THOMAS COULTER, Plaintiff, vs. TOWNSHIP OF BRIDGEWATER and MARIE L. BROUGHMAN as Zoning Officer for the TOWNSHIP OF BRIDGEWATER Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY DOCKET NO. SOM-L-279-15 Civil Action

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MAURO, SAVO, CAMERINO, GRANT & SCHALK
Counsellors at Law
77 North Bridge Street
Somerville, New Jersey 08876
(908) 526-0707
corsini@maurosavolaw.com
Attorneys for Defendants Township of Bridgewater
And Marie L. Broughman as Zoning Officer for the
Township of Bridgewater

Alan B. Grant, Esq.
Of Counsel

Christopher M. Corsini, Esq.
Of Counsel and On the Brief

Table of Contents

	Page
Table of Contents and Exhibits	i
Table of Citations	ii
Statutes, Court Rules and Other Authorities	iii
Preliminary Statement	1
Factual Background	2
Arguments	2-8
Point I: The Legal Standard for a Motion for Summary Judgment	2
Point II: As a Result of the Amendments to Chapter 146-1, Plaintiff's Complaint is Moot	3
Point III: The Complaint Must Be Dismissed Because the Zoning Officer's Interpretation of the Township Code is Neither Arbitrary, Capricious, Nor Unreasonable and Therefore Plaintiff Can Not Show A "Clear" Violation of an Ordinance	7
Point IV: The Complaint Must Be Dismissed Because the Plaintiff Has Alternative Adequate Relief Available	9
Conclusion	12

Exhibits

Summons and Complaint	A
Chapter 146-1 of the Bridgewater Township Code (prior to September 7, 2015)	B
Certification of Marie L. Broughman	C
Notice of Motion to Dismiss Complaint in Lieu of Filing an Answer	D
Order of Honorable Yolanda Ciccone, A.J.S.C.	E
Ordinance 33-15	F
Beacham Correspondence to Broughman, November 14, 2014	G
Martell's Tiki Bar, Inc. v. Borough of Point Pleasant Beach (2013 WL 5876769)	H

Martell's Tiki Bar, Inc. v. Borough of Point Pleasant Beach (2015 WL 8728599)................ I

Table of Citations

Case Law

	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)	4
Anderson v. Sills, 143 N.J. Super 432, 437-38, 363 A.2d 381 (Ch. Div. 1976)	5
Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995)	4
Bubis v. Kassin, 323 N.J. Super. 601, 617 (App. Div. 1999)	11
Cinque v. New Jersey Department of Corrections, 261 N.J. Super. 242 (App. Div. 1992)	5
Garrou v. Teaneck Tryon Co., 11 N.J. 294, 304 (1953)	9
Marjarum v. Hamilton, 336 N.J. Super. 85, 92 (App. Div. 2000)	5
Martell's Tiki Bar v. Borough of Point Pleasant Beach, (2014 WL 8728599)	6
Mullen v. Ippolito Corp., 248 N.J. Super. 85, 102 (App. Div. 2012)	10
Nini v. Mercer Cnty. Cmty. College, 2092 N.J. 98 (2010)	11
Nutt v. Chemical Bank, 231 N.J. Super. 57, 61 (App. Div. 1998)	4
Oxfeld v. New Jersey State Board of Educ., 68 N.J. 301, 303-304, 344 A.2d 381 (1975)	5
Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959)	10
Wyzkowski v. Rizas, 254 N.J. Super. 28, 38 (App. Div. 1992)	11

Statutes

N.J.S.A. 40:48-2.13 2

N.J.S.A. 40:48-2.14 2

Court Rules

Page

Rule 4:46-1 3

Rule 4:37-2(b) 4

Rule 4:46-2 (c) 4

Other Authorities

Cox, New Jersey Zoning & Land Administration§ 7-2.2 (2015) 11

Pressler, New Jersey Court Rules comment to Rule 4:46-2 (c) (2004) 4

Preliminary Statement

This matter is a property maintenance dispute between plaintiff Thomas Coulter and his neighbor in which plaintiff seeks to use the Township of Bridgewater to further his own purposes. At the commencement of this action, plaintiff ostensibly sought the court to issue a writ of mandamus to (a) force the Bridgewater Township Zoning Officer to issue a Notice of Violation against his neighbor pursuant Bridgewater Township Code §146, which deals with (among other things) the removal of brush, weeds, dead and dying trees, stumps, roots and obnoxious growths, in a manner contrary to the Zoning Officer's reasonable interpretation of the Township Code; and (b) force the Township to prosecute plaintiff's neighbor in a manner contrary to the Zoning Officer's reasonable interpretation of the Township Code. However, summary judgment must now be granted in favor of defendants as the change to Chapter 146-1 has rendered plaintiff's complaint moot and left the court without a legal remedy upon which it can grant plaintiff relief. In addition to the issue of mootness, defendant Township of Bridgewater renews the arguments made previously in this matter, that 1) the complaint must be dismissed because the plaintiff has alternative adequate relief available and 2) the complaint must be dismissed because the zoning officer's interpretation of the township code is neither arbitrary, capricious nor unreasonable and therefore plaintiff cannot show a "clear" violation of an ordinance. These arguments were made in defendant's prior motion to dismiss plaintiff's complaint in lieu of an answer and were rejected without opinion by the Honorable Yolanda Ciccone, A.J.S.C.. (See Exhibit E.) While defendant believes

that this matter is moot as a matter of law as argued in Point II, below, the matter can also be dismissed on the legal grounds articulated in Point III and Point IV.

Factual Background

Plaintiff Thomas Coulter is the owner of the property located at 1201 Sherlin Drive in the Township of Bridgewater. Adjacent to his home is the property located at 1178 Staffler Road in the Township of Bridgewater ("Staffler Property"). Hurricane Sandy caused widespread destruction throughout the Township of Bridgewater and caused the downing of certain trees and branches on the subject property, which is in a heavily wooded area. Plaintiff made several demands that the Zoning Officer, Marie L. Broughman, issue a Notice of Violation under the Section 146 of the Bridgewater Township Code, which states, in pertinent part:

> Pursuant to N.J.S.A. 40:48-2.13 and 48-2.14, the owner or tenant of a dwelling or lands lying within the limits of the Township shall be required to remove from such lands or dwelling or destroy brush, weeds, dead and dying trees, stumps, roots, obnoxious growths, filth, garbage, trash and debris, where it shall be necessary and expedient for the preservation of the public health, safety, general welfare or to eliminate blighted conditions or a fire hazard. For purposes of this chapter, "blight" is hereby defined as land with debris, litter and/or accumulation of trash or junk upon it, which tends to depress the aesthetic value of the neighborhood. [Bridgewater Township Ordinance § 146-1A]

The Zoning Officer investigated the subject property and exercised her discretion to determine that the conditions on the property did not constitute a violation of Section 146. Plaintiff, not satisfied with this response, engaged an attorney to threaten the Township and has now sued the Township seeking a writ of mandamus forcing the

Zoning Officer to issue a Notice of Violation to his neighbor and the Township to prosecute his neighbor. On August 17, 2015, the Township Council approved Ordinance 15-33, which amended Chapter 146-1 to include the following language: "However, blight shall not include brush, dead and dying trees, stumps, roots or other natural debris which result from a hurricane, tornado or other natural disasters or Acts of Gods." This ordinance became effective on September 7, 2015. As it is undisputed that the debris in question is a result of damage caused by Hurricane Sandy, plaintiff's complaint is now rendered moot by the adoption of amendatory language of Ordinance 15-33.

Arguments

POINT I

SUMMARY JUDGMENT IS AN APPROPRIATE REMEDY WHERE THERE ARE NO GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE

New Jersey Court *Rule* 4:46-2 provides that a motion for summary judgment must be rendered "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *Rule* 4:46-2(c).

A factual issue is genuine "only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact." *Ibid.* The evidence is to be adjudged according to the *prima*

facie standard provided in *Rule* 4:37-2(b) for involuntary dismissal. *Brill v. Guardian Life Insurance Company of America*, 142 N.J..520, 523 (1995); Pressler, *New Jersey Court Rules*, comment to *Rule* 4:46-2(c) (2004).

The standard for summary judgment has been set forth by the Supreme Court in *Brill v. Guardian Life Insurance Company of America,* 142 N.J. at 523. A motion judge must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). The weighing process to be applied involves a type of evaluation, analysis and sifting of evidential materials." *Brill, supra*, 142 N.J. at 536.

The court must consider whether the non-moving party has made a sufficient showing of evidence, "more than a scintilla", to warrant submission to the factfinder. *Id.* While a factfinder may selectively evaluate the evidence before it, a motion judge must grant all inferences in favor of the non-movant. *Id.*; *Nutt v. Chemical Bank, 231* N.J. Super. 57, 61 (App. Div. 1998). If there are no material factual issues in dispute for trial, the court must render summary judgment as a matter of law. *Brill*, *supra*, 142 N.J. at 537.

The import of the court's holding is "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." *Id. at 541.*

Therefore, for the substantive reasons set forth in this brief, summary judgment is an appropriate remedy.

POINT II

AS A RESULT OF THE AMENDMENTS TO CHAPTER 146-1, PLAINTIFF'S COMPLAINT IS MOOT

The jurisprudence on mootness in New Jersey is unambiguous. It is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed. Cinque v. New Jersey Department of Corrections, 261 N.J. Super. 242 (App. Div. 1992); Oxfeld v. New Jersey State Board of Educ., 68 N.J. 301, 303-304, 344 A.2d 381 (1975); Anderson v. Sills, 143 N.J. Super 432, 437-38, 363 A.2d 381 (Ch. Div. 1976). Judicial restraint compels New Jersey Courts to refrain from hearing cases in which they cannot grant relief. Nini v. Mercer Cnty. Cmty. College, 2092 N.J. 98 (2010); Marjarum v. Hamilton, 336 N.J. Super. 85, 92 (App. Div. 2000). As noted in Anderson, supra at 437, this doctrine exists "for reasons of judicial economy and restraint...courts [should] not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest." The Anderson court further stated that, "where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed."

As a result of actions taken by the Council of the Township of Bridgewater subsequent to the filing of plaintiff's action, plaintiff's action in lieu of a prerogative writ and verified complaint are now moot. There are no factual disputes in this matter, as both plaintiff and defendant agree that the cause of the allegedly blighted condition is debris

left behind in the wake of Hurricane Sandy and it is indisputable that Bridgewater duly amended its code to exclude damage from Hurricane Sandy from Chapter 146-1. (Exhibit A, Exhibit C, Exhibit F, Exhibit G) The only question before the court is whether the court can grant plaintiff the relief he requested in his complaint. In light of the passage and implementation of Ordinance 33-15, the unequivocal answer to that question is no.

As the Anderson court noted, courts should not decide cases where a judgment cannot grant effective relief. An order from this court directing Bridgewater to take "action pursuant to Chapter 146-1 et seq against the owners of the Staffler Property," as plaintiff requests in his complaint, offers plaintiff no relief as the complained-of course of conduct is no longer contrary to any Bridgewater ordinance. Plaintiff has found himself in the exact situation described by the Anderson court, supra: circumstances have changed so that a doubt has been created concerning the immediacy of the controversy. In this case, however, the argument for mootness is taken one step further. Rather than merely create a doubt as to the immediacy of the controversy, the changed circumstances in this matter have completely eviscerated whatever tenuous claim plaintiff had to relief in the first place.

The recent, unreported Appellate Division case of Martell's Tiki Bar v. Borough of Point Pleasant Beach (2014 WL 8728599), attached hereto as Exhibit I pursuant to Rule 1:36-3, is analogous to this matter. In that matter, Point Pleasant Beach changed an ordinance restricting the hours of operation for Martell's Tiki Bar. Martell's filed suit against the Borough, challenging the ordinance. After deliberations before the New Jersey Alcoholic Beverage Commission, and in light of the economic after effects of

Hurricane Sandy, the municipality subsequently rescinded the ordinance. Martells, however, maintained the action, but the trial court found the matter to be moot under Cinque and its progeny (2013 WL 5876769). A copy of the trial court's opinion is attached hereto as Exhibit H. The Appellate Division affirmed the trial court's findings, per curium, noting that the absence of an enforceable ordinance negated Martell's right to recover.[1]

As it was true in that matter, so is it true here. The absence of a valid ordinance producing an enforceable right leaves plaintiff in this matter without a cognizable remedy that this Court, viewing the facts most favorable to the plaintiff as it is required to do, could use to fashion plaintiff a remedy. As the matter is moot as both a matter of fact and a matter of law, the granting of summary judgment on defendant's behalf is appropriate.

POINT III

THE COMPLAINT MUST BE DISMISSED BECAUSE THE ZONING OFFICER'S INTERPRETATION OF THE TOWNSHIP CODE IS NEITHER ARBITRARY, CAPRICIOUS NOR UNREASONABLE AND THEREFORE PLAINTIFF CAN NOT SHOW A "CLEAR" VIOLATION OF AN ORDINANCE

While it is abundantly clear that this matter should be dismissed solely on mootness grounds, defendant further renews the argument that the plaintiff is also not entitled to a writ of mandamus because he is unable to show a "clear" violation of the Section 146 of the Bridgewater Township Code. The interpretation of the zoning ordinance by the Zoning Officer and the Zoning Officer's exercise of her discretion

[1] Indeed, Martell's concede the mootness point at oral argument before the Appellate Division, instead contesting the matter on appeal on an unrelated constitutional issue.

regarding the issuance of a violation on an individual property based on individual circumstances is entitled to "substantial deference." Wyzykowski v. Rizas, 254 N.J. Super. 28, 38 (App. Div. 1992).

Here the Zoning Officer visited the subject property and determined in her reasoned discretion, which is given substantial deference, that the property was not in violation of Section 146 of the Bridgewater Township Code and a Notice of Violation should not be issued for the following reasons:

a. The Code provides that a Notice of Violation may be issued for dead trees, branches, stumps, and roots when it is necessary and expedient for the public health. Her review of the property showed no dead trees, stumps, or roots that could be considered to have any impact upon public health.

b. Her review of the subject property showed and the Township Code showed that the definition of blight excludes dead trees, branches, stumps, and roots and therefore Mr. Coulter's complaint did not fit into the blight category for Township Code § 146. Additionally, she did not observe and Mr. Coulter did not provide my office with any evidence that the conditions on the property, namely downed trees in a heavily forested area, depressed the aesthetic value of his home or the neighborhood as a whole.

c. The Code provides that a Notice of Violation may be issued for dead trees, branches, stumps, and roots when a fire hazard. Her review of the property showed no dead trees, stumps, or roots that could be considered a fire hazard.

d. In light of the massive devastation caused by Hurricane Sandy, it would be an incredible burden to require homeowners to remove downed trees, branches, stumps or roots entirely on their own property in heavily wooded areas when they do not constitute a public health threat or a fire safety hazard.

[Broughman Cert, ¶ 5]

Plaintiff has not argued that public health or fire safety are at issue, and rests his entire complaint on an allegation that his neighbor's yard constitutes "blight", which is defined in the Ordinance as "land with debris, litter, and/or accumulation of trash or junk upon it, which tends to depress the aesthetic value of the neighborhood." Initially, the

court should note that the definition of "blight" does not include dead or dying trees, branches, stumps, brush, obnoxious growths or roots. Furthermore, it cannot be read to include those items because the term "debris" is listed separately from those items earlier in the Ordinance. Likewise, the determination of whether dead trees or branches on a neighboring property tends to "depress the aesthetic value of the neighborhood" is an inherently subjective determination to be made in the learned discretion Zoning Officer based on her review of the matter, a decision which is entitled to substantial deference. A review of the photographs in this matter (Broughman Cert., Exhibit D) shows that no such blighted conditions existed on the property, located in a heavily wooded area. Indeed, a finding of blight on the property would mean that the majority of the Township was blighted by Hurricane Sandy. At worst, reasonable minds could differ on the issue, which is not enough to show the "clear violation of the zoning ordinance" required to sustain a writ of mandamus, especially in light of the substantial deference to be afforded to the Zoning Officer's determination.

POINT IV

THE COMPLAINT MUST BE DISMISSED BECAUSE THE PLAINTIFF HAS ALTERNATIVE ADEQUATE RELIEF AVAILABLE

While it is abundantly clear that this matter should be dismissed solely on mootness grounds, defendant further renews the argument that the plaintiff has alternative adequate relief available to him. The writ of mandamus sought by plaintiff is an extraordinary remedy to issued by the court. Garrou v. Teaneck Tryon Co., 11 N.J. 294, 304 (1953). A court issuing a writ of mandamus must do so "carefully, in furtherance of

essential justice, and subject to important and well-defined qualifications." Mullen v. Ippolito Corp., 428 N.J. Super. 85, 102 (App. Div. 2012).

> There are three prerequisites that must be established by a party seeking a writ of mandamus: (1) a showing that there has been a *clear* violation of a zoning ordinance that has especially affected the plaintiff; (2) a failure of appropriate action despite the matter having been duly and sufficiently brought to the attention of the supervising official charged with the public duty of executing the ordinance; and (3) the unavailability of other adequate and realistic forms of relief.
> [Mullen, supra, 428 N.J. Super. at 103 (emphasis added)]

Plaintiff fails to meet the first prong because, as will be discussed in greater detail below, the Zoning Officer's reasonable interpretation of the Township Code in a manner contrary to plaintiff's preferences show that there has never been a "clear violation" of the Township Code. The second prong is inapplicable because there was never a violation of the Township Code. The third prong mandates the immediate dismissal of the plaintiff's complaint because there are multiple alternative forms of relief available to plaintiff which are both realistic and adequate, and which plaintiff has failed to take advantage of before suing the Township.

First, a basic reading of plaintiff's own complaint shows that plaintiff may file and seek to prove a private nuisance claim against his neighbor in the Superior Court. A private nuisance is defined as "an unreasonable interference with the use and enjoyment of land." Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959). Plaintiff's complaint states that his neighbor's property "is littered with dead and dying trees, stumps, roots, and obnoxious growths" which are "especially affecting plaintiff" by "depressing the aesthetic value of his home and the neighborhood as well." (Compl., ¶ 7-

8). There is no question that plaintiff may realistically file a private nuisance claim against his neighbor, and he would be entitled to both compensatory damages and equitable relief mandating a cleanup of the property should he be able to prove his damages. This clearly and unquestionably provides the availability of "other adequate and realistic forms of relief" that plaintiff must seek before suing the Township for a writ of mandamus.

Second, the plaintiff has also failed to appeal the decision of the Zoning Officer to the Board of Adjustment and has therefore failed to take advantage of another available form of adequate and realistic relief. As noted in *Cox*, in analyzing whether plaintiff has taken advantage of other available forms of relief, "the failure to pursue such an appeal in light of inactivity by officers involved in failing to act with respect to a request for enforcement should be considered by the reviewing court. The mere failure to obtain enforcement via communication with zoning officials should not be sufficient." *Cox,* New Jersey Zoning & Land Use Administration, §7-2.2 (2015) (emphasis added). Here the plaintiff has merely failed to obtain his desired form of enforcement via communication with the Zoning Officer and has failed to appeal the Zoning Officer's determination to the Board of Adjustment.

Third, the plaintiff has also failed to bring an action for injunctive relief under the Zoning Ordinance against his neighbor pursuant to N.J.S.A. 40:55D-18, which authorizes direct private claims against adjacent property owners for alleged ordinance violations. Bubis v. Kassin, 323 N.J. Super. 601, 617 (App. Div. 1999). Indeed, courts have encouraged such claims to made before issuing a writ of mandamus against a municipality. Id.

Because there are "adequate and realistic forms of relief" available to the plaintiff other than suing the Township for a writ of mandamus, he has failed to establish the third prerequisite for a writ of mandamus and his Complaint must be dismissed with prejudice.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment should be granted, and the plaintiff's claims against the Township of Bridgewater and Marie Broughman should be dismissed in its entirety.

Respectfully Submitted,

Christopher M. Corsini

THOMAS COULTER, Plaintiff, vs. THE TOWNSHIP OF BRIDGEWATER and MARIE L. BROUGHMAN as, Zoning Officer for THE TOWNSHIP OF BRIDGEWATER, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET CO. DOCKET NO. SOM-L-279-15 **CIVIL ACTION**

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION TO COMPEL DISCOVERY

BEACHAM and KIEGEL
Robert J. Beacham, Esq. (017271990)
104 Towne Centre Drive
Hillsborough, NJ 08844
908-704-8888
Attorneys for Plaintiff

Preliminary Statement

Plaintiff is a property owner in the Township of Bridgewater ("Bridgewater"). Plaintiff's neighbor's property (the "Staffler" property) is littered with dead trees, limbs, branches, stumps, brush and other debris which condition has depressed and continues to depress the aesthetic value of plaintiff's and surrounding properties. (See Exhibit A to the Certification of Tom Coulter submitted herewith ("Coulter Cert.")). Recognizing that all property owners have an obligation to their neighbors to keep their property in order, Bridgewater established an ordinance, Bridgewater Township Code § 146 ("Section 146"), which requires all property owners to keep their property free of all such dead trees, limbs, branches, stumps, brush and debris and specifically directs for the issuance of a notice of violation in the event that a property owner fails to do so. A review of the Bridgewater records which plaintiff was able to obtain pre-litigation reveals that Bridgewater has enforced this ordinance numerous times throughout the years including for damage caused by storms such as Superstorm Sandy. (See Exhibit B to Coulter Cert.). Despite numerous requests by plaintiff, as well as another property owner that abuts the offending property, Bridgewater has steadfastly refused to issue a notice of violation in the instant matter. (See Exhibit C to Coulter Cert.).

It is plaintiff's belief that Bridgewater's action, or rather inaction, is not the result of a true belief that the offending property is in compliance with the ordinance but rather due to the fact that in 2008 this plaintiff was awarded $17,000.00 against Bridgewater by the New Jersey Government Records Council when Bridgewater charged plaintiff an excessive fee for a records request.

In this matter, plaintiff has requested discovery which will show that officials, including the Mayor of Bridgewater Township, have surveyed the property and that the various reasons for the failure to issue a notice of violation are arbitrary, capricious and have changed over time. Defendants have blatantly and willfully violated this court's August 6, 2015 Case Management Order by failing to provide responses to plaintiff's discovery requests. In a letter to the court, defendants state that they believe there is no "utility" in providing discovery responses despite the court order based on their assertion that summary judgment is warranted. By their actions, defendants have gone from making up their own rules when it comes to running the Township of Bridgewater to making up their own rules when it comes to handling a litigation before this court. This is clearly an attitude that the court cannot, and should not, tolerate.

Blinded by its attempt to defeat plaintiff in this litigation, and despite the negative effect that its action will have on the public health, safety and general welfare of its citizens, during the course of this litigation defendant Township of Bridgewater amended Section 146 in a manner that it believes now moots plaintiff's claim. However, as is clear from plaintiff's submission in opposition to defendants' motion the amendment to Section 146 does not moot plaintiff's claim for relief and summary judgment should be denied. As is also clear, defendant has admitted to blatantly violating the court's August 6, 2015 Case Management Order by failing to provide discovery responses. Therefore, defendant's cross-motion to compel discovery should be granted.

Facts

Defendants' motion for summary judgment is based solely on defendants' assertion that plaintiff's cause of action is now moot based on the amendment to Section 146 which excludes damage that is the "result" of a hurricane, tornado, natural disaster or Act of God. Therefore, for the purposes of defendants' motion for summary judgment, the only material fact at issue is whether it is undisputed that the condition of the Staffler property was the "result" of a hurricane, tornado, natural disaster or Act of God. The answer is unequivocally no. Not only do the defendants fail to provide the court with any admissible evidence to substantiate their claim, the pictures provided to the court as well as the certification of Tom Coulter submitted herewith provide strong evidence that the condition of the Staffler property was the "result" of the property owners and/or their agents cutting, moving and piling trees, limbs, branches, and brush on the property.

Legal Argument

The New Jersey Supreme Court has recognized that a trial court should afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92, 99 (1977) (citing Robbins v. Jersey City, 23 N.J. 229 (1957)). Our Supreme Court has embraced the summary judgment standard applied by the federal courts and most state courts since 1986. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1955), the Court specifically adopted, with retrospective effect, the rationale of Fed. R. Civ. P. 56(c) as interpreted by Matsushita Electric Industrial Co., Ltd. v. Zenith Radio

Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Brill, 142 N.J. at 533, 545-46.

According to the well tested principle espoused by these Supreme Court cases, summary judgment is only appropriate when it is demonstrated that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-32; Fed. R. Civ. P. 56(c). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Liberty Lobby, 477 U.S. at 248.

Based on the standards set forth above, it is clear that defendants' motion for summary judgment must be denied. The Verified Complaint clearly sets forth allegations which, if proven, would entitle plaintiff to the relief sought even with the amended Section 146 no in effect. The allegations contained in the Verified Complaint do not in any manner assert that damage to the Staffler property was the "result" of a hurricane, tornado, natural disaster or Act of God. The color photographs attached as Exhibit A to the Certification of Tom Coulter show quite clearly that the vegetative debris on the Staffler property consists of trees, limbs and branches that have been cut, moved and piled by the property owners and/or their agents. In paragraph 22 of his Certification, plaintiff explains to the court that he personally witnessed individuals cutting, moving and piling the trees, limbs, branches and brush on the Staffler property. The current condition of the property is the "result" of the cutting, moving, and piling of this vegetative debris.

While defendants' claim that the fact that the damage was the result of Superstorm Sandy is "undisputed," defendants fail to provide any substantive, admissible

evidence that the condition of the Staffler property was solely the "result" of a hurricane, tornado, natural disaster or Act of God. For this motion, defendants do not provide a certification of any individual much less and individual with actual knowledge of the cause of the Staffler property debris. By way of attachments to Defendants' Statement of Material Facts, defendant provide this court with a pre-litigation letter from plaintiff's counsel to defendant Broughman. Counsel's letter does constitute competent, admissible evidence and therefore cannot be the basis for summary judgment. See Sellers v. Schonfeld, 270 N.J. Super. 424, 428 (App. Div. 1993). The only other "evidence" provided is defendant Broughman's April 27, 2015 Certification wherein she states: "In light of the massive devastation caused by Hurricane Sandy, it would be an incredible burden to require homeowners to remove downed trees, branches, stumps or roots . . ." She does not, in fact, state that the debris on the Staffler property was the "result" of Hurricane Sandy. It is clear from the pictures and personal observation provided by plaintiff that the debris was in fact the "result" of the cutting, moving and piling of the trees, limbs, branches and brush by the property owners or their agents.

In the Verified Complaint plaintiff alleges that defendant Broughman and her predecessors issued notices of violations both before and after Hurricane Sandy regardless of the cause of the debris. Proof of those notices of violation are attached as Exhibit B to the Coulter Certification submitted herewith. Because defendants have violated the August 6, 2015 Case Management Order and refused to provide discovery responses, neither plaintiff nor the court has the benefit of other documents which would support this allegation or the deposition testimony of defendant Broughman to explain her knowledge of cause of the Staffler property debris.

I. The Amendment to Section 146 Does Not Render Plaintiff's Claim Moot

Defendants surreptitiously amended Section 146 during this litigation to exempt from enforcement "brush, dead and dying trees, stumps, roots, other natural debris which results from a hurricane, tornado or other natural disasters or other Acts of God." The remainder of the ordinance remains untouched. From the pictures and certification testimony provided by plaintiff, it is clear that the debris on the Staffler property is the "result" of the cutting, moving and piling of the natural debris by the homeowners and/or their agents. Regardless of how formidable a hurricane, tornado, natural disaster or Act of God may be, such a natural occurrence does not machine cut, move and pile debris as such debris exists at the Staffler property. As defendants are still charged under Section 146 to require homeowners to remove such debris to preserve the public health, safety, general welfare or to eliminate blighted conditions (not caused by a hurricane, tornado, natural disaster or Act of God), plaintiff's cause of action remains intact.

II. Points III & IV of Defendants' Legal Brief are an Improper Rehash of Their Prior Motion to Dismiss Which Was Previously Denied by the Court

Points III & IV of defendants' legal brief are nothing more than a word for word copy of the exact same brief that defendants previously presented to this court in support of their motion to dismiss which was denied by Judge Ciccone's Order dated May 29, 2015. Defendants did not seek reconsideration of that decision nor did defendants appeal that Order. It is curious that defendants have taken the position that they have refused to respond to discovery requests in violation of the August 6, 2015 Case Management Order because they feel that it would be a waste of time and taxpayer money to do so, yet

defendants have no problem spending the time and taxpayer money to rehash issues that have already been decided by the court.

Unfortunately, it is plaintiff that must now also waste time and money to respond, again, to these same arguments that have been already rejected by the court. As defendants have done no more than cut and paste two sections from their prior brief, plaintiff will act in kind and apologize in advance for making this brief far longer than necessary.

A. Submission of the Previously Filed Certification of Marie L. Broughman Does Not Provide a Basis for Summary Judgment

As set forth above, defendants fail to provide any certification whatsoever in support of their summary judgment motion. Instead, they attach to Defendants' Statement of Material Facts the April 27, 2015 Certification of Marie L. Broughman that was previously filed by defendants in support of their motion to dismiss. Nothing has changed since Judge Ciccone denied defendants' motion to dismiss.

At the time of the motion to dismiss, plaintiff would pointed out two glaring problems with the substance of Ms. Broughman's Certification and the references to her Certification as used in defendants' legal brief.

First, Ms. Broughman's Certification is wrought with inaccuracies. Ms. Broughman is well aware that another neighboring property owner has made the same complaints to defendants regarding the condition of the subject property even if such complaints were not made to her directly. (See Exhibit C to the Coulter Cert.). The pictures attached as Exhibit D to her Certification belie her assertion that the property at 1178 Staffler Road is "heavily wooded." The pictures clearly show hand cut trees, limbs,

stumps and branches, and piled brush and debris in grassy areas on the Staffler property. While not germane due to the amendment to Section 146, Ms. Broughman's reference to not wanting to burden homeowners in the wake of Hurricane Sandy is disingenuous. In fact, the defendants issued numerous notices of violation pursuant to Code Chapter 146 to homeowners who failed to clear debris in the wake of Hurricane Sandy. (See Exhibit B to Coulter Cert.).

Of course, due to defendants' blatant violation of the August 6, 2015 Case Management Order, plaintiff has not had the opportunity to obtain addition documents from defendants nor depose Ms. Broughman as well as other officials who have obviously been involved in defendants' decision not to provide the subject property owner with notices of violation.

Quite simply, now that defendants' motion is one for summary judgment, even accepting that the zoning officer's actions are entitled to an amount of deference, as set forth at length above there exist genuine issues with respect to material facts which require a rational factfinder to resolve. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

B. There is no Basis to Dismiss the Verified Complaint Based on Defendants' Assertion that the Plaintiff Has Alternate Forms of Relief Available

Again, defendants argument that the Verified Complaint should be dismissed because of defendants' assertion that plaintiff has alternate forms of relief available was rejected by Judge Ciccone when the court denied defendants' prior motion to dismiss. Defendants' assertion that plaintiff's claim for mandamus relief is barred because "plaintiff has alternative adequate relief available" is incorrect. In fact, there is no such

legal standard. Defendants' assertion is derived from a misinterpretation of the relevant case law. As cited by defendants, the relevant standard for entitlement to mandamus relief was set forth by the New Jersey Supreme Court in the case of Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953) and more recently summarized by the Appellate Division decision in Mullen v. Ippolito Corp., 428 N.J. Super. 85 (App. Div. 2012). Citing Garrou, the Mullen court recognized three prerequisites that must be established by a party to obtain mandamus relief: 1) a clear violation of a zoning ordinance affecting the plaintiff; 2) failure of appropriate action by the relevant municipal officer after due notice; and, 3) "the unavailability of adequate and realistic forms of relief. Id. at 103. Defendants begin their argument for dismissal of plaintiff's case by misinterpreting and misapplying the third prong.

Despite defendants' assertion to the contrary, the Garrou Court did not set forth that a plaintiff would not be entitled to mandamus relief in the event that there were any alternate forms of relief available to plaintiff. Rather, the Garrou Court found that to satisfy the third prong a plaintiff need show only the "unavailability of any proceeding in lieu of prerogative writ **to compel enforcement of the ordinance**." 11 N.J. at 304. Here, the only argument that defendants make that there was alternative relief in the form of compelling enforcement of the ordinance is that the plaintiff "failed to appeal the decision of the Zoning Officer to the Board of Adjustment." Defs. Brief at p. 11.

However, defendants' argument that plaintiff did not exhaust his administrative remedies by failing to appeal Ms. Broughman's decision to the Board of Adjustment fails for two reasons.

First, a thorough review of the Code of Bridgewater Township ("Code") reveals that there are no provisions which set forth that the decision of the zoning officer not to issue an ordinance violation pursuant to Chapter 146, Section 146 is appealable to the Board of Adjustment. In fact, Section 146-2 sets forth that a failure to comply with a violation issued by the zoning officer will result in the matter being heard by the Bridgewater Township Municipal Court, not the Board of Adjustment. Code Section 146-6 states that in order to challenge a notice of violation the property owner is entitled to a hearing before the Township Council, again not the Board of Adjustment. Nowhere in the Code is there any reference whatsoever to a party such as the plaintiff having the right or obligation to bring the matter before the Board of Adjustment to complain of the zoning officer's failure to act. Presumably, that is why defendants failed to provide a legal citation in their brief to the Code supporting their position – because no such right or obligation to appeal to the Board of Adjustment exists. If such an appeal did exist, surely Ms. Broughman's January 20, 2015 letter (attached to her Certification as Exhibit C) would have stated specifically the time and manner of such appeal when she advised counsel of her decision not to issue a violation.

Second, in her January 20, 2015 letter, which was copied to the Township Administrator and the Director of Municipal Services & Township Engineer, Ms. Broughman stated that it was "the legal opinion of the Township Attorney William Savo" that she was not required to issue a notice of violation. It is important to remember that the doctrine of exhaustion of remedies is not "absolute" and that a "trial court's determination whether to invoke those principles is a discretionary one." Alliance for Disabled in Action, Inc. v. Cont'l. Props., 371 N.J. Super. 398, 408 (App. Div.2004).

Importantly, a party is not required to seek administrative remedies if doing such would be futile. Garrow v. Elizabeth Gen., Hosp. & Dispensary, 79 N.J. 549, 561 (1979). Based on Ms. Broughman's advisement that her decision was already reviewed and substantiated by the township attorney, the very same individual likely to provide the same advice to any municipal board or committee that plaintiff may have arguably appealed to, it is obvious that any such appeal would have been an effort in futility on the part of plaintiff.

Thus, as there is no appeal process set forth in the Code that would have aided plaintiff, and under the circumstances any such appeal would have been futile anyway, it is clear that there were no proceedings available to plaintiff "to compel enforcement of the ordinance." Garrou, 11 N.J. at 304.

Defendants also argue that plaintiff's demand for mandamus relief must be dismissed because of the availability of a private nuisance action against the offending property owner. As stated above, this is a misinterpretation of the third prong of the prerequisites established in Garrou because although plaintiff could obtain damages as well as injunctive relief in a private nuisance action plaintiff could not compel enforcement of the ordinance. Moreover, the case law is clear that plaintiff has no obligation to file a private action for nuisance and, more importantly, that whether he chooses to do so or not does not bar his right to mandamus relief.

Defendants do not cite a single case where any court has ever dismissed an action for mandamus relief based on plaintiff's failure to bring a private nuisance action directly against the neighboring landowner. In fact, the very cases cited by defendants dealt with

mandamus actions that were joined with private nuisance claims and fully support plaintiff's right to relief here.

The Garrou case involved a plaintiff that brought two lawsuits based on a neighboring landowner's actions that alleged violated a municipal zoning ordinance. The plaintiff filed a private action for damages and injunctive relief against the neighboring property owner and a second action against the municipality for mandamus relief to compel enforcement of a municipal zoning ordinance. 11 N.J. at 297-98. The actions were later joined. The Supreme Court reversed the lower court's dismissal of plaintiff's claim for mandamus relief. In reinstating plaintiff's claim for mandamus relief the Court recognized that "[i]n our State, perhaps more than any other, the prerogative writ has been used as a comprehensive safeguard against official wrong." Id. at 302. Importantly, the Court embraced the joinder of the private action with the demand for mandamus relief: "It seems clear to us that the joinder of such claims, in appropriate circumstances such as those presented in the instant matter, is well within the farsighted provisions of the rules and will serve the ends of sound judicial administration by curbing the inconvenience, delay and expense incident to independent trials." Id. at 305.

As in Garrou, the plaintiffs in Mullen also brought a private action against their adjacent landowner and a separate action for mandamus relief against the municipality and its zoning officer. 428 N.J. Super. at 88. After the two actions were joined, the municipal defendants moved to dismiss based on, inter alia, an assertion that plaintiffs failed to exhaust their administrative remedies. Correctly interpreting the third prong of the Garrou prerequisites, the Mullen court refused to dismiss the action for failure by plaintiffs to exhaust their administrative remedies finding that "[p]laintiffs presented

concrete evidence establishing a pattern of indifference by the municipal offices charged with the enforcement of the local zoning and beach ordinances. . . . Plaintiffs' actions in this respect are similar to the letters written by the plaintiff's attorney in Garrou. Like Garrou, plaintiffs were either ignored or told, in a summary and dismissive fashion, that enforcement action against the Driftwood was unwarranted." Id. at 103-04.

Neither in Garrou nor Mullin did either court entertain the dismissal of the plaintiffs' demand for mandamus relief simply because the plaintiffs had available to them a private action remedy.

Defendants' argument that plaintiff's claim here is barred due to plaintiff's failure to bring a private action for injunctive relief pursuant to N.J.S.A. 40:55D-18 is also wholly unsupported by any case law. Moreover, defendants' assertion that the Appellate Division decision in Bubis v. Kassin, 323 N.J. Super. 601 (App. Div. 1999) stands for the proposition that courts encourage private actions be filed before issuing a writ of mandamus against a municipality is completely inaccurate. The Bubis court simply found, after a two day trial, that plaintiffs did not prove their claim that defendants violated the applicable zoning ordinance.

In this case, plaintiff does not have a desire to undertake the added litigation attendant with a private cause of action. Plaintiff does not want the expense of proving actual damages against his neighbor as would be required in a nuisance suit. Plaintiff only wants the protections afforded him by municipal statute which the defendants refuse to enforce.

Even if defendants were correct in their assertion that plaintiff should be made to bring a private claim against the offending property owner, the proper procedure would

not be to dismiss plaintiff's Verified Complaint. Rather, plaintiff should be granted leave to amend the Verified Complaint to include direct causes of action against his neighbor. Again, the courts in Garrou, Mullin, and Bubis all dealt with claims by plaintiffs for mandamus relief as well as private remedies against the alleged offending property owners.

III. Plaintiff is Entitled to an Order Compelling Defendants to Respond to Discovery

There is no question that defendants have willfully and purposefully violated this court's August 6, 2015 Case Management Order by failing to provide any discovery responses whatsoever. In fact, in the October 2, 2015 letter to this court, defendants' admitted to violating the court order claiming that they failed to see the "utility in producing discovery" despite the court rules and order of the court. This anarchic approach to litigation cannot be tolerated by the court. Plaintiff is entitled to an order compelling discovery responses.

Conclusion

It is a sad commentary on the individuals entrusted by the electorate to run Bridgewater Township that they would go to such lengths to attempt to obtain dismissal of plaintiff's action. By their actions, Bridgewater Township is now powerless to require homeowners to clean up residential properties in the wake of a storm or other natural disaster so long as the homeowner simply leaves the debris where it lies. Of course, with its propensity to interpret or change ordinances to suit its immediate needs, it is likely that

Bridgewater Township will again require clean-ups when this action is ultimately resolved.

Here, however, defendants' questionable tactics have failed. The amendment to Section 146 does not render plaintiff's claim moot as it is obvious that the debris on the Staffler property is the result of the property owners' actions of cutting, moving and piling the debris and not the result of a storm. Of course, once this court rejects defendants' motion for summary judgment, defendants are free to again attempt to amend the ordinance to selectively carve plaintiff out of its enforcement responsibilities. Perhaps the ordinance can be further amended to provide that a resident that previously won attorneys' fees against Bridgewater Township for failing to comply with the law is not entitled to enforcement of local ordinances. At least that would be more transparent to defendants' motives and goals.

Until then, this court should deny defendants' motion and order defendant to respond to discovery.

Respectfully submitted,

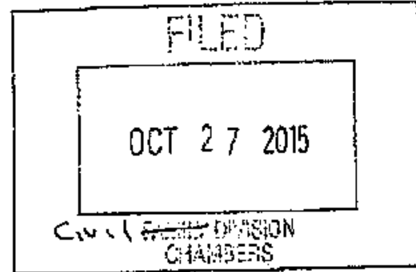
Beacham and Kiegel
Attorneys for Plaintiff

By:____________________
Robert J. Beacham

Dated: October 12, 2015

TRUE COPY

Christopher M. Corsini, Esq. Lic. # 022532009
MAURO, SAVO, CAMERINO, GRANT & SCHALK
Attorneys at Law
77 North Bridge Street
Somerville, New Jersey 08876
(908) 526-0707, (908) 725-8483 (Fax)
E-Mail: corsini@maurosavolaw.com
Attorneys for Defendant, Bridgewater Township and Marie L. Broughman



THOMAS COULTER, **Plaintiff,** **vs.** **TOWNSHIP OF BRIDGEWATER and MARIE L. BROUGHMAN as Zoning Officer for the TOWNSHIP OF BRIDGEWATER** **Defendants**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **SOMERSET COUNTY** **DOCKET NO. SOM-L-279-15** **Civil Action** **ORDER ENTERING SUMMARY JUDGMENT**

THIS MATTER being opened to the Court by Mauro, Savo, Camerino, Grant & Schalk, P.A., Attorneys for Defendant, Township of Bridgewater and Marie L. Broughman, as Zoning Officer for the Township of Bridgewater, and the Court having considered the moving papers and arguments of counsel; and for good cause shown;

IT IS on this 27th day of October, 2015;

ORDERED and ADJUDGED, that the motion of the Defendants, Township of Bridgewater and Marie L. Broughman as Zoning Officer for the Township of Bridgewater, is hereby **GRANTED**, dismissing the Complaint of the Plaintiff, with prejudice. For the reasons stated on the record on 10/27/15.

IT IS FURTHER ORDERED that a copy of the within Order be served upon all counsel within 7 days of the receipt hereof.

William H. D'Annunzio, ~~J.S.C.~~ P.J.A.D.
Retired + Temporarily on Recall

______Opposed
______Unopposed

RECEIVED OCT 2 7 2015