶¶ 1060–1067. To state a procedural due process claim, Plaintiffs must establish (1) that they were deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty and property, and (2) that the procedures available to them did not provide due process of law. *Schmidt v. Creedon,* 639 F.3d 587, 595 (3d Cir.2011).

Count 2, the fair notice claim, alleges that Tenafly and the BOE deprived them of "actual notice" regarding matters "directly or indirectly" affecting their home, the surrounding area, and Downey Drive. Am. Com. ¶ 1065. In particular, Plaintiffs challenge the notice given for meetings of the Tenafly Mayor and Council regarding Ordinances 10–19 and 10–20. *Id.* ¶¶ 245–248. They also allege that there may have been meetings held, and ordinances and resolutions adopted, that are currently unknown to them and affect their rights. *Id.* ¶ 1033; *see also* ¶¶ 385–386. Plaintiffs seek declaratory and injunctive relief, declaring Ordinances 10–19, 10–20, Resolution A–3 and the adoption of the Urbana Consulting Report to be void and invalid, enjoining the enforcement of those ordinances or resolutions, and directing the Defendants to provide "direct and actual notice" of any past or future ordinances or resolutions that "impact, impair, or interfere" with their home. *Id.* ¶ 1064.

To satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Pursuant to the New Jersey Open Public Meetings Act ("OPMA"), constructive notice by newspaper publication constitutes "adequate notice" for public meetings. N.J.S.A. 10:4–6 *et seq.* [3] Persons may request individualized notice of any regular, special, or rescheduled meeting. N.J.S.A. 10:4–18, 10:4–19. Tenafly responded to requests from the Plaintiffs under the Open Public Records Act ("OPRA") with "Proof of Publication Affidavits" purportedly showing published notice from The Record newspaper (known as the "Bergen Record") on 6/15/2010 and 6/27/2010. Am. Comp. ¶ 245. The Plaintiffs allege that even if this notice was provided, it was not "reasonably calculated" to, and did not, give them an adequate opportunity to respond and object. *Id.* ¶ 1064.

***5** Although notice by publication satisfies New Jersey state law, it does not necessarily follow that it satisfies the due process clause. To succeed on this claim, the Plaintiffs will have to show, *inter alia,* that they lacked actual notice; that this constructive notice fails the *Mullane* standard; and that some cognizable right was affected by the lack of direct notice. *See* 339 U.S. at 314.

The Plaintiffs also allege that a June 2011 evidentiary hearing conducted by Tenafly's Mayor and Council regarding the acceptance of the Urbana Report violated procedural due process. Am. Compl. ¶¶ 924–926. At that hearing, the Council allegedly considered evidence, including testimony from members of the BOE, which was not disclosed to the Plaintiffs or made part of the record. *Id.* ¶ 930. The Mayor and Council heard statements from the BOE, the HSA parent organization, and the Principal of the Smith School. *Id.* ¶ 931. The Plaintiffs further allege that the hearing was conducted *ultra vires* insofar as it adjudicated the Plaintiffs' legal rights. *Id.* ¶¶ 937–941. The Plaintiffs attended the meeting, but contend that that should have been allowed to cross-examine witnesses and conduct *voir dire* of the traffic consultant, Urbana Consulting. *Id.* ¶ 948.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). A due process claim under *Mathews* requires the balancing of three factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Id.* at 335. Assuming *arguendo* that the Plaintiffs have a property interest in an implied easement to the public street, the Court must determine whether the process afforded to the Plaintiffs in restricting that right failed to meet the due process test under *Mathews.*

Whether the evidentiary hearing fell short of due process standards cannot yet be determined, but the Amended Complaint states a claim that it did. The motion to dismiss Counts 2 and Count 3 will therefore be denied.

***b.* Conspiracy Under 18 U.S.C. § 1983 (Count 10)**

Count 10 alleges that the BOE and Tenafly entered into an unlawful conspiracy to commit Constitutional torts against the Plaintiffs in violation of 18 U.S.C. § 1983. Am. Compl. ¶ 1124. In order to state a § 1983 conspiracy claim, the plaintiff must "make specific factual allegations of a combination, agreement, or understanding among all or between any of the defendants to plot, plan or conspire to carry out the alleged chain of events" to deprive the plaintiff of a federally protected right. *Figueroa v. City of Camden,* 580 F.Supp.2d 390, 402 (D.N.J.2008) (citing *Fioriglio v. City of Atlantic City,* 996 F.Supp. 379, 385 (D.N.J.1998), *aff'd mem.* 185 F.3d 861 (3d Cir.1998)); *see also Green v. City of Paterson,* 971 F.Supp. 891, 909 (D.N.J.1997), *aff'd* 770 F.2d 1070 (3d Cir.1985).

***6** The Plaintiffs allege that through their formal and informal relationship and "Joint Use Committee," the BOE and Tenafly have entered into an agreement to "try to accomplish a common and unlawful plan that violated, and continues to violate, the plaintiffs' constitutional and protected property rights." Am. Compl. ¶ 1125. Elsewhere, they state that members of the BOE and Tenafly made joint decisions, and coordinated their actions regarding the Smith School "carpool" traffic, the drop-off and pick-up zone, and the right of way. *Id.* ¶ 440–441. These allegations are far from detailed, but they plausibly suggest that the Defendants acted together.

Because I find that some of the Plaintiffs' substantive Constitutional claims survive a motion to dismiss, it is appropriate to deny the dismissal of this conspiracy claim, which essentially adds the element of acting in concert. The motion to dismiss Count 10 will be denied.

***c.* Breach of Fiduciary Duties (Count 17)**

Count 17 alleges that the Defendants have breached their fiduciary duties to the Plaintiffs and the residents of Tenafly. Am. Compl. ¶ 1148. More specifically, they allege that the BOE is liable for a member's conflict of interest. *See* Am. Compl. ¶¶ 1149, 1152; discussion at pp. 17–19, *infra.*

In New Jersey, public officials owe a fiduciary duty to "display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty, and integrity." *Driscoll v. Burlington–Bristol Bridge Co.,* 86 A.2d 201, 221, 8 N.J. 433 (2006) (citations omitted). Public officials must be "impervious to corrupting influences and they must transact their business frankly and openly in the light of

public scrutiny so that the public may know and be able to judge them and their work fairly." *Id.* A citizen may bring suit in his or her name to enforce these obligations of public officials. *Id.* (citing *Tube Reducing Corp. v. Unemp't Comp. Comm'n,* 1 N.J. 177, 181, 62 A.2d 473, 5 A.L.R.2d 855 (1948); *Waszen v. City of Atlantic City,* 1 N.J. 272, 276, 63 A.2d 255 (1949); *Haines v. Burlington Cnty. Bridge Comm'n,* 1 N.J.Super. 163, 170–173, 63 A.2d 284 (N.J.Sup.Ct.App.Div.1949)). If the court finds that the public officials breached their fiduciary duties in conducting a transaction, that transaction may be voided as contrary to public policy. *Id.* at 222, 63 A.2d 284; *Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n,* 74 N.J. 113, 123, 376 A.2d 1194, 1199 (N.J.1977).

This Count sets forth a cause of action under New Jersey law. The motion to dismiss is therefore denied as to Count 17.

***d.* Injunction Against Ultra Vires Action Regarding the Traffic Ordinances (Count 32)**

In Count 32, the Plaintiffs seek an injunction prohibiting the Defendants from enforcing the traffic ordinances and declaring them to be void, invalid, and *ultra vires.* Am. Compl. ¶ 1220. One of the alleged bases for this Count is that Tenafly violated the Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD") as applicable under N.J.S.A. 39:4–8 and 39:4–197. *Id.* ¶¶ 1229–1230, 376 A.2d 1194. Together, these provisions allow a municipality to pass ordinances designating one way streets and regulating parking on streets, consistent with the standards of the MUTCD, without approval of the commissioner.[4] N.J.S.A. 39:4–8, 39:4–197. *See generally Casella v. Twp. of Manalapan,* No. L–3194–08, 2011 WL 1466161, *5 (N.J. Sup.Ct.App. Div. April 19, 2011) (placement of stop signs); *Rivera v. Southern R. Co. of New Jersey,* 698 A.2d 560, 304 N.J.Super. 117 (N.J.Sup.Ct.1996) (traffic controls for street and highway construction, maintenance, utility and incident management operations). One section of the MUTCD requires that municipalities maintain "good public relations" by, *inter alia,* considering the needs of abutting property owners and making "appropriate accommodations." MUTCD § 6B.01(7).[5]

***7** The Defendants contend that they did adequately consider the needs of the Lanins and other abutting property holders, but the Amended Complaint adequately alleges that Defendants did not. The motion to dismiss Count 32 will therefore be denied to allow for further factual development. Because I am not dismissing this Count, I do not reach the other statutory and equitable grounds asserted therein.[6] *See* Am. Compl. ¶¶ 1238–1266.

2. Counts 4, 6, 15, 16, 18, 20, 21, 22, 23, 25, 26, and 29 are Dismissed Pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6)

The remaining Counts against the BOE lack subject matter jurisdiction, fail to state a claim for relief, or both, and will be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

***a.* Fourteenth Amendment Equal Protection (Count 4)**

Count 4 asserts a claim under 18 U.S.C. § 1983 alleging that the BOE and Tenafly deprived Plaintiffs of their right to equal protection of the laws under the Fourteenth Amendment. Am. Compl. ¶ 1068. They assert that they are part of a "broad protected class" including "all of the residential property owners in the Borough of Tenafly" entitled to equal treatment as to their "freedom of movement, egress and ingress and access to their homes, payment of a proportionate share of real estate and school taxes." *Id.* They also assert they are members of a "narrower, protected class of similarly situated residential property owners on East Hill." *Id.* ¶ 1072. The Plaintiffs allege that they and eight other households, who comprise this protected class, have been discriminated against through "intentional different treatment" by the Defendants, including the adoption of the Urbana Consulting Report, Ordinances 10–19, 10–20, and 10–22, and Resolution A–3. *Id.* ¶¶ 1073, 1075.

The Plaintiffs have failed to state a cognizable Equal Protection claim under Section 1983. To state such a claim, the plaintiff must allege facts showing the existence of purposeful discrimination. *Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.,* 587 F.3d 176, 196 (3d Cir.2009) (citing *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1478 (3d Cir.1990)). The plaintiff must have received different treatment from that received by other individuals similarly situated. *Id.* And in such a Section 1983 case, the plaintiff must allege that a state actor intentionally discriminated against him because of his or her membership in a protected class. *Lande v. City of Bethlehem,* 457 Fed. App'x 188, 192 (3d Cir.2012) (citing *Chambers,* 587 F.3d at 196). Classically, but not

exclusively, such a protected class may be a racial, ethnic or religious minority. Neither the resident property holders of Tenafly generally nor the property holders on Downey Drive constitute a legally recognized protected class of this kind.

Plaintiff may nevertheless attempt to assert what is sometimes called a "class of one" theory. *Lande,* 457 Fed. App'x at 193. A "class of one" Equal Protection claim asserts that a person was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). The plaintiff must allege: "(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill v. Borough of Kutztown,* 455 F.3d 225, 239 (3d Cir.2006). The Amended Complaint does not set forth such a claim.

***8** The narrowest possible group of "similarly situated" individuals consists of residents of Downey Drive. Plaintiffs do not seem to be claiming that they were treated disparately vis-a-vis their Downey Drive neighbors. Indeed, Plaintiffs allege that eight other households on lower Downey Drive were fellow sufferers from, *e.g.,* selective enforcement of rights of way, imposition of unwanted sidewalks and the attendant duties to clear them of snow and ice, and facilitation of trespass to their properties. *Id.* ¶ 1072–73. The Amended Complaint alleges no facts suggesting that Plaintiffs, when compared to their near neighbors, were exposed to these conditions on any disparate basis-let alone that such disparity was irrational.

Rather, the Plaintiffs seem to be alleging that they (perhaps in common with their neighbors) were treated disparately with respect to other residents of the town. But the Plaintiffs fail to allege plausibly that any difference in treatment lacked a rational basis. The measures complained of, on their face, have their impact by virtue of the location of the Downey Drive property and its proximity to the Smith School. The fact that other Tenafly residents' properties are *not* located near the Smith School suggests an obvious rational basis for any disparate impact. The Amended Complaint itself repeatedly cites the minutes of the BOE August 24, 2010 meeting, [7] and those minutes state that the recommendations for sidewalks, one-way traffic, changes in pick-up and drop-off locations, and parking changes on Downey Drive were motivated by safety concerns with respect to the school. Def. Motion to Dismiss Exhibit A (Docket No. 39–2) at 3–4; Am. Compl. ¶¶ 192, 337, 420, 423–427. Such community safety concerns, particularly those arising in the environs of a school, would constitute a rational basis for the Defendants' taking action with respect to Downey Drive.

We are, of course, at the motion to dismiss stage. This stage of the analysis is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Bistrian v. Levi,* 696 F.3d 352, 365 (3d Cir.2012) (citing *Iqbal,* 556 U.S. at 679). A sufficient allegation that Defendants' stated motivations were not the real ones might support a cause of action. On that score, however, Plaintiffs do not offer anything sufficiently factual or plausible. The Amended Complaint says that the Defendants were motivated by "indifference, ill will, political expediency and/or an attempt to gain public favor." Am. Compl. ¶ 1074. These are conclusions or characterizations, not facts. The mere fact that the Town made changes to traffic, parking and pedestrian facilities in a location adjacent to a school, rather than elsewhere in town, does not in itself suggest an irrational disparity. To make out an equal protection claim, a plaintiff in this context would have to allege something factual and reasonably specific. The Amended Complaint, despite its length, does not do this.

***9** Count 4 fails to meet the test of *Twombly*/*Iqbal,* and will be dismissed pursuant to Rule 12(b)(6).

b. **Fourteenth Amendment Substantive Due Process (Count 6)**

Count 6, citing 42 U.S.C. § 1983, alleges that the Defendants violated Plaintiffs' substantive due process rights under the Fourteenth Amendment to "freedom of movement, egress and ingress, Free Speech, and Due Process" and interfered with the Plaintiffs' property rights. Am. Compl. ¶ 1089. This Count fails to plead a claim of deprivation of a fundamental right. [8]

The Amended Complaint's reference to movement, egress and ingress could be deemed a claim of denial of the right to intrastate travel. That right and its possible sources are exhaustively discussed in *Lutz v. City of York,* 899 F.2d 255, 268 (3d Cir.1990) (recognizing right to intrastate travel, subject to reasonable regulation). But the Amended

Complaint fails to plausibly plead a deprivation of that right. There are allegations to the effect that the one-way designation cuts off the most direct route, and requires the Plaintiffs to take a more roundabout route, to leave their neighborhood during school hours. *See* Am. Compl. ¶ 164, 237–239. Plaintiffs state that they feel compelled to "remain in their home and delay their departure" to avoid school traffic. Am. Compl. ¶¶ 275–276. They do not allege a single instance of actually being prevented from entering or leaving their home or neighborhood. Nor is anyone attempting to prohibit or prevent them from traveling. Traffic, even if it can be attributed to poor public planning, is not a deprivation of a fundamental right. Nor does it violate any fundamental right to require that auto traffic, at certain times of day, take a route that turns out to be more circuitous when viewed from the perspective of a particular property owner's driveway. Probably every traffic regulation inconveniences someone, while easing the path of someone else. The factual allegations of this complaint do not establish that such an inconvenience, incident to the control of traffic around a school, has burdened the fundamental right to travel.

The remaining "fundamental right" allegations against the BOE also fail to establish a cognizable violation. The Plaintiffs allege no unconstitutional deprivation of property. No condemnation of property, for example, is alleged, and nothing about the alleged changes to the Downey Street area rise to the level of shocking the judicial conscience. *Chainey v. Street,* 523 F.3d 200, 219 (3d Cir.2008) (substantive due process violation under Section 1983 for deprivation of property interest must "shock the conscience" to be actionable); *Eic hen laub v. Twp. of Indiana,* 385 F.3d 274, 286 (3d Cir.2004) (holding that allegations that township "maligned and muzzled" plaintiffs, applied standards not applied to similar properties, delayed permits and approvals, improperly increased tax assessments, and pursued unannounced and unnecessary enforcement actions in denying zoning requests failed to "shock the conscience").

***10** The allegations regarding the procedures in connection with hearings and other proceedings are more properly considered as alleged violations of procedural due process, and I have upheld them under that heading. *See* pp. 6–8, *supra;* Am. Compl. ¶ 1094. Couched as violations of substantive due process, they are superfluous.

In sum, the Plaintiffs have failed to allege sufficient facts in support of any substantive due process claim. Count 6 will be dismissed pursuant to Rule 12(b)(6).

***c.* Construction in Protected Riparian Zone (Count 15)**

Count 15 alleges that Tenafly submitted a false application with the New Jersey Department of Environmental Protection (NJDEP) for construction in a protected riparian zone, in violation of the Flood Hazard Area Control Act ("FHACA"), N.J.S.A. 58:16A–50 *et seq.* Plaintiffs allege that the Town failed to obtain necessary government approvals for construction of a "concrete platform" (*i.e.,* a sidewalk) on the south side of Lower Downey Drive. They further allege that the Town has threatened to build (and now has built) another sidewalk abutting Plaintiffs' property on the north side of Downey Drive. Am. Compl. ¶¶ 1139–1144. This claim fails on its face because there is no private right of action under FHACA. Only the NJDEP may seek penalties or an injunction for violations of the FHACA. N.J.S.A. 58:16A–63; N.J.A.C. 7:13–19.1. Count 15 will therefore be dismissed.

***d.* Conflict of Interest in Violation of N.J.S.A. 18A:12–24 (Count 16)**

Count 16 alleges that the BOE and Tenafly have a conflict of interest based on the involvement of school board member John Teall. Plaintiffs cite a New Jersey statute that prohibits a member of a Board of Education from acting in an official capacity in any matter where "he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family." N.J.S.A. 18A:12–24(c). [9]

Board member John Teall allegedly lives at 110 Downey Drive, not far from the Smith School. Am. Compl. ¶¶ 31, 39, 79. Plaintiffs describe their property as being on "Lower Downey Drive" and Teall's property as being on "Upper Downey Drive." *Id.* ¶ 270. They allege that "[d]espite his direct personal and pecuniary interest in the use of the alleged right of way and traffic issues, [Teall] was allowed to participate in and vote on matters which directly affect" both his and the Plaintiffs' homes. *Id.* ¶ 39. The Amended Complaint alleges that the BOE meeting minutes from August 24, 2010, confirm that Teall was in attendance. The minutes also allegedly note that the BOE worked with an "unidentified representative from

residents on Downey Drive" to improve procedures in the morning and afternoon. *Id.* ¶¶ 338–339. At that meeting, the BOE adopted Resolution A–3 to support Tenafly in creating a sidewalk on Downey Drive. *Id.* ¶ 420.

***11** Whatever the merits of this state-law claim, it must be dismissed for failure to exhaust administrative remedies. In New Jersey, the Ethics Commission is responsible in the first instance for resolving complaints alleging unethical conduct of members of a local school board. N.J.S.A. 18A:12–29; *see also Dericks v. Schiavoni,* No. 4–5/09A, 2011 WL 2304195 (N.J. Sup.Ct.App. Div. June 1, 2011). When a complaint is filed against a member of a local school board, the Ethics Commission "[s]hall determine whether the conduct complained of constitutes a violation of ... th[e] Act or the code of ethics, or whether the complaint should be dismissed." N.J.S.A. 18A:12–29(c). The Ethics Commission's decision shall be in writing and shall state its findings of fact and conclusions of law. *Id.* Such an administrative resolution of controversies and disputes arising under the school laws is considered a final agency action under the state Administrative Procedures Act. *Id.*

Only then is judicial review appropriate, by means of a direct appeal to the Appellate Division of the Superior Court. N.J.S.A. 18A:6–9.1. *See, e.g., Bd. of Educ. Of City of Sea Isle City v. Kennedy,* 393 N.J.Super. 93, 922 A.2d 805, 810 (N.J.Sup.Ct.App.Div.2007) (stating "arbitrary and capricious" standard of review for reviewing agency decision regarding school board member), *affirmed,* 196 N.J. 1, 951 A.2d 987, 999–1000 (N.J.2008); *In re Suspension of Right,* 2008 WL 351240 (N.J.Sup.Ct.App.Div. Feb. 11, 2008) (affirming Commission's suspension of board member); *Fisher v. Hamilton,* 2013 WL 3716880 (N.J.Sup.Ct.App.Div. July 17, 2013) (reversing Commission determination for reinstatement of the complaint; court did not retain jurisdiction).

Count 16 will therefore be dismissed on these procedural grounds. I note, however, that Count 17, which is not being dismissed, would appear to cover much of the same ground.

***e.* Breach of Duty to Ensure Child's Safety (Count 18)**

Count 18 alleges that the Defendants have breached their duty to ensure the "safety and supervision of children under the conditions the defendants have created" in the pick-up/drop-off zone and by the Creek. Am. Compl. ¶ 1155. Because Plaintiffs do not have standing to bring this claim, it will be dismissed pursuant to Rule 12(b)(1).

Any such duty is owed to the children attending Smith School and perhaps to their parents, but in any event not to these adult Plaintiffs. *See Jerkins v. Anderson,* 191 N.J. 285, 296, 922 A.2d 1279 (2007) (school has duty to monitor students for safety until dismissal). In addition, the Plaintiffs point to no case expanding the school's duty of reasonable care to require that the BOE supervise the children off school premises and prevent them from trespassing on private property. *See* Am. Compl. ¶ 1156.

The claimed duty, to the extent it may exist, is not owed to the Plaintiffs. Count 18 will be dismissed for lack of standing.

***f.* Injunction Against Violations of the Open Public Meetings Act (Count 20)**

***12** Count 20 alleges that the defendants have engaged in a pattern of violations of the New Jersey Open Public Meetings Act ("OPMA") by conducting public business in secret by email or in closed session. Am. Compl. ¶ 1186; N.J.S.A. 10:4–6. Plaintiffs request injunctive relief against future violations. N.J.S.A. 10:4–16. New Jersey has interpreted OPMA to allow injunctive relief if "a pattern of non-compliance" has been demonstrated. *McGovern v. Rutgers,* 211 N.J. 94, 112, 47 A.3d 724, 734 (2012). The Plaintiffs fall short, however, of alleging facts establishing such a pattern of secret meetings or deliberations.

The Plaintiffs make numerous conclusory allegations regarding the Defendants' "secret" communications and deliberations behind closed doors. *See e.g.* Am. Compl. ¶ 50. The Plaintiffs find it suspicious that, despite their requests, Defendants have not furnished copies of emails concerning "traffic, 'carpool,' sidewalk issues and related matters." *Id.* ¶ 50, 387–405. The Defendants allegedly denied Plaintiffs' request because they were unwilling to search through hundreds of thousands of emails. *Id.* The Plaintiffs do not point to any particular information, testimony, or influence that they believe would be contained in these emails.

The Plaintiffs assert that the Defendants received a preliminary report from Urbana Consulting regarding the disputed traffic and sidewalk issues, and that the

report was kept "secret from plaintiffs." *Id.* ¶ 854. However, the Amended Complaint itself establishes that the recommendations of that report were discussed at an open joint meeting of Tenafly and the BOE in May 2011. *Id.* ¶¶ 43, 856. Although the Plaintiffs did not attend this meeting, they allege that "other residents" did attend. *Id.* ¶ 859–861. Indeed, it was based on reports from those residents that Plaintiffs alleged that Urbana Consulting representatives "professed ignorance" about traffic patterns. *Id.*

Overall, the allegations of Count 20 are speculative and conclusory. The reader is to infer, for example, that, because email was employed, there were secret deliberations between BOE and Council members regarding the subject-matter of this complaint, or that because the Defendants reviewed the Urbana report before the public meeting, illegal secret deliberations occurred. *See id.* ¶¶ 396–399. These allegations, even viewed in the light most favorable to the Plaintiffs, do not establish secret proceedings, let alone a "pattern" of secret proceedings. They fall short of establishing a cognizable claim for injunctive relief under OPMA. Count 20 will be dismissed for failure to state a claim.

***g.* Attractive Nuisance (Count 21)**

Count 21 alleges that the Defendants "created or perpetrated" attractive nuisances near or around their property in the form of the creek, playground, student pick-up/ drop-off zone, and sidewalk. Am. Compl. ¶¶ 1170–1171. In addition to compensatory damages, they seek an injunction requiring the Defendants to remove the playground and all "sidewalks or platforms that connect to the Creek," to supervise children in the creek area, and to halt dangerous construction near the creek. *Id.* ¶¶ 1171.

***13** Under New Jersey law, the attractive nuisance doctrine does not apply to public entities. *Lopez v. N.J. Transit,* 295 N.J.Super. 196, 203, 684 A.2d 986, 990 (App.Div.1996); *Kolitch v. Lindedahl,* 100 N.J. 485, 492, 497 A.2d 183, 187 (1985). The cause of action to which this claim comes closest is a claim for a dangerous condition on a public entity's property, which must be brought under the New Jersey Tort Claims Act ("TCA"). *Kolitch,* 100 N.J. 485, 497 A.2d 183 at 187 (citing *Brown v. Brown,* 86 N.J. 565, 575, 432 A.2d 493 (1981)).

To state a claim for a dangerous condition, a plaintiff must allege that the property was in a dangerous condition at the time of the injury; that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; and that a public employee created the dangerous condition or that the public entity had notice in time to protect against the condition itself; and an injury was proximately caused by the dangerous condition. N.J.S.A. 59:4–2. Even when the claim is for a declaratory judgment or injunction, standing requirements dictate that the issue presented must be more than an "abstract, hypothetical or contingent" one. *St. Thomas–St. John Hotel & Tourism Ass'n v. Gov't of the U.S. Virgin Islands,* 218 F.3d 232, 240 (3d Cir.2000) (quoting *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945)). Finally, there can be no recovery under the statute unless the action or inaction on the part of the public entity in protecting against the condition was "palpably unreasonable." *Id.*

Certain of these allegations—the notion that a school playground constitutes an attractive nuisance, for example—may lack plausibility. I need not reach the reasonableness of any action or inaction by the Defendants, however, because the Plaintiffs have failed to plead an injury or danger to themselves as required under N.J.S.A. 59:4–2. Without an adequate allegation of actual or threatened injury proximately related to the alleged dangerous condition, Plaintiffs lack standing and there is no cause of action under the statute. *Id.; Furey v. Cnty. of Ocean,* 272 N.J.Super. 300, 309, 641 A.2d 1091, 1096 (N.J.Super.Ct.App.Div.1994). Therefore, Count 21 will be dismissed pursuant to Rules 12(b)(1) and 12(b)(6).

***h.* Injunction Against Threatened Violation of ADA (Count 22)**

The Plaintiffs seek to enjoin the construction of a second sidewalk, adjacent to their property on Downey Drive, claiming that it threatens to violate the Americans with Disabilities Act ("ADA"). When the Amended Complaint was filed, the second sidewalk had not yet been completed, *see* Am. Compl. ¶¶ 1173–1175, but now it has. The BOE does not address this Count in its motion to dismiss, but the completion of the second sidewalk has mooted the claim, depriving the Court of jurisdiction. *See* Def. Br. at 5; *Weiss v. Regal Collections,* 385 F.3d 337, 340 (3d Cir.2004) (court no longer has subject-matter jurisdiction when claim is moot because its jurisdiction is limited to "cases and controversies" under Art. III of the Constitution). Mootness aside, the Plaintiffs have not asserted any basis for standing under the ADA because

they have failed to allege a cognizable injury to themselves. *Doe v. Nat'l Bd. of Med. Examiners,* 199 F.3d 146, 152 (3d Cir.1999) (injury allegations are "necessary elements" of the plaintiffs' case).

***14** Because Count 22 is moot and does not allege an injury, it will be dismissed pursuant to Rule 12(b)(1).

***i.* Flooding—Damages and Injunction (Count 23)**

The Plaintiffs allege that the BOE's parking lot "routinely floods" into their backyard, and that the Defendants have breached their duty to maintain proper working drainage, to take precautions for managing storm water, and to avoid flooding. Am. Compl. ¶¶ 1178–1180. The flooding, they allege, is "interfering with the plaintiffs' use and enjoyment of their property and diminishing its value." *Id.* ¶ 764.

The Plaintiffs do not specify the statutory or common law basis for this cause of action, which seeks both damages and an injunction. *Id.* ¶ 1181. Their claim for damages could potentially be stated as a New Jersey Tort Claims Act ("TCA") claim, although the Plaintiffs would then face some procedural hurdles. [10] In support of the injunctive relief, Plaintiffs may have intended to plead a continuing nuisance claim. *See Sheppard v. Twp. of Frankford,* 261 N.J.Super. 5, 617 A.2d 666, 699 (N.J.Super.Ct.App.Div.1992). [11] The Amended Complaint fails to specify either of these potential causes of action.

Regardless of how the claim is characterized, however, the Plaintiffs have not factually alleged that the Defendants have caused, or are responsible for, flooding on their property. The Amended Complaint itself notes that Tenafly has "well publicized" flooding problems. *Id.* ¶ 754, 617 A.2d 666. According to a report from the Tenafly Environmental Commission, "[d]rainage and storm water runoff issues are particularly sensitive to the borough, as Tenafly is part of the Tenakill Brook Watershed." *Id.* ¶ 755, 617 A.2d 666. The Amended Complaint also explains that Tenafly has taken actions to improve the flooding issues in the town, digging up entire streets near Plaintiffs' home and replacing or renovating underground drainage systems. *Id.* ¶ 757, 617 A.2d 666. Plaintiffs also allege that the Mayor came to their property to view "water, leaves and debris" that entered their property under their back fence. *Id.* ¶ 776, 617 A.2d 666.

The missing piece is a plausible allegation that Defendants' actions have caused, or that Defendants as public entities are legally responsible for, the flooding. To say that flooding occurs on Plaintiffs' property, under these circumstances, does not support a plausible inference that, for example, something about Defendants' management of the nearby school property caused it. As the Amended Complaint acknowledges, flooding is a pervasive problem in the Borough. These mixed allegations do not establish that the Defendants are in any way causing or responsible for this particular flooding. The allegations in the Amended Complaint thus fail to establish any cognizable claim for an injunction or for damages under the TCA. Count 24 will be dismissed for failure to state a claim.

***j.* Trespass (Count 25)**

Count 25 alleges that the Defendants "purposefully and knowingly" interfered with Plaintiffs' property, right of way and easement to use the abutting public street. Am. Compl. ¶ 1193. The Defendants allegedly created artificial and man-made conditions that led children "under the care and responsibility of defendants" to "routinely" trespass on the Plaintiffs' property. *Id.* ¶ 1194–1196. The trespass claim encompasses two essential allegations: (1) that the traffic ordinances and parking policy constitute a trespass on the plaintiffs' right of way and easement to use the public road, and (2) that children from the school trespass on the Plaintiffs' land while playing in the creek and on the school playground. *Id.* ¶¶ 265, 725–739. The Plaintiffs have not alleged an actionable trespass claim.

***15** First, the Defendants do not state sufficient facts to support any claim that the parking policy or traffic ordinances constituted a trespass. An action for trespass arises under New Jersey law upon the "unauthorized entry onto another's property, real or personal." *Pinkowski v. Twp. of Montclair,* 299 N.J.Super. 557, 691 A.2d 837, 843 (N.J.Sup.Ct.App.Div.1997). Plaintiffs cannot state a claim for trespass on a public road. *See Miller v. Pennsylvania–Reading Seashore Lines,* 187 A. 332, 333, 117 N.J.L. 152, 154 (Ct. of Errors & App.1936). *See also Osborne v. Butcher,* 26 N.J.L. 308, 309–10 (N.J.1857) (obstruction to right of way is not a trespass, but a trespass on the case); Am. Compl. ¶¶ 178, 265, 1193. Further, the allegations regarding interference with the Plaintiffs' right of way merely state conclusions and fail to meet the *Twombly/Iqbal* pleading standard. *Twombly,* 550 U.S. at 555.

Second, the Defendants are not liable for any alleged trespass by the school children. Under New Jersey law, a parent is not liable for the trespass of his or her child. *McCauley v. Wood,* 2 N.J.L. 86, 1 Penning. 86 (N.J.1806); *see also Starego v. Soboliski,* 93 A.2d 169, 170–71, 11 N.J. 29 (1952) (holding that master/servant relationship must be established for trespass liability). There is no reason that the Defendants' legal duty to supervise the school children would be greater than that of the parents. No particular wrongful act or violation of an accepted standard of school supervision is alleged.

Count 25, the trespass claim, will also be dismissed pursuant to Rule 12(b)(6).

***k.* Violation of SESCA (Count 26)**

Count 26 seeks to enjoin the Defendants from construction activities and compel them to restore lands "in and around" Plaintiffs' home, alleging a violation of the Soil Erosion and Sediment Control Act ("SESCA"). Am. Compl. ¶ 1200 (citing N.J.S .A. 4:24–39). SESCA contains no private right of action; under the statute, only the municipality or district may bring suit. N.J.S.A. 4:24–53; *accord N.J. Dep't of Env't Prot. and Energy v. T.E. Warren, Inc.,* 270 N.J.Super. 546, 637 A.2d 591, 593 (N.J.Sup.Ct.App.Div.1994). Count 26 will be dismissed for failure to state a claim.

***l.* Disguised Tax Increase—Violation of N.J. Constitution Uniformity Clause (Count 29)**

Count 29 of the Amended Complaint alleges a violation of the New Jersey Constitution Uniformity Clause. According to Count 29, the shift of the liabilities and costs relating to the supervision of children, removal of snow, ice, and debris, and the maintenance and repair of the new sidewalk are tantamount to an increase in the Plaintiffs' school or property tax. Am. Compl. ¶ 1213. The General Ordinances cited in the Complaint, 12–3.1 and 12–3.2, are applicable to all "owners and tenants" of property "abutting or bordering upon sidewalks." Tenafly, N.J. Gen. Ordinance ch. 12–3.1. If any such owner or tenant does not remove all snow and ice within twenty-four hours, after three days' notice, the Superintendent may arrange for removal and add the cost added to the owner or tenant's property tax bill. Tenafly, N.J. Gen. Ordinance ch. 12–3.2. The Plaintiffs describe this requirement as "unfair and disproportionate treatment" and a "disguised property tax hike ." Am. Compl. ¶¶ 1213–1215.

***16** The Plaintiffs' allegations do not adequately plead a cause of action. The New Jersey Uniformity Clause requires that all real property be "assessed and taxed ... according to the same standard of value ... [and] at the general tax rate of the taxing district in which the property is situated...." N.J. Const., Art. VIII, § 1, ¶ 1(a); *Mobil Oil Corp. v. Twp. of Greenwich,* 22 N.J.Tax 1, 8 (N.J. Tax Ct.2004) (citing same). Cases under the Uniformity Clause generally involve such matters as property assessments and classification of property. *See e.g. Twp. of West Milford v. Van Decker,* 120 N.J. 354, 576 A.2d 881 (N.J.1990) (legality of spot assessments under Uniformity Clause); *Mobil Oil Corp., supra* (distinguishing between real and personal property; only real property is subject to clause); *Twp. of Jefferson v. Morris Cnty. Bd. of Taxation,* 26 N.J.Tax 129 (N.J. Tax Ct.2011) (use of equalization tables to assess property value).

The Plaintiffs have not pleaded facts showing that their property has been assessed or taxed on any basis that is not generally applicable. Their conclusory statement that the sidewalks on Downey Drive give rise to a "disproportionate" tax increase is without any factual support. The Ordinance, of course, applies to all owners and tenants in Tenafly whose properties abut or border sidewalks. And of course it is true that all properties are not identical or identically situated, and that the particular circumstances of a property may result in certain incidental costs. *See* Am. Compl. ¶¶ 1213–14. But the Plaintiffs do not adequately plead "unfair and disproportionate treatment" constituting a non-uniform tax in violation of the State Constitution's Uniformity Clause.

Count 29 will therefore be dismissed pursuant to Rule 12(b)(6).

III. CONCLUSION

For the reasons discussed above, the BOE's motion to dismiss the Am. Compl. is **DENIED** in part and **GRANTED** in part. It is **DENIED** as to Counts 2, 3, 10, 17, and 32, and it is **GRANTED** as to Counts 4, 6, 15, 16, 18, 20, 21, 22, 23, 25, 26, and 29.

An Order will be entered in accordance with this Opinion.

All Citations

Not Reported in F.Supp.3d, 2014 WL 31350

Footnotes

1 The Plaintiffs sought to enjoin the construction of the second sidewalk on the north side of the street (where Plaintiffs' house is located). (Docket No. 30). That application was denied by Judge Salas on July 31, 2012, and the sidewalk was completed. *See* Docket No. 34; Def. Br. at 5.

2 Only BOE has moved to dismiss; the Borough of Tenafly has answered the Amended Complaint. The rulings herein may apply to the Borough, however, as the context dictates.

3 Pursuant to N.J.S.A. 10:4–8(d), "adequate notice" is defined in part as written advance notice that shall be (1) "prominently posted in at least one public place reserved for such or similar announcements; (2) provided to at least two (2) newspapers with the greatest likelihood of informing the public body of the meeting; and (3) filed with the clerk of the municipality."

4 Available at http://mut cd.fhwa.dot.gov/htm/2009r1r2/html_ index.htm.

5 The Plaintiffs cite 6C.01(11), which provides that "[p]rovisions for effective continuity of railroad service and acceptable access to abutting property owners and businesses should also be incorporated into the [temporary traffic control] planning process." I take this citation to be an error.

6 The Plaintiffs cite numerous other statutory and equitable bases for relief under this Count: N.J.S.A. 39:4–197(1)(b) (limiting municipality from passing ordinances restricting commercial traffic); N.J.S.A. 39:4–85.1 (providing that a vehicle on a one-way street only be driven in the designated direction); N.J.S.A. 39:4–8(b)(3) (incorrectly cited as 39:4–8(3)) (requiring that the municipal engineer certify to the municipality that any designation of erection of signs or placement of pavement markings has been approved after investigation of the circumstances); and public policy. I do not find these additional bases for relief particularly convincing, but because I uphold the cause of action under the MUTCD and NJSA 39:4–8 and 39:4–197, this Count will survive the motion to dismiss.

7 Generally, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. The court may, however, consider a document "integral to or explicitly relied upon in the complaint." *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir.1997) (citation and emphasis omitted).

8 Plaintiffs separately allege a free speech claim against the Borough in Count One. Am. Compl. ¶ 1050. Because that Count was not alleged against the BOE, and Count 6 contains no distinct free speech allegations, it is not considered here.

9 Generic or diffuse conflicts are not covered. Thus a school official will not be deemed to have a conflict of interest if "by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group." N.J.S.A. 18A:12–24(h). The statute also would not appear to apply to Plaintiffs' complaint of Tenafly's "usurpation" of the role of the planning and zoning boards, and Tenafly's "policy of acting as applicant and/or arbiter over matters concerning its joint plans" with the BOE. Am. Compl. ¶ 1146. Tenafly, however, has not moved to dismiss the Complaint.

10 The BOE argues that the Plaintiffs failed to notify them of the claim as required under the TCA. Def. Br. at 51. Under the TCA, the suit will be dismissed if the claimant did not provide notice of the claim within 90 days of the accrual of the action. N.J.S.A. 59:8–8; *Davis v. Twp. Of Paulsboro,* 371 F.Supp.2d 611, 617–18 (D.N.J.2005). A New Jersey Superior Court Judge may, at his or her discretion, extend the notice period to one year from the claim's accrual if the public entity has not been prejudiced. NJSA 59:8–9.

11 In considering an injunction, the Court would look at: (1) the character of the interest to be protected; (2) the relative adequacy of the injunction to the plaintiff as compared with other remedies; (3) the unreasonable delay in bringing suit; (4) any related misconduct by plaintiff; (5) the comparison of hardship to plaintiff if relief is denied, and hardship to defendant if relief is granted; (6) the interests of others, including the public; and (7) the practicality of framing the order or judgment. *Sheppard,* 617 A.2d at 699 (citing Restatement (Second) of Torts § 936 (1977)).

Exhibit 3

2014 WL 8728599
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

MARTELL'S TIKI BAR, INC., Plaintiff–Appellant,
and
Jenkinson's Pavilion, Inc., Plaintiff,
v.
GOVERNING BODY OF the BOROUGH OF POINT PLEASANT BEACH, The Borough of Point Pleasant Beach, Vincent Barrella, Bret Gordon, Kristine Tooker and Michael Corbally, in their Individual and Official Capacity as Members of the Governing Body, Defendants–Respondents.

Argued Oct. 28, 2014.
|
Decided April 28, 2015.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L–2057–12.

Attorneys and Law Firms

R.S. Gasiorowski argued the cause for appellant (Gasiorowski & Holobinko, attorneys; Mr. Gasiorowski, of counsel; Cathy S. Gasiorowski, on the briefs).

Sean D. Gertner argued the cause for respondents (Gertner Mandel & Peslak, L.L.C., attorneys; Mr. Gertner, of counsel and on the brief; Jena R. Silverman, on the brief).

Before Judges NUGENT, ACCURSO and MANAHAN.

Opinion

PER CURIAM.

***1** Plaintiff Martell's Tiki Bar, Inc. appeals from a final order of summary judgment dismissing its complaint against defendants Borough of Point Pleasant Beach and members of its governing body seeking declaratory relief and alleging violations of the New Jersey Civil Rights Act, *N.J.S.A.* 10:6–2c, in regard to the Borough's "threat" to enact ordinances restricting Martell's hours of operation unless Martell's agreed to pay significant sums to the municipality. Because we agree with Judge Grasso that counts one through six of Martell's complaint were mooted when the Division of Alcoholic Beverage Control (ABC) stayed enactment of the ordinance and that Martell's failed to state a legally cognizable claim under the Civil Rights Act in count seven, we affirm.

Although the parties dispute the reasons for the ordinances at issue and the governing body's purpose in proposing them, the essential facts of the consideration of the ordinances and the timeline of events are undisputed. Martell's owns and operates a popular restaurant and bar on the Point Pleasant Beach boardwalk. It alleges that the Borough demanded money from it under threat of enacting Ordinance 2012–15, which, as originally conceived, would have required the bar to close at midnight unless it paid a fee, determined by its maximum occupancy, to allow it to continue to serve alcohol until 2:00 a.m.

The ostensible purpose of the ordinance was "to prevent further deterioration of public safety and quality of life" by curtailing the sale of alcohol after midnight while simultaneously allowing licensees "the ability to mitigate any perceived adverse effect" on their businesses by paying a fee which would allow the Borough to provide the "additional police, code enforcement and public works employees required to secure compliance with the provisions of the Alcoholic Beverage Control law and Borough Ordinances and to eliminate disturbing and disorderly conduct occasioned" by the sale of alcohol between midnight and 2:00 a.m. Martell's alleges that the Borough holds it "responsible for changing social mores ... alleged to encourage the excessive use of alcohol and outrageous behavior" and that the structure of the ordinance evidenced the Borough's intention to single it out in "extract[ing] exorbitant fees that would be used to subsidize the Borough's budget rather than accomplish a legitimate purpose of zoning or exercise of police powers."

After initially introducing Ordinance 2012–15, the governing body determined to sever the portion allowing extended hours and incorporate it into its own ordinance. Thereafter, proposed Ordinance 2012–15 provided that "no alcoholic beverages shall be sold, served, delivered to, or consumed in any licensed premises between the hours of 12:00 a.m. and 6:00 a.m.," effectively compelling the

Borough's bars to close at 12:00 a.m. rather than 2:00 a.m. Proposed Ordinance 2012–16 would have permitted licensees to continue to serve alcohol until 2:00 a.m. upon filing a petition requesting extended hours and paying a fee, based on maximum occupancy reduced by 200 and then multiplied by $60.00. [1]

***2** At a public hearing on the proposed ordinances on May 15, 2012, the mayor acknowledged receipt of a letter from the Acting Commissioner of the Department of Community Affairs advising the Borough of the Department's view that proposed Ordinances 2012–15 and 2012–16, considered together, were unlawful and beyond the scope of the powers delegated to the municipality by the State. Specifically, the Commissioner wrote:

> Proposed ordinance 2015 ... changes the closing time for establishments selling alcoholic beverages from 2:00 a.m. to 12:00 a .m. Ordinance 2012–16 ... requires those retail consumption establishments wishing
>
> to retain a 2:00 a.m. closing time to petition the governing body and pay an additional $60.00 per person of occupancy per year.... If approved by the governing body, the extended occupancy would run concurrent with the license term (July 1 through June 30).
>
> Ordinance 2012–16 appears to increase the annual liquor license renewal fee in excess of the maximum fee permitted by *N.J.S.A.* 33:1–12. Although municipalities have the authority to set hours of operation pursuant to *N.J.S.A.* 33:1–40, renewal fees for retail consumption ... are limited
>
> by *N.J.S.A.* 33:1–12. The maximum license fee for retail consumption licenses is $2,500.... *N.J.S.A.* 33:1–12. As to retail consumption licenses, "no ordinance shall be enacted which shall raise or lower the fee to be charged for this license by more than 20% from that charged in the preceding license year or $500, whichever is the lesser." [*Ibid.*]
>
> The conjunctive nature of [Ordinances] 2012–15 and 2012–16 suggests that the Borough is looking to use its power to regulate closing times as a means to increase liquor license fees more than ten times what would be permitted by State statute.
>
> As you know, municipalities are only permitted to exercise those powers expressly granted to them under law. However, the Borough appears to be undertaking an unlawful effort to institute a fee that it has no power to institute.

The governing body adopted Ordinance 2012–15 that evening with an effective date of July 1, but tabled Ordinance 2012–16.

On June 5, Martell's and Jenkinson's Pavilion, Inc. filed a petition of appeal and request for interim relief with ABC to contest the adoption and enforcement of Ordinance 2012–15. On June 29, the Director of ABC stayed the ordinance pending appeal. Although acknowledging the Borough's power to limit the hours of operation of licensed establishments under *N.J.S.A.* 33:1–40, the Director noted the same statute permits appeals of hours limitations to him, and that he was permitted to refuse to apply an ordinance upon determining it was adopted "in bad faith or for an illegitimate purpose," relying on *Great Atl. and Pac. Tea Co. v. Mayor and Council of Pt. Pleasant Beach,* 220 *N.J.Super.* 119 (App.Div.1987). Determining "the substantial factual history" surrounding consideration of Ordinances 2012–15 and 2012–16 "raises at least the need for an inquiry into the allegations of bad faith or illegitimate purpose," the Director concluded a hearing before the Office of Administrative Law was required. He further determined to stay Ordinance 2012–15 because in the event the licensees were successful, "there is no method of redress for them to recoup the financial losses they would incur while the earlier closing time was in effect."

***3** On the same day the Director entered the order staying the ordinance, Martell's and Jenkinson's filed a complaint in lieu of prerogative writs in Superior Court, seeking to invalidate it. The seven count complaint alleged (1) the Borough had induced Martell's and Jenkinson's to purchase and invest in their commercial properties and businesses; that they had done so in response to those inducements "with the representation and expectation of continued ability to operate their legal restaurant/tavern facilities during normal and reasonable operating hours as established by past practice over many years," and that adoption of Ordinance 2012–15 being "contrary to the inducements and practices over many years upon which the plaintiffs have relied and acted upon," was barred by equitable estoppel; (2) the ordinance was adopted in

violation of the Local Government Ethics Law, *N.J.S.A.* 40A:9–22.1 *et seq.;* (3) the ordinance had no rational or legitimate basis and was motivated by illegal and improper reasons; (4) the enactment of the ordinance violated the Public Trust Doctrine; (5) the ordinance was void for vagueness; (6) the ordinance was arbitrary, capricious and unreasonable; and (7) the ordinance violated plaintiff's rights under the New Jersey Civil Rights Act, thus entitling plaintiffs to attorney's fees, compensatory damages, and a civil penalty.

Defendants moved to dismiss the complaint in lieu of answer pursuant to *R.* 4:6–2. Judge Grasso denied the motion and temporarily stayed the matter pending resolution of the action before ABC, which he found had assumed primary jurisdiction over the controversy.

Following the devastation of super storm Sandy, the Borough on February 19, 2013 adopted Ordinance 2013–01, which rescinded Ordinance 2012–15 and restored the 2:00 a.m. closing time for all ABC licensed premises in the Borough. Following the rescission, all parties to the administrative appeal agreed it could be marked as settled and dismissed by ABC. Thereafter, Jenkinson's and defendants entered into a stipulation of dismissal, and the matter continued with Martell's as the sole plaintiff.

Defendants subsequently filed a motion for summary judgment to dismiss plaintiff's complaint, which the court granted on October 28, 2013. Judge Grasso found counts one through six of plaintiff's complaint were rendered moot when Ordinance 2012–15 was rescinded, a point Martell's conceded at oral argument on the motion.

With regard to count seven, plaintiff's claims under the New Jersey Civil Rights Act, Judge Grasso found "that the Borough's stated intention to enact Ordinance 2012–16 did not constitute a threat, intimidation, or coercion sufficient to warrant civil penalties" under the Act. The judge looked to *Riggs v. Long Beach,* 109 *N.J.* 601, 613 (1988), which commands a reviewing court presented with both valid and invalid purposes for a municipality's adoption of an ordinance to presume a valid purpose prevailed. Thus, accepting as true Martell's allegations that the Borough acted to extort significant sums from Martell's by threatening to restrict its hours of operation, the court found them insufficient as a matter of law to overcome the presumption created by the uncontroverted evidence of the Borough's valid purpose, namely "to stop the 'drunken raucous behavior' caused by bar patrons as described by residents during the public hearings." [2]

***4** The judge further found imposing "civil penalties on a municipality for words spoken during its deliberations" would undesirably chill the legislative process. Finally, Judge Grasso noted that Martell's had failed to cite any case where "a court has awarded civil penalties against a municipality for passing an allegedly invalid ordinance, and then rescinding it before the law takes effect." The judge declined to do so here "because it would constitute a purely academic exercise."

The judge also rejected Martell's claim to attorney's fees under the Civil Rights Act. Accepting for purposes of the motion that its lawsuit caused the Borough to rescind the ordinance, the judge nevertheless rejected Martell's claim that it qualified for fees under a catalyst theory. *See D. Russo, Inc. v. Union,* 417 *N.J.Super.* 384, 391 (App.Div.2010). Judge Grasso found Martell's could not prove it had a valid Civil Rights Act claim and thus that it would have prevailed had the Borough not rescinded its ordinance. Fundamentally, the judge concluded that New Jersey law does not generally treat a liquor license as property but rather as a temporary permit, which may not be revoked without due process. *See Boss Co. v. Bd. of Comm'rs.,* 40 *N.J.* 379, 384 (1963); *In re Schneider,* 12 *N.J.Super.* 449, 456 (App.Div.1951). Accordingly, he found "a liquor license affords its holder some procedural protections but it does not constitute a substantive right that would be protected by the Civil Rights Act."

The judge rejected Martell's alternate theory, that the Borough interfered with its right to do business, because no interference occurred as the ordinance never took effect. Finally, the judge noted that Martell's filed its Civil Rights Act claim in Superior Court only after enforcement of the ordinance was stayed by the ABC director, "[e]ssentially ... piggyback[ing] this Civil Rights Act claim onto its ABC appeal." Reasoning that our law would not allow Martell's to recover its attorney's fees for that administrative appeal in this action, the judge rejected reliance on the ABC stay to prove Martell's Civil Rights Action claim had an adequate basis in law. Martell's appeals.

We review summary judgment using the same standard that governs the trial court. *Murray v. Plainfield Rescue Squad,* 210 *N.J.* 581, 584 (2012). We accept defendant's

version of plaintiffs' conduct as true and give defendant the benefit of all reasonable inferences from the facts. *Baliko v. Stecker,* 275 *N.J.Super.* 182, 186 (App.Div.1994). Our task here is thus to determine whether Judge Grasso was correct in finding the facts, viewed most favorably to Martell's, do not state a claim cognizable under the Civil Rights Act.

Martell's spends the bulk of its brief taking issue with Judge Grasso's finding that it "enjoys no protected property right to its liquor license." It argues that "[w]hether one calls it 'property' or a 'privilege,' [Martell's] interest in its liquor license is by no means meager, transitory, or uncertain. Pursuant to state and federal law, [Martell's] is entitled to due process prior to the revocation or nonrenewal of its license."

***5** We agree, as did Judge Grasso. As the Supreme Court has recently explained, however, New Jersey's Civil Rights Act, unlike the analogous Federal Civil Rights Act, 42 *U.S.C.A.* § 1983, does not apply to violations of procedural due process. *Tumpson v. Farina,* 218 *N.J.* 450, 477 (2014) ("Section 1983 provides remedies for the deprivation of both procedural and substantive rights while *N.J.S.A.* 10:6–2(c) provides remedies only for the violation of substantive rights."). Accordingly, Martell's claim that the threat or deprivation of its liquor license without due process is an interest cognizable under the Civil Rights Act is plainly without merit. [3]

We also reject Martell's contention that Ordinance 2012–15 would violate its substantive due process right to a liquor license. "Typically, a legislative act will withstand substantive due process challenge if the government 'identifies a legitimate state interest that the Legislature could rationally conclude was served by the statute.' " *Nicholas v. Pa. State Univ.,* 227 *F.*3d 133, 139 (3d Cir.2000). Only "legislative acts that burden certain 'fundamental' rights may be subject to stricter scrutiny." *Ibid.*

Here, because the Borough articulated what is clearly a "legitimate state interest"—that is, "to prevent further deterioration of public safety and quality of life" by curtailing the sale of alcohol after midnight—and because a liquor license can hardly be deemed a "fundamental" right, a substantive due process claim fails. *See Rivkin v. Dover Twp. Rent Leveling Bd.,* 143 *N.J.* 352, 366 (1996) ("In the light of the clearly evident trend of the Supreme Court to limit substantive due process rights under the Fourteenth Amendment, we believe that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation.").

Although Martell's argued in the trial court that it was entitled to attorney's fees under *N.J.S.A.* 10:6–2f, and preserved the claim in its notice of appeal, it has not briefed the issue. Accordingly, we deem it abandoned. *539 Absecon Blvd., L.L.C. v. Shan Enters. Ltd. P'ship,* 406 *N.J.Super.* 242, 272 n. 10 (App.Div.), *certif. denied,* 199 *N.J.* 541 (2009); *see also* Pressler & Verniero, *Current N.J. Court Rules,* comment 4 on *R.* 2:6–2 (2015).

Because Martell's conceded that counts one through six of its complaint were mooted when the ABC director stayed enactment of Ordinance 2012–15, and we agree with Judge Grasso that its liquor license does not afford Martell's a substantive right subject to protection under the Civil Rights Act, we affirm the grant of summary judgment dismissing its complaint.

Affirmed.

All Citations

Not Reported in A.3d, 2014 WL 8728599

Footnotes

1 Martell's contends this formula, and a discount to holders of club licenses, effectively excludes virtually every other bar in the Borough, with the exception of its co-plaintiff Jenkinson's Pavilion, Inc., from the reach of proposed Ordinance 2012–16, reflecting the governing body's intent to single out the large boardwalk bars for unfair treatment.

2 Martell's acknowledges the evidence in the record of statistics from the Borough's police department indicating that over forty percent of all citations in the Borough are issued between the hours of midnight and 3:00 a.m. It contends, however, that there is no proof "that citations were issued to people who patronized Martell's or that [it] improperly or negligently served."

3 We further note that procedural due process is generally not implicated by legislative enactments because the legislative process itself provides all process due. *See Kelly v. Hackensack Meadowlands Dev. Com.,* 172 *N.J.Super.* 223, 229 (App.Div.) ("[E]xercise of the legislative power need not be attended by the gamut of procedural due process safeguards which govern quasi-judicial proceedings."), *certif. denied,* 85 *N.J.* 104 (1980).

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Exhibit 4

2012 WL 246382
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Robert J. TRAVISANO, Plaintiff–Appellant/Cross–Respondent,
v.
BOARD OF CHOSEN FREEHOLDERS FOR UNION COUNTY, Defendant–Respondent,
and
M. Elizabeth Genievich, Alfred Faella and Charlotte Defilippo, in their official and individual capacities, Defendants,
and
George W. Devanney, Defendant–Respondent/Cross–Appellant.

Argued Nov. 1, 2011.
|
Decided Jan. 27, 2012.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L–1592–07.

Attorneys and Law Firms

Mark W. Thompson argued the cause for appellant (Wong Fleming, attorneys; Linda Wong and Daniel C. Fleming, of counsel; Mr. Thompson, on the brief).

Kathryn V. Hatfield argued the cause for respondent/cross-appellant (Bauch Zucker Hatfield, LLC, attorneys; Ms. Hatfield and Evan M. Lison, of counsel and on the brief).

Edward J. Kologi argued the cause for respondent Board of Chosen Freeholders (Kologi Simitz, attorneys; Mr. Kologi and Michael S. Simitz, of counsel and on the brief).

Norman W. Albert, First Deputy County Counsel, argued the cause for respondent Union County (Robert E. Barry, Union County Counsel, attorney; Mr. Albert and Brian P. Trelease, Assistant County Counsel, on the brief).

Before Judges CARCHMAN, FISHER and BAXTER.

Opinion

PER CURIAM.

***1** Plaintiff Robert J. Travisano, a former Union County employee, alleged in this action that he was discriminated and retaliated against based on his age, disability, and political affiliation, asserting violations of the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5–1 to –49, and the New Jersey Civil Rights Act (CRA), *N.J.S.A.* 10:6–1 to –2, as well as other common law torts. He claims in this appeal, among other things, that the trial court erred in granting summary judgment in favor of defendants George W. Devanney, who was the Union County Manager, and the Board of Chosen Freeholders (the Board), and in denying him leave to amend his complaint to add Union County as a party late in the litigation. We reject these and all of plaintiff's other arguments and affirm.

I

On May 3, 2007, plaintiff filed a complaint against the Board and Devanney, as well as M. Elizabeth Genievich, the Union County Deputy Manager, Alfred Faella, the Director of Union County's Department of Economic Development, and Charlotte DeFilippo, the Chair of the Union County Democratic Committee and Executive Director of the Union County Improvement Authority. The complaint alleged discrimination based upon age and physical disability in violation of the LAD, political affiliation discrimination in violation of the CRA and the New Jersey Constitution, and intentional infliction of emotional distress. All individual defendants were named "in their official and individual capacities." Union County was not named as a defendant.

DeFilippo, Genievich, and Faella successfully obtained summary judgment; those rulings have not been appealed. The Board and Devanney also moved for summary judgment. The motion judge granted summary judgment in favor of the Board. He also granted partial summary judgment in favor of Devanney on plaintiff's claim of intentional infliction of emotional distress but denied summary judgment on plaintiff's LAD and CRA violations against Devanney, for reasons set forth in a written opinion filed on March 9, 2009.

On March 12, 2009, plaintiff moved to amend his complaint to add Union County as a defendant. Devanney cross-moved for reconsideration of the March 9, 2009 order insofar as it partially denied his motion for summary judgment. The motion judge denied leave to amend and also clarified his earlier decision, emphasizing that plaintiff's claim that Devanney aided and abetted LAD violations remained part of the case.

On September 21, 2009, the first scheduled trial date, another judge (hereafter "the trial judge") granted a motion to dismiss with prejudice the claim that Devanney aided and abetted any LAD violation. And subsequent motions led to a dismissal of the constitutional claims against Devanney. Because the trial judge thereby resolved all remaining issues as to all parties, plaintiff appealed, presenting the following arguments for our consideration:

I. THE TRIAL COURT ERRED IN DETERMINING THAT NEITHER THE BOARD NOR DEVANNEY, IN HIS OFFICIAL CAPACITY, WAS TRAVISANO'S "EMPLOYER."

***2** A. Devanney, In His Official Capacity, Was Travisano's "Employer" For Purposes Of The LAD.

B. The Board Should Have Been Subjected To Employer Liability Because It Is Indistinguishable From The County.

II. THE TRIAL COURT ERRED IN DENYING TRAVISANO'S MOTION TO AMEND.

A. The Trial Court Abused Its Discretion By Failing To Conclude That Amendment Would Correct A Mere Misnomer.

B. The Trial Court Failed To Properly Apply *R.* 4:9–3.

III. DEVANNEY CANNOT ASSERT A QUALIFIED IMMUNITY DEFENSE.

A. The Trial Court Should Not Have Permitted Devanney To Assert Qualified Immunity As A Defense On The Eve Of Trial.

B. Devanney Is Not Entitled To Qualified Immunity In This Case.

In his cross-appeal, Devanney argues [1] he was erroneously denied summary judgment on plaintiff's LAD and political affiliation claims because:

I. DEFENDANT DEVANNEY DID NOT INDIVIDUALLY AID OR ABET DISCRIMINATION UNDER THE LAD.

II. EVEN IF THIS COURT WERE TO DETERMINE THAT MR. DEVANNEY WAS PLAINTIFF'S EMPLOYER, MR. DEVANNEY IS STILL ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S LAD CLAIMS.

III. THE MOTION JUDGE ERRED IN DENYING MR. DEVANNEY'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S POLITICAL AFFILIATION CLAIM.

Because we find no merit in plaintiff's arguments, we need not reach the merits of those parts of Devanney's cross-appeal not otherwise incorporated in our disposition of plaintiff's appeal.

II

Because the claims against the Board and Devanney were summarily dismissed, the trial court was required to examine the facts in the light most favorable to plaintiff. *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540 (1995). This court is bound to that same standard. *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.,* 189 *N.J.* 436, 445–46 (2007).

Plaintiff testified at his deposition that, in 1988, he began his employment with Union County. In 1995, plaintiff had surgery to remove a brain tumor, which left him paralyzed on the left side of his face, deaf in his left ear, and with some vision loss in his left eye. He also suffered depression and embarrassment as a result of the effect of the facial paralysis on his appearance.

In 1997, at the request of then County Manager Michael Lapolla, plaintiff began working in Union County's newly-formed Department of Economic Development as an Economic Development Specialist. Plaintiff and Lapolla were childhood friends and remained very close. In 1997, Devanney was the Deputy County Manager, the

Director of the Department of Economic Development, and plaintiff's direct supervisor.

Plaintiff described his relationship with Devanney at the time as "good," and Devanney testified that, prior to the filing of the lawsuit, he considered plaintiff "a friend." Devanney gave plaintiff "very good" performance evaluations, and even appointed him to the chair of the Retail Coalition Alliance. Although Devanney was plaintiff's supervisor, plaintiff also worked for and received assignments from Lapolla.

***3** In 2002, Lapolla resigned as County Manager upon his appointment to the position of Executive Director of the New Jersey Turnpike Authority. Devanney was appointed County Manager, and Genievich was appointed Deputy County Manager. Following this, Devanney made some "wholesale changes" and reorganized the structure of Union County's departments. Plaintiff testified that, soon thereafter, Devanney asked for his resignation, which was refused. Plaintiff claimed he did not know why Devanney asked for his resignation but asserted at his deposition that he believed it was "because of [plaintiff's] relationship with the Lapollas whom Mr. Devanney didn't like." Plaintiff also based this belief on the fact that on two occasions between 1997 and 2000, Devanney told him "he didn't like the way [Lapolla] was running the county, and that certain programs were not up to his liking, and that he would do it differently."

In July 2002, Devanney transferred plaintiff to the Department of Human Services, under the supervision of Frank Guzzo, to work on the new juvenile detention facility. Devanney testified at his deposition that "he always thought [plaintiff] was good on projects" and would "be an asset to that project." In his deposition, however, plaintiff testified that Devanney accused him of giving him a hard time about the transfer; when plaintiff said he did not know what Devanney was talking about, Devanney accused him of being insubordinate and "yelled and screamed" at plaintiff.

Plaintiff testified that Guzzo assigned him a cubicle, which was so small he could hardly fit within it. Guzzo denied plaintiff's request for a different cubicle. Plaintiff testified he also asked Guzzo for work, but for eight months Guzzo gave him no assignments. Although he discussed with Guzzo his dissatisfaction with his assignment in Human Services and the problems he was experiencing, he never discussed it with Devanney and did not know whether Guzzo discussed it with Devanney.

In 2003, Devanney transferred plaintiff to the Department of Parks and Recreation under the supervision of Charles Sigmund. Seven months later, Devanney again transferred plaintiff, this time to the Department of Operations and Facilities, which was then supervised by Michael Lapolla's brother, Richmond Lapolla, who later testified that the Devanney administration was hostile to plaintiff at that time. In an affidavit dated June 13, 2008, Richmond Lapolla related that, soon after plaintiff's transfer to his department, DeFilippo summoned him to her house and asked him "why the Lapolla family was so loyal to the man with the crooked face." Richmond Lapolla "took th[at] statement as a form of intimidation, and ... got the sense that she knew that [plaintiff] would ultimately be terminated."

Plaintiff also testified that while he worked at the Department of Operations and Facilities, Devanney asked Richmond Lapolla, who was in charge of the motor pool, to reclaim the county vehicle that had been assigned to plaintiff since 2000 and to reclaim plaintiff's county-issued laptop and home computers. In his affidavit, Richmond Lapolla explained that he did not remove plaintiff's county-issued vehicle right away. He "asked Devanney for more time to retrieve the vehicle, which Devanney granted without specifying a deadline." Nevertheless, because he did not act sooner, Richmond Lapolla was suspended for two days and Devanney removed the motor pool from his authority.

***4** Devanney testified that he reorganized the Department of Operations and Facilities in 2005. In February 2005, he transferred plaintiff to the Department of Economic Development to work on project management under the supervision of James Daley. Devanney testified that he spoke with plaintiff prior to the transfer and that "[plaintiff] expressed that he'd like to go back to economic development where he had been." Devanney also testified that he viewed plaintiff as "a good project manager and thought" it was "a logical fit."

Plaintiff testified at his deposition that in April or May 2005 he was diagnosed with prostate cancer, which required a radical prostatectomy in August 2005. When he returned to work in October 2005, there were no

medical restrictions placed on his ability to perform his job, except that he was prohibited from lifting anything heavier than twenty-five pounds. He did not ask for any kind of accommodation, and he could not recall suffering "any discrimination on account of [his] disability from the county or any employee of the county when [he] returned."

Faella testified that he became the Director of Economic Development in 2006, when Daley resigned. At that time, he had three major projects that consumed most, if not all, of his time; none of them included plaintiff. He had made the decision to leave unaltered the status quo in the department; nobody was given additional duties and no existing duties were taken away from anyone until he had a chance "to evaluate the entire department and see what was going on." Faella testified that he believed it would take six months for him to complete his evaluation. Plaintiff was not aware of any projects within the department that could have been assigned to him at the time. Nevertheless, plaintiff testified that eventually, Faella asked him to supervise the work of the planners on the Trembley Point project.

Devanney testified that in early 2006, the Union County finance director informed him that the county was facing a budget deficit for the 2006 fiscal year. As a result, the Board approved a budget that implemented both an early retirement incentive program and layoffs, and Devanney advised department heads that they needed to determine "whether or not there were positions within their departments that they could do without." Although he left it up to the department heads to determine whether any positions could be eliminated and if so, which positions, he was ultimately responsible for signing off on their recommendations and did not override any of the recommendations of his department heads.

Faella testified that Devanney wanted to see a minimum of $250,000 savings from each department. On May 1, 2006, Faella forwarded his recommendations for the Department of Economic Development, which included a recommendation that plaintiff's position be eliminated. Faella testified that he did not consider the ages of individuals whose positions were to be eliminated as a result of his recommendation. [2] Faella also recommended the elimination of the Workforce Investment Board Director, a position held by Antonio Rivera. Rivera was not laid off but, instead, exercised his demotional (bumping) rights, which resulted in his transfer to Human Services.

***5** Faella testified that he did not contact the department head of Administrative Services about the possibility of reassigning plaintiff, and that he was unaware of any vacant positions within the Department of Economic Development that plaintiff could have filled. Devanney testified that he did not inquire of Faella whether plaintiff could have been reassigned; however, as part of their overall compliance with law, "that was something that was asked of the department heads to do."

Devanney testified that ultimately it was he who decided whether to accept the recommendations of his department heads. He did not accept the department heads' recommendations regarding layoffs wholesale; rather, he chose which employees to lay off based on those recommendations. For example, Faella recommended that eight positions be eliminated but only four were actually eliminated, and Sigmund recommended that four positions be cut from the Department of Parks and Services, yet no positions were eliminated. At his deposition, Devanney could not recall why some recommendations were followed and others were not.

By letter dated June 1, 2006, Devanney forwarded to the Department of Personnel Management, the "County of Union Layoff Plan," which explained the reason for the layoffs—"economy and efficiency"—and delineated the positions affected. The layoff plan specifically identified seventeen affected positions, including plaintiff's. The plan also set forth alternatives to layoffs, including: "[a] hiring freeze for all county positions," "[a] voluntary Furlough Program," "[a]n Early Retirement Program," "[use of] the Intergovernmental Transfer Program," and reorganizing the Departments of Public Works and Economic Development.

County counsel, Kathryn V. Hatfield, Esq., certified that the layoff plan was subject to State approval. She also explained that the Department of Personnel was "required to analyze whether each position identified for layoff was eligible for lateral or demotional (bumping) rights. Ultimately, it was the Department of Personnel that would decide whether a particular individual would be eligible for another position within the County by virtue of those bumping rights." The State approved the layoff plan. Although seventeen positions were subject to

layoffs, "due to bumping rights and eligible individuals taking advantage of the County's Early Retirement Incentive Program," only two individuals were actually laid off.

By letter dated June 30, 2006, Devanney provided plaintiff with notice of layoff pursuant to *N.J.S.A.* 11A:8–1; the notice stated:

> Since your position is subject to layoff, you may have the right to displace employees in other positions. A copy of this notice is being forwarded to the New Jersey Department of Personnel, which will be responsible for determining your seniority, lateral displacement, demotion, and/or special reemployment rights. The Department of Personnel will notify both you and the appointment authority of its determinations prior to the effective date of the layoff action.

***6** On August 18, 2006, the Department of Personnel informed plaintiff by letter that his layoff had been recorded and advised him of his special reemployment rights. Plaintiff chose instead to participate in the early retirement offer in lieu of being laid off; his retirement was effective August 31, 2006. He was then sixty-one years old.

Notwithstanding his admitted familiarity with the Union County policy against workplace discrimination and harassment, plaintiff never complained to Devanney, Faella, or anyone else that he was the victim of discrimination, disparate treatment, or a hostile work environment until, on May 3, 2007, approximately nine months after he retired, plaintiff filed his complaint in this suit. [3]

With regard to the political affiliation claim, plaintiff asserted in the complaint that, notwithstanding the fact that Lapolla and Devanney were Democrats, there was a political divide between the two. According to plaintiff's deposition testimony, there were political factions in the Democratic Party in Union County: "the associates, workers, and friends of Michael Lapolla and the associates, friends, and workers of Mr. Devanney." He could not, however, identify any of the people, other than himself, aligned with the so-called Lapolla faction, or, for that matter, any of the people in the Devanney faction.

III

In his appeal, plaintiff first contends that the motion judge erred in determining that neither the Board nor Devanney was plaintiff's "employer" under the LAD. We reject these arguments; indeed, plaintiff well understood his employer was Union County, as he acknowledged in his complaint. [4]

We start with the understanding that the LAD prohibits "employers" from engaging in unlawful employment practices and discrimination. *N.J.S.A.* 10:5–12(a). In explaining the meaning of this statute, we have held that "the LAD was intended to prohibit discrimination in the context of an employer/employee relationship," *Pukowsky v. Caruso,* 312 *N.J.Super.* 171, 184 (App.Div.1998), and that the absence of an employment relationship between a plaintiff and a defendant will preclude liability. *Thomas v. Cnty. of Camden,* 386 *N.J.Super.* 582, 594 (App.Div.2006).

The LAD defines "employer" as including "all persons as defined in [*N.J.S.A.* 10:5–5(a) [5]] unless otherwise specifically exempt under another section of this act, and includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." *N.J.S.A.* 10:5–5(e). Although the LAD's definitions of the terms "employer" and "employee" are admittedly broad, *D'Annunzio v. Prudential Ins. Co. of Am.,* 383 *N.J.Super.* 270, 277 (App.Div.2006), *aff'd as modified,* 192 *N.J.* 110 (2007), it has been established that a supervisor or co-worker is not an "employer" under the LAD. *Tarr v. Ciasulli,* 181 *N.J.* 70, 82–83 (2004). The LAD does, however, make it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act." *N.J.S.A.* 10:5–12(e). *See Tarr, supra,* 181 *N.J.* at 83. But there is no liability for aiding or abetting [6] absent a finding that the employer violated the LAD.

***7** Plaintiff argues that Devanney, in his official capacity, was his employer for purposes of the LAD. However, in both his complaint and motion for summary judgment,

plaintiff concedes Union County was his employer. Notwithstanding that this acknowledgement is fatal to plaintiff's claim in this regard, plaintiff presents a three-fold argument, asserting: (1) the *Pukowsky* factors establish that Devanney was his employer; (2) Devanney was a "public officer" within the LAD's meaning of "employer"; and (3) Devanney, in his official capacity, was an agent of Union County and therefore plaintiff's employer.

As to the first aspect, plaintiff's reliance on *Pukowsky* is misplaced because the test described in that case "contains elements that are unique to a determination of independent contractor status." *Feldman v. Hunterdon Radiological Assocs.,* 187 *N.J.* 228, 242 (2006). Because plaintiff does not argue he was an independent contractor, *Pukowsky* is inapposite. [7]

In the second aspect, plaintiff argues that Devanney, upon a sufficient demonstration of control, may be considered an employer. We are not persuaded. Indeed, *Cicchetti v. Morris County Sheriff's Office,* 194 *N.J.* 563 (2008), upon which the trial court heavily relied, requires rejection of plaintiffs argument. In *Cicchetti,* the plaintiff, a Morris County Sheriff's officer, alleged that he had been subjected to unlawful harassment after his positive test result for hepatitis was revealed to his co-workers. *Id.* at 569–72. He commenced a lawsuit against the Sheriff's Office and, individually, the Sheriff, Undersheriff, and several other Sheriff's officers, alleging violations of the LAD. *Ibid.*

The trial court in *Cicchetti* granted summary judgment to all the defendants, reasoning they could not be liable for aiding and abetting their own conduct. *Id.* at 573. On appeal, we affirmed with regard to the plaintiff's co-workers, concluding they could not be liable to the plaintiff but reversed with regard to the Sheriff and Undersheriff, holding they could be held liable as the plaintiff's supervisors. *Id.* at 573–74.

The Supreme Court affirmed but noted that although the defendants Sheriff and Undersheriff each undoubtedly had responsibility over the employees and over the workplace, they were merely the plaintiff's supervisors and the plaintiff's employer was the Sheriff's Office. *Id.* at 595. The Court also noted that the plain meaning of the definition of employer in the LAD does not include a supervisor, and that individual liability of a supervisor, for acts of discrimination or for creating or maintaining a hostile environment, can only arise through the 'aiding and abetting' mechanism that applies to 'any person.' *Id.* at 594 (citing *N.J.S.A.* 10:5–12(e)). Accordingly, the Court held that because neither the Sheriff nor Undersheriff was the plaintiff's employer within the meaning of the LAD, they could only be individually liable if they were themselves aiders and abettors. *Id.* at 595.

***8** Here, in holding that Union County was plaintiff's employer and not Devanney, the motion judge correctly explained that:

> Devanney, as county manager, is akin to the sheriff or undersheriff in [*Cicchetti*], and Union County is akin to the [Sheriff's] Office. Although Devanney undoubtedly has some control over personnel decisions and some input into the layoff plan, it is Union County which is plaintiff's employer. Therefore, as a supervisor, Devanney can only [be] held personally liable if the aider-abettor standard is satisfied.

We agree. The Court did not find that the Sheriff was an employer under the LAD. Just like the Sheriff in *Cicchetti,* Devanney would be considered a public official but not plaintiff's employer. *Cicchetti, supra,* 194 *N.J.* at 595; *see also Tarr, supra,* 181 *N.J.* at 82–83.

And, in the third aspect, plaintiff argues that the motion judge erred because he did not distinguish between personal and official capacity suits when determining whether Devanney was his "employer" within the meaning of the LAD. This argument is without merit because the question is not whether Devanney acted in an official capacity; the question was whether Devanney was plaintiff's employer and, clearly, he was not.

We also reject plaintiff's argument that the motion judge erred in determining that the Board could not be held liable as an employer. There is no dispute but that Union County was plaintiff's employer and there can be no dispute that Union County is an entity unto itself. Union County is a body politic and corporate that is subject to suit. *N.J.S.A.* 40:18–1 to –3; *N.J.S.A.* 59:1–3. The Board, on the other hand, is the duly elected legislative governing body of Union County under the County Manager form

of government. *N.J.S.A.* 40:41A–1 to –30; 40:41A–45 to –58; 40:41A–86 to –149.[8] Moreover, the Board was entitled to and, in fact, was properly granted summary judgment based upon legislative immunity. *See Bogan v. Scott–Harris,* 523 *U.S.* 44, 46, 118 *S.Ct.* 966, 969, 140 *L. Ed.*2d 79, 83 (1998); *Brown v. City of Bordentown,* 348 *N.J.Super.* 143, 148–49 (App.Div.2002). The motion judge properly relied on these authorities in holding that the Board's actions in approving the budget plan to eliminate certain county positions, including plaintiff's, was a legislative act and entitled the Board to immunity.

We, thus, conclude that the motion judge properly determined that neither the Board nor Devanney can be held liable to plaintiff pursuant to the LAD on the claim that either was plaintiff's employer. Liability against any of these defendants could only be based on the claim that they aided or abetted the alleged discriminatory conduct of plaintiff's employer. A claim of aiding and abetting unlawful employment discrimination presupposes and requires a viable claim against the employer itself.[9] Thus, the aiding and abetting claims could not be maintained here absent a finding of error in the motion judge's denial of plaintiff's motion to join the employer, Union County, as a defendant, a matter to which we now turn.

IV

***9** In his second point, plaintiff claims error in the denial of his motion to amend the complaint to add Union County as a defendant by failing to approach the motion with the liberality demanded by *Rule* 4:9–1. We disagree.

To be sure, "*Rule* 4:9–1 requires that motions for leave to amend be granted liberally." *Kernan v. One Washington Park Urban Renewal Assocs.,* 154 *N.J.* 437, 456 (1998). There necessarily remains, however, an "area of judicial discretion in denying such motions where the interests of justice require." *Wm. Blanchard Co. v. Beach Concrete Co., Inc.,* 150 *N.J.Super.* 277, 299 (App .Div.), *certif. denied,* 75 *N.J.* 528 (1977).[T]he factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation. *Bonczek v. Carter–Wallace, Inc.,* 304 *N.J.Super.* 593, 602 (App.Div.1997), *certif. denied,* 153 *N .J.* 51 (1998). In exercising that discretion in this case, two concerns were presented, i.e., prejudice to defendants resulting from the amendment and whether permitting the amendment would constitute a futile act.

The trial judge properly denied plaintiff's motion because the proposed amendment would have substantially prejudiced Devanney, an existing defendant, as well as Union County, the proposed new party. The record reveals that leave to amend was sought at a very late date. Plaintiff filed his complaint on May 3, 2007, and specifically asserted in that complaint that he was employed by Union County but did not move for leave to amend until March 12, 2009, after discovery had been completed and with a trial scheduled to begin on March 30, 2009.

In these circumstances, if the amendment was permitted, Devanney would have had to retain new counsel because he was represented by a law firm that had represented Union County as special labor counsel and in litigation involving its employees. In fact, the law firm representing Devanney had advised Union County regarding the layoff plan in question. These circumstances would have disqualified the firm from continuing to represent Devanney in this case. Additional prejudice would have resulted because, if joined, Union County would have had the right to take discovery. It would have been unfair to require Union County to be content with the state of discovery because no discovery had been taken from the employer's perspective. These circumstances would have necessitated a lengthy delay in the scheduled trial date, yet another reason for denying leave to amend. *See N.J. Dep't of Envtl. Prot. v. Dimant,* 418 *N.J.Super.* 530, 547 (App.Div.2011) (recognizing that an amendment "may be denied if granting it would unduly complicate or delay the trial or otherwise prejudice the parties").

Leave to amend may also be withheld when constituting a futile act. *Notte v. Merchs. Mut. Ins. Co.,* 185 *N.J.* 490, 501 (2006). Plaintiff argues the amendment would not have been futile—despite the fact that when leave to amend was sought the claim against Union County would have been barred by the statute of limitations—because he believes his amendment ought to be viewed as relating back to the original filing date, citing *Rule* 4:9–3. We find this argument to have insufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E). We would only add that *Rule* 4:9–3 would have permitted relation back only if Union County "knew or should have known that, but for a mistake concerning the identity of

the proper party, the action would have been brought against the party to be brought in by amendment." The Rule does not apply. The misnomer referred to in the Rule encompasses the situation "where the correct party is already before the court, but the name in the complaint is deficient in some respect." *Otchy v. City of Elizabeth Bd. of Educ.,* 325 *N.J.Super.* 98, 106 (App.Div.1999). As we have already mentioned, plaintiff knew his employer was Union County, stated that fact in his complaint, and yet proceeded against the other defendants until the eve of trial knowing that Union County was not a party. Plaintiff instead, with full knowledge of the facts, apparently relied on the mistaken theory that one or more of the other defendants could be found to be his employer within the meaning of the LAD.

V

***10** In point III, plaintiff argues the trial judge erred by granting Devanney summary judgment on the political affiliation discrimination claim based on the contention that Devanney did not properly raise the affirmative defense of qualified immunity or, if he did, he waived it, as well as the contention that he is not entitled to qualified immunity because his conduct violated plaintiff's constitutional rights. We reject these contentions because the defense was pled and was not waived and because it constituted a complete defense to the claim.

The defense in question arises from the Tort Claims Act, *N.J.S.A.* 59:1–1 to 12–3, which provides sovereign immunity to public entities, *Roman v. City of Plainfield,* 388 *N.J.Super.* 527, 533 (App.Div.2006), and a qualified immunity for certain public employees, *N.J.S.A.* 59:3–3; *Schneider v. Simonini,* 163 *N.J.* 336, 354 (2000), *cert. denied,* 531 *U.S.* 1146, 121 *S.Ct.* 1083, 148 *L. Ed.*2d 959 (2001).

Rule 4:6–2 provides that "[e]very defense, legal or equitable, in law or fact, to a claim for relief in any complaint ... shall be asserted in the answer thereto." And *Rule* 4:5–4 delineates those affirmative defenses that must be pleaded. Although not mentioned in *Rule* 4:5–4, it has been held that a public entity or public employee must plead and prove immunity. *See Wymbs v. Twp. of Wayne,* 163 *N.J.* 523, 539 (2000); *Wilson v. City of Jersey City,* 415 *N.J.Super.* 138, 154 (App .Div.2010), *certif. denied,* 205 *N.J.* 80 (2011).

We are satisfied that Devanney complied with his obligation to plead the defense. His twelfth affirmative defense asserted that "[t]he provisions of the New Jersey Tort Claims Act *N.J.S.A.* 59:1–1, et seq., bar recovery herein." Although that allegation was not very specific, it has been held that a "generalized pleading of the Tort Claims Act as an affirmative defense [i]s sufficient," and no waiver of immunity may be found "merely because [a] defendant d[oes] not plead," as here, "the specific statutory section relied upon." *Rivera v. Gerner,* 89 *N.J.* 526, 534–35 (1982). We, thus, reject plaintiff's contention that Devanney failed to plead the defense of qualified immunity.

We also reject the argument that Devanney waived that defense, which plaintiff describes as having resulted from the fact that Devanney's "subsequent actions in the litigation were entirely inconsistent with the notion of relying upon qualified immunity as an affirmative defense." According to plaintiff, "[f]or over two years, including a lengthy discovery process, Devanney's counsel at no time uttered the phrase 'qualified immunity,' nor directed any of discovery efforts towards the end of establishing a defense of qualified immunity."

To be sure, "[t]he one-time mention" of an affirmative defense will not always "serve to preserve that otherwise-unasserted defense" through a lengthy litigation. *Williams v. Bell Tel. Labs., Inc.,* 132 *N.J.* 109, 119 (1993). However,

> ***11** [w]aiver is the voluntary and intentional relinquishment of a known right. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. The party waiving a known right must do so clearly, unequivocally, and decisively.
>
> [*Knorr v. Smeal,* 178 *N.J.* 169, 177 (2003).]

Devanney may have delayed in seeking dismissal on this basis but his delay was neither purposeful nor unreasonable. The record reveals that Devanney first moved for summary judgment on the merits of plaintiff's constitutional claims and when that motion was denied Devanney moved for dismissal on qualified immunity grounds. According to Devanney, once the court denied

his summary judgment motion and, in his view, "expanded the law [of political discrimination claims], the issue of qualified immunity became germane and was raised" by later motion. We are satisfied that Devanney's serial approach in seeking dismissal of this suit, first on the merits and then on immunity grounds, was not unreasonable.

Finally, we reject plaintiff's argument that Devanney was not entitled to immunity because he violated plaintiff's clearly established constitutional right to political affiliation. Our consideration of this contention requires explanation regarding the defense itself.

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 *U.S.* 800, 818, 102 *S.Ct.* 2727, 2738, 73 *L. Ed.*2d 396, 410 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably ." *Pearson v. Callahan,* 555 *U.S.* 223, 231, 129 *S.Ct.* 808, 815, 172 *L. Ed.*2d 565, 573 (2009). "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Ibid.* (citations omitted).

In *Saucier v. Katz,* 533 *U.S.* 194, 201, 121 *S.Ct.* 2151, 2156, 150 *L. Ed.*2d 272, 281 (2001), the Court mandated a two-step process for resolving qualified immunity claims. That process required, first, a determination whether the facts alleged or shown make out a violation of a constitutional right. *Ibid.* And, if that first step was satisfied, the court was then required to determine if the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Ibid.; Anderson v. Creighton,* 483 *U.S.* 635, 640, 107 *S.Ct.* 3034, 3039, 97 *L. Ed.*2d 523, 531 (1987). In *Pearson,* the Court modified this approach, declaring that "the procedure required in *Saucier* ... should no longer be regarded as mandatory," although maintaining that the *Saucier* approach "is often beneficial." 555 *U.S.* at 236, 129 *S.Ct.* at 818, 172 *L. Ed.*2d at 576. We find its application beneficial here.

***12** A right is clearly established when its "contours ... [are] sufficiently clear that a reasonable official would understand that [the act in which he is engaging] violates that right." *Anderson, supra,* 483 *U.S.* at 640, 107 *S.Ct.* at 3039, 97 *L. Ed.*2d at 531; *see also McLaughlin v. Watson,* 271 *F.*3d 566, 571 (3d Cir.2001), *cert. denied,* 535 *U.S.* 989, 122 *S.Ct.* 1543, 152 *L. Ed.*2d 469 (2002). Put another way, "there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put [the] defendant on notice that his or her conduct is constitutionally prohibited." *Id.* at 572. The Supreme Court has emphasized that this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen,* 543 *U.S.* 194, 198, 125 *S.Ct.* 596, 599, 160 *L. Ed.*2d 583, 589 (2004) (quoting *Saucier, supra,* 533 *U.S.* at 201, 121 *S.Ct.* at 2156, 150 *L. Ed.*2d at 281).

In short, qualified immunity is not available if the unlawfulness of the official's act is objectively apparent given the state of the law at the time of the alleged deprivation of rights. *Anderson, supra,* 483 *U.S.* at 640, 107 *S.Ct.* at 3039, 97 *L. Ed.*2d at 531. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639, 107 *S.Ct.* at 3038, 97 *L. Ed.*2d at 531. Here, plaintiff contends that he established a prima facie case of discrimination based on political patronage. He alleges Devanney violated his rights by forcing him to resign because of his political affiliation with Lapolla, an alleged political rival of Devanney.

To make out a prima facie case of political affiliation discrimination, a plaintiff must show that (1) he was "employed at a public agency in a position that does not require political affiliation"; (2) he was "engaged in constitutionally protected conduct"; and (3) the conduct was "a substantial or motivating factor in the government's employment decision." *Galli v. N.J. Meadowlands Comm.,* 490 *F.*3d 265, 271 (3d Cir.2007). In initially denying partial summary judgment, and holding that plaintiff had established a prima facie case of political affiliation discrimination against Devanney, the motion judge explained:

> It is undisputed that plaintiff's position did not involve policy making, and thus did not require political

affiliation. However, the second element, whether plaintiff was engaged in constitutionally protected conduct, is in dispute. The courts have sometimes described the second prong "as a requirement that the employee maintain an affiliation with a political party." *Galli,* 490 *F.3d* at 272. However, the constitutionally protected activity is broader than the act of joining a political party. *Id.* It includes the right not to have allegiance to the official or party in power, irrespective of whether an employee is actively affiliated with an opposing candidate or party. *Id.* Accordingly, the courts have held that ["]a plaintiff can meet the second prong of a prima facie political discrimination claim if she suffers because of active support for a losing candidate within the same political party." *Id.*

***13** The essence of plaintiff's allegations are that he was forced to resign because of his political affiliation with Michael Lapolla, the former county manager who was replaced by Devanney, an alleged political rival of Lapolla. Therefore, plaintiff essentially alleges he was forced to resign because of his affiliation with a losing candidate in the same political party and has satisfied the second prong of the prima facie case.

With regards [sic] to the third element, plaintiff alleges the motivating factor in his forced resignation was his political affiliation with Lapolla. It should also be noted that this final element delves into defendant's motivation or intent and, therefore, is a matter of credibility typically best left for the jury to decide. *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 523 (1995). After granting plaintiff all favorable inferences, a prima facie case for political affiliation discrimination has been established[.]

In his cross-appeal, Devanney contends that the motion judge erred in holding that plaintiff established a prima facie case of political affiliation and asserts that plaintiff's life-long friendship with Lapolla should not be viewed as political affiliation. We need not decide that question but instead focus on whether, even if the motion judge was correct in viewing the merits of the political affiliation claim, Devanney was entitled to qualified immunity because his actions were objectively reasonable in light of the rules clearly established at the time action was taken. At the time the action in question was taken by Devanney, the political affiliation action was only cognizable if Devanney's participation in the employment action in question stemmed from plaintiff's maintenance of a political affiliation with a particular party or, specifically, from plaintiff's active support of a losing candidate in an election, failure to support a winning candidate, or "failure to engage in any political activity whatsoever." *Galli, supra,* 490 *F.*3d at 272–73. It remains unclear whether an employee's mere friendship or alignment with a former, political appointee qualifies as constitutionally-protected conduct.

As we have previously mentioned, Devanney argues that plaintiff's claim in this regard is not cognizable and that Devanney was entitled to its dismissal without the need to resort to the qualified immunity defense contained in *N.J.S.A.* 59:3–3. Assuming we were to agree that plaintiff stated a cause of action against Devanney in this regard —a question we need not reach—we cannot conclude that such a claim was sufficiently established as to negate the application of the qualified immunity to which Devanney would otherwise be entitled. At best, if cognizable, plaintiff's claim of a constitutional deprivation arises from his friendship with Lapolla, Devanney's predecessor. Lapolla, however, was not an elected official, and plaintiff was not forced from office; he voluntarily left to pursue other opportunities. The motion judge's analogizing of plaintiff's relationship to Lapolla as the equivalent of supporting a losing candidate constitutes, if correct, a view far more expansive than recognized in law when the action was taken. Accordingly, Devanney's alleged failure to conform to the standard imposed by the motion judge in this case does not negate application of the qualified immunity to which he was entitled.

***14** For these reasons, the orders under review in plaintiff's appeal are affirmed. As a result, we need not reach the issues raised in Devanney's cross-appeal.

Affirmed.

All Citations

Not Reported in A.3d, 2012 WL 246382

Footnotes

1 We have renumbered Devanney's points.

2 Prior to March 2006, and prior to any layoff notices being issued, plaintiff asked Faella about the truth of a rumor that there were going to be layoffs. Faella testified this inquiry occurred prior to the implementation of the layoff plan and so he told plaintiff he did not know. In May 2006, Faella's secretary impermissibly shared the contents of Faella's memorandum with plaintiff. Faella testified he did not discipline her as a result, but he did transfer her.

3 Plaintiff's seven-count complaint alleged his employment was terminated due to his age and disability in violation of the LAD, and his political affiliation in violation of the CRA and the New Jersey Constitution. He also asserted claims against Devanney under the LAD for aiding and abetting the discriminatory conduct and for intentional infliction of emotional distress.

4 The first phrase in the first paragraph of plaintiff's complaint states that "Robert Travisano was a loyal employee *of Union County* for approximately 18 years ..." (emphasis added).

5 A "person" is defined as including "individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries." *N.J.S.A.* 10:5–5(a).

6 Although the LAD does not define the terms "aid" or "abet," general principles of statutory construction apply and lead to the conclusion that "active and purposeful conduct" is required. *Tarr, supra,* 181 *N.J.* at 83.

7 Even if the *Pukowsky* test were applied here, the only reasonable conclusion that could be reached is what was conceded-that Union County was plaintiff's employer. That is, utilizing the *Pukowsky* factors, there is no doubt that (1) plaintiff was employed by Union County for eighteen years, and was only supervised by Devanney for four of those years (factors 2 and 5); (2) Union County, not Devanney, furnished the equipment and workplace (factor 4); (3) Union County, not Devanney, paid plaintiff's salary (factor 6); (4) plaintiff accrued retirement benefits paid by Union County (factor 10); and (5) Union County, not Devanney, paid social security taxes (factor 11).

8 In addition, plaintiff's argument that Devanney was an agent of the Board is contrary to statutory authority. Under the statute, the County Manager is not a member of the Board. *N.J.S.A.* 40:41A–46; 40:41A–50 to –55. Furthermore, the County Manager form of government under the Optional County Charter Law prohibits freeholders from "individually or collectively seek[ing] to influence the head of the executive branch to dismiss any person from ... any position in the executive branch of county government," *N.J.S.A.* 40:41A–87(a), and provides that "the board of chosen freeholders shall deal with county employees only through the officials responsible for the over-all executive management of the county's affairs ... i.e., through ... the county manager[.]" *N.J.S.A.* 40:41A–86. Simply put, the County Manager exercises executive power and is independent of the Board, which exercises legislative power.

9 Plaintiff recognizes this, stating in his reply brief that his appeal of the order granting summary judgment on the aiding and abetting claim "is predicated on the reinstatement of his primary LAD claims against the Board of Freeholders or against Devanney in his official capacity as Union County Manager or against Union County itself."

End of Document

Exhibit 5

2017 WL 2730243
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Appellant,
v.
Armando RAMOS, Defendant–Respondent.

Argued April 25, 2017
|
Decided June 26, 2017

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Municipal Appeal No. 0027–15.

Attorneys and Law Firms

John J. Lafferty, IV, Assistant Prosecutor, argued the cause for appellant (*Damon G. Tyner*, Atlantic County Prosecutor, attorney; *Mr. Lafferty*, of counsel and on the brief).

Louis M. Barbone argued the cause for respondent (*Jacobs & Barbone, P.A.*, attorneys; *Mr. Barbone* and *John R. Stein*, on the brief).

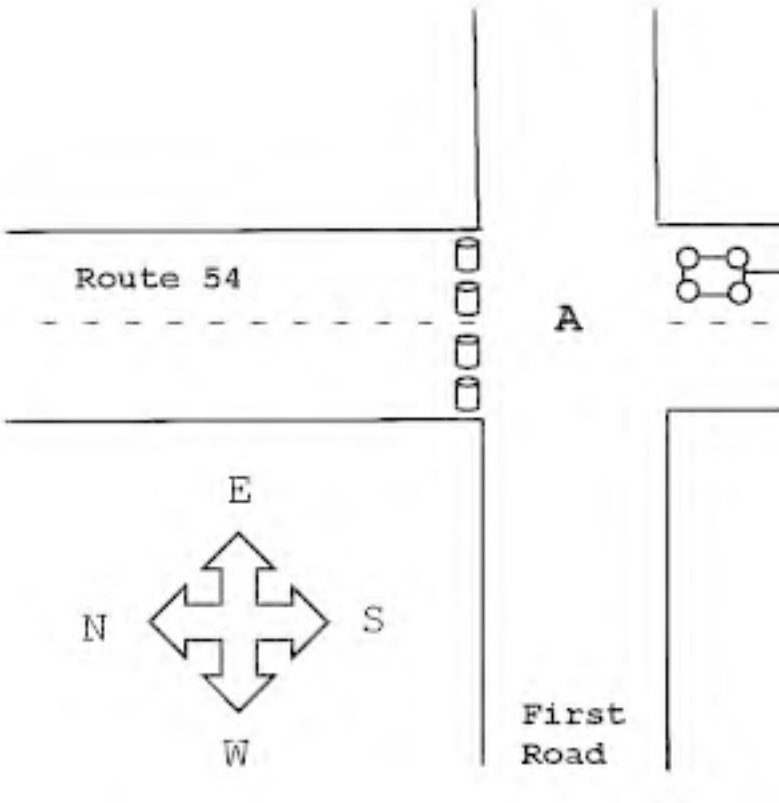
Before Judges Fisher, Vernoia and Moynihan.

Opinion

PER CURIAM

***1** In this appeal, the State challenges an order suppressing evidence—derived from a motor vehicle stop—to support a charge that the driver was intoxicated, *N.J.S.A.* 39:4–50. We reverse because defendant's abnormal operation of his vehicle, as he maneuvered around barrels and a road-closed sign barring his lane of travel, justified the officer's utilization of the community caretaker exception to the warrant requirement.

Defendant was charged with driving while intoxicated, *N.J.S.A.* 39:4–50, and other motor vehicle violations. He moved in municipal court for suppression of evidence gathered during the motor vehicle stop; the judge considered that question at a suppression hearing. The only witness—the police officer who conducted the motor vehicle stop—testified that, around midnight on June 24, 2014, he was on duty and assigned to traffic detail concerning road construction on Route 54. Specifically, he was stationed at what is depicted in the diagram below as Intersection A:



His aim was to ensure that no northbound vehicles on Route 54 traveled further north from Intersection B, or by turning north from either direction on Chew Road onto Route 54. In addition, vehicles traveling on First Road into Intersection A were either directed into the southbound lane of Route 54 or were permitted to stay on First Road as they traveled east or west on First Road.
Around 2 a.m., the officer's attention was drawn to a vehicle traveling east on Chew Road that entered Intersection B, turning left onto Route 54 by traversing around the two barrels[1] that impeded any vehicles attempting to travel north from Intersection B toward Intersection A. This observed vehicle was driven by defendant; his path is designated by the line that starts at Chew Road at the bottom of the diagram and ends with the depicted vehicle stopped at Intersection A.

The officer testified that, as the vehicle moved toward Intersection A, he walked into the intersection and motioned for defendant to stop his vehicle. As with prior motorists that night,[2] the officer walked to the driver side window and inquired about defendant's intentions in conformity with his mission to keep vehicles from traveling north through that intersection on Route 54. The officer testified that he "could smell an odor of an alcoholic beverage coming from the vehicle" as he spoke with defendant. The officer asked for credentials; defendant was slow to comply and fumbled with his documentation. Eventually, defendant was charged with driving while intoxicated and other motor vehicle offenses.

***2** The municipal judge found from this undisputed testimony a reasonable and articulable suspicion of a motor vehicle violation and, also, that the stop and inquiry of defendant was permitted by the community caretaker exception. Consequently, the municipal judge denied defendant's suppression motion.

Defendant unsuccessfully moved in the Law Division for leave to appeal the order denying his suppression motion, and thereafter entered a conditional guilty plea. This was not defendant's first DWI conviction. He was sentenced to 180 days in the county jail, and a ten-year license suspension and other monetary penalties were imposed. The municipal judge, however, stayed the incarceration portion of the judgment, pending disposition of defendant's appeal to the Law Division.

In the Law Division, defendant challenged only the denial of his motion to suppress, arguing: (1) the circumstances did not support employment of the community caretaker exception; and (2) the officer lacked a reasonable and articulable suspicion that defendant violated *N.J.S.A.* 39:4–94.2(b) (driving on a closed road).

Upon de novo review, the Law Division judge found the officer "overstepped his bounds" in performing the vehicle stop because the State acknowledged the wrong moving violation was issued,[3] thereby conceding defendant "wasn't in a place he wasn't supposed to be." Further elaborating, the judge stated that defendant's particular route into Intersection B—eastbound on Chew Road instead of northbound on Route 54—meant he would not "necessarily see [the road-closed] sign." The judge surmised that a driver could have assumed the barriers were placed to cover or block "a pothole," or signal something other than the roadway's closure in that direction. And, because the judge found defendant had a right to reasonably assume the road was not closed, there was—in the Law Division judge's view—no ground upon which the officer's utilization of the community caretaker exception could rest.

In appealing the suppression order to this court, the State argues the Law Division judge "erred in concluding that there was no basis for stopping the defendant's vehicle under the community caretaker exception." Specifically, the State claims that the Law Division judge erred by "considering the reasonable objective basis for the stop from the perspective of the defendant instead of from the perspective of the officer" and failed to adhere to our decisions in *State v. Martinez*, 260 *N.J. Super.* 75, 78 (App. Div. 1992) and *State v. Washington*, 296 *N.J. Super.* 569, 572 (App. Div. 1997). In reversing, we agree there was "sufficient evidence on the record that [the officer] observed the defendant operating his vehicle in an abnormal manner—driving in the southbound lane and around the barricade and sign, in the northbound lane—and was therefore justified in conducting a motor vehicle stop."

***3** To explain, we start by invoking the Supreme Court's description of the dual roles performed by police officers in today's society:

> On the one hand, they carry out traditional law enforcement functions, such as investigating crimes and arresting perpetrators. On the other hand, police officers perform a wide range of social services, such as aiding those in danger of harm, preserving property, and creating and maintaining a feeling of security in the community.
>
> [*State v. Bogan*, 200 *N.J.* 61, 73 (2009).]

Differentiating between these two functions requires consideration of the officer's underlying motives. *State v. Diloreto*, 180 *N.J.* 264, 276 (2004). When motivated by a desire to "detect or solve a specific crime, such as making arrests, interrogating suspects, and searching for evidence," an officer acts in accord with the law enforcement function. *Ibid.* "Conversely, when motivated by a desire to 'ensure the safety and welfare of the citizenry,' the officer acts pursuant to the community caretaking function." *Ibid.* "That function has its source in the ubiquity of the automobile and the dynamic,

differential situations police officers are confronted with to promote driver safety." *Washington*, *supra*, 296 *N.J. Super.* at 572. This function "finds support in the premise that abnormal operation of a motor vehicle establishes a reasonably objective basis to justify a motor vehicle stop." *Ibid.* "What is reasonably objective is measured by the dynamics or totality of the circumstances from the perspective of the officer on duty at the time and not from the esoteric perspective of the courtroom." *Ibid.*

We have applied this community caretaking exception in various similar situations. For example, in *State v. Goetaski*, 209 *N.J. Super.* 362, 364–65 (App. Div. 1986), we held that a defendant driving slowly on a rural highway's shoulder, with a flashing left-turn indicator, as the vehicle traveled for a tenth of a mile justified a stop. In *Martinez*, *supra*, 260 *N.J. Super.* at 77–78, we found "that operation of a motor vehicle in the middle of the night on a residential street at a snail's pace between five and ten m.p.h. is indeed 'abnormal' " and justified a community-caretaker stop. It is enough that the abnormal conduct "engenders reasonable grounds to conclude that the vehicle is a potential safety hazard to other vehicles and that there is either something wrong with the driver, with the car, or both." *Washington*, *supra*, 296 *N.J. Super.* at 572.

In examining the Law Division judge's decision, we only consider "whether the motion to suppress was properly decided based on the evidence presented at that time." *State v. Jordan*, 115 *N.J. Super.* 73, 76 (App. Div.), *certif. denied*, 59 *N.J.* 293 (1971). If there is sufficient credible evidence in the record, we defer to the judge's findings. *See State v. Elders*, 192 *N.J.* 224, 243 (2007). The judge's legal conclusion as to the meaning of undisputed facts, however, is not entitled to deference. *State v. Handy*, 206 *N.J.* 39, 45 (2011).

We reverse because we are satisfied that the judge's factual suppositions about what defendant might have thought—defendant, as mentioned earlier, never testified—are inconsistent with the police officer's unrebutted testimony and, also, because the judge misapplied the community caretaker exception. The undisputed facts reveal the officer's stop of defendant's vehicle occurred late at night and was based on his observation of defendant's vehicle as it entered the wrong lane of traffic on Route 54 by driving around barrels and a road-closed sign that cautioned against such a movement. Defendant's vehicle was headed toward Intersection A, where he would be unable to travel further on Route 54. From the officer's perspective—regardless of whether defendant's operation of the vehicle constituted a motor vehicle violation—the vehicle was being abnormally operated and justified the stop and the officer's approach toward the driver to inquire about where defendant intended to go. In this setting, application of the community caretaker exception required no more.

***4** We reverse the Law Division's order of August 29, 2016, which granted defendant's motion to suppress. We also vacate the stay of the incarceration portion of the sentence imposed. [4]

All Citations

Not Reported in A.3d, 2017 WL 2730243

Footnotes

1 The barrels were accompanied by a Department of Transportation (DOT) approved road closure sign.

2 During the first two hours of his tour of duty, the officer observed five or six other vehicles enter the barricaded area. He testified that each vehicle was stopped and each given directions helpful to their intended course. The officer testified Intersection B was sufficiently lit, and all drivers entering Intersection B would have had a clear view of the barrels and the road-closed sign.

3 As noted above, defendant was charged with driving on a closed road, *N.J.S.A.* 39:4–94.2(b). During the proceedings regarding the suppression motion, the State recognized this charge could not be sustained, apparently because the required governmental action necessary to close a road within the meaning of this statute could not be demonstrated. That fact, however, is not conclusive on the question of whether defendant was driving abnormally or in some way that warranted the officer's conducting a stop for community caretaking reasons.

4 In granting suppression of evidence, the Law Division judge took no further action with respect to the municipal court judgment. For example, the Law Division judge's order did not vacate the municipal court judgment or dismiss the charges. Consequently, by operation of our reversal of the Law Division order granting suppression, we assume that the municipal

court judgment remains in place and that the sentence and penalties imposed will continue to have effect. We remand to the Law Division judge to ensure that our mandate is carried out.

End of Document

JACQUELINE ROSA, Plaintiff, v. BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-607-18 Civil Action Before: Peter F. Bariso, Jr., P.J.S.C. Motion Date: August 31, 2018
STATE OF NEW JERSEY DEPARTMENT OF TRANSPORTATION, Plaintiff-Intervenor, v. BOROUGH OF LEONIA, NEW JERSEY, Defendant.	

BRIEF IN OPPOSITION TO PLAINTIFF ROSA'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION TO DISMISS

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Exhibit 2: Lanin v. Borough of Tenafly, No. 12-2725 (KM) 2014 WL 31350 (D.N.J. Jan. 2, 2014);

Exhibit 3: Martell's Tiki Bar, Inc. v. The Governing Body of Point Pleasant Beach, Civil Action 13-5676 (D.N.J. 2015);

Exhibit 4: Travasano v. Board of Chosen Freeholders for Union County, 2012 WL 256382 (N.J. App. Div. January 27, 2012); and

Exhibit 5: State of New Jersey v. Ramos, 2017 WL 2730243, fn.3 (App. Div. 2017).

Exhibit A- Amended Complaint filed by Plaintiff Jacqueline Rosa

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PRELIMINARY STATEMENT

This office represents the Borough of Leonia, Borough Council of Leonia, Mayor Judah Zeigler, and Police Chief Tom Rowe ("Defendants") in the above-captioned action in lieu of prerogative writ that was filed by Jacqueline Rosa ("Plaintiff or Rosa") on January 30, 2018, and amended on February 12, 2018. This Brief is being submitted in opposition to Rosa's Motion for Summary Judgment that was filed on July 16, 2018 and in support of Defendants' Cross-Motion for dismissal of Plaintiff's Amended Complaint in its entirety. For all of the reasons set forth in this Brief, Rosa's Motion for Summary Judgment must be denied, and Defendants' Cross-Motion to Dismiss the Amended Complaint should be granted.

PROCEDURAL HISTORY

As part of a comprehensive traffic initiative program, the Borough of Leonia (hereinafter referred to as "the Borough" and sometimes as "Leonia") enacted a series of ordinances beginning in 2017 to address growing significant traffic issues in the Borough for the health, safety and welfare of its residences. The Ordinances enacted as part of the Borough's comprehensive traffic initiative program are as follows:

Ordinance No. 2017-19, adopted on December 4, 2017 is entitled: An Ordinance Amending and Supplementing Chapter 194 "Vehicles and Traffic" of the Code of the Borough of Leonia by Adding to Article XI "Temporary Closing of Streets" §194-25.1 "Closing of Certain Streets" and Article XIV by the Addition Thereof of Schedule XVII "Streets Closed to Traffic," adopted December 4, 2017 (see DOT Exhibit "B").

Ordinance No. 2018-2, adopted on January 17, 2018 amends and supplements Chapter 194 of Leonia's Municipal Code to add a new section establishing a $200 penalty for any person convicted of violating Section 194.25.1 (see DOT Exhibit "C").

Ordinance 2017-19 was subsequently amended on March 5, 2017 by Ordinance No. 2018-5. Ordinance No. 2018-5 is entitled: An Ordinance Amending and Supplementing Chapter 194 Vehicles and Traffic" of the Code of the Borough of Leonia by Amending Ordinance 2017-19, Article XI "Temporary Closing of Streets" §194-25.1 "Closing of Certain Streets" and §194-49 Schedule XVII, adopted March 5, 2018 (see DOT Exhibit "D").

On January 30, 2018, Rosa filed a Complaint in Lieu of Prerogative Writ in Superior Court in the County of Bergen against Defendants challenging the amendments made to Borough Code §194-25.1 and §194-25.2, presumably as amended through adoption of Ordinance No. 2017-19 and 2018-2. On February 5, 2018, the case was then transferred *sua sponte* from Bergen County to Hudson County vicinage. On February 12, 2018, Rosa filed an Amended Complaint.[1]

In Count One of Rosa's Amended Complaint there is a claim asserted for declaratory relief on the basis that Municipal Code Sections 194-25.1 and 194.25.2 as amended by Ordinances 2017-19, and 2018-2, respectively, violate the public's right to travel.

In Count Two of Rosa's Amended Complaint there is a claim for declaratory relief on the basis that Municipal Code Section 194-25.1 is in violation of N.J.S.A. 39:4-8 because approval of the Commissioner was not sought and appropriate notice to adjoining municipalities of the impact of the change to same by Ordinance was not given by Defendants.

In Count Three of Rosa's Amended Complaint there is a claim for declaratory relief on the basis that Municipal Code Section 194-25.1 is in violation of N.J.S.A. 39:4-197 because approval of the Commissioner was required to adopt an Ordinance under the exceptions listed therein.

In Count Four of Rosa's Amended Complaint there is a claim for declaratory relief on the basis that Municipal Code Section 194-25.1 is in violation of N.J.S.A. 39:4-197.2 because it limits

[1] See copy attached hereto as "Exhibit A," for the Court's ease of reference.

traffic on county roads (Fort Lee Road, Broad Avenue, Grand Avenue and Bergen Boulevard) and no consent from the County has been obtained.

In Count Five of Rosa's Amended Complaint there is a claim for declaratory relief on the basis that the $200 fine provided for in N.J.S.A. 194-25.2 for any person who violates Municipal Code Section 194-25.1 is in violation of N.J.S.A. 39:4-94.2.

In Count Six of Rosa's Amended Complaint there is a claim for violation of Plaintiff's constitutional right to travel under the Fifth Amendment guarantee of liberty.

In Count Seven of Rosa's Amended Complaint there is a claim that the Municipal Code §194-25.1 violates the Interstate Commerce Clause found in Article 1, Section 8 of the U.S. Constitution.

Nowhere in either of the Complaints filed by Rosa is there any claim for injunctive relief of any type requested.

On February 28, 2018, Defendants filed an Answer and Affirmative Defenses to the Initial Complaint and on March 27, 2018, an Answer and Affirmative Defenses on behalf of Defendants was filed to the Amended Complaint.

On or about May 4, 2018, Plaintiff applied for an Order to Show Cause seeking a preliminary injunction against enforcement of Borough Code §194.25.1 and .2 as amended by Ordinance No. 2018-5. After a hearing on May 21, 2018, the Court entered an Order denying Plaintiff's application for an Order to Show Cause with preliminary injunctive relief on May 25, 2018.

On or about June 8, 2018, a Consent Order permitting the State of New Jersey Department of Transportation ("DOT" and sometimes referred to as "Intervenor") was entered and on June 11,

2018, the DOT filed a Complaint for Declaratory Judgment and Action in Lieu of Prerogative Writs.

On or about July 2, 2018, an Answer was filed by the Defendants to the Complaint filed by the DOT.

Prior to the commencement of any discovery, on July 11, 2018, DOT filed a Motion for Summary Judgment. On July 16, 2018 Rosa also filed a Motion for Summary Judgment. In submitting her motion for summary judgment, Rosa failed to move as to her claims contained in the Fourth and Seventh Counts of the Amended Complaint. Instead, she bases her motion for summary judgment entirely on the following arguments: (1) The Municipal Code 194-25.1 and 194-25.2 violate Plaintiff's right to freedom of travel; (2) The traffic restrictions in Municipal Code 194-25.1 and 194.25.2 are facially and presumptively invalid; and (3) The traffic restrictions in Municipal Code 194-25.1 and 194-25.2 are arbitrary, capricious and unreasonable (see Pl. Brief, p. 1). Thus, it is presumed that Rosa has abandoned her claims challenging Leonia's traffic restrictions on the basis that they violate the Interstate Commerce Clause or because Leonia did not receive permission from the County before enacting the underlying traffic restrictions.

The Leonia Defendants now oppose both the DOT's and Rosa's Motions for Summary Judgment and cross-move to dismiss both Complaints in their entirety.

STATEMENT OF FACTS

Defendants hereby incorporate herein by reference the Statement of Facts in Defendants' companion Brief opposing the DOT's Motion for Summary Judgment.

LEGAL ARGUMENT

POINT I

DISMISSAL OF PLAINTIFF'S CLAIMS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF IS WARRANTED AS A MATTER OF LAW

The Declaratory Judgment Act "expressly confers standing on a person whose legal rights have been affected by a municipal ordinance." Bell v. Stafford Tp., 110 N.J. 384, 390 (1988). N.J.S.A. 2A:16-53. However, the Act is not permitted to be used to secure court decisions that are merely advisory. Id. at 391. Here, Rosa has suffered no injury from the enactment of either Ordinance 17-19, 18-2, or 18-5. She does not allege that she has been fined under said Ordinances or even threatened with such a fine, and Plaintiff acknowledges that there are multiple alternative avenues for traversing on highways and roads and on Leonia streets at other times of the day. Nor has she submitted any proof that the temporary road closures to non-residents and persons who do not have business in Leonia each day from the hours of 6 a.m. to 10 a.m. and 4 p.m. to 9 p.m. have resulted in any increased traffic in surrounding towns or on the State highways (Route 4, Route 80 or the New Jersey Turnpike) during her commuting hours from and to her home in Edgewater, New Jersey. Absent any such injury, the court would be acting in a purely advisory capacity should it render a declaration that the Borough violated state law when enacting said Ordinances.

Similarly, and because traffic measures are entitled to a presumption of validity, Plaintiff is also not entitled to an injunction prohibiting the Borough from enforcing its traffic restrictions pursuant to an action in lieu of prerogative writs, as a matter of law. See Cedar Grove Twp. v. Sheridan, 209 N.J. Super. 267, 280 (App. Div. 1986), certif. denied, 104 N.J. 464 (1986) (holding that residents of municipality may not, through initiative and referendum, amend comprehensive traffic ordinance of municipality, nor may they compel adoption and enforcement of traffic

regulations through proceedings in lieu of prerogative writs). Accordingly, Plaintiff's motion for summary judgment seeking declaratory relief and an injunction against the Borough from enforcing its traffic Ordinances must be denied.

POINT II

PLAINTIFF IS NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF BASED UPON AN ALLEGED VIOLATION OF TITLE 39

Plaintiff also seeks declaratory and injunctive relief on the basis that the enactment of Ordinances regulating the flow of traffic through several congested streets located in the Borough of Leonia during certain designated hours violates certain sections of Title 39. Plaintiff is not entitled to such an injunction on the basis of such a claim since a private right of action for injunctive relief and/or damages cannot exist where the Legislature has not expressly provided for such action. R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 271 (2001); See also Cort v. Ash, 422 U.S. 66, 80 (1975) (holding squarely that a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone does not confer a private cause of action).

Here, there is no private right of action expressly conferred by the Legislature under Title 39 so as to permit Plaintiff, a private citizen, to enforce any of its sections, including but not limited to N.J.S.A. 39:4-8, N.J.S.A. 39:4-197.2 or N.J.S.A. 39:4-94.2. Indeed, the statute is silent with respect to conferring any remedy whatsoever for violations of the sections Plaintiff claims that Leonia has violated; thus, it cannot even be implied that there exists a private cause of action thereunder. See Jalowiecki v. Leuc, 183 N.J. Super. 22, 29 (App. Div. 1981); and New Jersey State League of Master Plumbers, Inc. v. New Jersey Natural Gas Co., 2010 WL 3720301 *4-5 (App. Div. 2010). (See Exhibit 1, attached to the Appendix hereto.)

Moreover, Title 39 cannot be construed to have been enacted for Plaintiff's benefit. Rather, the legislative intent behind the 2008 amendments to N.J.S.A. 39:4-8 in amending the statute was to confer a benefit upon Leonia by removing DOT oversight of a myriad of local traffic regulations which previously required Commissioner approval, including but not limited to approving street closures for not more than 48 continuous hours and/or controlling the passage of traffic on congested streets. See N.J.S.A. 39:4-8(c); and N.J.S.A. 39:4-197(1)(e). Thus, irrespective of whether Rosa would be able to prove that a violation occurred because Leonia did not obtain the approval of the Commissioner for the Department of Transportation for temporarily closing its streets to certain categories of persons, or for the failure to provide notice to neighboring municipalities, or for approving a fine greater than $100.00, said actions do not entitle Plaintiff to obtain any injunctive relief; nor does it entitle Plaintiff to an award of damages of any type against Defendants under Title 39. For all of the foregoing reasons, Plaintiff Rosa does not have standing to challenge the Borough's Ordinances on the basis that they violate Title 39, and as such these claims must be dismissed.

POINT III

PLAINTIFF'S ACTION IN LIEU OF PREROGATIVE WRIT CHALLENGING ORDINANCE 2017-19 IS UNTIMELY

An action in lieu of Prerogative Writ must be brought within 45 days of the municipal action being challenged. When Plaintiff initially filed the Complaint challenging Leonia's Municipal Traffic Code Section 194-25.1, she was essentially mounting a challenge to Ordinance No. 2017-19, which amended Section 194 of the Borough Code. That Ordinance amending Section 194 of the Borough Code restricting access to 44 streets to residents only was voted upon and passed by the Borough Council unanimously on December 4, 2017. The original Complaint in this matter was not filed by Plaintiff, however, until 57 days later on January 30, 2018, and more

than 45 days after the municipal action that is being challenged by Plaintiff. Furthermore, none of the exceptions for enlarging the time to bring her challenge to the original Ordinance which differentiated between residents and non-residents exists in the matter at bar. Accordingly, any challenge to the Borough's traffic regulations based upon residency, which were adopted after notice to the public (and to neighboring municipalities by virtue of being published in a newspaper prior to adoption on December 4, 2018), and then subsequently amended by Ordinance 2018-5, must be dismissed as untimely and/or moot.

POINT IV

PLAINTIFF HAS NOT ESTABLISHED THAT SHE HAS SUFFERED A DEPRIVATION OF HER CONSTITUTIONAL RIGHT TO TRAVEL SO AS TO BE ENTITLED TO DAMAGES PURSUANT TO 42 U.S.C. §1983

In the matter at bar, Plaintiff's 42 U.S.C. §1983 action is entirely based upon the passing of two Ordinances allegedly in violation of state law. 42 U.S.C. §1983 ("Section 1983") is a statute that creates a cause of action to remedy violation of rights under the federal laws or rights under the United States Constitution. West v. Atkins, 487 U.S. 42, 48 (1988). Accordingly, a Section 1983 action cannot be based on violations of state law since that statute was enacted to address solely "'deprivations of rights, privileges, or immunities secured by the Constitution and laws' of the United States." Gonzaga University v. Doe, 536 273, 283 (2002); see also Nunez v. Pachman, 578 F.3d 228, 233 (3d Cir. 2009) (holding that unlike procedural due process claims, "[s]ubstantive due process rights are founded not upon state law but upon deeply rooted notions of fundamental personal interests derived from the Constitution"). Indeed, Section 1983 is not a general tort statute; thus, it cannot be used to award monetary damages when state law otherwise provides for an adequate remedy. See General Motors v. City of Linden, 143 N.J. 336, 350 (1996),

cert. denied 519 U.S. 816 (1996). Thus, Plaintiff cannot rely upon alleged violations by Defendants of certain sections of Title 39 in order to obtain damages under section 1983.

Insofar as Plaintiff alleges that the Leonia Ordinances 17-19 and 18-5 violate her federal constitutional right to travel, it is well-settled, in the Third Circuit that the right to localized travel, as opposed to interstate travel, is not infringed upon where the only burden placed upon same is due to increased traffic or requires one to take a more circuitous route.[2] See Lanin v. Borough of Tenafly, No. 12-2725 (KM) 2014 WL 31350, at *9 (D.N.J. Jan. 2, 2014). (See Exhibit 2 attached to the Appendix hereto.) Nor is the right to travel violated where the regulation at issue is narrowly tailored to achieve a significant government interest, that is to alleviate traffic, such as the case in the matter at bar. Id. See also, Lutz v. City of York, Pa., 899 F.2d at 270 (3d Cir. 1990) (applying intermediate scrutiny to a vague and absolute "anti-cruising" law). [3]

Here, Plaintiff has presented no evidence that she is prevented from entering or leaving her home or neighborhood or prevented from travelling during any restricted street hours. As evidenced in the Statement of Facts, there are no restrictions in place that would limit travel through the Leonia. Further, access is not totally precluded on local streets, but only restricted for a period of four (4) hours in the morning and five (5) hours in the evening. Additionally, Plaintiff

[2] The United States Supreme Court has not yet recognized a constitutional right to localized travel, however, the Third Circuit has recognized such a right in 1990 when it decided that municipal "anti-cruising" ordinance outlawing unnecessary repetitive driving on grounds that it prevented emergency vehicles from timely responding to calls implicated a fundamental substantive due process right under the "narrowest conception." Lutz v. City of York, Pa., 899 F.2d 255, 257, 267-78 (3d Cir. 1990). Furthermore, insofar as Plaintiff alleges this right arises under the Fifth Amendment to the United States Constitution, by its express terms, the Fifth Amendment only constrains federal government actions. Nguyen v. U.S. Cath. Conf., 719 F.2d 52, 54 (3d Cir. 1983). Accordingly, the rights provided thereunder do **not** apply to the actions of state or local municipal officials, and thus, this serves as an additional basis for dismissal of Plaintiff's Section 1983 claim. See GEOD Corp., v. New Jersey Transit, 678 276, 288 (D.N.J. 2009).

[3] These are the same proofs for Plaintiff to succeed in an action in lieu of prerogative writ seeking to invalidate the ordinances at issue as arbitrary or unreasonable, and thus the same argument applies to warrant dismissal of Plaintiff's prerogative writ claims based upon her status as a non-resident.

has access to Fort Lee Road, Broad Avenue, Grand Avenue and other roadways that are not restricted in any manner for traversing to neighboring communities and roads. These unrestricted roadways provide for access through the Borough of Leonia to neighboring communities and any state or federal highway. Thus, similarly to Lanin, supra, Plaintiff's complaint is really for being subjected to an inconvenience due to increased traffic, and not truly for a deprivation of her right to travel, as she suggests (see Pl. Brief at page 2-3). Therefore, Plaintiff's unsubstantiated claim that she has been stripped of her right to freely engage in travel must be wholly rejected.

Furthermore, Leonia's implementation of traffic control devices is in accordance with the current standards prescribed by the Manual on Uniform Traffic Control Devices for Streets and Highways and represents a valid exercise of its police power. Indeed, federal law has recognized that the Constitution is not offended where such social and environmental objectives of reducing noise, traffic hazards, and litter exist to account for a municipality's regulation of its roads. See County Board of Arlington County, Va v. Richards, 434 U.S. 976 (1977). Nor is the Constitution offended where distinctions between residents and non-residents exist in a municipality's ordinance governing use of its streets. See Martell's Tiki Bar, Inc. v. The Governing Body of Point Pleasant Beach, Civil Action 13-5676 (D.N.J. 2015) (see Exhibit 3 attached to the Appendix hereto.) In fact, the Supreme Court has held that parking restrictions based upon a distinction between residents and non-residents that were designed for laudable goals such as to reduce hazardous traffic conditions and to protect neighborhood from unreasonable burdens in gaining access to their residence, etc. have a rational basis and as such, are not outlawed by the Constitution. See County Board of Arlington v. Richards, 434 U.S. 5-7 (1977).

Here, as in Richards and in Martell's Tiki Bar, it is clear that the Borough Ordinances are narrowly tailored to reach these laudable objectives, that is to address safety concerns due to

increase in traffic entering the George Washington Bridge during certain congested hours, and are narrowly restricted to those peak hours only. Outside of those restricted time periods, the streets are completely open to travel to all kinds of vehicles, and for any reason. Thus, in the absence of any proof that these ordinances were enacted for an invidious or discriminatory reason, they cannot, as a matter of law, offend the Constitution since it is well-settled that reasonable time, place, manner restrictions are permitted to be asserted on a person's right to travel in the Third Circuit. See Lutz v. City of York, Pa., supra; and Greenberg v. Kimmelman, 99 N.J. 552 (1985) (holding that a state statute or regulation does not violate substantive due process rights if it is "reasonably relate[d] to a legitimate legislative purpose and is not arbitrary or discriminatory).

Finally, it is significant that to sustain a claim for damages under Section 1983 for a deprivation of her "liberty" right such as to have been recognized by the Third Circuit to minimally exist under the substantive due process clause of the Fourteenth Amendment to the United States Constitution, Plaintiff must allege conduct which "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 847 n. 8 (1998); see also United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 400-02 (3d Cir. 2003).

Two years earlier than the decision in Sacramento v. Lewis, supra, our own state's Supreme Court in Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352 (1996), cert. denied, 519 U.S. 911 (1996) had also ruled that the concept of substantive due process prohibits deliberate and arbitrary abuses of power by the government, regardless of the fairness of the procedures used to implement them. Id. at 364, citing Daniels v. Williams, 474 U.S. 327, 337 (1986). It went onto predict, however, that the Supreme Court would hold that claims for violation of substantive due process would be only recognized for the most egregious governmental abuses against liberty or property rights, abuses that "**shock the conscience** or otherwise offend ...

judicial notions of fairness ... [and that are] offensive to human dignity." Id. at 366. Accordingly, it is not all government actions that infringe on a person's liberty interests or injure property rights that are protected by the substantive due process clause of the Fourteenth Amendment.

The Supreme Court in Rivkin further expounded, "with the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked." Id. (citations omitted). In fact, the "shock the conscience" standard encompasses "only the most egregious official conduct." United Artists, 316 F.3d at 400, quoting Lewis, 523 U.S. at 846). The Third Circuit has instructed that "the exact degree of egregious conduct necessary to reach the **'conscience-shocking'** level" will "depend [ ] upon the circumstances of a particular case," and may range from "deliberate indifference" to "actual intent to cause harm." Vargas v. City of Philadelphia, 783 F.3d 962, 973 (3d Cir. 2015) (internal quotation marks omitted). Thus, "mere negligence is [never] enough to shock the conscience," and the lesser "deliberate indifference" standard that may apply in certain circumstances to discretionary decisions requires, at the very least, "conscious [ ] disregard [of] 'a substantial risk of serious harm.'" Id. (citations omitted).

Here, it cannot be found that Defendants' actions to pass legislation to enact traffic controls amounted to even "deliberate indifference." As stated above, the restrictions placed on the listed residential streets located in the Borough in no way limit Plaintiff's ability to traverse to other locations outside the Borough since multiple alternative avenues of travel are available to her during restricted hours and absolutely no restrictions exist at any other times of the day. Furthermore, with the amendment to the Ordinance in March 2018, Plaintiff is able to travel freely during restricted hours to any location contained in Leonia. Thus, in the absence of any proof that there has been any egregious conduct by any one of the individual defendants, the restrictions

themselves cannot constitute the type of "conscience shocking" behavior that is required to sustain a claim for violation of her substantive due process rights.

For all of the foregoing reasons, Plaintiff's motion for Summary Judgment must be denied, and Defendants' Motion to dismiss Plaintiff's constitutional claims pursuant to 42 U.S.C. 1983 should be granted.

POINT V

THE BOROUGH COUNCIL AND MAYOR ARE ENTITLED TO LEGISLATIVE IMMUNITY AS TO PLAINTIFF'S CLAIMS PURSUANT TO 42 U.S.C. §1983

It is well-settled under federal law that state, regional, and local legislators are entitled to absolute immunity from liability pursuant to 42 U.S.C. §1983 for their legislative activities. Bogan v. Scott Harris, 523 U.S. 44, 49 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (city council's adoption of budget that eliminated employee's position was a legislative act and thus local legislators were entitled to absolute immunity from suit. See also Woods v. Gamel, 132 F.3d 1417, 1419-20 (11th Cir. 1998) (county commissioners' act of approving county budget for all county expenses, including funding for one specific department immunized). The types of legislative activities which have been deemed to be immune in the Third Circuit since the 1998 Supreme Court decision of Bogan v. Scott-Harris include but are not limited to: acts so as to introduce and sign into law an act eliminating a public official's position; voting to approve a county budget for all county expenses, allocating (or failing to allocate) appropriations for funding an office or for a promotion to a public official; and the enactment of a township zoning ordinance that allegedly prevented a single landowner from extending their sand and gravel extraction operations. See Baraka v. McGreevy, 481 F.3d 187, 197-98 (3d Cir. 2007); Travasano v. Board of Chosen Freeholders for Union County, not reported, 2012 WL 256382, *8 (N.J. App. Div. January 27, 2012) (Exhibit 4 attached to the Appendix hereto); Youngblood v. DeWeese, 352 836, 840-42 (3d Cir. 2003); Scully

v. Borough of Hawthorne, 58 F.Supp.2d 435, 449 (D.N.J. 1999); and County Concrete Corp v. Township of Roxbury, 442 F.3d 159, 172-93 (D.N.J. 2006). In addition, since pre-voting speech, debate, and reacting to public opinion are also manifestly in furtherance of legislative duties," then these actions are also absolutely protected by legislative immunity. Baraka, supra, 481 F.3d at 197 (a legislator's acts of drafting, reporting, debating, and then voting on a bill all constitute legitimate legislative activities irrespective of the motivation behind such acts) (*citing* Gravel v. United States, 408 U.S. 607, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).)

The jurisprudence developed in this respect instructs that legislative immunity generally turns upon whether the act is substantively "within the sphere of legitimate legislative duties," or in other words, involves discretionary policy-making decision of a general scope or involves line-drawing. Baraka v. McGreevy, supra, 481 F.3d at 198. Expounding further, the Third Circuit has mandated that the consideration of whether an act is legislative for purposes of absolute immunity is to be made "stripped of all considerations of [improper] intent or motive." Id. at 200, citing Bogan, supra, 523 U.S. at 55. "[I]t simply is not consonant with our scheme of government for a court to inquire into motives of our legislature." Bogan, supra.). In Baraka, the Third Circuit concluded without regard to Baraka's argument regarding the Governor's subjective intent, that the Governor's action to sign into law legislation abolishing the single position of Baraka as poet laureate was both in form and in substance legislative, thereby entitling him to absolute immunity from suit under section 1983.

The Borough Council's actions in passing ordinances for the regulation of the passage of traffic within its borders are purely legislative acts, as is the Mayor's approval of said Ordinances. In fact, such legislation has been recognized in New Jersey to be a highly appropriate use of a municipality's police powers that cannot be compelled by a resident through referendum or an

action in lieu of prerogative writs. See Cedar Grove Township v. Sheridan, supra, 209 N.J. Super. at 278-79 (holding that where a governmental entity, pursuant to its legislative authority, "makes a determination as to the best interest and most feasible manner of curing traffic evils and traffic congestion in a specific area, and such regulation bears a direct relationship to the public safety," such legislation will not be altered by the court in an action in lieu of prerogative writ).

Accordingly, there is no question that the Mayor and Council are entitled to absolute immunity from liability pursuant to Section 1983 for the legislative decision to adopt of Ordinances 2017-19, 2018-2 and 2018-5.

POINT VI

PLAINTIFF CANNOT PROVE THAT THE ORDINANCES RESTRICTING TRAFFIC DURING CERTAIN HOURS VIOLATE TITLE 39 IN SUBSTANCE OR FORM

Assuming *arguendo* that Plaintiff would be entitled to a bring a private right of action for the alleged violation of the procedures set forth in Title 39 by way of an action in lieu of prerogative writ pursuant to R. 4:69-1, because Leonia's legislative actions to stem the flow of traffic on certain streets during designated congested hours were enacted to advance the safety and welfare of the residents, Plaintiff cannot prove that the Ordinances should be invalidated.

It is well settled that ordinances advancing the health, safety, and welfare of the public are accorded a presumption of validity and that a party seeking to overturn the ordinance has a high burden to demonstrate by clear and convincing evidence that the ordinance at issue is "arbitrary or unreasonable." See Spring Lake Hotel and Guest House Ass'n. v. Borough of Spring Lake, 199 N.J. Super. 201, 207-08 (App. Div. 1985), certif. denied, 101 N.J. 267 (1985) (*citing* Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 564 (1975); and Collingswood v. Ringgold 66 N.J. 350, 358 (1975)). For an ordinance to be found arbitrary or unreasonable, a plaintiff must show "**beyond debate**" that the regulation at issue was beyond the police power of the local

governing entity. Id. at 208 (*citing* Vickers v. Twp. of Gloucester Tp. Comm., 37 N.J. 232, 242 (1962)) (emphasis added). Absent such proofs, a court cannot nullify an ordinance based upon the Borough's "decision that its welfare would be advanced by the action." Ibid.

Pursuant to N.J.S.A. 40:48-2, a municipality has been legislatively granted broad powers to enact ordinances, resolutions, and regulations for the benefit of the public health, safety and welfare. According to its police powers, a municipality has the sole authority to control and regulate the use of its municipal streets pursuant to its police powers, which authority is subject to only limited oversight by the Department of Transportation of certain enumerated traffic regulations, as granted to it by the Legislature. See Viera v. Town Council of the Township of Parsippany-Troy Hills, 156 N.J. Super. 19, 21 (App. Div. 1977), certif. denied, 77 N.J. 487 (1978) (citations omitted). Thus, a municipality enjoys a considerable degree of discretion as to the manner in which said police powers are exercised. Id. And so long as a municipality operates within its delegated police powers for the health, safety, or welfare of the public, "it is well established that the courts [in New Jersey] will not interfere with the manner in which it exercises [said powers] in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion." Id. In fact, where a governmental entity, pursuant to its legislative authority, "makes a determination as to the best interest and most feasible manner of curing traffic evils and traffic congestion in a specific area, and such regulation bears a direct relationship to the public safety, our courts have [consistently] held that such determination is reasonable and not arbitrary." Cedar Grove Township v. Sheridan, supra, 209 N.J. Super. at 278-79 (1986)) (internal citations omitted).

Despite this broad and virtually unfettered right to enact regulations controlling the flow of traffic within the Borough, Plaintiff nonetheless argues, without citation to any authority, that the traffic restrictions should be invalidated because 1) the regulations impact a State highway;

and 2) no notice was given to neighboring municipalities, pursuant to N.J.S.A. 39:4-8(a) (see p. 2-3 of Pl. Brief). The fatal flaw in Plaintiff's argument is that she has not established that there is any impact on a State highway or road of an adjoining municipality as the result of the Borough's traffic regulations. Furthermore, the plain language contained in N.J.S.A. 39:4-8, as amended in 2008, when read as a whole, clearly evidences the Legislature's intent to remove oversight by the Commissioner as to the Borough's traffic engineering decisions as it pertains to those regulations contained within N.J.S.A. 39:4-197.

Prior to 2008, N.J.S.A. 39:4-8 did not expressly permit municipalities to act in a certain manner to control traffic or the passage of motor vehicles on a street without first obtaining approval from the Commissioner of the DOT. See Senate Transportation Committee Statement, No. 2731, L.2008 c.110 (October 6, 2008). In 2008, however, N.J.S.A. 39:4-8 was expressly amended to except certain delineated provisions contained within N.J.S.A. 39:4-197 from DOT oversight, including, but not limited to, "regulating the passage or stopping of traffic at certain congested street corners and designated points…" N.J.S.A. 39:4-8(b)(1); and see N.J.S.A. 39:4-197(1)(e).

The only limitation on the regulation of the passage of traffic is that it must be effectuated through an ordinance, and cannot be implemented merely through a resolution or regulation. Id. Thus, pursuant to the amendments to N.J.S.A. 39:4-197 and N.J.S.A. 39:4-8 divesting oversight by the Commissioner of local traffic legislation, it is clear that, contrary to the arguments submitted by Rosa and the Deputy Attorney General in support of their motions for summary judgment, the Borough has broad authority pursuant to its police powers to make a variety of decisions with respect to traffic control, and to now unilaterally regulate the "passage or stopping of traffic at

certain congested street corners or other designated points." Thus, Plaintiff's argument that the failure to submit the Ordinances to the Commissioner invalidates same is without any merit.

Assuming *arguendo* that there is a need for approval by the Commissioner with respect to an "impact on a state highway," it is submitted that nowhere in N.J.S.A. 39:4-8(a) does it state that that approval must be obtained prior to the adoption of any municipal ordinance having an impact on a state highway. In fact, the next paragraph governing the procedure by which the Commissioner's approval is to be obtained clearly indicates that the Ordinance be submitted to the Commissioner after it has been adopted. The specific language is as follows:

> Where Commissioner approval is required, a certified copy of the adopted ordinance, resolution, or regulation shall be transmitted by the clerk of the municipality or county as applicable to the commissioner within 30 days of adoption.

Thus, under the plain language of the statute, the requirement for Commissioner approval in the case of an impact on a state highway was not intended to place any prior restraints on a municipality's legal authority pursuant to N.J.S.A. 40:48-2 to make laws to stem the flow of traffic on its roadways. Accordingly, same does not invalidate the Borough's actions to adopt the Ordinances in the first instance. See Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. 129, 158-159 (1977) (holding that due to the common law right to ratify governmental action that does not comply with the pre-requisites for enacting an ordinance, procedural irregularities will not invalidate an ordinance).

Also, assuming arguendo that there exists an impact upon a State highway requiring DOT approval, it is significant that the amended statute also provides that Commissioner approval of municipal ordinances, which are made in keeping with the provisions of the Manual on Uniform Traffic Control Devices for Streets and Highways and which are consistent with traffic engineering standards, may not be withheld unless the Commissioner finds that the regulations place an undue

burden or impact on the flow of traffic on the State highway system. N.J.S.A. 39:4-8 (emphasis added). Here, there is no evidence of any "undue" impact or burden on any State highway system to justify not approving the ordinances at issue. On the contrary, the DOT seemingly has agreed with the Borough that controls to prevent traffic on the streets impacted by the Borough's Ordinances 2017-19 and 2018-5 are in fact necessary and appropriate, despite the fact that such controls also would have the same effect on the state's highway (Grand Avenue) (see DOT Exhibit E). Moreover, since the Ordinances are currently under review by the DOT, even though there is no evidence of any undue impact on state highway, substantial compliance with the request for approval requirement in the statute has nevertheless been achieved. See Houman, supra, 155 N.J. at 169-70 (holding that "substantial compliance" with a statutory requirement is normally sufficient).

Similarly, substantial compliance with the notice requirement to adjacent municipalities prior to adoption of the Ordinances has also been achieved under the statute, despite the fact that there is no evidence submitted by Plaintiff of any impact on said municipalities which would require same. Indeed, nowhere in Title 39 is there contained a definition of the type of notice that is required, nor is there a definition of what constitutes an impact on a neighboring municipality. Here, the Borough gave notice of the pending adoption of the Ordinances to the public, as required by N.J.S.A. 40:49.2 and N.J.A.C. 19:26.18. Thus, contrary to Plaintiff's unsupported arguments, notice as required by law, has nevertheless been provided to adjacent municipalities. Accordingly, there is no merit to Plaintiff's argument that no notice was ever given by the Borough to any neighboring municipality.

For all of the foregoing reasons, it is clear that Defendants' ordinances substantially comport with the law and were not arbitrary, irrational, or unreasonable. As a result, Plaintiff is

not entitled to injunctive relief pursuant to Rule 4:69-1. Berdan v. Passaic Valley Sewerage Commissioners, 82 N.J. Eq. 235 (Ch. 1913); aff'd. 83 N.J. Eq. 340 (E&A, 1914) (holding that a court will not issue "relief by injunction against action of municipal bodies in matters properly resting within their jurisdiction, in the absence of fraud). Rather, her only remedy in the absence of any proof of fraud, misrepresentation or bad faith in enacting said traffic Ordinances is at the election polls. See Grogan v. DeSapio, 15 N.J. Super. 604, 611-12 (Law Division 1951) (holding that the remedy for municipal actions that comport with the law in either substance or form, and in the absence of bad faith or fraud is at the polls and not the courts). Thus, Plaintiff's motion for summary judgment requesting invalidation of Borough Code 194-25.1 must be denied and Defendants' Cross-Motion to dismiss this claim should be granted.

POINT VII

THE BOROUGH'S PRESCRIBED PENALTY FOR VIOLATING MUNICIPAL CODE 194-25.1 IS IN ACCORDANCE WITH THE LAW

Plaintiff also argues in support of her Motion for Summary Judgment that the Borough's penalty for violating Municipal Code 194-25.1 is in violation of N.J.S.A. 39:4-94.2; however, that Statute prescribes the penalty for a road closure where a barrier has been erected. See State of New Jersey v. Ramos, 2017 WL 2730243, *2, fn.3 (App. Div. 2017) (see Exhibit 5 attached to the Appendix hereto) . Here, the roads have not been closed; nor have any barriers been erected. It is merely the passage of a certain class of drivers who are restricted during certain hours in the morning and in the evening. Thus, N.J.S.A. 39:4-94.2 is inapplicable to the matter at bar.

Rather, it is N.J.S.A. 40:49-5 that confers to the Borough the authority to impose a fine of $200 for violation of Municipal Code Section 194-25.1. N.J.S.A. 40:49-5 places limits on a municipality's general authority to prescribe penalties for violation of its ordinances from a minimum of $100 up to $2,000 and/or imprisonment up to 90 days. In accordance with the limits

in N.J.S.A. 40:49-5, Leonia's Borough Code, section 1-1, validly adopted on October 4, 1982 provides: "Unless otherwise specifically provided for in any chapter of the Code of the Borough of Leonia, any person committing an offense against any provision of the Code of the Borough of Leonia shall be subject, upon conviction, to one or more of the following: a fine of not more than $1,000 or imprisonment for not more than 90 days, or to a period of community service not exceeding 90 days in the discretion of the Judge imposing the same." Here the prescribed penalty at issue is within the limits placed on such fines by the Borough itself.

Thus, the Borough's monetary fine of $200 for violation of Leonia's municipal code Section 194-25.1 neither violates the law, nor is it arbitrary, capricious or unreasonable as a matter of law. Accordingly, Plaintiff's request to invalidate Municipal Code 194-25.2, adopted pursuant to Ordinance 18-2, must be rejected in its entirety and Defendants' Cross-Motion to Dismiss this claim granted.

POINT VIII

DEFENDANTS JUDAH ZEIGLER AND TOM ROWE ARE ENTITLED TO A DISMISSAL OF PLAINTIFF'S AMENDED COMPLAINT

Plaintiff names the Police Chief, as well as the Mayor of the Borough of Leonia, in this action as individual defendants who are being sued in their official capacity only. Official capacity suits against government officials are simply an alternative to pleading an action to recover against the government body itself. Brandon v. Holt, 469 U.S. 464, 471-72 (1985). Thus, Plaintiff's official capacity claims against the Mayor and the Borough Clerk are redundant where the government entity employing that individual is also named as a defendant. Id. at 167, n. 14 (opining that there is no longer a need to bring official-capacity actions against local government officials, for under Monell, local government units can be sued directly for damages and injunctive or declaratory relief). See also Janowski v. City of North Wildwood, 259 F. Supp. 3d 113,

131(D.N.J. 2017) (quoting Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("[A]n official capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity."); and Baez v. Lancaster Cty., 487 Fed. App'x 30, 32 (3d Cir. 2012) (finding that where claims against an officer in his official capacity are duplicative of claims against the municipality, those claims are properly dismissed as redundant).

Additionally, it is significant that nowhere in the two Complaints filed by Plaintiff are there any allegations directed toward the Mayor or the Borough Clerk of any type of personal involvement in the constitutional violation to the right to travel claimed. Nor are there any allegations to plausibly suggest that either the Mayor or the Borough Clerk had directed anyone to violate Plaintiff's constitutional right to travel or had personal contemporaneous knowledge of any actions to enforce the Ordinance against Plaintiff and had acquiesced in same. In fact, there has been no enforcement of the Ordinances at issue since their enactment by the Borough to date. Accordingly, the failure to assert such allegations in the Amended Complaint mandates dismissal of Plaintiff's claim for damages pursuant to Section 1983 against these two Defendants as a matter of law. See Evancho v. Fisher, 423 F.3d 347, 354 (3d Cir. 2005) (holding that under federal notice pleading standard, a civil rights complaint is adequate only where it states the conduct, time, place, and persons responsible for the underlying acts that deprived plaintiff of any constitutional rights); and Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (holding that for a government official to be held responsible for a violation of constitutional rights, there must be personal involvement on the part of the governmental official in the wrongdoing).

Additionally, it is submitted that individual Defendants would be entitled to qualified immunity pursuant to N.J.S.A. 59:9-3 because individual public officials cannot be held liable for

damages ensuing upon their good faith exercise of judgment and discretion in performance of their duties. Nor are damages available from a municipality or its officials in an action in lieu of prerogative writ. Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 221-222, cert. den. 87 S.Ct. 1166, 386 U.S. 972 (1966) (holding that damages cannot be obtained from a municipality for improperly enacting a traffic ordinance designating a one-way street as a part of its police powers).

For all of the foregoing reasons, Defendants Judah Zeigler and Tom Rowe are entitled to a dismissal of Plaintiff's Amended Complaint as a matter of law.

POINT IX

PLAINTIFF IS NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES UNDER ANY THEORY OF LIABILITY

Plaintiff's Motion for Summary Judgment seeks an award of punitive damages against all Defendants. However, no punitive damages may be assessed against a municipality in an action under state law or under 42 U.S.C.A. §1983. T & M Homes, Inc. v. Pemberton Township., 190 N.J. Super. 637 (Law Div. 1983); and Marion v Borough of Manasquan, 231 N.J. Super. 320, 323-324 (App. Div. 1989). Indeed, the Supreme Court in Newport v. Fact Concerts Inc., 453 U.S. 247, 271 (1981) effectively foreclosed any ability for punitive damages to be assessed against a municipality or its governing body. And since official capacity suits against government officials pursuant to Section 1983 are treated the same as suits against the municipality itself, the individual defendants in the matter at bar are likewise immune from any punitive damages from being assessed against them. See Gregory v. Chehi, 843 F.2d 111, 120 (1988).

Nor are punitive damages available under Section 1983 against an individual defendant in the absence of success on a claim for violation of constitutional rights under Section 1983. Memphis Comm. Sch. District v. Stachura, 477 299, 306 fn. 9 (1986). In fact, a plaintiff seeking punitive damages against a government official in his personal capacity in a section 1983 action

must prove by clear and convincing evidence that defendant's conduct was motivated by evil motive or intent, or otherwise involves reckless or callous indifference to the federally protected rights of others. Smith v. Wade, 461 U.S. 30, 50 (1993). This requires at the very least a showing of a deliberate act or omission on the part of the official with knowledge of a high degree of probability of harm. Id. Under the reckless and/or deliberate indifference standard, the defendant does not have to recognize that his conduct is extremely dangerous, but a reasonable person must know or should know that the actions are sufficiently dangerous. Smith v. Whitaker, 160 N.J. 221 (1999). Plaintiff's allegations in the Complaint and arguments in her Brief in support of her motion for summary judgment make clear that none of the Defendants engaged in any type of conduct that could warrant the imposition of punitive damages in this case.

In addition, the New Jersey Tort Claims Act specifically bars claims for punitive damages against public entities. N.J.S.A. 59:9-2 (c). The immunity provided to municipalities under the Tort Claims Act is absolute such that even if Plaintiff's allegations are true, punitive damages still could not be awarded. The immunity afforded to public entities has been upheld by courts throughout the state, whereby these various courts have echoed the New Jersey Legislature's belief that punitive damages are not recoverable against a municipality. Marion v. Borough of Manasquan, supra, 231 N.J. Super. at 323.

Likewise, it is well-settled that no punitive damages are available in an action in lieu of prerogative writ. "To bring an action in lieu of prerogative writs, a plaintiff must show that the appeal could have been brought under one of the common-law prerogative writs." None of the common law writs authorized damages to be assessed against a municipality, much less punitive damages. O'Neill v. Washington, 193 N.J. Super. 481, 486 (App. Div. 1984) (differentiating between an action in lieu of prerogative writ and an action at law for damages); and see Visidor

Corp. v. Borough of Cliffside Park, supra, 48 N.J. at 222. Accordingly, no punitive damages may be awarded to Plaintiff based upon her challenge to Leonia's Ordinance Number 2017-19, 2018-2, or 2018-05.

For all of the foregoing reasons, Plaintiff's motion for summary judgment on the issue of punitive damages must be denied, and Defendants' motion to dismiss this claim should be granted.

POINT X

DEFENDANTS' CROSS MOTION TO DISMISS THE AMENDED COMPLAINT OF ROSA SHOULD BE GRANTED

A disposition on the pleadings under R. 4:6-2(e) is appropriate where the complaint states no basis for relief and where further discovery would be futile so as to provide any basis. Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001). Thus, a defendant is entitled to the dismissal of an action on a motion to dismiss for failure to state a claim upon which relief may be granted when, after an in-depth review of the complaint, giving plaintiff every reasonable inference of fact, the court concludes that a cause of action cannot be "suggested" by the facts. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). Moreover, in reviewing a motion under R. 4:6–2(e), a court may consider documents referred to in the complaint or documents explicitly relied on in the complaint, without converting the motion to dismiss into one for summary judgment. New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007), certif. denied, 192 N.J. 597 (2007); and see also N.J. Sports Prods., Inc. v. Bobby Bostick Promotions, L.L.C., 405 N.J. Super. 173, 178 (Ch. Div. 2007). Likewise, documents of which the court may take judicial notice as a court record pursuant to N.J.R.E. 201(b)(4) is also permitted. Accordingly, consideration of the documents and prior judicial decisions referenced herein need not convert Defendants' Motion to Dismiss into one for Summary Judgment.

Here, Defendants' Cross-Motion to Dismiss Rosa's Amended Complaint is particularly appropriate since she has failed to allege any injury to her personally (aside from being inconvenienced) so as to obtain declaratory or injunctive relief as it pertains to the traffic regulations enacted by the Borough, has failed to establish that her liberty rights based upon a purported Fifth Amendment right to intrastate travel have been infringed because certain traffic controls implemented by the Borough distinguish between residents and non-residents, has failed to establish that she is entitled to bring a claim under Title 39 for violations thereof, has failed to establish that the Borough's Ordinances should be invalidated as a matter of law based upon the failure to obtain Commissioner approval for any "undue impact" on a state highway or alleged failure to provide notice of the underlying Ordinances to adjacent municipalities, has failed to establish that the $200 fine for violating Municipal Code is illegal, and is not entitled to an award of punitive damages against the Borough as a matter of law.

CONCLUSION

For all of the foregoing reasons, Plaintiff Jacqueline Rosa's motion for summary judgment must be denied, and Defendants' Cross-Motion to Dismiss the Amended Complaint should be granted.

CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Defendants

By: s/ Ruby Kumar-Thompson
RUBY KUMAR-THOMPSON, ESQ.

Dated: August 20, 2018

APPENDIX

EXHIBIT A

SEIGEL LAW FIRM LLC
Jacqueline Rosa – 009372010
505 Goffle Road
Ridgewood, NJ 07450
(201) 444-4000

JACQUELINE ROSA,

Plaintiff,

vs.

BOROUGH OF LEONIA, BOROUGH OF LEONIA COUNCIL, TOM ROWE in his official capacity as acting Borough Clerk of the Borough of Leonia, JUDAH ZEIGLER, in his official capacity as Mayor of the Borough of Leonia, JOHN DOE MAINTENANCE COMPANIES 1-5

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-0750-18

Civil Action

AMENDED COMPLAINT IN LIEU OF PREROGATIVE WRITS

Plaintiff, JACQUELINE ROSA (herein "Plaintiff"), residing in Edgewater, New Jersey, by way of Complaint against Defendants, alleges as follows:

NATURE OF ACTION

This is an action in lieu of prerogative writs challenging the validity of an ordinance enacted by the Borough of Leonia.

PARTIES

1. Plaintiff is an interested party affected by the enactment of Defendant, Borough of Leonia's ordinance §194-25.1 and §194-25.2. Plaintiff's right to travel on public streets and freely enjoy public streets for the purpose of transportation have been denied, violated and infringed upon by the actions of the Defendants. Plaintiff is a resident of Edgewater, NJ, who commutes through Leonia on a weekly basis, to travel to and from her home. Plaintiff has standing to bring this

action because this case involves a substantial public interest, and the Plaintiff has a private interest.

2. Defendant, Borough of Leonia ("Borough") is the municipality enacting ordinance §194-25.1 and §194-25.2, and infringing upon Plaintiff's rights.

3. The Defendant Borough of Leonia Council ("Council") is the governing body of the municipality and is responsible for enacting and passing municipal ordinances.

4. The Defendant, Tom Rowe ("Rowe"), was the acting Borough Clerk for the Borough of Leonia, and in that capacity in the official custodian of records.

5. The Defendant, Judah Zeigler, ("Zeigler")is the mayor of the Borough of Leonia and approved ordinance §194-25.1 and §194-25.2

FIRST COUNT

CHALLENGE TO THE VALIDITY OF ORDINANCE §194-25.1 and §194-25.2

6. Plaintiff repeats and realleges the statements in numbers 1-5.

7. On January 22, 2018, the Borough put into effect ordinance §194-25.1, which was signed by defendant Rowe and Zeigler and approved by the Council. This ordinance amends chapter 194 to include "temporary closing of streets."

8. The Ordinance specifically mandates that over seventy streets will be closed to the public during designated hours, unless that person is a resident of the specific street, or needing access to his or her home within the Borough, or can name a business they are going to.

9. The Ordinance states that the seventy plus streets will be closed daily from 6:00am to 10:00am and from 4:00pm to 9:00pm.

10. Any person who is not a resident of the Borough, or who cannot produce valid documentation will be fined two hundred dollars as listed in §194-25.2.

11. Ordinance §194-25.1 and §194-25.2 violates Plaintiff's right to freedom of travel and are facially and presumptively invalid.

12. Ordinance §194-25.1 and §194-25.2 are arbitrary, capricious, and unreasonable.

13. The validity of Ordinance §194-25.1 and §194-25.2 are a matter of public interest rather than private interests and requires adjudication. Ordinance §194-25.1 and §194-25.2 cause a continuing public harm to travel.

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.1 and §194-25.2 are void and of no effect, for interest and costs of suit, attorney's fees, and for other such relief as the Court deems just and equitable.

SECOND COUNT

ORDINANCE §194-25.1 IS IN VIOLATION OF N.J.S.A. 39:4-8

14. Plaintiff repeats and realleges the statements in numbers 1-13.

15. N.J.S.A 39:4-8 states that any ordinance, resolution, or regulation which places any impact on a State roadway shall require the approval of the commissioner.

16. The Borough has closed over seventy streets, many of which connect to State Highway Route 4, Route 80, and the New Jersey Turnpike.

17. Closing these roads during commuting hours has resulted in an increase in traffic on all three State Highways and would therefore also increase the safety of commuters on these highways.

18. The Borough has not sought approval from the Commissioner and is in direct violation of N.J.S.A 39:4-8.

19. N.J.S.A 39:4-8 also states that municipality that is enacting the ordinance, must provide appropriate notice to the adjoining municipality or county before enacting such ordinance. No such prior notice was given.

20. The Borough's new ordinance places an increased burden on surrounding municipalities, some including Fort Lee, Teaneck and Edgewater, which will see an increase in commuting traffic from the state highways.

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.1 is void and of no effect, for interest and costs of suit, and for other such relief as the Court deems just and equitable.

THIRD COUNT

ORDINANCE §194-25.1 IS IN VIOLATION OF N.J.S.A 39:4-197.

21. Plaintiff repeats and realleges the statements in numbers 1-20.

22. N.J.S.A. 39:4-197 requires that a municipality may not pass an ordinance that alters or nullifies any provisions of N.J.S.A. 39:4-197 without the approval of the Commissioner.

23. The Borough's ordinance is in clear violation of the intended nature of N.J.S.A 39:4-8 and N.J.S.A. 39:4-197, and does not fall into any of the exceptions.

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.1 is void and of no effect, for interest and costs of suit, and for other such relief as the Court deems just and equitable.

FOURTH COUNT

ORDINANCE §194-25.1 IS IN VIOLATION N.J.S.A 39:4-197.2

24. Plaintiff repeats and realleges the statements in numbers 1-23.

25. N.J.S.A 39:4-197.2, states that a municipality may not regulate traffic on a county road unless it complies with N.J.S.A. 39:4-197, and has consent or the governing body of the county.

26. For reasons listed under Count Three, the Borough is not in compliance with N.J.S.A 39:4-197.

27. The Borough has limited traffic on parts of Fort Lee Road, Broad Avenue, Grand Avenue, and Bergen Boulevard, all of which are county roads except Broad Avenue. Broad Ave, Grand Ave and Bergen Boulevard run through both Bergen and Hudson counties.

28. By blocking off the roads to the public, the Borough has limited the public's ability to drive on roads that run through multiple municipalities and counties.

29. The Borough failed to get consent from the governing body of Bergen county and is therefore in violation of N.J.A. 39:4-197.2.

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.1 is void and of no effect, for interest and costs of suit, and for other such relief as the Court deems just and equitable.

FIFTH COUNT

ORDINANCE §194-25.2 IS IN VIOLATION of N.J.S.A 39:4-94.2

30. Plaintiff repeats and realleges the statements in numbers 1-29.

31. The Borough has enacted a two hundred dollar ($200.00) fine for any vehicle who violates ordinance §194-25.1.

32. N.J.S.A 39:4-94.2 specifically states that anyone who drives a vehicle over or upon the closed section of the highway, road or street which he knows or should have reason to know has been closed to traffic shall be subject to a fine of no more than $100.00.

33. The Borough has unilaterally decided on a fee they can charge to motorists which is in direct violation of state law.

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.2 is void and of no effect, for interest and costs of suit, and for other such relief as the Court deems just and equitable.

SIXTH COUNT

ORDINANCE §194-25.1 IS A VIOLATION OF PLAINTIFF'S CIVIL RIGHTS UNDER 42 U.S. CODE §1983.

34. Plaintiff repeats and realleges the statements in numbers 1-33.

35. U.S. Code §1983 guarantees Plaintiff her civil rights under the law.

36. Defendants' are violating Plaintiff's Fifth Amendment rights of basic liberty.

37. Plaintiff has a constitutional right to travel freely without being stopped and questioned

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.1 is void and of no effect, for interest and costs of suit, and for other such relief as the Court deems just and equitable.

SEVENTH COUNT

ORDINANCE §194-25.1 IS A VIOLATION OF THE INTERSTATE COMMERCE CLAUSE

38. Plaintiff repeats and realleges the statements in numbers 1-33.

39. The Interstate Commerce Clause, found in Article 1, Section 8 of the US Constitution states that a state may not pass legislation that discriminates against or excessively burdens interstate commerce.

40. State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, impinge on the Plaintiff's Constitutional rights.

41. The Borough cannot enact an ordinance that favors only the residents of its town, and discriminates against non-residents and commuters within and out of New Jersey.

WHEREFORE, Plaintiff demands judgment against Defendants, for a declaration that Ordinance §194-25.1 is void and of no effect, for interest and costs of suit, and for other such relief as the Court deems just and equitable.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, plaintiff designates Jacqueline Rosa as trial counsel.

CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to Rule 4:5-1, the undersigned certifies that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated.

SEIGEL LAW FIRM LLC

Jacqueline Rosa, Esq.
Pro Se Plaintiff

Dated: February 12, 2018