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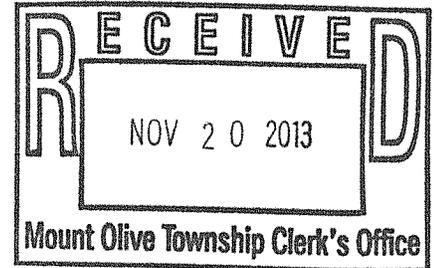
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SUPREME COURT OF NEW JERSEY
AS A CIVIL TRIAL ATTORNEY
+ MEMBER OF N.J. & D.C. BAR
° MEMBER OF N.J. & PA. BAR

November 18, 2013



Via Federal Express

Elizabeth Semple, Manager
Land Use Management
Department of Environmental Protection
Division of Coastal and Land Use Planning
Mail Code 401-07C
PO Box 420, 401 East State Street
Trenton, NJ 08625-0420

**Re: Jallad – Single Family Home
Block 7100, Lot 66
Program Interest No. 435442
Activity No: CSD120022**

Dear Ms. Semple:

I continue to serve as counsel to Mazouz and Tomasa Jallad. Recently, I received a copy of your November 13, 2013 correspondence, wherein you determined that the Jallads' proposed activity is not exempt, because it meets the definition of a "Major Highlands Development." After reading your correspondence, I believe that the decision was erroneously made, because you did not have data available to you at the time this decision was formulated. Consequently, I am providing additional information in hopes that you will reconsider your determination without requiring the Jallads to resubmit a complete application for another Plan Consistency Determination or file an appeal.

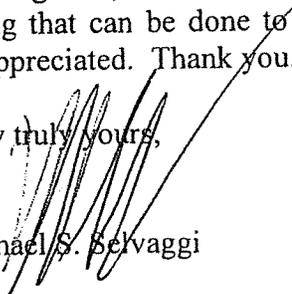
In your letter, you raised a question concerning whether the existing General Store structure is a lawful pre-existing use. You opined that the issue may be in some doubt due to a lawsuit before the Superior Court of New Jersey. Please be advised that the lawsuit is now concluded, because The Honorable Thomas L. Weisenbeck, A.J.S.C., ruled that the General Store is, in fact, a lawful pre-existing use. A copy of the written decision by Judge Weisenbeck is included. In his decision, the Judge clearly found that the General Store was not abandoned and would not need to be removed. I direct your attention to pages 12-18. By finding that the structure had not been

abandoned, Judge Weisenbeck conclusively found that the structure **could** lawfully remain on the property. Therefore, any impervious coverage associated with the **structure** must be included when determining the amount of lawfully existing impervious surface.

Similarly, the impervious surface associated with the existing wood road should also be included when determining the amount of existing impervious surface. This access point has been used in connection with the General Store which Judge Weisenbeck found has existed on the property for at least 60 years. The driveway to the General Store has also been in existence at least that long. Although the driveway looks like dirt on the photographs, it has gravel that was used to establish and stabilize it. Indeed, had there been no obvious driveway, the Township would not have installed depressed curbing, as noted in the Township Engineer's October 11, 2012 correspondence. The Jallads respectfully request that you visit their property to confirm the foregoing or speak to their civil engineer, James Glasson, who prepared the plans submitted in connection with their application. A sight visit should enable you to see that the driveway does, in fact, include impervious surface which should be counted when calculating the lawfully existing impervious surface on the property as of August 10, 2004.

The Jallads are extremely anxious to proceed with the renovation of **the** property and eventual use as a residence. Unfortunately, the litigation, which is now concluded, has resulted in a significant delay. Consequently, anything that can be done to expedite a consideration of the application before you would be greatly appreciated. Thank you.

Very truly yours,


Michael S. Salvaggi

MSS/tal

cc: James Glasson, P.E.

Mount Olive Township Clerk

Mount Olive Township Construction Official

Mount Olive Environmental Commission

Mount Olive Planning Board

Morris County Planning Board

Morris County Environmental Commission

Gene Feyl, New Jersey Highlands Council

Mr. and Mrs. Mazouz Jallad

PREPARED BY THE COURT:

_____ :
 :
 Carl J. Soranno and Elizabeth :
 Soranno, :
 :
 Plaintiffs, :
 :
 v. :
 :
 Tomasa Jallad and Mazouz Jallad, :
 The Township of Mount Olive, the :
 Mayor of Mount Olive, the :
 Township Council of Mount Olive, :
 The Township of Mount Olive :
 Planning Board, and the Zoning :
 Officer of the Township of Mount :
 Olive, :
 :
 Defendants. :
 _____ :

SUPERIOR COURT OF NEW JERSEY
 MORRIS COUNTY
 LAW DIVISION
 DOCKET NO. MRS - L-1248-12

FILED
 JAN 18 2013

THOMAS L. WEISENBECK, A.J.S.C.
 JUDGE'S CHAMBERS
 MORRIS COUNTY COURTHOUSE

CIVIL ACTION

PARTIAL SUMMARY JUDGMENT ORDER

THIS MATTER having been opened to the Court by way of motion for partial summary judgment filed by Anthony M. Gruppuso, Esq., counsel for plaintiffs Carl J. Soranno and Elizabeth Soranno, and with opposition filed by Michael S. Selvaggi, Esq., counsel for defendants Tomasa Jallad and Mazouz Jallad, and with opposition filed by Michael A. Augello, Jr., Esq., counsel for the Township, Mayor, Township Council, and the Zoning Officer of Mount Olive, and the Court having considered the filings and conducted oral argument, and for the reasons set forth in the attached Statement of Reasons and for good cause shown;

IT IS ON THIS 18th DAY OF JANUARY 2013, ORDERED as follows;

1. Plaintiffs' motion for partial summary judgment is denied; and
2. The Court remands the limited issue regarding the necessity of a Zoning Permit prior to the issuance of the Construction Permit to the Zoning Officer of the Township of Mount Olive, who shall determine said issue within fourteen (14) days hereof.



THOMAS L. WEISENBECK, A.J.S.C.

Dated: January 18 2013

STATEMENT OF REASONS

I. Background and Procedural History

Plaintiffs Carl J. Soranno and Elizabeth Soranno (“Sorannos”), husband and wife, are owners of a single-family home on property designated as Block 7100, Lot 65, on the Tax Map of the Township of Mount Olive, County of Morris, State of New Jersey, or more commonly known as 134 Flanders Drakestown Road, Flanders, New Jersey (“Soranno Property”).

Defendants Tomasa Jallad and Mazouz Jallad (“Jallads”), husband and wife, are the owners of property designated as Block 7100, Lot 66, on the Tax Map of the Township of Mount Olive, County of Morris, State of New Jersey, or more commonly known as at 134 Flanders Drakestown Road, Flanders, New Jersey (“Property”).

Defendant Township of Mount Olive (the “Township”) is a municipal corporation duly organized and existing pursuant to and in accordance with the laws of the State of New Jersey. The Township is a municipality as defined by N.J.S.A. 40:55D-5 of the Municipal Land Use Law, N.J.S.A. 40:55D-1, et. seq. (“MLUL”), and is governed under the Optional Municipal Charter Law, N.J.S.A. 40:69A-1, et. seq. (“Mayor-Council”), form of government providing for a separately elected mayor and council.

Defendant Township Council of Mount Olive (“Township Council”) is a municipal agency as defined by the MLUL and acts as the governing body of the Township. The Township Council is the legislative branch of the government charged with approving the municipal budget and enacting the code of the Township, its ordinances and resolutions as defined by N.J.S.A. 40:49-1, et. seq. (“Ordinance”), of the Township, as adopted by the Council, which has been revised, codified, and consolidated into chapters and sections approved, adopted, ordained, and enacted as the Code of the Township of Mount Olive (“Code”).

Defendant Mayor of the Township of Mount Olive (“Mayor”) is elected directly by the people of the Township and is the Chief Executive Officer of the Township. The Mayor is responsible for carrying out all Council decisions and is charged with the duty to control, oversee, and regulate the administration and functions of the Township.

Defendant Mount Olive Township Planning Board (“Board”) is a municipal agency and is authorized to act in a quasi-judicial capacity, and when acting pursuant to the MLUL is charged with the enforcement of the Township’s Code, its Ordinances, and Resolutions.

Defendant Zoning Officer of the Township of Mount Olive (“Zoning Officer” or “Zoning Official”) is the enforcing officer charged with the duty of administering and enforcing the provisions of the Township’s Ordinances and Resolutions.

On December 15, 2010, the Jallads purchased the Property. The Property contains two (2) buildings: one structure is a former day care center known as the Happy Time Nursery School (“Principal Structure”), while the other structure (“Second Structure” or “General Store”) is a 1,003 square foot building having the appearance of a barn.

On May 24, 2011, the Jallads applied for a construction permit to repair/rehabilitate the Second Structure on the Property. On June 10, 2011, the Municipal Construction Officer of the Township of Mount Olive (“Construction Officer” or “Construction Official”) issued a Notice of Imminent Hazard and Notice of Unsafe Structure (“Notice”) and advised the Jallads that the Township would not issue any permits to repair the Second Structure. The Notice provided that appeal of the Order could be made to the Construction Board of Appeals of the Morris County Board of Appeals within fifteen (15) days of receipt of the notice as provided by N.J.A.C. 5:23A-2.1.

On September 12, 2011, the Jallads filed an Application with the Board seeking variance relief to convert the Principal Structure into a residence and the right to repair and utilize the Second Structure, described as a “separate storage barn.” The Second Structure has a history that predates the Principal Structure on the Property. According to the New Jersey Office of Historic Preservation Historic Sites Inventory, the Second Structure has been identified as the former General Store of the Village of Mount Olive and has been in existence since the late 1800s. According to previous applications before the Township by prior owners of the Property, the Second Structure has not been in use and has stood vacant and boarded up for at least sixty (60) years. The Second Structure has fallen into disrepair, with the foundation crumbling, walls buckling, and a hole in the roof cause by a tree striking the building. Property Tax Record Cards for the Property ascribe no value to the Second Structure.

At the December 8, 2011 hearing on the Jallad’s Application, plaintiff Carl Soranno, the Jallad’s neighbor, appeared and asked for clarification from the Board concerning the

completeness of the Application and expressed his concern with **respect** to the alleged open violations on the Property, including those of the Second Structure. On February 10, 2012, plaintiff wrote to the Zoning Officer to inquire as to why no action **had** been taken to compel the demolition of the Second Structure, informed the Zoning Officer that **no** appeal had been filed with the Construction Board concerning the Notice, noted that the “**nuisance**” on the Property had not been abated, and reiterated a need for the demolition of the **Second Structure** as it was continuing to deteriorate.

On March 8, 2012, the Board granted the Jallad’s **Application** and subsequently memorialized the decision in a Resolution adopted on April 13, 2012. On May 18, 2012, the Sorannos filed a Complaint in Lieu of Prerogative Writs in the Law **Division**, Docket No. MRS L-1248-12, and a **Verified Complaint** in the Chancery Division, Docket No. MRS C-49-12. The defendants in both Complaints are identical, to wit, Tomasa Jallad and Mazouz Jallad, the Township of Mount Olive, the Township Council of Mount Olive, **the** Mayor of Mount Olive, the Mount Olive Township Planning Board, and the Zoning Officer **of** the Township of Mount Olive.

On May 25, 2012, plaintiffs filed an Order to Show Cause **in** the Chancery matter, seeking temporary restraints enjoining defendants from: (1) **engaging in** any further actions to repair or modify either the Primary or Secondary structures on **Property**; (2) removing any further trees from the Property without the consent and approval of **the** Township in compliance with the Township Code; (3) entering plaintiff’s property; (4) erecting **any** further fencing on the Property; (5) and filing any applications with the Township concerning **the** Property except upon notice to plaintiff’s counsel. Both Complaints revolve around an **application** for variances and other relief made by the Jallads before the Board in order to modify **conditions** on their Property. Plaintiffs are the owners of a single-family home on the property adjacent to the Jallad’s Property.

On May 30, 2012, the Municipal Construction Officer of the **Township** of Mount Olive (“Construction Official”) issued a construction permit permitting the **Jallads** to repair the Second Structure.

On June 4, 2012, plaintiffs, upon the suggestion of the **Planning** Board Attorney, filed a Notice of Appeal from the determination to issue the construction **permit**. On June 11, 2012, the Township’s counsel advised plaintiffs that the Zoning Officer had **made** no determination with

respect to the construction permit, that no action would be taken on **the** Notice of Appeal, and that plaintiffs should file an appeal with the Morris County Construction Board of Appeals. On June 13, 2012, plaintiffs filed a Notice of Appeal with the Construction Board of Appeals, which was rejected and returned because of due process concerns and **substantive** issues, including but not limited to the existence of this action and the Construction Board of Appeal's lack of jurisdiction to consider matters of zoning.

On June 15, 2012, the Court heard oral argument on the **Order** to Show Cause, and the Jallads stipulated on the record that they would waive any **hardship** argument in future proceedings before a municipal entity or before this Court in **relation** to their expenditure of resources in improving or repairing the Secondary Structure. On June 15, 2012, the Court denied plaintiffs' Order to Show Cause and consolidated the Chancery Division matter, Docket No. MRS-C-49-12, into the Prerogative Writs matter, Docket No. MRS-L-1248-12.

On June 28, 2012, the Jallads filed an Answer and Counterclaim, demanding dismissal of plaintiffs' action and seeking compensatory and punitive damages, **alleging**: in Count One, abuse of process by plaintiffs for filing three (3) separate judicial and quasi-judicial actions with an improper purpose to harass, cause unnecessary delay, and create **needless** litigation, actuated by malice, misappropriating process for an end other than that it was **designed** to accomplish; and in Count Two, accusing plaintiffs of interference with defendants' **property** rights by filing three (3) separate actions, delaying and/or preventing the Jallads from improving the Property pursuant to the variances and permits issued by the Township, with full **knowledge** that the Jallads will be damaged by the legal fees incurred in defending all three (3) actions.

On July 9, 2012, plaintiffs filed a motion to amend the **Verified** Complaint in Lieu of Prerogative Writs.

On July 10, 2012, an Order was entered referring the parties to **mediation**.

On July 11, 2012, plaintiffs filed a motion to dismiss the Jallad's counterclaims. On July 20, 2012, the Jallads filed opposition to the motion to dismiss. No **appearances** were made by any other defendants in these matters.

On July 27, 2012, the Court granted plaintiffs' motion to **amend** the Complaint and dismissed defendants' counterclaims without prejudice.

On September 25, 2012, plaintiffs filed a motion for **partial** summary judgment on Counts One and Five of their Amended Complaint in Lieu of **Prerogative** Writs seeking to have

the Court declare that (1) the General Store is abandoned as a **matter** of law and (2) the construction permit issued by the Township's Construction Official is **null** and void.

On January 3, 2012, defendants filed opposition.

On January 7, 2012, plaintiffs filed their reply.

On January 11, 2013, the Court heard oral argument.

II. Standard of Review

The New Jersey Court Rules require that summary judgment “**be rendered forthwith**” if the record shows “that there is no genuine issue as to any material **fact** challenged and that the moving party is entitled to a judgment . . . as a matter of law.” R. 4:46-2(c). “[T]he determination whether there exists a genuine issue with respect to a **material fact** challenged requires the motion judge to consider whether the competent **evidential** materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational **fact** finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520, 523 (1995). “[A] disputed issue of fact of an **insubstantial** nature should not preclude the grant of summary judgment.” Prant v. Sterling, 332 N.J. Super. 369, 377 (Ch. Div. 1999), aff'd 332 N.J. Super. 292 (App. Div. 2000). “Summary judgment is not to be denied if other papers pertinent to the motion show palpably the absence of any issue of material fact” Rankin v. Sowinski, 119 N.J. Super. 393, 399 (App. Div. 1972). Summary judgment is proper where it is clear that plaintiff cannot establish the elements of the claims asserted. See Pilkington v. Bally's Park Place, 370 N.J. Super. 140, 148 (App. Div. 2003), rev'd on other grounds, 180 N.J. 262 (2004).

III. Discussion

Public bodies such as the Board are allowed wide latitude **in** the exercise of their delegated fact-finding discretion because of their peculiar knowledge of **local** conditions. Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268, 296 (1965). A zoning board's decision on a variance application may be set aside only when arbitrary, capricious, or **unreasonable**. Id.; see also Cell S. of N.J. Inc. v. Zoning Bd. of Adj. of W. Windsor Twp., 172 N.J. 75, 81 (2002); New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj., 160 N.J. 1, 14 (1999). This standard comes from the recognition that local officials, who are **familiar** with a community's characteristics and interests, are best equipped to pass judgment **on** variance applications.

Kramer, supra, 45 N.J. at 296. Therefore, “courts ordinarily should not disturb the discretionary decisions of local boards that are supported by substantial evidence in the record and reflect a correct application of the relevant principles of land use law.” Lang v. Zoning Bd. of Adj. of Borough of N. Caldwell, 160 N.J. 41, 58-59 (1999).

Board decisions are presumed valid and the party attacking them has the burden of proving otherwise. Cell, supra, 172 N.J. at 81. A court will not disturb a board’s decision unless it finds a “clear abuse of discretion.” Id. at 82. Judicial review is meant to be a determination of the validity of the board’s action, not a substitute for the board’s judgment on a local determination. Medici, supra, 107 N.J. at 15.

Plaintiffs assert that they are entitled to summary judgment on Counts One and Five of their Amended Complaint because (1) the General Store’s non-conformities have been abandoned and cannot be continued and (2) the Jallad’s construction permit for the General Store is null and void because they failed to first obtain a zoning permit. The Sorannos point out that the General Store violates (a) the front-lot line setback requirements of the Code, (b) the side-lot setback requirements of the Code, and (c) qualifies as a secondary principal structure on the Property while the Code only allows for one. According to the Sorannos, even though the law permits pre-existing non-conforming structures while an ordinance may facially prohibit them, it does not insulate the structure from compliance with applicable zoning regulations in perpetuity.

Plaintiffs submit that the General Store was abandoned by the previous owners of the Property and, according to established case law and Section 400-87(A) of the Code, cannot be rebuilt or reestablished. See Camara v. Bd. of Adj. of Twp. of Belleville, 239 N.J. Super. 51, 56 (App. Div. 1990). Specifically, the Sorannos point out that the prior owner of the Property, Ms. McDavitt, agreed to leave the General Store vacant and not put it to use as a condition of obtaining zoning approval to re-open and expand the day-care center she operated on the Property. Furthermore, the successors-in-interest to Ms. McDavitt, i.e. Mr. Hull, Ms. Pucio and Mr. Pucio, never made any particular use of the General Store nor the Property at large, which was ultimately sold to the Jallads as vacant land. As such, according to the Sorannos, the General Store’s non-conformities were abandoned, this abandonment is binding on the Jallads, and the non-conforming rights which permitted the existence of the General Store cannot be revived.

Furthermore, the Sorannos claim that the construction permit permitting the Jallads to repair the General Store was issued in violation of the State Uniform Construction Code, the MLUL, and the Code. Specifically, the Sorannos claim that, pursuant to Section 400-6 of the Township's Code, the Jallads needed to first obtain a zoning permit prior to the issuance of the construction permit. As such, the issuance of the construction permit is a legal nullity, and the Jallads cannot begin construction on the General Store.

In opposition, the Jallads contend that summary judgment should be denied for the following reasons: (1) the Soranno's motion is premature as discovery has not yet concluded; (2) the threshold issues in the matter have not been addressed by the Planning Board as required by the exhaustion of remedies principle; and (3) the Jallads have a lawful right to continue, maintain, restore, and repair a pre-existing, non-conforming structure upon their property according to New Jersey Municipal Land Use Law ("MLUL"). Specifically, the Jallads emphasize that virtually no discovery has taken place since the Court's June 15, 2012 Order denying plaintiffs' Order to Show Cause and consolidating the chancery action with the action in lieu of prerogative writs. As such, the record is devoid of sufficient information or evidence on the issue of abandonment and the validity of the construction permit, making summary judgment premature at this juncture of the case. Furthermore, the Jallads claim that the Sorannos have not yet exhausted their administrative remedies and thus, pursuant to R. 4:69-5, it would be inappropriate for the Court to render judgment in the matter. To this extent, the Jallads contend that the issues relating to the non-conforming structures should first be heard by a Board of Adjustment. Nonetheless, should the Court consider the abandonment issue, the Jallads claim that there are no facts to support the notion that the General Store was abandoned and, even should the Court find that it was, there is no precedent indicating that its continued existence or proposed repair is illegal. As such, it was not necessary for the Jallads to obtain a zoning permit prior to the issuance of the construction permit.

Defendants Township, Mayor, Township Council, and Zoning Officer ("Mount Olive defendants") also assert that summary judgment should be denied because (1) there are many disputed issues of fact and (2) the Jallads' construction permit is valid and enforceable. In support of this contention, the Mount Olive defendants submit the certifications of Gary Lindsay, the Construction Official for the Township, and Frank Wilpert, Jr., the Zoning Officer for the Township, who both certify that no zoning variance or permit was required as a prerequisite to

issuance of the construction permit since the application was limited to repair work on the existing General Store structure.

IV. Exhaustion of Administrative Remedies

In Count One of the Amended Complaint, plaintiffs allege that the Board lacked the requisite authority under the MLUL and the Township Code to grant variances for the Property while open Code violations and substantial nonconformities existed on the Property. Relevantly, plaintiffs claim that the Board's approval of the Jallad's variance application for the Principal structure on the Property without consideration of, or a requirement that, such approval be conditioned on satisfying all outstanding zone violations was arbitrary, capricious and unreasonable. To that end, the Sorannos characterize the Board's refusal to consider evidence relating to the nonconforming use and structure of the General Store building as an abuse of discretion.¹ As such, the Sorannos demand declaratory judgment affirming that (1) the General Store is abandoned as a matter of law; (2) the General Store's use is terminated as a matter of law; (3) the General Store is an unsafe or unfit structure; and (4) the General Store is a nonconforming structure and use as defined under the Township's Zoning Code. Plaintiffs also request reasonable attorney's fees, interest, cost of suit, and such other relief as the Court deems appropriate.

The Sorannos assert that the General Store is abandoned. The Jallads contend the opposite. The Planning Board has not entered judgment determining the status of the structure. See Certification of Anthony Gruppuso, Esq. ("Gruppuso Cert."), August 29, 2012, Ex. F at 346 ("Nothing in this approval relates to any activity on the existing barn in the northwesterly corner of the Property fronting on Flanders-Drakestown Road. Any activity related to that structure is not before this Board If [sic] when any such activity is undertaken, the Board would otherwise have jurisdiction over such activity, in accordance with applicable law." [excerpt from the Board's April 13, 2012 Resolution approving in part the Jallad's request for certain variances relating to Principal Structure and General Store on the Property]). The Sorannos seek entry of

¹ The Sorannos assert that they have standing to pursue their claims against the Jallads under Section 400-4(A) of the Township Code which permits an "interested party" to "institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use [of buildings or structures in violation of §400-4(A) of the Code]. The Court finds that the Sorannos have standing to pursue their claims as objectors to the Jallad's variance application according to Allen v. Planning Bd. Tp. of Evesham, 137 N.J. Super. 359 (App. Div. 1975).

declaratory judgment affirming that the structure has been abandoned as a matter of law. Both parties agree that the General Store was constructed and its use abandoned well before passage of the relevant land use ordinances which rendered it non-conforming. The Court concludes that it is appropriate for it to render declaratory judgment on the abandonment issue.

Declaratory relief in land use actions is available pursuant to the Declaratory Judgment Act, N.J.S.A. 2A:16-53. The court may order such relief when a dispute arises regarding a property owner's rights under a municipal ordinance or the correct interpretation of the terms and conditions of an approval given by a municipal agency. Declaratory relief is particularly appropriate where it will avoid repeated litigation over the same issues. See, e.g., ML Plainsboro v. Plainsboro, 316 N.J. Super. 200, 204-05 (App. Div. 1998)(approving declaratory relief in a case in which the parties disputed the rights of a property owner under the terms of the municipal ordinance and municipal site plan approvals to rent units to the general public in a corporate conference center.) In general, therefore, if a dispute develops or if there is uncertainty as to whether an approval encompasses a proposed activity or use, especially if the time frame within which a direct appeal might be taken has expired, relief may be sought pursuant to the Declaratory Judgment Act. While such relief can be denied if alternative relief would be more effective or appropriate, especially in the absence of a true controversy, the decision rests within the Court's sound discretion.—Independent Realty v. North Bergen, 376 N.J. Super. 295, 303-04 (App. Div. 2005). However, "relief by way of declaratory judgment should be withheld when the request is in effect an attempt to have the court adjudicate in advance the validity of a possible [claim or] defense in some expected future law suit." Id. at 302 (citing Donadio v. Cunningham, 58 N.J. 309, 325 (1971)).

Defendants assert that plaintiffs have failed to exhaust their administrative remedies. The "doctrine of exhaustion of administrative remedies serves three primary goals: (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). See also Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 317 (1979); Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 386-88 (1979). The doctrine dovetails with R. 4:69-5, the statutory authority governing actions in lieu of prerogative writs, which dictates that, "[e]xcept

where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.” Id.

Here, the Jallad’s assertion that the Sorannos have failed to exhaust their administrative remedies stands in stark contrast to the Sorannos’ allegations that the Board has refused to consider their claims regarding the status of the General Store and that, as such, the matter is appropriate for this Court’s consideration. The Jallads maintain that any issues related to non-conforming structures, i.e., the General Store, must first be decided by a Board of Adjustment pursuant to N.J.S.A. 40:55D-68. That statute provides the following:

Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.

The prospective purchaser, prospective mortgagee, or any other person interested in any land upon which a nonconforming use or structure exists may apply in writing for the issuance of a certificate certifying that the use or structure existed before the adoption of the ordinance which rendered the use or structure nonconforming. The applicant shall have the burden of proof. Application pursuant hereto may be made to the administrative officer within one year of the adoption of the ordinance which rendered the use or structure nonconforming or at any time to the board of adjustment.

[Id.]

The Jallads have filed an application with the Township Planning Board requesting issuance of a certificate certifying that the General Store existed prior to the adoption of the ordinances which rendered it non-conforming. The hearing on the Jallad’s application was conducted on December 20, 2012. While the Board has not issued a formal decision on the matter, the Court was advised at oral argument that the Board determined that the General Store structure existed before the adoption of the ordinances. Nonetheless, the Court’s ruling in the summary judgment motion would not necessarily hinge on the Board’s decision on the certificate application, as the Sorannos do not assert that the General Store fails to qualify as a pre-existing non-conforming structure, but instead contend that it has been abandoned as a matter of law. As such, the Court does not find, as urged by the Jallads, that the certificate application must first be determined by the Board prior to the Court’s consideration of the abandonment issue. That being said, the Court must yet examine whether the relief sought by the Sorannos, i.e., a declaration

that the General Store is an abandoned structure, is more appropriately addressed by an administrative agency.

The Court first notes that the Board's consideration of the Jallad's variance application for the Primary Structure, in which defendants sought permission to renovate the day-care center and repair the General Store, was limited in scope to that issue alone, and did not involve a determination on the status of the General Store. To wit, in its April 12, 2012 Resolution, the Board expressly stated:

However, because of the existing condition of that barn structure and questions related to whether the structure can indeed be rehabilitated, are issues that have to be determined in the future by the Construction Official and/or Zoning Officer and/or other representatives or departments in the Township, the Board does not address any proposed activity with regard to this accessory structure.

[Gruppuso Cert., Ex. H, at 341.]

The Board further noted the following:

In the event there is a need for further Board action based upon determinations made by other entities or departments within the Township of Mount Olive or elsewhere, the Board will address those issues at the appropriate time. Thus, although the Plans submitted by the Applicant's Architect contain Sheets BA-0 to BA-4A addressing the barn, the Board determines that activity related to the barn is not presently before it and will not be addressed in this application. As abovementioned, if there is a need for further Board action as it relates to the barn structure, the Applicant will have to submit a separate application dealing with the same, which will be addressed in full at that time.

[Id.]

While the Board did not completely foreclose future action relating to the General Store, the procedural process by which the Sorannos could force the Board to render a decision on the abandonment of the structure is unclear, especially as the Construction Official's issuance of the construction permit has ostensibly eliminated the Jallad's need to file additional variance applications with the Board for the foreseeable future. As such, the Court concludes that declaratory judgment is appropriate in this instance, particularly as (1) the dispute involves the interpretation of a municipal land use ordinance, (2) declaratory judgment will avoid "repeated litigation over the same issues[,]" and (3) the Planning Board and related defendants have not ruled on the status of the General Store. See, e.g., ML Plainsboro, supra, 316 N.J. Super. at 204-05; see also Eltrym Euneva, LLC v. Keansburg Planning Bd. of Adjustment, 407 N.J. Super.

432, 439, (Ch. Div. 2008)(finding that the Court was vested the power to determine, as a matter of law, whether plaintiff had abandoned its pre-existing, non-conforming use even though the Board of Adjustment had not considered the issue)(citing Borough of Belmar v. 201 16th Ave., Belmar, 309 N.J. Super. 663, 674-75 (Ch. Div. 1997) and R. 1:7-4.)

V. Abandonment of the General Store

N.J.S.A. 40:55D-68 provides that “any nonconforming use or structure existing at the time of passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”

Id. As such, the passage of the land use ordinances which rendered the General Store nonconforming did not automatically render the continued use or existence of the building illegal. Nonetheless, such non-conforming uses or structures are disfavored by the Courts, with the “underlying assumption that, with the passage of time, they will become fewer and fewer in number.” Belmar, supra, 309 N.J. Super. at 671. The relevant issue here is whether the structure of the General Store was abandoned.

The Court first notes that its determination on plaintiff’s application necessitates a fact-sensitive analysis in light of the totality of the circumstances. See S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford, 373 N.J. Super. 603, 617-18 (App. Div. 2004). The Court finds the Appellate-Division’s reasoning in S & S Auto Sales, while directed at abandoned “uses” and not “structures,” to be nevertheless helpful. In relevant part, it states:

Mere passage of time during a cessation of active use does not constitute abandonment. The length of time that passes is a factor in the overall circumstances to be considered. There is no formula . . . As the passage of time increases, the weight attributable to that circumstance grows heavier. But two things must be kept in mind: (1) some discontinued uses are more readily revivable than others, and (2) the passage of time must be considered in conjunction with all circumstances, including those that cause the cessation, the nature and quality of efforts being made to resume the use, and any other objective manifestations supporting or negating the owner’s expressed intention to continue the use.

[Supra, 373 N.J. Super. at 617-18.]

Thus, it is clear that there is no set formula to determine the issue of abandonment.

Moreover, while the property owner has the ultimate burden of proof in establishing that a non-conforming structure or use has not been abandoned pursuant to N.J.S.A. 40:55D-68, the objector, or in this case the Sorannos, have the burden of initially presenting sufficient evidence

of a “temporal or physical abandonment” to trigger the owner’s burden of persuasion. Berkeley Square Ass’n, Inc. v. Zoning Bd. of Adjustment of City of Trenton, 410 N.J. Super. 55, 269 (App. Div. 2009), certif. den., 202 N.J. 347 (2010). In the instant action, the Sorannos allege that the General Store has stood vacant and abandoned for decades. Furthermore, the Sorannos contend that a prior owner of the Property, Ms. McDavitt, agreed that the General Store would remain vacant and not be put to any use as a condition to her receiving zoning approval to re-open and expand her day-care operation. These facts, according to the Sorannos, establish that both the use and structure of the General Store have been abandoned as a matter of law. In support of this allegation, the Sorannos submit an excerpt from the June 7, 1993 meeting of the Mount Olive Board of Adjustment during which Ms. McDavitt’s attorney, Richard Stein, Esq., presented proof that her proposed improvements of the day-care center on the Property met fifteen (15) conditions requested by the Board. Gruppuso Cert., Ex. H at 251. In relevant part, the transcript reads as follows:

Item eight indicates that the old building is not to be used. That’s the building on the far northerly corner of the property which I believe was an old general store, its now marked as a barn in ruins. We have put a notation on the plan, note number seven that its not to be used (emphasis added).

[Id.]

The Court notes that Mr. Stein’s testimony supports plaintiffs’ contention that the General Store was not to be used in connection with Ms. McDavitt’s proposed renovation of her day-care facility. There is no disagreement, however, that the General Store has not been utilized for the provision of goods and supplies for almost a century, and that such use of the General Store has been abandoned. Indeed, the Court notes that the Jallads do not seek to reopen the General Store for the sale of goods; rather, they seek to “restore it to the way it looked when it was built[,]” and to “not use it for anything but some minimal storage.” Certification of Tomasa Jallad (“Jallad Cert.”), June 8, 2012, at ¶¶7, 23.

As noted, the principal question is whether the structure itself has been abandoned. See Foster-Hyatt Group of Companies, Inc. v. W. Caldwell Planning Bd., 174 N.J. Super. 10, 12-13 (App. Div. 1980)(“But a nonconforming use is separate and distinct from a nonconforming lot or structure. See N.J.S.A. 40:55D-5.”). The Sorannos allege that the General Store is an “eyesore,” “unsafe,” “dilapidated,” and that it continues to deteriorate with the passage of time. Plaintiffs’

Amended Complaint, at 22, 25. The Township initially shared some of the Sorannos' concerns, ostensibly leading to the June 9, 2011 inspection of the structure by the Construction Official and the June 10, 2011 issuance of the Notice of Imminent Hazard and Notice of Unsafe Structure. Gruppuso Cert., Ex. I. The Notice of Imminent Hazard directed the Jallads to immediately "determine if [the structure was] repairable or to be demolished." Id. The Notice of Unsafe Structure made a similar finding. Id. In a June 9, 2011 memo from the Zoning Officer to the Construction Officer, the Zoning Officer noted that, upon a review of the plans submitted in conjunction with the Jallad's variance application, in his opinion, the building had been abandoned and should be condemned. Id.

Pursuant to the Construction Officer's direction to determine if the General Store could be repaired or should be demolished, the Jallads hired Eric Heiberg, P.E., to inspect the structure and relay his professional opinion to the Township. In a September 13, 2011 letter from Mr. Heiberg to the Township regarding repairs to the General Store, Mr. Heiberg noted the following: (1) less than 25% of the floor joints require repair, (2) less than 13% of the subflooring requires repair, (3) less than 15% of the roof rafters require repair, (4) less than 10% of the roof requires immediate repair, (5) less than 10% of the wall framing requires repair, (6) less than 10% of the exterior cladding requires repair, (7) the foundation is in need of re-grouting and is bulging slightly to the interior of the structure, (8) less than 25% of the wood in the structure is rotten and in need of repair, and (9) less than 25% of the roofing and cladding materials are rotting and in need of replacement. Mount Olive Defendants' Opposition, January 3, 2013, Ex. D. Mr. Heiberg concluded, within a reasonable degree of engineering certainty, that the value of repairing the structure is substantially less than 50% of the value of replacing the entire structure.

In a September 20, 2011 letter from the Construction Official to the Jallads, Mr. Lindsay noted his receipt of Mr. Heiberg's opinion letter, and requested the Jallads make arrangements to have the building open so that he and the Zoning Officer could make another inspection for their evaluation of General Store's condition. In May of 2012, the Jallads applied for a construction permit to make repairs to the barn, ostensibly to comply with the June 10, 2011 Notices issued by the Construction Official. The Township Zoning Officer reviewed the permit application and, according to the Township, signed off on the application, which was subsequently approved by the Construction Official.

The Sorannos rely heavily on Camara, supra, 239 N.J. Super. 51, for the proposition that an abandoned non-conforming structure cannot be rebuilt or reestablished. In that case, a physician took over the lease of a liquor store that had been permitted to hang a non-conforming sign in front of its business as an existing non-conforming structure established prior to the introduction of land use ordinances which prohibited the signage. Id. at 53. Prior to the physician's purchase of the building, the liquor store went out of business and terminated its use of the building and the non-conforming sign. Shortly after purchasing the building, the physician rehung the non-conforming sign with minor modifications to reflect the change in business. Id. The court ultimately determined that the liquor store's termination of its business simultaneously terminated any right to a subsequent tenant to continue hanging the non-conforming sign, and equated the demise of the liquor store with the total destruction of a non-conforming structure. Id. at 59-61.

The Camara holding has been sharply limited by subsequent court decisions. See S & S Auto Sales, supra, 373 N.J. Super. at 623 ("By its terms, the holding was narrowly limited to its facts. The vitality of the holding in Camara is further limited because another panel of this court considered precisely the same issue and adopted Camara's dissent, which the Supreme Court affirmed." Rogers v. Zoning Bd. of Adj. of Ridgewood, 309 N.J. Super. 630 (App. Div. 1998), aff'd o.b., 158 N.J. 11 (1999).).

The Court first notes the dearth of New Jersey case law addressing abandonment of a non-conforming structure, as compared to abandonment of a non-conforming use. That being the case, the Court turns to other sources for guidance on the abandonment of a structure.

Black's Law Dictionary defines "abandon" as:

To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest. To give up or to cease to use. To give up completely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert. It includes the intention, and also the external act by which it is carried into effect.

[Fifth Edition, copyright 1979.]

It also defines "abandoned property" as follows:

'Abandoned property' in a legal sense is that to which owner has relinquished all right, title, claim and possession, with intention of not reclaiming it or resuming its ownership possession or enjoyment (internal citations omitted).

[Id.]

Our legislature has addressed “abandoned” structures in Title 55 of New Jersey Statutes Annotated, which regulates tenement and public housing. It defines “abandoned property” as follows:

Except as provided in [N.J.S.A. 55:19-83], any property that **has** not been legally occupied for a period of six months and which meets any one of the following additional criteria may be deemed to be abandoned property upon a determination by the public officer that:

a. The property is in need of rehabilitation in the reasonable judgment of the public officer, and no rehabilitation has taken place **during** that six-month period;

b. Construction was initiated on the property and was **discontinued** prior to completion, leaving the building unsuitable for occupancy, and no construction has taken place for at least six months as of the date of a determination by the public officer pursuant to this section;

c. At least one installment of property tax remains **unpaid** and delinquent on that property in accordance with chapter 4 of Title 54 of the Revised Statutes as of the date of a determination by the public officer pursuant to **this** section; or

d. The property has been determined to be a nuisance **by** the public officer in accordance with section 5 of P.L.2003, c. 210 (C.55:19-82).

A property which contains both residential and non-residential space may be considered abandoned pursuant to P.L.2003, c. 210 (C.55:19-78 et al.) so long as two-thirds or more of the total net square footage of the **building** was previously legally occupied as residential space and none of the residential space has been legally occupied for at least six months at the time of the determination of abandonment by the public officer and the property **meets** the criteria of either subsection a. or subsection d. of this section.

[N.J.S.A. 55:19-81.]

Title 55 also permits qualified municipalities to appoint a public officer charged with identifying abandoned property so as to create an abandoned property **list**. N.J.S.A. 55:19-55(a). The public officer is not permitted to list properties as abandoned if “**rehabilitation** is being performed in a timely manner, as evidenced by building permits issued **and** diligent pursuit of rehabilitation work authorized by those permits.” N.J.S.A. 55:19-55(b). Moreover, should the public officer list property as abandoned, an aggrieved owner may **challenge** the adverse determination by instituting an action in the Superior Court, Law Division, where the “sole

ground for appeal shall be that the property in question is not abandoned property as that term is defined in [N.J.S.A. 55:19-81].” N.J.S.A. 55:19-55(f).

While the provisions of Title 55 are not directly applicable to **the** case at hand, as they relate to tenement or public housing, the Court nonetheless finds it **persuasive** that the Legislature has addressed abandoned property in this fashion. The Court further notes the Legislature’s declaration in N.J.S.A. 55:19-79(g), that

[m]any abandoned buildings still have potential value for residential and other uses and such buildings should be preserved rather than demolished, wherever feasible, particularly buildings that have historic or architectural value, or contribute to maintaining the character of neighborhoods or streetscapes, or **both**, as the case may be.

While not listed on the national register of historic landmarks, the General Store’s historic significance in Mount Olive is not disputed.

The Court concludes that there must be more than mere vacancy under the MLUL to establish abandonment, even if such vacancy exists for a substantial period of time. This conclusion is supported by the MLUL, which provides that a non-conforming structure “may be restored or repaired in the event of partial destruction thereof.” N.J.S.A. 40:55D-68. To conclude otherwise would ignore this language, a result that is disfavored. Sussex Commons Associates, LLC v. Rutgers, 210 N.J. 531, 541 (2012)(“The Court’s obligation when interpreting a law is to determine and carry out the Legislature’s intent.” Allen v. V & A Bros., Inc., 208 N.J. 114, 127 (2011). ‘To do so, courts first look at the plain language of the statute.’” DiProspero v. Penn, 183 N.J. 477, 493 (2005)). Moreover, even though no New Jersey case defines the term “vacant,” it is generally considered to mean unoccupied. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1995), at 1301 (“not occupied by an occupant, possessor, or officer.”)² Had the Legislature intended that a structure be deemed “abandoned” simply because it was “vacant,” they could have used that term instead.

While the Court notes the extended period of time the General Store has lain vacant, as well as Ms. McDavitt’s 1993 representation to not use the Store so as to receive permission to renovate her day-care center, these facts fail to establish that the General Store was abandoned. There is no record evidence that the Jallads or the prior owners of the Property ever relinquished

² The section of the Mount Olive Municipal Code concerning abandonment, §400-87, defines abandoned uses, not structures.

all connection with or concern in the structure, such that they never again intended to resume their interest in it. See BLACK'S LAW DICTIONARY, supra, at "abandon."

Moreover, even though the General Store has no assessed value, defendants have presented sufficient proof that they continue to pay taxes on their Property. In addition, the structure is not a nuisance, such that its existence "endangers the safety or health of a considerable number of persons." N.J.S.A. 2C:33-12. While the dual June 9, 2011 Notices present some evidence regarding the disrepair of the building, the Court finds that Mr. Heiberg's opinion letter adequately rebuts the Sorannos' claim that it is "unsafe." Indeed, the Jallads are voluntarily undertaking rehabilitation of the General Store. Furthermore, the Township's issuance of the Construction Permit provides additional evidence supporting the Court's determination that the General Store has not been abandoned. To wit, the Construction Official who issued the June 9, 2011 Notices to the Jallads approved their subsequent application for the Construction Permit. Had the Construction Official determined that the General Store had been abandoned and should be condemned by the Township, as the Zoning Official apparently had at one point, the Construction Permit would not have issued.

Consequently, the concept of "abandonment," or "abandon," which Webster's defines as "to give up with the intent of never again claiming a right or interest in," id. at 43, requires the Sorannos to submit in the first instance, in addition to vacancy, some evidence by the owner of an act or failure to act in the face of a requirement to do so, such as a failure to pay taxes or rehabilitate a partial destruction after notice to do so. By way of example, none of the indicia for abandonment in N.J.S.A. 55:19-81, i.e., (1) a failure to rehabilitate the property after a determination that such work was necessary, (2) discontinued construction for at least six months, (3) unpaid property taxes, or (4) a determination by a public official that the structure is a nuisance, are present in this case. Cf. N.J.S.A. 3B:14-64 (describing the court's statutory authority to ratify a fiduciary's abandonment of real property when the fiduciary has "refrained from paying real property taxes . . .").

As the Sorannos have failed to meet their burden, the Court concludes that the General Store is not an abandoned structure.

V. The Construction Permit

As The Sorannos also challenge the validity of the Jallad's construction permit for the General Store. On May 30, 2012, the Construction Official issued a construction permit granting

the Jallad's the right to repair the General Store. On June 4, 2012, the Sorannos filed a notice of appeal from that determination. On June 11, 2012, the Township's counsel advised the Sorannos that no action would be taken on the notice of appeal, and that plaintiffs should instead file an appeal with the Morris County Construction Board of Appeals. On June 13, 2012, the Sorannos filed a notice of appeal with the County Construction Board of Appeals, which refused to hear the appeal in its entirety after determining that it lacked jurisdiction to hear zoning issues and was concerned by the fact that the Sorannos had already filed the instant action with the Court. On July 27, 2012, the Court granted plaintiffs' motion to amend their Complaint in Lieu of Prerogative Writs to include their challenge to the Construction Official's issuance of the construction permit. As such, the Sorannos contend that they have exhausted all available administrative remedies, and that the Court has jurisdiction pursuant to R. 4:69-1, et. seq., to review the decision of the Township defendants.

N.J.S.A. 52:27D-127(a) provides for the creation of county boards of construction appeals and N.J.S.A. 52:27D-206 grants them jurisdiction over appeals from the decisions of the relevant enforcing entity, or in this case the Construction Official. In relevant part, N.J.S.A. 52:27D-127(b) reads as follows:

When an enforcing agency refuses to grant an application or refuses to act upon application for a construction permit, or when the enforcing agency makes any other decision, pursuant or related to this act or the code, an owner, or his authorized agent, may appeal in writing to the county or municipal or joint board, whichever is appropriate. The board shall hear the appeal, render a decision thereon and file its decision with a statement of the reasons therefor with the enforcing agency from which the appeal has been taken not later than 10 business days following the submission of the appeal, unless such period of time has been extended with the consent of the applicant. Such decision may affirm, reverse or modify the decision of the enforcing agency or remand the matter to the enforcing agency for further action. A copy of the decision shall be forwarded by certified or registered mail to the party taking the appeal. Failure by the board to hear an appeal and render and file a decision thereon within the time limits prescribed in this subsection shall be deemed a denial of the appeal for purposes of a complaint, application or appeal to a court of competent jurisdiction. A record of all decisions made by the board, properly indexed, shall be kept by the enforcing agency and shall be subject to public inspection during business hours. The board shall provide rules for its procedure in accordance with this act and regulations established by the commissioner (emphasis added).

[Id.]

In the instant action, the County Board of Construction Appeals failed to render a decision on the merits of the Sorannos appeal and, according to the aforementioned statute, the Court deems this failure to be a denial.

Initially, the Court concludes that the Sorannos, as neighbors of the subject property, should not have been referred to the County Board of Construction Appeals, in that they are not the “owners” or the “authorized agent [of the owner]” for the Property subject to the appeal. See N.J.S.A. 52:27D-127(b). In any event, as the County Board of Construction Appeals declined to consider their appeal, the Court has jurisdiction to hear it. See Kelley v. Morris County Bd., 2008 N.J. Super. Unpub. LEXIS 208, *12-13 (App. Div. July 22, 2008).

“A trial court’s standard of review on an appeal from a decision of a construction board of appeals is limited[.]” Id. (citing Bell, supra, 196 N.J. Super. at 312), and the Court will not “disturb an administrative agency’s determinations or findings unless there is a clear finding that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious or unreasonable; or (3) the decision was not supported by substantial evidence.” In re Virtua-West Jersey Hosp. Voorhees, 194 N.J. 413, 422 (2008).

The Sorannos claim that the construction permit issued by the Township Construction Official is void because a zoning permit was required for the repair work authorized by the construction permit. The Jallads assert that there is an inadequate record upon which to determine the validity of the construction permit. The Mount Olive defendants contend that a zoning permit was not required for the issuance of the construction permit because the work requested by the Jallads was limited to repairs to the existing General Store structure, and did not include erection, construction, reconstruction, alteration, conversion, or installation of a structure or building. The Court concludes that the issue should be remanded to the Zoning Official for a determination as to whether a zoning permit should issue.

Pursuant to N.J.S.A. 52:27D-131, applications for construction permits are required to conform to local municipal ordinance procedure. While local ordinances may require a construction permit applicant to first obtain a zoning permit as a prerequisite to the construction permit, such a requirement is not automatic, as “a zoning approval is not a construction approval.” Mahwah Tp. v. Landscaping Tech., 230 N.J. Super. 106, 109 (App. Div. 1989). “Specifically, a ‘zoning permit’ may be issued by the ‘administrative officer’ when ‘required by ordinance as a condition precedent to the commencement of a use or the erection, construction . .

. or installation of a structure or building and . . . which acknowledges that such use, structure or building complies with the provisions of the municipal zoning ordinance or variance.” Acqua Development Corp. v. Township of Holmdel, 287 N.J. Super. 578, 585 (Law Div. 1995)(citing N.J.S.A. 40:55D-7).

The Sorannos assert that several sections of the Township’s Municipal Code requires a construction permit applicant to first obtain a zoning permit prior to the issuance of a construction permit by the Construction Official. In relevant part, Section 400-6, or the “Definitions” portion of the Code, defines a “zoning permit” as follows:

A document signed by the Director of Planning, Zoning and Code Enforcement, or such other designee, which is required as a condition prior to the commencement or change of use, including the change in business entity and/or business tenant occupying a building or space, or the erection, construction, reconstruction, alteration, conversion or installation of a structure or building and acknowledge that such use, structure or building conforms and complies with the provision of this chapter or that variances or design waivers have been granted by the approving Board (emphasis added).

[Id.]

The term “construction” is defined as follows:

The construction, erection, reconstruction, alteration, conversion, demolition, removal, repair or equipping of buildings or structures (emphasis added).

[Id.]

In particular, the Sorannos contend that Section 400-23(B) of the Code requires the issuance of a zoning permit prior to the issuance of a construction permit. It reads as follows:

A zoning permit shall be issued by the Zoning Officer before the issuance of either a certificate of occupancy to a new occupant of an existing building or portions of an existing building or before the issuance of a building permit.

The Sorannos also submit that the prefatory sentence on the Township’s zoning permit application form, which states, “[o]btaining a Zoning Permit is the first step in securing a building permit or a certificate of occupancy[.]” supports their contentions regarding the necessity of a zoning permit for the work requested on the General Store.

The Court concludes that the Zoning Officer should have issued a zoning permit prior to the issuance of the construction permit, especially as the term “construction” includes the “repair” of a building or structure in its definition. See §400-6 of the Code. While the Zoning Officer contends that his “signature on the Building Permit [annexed to the Certification of

Michael A. Augello, Esq., December 4, 2012, Ex. G] indicates that the requested work did not run afoul of the Township's zoning ordinances[,]” the Court finds that **this** falls short of “[a] document signed by the [Zoning Officer] . . . required as a condition **prior** to . . . construction . . . of a structure or building . . . [that] acknowledge[s] that such use, **structure**, or building conforms and complies with the provisions of this chapter” See §400-6 of **the** Code, “zoning permit.” As such, the Court concludes that the Zoning Officer should have made an official determination on the necessity of a zoning permit pursuant to §400-6 of the Township Code prior to the issuance of the construction permit.

Based on the foregoing, the Court denies plaintiffs' motion for **partial** summary judgment and remands the limited issue regarding the necessity of a Zoning **Permit** prior to the issuance of the Construction Permit to the Zoning Officer of the Township of Mount Olive, who shall determine said issue within fourteen (14) days hereof.