SUPERIOR COURT OF NEW JERSEY

HOBOKEN FOR RESPONSIBLE CANNABIS, INC. & ELIZABETH URTECHO, Plaintiffs/Respondents, v. CITY OF HOBOKEN PLANNING BOARD & BLUE VIOLETS LLC, Defendants/Appellants.	APPELLATE DIVISION DOCKET NO. A-000556-23 Civil Action ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-3520-22 Sat Below: Hon. Anthony V. D'Elia, J.S.C. Brief Submitted to the Appellate Division on January 30, 2024.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT, BLUE VIOLETS LLC

Of Counsel and on the Brief:
Michael C. Klauder

COLE SCHOTZ P.C.
25 Main Street
P. O. Box 800
Hackensack, NJ 07602-0800
mklauder@coleschotz.com
(201) 489-3000
Attorneys for Defendant-Appellant,
Blue Violets LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF JUDGMENTS AND ORDERS BEING APPEALED

INTRODUCTION

This appeal concerns two primary issues. First, whether the trial court erred in concluding Hoboken for Responsible Cannabis, Inc. ("HFRC") and Elizabeth Urtecho ("Ms. Urtecho") (together, "Plaintiffs") – parties who have admittedly not been affected in any way whatsoever by the challenged development – possess standing to assert claims under the New Jersey Municipal Land Use Law ("MLUL"). Second, whether the trial court erred in concluding that Blue Violets LLC's ("Blue Violets") submission of a complete application to the City of Hoboken Cannabis Review Board ("CRB") – a separate arm of the City of Hoboken Planning Board ("Planning Board") tasked with reviewing and approving cannabis-related site plan applications pursuant to the land use powers delegated to it by Hoboken's ordinances – did not trigger the Time of Application Rule ("TOA Rule") under the MLUL. For the reasons explained below, both questions should be answered in the affirmative.

This matter arises out of the Planning Board's decision to approve Blue Violets' conditional use application for a cannabis micro-dispensary. The Planning Board found that Blue Violets' application satisfied all relevant conditional use standards and, accordingly, unanimously approved Blue Violets' application. In conjunction therewith, the Planning Board correctly found that Blue Violets was entitled to the benefit of the TOA Rule, starting from the date

on which it commenced Hoboken's cannabis land use development approval process by submitting a complete application to the CRB. HFRC – a nonprofit corporation formed ***after*** the Planning Board approved Blue Violets' conditional use application – commenced this litigation alleging that the Planning Board's application of the TOA Rule was "arbitrary, capricious and unreasonable." Ms. Urtecho – who was (incorrectly) permitted to intervene on the eve of trial – asserted similar claims just days before the trial court entered its final decision.

When analyzing whether Plaintiffs possessed standing to assert claims under the MLUL, the trial court failed to apply the proper standard – the "interested party" standard set forth in the MLUL. The plain language of the MLUL, and the binding case law interpreting same, make clear that a party only possesses standing if it establishes that it has a possessory interest in property that will be adversely affected by the challenged development. Plaintiffs made no such showing, admitted they would suffer no such adversity, and the trial court made specific findings of fact that Plaintiffs did not possess property anywhere near the facility in question and were not affected in any way whatsoever by the challenged approval. Notwithstanding its factual findings, the trial court – relying on a single outdated decision issued ***prior*** to the enactment of the MLUL – erroneously concluded that Plaintiffs possessed standing. Had the trial court applied the correct standard – *i.e.*, the "interested

party" standard in the MLUL – the only conclusion it could have reached was that neither party possesses standing. The trial court's decision to the contrary runs afoul of every single relevant authority interpreting the MLUL.

Further, the trial court erroneously concluded that Blue Violets' submission of a complete application to the CRB did not constitute an application for development under the MLUL and, therefore, did not trigger the TOA Rule. That decision is contrary to the clear provisions of the MLUL, which provide that an application is complete for purposes of the TOA Rule when submitted to an agency created by, or responsible to, the municipality when such agency is acting pursuant to the MLUL. The CRB – a municipal agency specifically created as an arm of the Planning Board to review cannabis-related development applications – meets the statutory criteria.

Significantly, the trial court's decision to overturn the Planning Board's decision is contrary to the overall purpose and spirit of the TOA Rule. The Legislature enacted the TOA Rule specifically to avoid situations – like here – where a developer spends time and money pursuing an application, only to have a municipality change the zoning to the developer's detriment while the application was pending. The trial court erred in failing to consider and give effect to the Legislative intent when adjudicating this issue of first impression. That gravely inequitable result must be reversed.

STATEMENT OF FACTS

Blue Violets and the Proposed Development

Blue Violets is a certified minority/women-owned small business, owned and managed by a young married couple who are residents of Hudson County: Lauren and Max Thompson. (Da320.)

The development at issue in this matter is an adult-use "micro" cannabis retail establishment, *i.e.*, cannabis micro-dispensary.[1] (Da316.) The location for the micro-dispensary is 628 Washington Street, Hoboken, New Jersey, designated at Block 205, Lot 30.02 on the Tax Maps of the City of Hoboken (the "Property"). (Id.) The Property is a commercial unit within an existing mixed-use commercial and residential building that is located in Hoboken's C-2 Zone. (Id.) Following the successful completion of Hoboken's lengthy cannabis land use approval process, on September 21, 2022, Blue Violets received a "resolution of support" to operate its dispensary by a majority vote of the Council of the City of Hoboken. (Da463-464.) Subsequently, on February 9, 2023, Blue Violets was approved for an Annual License to operate as a Class 5

[1] A cannabis "microbusiness" is a locally owned small business that is given priority in the application review process. This designation is designed to support New Jersey entrepreneurs. See N.J.S.A. 24:6I-36.

Cannabis Retailer in Hoboken by the New Jersey Cannabis Regulatory Commission. (Da466-467.)

Hoboken's Cannabis Ordinance and Cannabis Review Board

On August 18, 2021, the City of Hoboken adopted Ordinance B-384 which, among other things, made the retail sale of cannabis a conditionally permitted use. (Da363-378.) That Ordinance was subsequently codified in Hoboken City Ordinance §196-33.1, which sets forth applicable zoning for cannabis-related developments. *See* Hoboken City Ordinance §196-33.1. Significantly, Hoboken City Ordinance §196-33.1(M) sets forth the minimum requirements to obtain site plan approval for a cannabis-related development. Id. Furthermore, Section 196-33.1(I) initially prohibited a cannabis retailer from being located on the "same block frontage" as a primary or secondary school. Id.

As part of the cannabis-related development process, the City of Hoboken created the City of Hoboken Cannabis Review Board (the "CRB"). *See* Hoboken City Ordinance §36. Specifically, Section 36-1(a) provides, as follows:

> There is hereby created a City of Hoboken Cannabis Review Board ('Review Board') which shall serve as an advisory committee to the City of Hoboken whose duty it shall be to review applications for cannabis wholesaler, cannabis retailer, medical cannabis dispensary and cannabis delivery operations based within the City of Hoboken.

At the time of Blue Violets' application (described below), the CRB was comprised of three members, including the Mayor of Hoboken (or his/her designee), a City Councilmember, and the Director of Health and Human Services. See Hoboken City Ordinance §36-1(B). "The purpose of the Cannabis Review Board is to assure the public health, safety, and general welfare of the City of Hoboken and its residents, business establishments and visitors." See Hoboken City Ordinance §36-1(C). In order to obtain site plan approval for a cannabis-related use, an applicant must obtain approval (*i.e.*, an endorsement) from the CRB, and it must do so ***prior*** to proceeding to the Planning Board. See Hoboken City Ordinance §§196-33.1(M)(1), 36-4(A).

In order to obtain approval from the CRB, an applicant must first submit a complete application to the CRB. (Da469-477.) In addition to the written application, "[t]he following items are required for submission of a complete application to the Hoboken Cannabis Review Board . . .

> 1. Completed CRB application, checklist and responsive materials submitted online.
>
> 2. Fees: administrative fees and escrow fees remitted to the City of Hoboken. Application Fee: $2,500. Escrow Fee: $5,000.
>
> 3. Where the license applicant will be leasing the premises, a signed certification from the property owner/landlord that the owner/landlord is aware that the tenant's use of the premises will involve activities

associated with medical, retail, wholesale, delivery, and/or consumption of cannabis.

4. Proof of legal possession of the proposed premises by virtue of ownership, lease agreement or other arrangement.

5. A neighborhood impact report. This report should address issues including, but not limited to: anticipated increase in vehicular and pedestrian traffic to and from the site; queuing of customers on the right-of-way; noise; odor; accommodations for delivery services, loading/unloading, and parking; and any provision of public amenities.

6. An environmental impact plan, which shall, at [a] minimum, include consideration of sustainable alternatives to single-use plastic packaging, efforts to minimize water usage, efforts to minimize light pollution, a refuse and recycling plan, and other 'Green Business' recommendations as set forth by the Hoboken Green Team.

7. An inventory control plan outlining what process the applicant will use to track and control cannabis product inventories including, for instance: products received from wholesalers and other outside sources, products distributed to other facilities on a wholesale basis, products sold through delivery services or by other means to off-site customers: and products sold to on-site customers.

8. A copy of the safety and security plan the applicant will be submitting with their State application.

* * *

16. Business Plan – same plan as submitted with State application.

17. Compliance Plan – same plan as submitted with State application.

> 18. Vendor-Contract Agreements – same as submitted with State application.
>
> 19. Any and all other information necessary to satisfy the requirements set forth in the Municipal Code of the City of Hoboken.
>
> [Da475-476.]

Blue Violets' Efforts to Locate a Suitable Property and Prepare CRB Application

Locating and securing the Property for Blue Violets and beginning the City of Hoboken's application approval process was an exceptionally difficult task, requiring considerable time, effort, and resources. Beginning in spring of 2021, the principals of Blue Violets spent several months unsuccessfully searching Hudson, Bergen, and Union counties for available properties within the few limited cannabis-approved zones. (Da123.)

In September 2021, after months of searching, Blue Violets identified a potentially suitable location for the micro-dispensary: the Property. On September 25, 2021, the principals of Blue Violets made their first contact with the real estate broker for the Property. (Da439.) After conducting the first site visit on September 29, 2021, Blue Violets immediately executed the broker's letter of intent and submitted same to the owner of the Property. (Id.) On October 21, 2021, the principals of Blue Violets conducted a second site visit and answered several of the Property owner's questions concerning cannabis and the business. (Id.)

In early October 2021, Blue Violets also began vetting cannabis bank account options and engaged HUB International to discuss insurance needs for the Property. (Id.) Shortly thereafter, Blue Violets: (i) sent introductory emails to certain Councilmembers and held introductory calls, (ii) attended Hoboken City Council meetings where Blue Violets announced its intention to operate at the Property, and (iii) began the onboarding and diligence process with Valley Bank. (Id.)

In November 2021, Blue Violets continued to provide updates to the Property owner regarding its cannabis application process and prepared a bespoke "option to lease" agreement for the Property. (Id.) Blue Violets also continued to correspond with Councilmembers to provide updates regarding the process. (Id.) Also in November 2021, Blue Violets reached out to Hoboken's local zoning officials to inquire about the opening of Hoboken's cannabis application process. (Id.)

On December 1, 2021, Blue Violets made its first contact with the attorney for the CRB – Ron Mondello, Esq. – via telephone to discuss the opening of the Hoboken cannabis application process and the imminent timing for same. (Id.) As a follow up to that telephone call, Blue Violets provided Mr. Mondello with Blue Violets' business background via email. (Id.) Throughout December 2021, in preparation of Hoboken's forthcoming CRB application, the principals of

Blue Violets conformed its entire slate of Standard Operating Procedures to accommodate operations within the Property, which was roughly 85 pages of compliant operational documents that the principals prepared from scratch. (Id.) On December 31, 2021, the City of Hoboken posted its cannabis application on the website. (Id.)

In January 2022, Blue Violets continued to negotiate the proposed option to lease offer with the Property owner, however, those discussions transitioned to a negotiation of a full lease agreement. (Da440.) During that time, Blue Violets: (i) completed and submitted an Environmental Impact Plan to the Hoboken Green Team, (ii) re-engaged its marketing and branding partner for website and social media development to begin community engagement, and (iii) obtained a letter of intent from its insurance broker (HUB International) to satisfy the CRB application's insurance requirement. (Id.) Blue Violets also continued to correspond with the Hoboken Zoning Officer regarding its imminent CRB application at the Property. (Id.)

The CRB Deems Blue Violets' Application Complete

While still negotiating the lease agreement for the Property, on January 22, 2022, Blue Violets attempted to submit its development application to the CRB. (Da440.) The attorney for the CRB advised that, without site control, the application would be rejected. (Id.) On February 18, 2022, Blue Violets

submitted the final requisite documents (executed lease and property owner's certificate) to the CRB, thereby completing its development application. (Id.) On March 8, 2022, the attorney for the CRB confirmed that Blue Violets' development application was on the agenda for the next CRB meeting, scheduled for March 24, 2022, and that Blue Violets must send a ten (10) days' advance notice of the hearing, via certified mail, to all properties located within 200 feet of the Property. (Da440; Da479-480.)

The very next day, on March 9, 2022, an ordinance was introduced by Councilwoman Tiffanie Fisher, classified as Ordinance B-446 (the "Ordinance"). (Da521 at ¶15.) The proposed Ordinance sought to amend Hoboken Zoning Ordinance §196-33.1 by, among other things, providing that no "cannabis retailer or dispensary. . .shall [] be located within 600 feet in all directions of any primary or secondary school. . ." (Da521 at ¶16.)

Although included on the CRB agenda on March 24, 2022, Blue Violets' development application was not heard on March 24, 2022 due to time constraints borne from hearing other applications. As a result, Blue Violets' development application was carried to the next CRB meeting, scheduled for April 21, 2022. (Da482-83.)

At the April 21, 2022 CRB meeting, the CRB heard testimony from Blue Violets, asked questions regarding its plans, allowed members of the public to

ask questions, and ultimately approved Blue Violets' development application and voted to endorse same. (Da485-486.) The Ordinance went into effect on April 28, 2022 – just four (4) business days after the CRB approved Blue Violets' development application. (Da521 at ¶21.)

The Planning Board Approves Blue Violets' Conditional Use Application

On April 29, 2022 – five (5) business days after it obtained the necessary approval from the CRB – Blue Violets submitted its application for conditional use approval to the Planning Board. (Da316-361.) Because it was a conditional use application, Blue Violets did not apply (nor did it need to apply) for a variance. (f) On September 15, 2022, the Planning Board unanimously voted to approve Blue Violets' conditional use application. (Da311-313.)

On October 13, 2022, the Planning Board adopted the "Resolution of Approval – Application of Blue Violets LLC – Approval of Conditional Use" (the "Resolution"). (Da454-458.) The first Whereas Clause in the Resolution makes clear that Blue Violets "requested approval of its conditional use for [the Property]". (Da454.) The Resolution provides, as follows:

> **NOW, BE IT FURTHER RESOLVED**, that the Planning Board of the City of Hoboken, County of Hudson and State of New Jersey, on the 15th day of September, 2022, concluded that the Application satisfies all relevant conditional use standards imposed at Hoboken Ordinance §166-33.1 and is therefore entitled to approval.

> **NOW, THEREFORE, BE IT RESOLVED**, by the Planning Board of the City of Hoboken, County of Hudson and State of New Jersey, on the 15th day of September, 2022 . . . the Application of Blue Violets LLC is hereby **APPROVED** . . . .
>
> (Da456.)

The Resolution expressly addressed the Ordinance and noted that the conditions set forth therein did not apply to Blue Violets' conditional use application. (Da454-456.) Specifically, the Resolution provides, as follows:

> Notably, a condition placed upon retail cannabis use is that cannabis dispensaries may not be located within 600 feet of a primary or secondary school. However, the Board finds that [Blue Violets] began its approval process by applying to the Cannabis Review Board prior to the adoption and applicability of that ordinance. Accordingly, [Blue Violets] is entitled to application of the ordinance as it existed at the commencement of its approval process, and this proximity requirement does not apply to the subject Application.
>
> [Da454-456.]

HFRC is Created After Blue Violets Obtains Unanimous Planning Board Approval

The initial plaintiff, HFRC, is a New Jersey nonprofit corporation that was incorporated on October 5, 2022 – 20 days ***after*** the Planning Board unanimously voted to approve Blue Violets' conditional use application. (Da488.) As alleged in its Complaint, HFRC is a "non-profit corporation formed by residents and taxpayers of the City of Hoboken . . . who are concerned about the manner in which the City of Hoboken and its subordinate agencies and

boards is implementing . . . its land use ordinance adopted pursuant to the Municipal Land Use Law[.]" (Da518 at ¶2.)

PROCEDURAL HISTORY[2]

On October 21, 2022, HFRC commenced this action by filing a Complaint in Lieu of Prerogative Writs. (Da1-14.) Significantly, HFRC was the only named plaintiff. (Da1.) On November 30, 2022, Blue Violets filed an Answer and Separate Defenses. (Da15-24.) Blue Violets' responsive pleading included an Affirmative Defense alleging that "Plaintiff lacks standing to pursue the claims alleged in the Complaint." (Da22.)

On January 27, 2023, HFRC filed its Trial Brief. On May 8, 2023, Blue Violets filed its Trial Brief. On June 5, 2023, HFRC filed its reply Trial Brief. On June 5, 2023 – the same day HFRC filed its reply Trial Brief, thereby concluding the trial briefing – Elizabeth Urtecho ("Ms. Urtecho") filed a motion to intervene. (Da489-512.)

On July 18, 2023, the trial court conducted a hearing. (1T.) At the outset of the hearing, the trial court noted, as follows:

> This is technically the return date on the prerogative writ matter. I want to let everyone know that I had some emergent matters that have been assigned to me today, which means you'll probably have to continue this until next week. I'll talk to everybody's calendar on the prerogative writ matter.

[2] 1T shall mean and refer to the July 18, 2023 transcript. 2T shall mean and refer to the August 31, 2023 transcript. 3T shall mean and refer to the September 26, 2023 transcript.

> Also , on Friday related to this application this complaint for prerogative writ is Ms. . . .Orthecho [*sic*] application to intervene. What I would like to do is confirm some things in my mind today, at least to get some good use out of today's proceeding even though we really have to continue and finalize a prerogative writ hearing next week.
>
> [1T4:9-22.]

Following the July 18, 2023 hearing, the trial court entered an Order directing the parties to submit supplemental briefing on certain issues identified in the Order. (Da513-514.)

On August 31, 2023, the court held a second hearing. (2T.) At the end of the hearing, the trial court: (i) advised that it was "reserving" its decision on the issue of standing pending its adjudication of the merits of the prerogative writ, and (ii) discussed the scheduling of a mutually agreeable time with the parties to hear the prerogative writ argument. (2T42-46.)

On September 22, 2023, the trial court entered an Order granting Ms. Urtecho's motion to intervene. (Da515-516.) On September 22, 2023, HFRC and Ms. Urtecho filed an amended Complaint in Lieu of Prerogative Writs. (Da517-531.)

Contrary to its earlier statements, the trial court did not permit the parties the opportunity for oral argument on the merits of the prerogative writ claims. Instead, on September 26, 2023, the trial court read a final decision into the

record. (3T.) On September 26, 2023, the trial court entered an Order vacating the Resolution based on "the reasons placed on the record of 9/26/2023." (Da532.)

On October 24, 2023, Blue Violets filed a Notice of Appeal and Case Information Statement with this Court. (Da533-545.) On October 25, 2023, Blue Violets filed a motion before the trial court seeking a stay of the trial court's September 26, 2023 Order pending appeal pursuant to R. 2:9-5. (Da546-547.) On November 17, 2023, the trial court entered an order denying Blue Violets' motion for a stay pending appeal. (Da548-549.)

On December 13, 2023, Blue Violets filed a motion before this Court seeking a stay of the trial court's September 26, 2023 Order pending appeal pursuant to R. 2:9-5. (Da550-552.) On January 4, 2024, this Court entered an Order granting Blue Violets' motion for a stay pending appeal. (Da553.)

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFFS POSSESS STANDING DESPITE FINDING THEY DO NOT MEET THE "INTERESTED PARTY" STANDARD REQUIRED TO ESTABLISH STANDING UNDER THE MLUL (DA532; 2T24-32; 3T8-12.)

The trial court erred in concluding that HFRC and Ms. Urtecho[3] possess standing to pursue the claims asserted in this matter. In reaching that erroneous conclusion, the trial court failed to apply the correct standard – the "interested party" standard set forth in the MLUL. Had the trial court conducted a proper analysis based on the "interested party" standard set forth in the MLUL, the only conclusion it could have reached is that Plaintiffs do not possess standing.

"Standing is a threshold issue. . .[that] neither depends on nor determines the merits of plaintiff's claim." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 417 (1991). "A litigant has standing only if the litigant demonstrates 'a sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm . . . in the event of an unfavorable decision.'" Edison Bd. of Educ. v. Zoning Bd. of Adjustment of Twp. of Edison, 464 N.J. Super. 298, 305 (App. Div. 2020) (quoting Cherokee LCP Land, LLC v. City of Linden Planning Bd., 234 N.J. 403, 423 (2018)).

[3] As explained in Section II, *infra*, Ms. Urtecho should not have even been permitted to intervene in this action on the eve of trial in any event.

The MLUL contains specific requirements for standing, both before the land use board and before the court." Edison Bd. of Educ., 464 N.J. Super. at 306. Specifically, N.J.S.A. 40:55D-4 defines an:

> '[i]nterested party' . . . in the case of a civil proceeding in any court or in an administrative proceeding before a municipal agency, [as] any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under [the MLUL], or whose rights to use, acquire, or enjoy property under [the MLUL], or under any other state law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under [the MLUL].

"Although the language is particularly broad it should be understood in the context of the MLUL generally. Thus, the use, enjoyment or right to acquire should always be evaluated in terms of the purpose of the MLUL." Edison Bd. of Educ., 464 N.J. Super. at 306. (citation omitted). Accordingly, the New Jersey Supreme Court has held that, for actions under the MLUL, ***"standing requires that, in addition to establishing its 'right to use, acquire, or enjoy property,' a party must establish that that right 'is or may be affected.'"*** Cherokee LCP Land, LLC, 234 N.J. at 416-17 (quoting N.J.S.A. 40:55D-4) (emphasis added).

This Court's decision in Edison Bd. of Educ. is instructive in this regard. In Edison Bd. of Educ., the Edison Board of Education filed a complaint in lieu of prerogative writs claiming, among other things, that the Edison Township

Zoning Board of Adjustments' decision to approve certain use and bulk variances was arbitrary, capricious and unreasonable. 464 N.J. Super. at 302-03. The Board of Education argued that it possessed standing to challenge the board's approval because "the school district was overcrowded and permitting further multi-family residential development would only exacerbate the problem." Id. at 303. The trial judge rejected that argument and dismissed the plaintiff's claim, finding that "the BOE had no possessory interest in the property or adjacent property that would be adversely affected by the development, nor had the BOE alleged that the action taken by the Board created a likelihood of harm to it, as a body." Id. This Court affirmed the trial court's decision, finding that the "BOE's generalized claim of harm caused by the possibility of students being added to an already overcrowded school district is insufficient to make the BOE an 'interested party,' entitled to litigate its claim under the MLUL." Id. at 306-07.

In reaching its erroneous conclusion that Plaintiffs possess standing in this matter, the trial court refused to apply the relevant standard set forth under the MLUL – the "interested party" standard. Had the trial court applied the correct standard, it could have reached only one conclusion: Plaintiffs do not possess standing. Prior to reaching its erroneous conclusion, the trial court specifically found that the record clearly and undisputedly demonstrates that neither HFRC

nor Ms. Urtecho: (i) possess a property interest "anywhere near [the] facility" in question, (ii) are affected in any way whatsoever by the challenged approval, (iii) "have any special damages", and/or (iv) established a generalized claim of harm to the community caused by the challenged approval. (Da022.) In fact, the trial court expressly noted that the approval would not create any "major traffic implications" or otherwise create a disturbance to the area. (Id.) Applying those findings to the well-settled standard – *i.e.*, the "interested party" standard applied in *every case decided in this State since the time the MLUL was adopted* – there is no question that neither party possesses standing. The trial court's decision to the contrary runs afoul of every single relevant authority.

In reaching its erroneous decision, the trial court improperly relied on one single case – Dover Twp. Homeowners & Tenants Ass'n v. Dover Twp., 114 N.J. Super. 270 (App. Div. 1971). The trial court's reliance on that decision was severely misplaced. The Dover decision was issued four years prior to the adoption of the MLUL – a comprehensive statute that contains a specific standard for determining whether a party possesses standing to assert a claim under the MLUL. At the risk of stating the obvious, the Dover decision was not based on an analysis of the "interested party" standard set forth by the now-current law – the MLUL. Rather, the Dover decision was premised on the then-current law – N.J.S.A. 40:55-1 – a law that was ***expressly repealed when the***

MLUL was enacted. Thus, contrary to the trial court's finding, the Dover decision is not "good law." That decision should not have even been considered and, in any event, it certainly does not outweigh the overwhelming body of case law applying the "interested party" standard in the MLUL. As if there were any doubt that the Dover decision is not "good law," that doubt is removed by the fact that the Dover decision has never been relied upon by any court when analyzing standing under the MLUL.

Yet even if the decision in Dover did reflect the current state of the law (which it does not), that decision is still wholly inapplicable. The decision in Dover involved the question of standing in the context of a claim that the Planning Board acted "grossly illegally" due to certain conflicts of interest of a Planning Board member with ties to the applicant, a Planning Board Chairman that declined to swear in witnesses so their testimony would not be given under oath, failure to provide a transcript of the hearing, and a deficient hearing notice that was in "flagrant disregard of the legislative provision." Id. That is completely incomparable to the matter at hand. In this matter, Plaintiffs never once alleged or argued that the Planning Board acted "grossly illegally." (See Da1-14; Da517-531.)[4] Nor could they have made such a claim. There is no

[4] In fact, the word "illegal" is not contained anywhere in the original or Amended Complaint. (See Da1-14; Da517-531.)

legitimate dispute that: (i) a planning board possesses jurisdiction over "conditional uses pursuant to article 8" (N.J.S.A. 40:55D-25a(4)), and (ii) the Planning Board was within its right to apply the time of application rule. See Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546 (2018) (reviewing Planning Board's application of the Time of Application Rule under an arbitrary and capricious standard).

Plaintiff's ***actual*** claim – as set forth in every single submission – was as follows: "The Board's Decision to Apply the Time of Application Rule to an Application Filed After the Effective Date of the Ordinance was Arbitrary, Capricious and Unreasonable." In fact, the trial court acknowledged that "the critical question is time of application and – and – and whether the Planning Board got it right or wrong." (3T16:12-14.) Thus, even *if* Dover was good law (which it is not), and even if the trial court had determined that the Planning Board "got it wrong" (*i.e.*, acted arbitrarily and capriciously), such action still does not rise to the "gross illegality" that was at issue in Dover. Nevertheless, the trial court, without justification, unilaterally ignored the "interested party" standard in the MLUL and decided that the "standard that's in front of the Court today" was a so-called claim for "gross illegality" and concluded that Plaintiffs possessed standing despite the absence of an affected property right. (3T14:11-

21.) The trial court had no authority to take those unilateral actions and therefore, the decision must be reversed.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT BLUE VIOLETS' SUBMISSION OF A COMPLETE APPLICATION TO THE CRB DID NOT TRIGGER THE TIME OF APPLICATION RULE. (DA532; 3T13-21.)

Under N.J.S.A. 40:55D-10.5, (the "TOA Rule"), the court must consider the law in effect when an application for development was made. Specifically, N.J.S.A. 40:55D-10.5 provides, in relevant part, as follows:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application of development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance . . . that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

The Planning Board's determination of whether Blue Violets' application was afforded the protection of the TOA Rule turned on whether the application submitted to the CRB constituted an application for development under the MLUL. The Planning Board correctly found in the affirmative. The trial court, however, reversed that decision based on its erroneous conclusion that "[t]he submission of an applicant's application to the Cannabis Review Board is not an application for development under the MLUL . . . because the Cannabis

Review Board does not give approval for conditional use variances or subdivision plat, site plan, planned development, cluster development, zoning variance for direction of the issuance of a permit." (Da023.) That finding is based on a misapplication of the MLUL and a misunderstanding of Hoboken's cannabis land use application process.

The trial court's decision – and in particular its misapplication of Dunbar – ignores the unique facts and circumstances at play in this matter. This matter does not involve a typical conditional use application. Rather, this matter involves an issue of first impression not contemplated or addressed by Dunbar – a situation where the City of Hoboken created a separate arm of the Planning Board (the CRB). Not only did the City of Hoboken specifically task the CRB with reviewing cannabis-related site plan applications for land use compliance, but it required every single cannabis applicant to go through the onerous process (described below) to obtain approval from the CRB in order to obtain final site plan approval. Under the circumstances, a review of the relevant statutory scheme demonstrates that the application to the CRB constituted an "application for development." To that end, N.J.S.A. 40:55D-10.3, provides, in pertinent part, as follows:

> An application for development shall be complete for purposes of commencing the applicable time period for action by a ***municipal agency***, when so certified by the

> ***municipal agency*** or its authorized committee or designee . . . .
>
> [emphasis added].
>
> The MLUL defines "Municipal Agency" as:
>
> [A] municipal planning board or board of adjustment, or a governing body of a municipality when acting pursuant to this act ***and any agency which is created by or responsible to one or more municipalities when such agency is acting pursuant to this act***.
>
> [N.J.S.A. 40:55D-5 (emphasis added); see also N.J.S.A. 40:55D-9 & 10 (prescribing the authority of a "municipal agency" to hold meetings and hearings).]

The primary purpose and function of the CRB is "to assure the public health, safety and general welfare of the City of Hoboken and its residents, business establishments and visitors" (Hoboken City Ordinance §36-2) – a land use responsibility well-contemplated by the MLUL. See Dunbar, 233 N.J. at 560 ("The MLUL is a 'comprehensive statute that allows municipalities to adopt ordinances to regulate land development in a manner which will promote the public health, safety, morals and general welfare using uniform and efficient procedures.'" (quoting Rumson Estates, Inc. v. Mayor Council of Fair Haven, 177 N.J. 338, 349 (2003)). The CRB is a municipal agency serving as an arm of the Planning Board, responsible to the City of Hoboken acting pursuant to the MLUL by reviewing applications for development and holding hearings for the

same, as was plainly intended by the City of Hoboken when the agency was established.[5]

It is beyond legitimate dispute that Blue Violets submitted a complete application to the CRB – a municipal agency and arm of the Planning Board – before the Ordinance was passed, thereby triggering the TOA Rule. The New Jersey Supreme Court has clarified that "[d]eterminations as to the precise contents of an 'application for development' are . . . left to the municipalities, in accordance with the Legislature's general exercise of its 'constitutional authority to delegate to municipalities the police power to enact ordinances governing' land use 'through the passage of the [MLUL].'" Dunbar, 233 N.J. at 561 (quoting 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 333 (2015)). Where, as were the circumstances here for the City's cannabis development applications, there is a checklist of application components provided by ordinance, which is "anticipated in, and incorporated by, the MLUL definition of 'application for development' in N.J.S.A. 40:55D-3 and, by extension, the TOA Rule of N.J.S.A. 40:55D-10.5." Dunbar, 233 N.J. at 561-62. Thus, to determine whether an application benefits from the protection of the TOA Rule, a court must analyze whether the

[5] Plaintiffs concede that the CRB is indeed an "agency" of the City of Hoboken. (Da518.)

application contained all of the components contemplated under the ordinance. See id. Significantly, the standard simply requires a comparison of a submission to "the requirements of the municipal ordinance; it does not require review of each submission to determine whether a 'meaningful review' can be undertaken." Id. at 562.

Pursuant to its delegated power, the City of Hoboken incorporated into its ordinances a set of requirements for site plan approval for permitted cannabis-related uses. See Hoboken City Ordinance § 196-33.1(M). Section 196.33.1(M) – which is entitled "Site Plan approval; minimum requirements; performance standards" – sets forth the materials required for cannabis-related site plan approval. Those materials include: (1) prior approval from the CRB, (2) building use, (3) setback requirements, (4) product display and storage, (5) delivery vehicles, (6) consumption, (7) odor, (8) noise, (9) security, (10) queuing, and (11) parking. See Hoboken City Ordinance § 196-33.1(M).

A review of the CRB application requirements confirms that ***all*** of the items and information required for cannabis-related site plan approval are, in fact, contained within any CRB application. (Da469-477.) For example, the application requires a detailed description of: (i) the building use (including the precise location and nature of the property), (ii) the alarm system, and (iii) parking. (Da471-472.) In addition, the CRB application provides a checklist of

documents that must be submitted to the CRB, which includes, among other things:

> 3. Where the license applicant will be leasing the premises, a signed certification from the property owner/landlord that the owner/landlord is aware that the tenant's use of the premises will involve activities associated with medical, retail, wholesale, delivery, and/or consumption of cannabis.
>
> . . . .
>
> 5. A neighborhood impact report. This report should address issues including, but not limited to: ***anticipated increase in vehicular and pedestrian traffic to and from the site***; ***queuing of customers on the right-of-way***; ***noise***; ***odor***; ***accommodations for delivery services***; ***loading/unloading, and parking***; and any provision of public amenities.
>
> 6. An environmental impact plan, which shall, at [a] minimum, include consideration of sustainable alternatives to single-use plastic packaging, efforts to minimize water usage, efforts to minimize light pollution, a refuse and recycle plan, and other 'Green Business' recommendations as set forth by the Hoboken Green Team.
>
> 7. An inventory control plan outlining what process the applicant will use to track and control cannabis product inventories including, for instance: products received from wholesalers and other outside sources, products, distributed to other facilities on a wholesale basis, products sold through delivery services or by other means to off-site customers; and products sold to on-site customers.
>
> 8. ***A copy of the safety and security plan*** the applicant will be submitting with their State application.

> * * *
>
> 16. Business Plan – same plan as submitted with State application.
>
> 17. Compliance Plan – same plan as submitted with State application.
>
> 18. Vendor-Contract Agreements – same as submitted with State application.
>
> 19. ***Any and all other information necessary to satisfy the requirements set forth in the Municipal Code of the City of Hoboken***.
>
> [Da475-476 (emphasis added).]

The CRB reviewed Blue Violets' application – which contained all the requirements identified in Hoboken City Ordinance § 196-33.1(M) – and deemed it complete as of February 2022. Accordingly, the Planning Board correctly found that the Ordinance, which did not go into effect until April 28, 2022, did not apply to Blue Violets' application.

III. THE TRIAL COURT'S DECISION TO VACATE THE RESOLUTION UNDERMINES THE CLEAR PURPOSE AND INTENT OF THE TOA RULE. (DA532; 3T13-21.)

Despite acknowledging that "the court must strive to effectuate the Legislature's intent in enacting the time of application rule," the trial court's decision creates a manifestly absurd result and is contrary to the overall purpose and spirit of the law.

In construing legislative provisions, the court's "overriding goal is to give effect to the Legislature's intent." State v. D.A., 191 N.J. 158, 164 (2007) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). While the plain language of the statute is ordinarily the best indicator of legislative intent, New Jersey courts "do not follow that rule when to do so would produce an absurd result, at odds with the clear purpose of the legislation." Jai Sai Ram, LLC v. Planning/Zoning Bd. of Borough of Toms River, 446 N.J. Super. 338, 345 (App. Div. 2016) (citing Perrelli v. Pastorelle, 206 N.J. 193, 200-01 (2011)). Indeed, the New Jersey Supreme Court has made clear that "where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirit of the law should control." Id. (quoting Hubbard v. Reed, 168 N.J. 387, 392 (2001)); see also Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 540-41 (2012). "Thus, when a literal interpretation of individual statutory terms or provisions would lead to results inconsistent with the overall purpose of the statute, ***that interpretation should be rejected***." Hubbard, 168 N.J. at 392-93. (citation omitted) (emphasis added); see also N.J.S.A. 40:55D-136 ("The provisions of this act shall be liberally construed to effectuate the purpose of this act.")

"The clear purpose of N.J.S.A. 40:55D-10.5 . . . was to assist developers and property owners by obviating the time of decision rule." Jai Sai Ram, 446 N.J. Super. at 343 ("The time of decision rule allowed municipalities to block

proposed developments by changing the applicable zoning ordinances while the development applications were being considered.") "The Legislature was concerned about situations in which a developer would spend time and money pursuing an application, only to have a municipality change the zoning to the developer's detriment while the application was pending." Id. at 344. Indeed, the Sponsor's Statement reflects the statute's purpose, and provides as follows:

> Under current law, applicants are subject to changes to municipal ordinances that are made after the application has been filed, and even after a building permit has been issued . . . . Application of this rule sometimes causes inequitable results, such as when an applicant has expended considerable amounts of money for professional services and documentation that become unusable after the ordinance has been amended. [The TOA Rule] effectively prohibit[s] municipalities from responding to an application for development by changing the law to frustrate the application . . . .
>
> [Id. (quoting Sponsor's Statement to A. 437 (2010).]

The Governor's Message, issued upon signing the bill, further explained the goals of the TOA Rule:

> The legislation does not guarantee approval of a land-use application, but instead allows for the application process to move forward without the unnecessary hurdle of constantly changing requirements while the application is pending.
>
> New Jersey's business and entrepreneurs – the job creators of our state – invest considerable amounts of financial and human resources in navigating a vast landscape of rules and regulations at the state and local

> level . . . . Prior to the signing of this legislation, the system allowed for those rules to be changed in the middle of the process, even after an application has been submitted. This legislation makes common sense changes to improve the application process and move New Jersey in the right direction of providing a friendlier environment for job creation, while keeping safeguards for public health and safety in place.
>
> Currently, regulations do not 'lock-in' until preliminary approval is granted for an application, allowing municipalities to change the requirement of an application after its initial submission, resulting in a business that is investing in New Jersey having to start the costly, time-intensive application process over, or abandoning the project altogether.
>
> [Id. (quoting Governor's Message to S. 82 (May 5, 2010).]

By finding that the Planning Board acted unreasonably when it determined that an application submitted to and deemed complete by the CRB triggered the TOA Rule, the trial court reached a conclusion that is completely inconsistent with the overall purpose and spirit of the TOA statute. The City of Hoboken specifically created the CRB to act as an authorized municipal agency which would review applicants for cannabis-related development to protect "the public, health, safety, and general welfare of the City of Hoboken and its residents[.]" See Hoboken City Ordinance §196-33.1; §36-4(A). The CRB application process is not, as the trial court suggested, merely a submission requirement. Rather, it is a rigorous application process that includes the submission of all materials required for the CRB's cannabis-related site plan

approval and requires a public hearing, notice of that public hearing via certified mail, testimony from the applicant's operators, questions from members of the CRB and the public, and final agency approval via vote of its members. If the City were permitted to change relevant ordinances during the CRB application process, or even after the CRB deems an application complete (as was the case here), it would allow the City to change the law to frustrate the application. That is the ***precise*** result the TOA Rule seeks to avoid.

The potential that the City of Hoboken may change the law to frustrate the application is not just theoretical – it is ***exactly*** what happened in this case. Blue Violets began the process of preparing the CRB application in September 2021. (Da439.) Blue Violets expended a tremendous amount of time, money and effort to secure all the necessary requirements to obtain CRB approval including, without limitation, locating the Property after an exhaustive and expansive search, securing the Property including negotiating and signing a 35-page lease agreement, securing a cannabis business bank account, establishing accounts with utility providers, soliciting and obtaining proposals from security vendors, creating and conforming their plans for the business' operations and security procedures within this specific Property, providing security deposits, payments for brokers fees, rent payments, procuring the necessary insurance, and creating an environmental impact plan and community impact plan specific to the

Property. (Da439-442.) In total, the principals of Blue Violets incurred expenses of approximately $30,000 in preparation for the CRB application alone. (Da433.) All of this effort was expended well before the Ordinance was even introduced. Thereafter, in order to secure the remainder of their local approvals and continue fighting to open their business at the Property, Blue Violets' principals incurred additional expenses exceeding $100,000.

Moreover, the CRB application process alone spanned the course of three (3) months. Blue Violets submitted its initial application to the CRB on January 22, 2022. The CRB deemed the application complete on February 18, 2022. On March 8, 2022, the CRB placed Blue Violets' application on the agenda for the CRB meeting scheduled on March 24, 2022. ***The very next day***, the Ordinance was introduced which included a condition that prohibits the sale of cannabis within 600 feet of any primary or secondary school. In other words, certain legislators[6] effectively responded to Blue Violets' application by attempting to change the law to frustrate the application. Unfortunately, despite being on the CRB agenda for March 24, 2022, Blue Violets' application was not heard due to the length of the application hearings scheduled before them, and it was

[6] By majority vote, the Hoboken City Council ultimately approved a resolution of support for Blue Violets' application to the New Jersey Cannabis Regulatory Commission in September 2022, substantiating the Planning Board's decision to approve the application. (Da463-464.)

carried to the next CRB meeting scheduled for April 21, 2022. During that time, on April 8, 2022, the Ordinance was formally adopted and subject to a 20-day estoppel period. The CRB deemed Blue Violets' application complete and provided Blue Violets its endorsement during the April 21, 2022 meeting – four (4) business days before the Ordinance became effective.

Simply put, the trial court's decision has sanctioned the exact result the Legislature sought to avoid in passing the TOA Rule. Rather than ensuring that Blue Violets' application proceeded without the unnecessary hurdle of constantly changing requirements, the trial court endorsed the City's actions – *i.e.*, changing the law to specifically frustrate Blue Violets' application – effectively signaling to New Jersey's municipalities that they can easily avoid the TOA Rule by creating similarly time- and cost-intensive hurdles that must be satisfied prior to the subsequent submission to a planning board. The trial court's decision (if left undisturbed) will result in the total loss of the time, money and effort Blue Violets expended. Given that Blue Violets is a small business with no more capital to expend, the trial court's decision (if left undisturbed) will force Blue Violets' principals to abandon the project altogether – the ***exact*** harm the Legislature sought to avoid when enacting the TOA Rule.

IV. MS. URTECHO'S ELEVENTH-HOUR MOTION FOR LEAVE TO INTERVENE, WHICH WAS ADMITTEDLY PURSUED FOR AN IMPROPER PURPOSE AND SOUGHT TO ASSERT UNTIMELY CLAIMS, SHOULD HAVE BEEN DENIED. (DA515-516; 2T.)

The trial court erroneously granted Ms. Urtecho leave to intervene in the matter at the eve of trial. The trial court made three fundamental errors in its analysis when electing to grant Ms. Urtecho's motion for leave to intervene. First, as explained in detail in Section I, *infra*, the trial court incorrectly concluded that Ms. Urtecho possessed standing to assert and pursue her claims.[7] Second, the trial court ignored the fact that Ms. Urtecho's motion was untimely and, by Ms. Urtecho's own admission, was pursued for an improper purpose. Third, the trial court erred by enlarging the statute of limitations applicable to Ms. Urtecho's proposed claims and permitting her to file untimely claims. Those errors warrant reversal.[8]

[7] For the sake of brevity, Blue Violets respectfully refers to and incorporates by reference the argument set forth in Section I, *infra*, for this point.

[8] The trial court's erroneous decision to grant Ms. Urtecho's untimely motion for leave to intervene was of critical importance. Had the trial court properly denied that motion, HFRC – an entity that was not even formed until after the Planning Board voted to approve Blue Violets' conditional use application – certainly would not possess standing on its own.

A. The Trial Court Erred in Permitting Ms. Urtecho to Intervene on the Eve of Trial. (Da515-516; 2T.)

Ms. Urtecho's motion for leave to intervene – which was filed on the eve of trial and after all trial briefing was submitted – was untimely and pursued for an improper purpose. The trial court's decision to nevertheless grant Ms. Urtecho's motion was plain error and should be reversed.

It is well settled that the making of a "timely" application to intervene is a prerequisite to gaining intervention as of right under R. 4:33-1. See, e.g., New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 286 (App. Div. 2018); Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3 to R. 4:33 (2024) ("The court has discretion to determine the timeliness, under all the circumstances, of the intervention application, and may deny the application if deemed untimely.") On the issue of timeliness, a court must consider both the procedural posture of the matter as well as "the purpose for which intervention is sought." Chesterbrooke Ltd. P'Ship v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118, 125 (App. Div. 1989). To that end, where a party seeks to intervene as of right:

> [a]n essential prerequisite to intervention is timeliness, which should be equated with diligence and promptness. One who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express [her] disagreement only

> when the results of the battle are in and [she] is dissatisfied.
>
> [Twp. of Hanover v. Town of Morristown, 118 N.J. Super. 136, 143 (Ch. Div.), aff'd, 121 N.J. Super. 536 (App. Div. 1972).]

By her own admission, Ms. Urtecho had been actively monitoring and, in her individual capacity, vigorously opposing Blue Violets' efforts to obtain the subject approval from the Hoboken Planning Board. For example, in June 2022, Ms. Urtecho signed a letter urging the Hoboken Planning Board to deny Blue Violets' then-forthcoming application. (Da422-424.) Then, on September 14, 2022, Ms. Urtecho attended the Hoboken Planning Board meeting as a so-called "objector" and opposed Blue Violets' application for a conditional use approval. (Da94; Da255.) To that end, the trial court expressly found:

> It's undisputed [that Ms. Urtecho] has been involved in this fight from day one, she's the one that's carried the fight against the cannabis store. She appeared below, she questioned the witnesses. I think she provided testimony to the Planning Board below.
>
> [3T13:3-7.]

Despite her intimate knowledge and involvement, Ms. Urtecho did not timely commence a litigation seeking to challenge the subject approval and resolution in her individual capacity. Nor did Ms. Urtecho diligently or promptly seek to intervene in this matter in her individual capacity. Instead, Ms. Urtecho engaged in the precise conduct this Court expressly deemed

inappropriate: she sat on the sidelines and only sought to intervene when it was clear HFRC's claims were going to fail for lack of standing. Indeed, Ms. Urtecho – who only sought to intervene ***after*** all trial briefing was fully submitted – admitted that she filed her motion to intervene "in response to a claim that the plaintiff in this action lacks standing." (Da491 at ¶1.) What's more, Ms. Urtecho's request expressly stated that she was only requesting to intervene "[i]n the event that the Court determines that HFRC lacks standing". (Da492 at ¶7.) By her own admission, Ms. Urtecho waited until the results of the battle were in before seeking to take action. See 118 N.J. Super. at 143.

Ms. Urtecho's delay in seeking leave to intervene was particularly egregious considering Blue Violets raised "lack of standing" as an affirmative defense in its first pleading in November 2022. (Da22.) Ms. Urtecho and Plaintiff were fully aware of the standing issue since the outset of the case. Ms. Urtecho, however, did not seek to intervene at that time. Instead, she waited until the eve of trial – after all parties submitted full trial briefing – to file a motion for leave to intervene. Ms. Urtecho's untimely and ill-motivated motion to intervene should have been denied.

B. The Trial Court Erred By Enlarging the Statute of Limitations Applicable to Ms. Urtecho's Claims and Permitting Ms. Urtecho to File Her Otherwise Time-Barred Claims. (Da515-516; 3T12-13.)

Pursuant to Rule 4:69-6, the statute of limitations for challenging a planning board's decision is forty-five days. See Rule 4:69(a) ("No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to review, hearing or relief claimed . . ."); Rule 4:69(b)(3) (providing that the 45-day limitation period applies to actions seeking to "review a determination of the planning board[.]") The 45-day time frame set forth in Rule 4:69-6 "is designed to give an essential measure of repose to actions taken against public bodies." Washington Twp. Zoning Bd. v. Planning Bd., 217 N.J. Super. 215, 225 (App. Div.), cert. den., 108 N.J. 218 (1987). That time limitation is specifically "aimed at those who slumbered on their rights." Id.

It is undisputed that, pursuant to R. 4:69-6, Ms. Urtecho was required to commence an action by no later than November 27, 2022 – 190 days prior to the date she filed a motion to intervene. Notwithstanding the untimeliness, the trial court elected to "relax" the 45-day requirement, pursuant to R. 4:69-6(c), and permit Ms. Urtecho to file and pursue her otherwise time-barred claims. That decision was plain error and should be reversed.

"Because of the importance of stability and finality to public actions, courts do not routinely grant an enlargement of time to file an action in lieu of prerogative writs." Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy, 349 N.J. Super. 418, 423 (App. Div. 2022), certif. den., 174 N.J. 189 (2002). None of the exceptions permitting enlargement "in the interest of justice" – such as those involving "important public as opposed to private interests which require adjudication or clarification" – are applicable here. See R. 4:69-6(c); Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975); Tri-State, 349 N.J. Super. at 424 (finding that a plaintiff's inclusion of its property in a redevelopment district involved a private rather than public interest).

In this action, Ms. Urtecho did not articulate, and the trial court did not provide, any legitimate basis warranting a 190-day enlargement of the applicable statute of limitations. Instead, the trial court simply concluded that enlargement was warranted because Ms. Urtecho had "been involved in this fight from day one[.]" (3T13:3-4.) That conclusion (even if true) does not warrant enlargement of the statute of limitations. That Ms. Urtecho challenged the subject resolution before the Planning Board – and then inexplicably failed to timely assert claims in this litigation – does not implicate an "important public right." Rather, the "grievance" is purely "private" and particular to Ms. Urtecho (despite her inability to articulate any property right affected by the subject

resolution.) Ms. Urtecho knowingly and voluntarily slumbered on her rights and then sought to intervene at the eleventh hour for an improper purpose. Under the circumstances, enlargement of the statute of limitations – which is not routinely granted– was not warranted.

CONCLUSION

For the foregoing reasons and authorities, Blue Violets respectfully requests that this Court reverse the trial court's September 26, 2023 Order in its entirety.

COLE SCHOTZ P.C.
Attorneys for Defendant/Appellant,
Blue Violets LLC

By: */s/ Michael C. Klauder*
Michael C. Klauder

DATED: January 30, 2024

HOBOKEN FOR RESPONSIBLE CANNABIS, INC. Plaintiff-Respondent, v. CITY OF HOBOKEN PLANNING BOARD, Defendant-Respondent, And BLUE VIOLETS, LLC, Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000556-23 Civil Action On Appeal From the Final Order of the Superior Court of New Jersey Law Division: Hudson County Docket No. HUD-L-3520-22 Sat Below: Hon. Anthony V. D'Elia, J.S.C.

(3527922.1)

APPELLATE BRIEF OF DEFENDANT-RESPONDENT, CITY OF HOBOKEN PLANNING BOARD

WEINER LAW GROUP LLP
629 Parsippany Road
Parsippany, NJ 07054
Phone: (973) 403-1100
Attorneys for Defendant-Respondent,
City of Hoboken Planning Board
Dated: April 2, 2024

Of Counsel:
Richard Brigliadoro, Esq., 012661982

On the Brief:
Richard Brigliadoro, Esq., 012661982
Glenn C. Kienz, Esq., 014431981

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

PRELIMINARY STATEMENT

The Defendant-Appellant, Blue Violets, (hereinafter "Blue Violets") filed an application for development with the Defendant-Respondent, Hoboken Planning Board (hereinafter "Planning Board" or "Board"). Blue Violets sought approval from the Planning Board that would permit it to operate an adult use "micro" cannabis retail business in a mixed-use building located at 628 Washington Street, Hoboken, New Jersey in the Commercial C-2 Zone.

The City of Hoboken (hereinafter "Hoboken") regulates cannabis under the Hoboken Code codified under Section 196-33.1. A Class 5 Cannabis Retailer is a conditionally permitted use under Hoboken's Code. In addition, Hoboken has also created a Cannabis Review Board (hereinafter "CRB"), which was codified under Hoboken Code Section 36.1. A unique feature of the CRB Ordinance requires an Applicant to first proceed before the CRB and to obtain an endorsement or a report to the contrary which shall be provided to the land use board of jurisdiction prior to the Applicant's submission of a conditional use application to the appropriate land use board exercising jurisdiction over the application.

Blue Violets filed an application seeking such an endorsement from the CRB and proceeded with its application before the CRB. On April 22, 2022 Blue Violets received a favorable endorsement from the CRB. Blue Violets

filed its application seeking site plan and conditional use approval with the Planning Board on April 29, 2022. Multiple public hearings were heard by the Planning Board. Blue Violets met all of the conditions of Hoboken's Conditional Use Ordinance. Thus, the Planning Board was the appropriate land use board to exercise jurisdiction over this matter. However, on April 6, 2022 the Hoboken Governing Body amended Ordinance 196-33.1 which Ordinance was signed by Mayor Bhalla on April 8, 2022 and which Ordinance became effective 20 days later. The effect of this amendment to the zoning ordinance was to establish distance requirements where a cannabis dispensary could be located in relation to schools and early childhood learning centers.

The Planning Board over objections from the public, ruled that under the Time of Application Rule (TOA Rule), Blue Violets' application for development was not subject to the amended Ordinance because Blue Violets had been proceeding with its application before the CRB as mandated by Ordinance before it was permitted to proceed with its application before the Planning Board.

Blue Violets' application was approved on September 15, 2022 and memorialized in a Resolution adopted on October 13, 2022. Hoboken For

Responsible Cannabis, Inc., a New Jersey Non-Profit Corporation ("HFRC") filed an appeal of the Planning Board decision. The Trial Court reversed the Planning Board finding the submission of an application to the CRB was not an application for development under the Municipal Land Use Law (MLUL).

The legislature enacted the TOA Rule specifically to prevent situations such as occurred here wherein an Applicant relies upon the Ordinance in effect at the time it files its application with the CRB and proceeds in good faith in order to first obtain an endorsement from the CRB. Obtaining an endorsement from the CRB is a necessary predicate step that must be complied with before an application can be filed with the Planning Board seeking site plan and conditional use approval for a "micro" cannabis business. The Trial Court's decision to overturn the Planning Board unanimous approval of a conditionally permitted use is contrary to the overall purpose, intent, spirit and application of the TOA Rule. The Trial Court erred in failing to consider and give effect to the legislative intent behind the TOA Rule as case law has required. The decision of the Trial Court must be reversed and the approval of the Planning Board reinstated.

PROCEDURAL HISTORY

The Planning Board granted conditional use and site plan approval to Blue Violets on September 15, 2022, which approval was memorialized in a Resolution adopted by the Planning Board on October 13, 2022 (Da454). HFRC filed a Complaint in lieu of prerogative writs on October 21, 2022 challenging the Planning Board's grant of approval. The matter was tried before the Honorable Anthony V. D'Elia, J.S.C. and the Court reversed the decision of the Planning Board (M-Da7) and entered an Order vacating the Resolution for the reasons placed on the record of September 26, 2023 which Order was entered on September 26, 2023 (M-Da21).

On October 24, 2023, Blue Violets filed a Notice of Appeal and Case Information Statement with the Court (M-Da533-545). On October 25, 2023 Blue Violets filed a Notice of Motion for a Stay pending appeal with the Trial Court. (M-Da19). On November 17, 2023 the Trial Court denied the Motion for a Stay pending appeal. (M-Da21). The Planning Board filed a Case Information Statement with the Appellate Division on November 8, 2023.

Blue Violets next filed a Motion for a Stay pending appeal with the Appellate Division on December 13, 2023. (M-Da23). The Appellate Division entered an Order granting a stay of the Trial Court decision pending appeal on January 4, 2024. (M-Da26). The Appellate Division entered a further Order on February 29, 2024 denying a Motion for Reconsideration, and/or clarification of the January 4, 2024 Order or in the alternative, to accelerate the appeal which Motions were filed on behalf of HFRC.

STATEMENT OF FACTS

This appeal arises out of an action in lieu of prerogative writs wherein HFRC challenged the decision of the Planning Board granting conditional use and site plan approval to Blue Violets. The Planning Board approval permits Blue Violets to operate an adult use "micro cannabis" retail business within the City of Hoboken. The Planning Board unanimously granted Blue Violets' application and included a detailed statement of facts and conclusions of law in its memorializing Resolution. (Da454). The Planning Board relies on those findings of fact as well as the record before the Planning Board and offers the following, which more specifically relate to the instant appeal.

A. The Subject Property.

The subject Property is located at 628 Washington Street. The Block is 2005 and the Lot number is 30.02 which is depicted on the Tax Assessment Map of the City of Hoboken. The lot is an interior lot on the west side of Washington Street and located south of 7th Avenue. The subject Property is located in the C-2 Commercial Zone. (Da209).

The zoning designation for the subject Property was formerly the CBD Zone. However, as a result of the 2018 Master Plan, this Property was rezoned

and designated in the C-2 Zone along with the surrounding properties. (Da209 and Da210).

The subject Property contains a commercial unit located within an existing mixed-use commercial and residential building and is located within the C-2 Zone. The first floor is commercially developed and the second and third floors are developed residentially. (Da210). After the adoption of the Land Use Plan in 2018, the zoning ordinance was subsequently amended and the CBD Zones were eliminated. (Da210).

The Applicant proposes to occupy approximately 865 square feet of space at street level with use of the basement area for non-retail purposes. Thus, the Applicant will occupy a total of approximately 1,095 square feet of space. (Da221). The Applicant proposes only internal modifications to the space to be occupied. No exterior construction is proposed. (Da218).

The Board and the Applicant reviewed the issue of whether or not off-street parking was required in connection with the development application. The Board Engineer, Mr. Nash, confirmed that one (1) parking space is required if there are twenty (20) or more persons on-site. (Da219). The Applicant's Planner, Mr. Lydon, agreed to a condition of approval that a maximum of

nineteen (19) people would be on-site at any one time, thus resulting in the occupancy not triggering a requirement to provide one (1) on-site parking space. (Da223).

B. <u>Establishment and Role of The Cannabis Review Board.</u>

Hoboken established a CRB under Chapter 36 of the City of Hoboken Code. Pursuant to Section 36-1, the City of Hoboken created a CRB "which shall serve as an Advisory Committee to the City of Hoboken whose duty it shall be to review applications for a cannabis wholesaler, cannabis retailer, medical cannabis dispensary and cannabis delivery operations based within the City of Hoboken." (M-Da356).

Section 36-2 of the CRB Ordinance establishes the purpose of the CRB in order to "assure the public health, safety and general welfare of the City of Hoboken and its residents, business establishments and visitors." (M-Da356).

Section 36-4a permits the CRB among other things, to receive and review applications for a cannabis retail establishment and the CRB is required to **provide either an endorsement or a report to the contrary to the land use board exercising jurisdiction "prior to the Applicant's submission of a conditional use application to the Board."** (M-Da357) (emphasis supplied).

Furthermore, hearings before the CRB are required to be on notice to the public with notice of the application and hearing to be served upon all property owners as shown on the current tax duplicates located within 200' in all directions of the proposed location. Furthermore, the notice is required to comply with the notice procedures of the MLUL pursuant to N.J.S.A. 40:55D-12b and notice is required to be provided at least 10 days prior to the date of the hearing. (M-Da357-358).

In accordance with Section 36-4D, the CRB has 45 days from the conclusion of the hearing to issue either an endorsement or a report to the contrary to the land use board exercising jurisdiction over the application. (M-Da358).

At the April 22, 2022 CRB meeting, the CRB conducted a public hearing in regard to Blue Violets' application under Docket No. CRB-22-5. At the conclusion of the public hearing, the CRB issued its endorsement approving Blue Violets' development application. (Da423, 424). A Resolution of support was memorialized by the CRB on July 6, 2022, specifically finding that Blue Violets will have a positive impact on the City's community. The Board also

determined that the application was consistent with the intent of the City's Cannabis Ordinances. (Da423, 424).

C. Cannabis is a Conditionally Permitted Use in Accordance with City of Hoboken Code Section 196-33.1E

Moreover, an Applicant seeking approval from the appropriate land use board to operate a cannabis retail establishment is required to obtain the following approvals in order to operate a business as a cannabis retailer.

> (1) A license or permit for each use must be obtained from the State of New Jersey Cannabis Regulatory Commission;
>
> (2) A letter of endorsement and community host agreement must be obtained from the Hoboken Cannabis Review Board; [Amended 3-23-2022 by Ord. No. B-446];
>
> (3) A state and local consumption endorsement, if applicable, must be obtained pursuant to the N.J.S.A. 24-61-21, N.J.S.A. 24:61-42 and City of Hoboken regulations;
>
> (4) Site plan approval shall be obtained from the City of Hoboken Planning Board or Board of Adjustment, as the case may be;
>
> (5) A first certificate of zoning compliance shall be obtained along with all necessary building permits for build-out of the dispensary in accordance with the approved site plan; and

(6) A final certificate of zoning compliance and certificate of occupancy must be issued.

As to the required site plan approval, the City Code stipulates certain minimum requirements and performance standards for building use, setback requirements, product display and storage, delivery vehicles, consumption, odor, noise, security, queuing and parking. Id. at §196-33.1(M). That section also stipulates that site plan approval requires an endorsement by the Hoboken Cannabis Review Board. Id. at (M)(1). Thus, the initial step for approval by the City of Hoboken of a conditional use as a cannabis retailer is a letter of endorsement issued by the CRB as well as a community host agreement. Subsequently, site plan approval and conditional use must be obtained from the Planning Board if the Applicant complies with all conditions of the conditional use ordinance pursuant to §196-33.1 et. seq. and the MLUL pursuant to N.J.S.A. 40:55D-67 or the Board of Adjustment if a use variance is required pursuant to N.J.S.A. 40:55D-70d(3). (Id.)

D. The City of Hoboken Amends Chapter 196-33.1 Cannabis and Chapter 36 Cannabis Review Board By Ordinance No. B-446

On April 6, 2022, the City Council adopted Ordinance No. B-446 which among other amendments, amended Chapters 196-33.1 and 36. Ordinance B-

446, provided that a cannabis retailer or dispensary could not be located on the same block frontage as a primary or secondary school, "nor shall it be located within 600 feet in all directions of any primary or secondary school or located directly adjacent to any early childhood learning facility". . .

The Ordinance was signed into law by Mayor Bhalla on April 8, 2022. (M-Da361).

E. The Planning Board Approves Blue Violets' Conditional Use And Site Plan Application to Permit A Cannabis "Micro" Dispensary

The Board considered the applicability of Hoboken Ordinance B-446 and addressed the issue in its Resolution stating:

> "notably, a condition placed upon retail cannabis use is that cannabis dispensaries may not be located within 600 feet of a primary or secondary school. However, the Board finds that the Applicant began its approval process by applying to the Cannabis Review Board prior to the adoption and applicability of that Ordinance. Accordingly, Applicant is entitled to application of the Ordinance as it existed at the commencement of its approval process, and this proximity requirement does not apply to the subject application." (M-Da455, M-Da456)[1].

[1] Also see Statement of Planning Board Attorney Carlson (Da234).

On September 15, 2022, the Planning Board unanimously voted to approve Blue Violets' conditional use and site plan application for a cannabis "micro" dispensary which approval was memorialized in a Resolution adopted by the Planning Board on October 13, 2022. (Da454).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT BLUE VIOLETS' APPLICATION TO THE PLANNING BOARD DID NOT HAVE THE PROTECTION OF THE TIME OF THE APPLICATION RULE AGAINST SUBSEQUENT ZONING CHANGES. (3T.19:4-25, 3T.20:1-17)

Blue Violets applied to the CRB in accordance with Hoboken Code Section 36-1 et. seq. Blue Violets was required to first file an application with the CRB in order to obtain an endorsement from the CRB to operate a business as a cannabis retailer within the City of Hoboken. Section 36-4 of the Hoboken Code also requires the CRB to "provide an endorsement, or report to the contrary, to the land use board of jurisdiction prior to the Applicant's submission of a conditional use application to the Board." (M-Da357). The Hoboken Cannabis Ordinance in effect when the Applicant applied to the CRB did not contain a requirement that a retail cannabis dispensary be located a certain distance away from a primary or secondary school or from an early childhood learning facility.

Subsequently, while Blue Violets application was pending before the CRB, Hoboken adopted Ordinance No. B-446 which Ordinance amended Section 196-33.1 "Cannabis" of the Hoboken Code. More specifically, the Section of the Ordinance that is applicable to Blue Violets' application is Section 196-33.1I which among other things provides the following amendment:

> "in no case shall a cannabis retailer or dispensary be located on the same block frontage as a primary or secondary school, nor shall it be located within 600 feet in all directions of any primary or secondary school or located directly adjacent to any early childhood learning facility."

Hoboken Ordinance No. B-446 was adopted on April 6, 2022 and signed by Mayor Bhalla on April 8, 2022 which Ordinance then went into effect on April 28, 2022.

A. Applicability of The Time of Application Rule

The TOA Rule was codified within the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-10.5. N.J.S.A. 40:55D-10.5 provides:

> "Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public

> safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to the application for development."

Blue Violets filed its application with the CRB and proceeded with the CRB review process which culminated in the CRB issuing an endorsement of Blue Violets' application which decision of the CRB occurred on April 22, 2022.

Having secured the endorsement of the CRB, on April 29, 2022 Blue Violets next submitted an application to the Planning Board seeking conditional use and site plan approval in order to operate a cannabis "micro" dispensary.

During the Planning Board hearing on September 15, 2022, Planning Board Attorney Carlson addressed the issue of the TOA Rule and stated:

> ". . . any applicant is entitled to the benefit of the law as it stands at the time that they submit the application to the City. . . there was no school requirement at the time the application was submitted and accordingly it does not apply to this application." (Da234).

Dunbar Homes, Inc. v. Zoning Board of Adjustment of Twp. of Franklin, 233 N.J. 546, 560, 561 provides in relevant part:

> "the MLUL is 'a comprehensive statute that allows municipalities to adopt ordinances to regulate land development in a manner which will promote the public, health, safety, morals and general welfare'

> using uniform and efficient procedures." Rumson Estates, Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 349 (2003). (citations omitted).

Furthermore, the New Jersey Supreme Court in Dunbar held:

> "The Legislature acknowledged that the time of decision rule had produced 'In equitable results, such as when an applicant has expended considerable amounts of money for professional services and documentation that becomes unusable after [an] ordinance has been amended.'" A. Housing & Local Gov't Comm. Statement to A. 437 (2010). In order to "effectively prohibit"[] municipalities from responding to an application for a development by changing the law to frustrate the application." Ibid., the Legislature adopted the TOA Rule: Dunbar Homes, Inc., supra, 233 N.J. at 560.

The Supreme Court in Dunbar considered the definition of an application for development under the MLUL pursuant to N.J.S.A. 40:55D-3. "Thus, the term "application for development" must be **interpreted to mean "the application form and all accompanying documents required by Ordinance for approval of a subdivision plat, site plan, plan development, cluster development, conditional use, zoning variance or direction of the issuance of a permit."** N.J.S.A. 40:55D-3. (emphasis added). Dunbar Homes, Inc., supra, 233 N.J. at 561.

The amendment to Hoboken Code Section 196-33.1 in April 2022 imposed additional conditions i.e., distance requirements from a cannabis retail dispensary from a primary or secondary school or to an early childhood learning center, which conditions were not present in the ordinance when Blue Violets first filed its application with the CRB seeking an endorsement to operate a cannabis "micro" dispensary. Application to the CRB was a necessary and mandatory step in the process prior to Blue Violets even being permitted to file its application with the Planning Board. (M-Da357).

The amendments to Section 196-33.1 were to the detriment of Blue Violets. In Jai Sai Ram, LLC v. Planning Bd., 446 N.J. Super. 338 (App. Div. 2016), the Appellate Division held:

> "The clear purpose of N.J.S.A. 40:55D-10.5, . . . was to assist developers and property owners by obviating the time of decision rule. . . . The Legislature was concerned about situations in which a developer would spend time and money pursuing an application, only to have a municipality change the zoning to the developers detriment while the application was pending." Id. at 343, 344.

In Jai Sai Ram, the Appellate Division held:

> "In construing legislation our "overriding goal is to give effect to the Legislature's intent." (citations omitted). . . However, we do not follow that rule when

> to do so would produce an absurd result, at odds with the clear purpose of the legislation. (citations omitted) Jai Sai Ram, LLC, supra. 446 N.J. Super. at 344, 345.

Thus, the Appellate Division in Jai Sai Ram determined that any land use amendment which occurs during the pendency of an application and which is beneficial to an application for development pending before the local board or on appeal must be applied. Therefore, in accordance with the holding in Jai Sai Ram, the TOA Rule only bars the use of a new ordinance which is detrimental to the Applicant and not an amendment to an ordinance which is favorable to an Applicant.

During the September 15, 2022 hearing, there was a colloquy between a member of the public Ms. Urtecho and the Board wherein Ms. Urtecho stated:

> "so, it contradicts, actually, that the City Council went ahead and passed the 600 feet ordinance, **the City Council recognized late in the game that this was too close to a school and they put in the parameters around the 600 feet."** (M-Da249, M-Da250). (emphasis is supplied).

Ms. Urtecho's comments to the Planning Board provide evidence that as Blue Voilets' application was nearing a decision by the CRB, efforts were underway to amend the Cannabis Ordinance in such a way as to be detrimental

to Blue Violets' application seeking conditional use and site plan approval to permit a cannabis "micro" dispensary at 628 Washington Street in Hoboken.

Blue Violets' application to the CRB contained all of the requirements identified in Hoboken City Ordinance Section 196-33.1(M). The CRB deemed the application complete in February 2022. The Planning Board correctly found that the amendments proposed in Ordinance B-446 which did not go into effect until April 28, 2022 did not apply to Blue Violets' application before the Planning Board. Thus, this determination by the Planning Board is consistent with the holding in Jai Sai Ram.

POINT II

THE TRIAL COURT ERRED IN NOT CONCLUDING THAT THE HOBOKEN CANNABIS REVIEW BOARD IS THE FUNCTIONAL EQUIVALENT OF AND AN INTEGRAL PART OF THE HOBOKEN PLANNING BOARD PROCESS. (3T.19:4-25, 3T.20:1-8)

This case is different and unique from a land use prospective. Normally, there is no condition precedent for an Applicant to file an application with the Planning Board for a conditionally permitted use such that the Applicant is required to first obtain an approval from another public entity before the Applicant can even file an application for development with the appropriate land use board let alone proceed to a public hearing before such board, which in this instance is the Hoboken Planning Board. The MLUL under N.J.S.A. 40:55D-22(b) addresses the issue of conditional approvals. N.J.S.A. 40:55D-22(b) states:

> "in the event that development proposed by an application for development requires an approval by a governmental agency other than the municipal agency, the municipal agency shall, in appropriate instances, condition its approval upon the subsequent approval of such governmental agency; provided that the municipality shall make a decision on any application

> for development within the time period provided in this act or within an extension of such period as has been agreed to by the Applicant unless the municipal agency is prevented or relieved from so acting by the operation of law." N.J.S.A. 40:55D-22b.

Under Hoboken Code Section 36-4A, an Applicant is required to file an application with the CRB before an Applicant can file a land development application with the appropriate land use board. Furthermore, the CRB is required to take action and to render a determination on the application before an Applicant can proceed to the next step which under the Hoboken Code means filing an application with the Planning Board or Zoning Board as the case may be. (M-Da357).

The Hoboken Code which established the Cannabis Review Board under Section 36-2 sets forth the purpose of the CRB which "is to assure the public health, safety, and general welfare of the City of Hoboken and its residents, business establishments and visitors." (M-Da356).

Moreover, under the Hoboken Code Section 36-4A, the CRB "**shall provide an endorsement or report to the contrary to the land use board of jurisdiction prior to the Applicant's submission of a conditional use application to the Board."** (M-Da357). (emphasis supplied).

Furthermore, under the City of Hoboken Code under Section 196-33.1M(1) "a cannabis retailer. . . within the City of Hoboken shall first obtain an endorsement from the Hoboken Cannabis Review Board."

Thus, what Hoboken has legislatively created was the functional equivalent of an integral part of the Planning Board process, but strictly limited to cannabis related matters. Reading these sections of the Hoboken Code in Pari materia it is clear that an Applicant is barred from not only proceeding with an application before the Planning Board, but an Applicant is prohibited from even filing an application with either the Planning Board or Zoning Board of Adjustment as the case may be. The commencement of the review process before the Planning Board is delayed and cannot even begin to occur until the Applicant files an application and completes the review process with the CRB culminating in obtaining a "endorsement" from the CRB.

The CRB considered Blue Violets' application at a public hearing on April 22, 2022. At the conclusion of the public hearing, the CRB determined that "Blue Violets will have a positive impact on the City's community and the Board finds that this application is consistent with the intent of the City's Cannabis Ordinances." As a result, the CRB issued a Resolution endorsing Blue Violets'

application and plan which approval was granted on April 22, 2022. (Da423). Once the CRB issued its endorsement, Blue Violets satisfied one of the mandatory ordinance requirements in order to initiate and prosecute a land development application before the Planning Board for a cannabis "micro" dispensary which application complied with all of the conditions of the conditional use ordinance.

The City of Hoboken also adopted a Resolution supporting Blue Volets' application to the Cannabis Regulatory Commission. (Da404). The Resolution from the City of Hoboken was adopted after the CRB issued its endorsement (Da423) and after the Planning Board approved Blue Violets' application for development (Da454).

CONCLUSION

For the foregoing reasons, the Planning Board respectfully requests the decision of the Trial Court be reversed and the Resolution of the Planning Board granting conditional use and site plan approval to permit a cannabis "micro" dispensary be reinstated.

Respectfully submitted,

WEINER LAW GROUP LLP
Attorneys for the Defendant-Respondent
Hoboken Planning Board

Dated: April 2, 2024

Richard Brigliadoro, Esq.

BEATTIE PADOVANO, LLC
Daniel L. Steinhagen, Esq. (018622005)
200 Market Street, Suite 401
Montvale, New Jersey 07645
(201) 799-2128
dsteinhagen@beattielaw.com
Counsel for Plaintiffs-Respondents Hoboken for Responsible Cannabis, Inc., an NJ Nonprofit Corporation and Elizabeth Urtecho

HOBOKEN FOR RESPONSIBLE CANNABIS, INC., AN NJ NONPROFIT CORPORATION,

Plaintiff,

vs.

CITY OF HOBOKEN PLANNING BOARD and BLUE VIOLETS, LLC,

Defendants.

SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION

DOCKET NO. A-556-23

CIVIL ACTION

ON APPEAL FROM FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY

Docket No. Below: HUD-L-3520-22

Sat Below: Hon. Anthony V. D'Elia, J.S.C.

BRIEF OF PLAINTIFFS-RESPONDENTS HOBOKEN FOR RESPONSIBLE CANNABIS, INC. AN NJ NON-PROFIT CORPORATION AND ELIZABETH URTECHO

Daniel L. Steinhagen, Esq.
Of counsel and on the brief

April 3, 2024

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Table of Authorities

Cases

Statutes

Municipal Ordinances

Treatises

Rules of Court

PRELIMINARY STATEMENT

This is a land use appeal arising out of an erroneous decision of the Hoboken Planning Board. The Board improperly and unlawfully considered Blue Violets, LLC's application for a cannabis retail store even though Hoboken's City Council adopted a zoning ordinance days before Blue Violets filed the application that made the cannabis use impermissible in the proposed location because the location was, in the determination of the City Council, too close to a school building. That determination required at least 600 feet of separation, and Blue Violets' site is closer than 600 feet to two schools. The Law Division reversed the Board's approval, holding that the Board lacked jurisdiction to consider the application and that Blue Violets needed a conditional use variance from Hoboken's Zoning Board of Adjustment.

There are two significant issues in this appeal. First is the issue raised in the complaint filed by Plaintiff-Respondent Hoboken for Responsible Cannabis, Inc., an NJ Nonprofit Corporation ("HfRC"): whether the Board unlawfully exercised jurisdiction over Blue Violets' application for development, or whether because Blue Violets had made a submission to another agency in Hoboken – its Cannabis Review Board – that the "Time of Application" Rule in the Municipal Land Use Law, *N.J.S.A.* 40:55D-10.5 insulated Blue Violets from Hoboken's zoning ordinance. This issue is

straightforward, since Blue Violets' submission to the Cannabis Review Board did not implicate any land use issues, the "Time of Application" Rule had no bearing on that submission, and the triggering date for the "Time of Application" Rule was, as the New Jersey Supreme Court held in *Dunbar Homes, Inc. v. Twp. of Franklin Bd. of Adj.,* 233 *N.J.* 546 (2018), the date when a complete "application for development" was filed. Because Blue Violets did not file a complete application for development before the 600-foot restriction became effective, its application was subject to that restriction.

The second issue in this appeal is whether HfRC had standing to challenge the Board's decision to hear the application. HfRC's membership is comprised of residents and taxpayers of Hoboken, and includes persons living within 200 feet of the site Blue Violets sought to develop. Blue Violets claimed below, and claims here, that HfRC lacks standing and failed to show "special damages" because it does not own property and was not even formed on the date the Board voted to approve its application. Derivative of the standing issue is Blue Violets' claim that the trial court should not have permitted HfRC's President to intervene, but if the Court agrees that the entity has standing, then it need not address this derivative argument. On the issue of standing, this Court has never precluded resident taxpayers from challenging the validity of a land use board action on jurisdictional grounds based upon

their standing to sue. And if standing was actually an issue, the residency of one of HfRC's initial trustees within 200 feet of Blue Violets' property is more than sufficient to confer standing.

The trial judge rightly found that the Board lacked the authority to consider Blue Violets' application because it clearly needed a conditional use variance that only Hoboken's zoning board could consider. It also properly found that HfRC, along with its President, Elizabeth Urtecho (who sought and was granted leave to intervene after Blue Violets failed to file the required statement of factual and legal contentions prior to the case management conference and asserted, for the first time, in its trial brief, the factual basis for its claim that HfRC lacked standing) did, in fact, have standing to appeal, to challenge the Board's jurisdiction to consider the application. The Court should affirm the decision below.

PROCEDURAL HISTORY

Blue Violets filed an application for development with the Board on April 29, 2022. [Da316, 323]. It was not complete when Blue Violets filed it, as the Board's subcommittee so found on May 10, 2022. [Da56 at 65-10 to 65-20]. It was still incomplete on June 14, 2022. [Da77 at 25-7 to 25-24]. Finally, on July 7, 2022, the Board deemed the application complete and scheduled the application for a public hearing. [Da88 at 30-24 to 31-19].

The Board held a hearing on Blue Violet's application for development on September 14, 2022. [Da94]. The Board voted to approve the application and memorialized its decision in a resolution on October 13, 2022. [Da454].

HfRC challenged the Board's decision in a Complaint in Lieu of Prerogative Writs filed on October 21, 2022. [Da1]. Blue Violets filed an answer on November 30, 2022. [Da15]. The Board answered on January 12, 2023. [Da25]. The Court scheduled a pretrial conference for January 3, 2023, and pursuant to *R.* 4:69-4, HfRC submitted a statement of factual and legal issues to the trial court on December 29, 2023. [Pa40]. Neither the Board nor Blue Violets made a similar submission. The trial court held the conference on January 3, 2023 and established a briefing and trial schedule. [Pa46].

Although Blue Violets failed to file statement of factual and legal issues, or a motion to dismiss for failure to state a claim, it asserted that HfRC lacked standing to sue in its trial brief filed on May 8, 2023. Urtecho, who founded HfRC, moved to intervene on June 5, 2023 (concurrent with its reply trial brief). [Da489]. The trial court conducted a prerogative writ trial on July 18, 2023 [1T][1]. Contrary to Blue Violets' claim here, the trial court *did* hold a

[1] The transcripts of the proceedings in the Law Division are referenced as follows:

1T = July 18, 2023
2T = August 31, 2023
3T = September 26, 2023

prerogative writ trial on July 18, 2023, where it engaged in a substantive discussion of the issues on appeal, including about the meaning and import of *Dunbar, supra,* which is dispositive of the issues in this case. [1T 20:24 to 25:8]. The trial court considered further arguments on the motion to intervene on August 25, 2023 and concluded, at that time, that Urtecho would be granted leave to intervene. [2T at 46:4-12]. The trial court entered an Order on September 22, 2024 permitting Urtecho to intervene, and she filed her answer immediately. [Da515; Da517]. The trial court issued a decision on the record on September 26, 2023 [3T] and entered final judgment on that date. [Da532].

Blue Violets filed a notice of appeal on October 24, 2023. [Da533]. The Board did not appeal or cross appeal the Judgment. Blue Violets moved for a stay of the Judgment in the Law Division on October 25, 2023 [Da546], which the trial court denied on November 17, 2023. [548]. It made the same motion in this Court on December 13, 2023 [Da550], which this Court granted on January 4, 2024. [553]. HfRC and Urtecho moved to modify and clarify the stay, which the Court denied on March 4, 2024. [Pa50].

STATEMENT OF FACTS

A. The Property

The site that is the subject of this case is located at 628 Washington Street, Hoboken, New Jersey (the "Property"). [Da316, 318]. The Property is

improved with a two-story, mixed use building containing retail at street level and apartments above the retail spaces. [Da316]. Nearby the Property are two schools – the All Saints Episcopal School and the Hoboken Charter School. Both All Saints and Hoboken Charter are within 600 feet of the Property. [Da3 at ¶ 7; Da16 at ¶ 7; Da16 at ¶ 7; Da247 at 171-20 to 171-25]. The Property is located in Hoboken's C-2 Zoning District, where the retail sale of cannabis is a conditionally permitted use. [Da327, Da209 at 133-22 to 134-4].

B. The Zoning

After the Legislature adopted the NJCREAMM Act, PL. 2021, c. 19, Hoboken elected to make the retail sale of cannabis a conditionally permitted use pursuant to *N.J.S.A.* 40:55-67 of the Municipal Land Use Law ("MLUL"). Hoboken did this by adopting Ordinance B-384 on August 18, 2021. [Da363]. The original conditional-use standards included a proximity restriction between cannabis businesses and a limitation against cannabis businesses on the same block frontage as schools. [Da372-373].

Separately, Hoboken created a Cannabis Review Board. [Da380]. § 36-1A of the Hoboken Code states that "There is hereby created a City of Hoboken Cannabis Review Board ("Review Board") which shall serve as an advisory committee to the City of Hoboken whose duty it shall be to review applications for cannabis wholesaler, cannabis retailer, medical cannabis

dispensary and cannabis delivery operations based within the City of Hoboken." [Da380]. According to § 36-2 of the Hoboken Code, "The purpose of the Cannabis Review Board is to assure the public health, safety, and general welfare of the City of Hoboken and its residents, business establishments and visitors." [Da380]. § 36-4(A) of the Hoboken Code provides:

> The Review Board shall receive and review all applications for cannabis wholesaler, cannabis retailer, medical cannabis dispensary and Hoboken-based cannabis delivery and *shall provide an endorsement, or report to the contrary, to the land use board of jurisdiction prior to the applicant's submission of a conditional use application to the board*. [Da381; emphasis added]

This provision makes clear that the Cannabis Review Board (referred to in this brief as the "CRB") has no powers conferred by the MLUL, since it confirms that the CRB undertakes its work *before* a conditional use application (i.e., an application for development) is submitted to the land use board of competent jurisdiction (i.e., either the Board, if all of the conditions are met, or the Board of Adjustment if the conditions are not met).

Several months after adoption of the original ordinance, the City Council determined it necessary to revise the conditional-use standards in the City's Zoning Ordinance. Ordinance B-446 (the "Ordinance"), introduced on March 9, 2022, proposed additional conditions to the retail sale of cannabis. [Da385]. They include, most notably, a condition that prohibits the sale of cannabis

within 600 feet of any primary or secondary school, early childhood learning, recreation or day care facility, or parks. [Da387]. The Council adopted the Ordinance on second reading on April 6, 2022. Hoboken's Mayor signed the Ordinance on April 8, 2022, and pursuant to *N.J.S.A.* 40:69A-181, the Ordinance became effective on April 28, 2022. [Da 393].

C. The Application

Blue Violets filed Hoboken's application for development form under cover dated April 29, 2022 one day *after* the Ordinance became effective. [Da316, 318]. The application form indicated that Blue Violets sought site plan and conditional-use approval to operate a retail cannabis business on the Property. [Da327]. Items required by the City's Land Use Checklist for Conditional Use Applications, such as contribution disclosure forms, a flood plain administrator review memo, and a certification of real estate taxes paid [Pa35], were not submitted on April 29, 2022.

On May 9, 2022, the Board's planner, George Williams, P.P., AICP, issued a memorandum recommending the Application be deemed incomplete because specific items required by the City's ordinances had not been submitted. [Da395]. On May 10, 2022, the Board agreed with Williams and determined that the application for development was incomplete. [Da56 at 65-10 to 65-20]. During those proceedings, the Board noted that some of the

items, notably, the certification of real estate taxes paid had been submitted earlier that day, and the City's Contribution Disclosure Form had been submitted in draft form, but that the supplemental documentation had not been reviewed. [Da45 at 54-10 to 54-13]. Some of these items, were submitted in the following weeks. For example, Hoboken's Flood Plain Administrator review memo was signed by the Flood Plain Administrator on May 19, 2022, clearly after the effective date of the Ordinance. [Da402]. Contribution disclosures for Blue Violets and its professional were dated May 10, 2022, June 9, 2022, June 10, 2022 and June 16, 2022. [Da405-420]. Although the Certification of Taxes Paid, Contribution Disclosure Form, and Flood Plain Administrator Review Letter were required by Items 3, 4, and 9 of the Application for Development Conditional Use Checklist [Pa35], neither they, nor any portion of Blue Violets' application for development was submitted to the Board prior to the effective date of the Ordinance.

Blue Violets returned to the Board on June 14, 2022 and the Board reached the same decision – the application was still incomplete. [Da77 at 25-7 to 25-24]. Prior to that meeting, an interested resident, Elizabeth Urtecho, and two members of the City's governing body, submitted a letter to the Board arguing that the adoption of the Ordinance eliminated the Board's jurisdiction over the application and objecting to the Board's further consideration of Blue

Violets' site plan. [Da422]. But the Board disregarded this information after receiving correspondence from Blue Violets on July 1, 2022 asserting that the changes to Hoboken's zoning ordinance that preceded the filing of its application for development did not require it to proceed before the Board of Adjustment because prior to the adoption of the Ordinance, Blue Violets had made the application to the CRB. Blue Violets claimed, without basis in law, that its application to the CRB was an application for development and it was protected it from changes in zoning under the Time of Application Rule, *N.J.S.A.* 40:55D-10.5 ("TOA Rule") even though its actual application for development was filed months later and was still incomplete. [Da426].

On July 7, 2022, the Board's Planner issued a revised completeness review memo, which recommended the application for development finally be deemed complete because Blue Violets had submitted all the documents required by the City's ordinances. [Da444"]. At a meeting held that evening, the Board determined voted for completeness and scheduled a hearing for September 14, 2022. [Da88 at 30-24 to 31-19].

D. The Hearing

The Board conducted a public hearing on Blue Violets' application for conditional-use and site-plan approval on September 14, 2022. During that hearing, Blue Violets presented witnesses including its principal, an architect,

its lawyer and a planner. They testified about Blue Violets' business model and its compliance with the conditional-use standards in the original ordinance (B-384), but not the Ordinance, which went into effect five months beforehand.

The hearing drew significant public interest and vocal opposition from residents of Hoboken, including Urtecho, who earlier had submitted a letter to the Board questioning its jurisdiction, and referred to herself as an "objector" at least seven times and indicated that she was considering legal action in the event that the Board exercised jurisdiction over and decided Blue Violets' application. [Da100 at 24-6 to 24-14; Da103 at 27-2 to 27-6; Da261 at 185-19 to Da262 at 186-7; Da297 at 221-9;]. Blue Violets did not contest her ability to testify, submit evidence into the record [Da266 at 190-15 to Da270 at 194-7], or question her standing or object.

During the hearing, Blue Violets' planner conceded that the Property is located within 600 feet of a school. [Da 242 at 166-23 to Da 244 at 168-6]. But Blue Violets again argued the proximity of the Property to a school was irrelevant to the review of its application for development because the TOA Rule protected it from 600-foot proximity restriction implemented by the Ordinance. Blue Violets, through counsel argued, "[O]ne of the most important things about time of application is you don't have to be deemed complete to be in compliance with time of application." [Da290 at 214-6 to 214-9].

Accepting that argument – which is wrong as a matter of law – the Board determined that the TOA Rule governed the review of Blue Violets' application for development even though it was not filed until April 29, 2022, the day after the Ordinance went into effect, and it was deemed incomplete twice. The Board's then-attorney advised it that the TOA Rule merely required "substantial compliance" and that by seeking approval from the CRB prior to April 28, 2022, Blue Violets was immune from the effect of the Ordinance, even if checklist items were missing or the Board had deemed the application incomplete after the date the Ordinance went into effect. [Da 290 at 214-25 to Da291 at 215-3; Da309 at 233-5 to 233-11]. Finding that the application complied with the City's prior zoning regulations concerning the retail sale of cannabis (but not those imposed by the Ordinance, which it disregarded), the Board voted to approve. [Da311 at 235-14 to Da312 at 236-19].

E. The Board's Decision

The Board adopted a memorializing resolution on October 13, 2022. [Da454]. The Resolution states, "Applicant began its approval process by applying to the Cannabis Review Board prior to the adoption and applicability of that ordinance. Accordingly, Applicant is entitled to application of the ordinance as it existed at the commencement of its approval process, and this proximity requirement does not apply to the subject Application." [Da456].

F. Proceedings Below

Citizens and residents of Hoboken displeased by the Board's decision to disregard Hoboken's decision to impose stringent limits on the sale of cannabis within 600 feet of schools decided to take action. Several of them – Urtecho, Francis Dixon, Jeffrey Tennenbaum (both of whom also testified at the September Planning Board meeting), and Matthew Natale formed HfRC in the period between the September 14, 2022 and October 13, 2022 meetings of the Board. [Da494]. Natale lives at 633 Washington Street. [Da633]. Natale's home is within 200 feet of the Property and its owner (a family member) received notice of the hearing because that lot (Block 217, Lot 10) is within 200 feet of the Property. [Da344].

Shortly after the Board adopted the Resolution, HfRC filed the Complaint alleging the TOA Rule did not insulate the Application from the Ordinance, that the Board's decision to the contrary, was unlawful, because it lacked jurisdiction to even consider the Application. [Da1, 9 at ¶ 47]. Instead, as the Complaint asserted Blue Violets a required a conditional-use variance, which falls under the exclusive jurisdiction of Hoboken's Board of Adjustment because the Property is less than 600 feet from two schools and in violation of a condition of the Ordinance. [Da9 at ¶ 46-47; Da10 at ¶52-54]. Prior to the

January 3, 2023 pretrial conference [Pa46], Blue Violets failed to submit a statement of factual and legal contentions that *R.* 4:69-4 required it to submit.

In response to a baseless claim contained in Blue Violets' trial brief filed on May 5, 2023 that, because HfRC had been formed after the Board voted to approve the application but before it took official action thereon by adopting its resolution, Urtecho moved to intervene on June 5, 2023. [Da489]. The Hon. Anthony V. D'Elia, J.S.C. conducted a bench trial on July 18, 2023 [1T] and asked for additional briefing on Urtecho's motion to intervene. [Da513]. The Court held further argument on August 25, 2023 and determined that Urtecho and HfRC would have standing to challenge the Board's jurisdiction, but concluded that if the Board had jurisdiction, they would not be able to challenge any of its decisions. [2T at 46:4-19]. The trial court entered an Order granting leave to Urtecho to permit her to file a Complaint on September 22, 2023 [Da515] and she did so later that day. [Da517].

On September 26, 2023, Judge D'Elia issued an oral decision that found that the Board lacked jurisdiction over Blue Violets' application for development. [3T]. Judge D'Elia entered Judgment that day reversing the Planning Board's decision and vacating the approval. [Da532].

LEGAL ARGUMENT

Standard of Review

While the court should not substitute its judgment for a land use board's, *Rocky Hill Citizens v. Planning Board,* 406 *N.J. Super.* 384, 411-412 (App. Div. 2009), the review is "not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." *CBS Outdoor, Inc v. Lebanon Planning Bd.*, 414 *N.J. Super.* 563, 578 (App. Div. 2010), *quoting Chou v. Rutgers, State University*, 283 *N.J. Super.* 524, 539 (App. Div. 1995), *certif. denied*, 345 *N.J.* 374 (1996). The court must determine whether the board has followed the statutory guidelines and properly exercised its discretion. *Id*. Accordingly, the Court should resist any urge to gloss over glaring problems in the name of deference.

Of particular import here is that a planning board's legal conclusions and statutory interpretations are not entitled to any deference. Instead, they are reviewed *de novo*. This is because a planning board's interpretive skills are not superior to those of the Court. *See, e.g., Reich v. Fort Lee Bd. of Adj.*, 414 *N.J. Super.* 483, 517 (App. Div. 2009), *citing Jantausch v. Borough of Verona,* 41 *N.J. Super.* 89, 96 (Law Div. 1956), *aff'd,* 24 *N.J.* 326 (1957).

I. Hoboken's 600-foot Conditional Use Standard Governed the Review of Blue Violets' Application for Development Because the Ordinance that Established that Standard was in Effect on the Date Blue

Violets' Application for Development Became Complete [3T 16:12 to 20:17; Da532].

A. Blue Violets' application for development was not "complete" before the Ordinance took effect, as Blue Violets filed an incomplete application for development on April 29, 2022; the CRB application was not an application for development. [3T]

The New Jersey Supreme Court established, conclusively and without qualification, that the TOA Rule, *N.J.S.A.* 40:55D-10.5, which protects applicants from changes in zoning and other development regulations, only applies to applications to development that are "complete" on the date the ordinance adopting the restriction becomes effective. *Dunbar*, *supra.* Conversely, an application for development that is not complete on the date a zoning ordinance takes effect is not protected by the TOA Rule, as the Supreme Court held based on the fact in *Dunbar.* Here, in its Answer to HfRC's Complaint, "Blue Violets admits that it submitted an application for development to the Board on April 29, 2022." [Da18 at ¶ 25]. Because the Ordinance went into effect before that date, the application for development was not only not "complete" as the Board later determined, it had not even been filed when the applicable zoning laws changed. Blue Violets therefore required a conditional use variance under *N.J.S.A.* 40:55D-70(d)(3) that only the Hoboken Zoning Board of Adjustment could consider and grant. *Coventry Square, Inc. v. Bd. of Adj.*, 138 *N.J.* 285, 295 (1994). The Board had no

authority whatsoever to consider an application that required conditional use variance relief, and its review was unlawful. This is a simple case, and the Court's analysis need not go further, but Blue Violets grasps at anything to avoid the clear consequences of the statute – the approval is void and it must seek relief from the Board of Adjustment.

Blue Violets does so by baselessly asserting that its separate, prior submission to the CRB was an "application for development" under the MLUL. Its nonsensical position has no support in law. This is because an "application for development" is defined by the MLUL as "the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, cluster development, conditional use, zoning variance or direction of the issuance of a permit pursuant to section 25 or section 27 . . ." *N.J.S.A.* 40:55D-3. There are only two bodies in Hoboken that are authorized to review and approve applications for development – the Board and the Board of Adjustment. *See N.J.S.A.* 40:55D-34, -36, -45, -46, -46.1, -47, -48, -50, -67, -70, -76(b). There is no provision in the MLUL that allows a municipality to assign powers delegated by the Legislature to planning and zoning boards to other boards, and the Supreme Court has stated emphatically that the planning and zoning power must be exercised in strict conformity with the MLUL. *See Nuckel v. Little*

Ferry Planning Bd., 208 *N.J.* 95, 101 (2011). Thus, the submission to the CRB cannot be an "application for development" because the type of approval that Blue Violets sought from the CRB was not any of the things the MLUL defines as falling within the ambit of an "application for development." And why have two applications for development, but only one approval for it?

Despite this, Blue Violets postulates that the CRB is an "arm" of the Board. Relying on circular logic, it claims – on pages 25 and 26 of its brief – that the CRB is a "municipal agency", defined at *N.J.S.A.* 40:55D-5, for purposes of determining whether an application for development is "complete" pursuant to *N.J.S.A.* 40:55D-10.3, and therefore, because it made a submission to the CRB before the Ordinance went into effect, the Ordinance does not impact its application. But its analysis fails because a "municipal agency" requires, as the MLUL defines the term, that ". . . such agency is *acting pursuant to this act*." *N.J.S.A.* 40:55D-5 (emphasis added). Blue Violets does not identify a single action that the CRB took pursuant to the MLUL, and it cannot. This is because the CRB is vested with no power under the MLUL. The ordinance establishing the CRB is clear that its role is purely advisory and has no power to grant any of the approvals described in the MLUL. Instead, it acts pursuant to *N.J.S.A.* 24:6I-21, which allows municipalities to "endorse" cannabis consumption areas, not give land use approvals. [Da381-382].

The trial court recognized the infirmity of Blue Violets' argument at the July 13, 2023 trial. Pressing Blue Violets about what powers the CRB had under the MLUL, all Blue Violets could muster was that it deemed an "application" complete despite conceding that the CRB "did not grant and could not grant conditional use." [1T at 15:2 to 16:1]. This by itself means that the CRB application cannot be an application for development. And even though the CRB's alleged completeness determination is not in the record, the CRB application is, and it is obviously not Blue Violets' conditional use and site plan application. [Compare Da51 with Pa318]. The CRB application does not even ask what zoning district the subject property is located in!

Blue Violets presents no cognizable theory that justifies its disjointed reading of the TOA Rule. There is no support for it in the MLUL. There is no support in any case. Hoboken's own ordinances eschew Blue Violet's interpretation. This is because Hoboken defined what an "application for development" actually is in the Land Use Procedures Ordinance ("LUPO"), which is codified in Chapter 44 of the City's Code. By contrast there is no similar definition in the CRB ordinance. [Pa380-381].

In particular, § 44-304(A) of the LUPO provides as follows: "An application for development shall mean an *application and checklists, on standard forms* available in the Planning Board or the Zoning Board office, on

the City's website, and attached to this chapter and made a part hereof as Appendix A." [Pa12; emphasis added]. The application packet referenced in § 44-304(A) is the one that Blue Violets filed on April 29, 2022 [Da318] and the complete form is attached to and made part of the LUPO. [Pa19]. Blue Violets is not free to make up its own definition of what an "application for development" is, use its own form, or ask this Court to re-write the City's plainly written and clearly understood ordinance that conclusively establishes what an application for development is, and what it is not.

The terms of the LUPO are clear: the CRB application is not an application for development, and Blue Violets' application was neither filed nor complete when the Ordinance went into effect on April 28, 2022. The TOA Rule simply does not apply just because Blue Violets filed a form that lists its name, address and telephone number with the CRB. [Pa52-60]. Blue Violets' assertion – on page 28 of its brief that its application to the CRB has "all of the information" required for approval is wrong; none of the information required to be submitted by § 44-304 was submitted to the CRB. Filing a form is not the same thing as filing *the* application for development form; it certainly does not substitute for filing the documents required by the Checklist for conditional use applications. [Pa36]. Indeed, there is an enormous difference between providing substantive information about the application, like the type of alarm

system it had (as Blue Violets alludes to in its brief), and providing the 20 specific documents and other items required by the Checklist for procedural completeness. These were, along with the Land Use Application Form, according to *Dunbar, supra,* the items required to be filed before the Ordinance took effect. They were not, so the TOA Rule cannot protect Blue Violets.

Putting aside the question of what is the "application for development," the trial court found the Board's two determinations of incompleteness "destroyed" any claim that the TOA Rule insulated Blue Violets from the change wrought by the Ordinance. [3T at 19-18 to 20-8]. This is because the application checklist for conditional use applications like the one Blue Violets required, many documents that the CRB application does not require, in addition to lacking much of the information that the Land Use Application Form also requires. [*Compare* Pa35-36 with Pa52-60].

In particular, Blue Violets' untimely April 29, 2022 filing failed to include several "documents required by the checklist", namely, Checklist Item 3 (Certification of Taxes Paid), Checklist Item 5 (Contribution Disclosure Statements from applicant and professionals), and Checklist Item 10 (Floodplain administrator review letter). [Pa25]. Blue Violets' Certification of Taxes Paid is dated May 10, 2022. [Pa38]. Its principal signed, and had his own Contribution Disclosure Statement notarized on May 10, 2022, while its

professionals' disclosure forms bear the dates of June 9, 2022 (Jonathan Goodleman, Esq.), June 10, 2022 (Craig Peregoy, P.E.), and June 16, 2022 (Joseph Burgis, P.P.). [Da407, 415, 417, 419]. Blue Violets submitted the Floodplain administrator's review letter on or after May 19, 2022. [Da403]. The application was complete on June 16, 2022, which is why the Board deemed it complete on July 7, 2022. [Da88 at p. 30-24 to 31-15].

The absence of these documents, for example, is why the Board's planner referenced, on page 2 of his May 9, 2022 review memo [Da396], §44-304C of the LUPO, which states in pertinent part as follows:

> "the Secretary of the Planning Board . . . shall certify an application as complete . . . only if the application, checklist, all documents required by the checklist, application fee, and escrow fees have been received. If the application lacks the required information, documents, or fees, or requires referral pursuant to § 44-304, the applicant shall be so notified, in writing, of the deficiency, and the application shall be deemed incomplete." [Pa12; emphasis added]

Blue Violets' "application" to the CRB could not be deemed a complete application for development because, as noted above, it did not contain the application form required by the LUPO, the checklist attached to the application form, all documents required by the checklist, the application fee or the escrow fees required for the application. Blue Violets only began submitting those items – as it admitted in its Answer – on April 29, 2022, after the Ordinance went into effect. But even then, its

submission was not complete, as the Board found on two occasions. Irrespective of when the submission occurred, this determination put Blue Violets into the same position as the applicant in *Dunbar, supra* – subject to any zoning ordinance adopted before completeness. Here, the Ordinance was in effect before the filing, and should have governed the review of Blue Violets' application for development.

The trial court got it right. Blue Violets' application to the CRB was not an application for development. [3T 19:4-10]. Otherwise, as the trial court noted, why else submit the actual application for development? [3T 19:13-16]. Because Blue Violets' submission of the application for development came after the Ordinance took effect, and it was incomplete at that, the Board lacked jurisdiction over the application, and Blue Violets required conditional use variance relief from the Hoboken Board of Adjustment because the Property is within 600 feet of a school. [3T 19:16 to 20:17].

B. The policy for the TOA Rule does not authorize the Planning Board's exercise of jurisdiction in derogation of the plain language of N.J.S.A. 40:55D-70(d)(3). [3T]

Disregarding its own failure to file the Board application before the Ordinance went into effect, Blue Violets resorts to an incorrect policy argument that amounts to a claim that the Supreme Court got it wrong in

Dunbar, supra. Blue Violets wants this Court to ignore the plain language of *N.J.S.A.* 40:55D-70(d)(3) that assigns exclusive jurisdiction over applications for development requiring conditional use variance to boards of adjustment. In doing so, Blue Violets also asks the Court to disregard the plain language of the TOA Rule and seeks to contort the TOA Rule's legislative history in a misguided effort to rescue itself from to its failure to file its application with the Board prior to April 28, 2022, to say nothing about its obligation to file a complete application prior to the effective date of the Ordinance.

The purpose of the TOA Rule is to balance rights of developers against those of municipal governing bodies to pass legislation that is responsive to the needs of its citizenry, which is precisely what Hoboken did here. In particular, the TOA Rule is designed to protect developers from changes to development regulations made after a complete application is filed; it does not protect developers who file incomplete applications – as in *Dunbar, supra* – or as here, who tarry and only file after the law changes. The TOA Rule does not give a developer an exemption from new legislation that is in effect simply because the developer undertook some work in furtherance of its project before the legislation took effect, or because some of the substantive information necessary for the application is on file somewhere in the municipal building.

Instead, the TOA Rule exempts developers from new legislation when their applications for development are complete, as *Dunbar* held.

When the legislative history cited by this Court in *Jai Sai Ram v. Planning Bd.*, 446 *N.J. Super.* 338 (App. Div. 2016), is examined in detail, it is clear that neither the purpose of the statute cited by Blue Violets nor the practical effects it is concerned about apply to the present facts. In fact, Blue Violets' position, if validated, would directly undermine both the plain language of the TOA Rule and the Legislature's intent.

For example, citing the Sponsor's Statement, this Court noted in *Jai Sai Ram* that "The Legislature was concerned about situations in which a developer would spend time and money pursuing an application, only to have a municipality change the zoning to the developer's detriment **while the application was pending**." *Id.* at 344 (emphasis added). In a similar fashion, it noted that Governor Christie explained the goals of the TOA Rule as follows: "Prior to the signing of this legislation, the system allowed for those rules to be changed in the middle of the process, even **after an application has been submitted**." *Id.* (emphasis added). Blue Violets' Answer admits its application for development was submitted on April 29, 2022 [Da18 at ¶ 25] – after the Ordinance took effect so the policy concerns described in *Jai Sai Ram* are simply inapplicable here because the application for development was

submitted when the change to the zoning took place. Of course, analysis of legislative history is only necessary when the legislative intent, as expressed through the plain language is ambiguous; otherwise, the plain language is applied and a court need go no further. *See, e.g., Matter of H.D.*, 241 *N.J.* 412, 418 (2020). Blue Violets offers no plausible explanation that justifies an examination of the legislative history, other than application of the plain language creates a result that it does not like. But even when the legislative history is considered, the facts presented do not line up to justify a departure from the rule that requires the application to be submitted and complete before the new regulations take effect.

Instead, the legislative history highlights the unfairness of the prior regime, where a municipality could, as occurred in *Manalapan Realty, LP v. Twp. Committee of Manalapan*, 140 *N.J.* 366 (1995), amend its zoning ordinance to prohibit a use in the middle of hearings on an application for that use (i.e., before the otherwise applicable statutory protections set forth in *N.J.S.A.* 40:55D-49(a) that insulate a preliminary site plan or subdivision from changes in zoning for three years).[2] The policy implications of this regime

[2] In *Manalapan*, the municipality adopted a zoning ordinance amendment that worked to prohibit the proposed Home Depot after the local planning board had held three hearings on the application for development; the project died as a result because the Board's jurisdiction was eliminated mid-hearing.

recognize that sometimes, potential developers may be impacted by legislative changes that occur prior to the filing of an application for development, but unfortunately, that is the price for living in a representative democracy.

The "absurd result" discussed in *Jai Sai Ram, supra,* has no applicability to this case. There, the objector argued that the developer needed a use variance for the proposed Wawa, but the board ruled that no variance was required. During the pendency of the appeal, the municipality amended its ordinance to clarify that determination as it pertained to the proposed use. This Court ruled that the board's decision was correct, but that even if it was incorrect, it would have been absurd to require the developer to reapply for approval from the planning board under the new ordinance when that same board had already approved the application. Instead, there was recognition that the developer could have, if it needed to, taken advantage of the favorable zoning adopted during the litigation.

Here, by contrast, Blue Violets needed a conditional use variance on the day it applied to the Board, on the day its application was considered by the Board, on the day the Board adopted the Resolution, the day HfRC filed the Complaint, on the date of trial, on the day it filed its notice of appeal, on the day it filed its appeal brief and even today. The operative facts are entirely different, because Hoboken did not change its ordinance to help Blue Violets'

cause. If the Board was wrong to consider Blue Violets' application, barring a revision to the City's ordinance, then the development was only reviewable by Hoboken's Board of Adjustment. Accordingly, the approval issued by the Board is *ultra vires* and void as a matter of law, and the trial court's decision to overturn it must be upheld. *See, e.g., Najduch v. Independence Twp.,* 411 *N.J. Super.* 268 (App. Div. 2009)(holding that planning board cannot grant site plan approval where "d" variance is required, and any such approval is both invalid and subject to collateral attack at any time); *see also, Nuckel, supra* (invalidating site plan approval and remanding application to combined land use board for consideration of site plan with "d" variance not considered). The Court should affirm the decision below.

II. Plaintiffs-Appellants had standing to appear before the Board and Challenge its Decision [2T 46:4-12; 3T; Da532].

A. Plaintiff HfRC and Intervenor-Plaintiff Urtecho have standing. [2T 46:4-12].

New Jersey's courts treat the issue of standing liberally. *See, e.g., Crescent Park Tenants Assn. v. Realty Equities Corp.*, 58 *N.J.* 98, 101 (1971). The purpose of the standing rule is to prevent courts from functioning in the abstract. *Id.* at 107. Accordingly, courts will not "entertain proceedings by plaintiffs who are 'mere intermeddlers' or are merely interlopers or strangers to the dispute." *Id.* However, New Jersey's standing rules are animated by a "venerated" principle:

"In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits.'" *Campus Assocs. L.L.C. v. Bd. of Adj. of Twp. of Hillsborough*, 413 *N.J. Super.* 527, 534 (App. Div. 2010).

Governed by the definition of "interested party" in *N.J.S.A.* 40:55D-4, the MLUL affords standing to people whose rights to use, enjoy or acquire property is or may be affected by the action taken, or whose rights to use, acquire or enjoy property have been denied, violated or infringed by an action or a failure to act. Courts have adopted the MLUL definition to determine standing in land use appeals. *See, e.g., Funeral Home Mgmt., Inc. v. Basralian,* 319 *N.J. Super.* 200, 215 (App. Div. 1999), *citing Aurentz v. Planning Bd.*, 171 *N.J. Super.* 135, 143-144 (Law Div. 1979)("the right to sue in the Superior Court or to appeal to the governing body [as an interested party] should be identical"). Consistent with liberal attitude our courts take to issues of standing, courts virtually always grant standing to objectors to land use board decisions, especially when those objectors are challenging the jurisdiction of the land use board's acts. *See, e.g., DePetro v. Wayne Twp. Planning Bd.*, 367 *N.J. Super.* 161, 171-172 (App. Div.), *certif. denied* 181 *N.J.* 544 (2004)("plaintiffs are challenging the authority of the Planning Board to grant site plan approval . . . on the ground that the use is

prohibited by the governing zoning ordinance . . . and plaintiffs' proceeding effectively serves the public interest in determining whether the Township's zoning ordinance has been properly applied to permit the development in question. We thus find the requirements of standing to have been met").

This Court noted in *DePetro* that, "A substantial public interest exists in the preservation of the integrity of a zoning ordinance" when finding that the objectors in that case had standing to challenge the board's decision to exercise jurisdiction. *Id.* at 171. Here, where the zoning ordinance in question went into effect the day before Blue Violets filed its application, residents like Urtecho had every right to be concerned about the integrity of the zoning ordinance, and the Board's lack of respect for the zoning decisions of Hoboken's elected officials. That also includes Matthew Natale, who lives directly across the street from the Property (at 633 Washington Street), and who formed HfRC with Urtecho, and several other residents and taxpayers of Hoboken shortly after the Board voted to approve the application. [Da494].

The right of citizens and taxpayers to contest the irregular application of local zoning laws is long established. For example, in *Booth v. Rockaway,* 50 *N.J.* 302 (1967), the Supreme Court held that "plaintiff, as a citizen and taxpayer . . . had standing to challenge the establishment of a blacktop plant in a mining district . . . [because] the contemplated blacktop use had a potential impact on

the integrity of the zoning plan and the community welfare sufficient to permit the intervention of a citizen and taxpayer." *Id.* at 305. This Court has long relied upon *Booth* to find that objectors challenging land use board decisions on similar grounds. *See, e.g., DePetro, supra; Funeral Home, supra,* 319 *N.J. Super.* at 215-216; *Dover Twp. Homeowners & Tenants Assn. v. Dover Twp.,* 114 *N.J. Super.* 270, 275 (App. Div. 1971). The Law Division has relied upon *Booth* to find standing when variances are required, or where the development could have impacted the zoning scheme. *See Village Supermarket, Inc. v. Mayfair Supermarkets, Inc.,* 269 *N.J. Super.* 224, 233-234 (Law. Div. 1993); *Aurentz, supra*, 171 *N.J. Super.* at 143-144.

In fact, both *Booth* and *Dover* held residents and taxpayers had standing to challenge decisions that had a potential impact on the integrity of the zone plan and community welfare or where the action challenged was *ultra vires*. It cannot be credibly argued[3] that the Complaint does not seek that type of relief,

[3] Blue Violets focuses on the fact that the Complaint sought a determination that the Planning Board's assumption of jurisdiction was arbitrary, capricious and unreasonable, as evidence that HfRC and Urtecho were not challenging the Board's jurisdiction. Blue Violets' semantic exercise is worth no attention whatsoever. Count One of the Complaint is captioned "Approval Void for Lack of Jurisdiction." [Da9]. The prayer for relief seeks a determination that the decision of the Planning Board "was arbitrary, capricious and unreasonable for lack of jurisdiction." [Da10]. The Court should reject Blue Violets myopic argument that is predicated merely on the use of the phrase "arbitrary, capricious and unreasonable," which is the simply standard of appellate review. *Cox & Koenig, N.J. Zoning & Land Use Administration*, § 42-2.1 at p.

and so it is improbable that Blue Violets will be successful in its appeal of the Court's determination that Plaintiffs had standing to appeal. Furthermore, one of the initial trustees of HfRC – Matthew Natale, of 633 Washington Street – lives directly across the street from Blue Violets' proposed location at 628 Washington Street. [Da494]. His residence, which is within 200 feet of the Property and listed on the 200-foot list for notice (though owned by a family member in a corporate name) [Da344] gives HfRC standing independent of the rationale stated in the Court's decision based upon the *Dover* case. Quite simply, there is no case that lays down a standing rule that would bar HfRC from appealing the Board's decision.

And based upon these prior decisions, that is exactly what HfRC did. An examination of HfRC's October 21, 2022 Complaint reveals that it amply alleges

---

619 (GANN 2024 Ed.). Paragraphs 47 and 52-55 of the Complaint make amply clear that HfRC sought a determination that the Planning Board lacked jurisdiction to consider Blue Violets' application for development. [Da 9-10]. And HfRC's *R.* 4:69-4 Statement of Factual and Legal Issues, whose purpose is discussed in Point II.B, *infra,* states what its legal claims were: (1) "Whether an application for development filed after the effective date of an ordinance is subject to the provisions of *N.J.S.A.* 40:55D-10.5"; and (2) "Whether the City of Hoboken Planning Board improperly exercised jurisdiction over an application that required relief pursuant to *N.J.S.A.* 40:55D-70(d)(3)." [Pa43]. And even if the Court were to countenance these arguments, it should not punish HfRC and Urtecho for its attorney's reference to the standard of review in the Complaint when it is obvious what relief they were actually seeking.

sufficient facts in this regard. Paragraph 2 of the Complaint, which identifies HfRC and Urtecho, describes their interest as follows:

> [They] are concerned about the manner in which the City of Hoboken and its subordinate agencies and boards [are] implementing the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, PL. 2021, c. 19 (the "NJCREAMM Act") and its land use ordinances adopted pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (the "MLUL")." [Da2].

Paragraph 46 and 52 alleges that Blue Violets' application violated the conditional use standards in Hoboken's Zoning Ordinance while Paragraphs 47 and 53 asserts jurisdiction over the application should have laid with the Board of Adjustment, and Paragraph 54 alleges that the Board lacked jurisdiction over the application. [Da9-10]. Paragraph 63 of the Complaint asserts that the Board deprived members of the public (i.e., Urtecho) of their rights protected by the MLUL and the New Jersey Constitution, and that the hearing was conducted in violation of the MLUL. [Da11].

The trial court, relying on *Dover, supra*, noted the illegal acts alleged in the Complaint gave HfRC and its members – whom it noted were unquestionably residents of the municipality – standing to sue based upon the impacts to the integrity of the zoning ordinance. [3T 10:1 to 11:6]. Unlike here, the "gross illegality" in *Dover* was not that the Dover Planning Board did not have authority to approve the application, but rather, that one of the board members

had a conflict of interest. 114 *N.J. Super.* at 274, 276. This Court nevertheless found that the citizens group had standing to challenge the action of the planning board. *Id.* at 275-276. The same conclusion must hold here for HfRC.

Blue Violets' efforts to distinguish *Dover* are unavailing. Its unsupported claim that the replacement of the Municipal Planning Act, *N.J.S.A.* 40:55-1 *et seq.* ("MPA") with the MLUL and its definition of "interested party" abrogates *Dover*, *supra,* is wrong. This is because the MPA did not define the term "interested party," so the adoption of the MLUL did not change anything. *See* P.L. 1953, c. 464. [Pa61-80]. Instead, the MLUL only codified common law. Notably, *Dover* does not cite to a statutorily defined term, and no case has overruled it, or *Booth, supra,* upon which it relies. Indeed, footnote 1 to the *DePetro* decision makes specific reference to *Booth,* as well as *Funeral Home, supra, Village Supermarkets, supra,* and *Aurentz*, *supra,* all of which stand for the same principle, and each were decided after the MLUL took effect. 367 *N.J. Super.* at 173, fn. 1. Blue Violets has addressed none of these decisions, and offers no cogent logic to justify its wrongful attack on the residents of Hoboken who are simply trying to secure the reciprocal benefits of a comprehensive zoning scheme that the MLUL entitles them to. *Cf., N.J.S.A.* 40:55D-62(a) ("The regulations in the zoning ordinance shall be uniform throughout each district . . ."). Indeed, if, as Blue Violets claims, *Dover* is

based on old and invalid law (which it is not), Blue Violets should explain why this Court wrongly used the same rationale 30 years later to affirm standing in *DePetro* (a decision for about which certification was declined).

The instances where land use objectors have lacked standing are exceedingly rare and are predicated on circumstances far different than those here. For example, in *Edison Bd. of Ed. v. Bd. of Adj.*, 464 *N.J. Super.* 298 (App. Div. 2020), this Court held that the Edison Board of Education lacked standing to assert generalized claims that residential development would further overcrowd its schools, but noted that in other circumstances the Board of Education might have had standing to challenge variances for such development applications. *Id.* at 306-307. In *Paramus Multiplex Corp. v. Hartz Mtn. Indus., Inc.,* 236 *N.J. Super.* 104 (Law Div. 1987), the Law Division held that a non-resident objector lacked standing to make objections based upon increased competition. *Id.* at 110. This court distinguished *Paramus* in *DePetro* as follows:

> What distinguishes *Paramus* from the present case is the fact that here the plaintiffs are challenging the authority of the Planning Board to grant site plan approval to SUSA's proposed development of the property for use as a self-storage facility *on the ground that the use is prohibited by the governing zoning ordinance*. Plaintiffs are not merely raising competitive objections to a proposed site plan.
> [*DePetro, supra,* 367 *N.J. Super.* at 171; emphasis added]

This is the same reason that the Plaintiffs appeared before the Board and challenged the Board's decision. *DePetro* confirms their standing to challenge the jurisdiction of the Board based upon impacts to the zoning scheme.

But even if they were advancing another claim, for example, that the board should not have granted variance relief, that is a sufficient basis to articulate standing. For example, in *Funeral Home, supra,* this Court held, "As a citizen and taxpayer of Oradell and operating, as well, a competing business within a mile of the site, we would think plaintiff met the broad definition of 'interested party' in *N.J.S.A.* 40:55D-4." 319 *N.J. Super.* at 215. Similarly, the decision in *Edison* highlighted the problem with the objector's arguments, and noted that it could have challenged the variances that the developer sought.

Standing is to be considered on a case-by-case basis. *Edison, supra,* 464 *N.J. Super.* at 298. The decisions cited above, particularly *DePetro, supra,* demonstrate that where a taxpaying resident objects and presents arguments grounded in the impacts to the zoning ordinance, standing will always be found. Urtecho is such a person, and HfRC, has standing pursuant to *Crescent Park, supra,* irrespective of the fact that Natale, who formed HfRC with her, lives within 200 feet of the Property, which provides another basis for HfRC's standing. If a commercial objector owning a business had standing to challenge the use variance granted by the Oradell Board of Adjustment in *Funeral Home,*

supra, based upon impacts to the zone plan, why wouldn't the residents of Hoboken have standing to argue that Blue Violets needed to go to the Board of Adjustment so that they could make those same arguments about the conditional use variance that Blue Violets so obviously needed?

There is no published authority supporting a claim that a citizen-taxpayer (or a group formed by a citizen-taxpayer) lacks standing to challenge the jurisdiction of a planning board when alleging a use variance is required. Likewise, there is no caselaw that supports the theory Blue Violets espouses that Urtecho could only challenge the Board's jurisdiction if her property were directly affected because it was immediately proximate to the Property. Indeed, *Aurentz, supra,* suggested the exact opposite is the correct approach. The Board's decision to ignore the decision of the citizens' elected representatives to require at least 600 feet between a cannabis retailer and a school, or else obtain a conditional use variance is the harm that HfRC and Urtecho alleged and that they suffered, and it is more than sufficient to confer standing as an "interested party" under *N.J.S.A.* 40:55D-4 and the long line of published cases starting at least with *Booth* and culminating with *DePetro*.

There is not a single case that supports Blue Violets' theory on standing. Neither the Supreme Court nor this Court has ever closed the door to a litigant like HfRC (or Urtecho). A case such as this, where the Board ignored brand-new

legislation, which was so obviously designed to protect the general welfare, *see N.J.S.A.* 40:55D-2(a), is not the appropriate vehicle to deny citizens and taxpayers the opportunity to seek redress against their government for wrongful government action. The Court should affirm the trial court's determination that HfRC (through Urtecho and Natale, and others) has standing.

B. Blue Violets waived/abandoned its right to assert standing as an affirmative defense. [1T at 53:22 to 55:5; 2T at 45:22-25].

This Court should also find that Blue Violets waived or abandoned any claim to challenge Urtecho's standing to appeal. She appeared at the hearing, announced herself to be an objector at least seven times, asked for and was given the right to submit evidence on the exact issue that is the subject of this case, and Blue Violets sat on its hands and did not object or challenge her ability to participate. Since the courts have adopted the MLUL definition of "interested party" as the basis for standing to sue to challenge a land use board decision, the failure to object at the board constitute a waiver, and because Blue Violets failed to raise standing as an issue before the Board, it must be barred from doing so on appeal. *See, e.g., Sugarman v. Teaneck Planning Bd.*, 272 *N.J. Super.* 162, 171 (App. Div. 1994)(party cannot save an issue as a trump card on appeal).

In addition to its waiver of standing before the Board, Blue Violets also waived its standing affirmative defense in the trial court by not filing a pre-Answer motion to dismiss for failure to state a claim and instead, trying to

sandbag HfRC with this issue at trial. Standing or lack thereof is treated as a "failure to state a claim defense." PRESSLER & VERNIERO, Current N.J. Court Rules, Comment 4.1.1 to *R.* 4:6-2, p. 1233-1234 (GANN 2024 Ed.); *see also*, *In re Ass'n of Trial Lawyers of Am.*, 228 *N.J. Super.* 180, 182 (App. Div.), *certif. denied* 113 *N.J.* 660 (1988). *R.* 4:6-3 provides that affirmative defenses that allege a failure to state a claim "shall be heard and determined before trial."

Even after filing its Answer, Blue Violets failed to submit its legal issues for the appeal, despite the requirement in *R.* 4:69-4 to do so: "At least five days in advance of the conference, each party shall submit to the managing judge a statement of factual and legal issues and an exhibit list." *Id.* The purpose of the conference is, among other things, "to determine the factual and legal disputes" but Blue Violets failed to identify how or why it believed its boilerplate defense had merit because it never produced the required pretrial submission. The Court should find that this failure to file the statement of factual and legal contentions constitutes a waiver and/or abandonment of Blue Violets' standing defense.

There is no authority from the Supreme Court or this Court interpreting what *R.* 4:69-4 requires and the land use bar needs guidance. *But see Saia v. Bellizio,* 53 *N.J.* 24 (1968)(describing obligations of a defendant regarding identification of factual and legal issues in a pretrial order applicable to standard civil litigation, or highlighting that the defendant may assert no factual or legal

issues, but that to do so, "he must so state in the order"). Plaintiff is aware of an unpublished opinion of the Law Division, *TSI Marlboro, Inc. v. Marlboro Bd. of Adj. and Marlboro Sports Center, slip op.,* MON-L-1623-04 (Law Div. April 29, 2009)[4], where the Hon. Lawrence Lawson, A.J.S.C., held that a party's failure to preserve an issue in the *R.* 4:69-4 statement of factual and legal contentions submitted prior to the case management conference barred the argument at trial. *Id.* at * 71-74. [Pa151-154]. Likening the efforts to raise the issue at trial to "kick[ing] sand in the face of the rules. . ." Judge Lawson recognized that "all issues must be presented at the pretrial conference to encourage an efficient and open process" and to avoid "unfairly blindside[ing] the opposing parties with new issues which could have been properly resolved at the pretrial conference." *Id.* at *72 [Pa152]. Blue Violets' gripes about how the trial proceedings unfolded below are precisely because it failed to follow *R.* 4:69-4 and specifically identify the legal basis for its affirmative defense as the Rules of Court require.

Given the paucity of direction, the Court should use this opportunity to fashion guidance, much like that in *TSI Marlboro, Inc. v. Marlboro Bd. of Adj. and Marlboro Sports Center, slip op.,* MON-L-1623-04 (Law Div. April 29,

[4] The undersigned is unaware of any contrary unpublished decisions. While there is obvious hesitancy to cite an unpublished decision of the Law Division, the lack of authority from this Court on this issue highlights the need for same. *See also, PRESSLER & VERNIERO, Current N.J. Court Rules,* Comment 5.1 *to R.* 4:69-4 at p. 1643 (GANN 2024 Ed.), with no commentary on this requirement.

2009), and hold that Blue Violets' failure to file a Statement of Factual and Legal Contentions constitutes a waiver/abandonment of its standing defense.

III. The Trial Court's Decision to Grant Leave to Permit Elizabeth Urtecho to Intervene as a Plaintiff was Reasonable and Appropriate [2T 46:4-12; Da515].

As discussed in Point II.B, the reason Urtecho "waited" to file her motion to intervene until, as Blue Violets characterizes it, the "eve of trial," is because Blue Violets violated the Court Rules. Rather than immediately filing a motion to dismiss for failure to state a claim arguing that HfRC lacked standing, Blue Violets waited until May of 2023 to assert that because Urtecho had formed HfRC after the Board unlawfully took jurisdiction over its application and voted to grant conditional use and site plan approval despite its lack of jurisdiction over the application for development, HfRC had suffered no harm by virtue of Board's action. [1T at 48:17-19; 2T at 7:10 to 8:2]. She did so because if the trial court accepted Blue Violets' argument that because HfRC was formed after the date of the Board's vote it lacked standing, there would be no one to advance *her* interest in challenging the Board's decision. Accordingly, the Court should only address this issue if it concludes that the reason HfRC lacks standing is because it was formed after the Board took its vote. If it finds that HfRC has standing, then Blue Violet's appeal of Urtecho's intervention motion is moot.

A. Urtecho satisfied the requirements of R. 4:33-1. [2T]

Urtecho moved to intervene only under *R.* 4:33-1, which provides:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical manner impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The trial court rightly found that Urtecho satisfied all of these requirements.

First, she moved on June 5, 2023 – less than 45 days after Blue Violets formally articulated its objection to HfRC's standing in its trial brief, which was filed on May 8, 2023[5]. [Da489; 1T at 48:7-9]. Second, in her Certification filed in support of her motion to intervene, she detailed her involvement in the submission of the June 14, 2022 letter to the Board with two members of Hoboken's Governing Body that questioned the Board's jurisdiction over Blue Violet's application for development [Da422] and demonstrated that she was a property owner and taxpayer in Hoboken, Urtecho was damaged by the Board's irregular application of the City's Zoning Ordinance. [Da491 at ¶ 4 citing to Da422]. Third, absent intervention, if the Court agrees that because Urtecho only decided (based upon counsel's advice) to form a non-profit entity to challenge the Board's decision with other like-minded citizens and

[5] The Defendants' briefs were originally due on February 17, 2023. [Pa46]. The Defendants secured a lengthy extension of time to file their trial briefs, until May 8, 2023. [Pa48].

taxpayers after the Board voted to approve the application [Da492 at ¶5], the entity lacked standing, there would be no one to protect her interest in ensuring the lawful and proper application of the City's ordinances and the TOA Rule. Indeed, as set forth in her certification, she formed HfRC as a vehicle to challenge that action that fostered pooling of resources amongst its supporters without generating income tax liability. If HfRC is denied standing because of when it was formed, she (and the other supporters of HfRC) will have lost their opportunity to challenge the Board's decision on the merits.

An analogous set of facts was raised in *Chesterbrooke Limited Partnership v. Planning Bd. of Chester*, 237 *N.J. Super.* 118 (App. Div. 1989). There, an application for a subdivision had been denied without prejudice when the applicant refused to grant the Board an extension. *Id.* at 122. The applicant appealed and the trial court granted an automatic approval pursuant to *N.J.S.A.* 40:55D-61. Thereafter, the Board chose not to appeal. At that juncture, two objectors sought to appeal the trial court ruling. The trial court denied their request on timeliness grounds. *Id.* This Court reversed stating that the trial judge should have permitted the objectors to intervene, reasoning that they moved to intervene "immediately after learning of the Board's decision not to file an appeal." *Id.* at 125-126.

Urtecho's response to Blue Violet's arguments about why it believed HfRC lacked standing based upon its date of formation are similar – she sought leave to intervene immediately but sought no delay of the trial or to add any additional claims or argue anything different than what her entity had already presented. [Da492 at ¶6-7; 498-512 (highlighting no changes in proposed complaint for intervention aside from names of parties)]. Timeliness for intervention purposes into an already-pending land use appeal is determined based upon when the interests of the parties diverge. *Warner Co. v. Sutton,* 270 *N.J. Super.* 658, 664-665 (App. Div. 1994). That could have only occurred if the trial court found HfRC lacked standing because of when it was formed, but it made no such finding, and neither should this Court.

Blue Violets' reliance on *Twp. of Hanover v. Twp. of Morristown*, 118 *N.J. Super.* 136 (Ch. Div.), *aff'd o.b.* 121 *N.J. Super.* 536 (App. Div. 1972), to highlight the untimeliness of the motion to intervene is disingenuous. The distinctions between that case and this are striking. There, the movants in that case, who were strangers to the litigation, sought leave to intervene 17 months after a reported opinion and 14 months after the entry of final judgment. *Id.* at 137-138. Here, the President of the non-profit entity that filed a timely complaint predicated upon associational standing pursuant to *Crescent Park, supra,* sought leave to intervene *before* trial. The "results of the battle" were

not "in" on June 5, 2023 when Urtecho moved to intervene, and there is obviously no need to examine the rules concerning intervention after final judgment. *Id.* at 143. The dissimilarities between the cases are so obvious that we must question why Blue Violets believes it appropriate to alert the Court to this case in the first place, aside from citing to inapplicable *dicta*.

And to respond to Blue Violets' commentary on page 39 of its brief about Urtecho's alleged failure to timely commence litigation, it should be beyond obvious that Urtecho did just that. What Blue Violets is really complaining about is that the caption in the Complaint filed on October 21, 2022 – a mere 9 days after the Board adopted the Resolution – does not list Urtecho as a plaintiff, but does list her as the entity's registered agent. [Da2 at ¶2]. Her certification confirms that she followed the advice of counsel regarding the formation of a non-profit entity. [Da492 at ¶ 5]. Of course she was involved – she was the one that instigated the entire litigation and formed HfRC. [Da494]. That is why she moved to intervene immediately when Blue Violets asserted, baselessly, that the entity that she formed lacked standing (after it failed to follow the Rules of Court by explaining how, in a *R.* 4:69-4 statement of factual and legal issues, the basis for its allegation). Had Blue Violets complied with the Court Rules, and if the Defendants had not secured a months-long delay of their trial brief [Pa46, 48], Urtecho's motion would have

come much earlier. The Court should reject Blue Violets' untimeliness argument because its noncompliance with the Rules are the reason why the motion was filed on June 5, 2023 rather than months earlier.

B. To the extent required, enlargement pursuant to R. 4:69-6(c) was appropriate in the interests of justice. [2T]

R. 4:69-6(c) permits enlargement of the 45-day time period to challenge municipal action when the interest of justice requires. The decision to enlarge the time to challenge municipal action is left to the discretion of the trial court. *Hopewell Valley Citizens' Group, Inc. v. Berwind Prop. Group Dev. Co., L.P.,* 204 *N.J.* 569, 578 (2011). That discretionary decision is based on a consideration on all relevant, equitable circumstances. *See* PRESSLER & VERNIERO, Current N.J. Court Rules, Comment 7.3 to *R.* 4:69-6, p. 1648 (GANN 2024 Ed.), *citing Hopewell Valley*, 204 *N.J.* at 583-584.

To the extent the 45-day appeal limitation was even applicable to this issue, Judge D'Elia properly exercised his discretion to allow Urtecho to intervene and file her complaint. Blue Violets presents nothing on appeal demonstrating that the trial court abused its discretion and its arguments on appeal should be cast aside. However, as argued above in Point I, *supra,* Blue Violets obtained a defective conditional use approval from the Board without any jurisdiction to consider Blue Violets' application for development since Blue Violets required a conditional use variance that the Board had no

authority to consider or grant. But because there was no semblance of compliance with the MLUL or Hoboken's Zoning Ordinance, the Board's decision was *ultra vires* and subject to collateral attack *at any time* and the 45-day limitation in *R.* 4:69-6(b)(3) is inapplicable. *See Najduch, supra.*

Even though the 45-day limit in *R.* 4:69-6(b)(3) should not apply, even if it did, the trial court was right to enlarge it because it was manifest that the interests of justice warranted enlargement. Our courts have recognized three categories of cases in which a trial court may grant even a very substantial enlargement of time under *R.* 4:69-6(c): "[C]ases involving (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." *Borough of Princeton v. Bd. of Chosen Freeholders of Mercer Cty*., 169 *N.J.* 135, 152 (2001), *quoting Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975).

But a trial court's discretion to enlarge under *R.* 4:69-6(c) is not limited to these three categories. *Cohen v. Thoft*, 368 *N.J. Super*. 338, 345-347 (App. Div. 2004). Even if only private interests are involved, a court may conclude that the "interest of justice" warrants an enlargement. *Id.* at 346-47. In any enlargement situation under *R.* 4:69-6(c) a court must weigh the public and private interests that favor an enlargement against "the important policy of

repose expressed in the forty-five day rule." *Borough of Princeton*, *supra*, 169 *N.J.* at 152-53, *quoting Reilly v. Brice*, 109 *N.J.* 555, 559 (1988). No overriding interest in repose favors Blue Violets here. HfRC's Complaint was timely filed on October 21, 2022 – 36 days after the Board approved the application and 8 days after it adopted its resolution on October 13, 2022. [Da9 at ¶ 48-49]. Urtecho asserted the same claims, through the same arguments, that HfRC made on the timely-filed Complaint. Blue Violets could not and cannot point to any vested rights secured by the approval, and therefore, it could not have relied upon its approval in the absence of a challenge.

On the other hand, the public interest was and is significant. The City of Hoboken adopted the Ordinance, mandating that the sale of cannabis be at least 600 feet from school buildings, which the Property is not. The City thus made a determination that there needs to be "special reasons" and no substantial impairment to the intent and purpose of the 600-foot restriction if a developer wants to locate a cannabis retailer within 600 feet of a school building. *See N.J.S.A.* 40:55D-70(d)(3). But the Board ignored the legislative determination of Hoboken's elected representatives in approving the application rather than finding, as required by law, that the TOA Rule did not apply to an application for development filed *after* the Ordinance went into effect. The ability of a citizen – who formed an entity to challenge that action

– to also pursue that challenge is clearly in furtherance of the public interest and warranted enlargement to ensure that the merits of the appeal be reached.

Similar reasoning justified enlargement under *R.* 4:69-6(c) in *Willoughby v. Planning Bd. of Deptford*, 306 *N.J. Super.* 266 (App. Div. 1997). There, the planning board raced ahead to approve a controversial development application before the governing body repealed the zoning ordinance that allowed the project (this is the race-to-finish that the TOA Rule avoids, as discussed in footnote 2 on page 27 of this brief). Like here, a citizens' group challenged the project and also sued (out-of-time) to challenge the original ordinance that had already been repealed in the hopes of undoing the approval. Finding statutory impropriety, this Court enlarged the time to challenge the ordinance. *Id.* at 277-279. Later, in *Willoughby v. Wolfson Group, Inc.,* 332 *N.J. Super.* 223 (App. Div.), *certif. denied* 165 *N.J.* 603 (2000), the invalidity of the ordinance was upheld and presumptively, the site plan approval was overturned too. The same outcome is warranted here too, if necessary.

IV. The Court Should Not Consider the Planning Board's Arguments for Reversal of the Judgment Because it Failed to Appeal or Cross-Appeal the Judgment [Issue Not Raised Below].

The Board did not file a Notice of Appeal, nor did it cross-appeal the Judgment, as its November 8, 2023 Case Information Statement confirms. [Pa157]. But now, it seeks a reversal. The Court should not entertain this.

While a respondent may "argue . . . any alternative basis for partial or full affirmance of the trial court's judgment," *O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am.*, 361 *N.J. Super.* 264, 271 (App. Div. 2003), *certif. denied*, 178 *N.J.* 452 (2004), the same is not true when seeking reversal. Instead, a cross-appeal must be filed. *State v. Elkwisni*, 190 *N.J.* 169, 175 (2007). This rule is applied to land use boards. *See Reich, supra,* 413 *N.J. Super.* at 499, n. 9. The Court should not consider the basis for reversal set forth in the Board's brief because it elected not to cross-appeal the Judgment.

CONCLUSION

For these reasons, it is respectfully requested that the Court affirm the trial court's decision that the Board had no authority to consider Blue Violets' application for development because Blue Violets required a conditional use variance pursuant to *N.J.S.A.* 40:55D-70(d)(3). The Court should uphold the determination that HfRC has standing, and to the extent necessary, that Urtecho was properly granted leave to intervene. It should not consider the Board's arguments for reversal because the Board did not file a cross-appeal.

Respectfully submitted,

BEATTIE PADOVANO, LLC
Attorneys for Hoboken for Responsible Cannabis, Inc. and Elizabeth Urtecho

By: */s/ Daniel L. Steinhagen*
Daniel L. Steinhagen, Esq.

Dated: April 3, 2024

SUPERIOR COURT OF NEW JERSEY

HOBOKEN FOR RESPONSIBLE CANNABIS, INC. & ELIZABETH URTECHO, Plaintiffs/Respondents, v. CITY OF HOBOKEN PLANNING BOARD & BLUE VIOLETS LLC, Defendants/Appellants.	APPELLATE DIVISION DOCKET NO. A-000556-23 Civil Action ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-3520-22 Sat Below: Hon. Anthony V. D'Elia, J.S.C. Brief Submitted to the Appellate Division on April 17, 2024

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT, BLUE VIOLETS LLC

Of Counsel and on the Brief:
Michael C. Klauder

COLE SCHOTZ P.C.
25 Main Street
P. O. Box 800
Hackensack, NJ 07602-0800
mklauder@coleschotz.com
(201) 489-3000
Attorneys for Defendant-Appellant,
Blue Violets LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

LEGAL ARGUMENT

I. PLAINTIFFS DO NOT POSSESS STANDING UNDER ANY OF THE MYRIAD LEGAL THEORIES THEY ADVANCE IN OPPOSITION.

In opposition, Plaintiffs obfuscate and merge several unrelated legal concepts in a transparent attempt to convince this Court they possess standing to challenge the Planning Board's review and approval of Blue Violets' conditional use application. Unraveling the web of independent (and mischaracterized) legal concepts that Plaintiffs attempt to fuse together, however, reveals their arguments are all legally unsustainable. Put simply, Plaintiffs do not possess a property or economic interest that has been affected by the Resolution and, therefore, they do not possess standing.

A. There is No Citizen/Taxpayer Standing Under the MLUL.

Despite acknowledging, as they must, that standing is governed by the definition of "interested party" (N.J.S.A. 40:55D-4), Plaintiffs brazenly argue that standing "will always be found" if a taxpayer is challenging jurisdiction or "the impacts to the zoning ordinance." (Pb36.) In fact, Plaintiffs go so far as to boldly proclaim that "there is no case that lays down a standing rule that would bar HfRC from appealing the Board's decision." (Pb32.) Plaintiffs are simply incorrect. The plain language of the MLUL – and *every single case* that has

been decided since the adoption of the MLUL – "lays down a standing rule" that Plaintiffs cannot satisfy.

The decisions relied upon by Plaintiffs do not support their hollow argument that a party need only be a citizen/taxpayer to possess standing under the MLUL if the challenge involves jurisdiction or a so-called "impact to the zoning ordinance." To the contrary, in each of the cases cited by Plaintiffs (as well as every other relevant authority), this Court ***confirmed*** that standing under the MLUL requires the challenging party to meet the definition of "interested party" set forth in the MLUL. See, e.g., DePetro v. Twp. of Wayne Planning Bd., 367 N.J. Super. 161, 170 (App. Div. 2004); Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 215-16 (App. Div. 1999).

For example, in DePetro, four shareholders in a self-storage facility business challenged the planning board's decision to grant site plan approval for a self-storage development in an area that was zoned for business uses. 367 N.J. Super. at 164. In that matter, this Court -- relying upon the New Jersey Supreme Court decisions in Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657 (1957) and Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 81 N.J. 127 (1979) -- found that the plaintiffs satisfied the "interested party" standard specifically because the proposed development had a potential economic impact upon them. Id. at 273. To that end, this Court found:

> As in *Walker* and *Home Builders* and the cases upon which those decisions rely, in the present case, ***plaintiffs are not simply interlopers, the potential impact upon them of [defendant's] proposed development is not fanciful,*** and plaintiffs' proceeding effectively serves the public interest . . .We thus find the requirement of standing to have been met in this case . . .
>
> [Id. at 172-73 (emphasis added).]

Similarly, in Funeral Home, an owner of a local funeral home challenged the Zoning Board of Adjustment's decision to grant a use variance to permit the applicant to operate a funeral home on a property located partially in an office use zone and partially in a residential zone. 319 N.J. Super. at 203. This Court – as it did in DePetro – found that the challenger possessed standing because of the potential economic impact it had on the challenger's business, not simply based on its status as a "taxpaying resident." Id. at 215. Specifically, this Court held: "as a citizen and taxpayer of Oradell ***and operating, as well, a competing business within a mile of the site***, we would think plaintiff met the broad definition of 'interested party' in *N.J.S.A.* 40:55D-4." Id. (emphasis added).

Plaintiffs' contention – that the above decisions provide for "general taxpayer standing" in situations involving impacts to the zoning ordinance[1] – is

[1] In any event, the current situation involves the granting of a conditional use, which is "significantly differen[t]" than a situation where the use is prohibited by governing zoning ordinance. See, e.g., Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138, N.J. 285, 297 (1994) ("[O]ur courts generally have treated (continued…)

a gross mischaracterization of this Court's holdings. Rather, each of those cases stand for the proposition that a property owner's economic interest, coupled with a strong public interest in the issue raised, *could* be sufficient to confer standing. Here, Plaintiffs have shown no economic impact whatsoever resulting from the approval of Blue Violets' conditional use application.[2]

The additional authorities cited by Plaintiffs lend no support to Plaintiffs' baseless argument. For example, Plaintiffs' reference to Booth v. Bd. of Adjustment of Rockaway, 50 N.J. 30 (1967) is misplaced. That decision was issued ***eight years before the MLUL was adopted*** and, therefore, provides no guidance on the current standard (*i.e.*, who constitutes an "interested party" under the MLUL). The non-binding authorities cited by Plaintiffs require minimal discussion. For example, in Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224 (Law Div. 1993), the Law Division

---

a conditional use that does not comply with all the conditions of the ordinance as if it were a prohibited use . . . In our view, that standard is plainly inappropriate and does not adequately reflect the significant differences between prohibited uses, on the one hand, and conditional uses that do not comply with one or more of the conditions imposed by an ordinance, on the other hand.")

[2] The only reason the DePetro court discussed the challengers' status as citizens/taxpayers was to distinguish Paramus Multiplex Corp. v. Hartz Mtn. Indus., Inc., 236 N.J. Super. 104 (Law Div. 1987) - a case where the court found that owners of businesses located in ***surrounding municipalities*** did not possess standing (despite their economic interest in the development).

dismissed a two-count civil complaint for damages for failure to state a claim. Id. at 239. That decision made no substantive findings regarding so-called "taxpayer" standing. Id. Relatedly, Aurentz v. Plan Bd. of Little Egg Harbor Twp., 171 N.J. Super. 135 (Law Div. 1979) is inapplicable because Plaintiffs are not challenging a "zoning scheme" or "comprehensive plan on of the Township." Id. at 143-44. What's more, the court in Aurentz relied upon the now significantly outdated decision in Booth to reach its inapplicable conclusion. Simply put, there is not a single, relevant authority to support Plaintiffs' argument that a party has standing under the MLUL simply because he/she/it is a taxpayer of the municipality.

B. HFRC Does Not Constitute an "Interested Party" under the MLUL

As set forth in Blue Violets' moving brief, the record clearly and undisputedly demonstrates that neither HFRC nor Ms. Urtecho: (i) possess a property interest "anywhere near [the] facility" in question, (ii) are affected in any way whatsoever by the challenged approval, (iii) "have any special damages", and/or (iv) established a generalized claim of harm to the community caused by the challenged approval. (Da022.) What's more, Plaintiffs admit that the Resolution does not, in any way, impact them economically. Applying those undisputed facts to the well-settled standard – *i.e.*, the "interested party"

standard applied in *every case decided in this State since the time the MLUL was adopted* – there is no question that neither party possesses standing.

Nevertheless, Plaintiffs, for the first time, argue that HFRC possesses standing because one of its "initial trustees" – Matthew Natale – purports to reside in a nearby property that is "owned by a family member in a corporate name." (Pb32.) That argument fails for myriad reasons. First and foremost, Plaintiffs never raised this argument below and, therefore, it is waived. N. Haledon Fire Co. No. 1 v. Borough of N. Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012). Mr. Natale was not even mentioned in any of the pleadings or either of Plaintiffs' trial briefs. (Da1-14, 517-531.)

Even if Plaintiffs did not waive that argument (which they did), Plaintiffs' argument nevertheless fails. Mr. Natale does not constitute an "interested party" under the MLUL. Plaintiffs have not proffered any competent evidence establishing that Mr. Natale possesses a property interest anywhere near the facility.[3] To the contrary, Plaintiffs' appeal brief admits that the referenced property is "owned by a family member in a corporate name." (Pb32.) Moreover, Plaintiffs do not even attempt to articulate how Mr. Natale's

[3] In fact, when Plaintiffs contend that "Natale lives at 633 Washington Street", they do not cite to a document actually contained in the appellate record. (See Pb13 referencing "Da633.")

purported property rights have or will be "affected… denied, violated or infringed" by the Planning Board approval.

Even if Mr. Natale did constitute an "interested party" (which he does not), that alone would not confer standing upon HFRC. HFRC was not even formed until after the Planning Board voted to approve Blue Violets' conditional use application. While Plaintiffs simply conclude (as they have done throughout the matter) that HFRC can establish "associational standing" through its members, they have not provided any authority that supports the proposition that an entity formed ***after*** the alleged unlawful act occurred can possess standing to challenge the act. The reason for that omission is self-evident: an entity that was not in existence at the time of the allege action could not possibly have suffered an injury-in-fact from that action to confer it standing (regardless of the composition of its members). Thus, even if Mr. Natale would otherwise constitute an "interested party" – that does not grant HFRC standing.

C. Standing Can Never Be Waived

In a last-ditch effort to avoid the consequences of their lack of standing, Plaintiffs argue that Blue Violets waived its right to challenge Plaintiffs' lack of standing. Plaintiffs urge this Court – without providing any support whatsoever – to create new law providing that a party's failure to file a Statement of Factual

and Legal Contentions constitutes a waiver of a standing defense. Plaintiffs' "request" directly contradicts New Jersey Supreme Court precedent.

The New Jersey Supreme Court has made crystal clear that "standing is an element of justiciability that cannot be waived or conferred by consent." See, e.g., In re Baby T., 160 N.J. 332, 341 (1999); see also New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 411 (App. Div. 1997) ("A plaintiff does not meet standing's requirements simply because the defendant. . .may not have raised the issue or objected to the plaintiff's lack of standing in the trial court. Hence, in order for standing to have real meaning, standing cannot be waived. If standing were waivable, the public could no longer be assured that the invocation and exercise of judicial power in a given case are appropriate.") (internal quotation omitted). Plaintiffs' argument is frivolous.[4]

II. THE PLANNING BOARD UNQUESTIONABLY POSSESSED JURISDICTION OVER BLUE VIOLETS' CONDITIONAL USE APPLICATION.

Even if this Court were to find that Plaintiffs possessed standing to challenge the Planning Board's jurisdiction (which it should not), there can be no legitimate dispute that the Planning Board possessed jurisdiction.

[4] In any event, Plaintiffs' suggestion that they were "unfairly blindsided" or "sandbag[ged]" by Blue Violets' standing defense is disingenuous. Blue Violets asserted lack of standing as an affirmative defense in its very first pleading. (Da22.) Thus, Plaintiffs have been aware of the issue since the outset of the case.

The Resolution that Plaintiffs attempt to challenge in this action is entitled "Resolution of Approval – Application of Blue Violets LLC Approval of Conditional Use." (Da453.) The Resolution expressly indicates that the Planning Board was considering, and approving, an "Application for Conditional Use." (*Id*.) N.J.S.A. 40:55D-25a(4) provides that the planning board possesses jurisdiction over "conditional uses pursuant to article 8." See also William M. Cox & Stuart R. Koenig, N.J. Zoning and Land Use Administration, § 25-2 at 551 ("Conditional uses themselves, as well as the planning board's jurisdiction over them, are authorized by provisions of Article 8 of the Act".) "A conditional use is basically a permitted use in the zone, provided all conditions are met. Therefore, if the conditions are satisfied, the applicant is not seeking a variance from the terms of the ordinance." Id. "Thus, if the planning board finds compliance with the specific standards of the ordinance for the specific proposed conditional use, it will be required to approve the application." Id. at 552 (citing Exxon Co., U.S.A. v. Livingston Twp. in Essex Cnty., 199 N.J. Super. 470, 477 (App. Div. 1985)).

Additionally, as part of the Planning Board's indisputable jurisdiction over conditional use applications, the Planning Board is authorized to interpret the MLUL, including by making determinations that certain conditions are (or are not) satisfied based on an application of the TOA Rule. Plaintiffs do not cite

a single authority (because none exist) suggesting otherwise. In fact, the case that Plaintiffs rely heavily upon – Dunbar Homes, Inc. v. Zoning Bd. of Adjustments of Twp. of Franklin, 233 N.J. 546 (2018) – involved a review of a board's interpretation and application of the TOA Rule. In that case, neither the New Jersey Supreme Court, the Appellate Division or the trial court ever questioned a board's right to interpret and apply the TOA Rule in connection with a conditional use application.

Plaintiffs' argument (stripped of its obfuscation) is that ***had*** the Planning Board not applied the TOA Rule, Blue Violets ***would have*** been required to obtain a use variance, and ***in that scenario*** the Planning Board would not have possessed jurisdiction to issue an approval of the conditional use application. But that is not what happened. The Planning Board interpreted and applied the TOA Rule – which it had jurisdiction to do – determined no variance was required and approved a conditional use application. That Plaintiffs disagree with the Planning Board's ***substantive*** finding – that Blue Violets "is entitled to application of the ordinance as it existed at the commencement of its approval process" – does not mean the Planning Board lacked jurisdiction.

If the Court were to accept Plaintiffs' intentionally convoluted argument and conclude Plaintiffs possess standing, such a finding would run afoul of the most basic tenant of standing jurisprudence. It is black letter law that

"[s]tanding is a threshold issue. It neither depends on nor determines the merits of a plaintiff's claim." Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 417 (1991); see also Warth v. Seldin, 422 U.S. 490, 500 ("standing in no way depends on the merits of plaintiff's contention that particular conduct is illegal"). Plaintiffs' entire argument as to standing is premised on the ***merits*** of their case. *To wit*, Plaintiffs argue that ***if*** they are correct on the merits – *i.e.*, that the Planning Board's application of the TOA Rule was substantively incorrect – ***then*** that board's jurisdiction is implicated and Plaintiffs, as taxpayers, possess standing to challenge jurisdiction. That is not the law. Moreover, taking Plaintiffs' faulty argument to its logical conclusion, any citizen of any municipality would possess standing to challenge any decision rendered by a local planning board by simply arguing that the board "got it wrong" and, therefore, did not possess jurisdiction. That is not the law.

III. THE DECISION IN DUNBAR, WHILE NOT FACTUALLY SIMILAR TO THIS MATTER, SUPPORTS THE PLANNING BOARD'S APPLICATION OF THE TOA RULE.

Throughout their opposition, Plaintiffs attempt to characterize the decision in Dunbar as factually analogous to this matter and "dispositive" against the Planning Board's application of the TOA Rule. That argument misses the mark.

In Dunbar, unlike here, the issue was whether the Zoning Board of Adjustment acted arbitrarily when it determined that an applicant had not submitted a complete application for development to the Planning Board prior to the effective date of a new ordinance. See Dunbar, 233 N.J. at 550. In this matter, the issue is whether the Planning Board acted arbitrarily when it determined that Blue Violets' submission of a complete application to a different statutorily-created municipal agency – the CRB – triggered the TOA Rule. The answer to that question is "no."

The MLUL defines 'application for development' as "the application form and all accompanying documents required by ordinance for approval of… a site plan." N.J.S.A. 40:55D-10.3. The Court in Dunbar confirmed that "[d]eterminations as to the precise contents of an 'application for development' are . . . left to the municipalities, in accordance with the Legislature's general exercise of its 'constitutional authority to delegate to municipalities the police power to enact ordinances governing' land use 'through the passage of the [MLUL].'" Id. at 561 (quoting 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 221 N.J. 318, 333 (2015)). Hoboken's cannabis zoning ordinance at Section 196.33.1(M) specifies the items required for approval of a cannabis site plan, and the CRB application contains a checklist. The application packet that the CRB receives addresses each and every one of the elements

required in order for the CRB to give its own approval of the cannabis site plan, as prescribed by Hoboken's ordinances. Upon review of Blue Violets' application, the CRB deemed the application for development complete, held a hearing, and provided its statutorily prescribed approval.

That the Planning Board required additional items before granting conditional use approval is irrelevant. See Dunbar, 233 N.J. at 562 (an application is not rendered "incomplete" simply because a municipality requires "submission of additional information not specified in the ordinance. . .") The only relevant inquiry is whether a complete application for development was submitted to a municipal agency. This is analogous to the circumstances in Dunbar, where Franklin Township had a 'bifurcated' development application process. However, Franklin Township allowed applicants to either apply to the Zoning Board of Adjustment and Planning Board simultaneously, or to the former first and then the latter subsequently. Id. at 565. The key difference, of course, is that the City requires all cannabis developers to commence the process for approval for their cannabis site plan with the CRB. Unlike the plaintiff in Dunbar, who did not submit a single complete application to satisfy either option available to them, Blue Violets submitted a complete application to the appropriate municipal agency.

Plaintiffs have dismissed Blue Violets' policy arguments repeatedly, but the impact cannot be understated: if the Planning Board's determination that the TOA Rule applied in this instance were to be deemed arbitrary, it would permit municipalities to circumvent the TOA Rule altogether. Municipalities could simply implement a mandatory "review board" for *any* issue, require developers to secure property, conduct inspections, hire professionals, submit a rigorous application, and go through a months' long application and review process with that board, just to change the local zoning requirements during that process and completely frustrate ongoing development applications.

IV. THE PROPRIETY OF THE CITY'S DELEGATION OF LAND USE POWER IS NOT AT ISSUE

Plaintiffs attempt to merge two different concepts into one: (1) that the City did not delegate land use powers to the CRB, and (2) that the City could not delegate land use powers to the CRB. This is just another attempt to obfuscate the relevant issue, as the second issue does not affect the first.

Plaintiffs claim, "there is no provision in the MLUL that allows a municipality to assign powers delegated by the Legislature to planning and zoning boards to other boards[.]" (Pb.17.) It is undisputed that: (i) the City created a new "municipal agency" – the CRB, (ii) the City delegated land use powers to that agency, and (iii) the CRB exercised land use powers.

Recognizing this, the Planning Board made the reasonable determination that the TOA Rule applied with respect to Blue Violets' cannabis development application process. Whether the City appropriately delegated that land use power to the CRB is of no moment. Nevertheless, Plaintiffs' argument is belied by the fact that the City's delegation of land use power to the CRB was, in fact, appropriate. It cannot be legitimately disputed that the New Jersey Legislature left room for other statutorily created boards within the definition of "municipal agency" in the MLUL. See N.J.S.A. 40:55D-5. The CRB was specifically established for the purpose of reviewing and opining on the general health and welfare implications of any cannabis site plan application, which is squarely a land use power under the MLUL.

CONCLUSION

For the foregoing reasons and authorities, as well as those set forth in Blue Violets' initial appeal brief, Blue Violets respectfully requests that this Court reverse the trial court's September 26, 2023 Order in its entirety.

COLE SCHOTZ P.C.
Attorneys for Defendant-Appellant,
Blue Violets LLC

By: */s/ Michael C. Klauder*
Michael C. Klauder

DATED: April 17, 2024