

KGNJ OPERATIONS, LLC,

*Appellant,*

v.

BOROUGH OF KEYPORT, BLAZE  
KEYPORT, LLC, AND GARDEN  
STATE MARIJUANA, LLC,

*Respondents.*

SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION

Docket No. A-001424-23

Civil Action

On Appeal From:

Superior Court of New Jersey, Law  
Division, Monmouth County

Docket No. MON-L-2997-22

Sat Below:

Hon. Linda Grasso Jones, J.S.C.

---

**BRIEF OF APPELLANT**

---

Joshua Bauchner (051242013)  
Andrew Gimigliano (016792012)  
Marlene Arabia (403672022)  
**MANDELBAUM BARRETT PC**  
3 Becker Farm Road, Suite 105  
Roseland, New Jersey 07068  
(973) 736-4600 (p)  
(973) 325-7467 (f)  
jbauchner@mblawfirm.com  
agimigliano@mblawfirm.com  
marabia@mblawfirm.com  
*Attorneys for Appellant, KGNJ  
Operations, LLC*

Of Counsel and On the Brief:

Joshua S. Bauchner (051242013)

Andrew Gimigliano (016792012)

Marlene M. Arabia (403672022)

**TABLE OF CONTENTS**

TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED ..... ii

TABLE OF AUTHORITIES ..... iii

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 3

    A. The Borough of Keyport Issues a Request for Applications for Class 5  
    Cannabis Retailer License Applications ..... 4

    B. The Borough Fails to Follow the Process Set Forth in the Ordinance, RFA,  
    and Evaluation Sheet ..... 5

PROCEDURAL HISTORY ..... 8

STANDARD OF REVIEW ..... 10

LEGAL ARGUMENT ..... 11

    I. The Trial Court’s Order Affirming the Resolution Should be Reversed Because  
    the Borough’s Action Was Arbitrary, Capricious, and Unreasonable (1a) ..... 11

        A. The Borough Did Not Follow the Evaluation and Completeness Process It  
        Established for Reviewing and Scoring Applications ..... 12

        B. The Trial Court’s Decision Should Be Reversed to Ensure the Integrity of  
        the Process and to Ensure Municipalities Adhere to Announced Standards and  
        Guidelines ..... 16

CONCLUSION ..... 21

**TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED**

Order dated December 12, 2023.....1a

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<u>Acoli v. N.J. State Parole Bd.</u> , 224 N.J. 213 (2016) .....	17
<u>Bressman v. Gash</u> , 131 N.J. 517 (1993) .....	10
<u>Bryant v. City of Atl. City</u> , 309 N.J. Super. 596 (App. Div. 1998) .....	10
<u>In re Carter</u> , 191 N.J. 474 (2007) .....	13
<u>CBS Outdoor v. Lebanon Planning Bd.</u> , 414 N.J. Super. 563 (App. Div. 2010) .....	10
<u>Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp.</u> , 172 N.J. 75 (2002) .....	16
<u>F.M.C. Stores Co. v. Borough of Morris Plains</u> , 100 N.J. 418 (1985) .....	19
<u>Kane Props., LLC v. City of Hoboken</u> , 325 N.J. 199 (2013) .....	14, 15
<u>R. Neumann &amp; Co. v. City of Hoboken</u> , 437 N.J. Super. 384 (App. Div. 2014) .....	10, 11
<u>Rivkin v. Dover Twp. Rent Leveling Bd.</u> , 143 N.J. 352 (1996) .....	10
<u>In re Stallworth</u> , 208 N.J. 182 (2011) .....	13, 20
<u>In the Matter of the Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health &amp; Wellness, LLC</u> , 465 N.J. Super. 343 (App. Div. 2020) .....	17, 18, 19, 21

W.V. Pangborne & Co., Inc. v. N.J. Dept. of Transp.,  
116 N.J. 543 (1989) .....19

**Statutes**

N.J.S.A. 24:6I-7.2d(4)(c) .....3

## PRELIMINARY STATEMENT

Process matters. This appeal involves the arbitrary, capricious, and unreasonable process used by Respondent Borough of Keyport (“Borough”) in adopting a resolution of approval in connection with an application for a Class 5 cannabis retailer license.

The Borough adopted an ordinance and put in place a process and criteria to review applications in connection with the license to ensure the integrity of, and public confidence in, its decision. Appellant, KGNJ Operations, LLC (“KGNJ”), submitted an application. Respondent Blaze Keyport, LLC (“Blaze”) also submitted an application. The Borough adopted a resolution of approval in favor of Blaze.

After the resolution was adopted, KGNJ learned that the Borough did not employ the process it publicly announced it would follow. The Borough did not use the scoring sheet that it published and that it specifically told KGNJ would be used to evaluate applications. Instead, the Borough apparently used no rubric at all, allowing the applications to be considered without guidelines or consistency and allowed personal opinions to invade the proceedings—undermining the integrity of the very process it established.

The way the Borough proceeded, therefore, was improper because the Borough misled the public and the applicants and left no way for the courts to

determine whether the Borough acted fairly and consistently with respect to the process. That is the hallmark of arbitrary, capricious, and unreasonable conduct.

This Court's intervention is necessary to correct the defects in the process the Borough used. In other words, this Court should step in to order the Borough to comply with the process it adopted and to consider the applications anew consistent with that process. Public integrity and public trust are paramount to government action. And, when the government acts in a way that can undermine the public trust, the courts are the only available remedy.

That point is critical in the emerging area of cannabis licensure. The Legislature has left it up to local governing bodies to determine how they will review and approve applications for cannabis licenses. With that discretion left to municipalities, it is essential for this Court to remind local governments that it must deal fairly with the public, and when a municipality adopts a process or procedure, it must follow its own design.

For those reasons, and as set forth below, KGNJ respectfully requests that this Court reverse the trial court order affirming the Borough's resolution of support in favor of Blaze. KGNJ further respectfully requests that the Court remand the matter to the Borough to consider the applications consistent with the process and criteria it publicly adopted.

## STATEMENT OF FACTS

This matter arises from the Borough’s solicitation of applications for resolutions of support in connection with an entity’s application for a Class 5 cannabis retailer license with the Commission. (37a). The Commission requires applicants for a Class 5 cannabis retailer license, like KGNJ, to demonstrate support from the municipality where the proposed facility will be located, which is usually in the form of a resolution of support. Ibid. In the absence of a resolution of support, an applicant cannot win approval from the Commission. Ibid.

The resolution of support requirement comes from the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“NJCREAMMA”), which provides, among other things, that an applicant establish “proof of local support for the suitability of the location, which may be demonstrated by a resolution adopted by the municipality’s governing body indicating that the intended location is appropriately located or otherwise suitable for such activities related to the cultivation, manufacturing, or dispensing of medical cannabis, cannabis products, and related supplies as will be conducted at the proposed facility.” N.J.S.A. 24:6I-7.2d(4)(c).



**A. The Borough of Keyport Issues a Request for Applications for Class 5 Cannabis Retailer License Applications**

On November 9, 2021, pursuant to NJCREAMMA, the Borough adopted Ordinance #15-21 to allow for the operation of a limited number of cannabis businesses subject to certain conditions (the “Ordinance”). (115a-123a). The Ordinance provided that the Borough would issue a maximum of two Class 5 cannabis retailer licenses. (115a-123a). The Borough later determined that one of the two available Class 5 cannabis retailer licenses would be for the Highway Commercial District (“HCD”), which is the license at issue in this appeal. (38a). The Ordinance also provided that the Borough Council (the “Council”) would form a Cannabis Subcommittee (the “Subcommittee”), consisting of two members of the Council, the Borough’s chief of police, and the Borough’s business administrator. The Subcommittee was tasked with reviewing all applications for cannabis licenses and submitting a recommendation to the Council for final action. (38a).

In January 2022, the Borough issued a request for applications (“RFA”) for resolutions of support. The RFA set forth the process the Borough would follow for evaluating applications and included a checklist identifying the required information to be submitted with the application. (48a-63a)

On October 11, 2022, the Borough published a document titled, Municipal Cannabis Business License Application Evaluation Criteria (“Evaluation Sheet”), via the Borough’s website stating: “The criteria enumerated thereunder were

provided to the public via the Borough's website, to ensure transparency in the evaluation process and as previously stated, were discussed during various Subcommittee meetings as a means to direct the Subcommittee's deliberations." Ibid. The Evaluation Sheet states: "The Borough's Cannabis Subcommittee will review and evaluate each Applicant based on the following criteria in making its recommendation to the Borough Council." Ibid. The Evaluation Sheet indicates that a maximum of ten points could be awarded in each category. Ibid.

**B. The Borough Fails to Follow the Process Set Forth in the Ordinance, RFA, and Evaluation Sheet**

In response to the RFA, KGNJ, Blaze, and Garden State Marijuana ("GSM") applied for resolutions of support from the Borough in connection with their respective Class 5 cannabis retailer license applications. (65a). On September 20, 2022, the Council awarded a resolution of support to Blaze, which was memorialized in Resolution #2022-208 (the "Resolution"). (65a-68a).

On October 6, 2022, KGNJ wrote to the Borough regarding its application and requested information about the RFA process. (70a-72a). On October 11, 2022, the Borough responded to KGNJ's letter. (74a-75a). The Borough's response revealed numerous problems with the application review and scoring process, revealing the process was devoid of the objective criteria required to ensure a fair review. Instead, as the record shows, the process was subjective and inconsistent with the process the Borough established. Ibid.

Indeed, KGNJ learned the Borough failed to apply its own evaluation criteria and approved Blaze's application even though it failed to sign the required certification attesting to the veracity of the documents and information submitted within its application. (303ca). The Evaluation Sheets, which the Borough published as the criteria against which applications would be scored, were not used for that purpose. (99a). Although the Borough announced that the Evaluation Sheets with guide the Subcommittee's work, the Subcommittee apparently did not use the Evaluation Sheet, with a lone exception. Ibid.

One of the Subcommittee members completed the Evaluation Sheet but only with respect to KGNJ's application. (76a). Notably, only one member of the Subcommittee used the Evaluation sheet and gave KGNJ a perfect score on its application (after excluding the one category that was not applicable and was later removed from the criteria). (76a, 203a).

The notes from the executive session of the September 20, 2022 Council meeting show that the Borough, rather than relying on objective criteria applied evenly to all applications, subjectively considered the applications, applying personal viewpoints without any consistency to the process. (110a-111a). The subcommittee chairperson (who supported Blaze's application) applied arbitrary, subjective, and biased criteria to reach her conclusion. For example, she noted that "[w]hile I am not 'afraid' of large companies or international investors[,] I lean

toward more midsize organizations[.]” (80a). Personal prejudices, including the size of the company, are not part of the criteria for scoring identified in the Evaluation Sheet. (63a).

Moreover, the notes provided by another Subcommittee member (who supported KGNJ’s application) referenced the Council’s apparent unexplained and unjustified unease with working with international companies. In particular, she stated: “I work with [i]nternational [c]ompanies now and through much of my career and do not feel this should negative impact our decision.” (77a). She also noted that KGNJ’s proposed chief operating and chief strategy officers had significant experience and one of the proposed owners was a respected local businessperson who was an asset to the community. Ibid. The Subcommittee member further noted that KGNJ’s proposal “seems to be a perfect location for the highway district” with “[e]asy access coming off and going back on the parkway or one of the 2 highways (Rt. 35/36)” and “plenty of space for parking – they have proposed 50 spaces.” Ibid.

By contrast, the Subcommittee chairperson reached the opposite conclusion. She noted that she was “[c]oncerned about the # of cars entering and leaving, visibility coming out into high speed [sic] travel lane.” (79a-80a). That member, however, has no expertise with traffic safety issues and merely offered her subjective, personal opinion. The same member of the Subcommittee also positively

commented on another applicant’s “safety of entry,” again without any expertise in this area, relying only on her personal, subjective opinion. Ibid.

Notably, this member also wrote that both applicants “Blaze and KGNJ would need to go before the Planning Board as they would be new construction.” Ibid. As part of the Planning Board review, both applicants would have been required to submit a traffic study as that was the proper forum for such considerations, not the Cannabis Subcommittee. Ibid. In fact, “traffic safety” issues were not even included in the purported Guidelines to be used by the Council members in evaluating applicants. Ibid.

### **PROCEDURAL HISTORY**

On October 28, 2022, KGNJ filed a verified complaint in lieu of a prerogative writ. (36a-46a). On December 12, 2023, the trial court affirmed the Borough’s resolution of support in favor of Blaze. (1a-15a).

In affirming the Resolution, the trial court concluded that the Borough’s process was not flawed. Ibid. The court recognized that the Borough had established a process but concluded that the Borough’s determination was not arbitrary, capricious, or unreasonable because the Legislature, in NJCREAMMA, did not establish a procedure for municipalities to follow in awarding resolutions of support. Ibid. The trial court did not analyze whether the Borough was obligated to follow the very process it established in evaluating applications, nor did the trial court

consider whether the Borough could follow the process for some applicants and not for others. Ibid.

With respect to the Evaluation Sheet, the trial court stated that no documents submitted to the court indicated that the Subcommittee were to fill out or refer to the Evaluation Sheet. Ibid. The trial court did not address the unequivocal language on the Evaluation Sheet stating that Subcommittee members were to score each application based on the criteria set forth in the Evaluation Sheet. Ibid. Instead, the trial court concluded it was appropriate for Subcommittee members to “dr[a]w their own conclusions” based on the information submitted in the applications and articulate a view of the “strength and weakness of the applicants” without use of the Evaluation Sheet. Ibid.

The trial court also concluded “there is no obligation under any statute or administrative code provision requiring an applicant to a local governing body to submit a signed application for a resolution of support.” (8a). The trial court reached that conclusion despite the instructions provided to applicants, which stated that “[a]pplications must be completed and include all required documents,” that all legal documents part of the applications must “be properly signed and executed,” and that “[i]ncomplete [a]pplications will be rejected and returned to the [a]pplicant.” (48a).

The trial court concluded it could not substitute its judgment for that of the Borough, without recognizing the patent procedural flaws in how the Borough

conducted the review process. (14a). The trial court held that “the applicants were provided with a full and fair opportunity to present their applications to both the cannabis subcommittee and the full Borough council, and no challenge to the process can be sustained.” Ibid.

### **STANDARD OF REVIEW**

Where, as here, there is a “challenge to a determination of a municipal agency, ‘an appellate court is bound by the same scope of review’ as the trial court.” R. Neumann & Co. v. City of Hoboken, 437 N.J. Super. 384, 393 (App. Div. 2014) (quoting Charlie Brown of Chatham, Inc. v. Bd. of Adj. for Chatham Tp., 202 N.J. Super. 312, 321 (App. Div. 1985)). While the review of municipal action is narrow in scope “municipal action will be overturned by a court if it is arbitrary, capricious or unreasonable.” Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998); Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 378 (1996) (“A court may set aside a municipal board decision if it is shown to be arbitrary, capricious or unreasonable, not supported in the evidence, or otherwise contrary to law.”).

Although a reviewing court should not substitute its judgment for that of the agency or local government subdivision, the court must determine whether the governing body followed the relevant guidelines and properly exercised its discretion. See CBS Outdoor v. Lebanon Planning Bd., 414 N.J. Super. 563, 578 (App. Div. 2010); Bressman v. Gash, 131 N.J. 517, 526-28 (1993). The burden of

proof to show that a municipal action is arbitrary, capricious or unreasonable is imposed upon the party challenging the municipal action. R. Neumann & Co., 437 N.J. Super. at 393.

Here, the Borough’s adoption of the Resolution was arbitrary, capricious, and unreasonable. The Borough did not follow the process it established for evaluating applications. Not all of the applications were scored pursuant to the Borough scoring process, and the Borough’s decision was instead based on subjective considerations without ensuring that all applications were reviewed for the same criteria and evaluated consistently. Because the process failed, remand is necessary to review the applications and adopt a resolution consistent with the metrics and process set forth by the Borough.

## **LEGAL ARGUMENT**

### **I. The Trial Court’s Order Affirming the Resolution Should be Reversed Because the Borough’s Action Was Arbitrary, Capricious, and Unreasonable (1a)**

The Borough established evaluation criteria (after an internal deliberative process), which it then publicized—in the Borough’s own words—“to ensure transparency in the evaluation process and as previously stated, were discussed during various Subcommittee meetings as a means to direct the Subcommittee’s deliberations.” (74a). The Borough, however, failed to use the Evaluation Sheet, and it is apparent that the different members of the Subcommittee applied different



criteria and methodologies to reach their conclusions. (74a-75a). The Borough's failure to adhere to the process it adopted renders the Borough's adoption of the Resolution arbitrary, capricious, and unreasonable and not supported by credible evidence in the record. That failure of process requires reversal by this Court and a remand ordering the Borough to evaluate the applications pursuant to the process it established.

**A. The Borough Did Not Follow the Evaluation and Completeness Process It Established for Reviewing and Scoring Applications**

The Borough established a process and evaluation criteria for assessing applications but failed to follow that process. (63a). The Borough also established a completeness process, which required rejecting incomplete applications, but failed to enforce that process. The Borough established this procedure "to ensure transparency in the evaluation process" requiring the Subcommittee to "review and evaluate each Applicant based on" specific criteria. (74a). The Borough erred by failing to adhere to its own process and those errors were arbitrary, capricious, and unreasonable.

Most significantly, the Borough established criteria for the Subcommittee to apply when reviewing applications and making a recommendation to the Council, including a specific scoring process. The Borough published the Evaluation Sheet and indicated to the public that the Evaluation Sheet would be used by the Subcommittee to "review and evaluate each Applicant" and "in making its

recommendation to the Borough Council.” (74a). Despite that requirement, only one member of the Subcommittee used the Evaluation Sheet, and that member only used the Evaluation Sheet to evaluate KGNJ.

Putting aside that KGNJ received a perfect score on the only Evaluation Sheet completed, there is no way to know whether the other Committee Members properly assessed the metrics in the Evaluation Sheet. As a result, neither the Subcommittee nor the Council evaluated the strengths or weaknesses of the applications based on the same criteria and may not have relied on the criteria set forth in the Evaluation Sheet. This failure left the trial court, and leaves this Court, without sufficient information to determine how the applications were scored or analyzed by the Subcommittee. The Borough’s action therefore was arbitrary, capricious, and unreasonable. See In re Stallworth, 208 N.J. 182, 194 (2011).

That error is magnified by the total absence of identifiable criteria being applied to Blaze’s application, the application that ultimately secured the Resolution. That hole in the record makes it impossible to determine whether credible evidence in the record could support the Borough’s determination. See In re Carter, 191 N.J. 474, 481-82 (2007).

In addition, the trial court erred in looking to the enabling statutes to determine whether any specific process was required to evaluating the applications. To be sure, NJCREAMMA does not enumerate specific factors that a governing body must

consider in granting a resolution of approval. But that is the wrong inquiry. The relevant inquiry is whether the governing body adopted a process and standards to assess applications before granting a resolution of approval. In this case, the Borough did but failed to follow its own process and requirements.

The Borough adopted the Ordinance and announced a process to be followed in the RFA, including the creation of the Subcommittee. (48a-61a). In furtherance of the Subcommittee’s work evaluating applications, the Borough created and published the Evaluation Sheet, setting forth the specific criteria and scoring method to be used in reviewing applications. (63a). The Borough, however, deviated from that process and those standards by not following the protocols it required and by adopting the Resolution without ensuring that the process was followed. The Borough’s adoption of the Resolution therefore was an abuse of discretion and was arbitrary, capricious, and unreasonable because—irrespective of NJCREAMMA—the Borough adopted the Ordinance and a specific review process and then did not follow its own requirements. See Kane Props., LLC v. City of Hoboken, 325 N.J. 199, 229 (2013) (stating that when governing body adopts an ordinance it must follow the ordinance).

Similarly, the Borough required all legal documents in support of the application to “be properly signed and executed.” (48a). Blaze, however, failed to execute the required certification that attested (1) to the accuracy of the documents

submitted with the application, (2) that the applicant's proposed location applied with applicable zoning requirements, and (3) that the applicant did not omit or conceal any documents that would impact the decision to grant or deny the application. Blaze's failure to provide the required signed certification, and the Borough's decision to accept the application and grant the resolution without that legal certification are reversible error. (290ca-416ca).

Rather than applying and relying on the criteria the Borough set to govern the applications, the Borough, as the trial court put it, allowed the Subcommittee members and, therefore, the Borough to "dr[a]w their own conclusions" based on each application. (13a-14a). That approach not only was inconsistent with the Borough's stated procedure but also allowed for subjective and apparently biased evaluation of the applications untethered from the governing criteria established by the Borough. (801a).

For example, one of the subcommittee members expressed bias and possible hostility toward larger companies, without explaining why she "leaned" towards smaller entities or what that had to do with the evaluation process. Ibid. Indeed, the Evaluation Sheet does not list the size of the company as a criterion to be considered. (63a). Other members of the Subcommittee offered personal opinions on issues related to traffic and other matters that should have been evaluated by experts on the Planning Board as they were outside the specific mandate of the Subcommittee.

(39a). All of this shows the Borough deviated from the process and evaluation criteria it established.

Those mistakes all bear on the process employed by the Borough and the failure to apply a uniform and fair process for all applicants. Put simply, the Borough's failure to enforce its own rules was an abuse of discretion requiring reversal of the trial court order and remand to evaluate the applications consistent with the process the Borough adopted. See Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 81-82 (2002) (noting that local decision should be overturned on finding of abuse of discretion).

**B. The Trial Court's Decision Should Be Reversed to Ensure the Integrity of the Process and to Ensure Municipalities Adhere to Announced Standards and Guidelines**

Regardless of whether NJCREAMMA sets forth a process for governing bodies to adopt a resolution of approval in connection with cannabis licenses, when the governing body establishes a process and scoring system, the governing body must be obligated to follow those protocols. In fact, because the Legislature, in NJCREAMMA, decided not to adopt a uniform process for all municipalities to follow, it is even more important for this Court to ensure that when a municipality adopts a process, the municipality follows the process it adopted. Otherwise, municipalities would be free to set standards and public expectations "to ensure transparency," and then deviate from them for any reason—or for no reason at all.

This Court should not allow the Borough to evade its own process and compromise the integrity of the application process. Cf. Acoli v. N.J. State Parole Bd., 224 N.J. 213, 226 (2016) (“In the performance of administrative law actions and determinations, process matters.”)

On that front, this appeal shares similarities with In the Matter of the Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC, 465 N.J. Super. 343 (App. Div. 2020). In that case, this Court—considering appeals filed by numerous unsuccessful applicants challenging the Department of Health’s awarding of vertically integrated alternative treatment center permits as part of the State’s medicinal cannabis program—recognized and reaffirmed that transparency in the decision-making process is paramount to build and maintain public confidence in the review process. In those appeals, the Department of Health (“Department”) failed to provide any coherent explanation for the vastly disparate application scores, such as when different reviewers gave the same applicant zeros and perfect scores in the same category. Id. at 370 (“The Department has done little to justify these anomalies or explain why they should be disregarded.”).

After cataloguing the numerous problems with the scoring, the panel found that “[t]here is no escaping the fact that some of these scores simply ‘don’t compute’ and that, no matter how the Department and the other respondents may attempt to

slice it, the results are still unsettling.” Id. at 371. In other words, the Court opined that the Department’s decisions “present little more than sets of numbers that declare the appellants placed out of the money.” Id. at 369.

The panel observed that “the final agency decisions provide only the scores resulting from the work of the review committee.” Id. at 385. The Court also was concerned about whether “members understood or followed instructions” and noted “there [was] no evidence that the scores were verified in some manner or whether anomalies . . . have been harmonized in some reasonable, non-arbitrary way.” Ibid.

The Court then noted it had “considerable concerns about the Department’s processes and the results produced that—without further agency proceedings and explanation—would leave us to conclude that the decisions in question are arbitrary, capricious and unreasonable.” Id. at 400. To remedy those concerns, the Court noted it must intervene “to ensure the public’s confidence in both the results achieved at the agency level so far and to ensure that future similar proceedings will be likewise subjected to a measure of scrutiny at the agency level that will guarantee the process does not produce determinations that are arbitrary, capricious or unreasonable.” Id. at 382-83. The Court’s intervention was necessary because “[b]oth the public interest and the public’s perception that the process is fair, competitive and trustworthy are critical components and objectives.” Id. at 383 (quoting Muirfield Constr. Co. v. Essex Cnty. Improvement Auth., 336 N.J. Super. 126, 137-38 (App. Div. 2000)).

The Court therefore vacated the final agency decisions on appeal and remanded to the Department for further proceedings “in conformity with the spirit of this opinion.” Id. at 400. The same result should follow here.

The Borough established evaluation criteria (after an internal deliberative process), which it then published in the Evaluation Sheet. Indeed, the Borough Administrator emailed KGNJ’s consultant a copy of the evaluation criteria on March 18, 2022, in response to her inquiry from earlier in the week asking whether any criteria had been developed. (136-141a). The Borough should not be permitted to inform a candidate of specific review criteria only to change horses in the middle of the stream and apply whatever criteria it wants. See F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985) (noting that “[i]n dealing with the public, government must turn square corners”); W.V. Pangborne & Co., Inc. v. N.J. Dept. of Transp., 116 N.J. 543, 562 (1989) (recognizing “the supervening obligation of government to deal scrupulously with the public”).

If the Borough did not intend to use the Evaluation Sheet as a scoring rubric, the creation, adoption, and publication of the evaluation sheet did not foster any transparency in the process because the actual criteria would be known only to the Borough and remain hidden from the public. Similarly, the Evaluation Sheet would have served no guiding purpose for the members of the Subcommittee and its



deliberations if the members were considering other (unpublished) criteria arbitrarily (and, thus, subjectively) selected by each member.

Moreover, the trial court incorrectly minimized the importance of the Evaluation Sheet. The trial court stated that no document indicated that the Evaluation Sheet was required to be used, but that finding is contradicted by the express language on the Evaluation Sheet, which states the document and enumerated criteria were to be used to review applications. (9a). Regardless, if the Borough did not intend to use the Evaluation Sheet, then none of the Subcommittee members would have used the Evaluation Sheet—rather than one member applying it. The inconsistent use of the Evaluation Sheet is evidence that the different members of the Subcommittee applied different criteria and methodologies to reach their conclusions which, by definition, renders the process and Resolution arbitrary, capricious, and unreasonable and not supported by credible evidence in the record. See In re Stallworth, 208 N.J. at 194.

Similarly, the Borough's apparent reliance on company size, status as an international company, and other like matters indicates that the Borough's review was based on subjective considerations with members allowed to consider any factor at all—rather than the criteria announced to the public. Indeed, the Borough proceeded without any disclosure to the general public or any explanation of why it

abandoned the published criteria, what criteria it would apply, or why the criteria was relevant to the operation of a cannabis retail establishment in the Borough.

Like in Pangaea, this Court’s intervention is necessary to engender public trust in the process under NJCREAMMA. Municipalities should not be permitted to lead the public to believe it will proceed in one manner while it actually proceeds in another. On this record, the Court has no way to know how the Borough proceeded or why it proceeded in the manner it did. The Court should reverse the trial court’s order and remand this matter to be reviewed consistent with the process adopted by the Borough in the “public interest and [to engender] public’s perception that the process [was] fair, competitive and trustworthy.” In the Matter of the Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC (“In re Pangaea”), 465 N.J. Super. 343, 383 (App. Div. 2020).

### **CONCLUSION**

The Borough adopted a process for reviewing applications for a Class 5 cannabis retailer license. The Borough published that process and the criteria it would use to evaluate applications. Then, the Borough abandoned the process and criteria without informing the public. It was not until after the Borough adopted a resolution of support in favor of Blaze that KGNJ learned what the Borough actually did. But the Borough has an obligation to deal fairly with the public and to act in accordance with ordinances it adopts and procedures it announces.

Because the Borough did not act in accordance with its own process, permitting subjective and prejudicial opinions to taint the review process, the adoption of the resolution of support in favor of Blaze was arbitrary, capricious, and unreasonable. To ensure fairness and engender public trust in the Borough's actions, the trial court's order affirming the resolution of approval should be reversed, and this matter should be remanded for the Borough to consider the applications pursuant to the process and criteria it adopted.

Respectfully submitted,  
**MANDELBAUM BARRETT PC**

Dated: May 1, 2024

By: /s/ Andrew Gimigliano  
Andrew Gimigliano

McMANIMON, SCOTLAND & BAUMANN, LLC  
Leslie G. London, Esq. (020801988)  
75 Livingston Avenue  
Roseland, New Jersey 07068  
(973) 622-1800  
Attorneys for Respondent Defendant,  
Borough of Keyport

**SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION  
DOCKET(S): A-001424-23**

**KGNJ OPERATIONS, LLC,**

**Plaintiff,**

**v.**

**BOROUGH OF KEYPORT, BLAZE  
KEYPORT, LLC, AND GARDEN  
STATE MARIJUANA, LLC,**

**Defendants.**

ON APPEAL FROM:

December 12, 2023 Final Order and  
Decision of the Superior Court of New  
Jersey, Monmouth County – Law Division

Sat Below:

Hon. Linda Grasso Jones, J.S.C.

Civil Action

---

**MERITS BRIEF AND BOUND APPENDIX OF RESPONDENT  
DEFENDANT BOROUGH OF KEYPORT IN OPPOSITION TO APPEAL**

---

Of Counsel and on the Brief:

Leslie G. London, Esq. ([llondon@msbnj.com](mailto:llondon@msbnj.com))

Ted Del Guercio, III, Esq. ([tdelguercio@msbnj.com](mailto:tdelguercio@msbnj.com))

Submitted on: June 17, 2024

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES ..... ii**

**TABLE OF ORDERS AND JUDGMENTS..... iii**

**PRELIMINARY STATEMENT .....1**

**STATEMENT OF RELEVANT FACTS  
AND PROCEDURAL HISTORY .....3**

**LEGAL ARGUMENT .....11**

**THE COUNCIL DECISION TO AWARD THE SUPPORT  
RESOLUTION TO BLAZE WAS NOT ARBITRARY,  
CAPRICIOUS, NOR UNREASONABLE, AND WAS PREDICATED  
UPON A SUBSTANTIAL, CREDIBLE MUNICIPAL RECORD  
DEVELOPED FOLLOWING A PROCESS THAT COMPLIED  
WITH APPLICABLE LAW (Pa1).....11**

**CONCLUSION.....21**

**TABLE OF AUTHORITIES**

**Cases**

*Anastasio v. Planning Bd. of Twp. of W. Orange*, 209 N.J. Super. 499  
 (App. Div. 1986), *certif. denied*, 107 N.J. 46 (1986) .....12

*Bressman v. Gash*, 131 N.J. 517 (1993) .....12

*CBS Outdoor v. Lebanon Plan. Bd.*, 414 N.J. Super. 563 (App. Div. 2010) .....12

*Cell S. of N.J. v. Zoning Bd. of Adjustment*, 172 N.J. 75 (2002).....12

*Grabowsky v. Twp. of Montclair*, 221 N.J. 536 (2015) .....11

*Kellwood Assocs. v. Bd. of Adjustment of the City of Englewood*,  
 141 N.J. Super. 1 (App. Div. 1976) .....12

*Kenwood Assocs. v. Bd. of Adjustment of the City of Englewood*,  
 141 N.J. Super. 1 (App. Div. 1976).....18

*Kramer v. Bd. of Adjustment*, 45 N.J. 268 (1965).....12

*Price v. Himeji, LLC*, 214 N.J. 263 (2013) .....11

*Reich v. Borough of Fort Lee Bd. of Adjustment*, 414 N.J. Super. 483  
 (App. Div. 2010).....13

*Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Rocky Hill*,  
 406 N.J. Super. 384 (App. Div. 2009).....12

*Rowatti v. Gonchar*, 101 N.J. 46 (1985) .....12

*Stolz v. Ellenstein*, 7 N.J. 291 (1951).....12

*Ward v. Scott*, 16 N.J. 16 (1954).....12

*Witt v. Gloucester County Bd. Of Chosen Freeholders*,  
 94 N.J. 422 (1983) .....11

**Statutes**

*N.J.S.A. 24:61-36, et seq.*..... 5, 13, 14, 17

*N.J.S.A. 24:61-36(d)(1)(c)(iv)*..... 5, 9, 14

*N.J.S.A. 40A:11-1 et seq.*.....16

**Rules**

*R. 2:9-5*.....10

**TABLE OF ORDERS AND JUDGMENTS**

December 12, 2023 Final Order and Opinion.....Pa1

**TABLE OF CONTENTS OF APPENDIX BOUND HEREWITH**

December 7, 2022 Order Denying Order to Show Cause .....Da1

February 8, 2024 Trial Court Order and Decision Denying Stay .....Da3

March 25, 2024 App. Div. Order Denying Stay .....Da13

**PRELIMINARY STATEMENT**

This firm represents Defendant Respondent Borough of Keyport (the “Borough” or “Defendant”), with respect to the instant appeal. Please accept this merits brief on behalf of the Borough, in opposition to Plaintiff Appellant KGNJ Operations, LLC’s (“Plaintiff” or “KGNJ”) appeal seeking to reverse the trial court’s December 12, 2023 Order which is the subject of this appeal and which, among other things, dismissed the instant action below, and upheld the Borough’s award resolution which is the subject of this case. For the reasons that follow, the appeal is without merit, and the December 12, 2023 Order should be affirmed.

The trial court, by Order and Decision entered on December 12, 2023 following trial in this prerogative writ matter, found that the Borough’s Support Resolution, adopted on September 20, 2022 and supporting Defendant Respondent Blaze Keyport, LLC (“Blaze”)’s application to the State of New Jersey’s Cannabis Regulatory Commission (“the Commission”) for a Class 5 cannabis retailer license to operate a cannabis retail facility in the Borough’s Highway Commercial District, was supported by substantial, credible evidence in the municipal record established before the Borough. The trial court also found that the process utilized by the Borough to make a selection for the issuance of a Support Resolution was consistent with applicable law, and consistent with the Borough’s consideration of all applicants for the subject license.



As the court recognized below, the Borough engaged in a lengthy, thorough and exhaustive process beginning early in 2022, to accept and evaluate applications from interested cannabis operators to operate within the Borough. That process involved the acceptance of applications from interested operators; the consideration thereof; interviews with and presentations by applicants; multiple deliberations of both the Borough's Cannabis Subcommittee and the Borough Council; the recommendation of the Borough's Cannabis Subcommittee to the Borough Council as to which applicant should be granted a local support resolution; and, ultimately, independent consideration of the applications by the Borough Council which resulted in a 5-1 vote by the full Council on September 20, 2022 supporting the award of the Support Resolution to Blaze. The record was fully developed before the Borough below, and in consequence, the KGNJ challenge was correctly dismissed on December 12, 2023 as being without merit.

Given the strength of the record developed and the state of applicable law, there is no basis on which the appeal brought by KGNJ should be sustained. While KGNJ may continue to have subjective views as to the merits of its application for a resolution of support over Blaze's, that is a matter which remains reasonably debatable, and therefore was neither controlling nor binding upon the Borough Council. And, where a matter is reasonably debatable and two paths are open to a public body as to which way to act, the selection of one path over another will be

upheld if predicated upon some basis within the public body's experience, and critically, when supported by the record, as was the case here.

KGNJ's appeal seeking to overturn the December 12, 2023 Order should be denied, as its Complaint was rightly found to be without merit below. The December 12, 2023 Order should be affirmed.

### **STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

For purposes of this opposition to the appeal, the Borough cites chiefly to the recitation of the relevant facts and background, all as set forth by the trial court in its December 12, 2023 Decision. Pa2. Reference will also be made, as applicable, to either Plaintiff's Appendix (or its Confidential Appendix) in support of its appeal, or, to the case jacket in eCourts where so indicated.

This case was brought as an action in lieu of prerogative writs by Plaintiff KGNJ, against Defendants Borough, Blaze, and Garden State Marijuana, LLC ("Garden State"). KGNJ sought relief against the Borough alleging, among other things, that the process that the Borough undertook to solicit applications for, and to award a Resolution of Support to, Blaze for the operation of a Class 5 cannabis retail license operation in its Highway Commercial district, was flawed with respect to the Cannabis Subcommittee's evaluation of applications. KGNJ contended that the

---

<sup>1</sup> As they are intertwined, they are combined for the convenience of the Court.

Borough's action in awarding the resolution of support to Blaze was arbitrary, capricious, and unreasonable, because the Borough failed to properly apply the Borough's own objective criteria as set forth in its own ordinances, and instead was biased and subjective in that regard. KGNJ further contended that the Borough improperly approved Blaze's application, even though a representative of Blaze failed to sign the required certification to the veracity of the documents and information submitted within Blaze's application, and instead rejected KGNJ's application for a resolution of support. Defendant Blaze contended that the Borough's review of its application was procedurally appropriate, and the grant of the Resolution of Support to Blaze was not arbitrary, capricious, and unreasonable, as it was supported by sufficient credible evidence in the record. The Borough likewise contended that the action taken by the Borough Council following its independent consideration of the applications, which resulted in a 5-1 bipartisan vote with respect to the award of a Resolution of Support for a Class 5 cannabis retailer license in its Highway Commercial District to Blaze, was in accordance with applicable law and was supported by substantial, credible evidence in the municipal record established before the Borough. The Borough further contended the record was fully developed before the Borough, and in consequence, KGNJ's prerogative writ challenge was without merit. Pa2; Pa73; Pa90.

Notably, the Borough's solicitation of applications for Resolutions of Support in connection with an entity's application for a Class 5 cannabis retailer license, are only

one of several steps to be undertaken to obtain ultimate licensure with the New Jersey Cannabis Regulatory Commission (again "Commission"). Pa2. The Resolution of Support aspect of an application arises from the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the "NJCREAMM Act"), *N.J.S.A.* 24:61-36, *et seq.* which provides, in relevant part, that an applicant for a Class 5 cannabis retailer license include:

[a] description of the proposed location for the applicant's site, including the following, if applicable:

. . . .

The submission of **proof of local support for the suitability of the location, which may be demonstrated by a resolution adopted by the municipality's governing body** indicating that the intended location is appropriately located or otherwise suitable for activities related to the operations of the proposed cannabis cultivator, cannabis manufacturer, cannabis wholesaler, cannabis distributor, cannabis retailer, or cannabis delivery service. *N.J.S.A.* 24:61-36d(1)c(iv) (Emphasis added)

On November 9, 2021, the Borough adopted Ordinance No. 15-21 (the "Ordinance"), "to allow for the operation of a limited number of cannabis businesses subject to certain conditions." Pa115. The Ordinance provides that the Borough would issue a maximum of two Class 5 cannabis retailer licenses. *Id.* The Borough later determined that one of the two available Class 5 Cannabis retailer licenses would be for a business located in the Highway Commercial District. Pa2. The license at issue in the present matter is located within that District. The Borough also determined that the Council would form a Cannabis Subcommittee, consisting of two members of the

Council and the Borough's Chief of Police. The Subcommittee was responsible for reviewing all applications for cannabis licenses, and submitting a recommendation to the Borough Council for final action. Pa2; Pa115.

The Borough issued a request to the public for submission of applications for Borough Resolutions of Support with respect to licensure in the Highway Commercial District. Pa47. Three applications for the Resolution of Support were submitted, by Plaintiff KGNJ, Defendant Blaze, and Defendant Garden State. Pa2; Pa327; Pa616. All three applicants were interviewed by the members of the Subcommittee, and all three applicants were provided with the opportunity to make a presentation on their application to the full Borough Council. Pa2; Pa64; Pa73.

The Borough engaged in a lengthy, thorough, and exhaustive process beginning early in 2022, to accept and evaluate applications from interested cannabis businesses to operate within the Borough. That process involved the acceptance of applications from interested operators; the consideration thereof; interviews with and presentations by applicants; multiple deliberations of both the Borough's Cannabis Subcommittee (*see, e.g.*, Pa225, Pa246, Pa304) and the Borough Council; the recommendations of the Borough's Cannabis Subcommittee to the Borough Council as to which applicant should be granted a local support resolution; and, ultimately, independent consideration of the applications, the public hearing presentations by each applicant, site visits of the location of the proposed facility and public comment, all by the Borough Council, which resulted in a 5-1 bipartisan vote by the full Council on September 20, 2022 supporting the award of the Support Resolution to Blaze. Pa2; Pa64.

Exhaustive interviews were conducted with all of the cannabis license applicants in April by the Subcommittee and, in May 2022, all of the applicants made presentations at a public hearing. Each applicant had the opportunity to present its comprehensive and detailed vision and plan for its facility within the Borough to the full Council as well as the public at the public hearing. Applicants had a full opportunity to explain how their facility would benefit the Borough.

To assist with the interviews, the Chief of the Borough Police Department prepared a questionnaire, which was used to question applicants respecting many facets of the application process, including without limit, business location; the size of the business in square footage; parking and traffic concerns; operational concerns; and, financial concerns. Pa304.

Similarly, to guide the members of the Subcommittee in their evaluation of the applications, the Borough attorney, with input from the Subcommittee members, prepared an evaluation sheet as a tool to help guide the Subcommittee during its review. Pa48.

The evaluation sheet of the Subcommittee was posted on the Borough's website. Pa89. It contained most of the areas covered in the RFA. *See*, Pa48; Pa63. The evaluation sheet was strictly an internal guidance document prepared for the use of the Subcommittee (*see*, Pa304); there is nothing in the record that the criteria set forth in the evaluation sheet was "adopted" by the Borough, and, critically, that the evaluation sheet was required to be completed by the either Subcommittee members, or by the full membership of the Council in ultimately adopting the Support Resolution. Further, there is nothing in the record that the RFA or the

Evaluation Sheet contemplated a mandatory numeric scoring of applicants by either the Subcommittee, or, importantly, the full Borough Council.

Consistent with the foregoing, on October 11, 2022 counsel for the Borough advised counsel for KGNJ that the Evaluation Sheets were only meant to direct the Subcommittee's deliberations, "to be used solely as guidance documents for the . . . Subcommittee . . . as a part of their review to help steer them in their review, evaluation and discussion of the applications." Pa74. They were not binding.

On September 20, 2022, the Council issued Resolution No. 2022-208, which was a Resolution of Support to Defendant Blaze. Pa2; Pa64. A Resolution of Support was not issued to either Plaintiff KGNJ or Defendant Garden State.

The amended, closed session meeting minutes of the Borough Council from September 20, 2022 explained the thought process of the full Council respecting the selection of Blaze. Pa110. Council President McNamara explained her thoughts on the process, including the pros and cons for why she favored Blaze over KGNJ. She noted her preference for supporting a midsized organization for the Support Resolution, such as Blaze, as opposed to a larger organization. In addition, she, along with Councilmembers Pacheco, Peperoni, and Davidson, expressed concerns with the KGNJ site, including the number of cars entering and leaving the site, visibility concerns, and traffic exiting the site into a high speed lane of oncoming traffic. The RFA explicitly required applicants to address traffic issues, stating

17. Describe the Applicant's nuisance mitigation plan that specifically addresses: . . . (d) vehicular congestion mitigation." Pa48.

Consideration of traffic concerns are consistent with the Act, which specifically requires proof of local support for the suitability of the location **indicating that the intended location is appropriately located.** *N.J.S.A. 24:6I-36(d)(1)(c)(iv).*

Councilwoman Araneo provided her thoughts that working with larger or international companies, such as KGNJ, was not a concern of hers. The Councilwoman also stated that she felt that the KGNJ location was a good location within the Highway Commercial District (just as the Council President did with respect to the Blaze site), with easy access onto the Garden State Parkway or two local highways, along with ample parking space.

Thus, the Council members were presented with two paths to consider – to support Blaze, or, to support KGNJ. While the two Council members of the Subcommittee (Council President Kathleen McNamara and Councilwoman Rose P. Araneo) had no shared consensus on the selection of a cannabis retailer for the Borough's Highway Commercial District, the Council, as a whole, was favorable to the application of Blaze. Pa110; Pa65.

Following the adoption of the Support Resolution for Blaze, the Council also took the time to supplement the Borough record at the regular Council meeting of October 18, 2022, to elaborate further on the full Council's selection of Blaze. *See*, Pa233. The supplementation walked through the Borough's exhaustive application



and review process as a means of explaining the considerations that went into the Borough Council's ultimate decision. *Id.*

KGNJ then filed its Complaint in Lieu of Prerogative Writs and an Order to Show Cause below on October 28, 2022, requesting emergent injunctive relief, specifically the granting of temporary and preliminary injunctive relief pending the entry of a final decision by the trial court in this matter. That application was denied on December 7, 2022. Da1. A pretrial conference was then held by the trial court and, upon consultation with the parties, a pretrial order scheduling the filing of pretrial submissions by the parties was issued. Pa2. Briefs and exhibits were then filed by the parties, and trial (oral argument) was held on April 6, 2023<sup>2</sup>.

The trial court, on December 12, 2023, issued its Order and written Decision, affirming the Resolution of Support to Blaze, and dismissing KGNJ's action with prejudice. Pa1; Pa2-15. KGNJ then appealed that determination to this Court. Pa16; Pa24.

KGNJ first moved before the trial court for a stay pending appeal pursuant to the Part II Rules (*R. 2:9-5*). That application was denied on February 8, 2024, Da3, and KGNJ renewed that application to the Appellate Division. That application to stay was also denied on March 25, 2024. Da13.

Merits briefing then ensued.

---

<sup>2</sup> Transcripts in this matter are referenced thus: "1T" shall reference the transcript of the trial held in this matter below before the trial court.

## LEGAL ARGUMENT

### **THE COUNCIL DECISION TO AWARD THE SUPPORT RESOLUTION TO BLAZE WAS NOT ARBITRARY, CAPRICIOUS, NOR UNREASONABLE, AND WAS PREDICATED UPON A SUBSTANTIAL, CREDIBLE MUNICIPAL RECORD DEVELOPED FOLLOWING A PROCESS THAT COMPLIED WITH APPLICABLE LAW (Pa1)**

The trial court correctly found that the process which resulted in the award to Blaze was compliant with applicable law, and was predicated upon a substantial, credible municipal record developed before the Borough below. There is no reason, given applicable legal requirements governing municipal action, to disturb those results.

#### **(i) Standard of Review of Municipal Action**

"Legislative action of municipal and county bodies is presumed valid, and will be upheld in the absence of sufficient proof to overcome the presumption." *Witt v. Gloucester County Bd. Of Chosen Freeholders*, 94 N.J. 422, 429-30 (1983). An ordinance will not be overturned by a reviewing court, unless the objector challenging the ordinance can prove that the governing body's action was arbitrary, capricious or unreasonable. *Grabowsky v. Twp. of Montclair*, 221 N.J. 536, 551 (2015). On a review in court, the factual determination of a governing body is presumed to be valid. The burden of proof rests with the plaintiff who challenges the municipal action. *Price v. Himeji, LLC*, 214 N.J. 263, 284 (2013).

The arbitrary and capricious standard, although it "may sound harsh", is simply a standard of appellate review. *Anastasio v. Planning Bd. of Twp. of W. Orange*, 209

N.J. Super. 499, 522 (App. Div. 1986), *certif. denied*, 107 N.J. 46 (1986). The arbitrary and capricious standard is analogous to the substantial evidence standard supporting municipal action. See, *Cell S. of N.J. v. Zoning Bd. of Adjustment*, 172 N.J. 75, 89 (2002) (citing *Rowatti v. Gonchar*, 101 N.J. 46, 50-51 (1985)).

Judicial review is intended to be a determination of the validity of the agency's action, **not** a substitution of the court's judgment thereof. *CBS Outdoor v. Lebanon Plan. Bd.*, 414 N.J. Super. 563, 578 (App. Div. 2010); *Rocky Hill Citizens for Responsible Growth v. Planning Bd. of Rocky Hill*, 406 N.J. Super. 384, 411-412 (App. Div. 2009). Thus, the reviewing court must determine whether the governing body below followed statutory guidelines and properly exercised its discretion – not whether an exercise of local discretion should be supplanted. *Bressman v. Gash*, 131 N.J. 517, 526-528 (1993).

Because of their familiarity with the "community's characteristics and interests," the decisions of a local governing body, like those of a local land use board, are generally entitled to substantial deference. *Kramer v. Bd. of Adjustment*, 45 N.J. 268, 296 (1965) (quoting *Ward v. Scott*, 16 N.J. 16, 23 (1954)). As representatives of the people, members of a local governing body are best equipped to make the decisions on the issues before that body. On appeal, a court shall not substitute its own judgment for that of the governing body on issues of fact, and the governing body's decision should only be disturbed when arbitrary, capricious and unreasonable. *Kellwood Assocs. v. Bd. of Adjustment of the City of Englewood*, 141 N.J. Super. 1, 4 (App. Div. 1976) (citing *Stolz v. Ellenstein*, 7 N.J. 291 (1951)). However, decisions of a local governing body on "purely legal" matters are to be reviewed *de novo* by a reviewing court, and are not

entitled to any particular deference. *Reich v. Borough of Fort Lee Bd. of Adjustment*, 414 N.J. Super. 483, 499 (App. Div. 2010).

Here, the trial court properly applied these standards to sustain the Borough's grant of a Resolution of Support to Blaze. The municipal record was reviewed, and rightly held to have contained substantial, credible evidence to support the award of a Support Resolution to Blaze. KGNJ has not presented anything to either the trial court or this Court that warrants any deviation from that conclusion, other than a subjective belief in the relative merits of its own application for a cannabis license. Application of long established standards of review of municipal actions supports the settled law in the Borough's favor here.

**(ii) The Borough's Process Here Complied With Applicable Law**

*N.J.S.A. 24:61-36* provides a detailed application process and criteria regarding information to be submitted to the New Jersey Cannabis Regulatory Commission, and the review by the Commission of applications submitted. The statute contains **no** specific requirements as to what should be considered by a local public entity with reference to applications for a Resolution of Support issued by the local governing body. The statute only indicates:

The criteria to be developed by the commission pursuant to subparagraph (a) of this paragraph shall include, in addition to the criteria set forth in subparagraphs (b) and (d) of this paragraph and any other criteria developed by the commission, an analysis of the following factors, if applicable:

(iv) A description of the proposed location for the applicant's site, including the following, if applicable:

the submission of proof of local support for the suitability of the location, which may be demonstrated by a resolution adopted by the municipality's governing body indicating that the intended location is appropriately located or otherwise suitable for activities related to the operations of the proposed cannabis cultivator, cannabis manufacturer, cannabis wholesaler, cannabis distributor, cannabis retailer, or cannabis delivery service. *N.J.S.A. 24:61-36d(1)c(iv)*

The statute contains no restrictions as to the factors that a local governing body may consider in adopting such a resolution, and also contains no requirements concerning factors that a local entity must consider in adopting a Resolution of Support. The statute only directs that a municipality may adopt a resolution which is "proof of local support for the suitability of the location," which is one aspect of an application by a proposed cannabis retailer that can be considered by the Commission in deciding whether to issue a cannabis license.

As the municipal record indicates here, the Borough engaged in a detailed process to decide which applicant should be granted a Resolution of Support. The process included creation of a cannabis Subcommittee consisting of two members of the local governing body and the Borough Chief of Police to provide a recommendation to the full Borough governing body. The trial court correctly found that the Borough's review process and the Resolution of Support adopted by the Borough do not violate any requirement of *N.J.S.A. 24:61-36*. The statute does not contain any specific requirements concerning the process to be engaged in by a municipality, and the process engaged in by the Borough here does not fail to comply with any provision of the statute in any way.

As the trial court rightly found, the Borough, through the cannabis Subcommittee and through the actions of the Borough Council itself, engaged in a long, thoughtful process leading to the award of the Resolution of Support to Blaze. No document has been presented indicating that the members of the Cannabis Subcommittee were required to refer to or fill out the evaluation sheet, a point raised by KGNJ. Pa2; Pb11. The considerations referenced in the evaluation sheet addressed the same information as was provided by the applicants to the Cannabis Subcommittee, and thereafter in a presentation to the full Borough Council. Stated differently, the information referenced in the evaluation sheet was also available to the Borough governing body through the information furnished by applicants.

As the trial court observed in its December 2023 Decision, KGNJ provided no support to it indicating that members of the Subcommittee or the Borough Council were required to fill out any particular form, such as the evaluation sheet, in performing a review of the applicants. Each member of the Subcommittee and of the Borough Council received the same information, and drew their own conclusions based upon that information. The two Borough Council members of the Subcommittee came to different conclusions as to which applicant should be granted the Resolution of Support, and the vote of the full Borough Council was 5-1, with Blaze receiving five votes and the Resolution of Support thus going to Blaze. Pa2; Pa64.

The individual members of the cannabis Subcommittee and of the Borough Council may have differed in their views of the strength and weaknesses of the applicants, but their views did not need to coincide, as a unanimous vote was not required. Ultimately, the members of the governing body voted 5-1 that the Resolution

of Support should be granted to Blaze. As a matter of law, that vote was absolutely sufficient.

Although KGNJ raised the issue of Blaze's application being unsigned as a potential flaw in the same (similar to a defect in a public procurement), Pa2; Pb12-16, the trial court correctly found that argument to have no merit given the strength of the record and applicable law. Pa2. After the Resolution of Support was granted to Blaze, it was noted that Blaze's application was not signed; Blaze however, submitted an explanation that if the application was not signed, it was an error due to the process of sending the documents to an outside copy service for photocopying. It was therefore, if anything, inadvertent and clerical in nature, as the trial court found. Pa2.

The process undertaken by the Borough was not a public bidding or procurement process; it was only for a Resolution of Support, not a bid for goods or services under the Local Public Contracts Law, *N.J.S.A. 40A:11-1 et seq.* There is no obligation under any statute or administrative code provision requiring an applicant to a local governing body for a cannabis license to submit a signed application for a Resolution of Support.

The trial court undertook a thorough review of the record, applicable law, and KGNJ's contentions respecting the process undertaken here. And, it found that the record on which the Borough acted was sound, compliant with law, and that in consequence, the process was not infirm as KGNJ maintains.

**(iii) The Borough's Decision To Support Blaze Was Not Arbitrary, Capricious nor Unreasonable**

KGNJ contends that the notes from the executive session of the September 20, 2022 Borough Council meeting show that one of the Subcommittee members applied

arbitrary, subjective and biased criteria to the applications, specifically that the Council member in issue stated that, "[w]hile I am not 'afraid' of large companies or international investors, I lean toward more midsize organizations." Pa1 10. KGNJ noted that the other Borough Council Subcommittee member viewed the KGNJ application favorably from a corporate size standpoint, disagreeing with the first member's concerns about that point. Pa2; Pb6-7. Concerns regarding potential traffic issues associated with the KGNJ site were also raised by the first Borough Council Subcommittee member. Pa2; Pb7-8; Pb20. KGNJ argues that the consideration of the Subcommittee member of the size of the applicant's organization, and potential traffic issues, constituted the use of arbitrary, subjective and biased criteria requiring reversal of the issuance of the Resolution of Support to Blaze, and were beyond the scope of the Subcommittee's mandate. Pa2; Pb15.

However, those arguments are without merit. The trial court rightly took exception to those assertions. As the trial court noted in its December 2023 Decision, there is no requirement in *N.J.S.A. 24:61-36* that the Borough engage in any particular form of inquiry in its determination on the issuance of the Resolution of Support. Both of the Borough Council Subcommittee members properly considered the information presented by the applicants including, among other things, considerations of traffic and the size of the applicant's organization. The fact that the members of the Subcommittee did not agree as to the positive and negative aspects of each applicant does not render



the Borough Council's ultimate decision to issue a Resolution of Support to Blaze to be arbitrary, capricious and/or unreasonable. Indeed, the fact that differing views are reasonably debatable is of no moment.

The sole, specific issue or factor that is referenced in the statute with reference to consideration of a Resolution of Support addresses the suitability of the location, which encompasses a wide range of specific concerns; the statute does not restrict the local governing body from considering other items addressed by the cannabis Subcommittee and/or the Borough council, which were all properly considered to be important to the Borough governing body. The members of the Subcommittee and the entire governing body were free to consider all of the issues that were addressed in the analysis and determination of the Borough Council, including issues of traffic, parking and sight visibility, among others.

There were two different views, expressed by the two different members of the governing body on the Subcommittee, respecting the size of KGNJ as an applicant organization. However, the trial court rightly noted that it shall not substitute its own judgment for that of the governing body on issues of fact, and the governing body's decision should only be disturbed when it is arbitrary and capricious or unreasonable." *Kenwood Assocs. v. Bd. of Adjustment of the City of Englewood*, 141 N.J. Super. 1, 4 (App. Div. 1976). As noted, there is nothing in applicable law or the NJCREAMM Act, that prohibits the cannabis Subcommittee members or the members of the entire Borough

Council from considering the size of the applicant's company or organization in deciding the issuance of the Resolution of Support. KGNJ's subjective belief that consideration of the size of the applicant company is irrelevant does not make that factor irrelevant; members of the Subcommittee and of the Borough Council are free to consider it, and are equally free to have reasonable disagreement over the import of such considerations. The decision of the full governing body to grant the Resolution of Support to Blaze, perhaps considering, in part, the size of the applicant's organization, does not render the Borough's decision arbitrary, capricious and unreasonable against that standard.

The trial court rightly found that the decision of the Borough Council in granting its support to Blaze was not arbitrary, capricious and unreasonable, because evidence has been presented, which the Borough considered to be meaningful and important to its decision, to support the Borough's award decision. KGNJ's subjective belief that it should rightly be entitled to a license furnishes no basis to disturb the Blaze award which was affirmed by the trial court. All applicants were provided with a full and fair opportunity to present their applications to both the cannabis Subcommittee and the full Borough Council, and no challenge to the process should be sustained on the record developed here. The decision by the Borough to grant a Resolution of Support to Blaze was not procedurally deficient nor inappropriate, and was likewise not arbitrary, capricious and unreasonable.

The Borough has already solicited applications and engaged in a deliberative process, by which it opted to select Blaze for the receipt of the Support Resolution in the Highway Commercial District. That process has been upheld below. The Borough has already applied its insights and efforts as a municipality to a process whereby it would select a cannabis retailer to support in the Highway Commercial District. That decision making process is predicated upon a substantial, credible record and should not be disturbed. To have that all undone simply because KGNJ subjectively believes it, and not Blaze, is entitled to a Resolution of Support, would be the height of inequity with respect to the Borough's exercise of its right to determine what is in its best local interests based upon its knowledge of local conditions respecting cannabis licensing.

The Borough Council went to lengths to consider each applicant for the Support Resolution. Consideration was given to those aspects of cannabis operations uniquely within the purview of local municipalities and local interests, including without limit, site location; parking; traffic circulation; hours of operation; and, the size of the proposed cannabis facility within the Highway Commercial District. Pa2; Pa64; Pa110. Consideration was also given generally to the requirements of the Borough's Request For Applications, including the four broad areas to be considered in granting a Support Resolution (namely, nuisance mitigation; community impact; environmental impact; and, safety and security). *Id.*

These were all efforts undertaken by the full Council upon a full, substantive record, and with the public interest in mind. These efforts undertaken in the broader public interest with respect to cannabis oversight at the local level, along with the Support Resolution, should not be enjoined or disturbed because of KGNJ's subjective belief in the veracity of its own application over that of Blaze's – and its subjective belief that it might prevail on this appeal despite the weight of the record.

**CONCLUSION**

For the foregoing reasons, the December 20, 2023 Order and Decision should be affirmed, as Plaintiff KGNJ's appeal is without merit.

Respectfully submitted,

*/s/ Leslie G. London, Esq.*

Leslie G. London, Esq.

LGL/tjd

DATED: June 17, 2024

KGNJ OPERATIONS, LLC,

Plaintiff/Appellant,

v.

BOROUGH OF KEYPORT, BLAZE  
KEYPORT, LLC AND GARDEN  
STATE MARIJUANA, LLC,

Defendants/Appellees.

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION

DOCKET NO.: A-001424-23

CIVIL ACTION

On Appeal From:  
December 12, 2023 Final Order And  
Decision of the Superior Court of New  
Jersey, Monmouth County – Law  
Division

Docket Number: MON-L-2997-22

Sat Below:  
Honorable Linda Grasso Jones, J.S.C.

---

**BRIEF OF DEFENDANT-APPELLEE BLAZE KEYPORT, LLC**

---

**FOX ROTHSCHILD LLP**

Formed in the Commonwealth of Pennsylvania  
*Attorneys for Defendant-Appellee, Blaze  
Keypport, LLC*

1301 Atlantic Avenue, Suite 400

Atlantic City, NJ 08401

Tel: (609) 348-4515

Fax: (609) 348-6834

On the Brief:

Timothy J. Bloh, Esquire

NJ Bar Id. No.: 02311989

Jacqueline A. Davis, Esquire

NJ Bar Id. No.: 374132022

Submitted on: June 21, 2024

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
PRELIMINARY STATEMENT .....	1
PROCEDURAL HISTORY.....	2
I.    The Borough Adopts the Ordinance. ....	4
II.   The Cannabis License Application Process and Review.....	5
LEGAL ARGUMENT STANDARD OF REVIEW .....	9
POINT I The ORDINANCE GOVERNS THE PROCESS FOR AWARDED A LICENSE TO CANNABIS APPLICANTS .....	11
POINT II THE BOROUGH MADE A REASONED DECISION IN PASSING THE RESOLUTION BECAUSE IT ADEQUATELY CONSIDERED ALL THE EVIDENCE BEFORE IT, INCLUDING THE EVALUATION SHEETS AND APPLICATIONS.....	16
POINT III THE BOROUGH HAS IDENTIFIED ITS REASONS FOR ISSUING THE RESOLUTION. ....	21
CONCLUSION.....	24

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<u>Avalon Manor Improvement Ass’n, Inc. v. Twp. of Middle,</u> 370 N.J. Super. 73 (App. Div. 2004).....	9
<u>Big Smoke LLC v. Twp. of W. Milford,</u> 478 N.J. Super. 203 (App. Div. 2024).....	9
<u>Bryant v. City of Atl. City,</u> 209 N.J. Super. 596 (App. Div. 1998).....	9
<u>CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment,</u> 414 N.J. Super. 563 (App. Div. 2010).....	10
<u>D’Anastasio Corp. v. Twp. of Pilesgrove,</u> 387 N.J. Super. 247 (Law Div. 2005).....	10
<u>Seaview Harbor Realignment Comm., LLC v. Twp. Comm. of Egg Harbor Twp.,</u> 470 N.J. Super. 71 (App. Div. 2021).....	10
<u>Matter of the Application for Med. Marijuana Alt. Treatment Ctr. for Pangea Health and Wellness, LLC,</u> 465 N.J. Super. 343 (App. Div. 2020).....	14, 15
<u>Vineland Const. Co. v. Twp. Of Pennsauken,</u> 395 N.J. Super. 230 (App. Div. 2007).....	10
<u>Worthington v. Fauver,</u> 88 N.J. 183 (1982) .....	10, 23
<b>Statutes</b>	
<u>N.J.S.A. 24:61-31, et seq. ....</u>	3
<b>Other Authorities</b>	
<u>R. 4:69 .....</u>	2

Blaze Keyport, LLC (“Blaze Keyport”), through its undersigned counsel, submits this brief in opposition to Plaintiff-Appellant KGNJ Operations, LLC’s (“KGNJ”) Appellant Brief. Blaze Keyport adopts and incorporates by reference the arguments raised in Defendant-Appellee Borough of Keyport’s (the “Borough”) Appellee Brief.

### **PRELIMINARY STATEMENT**

Once again, KGNJ advances a claim, devoid of any factual or legal support, that the Borough erroneously failed to consider, evaluate, and score applicants for a Class 5 Cannabis Retail License in accordance with certain enumerated criteria, and without any deference to additional considerations identified in the cannabis retail license applications, or the Borough Council members’ particular knowledge of local conditions.

Between March 2022 and September 2022, the Borough engaged in a lengthy, thorough and exhaustive process to accept and evaluate applications from interested cannabis businesses to operate within the Borough. The process involved the acceptance of applications; the consideration thereof; interviews with and presentations by applicants; multiple deliberations by both the Borough’s Cannabis Subcommittee and the Borough Council; the recommendations of the Borough’s Cannabis Subcommittee to the Borough Council as to which applicant should be granted a local support resolution; and, ultimately, independent consideration of the



applications, public hearing presentations, site visits, and public comment, all by the Borough Council, which resulted in a 5-1 bipartisan vote by the full Council on September 20, 2022 supporting the award of the support resolution to Blaze Keyport.

Despite this exhaustive process, KGNJ claims that the process was flawed, and the Council arbitrarily and unreasonably awarded a resolution of support to Blaze Keyport because the Borough failed to score the applicants for the Class 5 Cannabis Retail License in accordance with an Evaluation Sheet created by the Borough, and thereafter select the applicant with the highest score. There is no support for KGNJ's claim in either the factual record or in law. Indeed, the record developed in the trial court and presented to this Court conclusively demonstrates that the Council relied on adequate evidence to award a resolution of support in favor of Blaze Keyport. For the reasons that follow, the Court should affirm trial court's Order affirming the Borough's resolution of support and denying KGNJ's prerogative writs complaint.

### **PROCEDURAL HISTORY**

KGNJ filed a Verified Complaint in Lieu of Prerogative Writ Pursuant to Rule 4:69 on October 28, 2022 against the Borough, Blaze Keyport, and GSM (the "Complaint"). (36a-46a). Through the Complaint, KGNJ pled three causes of action: (1) temporary and preliminary injunctive relief; (2) arbitrary, capricious and unreasonable municipal action; and (3) municipal action against the weight of the

evidence in the Record. Each of KGNJ's claims rested on the allegation that the Borough's action in awarding a resolution of support in favor of Blaze Keyport was "arbitrary, capricious, and/or unreasonable," and "against the weight of the evidence" because the Borough's application review process was not followed. (36a-46a). Both the Borough and Blaze Keyport filed answers on December 1, 2022, and December 5, 2022, respectively, through which the Borough and Blaze Keyport denied that the Borough's application review process was arbitrary, capricious, unreasonable, or that the Borough's decision to award a resolution of support in favor of Blaze Keyport was against the weight of the evidence. (90a-106a). The trial court held a trial on April 6, 2023, and issued an Order on December 12, 2023, affirming the Resolution (the "Order"). (1a).

In its accompanying Memorandum and Decision (the "Memorandum"), the trial court explained that the "New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act," N.J.S.A. 24:61-31, et seq. ("CREAMMA") does not require a municipality to follow a specific procedure or consider certain factors with reference to applications for a resolution of support. (7a-8a). The court further concluded that although the Borough "engaged in a long, thoughtful process leading to the award of the [R]esolution," there was no evidence that the Borough was, in any way, required to refer to or fill out the Evaluation Sheets. (8a).

The trial court also rejected KGNJ's argument that Blaze's inadvertent submission of its application without a signed certification somehow rendered the entire process arbitrary and capricious. (9a). The court explained the Borough "made a determination that the lack of signature did not void or require vacation of Blaze's application," and there was no reason to conclude that this determination was incorrect as a matter of law. (9a-10a).

KGNJ filed a Notice of Appeal on January 12, 2024, and Amended Notice of Appeal on January 31, 2024, through which it seeks appellate review of the Order. (16a-31a). Thereafter, KGNJ filed its Appellant Brief on May 1, 2024. Appellee Blaze Keyport submits this Brief in response.

## **STATEMENT OF FACTS**

### **I. The Borough Adopts the Ordinance.**

On or about November 9, 2021, the Borough adopted Ordinance #15-21 to allow for the operation of a limited number of cannabis businesses within the Borough, subject to certain conditions (the "Ordinance"). (115a-123a). The Ordinance provides that the Borough may issue a maximum of two (2) local Class 5 cannabis retail licenses. (115a-123a). The Borough later determined that one of the two available Class 5 cannabis retail licenses would be for the Highway Commercial District ("HCD"), which is the subject of this matter. (38a).

The Ordinance requires the Council to form a Cannabis Subcommittee (the “Subcommittee”) to review all submissions for any Cannabis license and submit a recommendation to the entire governing body (the Council) regarding the grant or denial of a license. (121a). The Subcommittee must be composed of four members: (i) two (2) members of the Council; (ii) the Borough Chief of Police; and (iii) the Borough Business Administrator. (121a). Although the Subcommittee has the authority to make recommendations to the Council, the Council has the “sole and absolute discretion” to award licenses. (120a-121a).

## **II. The Cannabis License Application Process and Review.**

On or about March 2, 2022, the Borough issued a Request for Applications (“RFA”) for resolutions of support, with applications due no later than March 23, 2022 at 4:00 p.m. (48a-61a). The Application set forth the process that the Borough would follow for evaluating applications. (48a). The RFA provided that:

After submission to the Borough Clerk, completed Applications will be sent to the Keyport Police Department for background check and processing. Following review and approval by the Keyport Police Department, the Application will be sent to the Borough Cannabis Subcommittee, established in accordance with [the Ordinance], for review and recommendation to the [Council] as to whether the license should be granted or denied. The [Subcommittee’s] review will also include an interview with the Applicant.

Following a review of the Application and interview by the [Subcommittee,] the Applicant will be invited to attend the next scheduled public meeting of the [Council] to

make a presentation to [the Council] and the public and to respond to questions raised. After the public hearing, the [Subcommittee] will make a recommendation to the [Council] at the next scheduled public meeting regarding the Applicant. The award of a municipal cannabis business license will be made contingent upon the Applicant reviewing a State license and all applicable State and local requirements.

[(48a.)]

Additionally, to guide the Subcommittee members in their evaluation of the applications, the Borough attorney, with input from the Subcommittee members, prepared an evaluation sheet (the “Evaluation Sheet”) to help guide the Subcommittee during its review. The Evaluation Sheet included a statement that the Subcommittee would “review and evaluate each Applicant based on the [Evaluation Sheet] in making its recommendation to the [Council].” (63a). The Evaluation Sheet lists the following criteria as relevant to the Subcommittee’s review:

- (1) Applicant’s owners’ or principals’ qualifications and experience operating in highly regulated industries, including cannabis, healthcare, pharmaceutical manufacturing, and retail pharmacies;
- (2) Results of Applicant’s background check;
- (3) Applicant’s commitment to employ Borough residents;
- (4) Applicant’s ties to the Borough;
- (5) Applicant’s proposal to provide community benefits;
- (6) Applicant’s demonstrated commitment to diversity in its ownership;

- (7) Public input;
- (8) Applicant's financial capability to open and operate; and
- (9) Applicant's completed *Application for a Municipal Cannabis Business License*.

(63a). The Evaluation Sheet was strictly an internal guidance document that the Borough's attorney prepared for the Subcommittee's use. (74a-75a). The Council did not "adopt" the Evaluation Sheets, nor was there any requirement that the Subcommittee or Council fill out the Evaluation Sheets for each applicant. (74a-75a).

Critically, neither the Evaluation Sheet nor the RFA indicated that the Subcommittee and Council could *only* consider the criteria identified in the Evaluation Sheet. (48a-63a). In fact, the RFA requested information wholly unrelated to the Evaluation Sheet criteria. For example, the RFA asks whether or how the applicant will: (1) offer on-site parking; (2) begin operation immediately upon issuance of state licensing; (3) provide security in and around its location; (4) prevent minors from purchasing cannabis; and (5) mitigate nuisances regarding noise, odor, waste disposal, and vehicular congestion. (53a-58a).

Three businesses submitted applications in response to the RFA: KGNJ, Blaze, and GSM. (65a). The Borough engaged in a lengthy, thorough and exhaustive process, which included the acceptance of applications; the consideration thereof;

interviews with and presentations by applicants; multiple deliberations of both the Subcommittee and Council; the Subcommittee's recommendations to the Council; and, ultimately, independent consideration and selection by the Council. (65a).

The Council interviewed KGNJ on April 21, 2022, and KGNJ presented its comprehensive vision for its facility to the Council on May 7, 2022. (70a). Although the Subcommittee was not required to fill out the Evaluation Sheets, Subcommittee and Council Member Rose Araneo ("Araneo") completed an Evaluation Sheet as to KGNJ only and gave KGNJ a "perfect score." (76a). Additionally, while Araneo considered KGNJ the best applicant, the three other Subcommittee members ranked Blaze as the best applicant. (78a.)

During the September 20, 2022 Closed Session, the Council, together with Mayor Kennedy, Borough Administrator Jay Delaney, and Borough attorney Leslie London, discussed which applicant to issue a resolution of support in favor of. (111a). The Council discussed the relative positives and negatives of each applicant, including the proposed location for each applicant. (111a). Various Council Members expressed concern that KGNJ's location entrance was around a curve and lacked a shoulder, which could result in a dangerous flow of traffic. (111a).

The Council also considered the size of the applicants. While Council Member McNamara expressed a preference for midsized organizations, Council

Member Araneo opined that working with larger companies was not a concern to her, based on her personal experience working with international companies.

The Council voted 5-1 to issue a resolution of support in favor of Blaze (the “Resolution”). (65a). Following the adoption of the Resolution, the Council supplemented the Borough record at the regular Council meeting of October 18, 2022, to elaborate further on the full Council’s selection. (233a-234a.) The supplementation walked through the Borough’s exhaustive application and review process as a means of explaining the considerations that went into the Borough’s ultimate decision. Id. Against these facts, KGNJ cannot now claim that the Borough’s decision to issue a Resolution in support of Blaze Keyport was arbitrary, capricious, or unreasonable.

## **LEGAL ARGUMENT**

### **STANDARD OF REVIEW**

Municipal actions enjoy a presumption of validity. Big Smoke LLC v. Twp. of W. Milford, 478 N.J. Super. 203, 217 (App. Div. 2024) (citing Bryant v. City of Atl. City, 209 N.J. Super. 596, 610 (App. Div. 1998)). Because municipalities “have particular knowledge of local conditions,” they have traditionally been afforded “wide latitude in the exercise of their delegated discretion.” Avalon Manor Improvement Ass’n, Inc. v. Twp. of Middle, 370 N.J. Super. 73, 90 (App. Div. 2004).



The challenger of the municipal action bears the “heavy burden” of overcoming the presumption of validity by showing that the municipal action is arbitrary, capricious, or unreasonable. Vineland Const. Co. v. Twp. Of Pennsauken, 395 N.J. Super. 230, 256 (App. Div. 2007). An action is arbitrary, capricious, and unreasonable when it is a “willful and unreasoning action, without consideration and in disregard of circumstances.” Seaview Harbor Realignment Comm., LLC v. Twp. Comm. of Egg Harbor Twp., 470 N.J. Super. 71, 95 (App. Div. 2021) (citing D’Anastasio Corp. v. Twp. of Pilesgrove, 387 N.J. Super. 247, 251 (Law Div. 2005); see also CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 578 (App. Div. 2010) (“The court’s authority and duty is to review the record before the Board in order to determine whether the Board’s decision was adequately supported by the evidence”). Where two conclusions may be reached, a decision is valid “when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” Worthington v. Fauver, 88 N.J. 183, 204-05 (1982).

The Borough made a reasoned decision to adopt the Ordinance based on all the evidence before it. Because KGNJ cannot demonstrate that the Borough’s decision was “arbitrary, capricious, or unreasonable,” this Court should affirm the Trial Court’s Order.

**POINT I**

**THE ORDINANCE GOVERNS THE PROCESS FOR AWARDING A  
LICENSE TO CANNABIS APPLICANTS**

Pursuant to the Ordinance, the Borough has the authority to regulate the sale of cannabis within the Borough “in accordance with the provisions of [CREAMMA].” (120a). The Ordinance further provides that, “there shall be a standing Cannabis Subcommittee, which shall review all completed submissions for any Cannabis license and submit a recommendation to the entire governing body regarding the grant or denial of a license.” (121a). In other words, the Ordinance requires the Subcommittee to review submissions and submit a recommendation to the Council. Appellants do not claim, nor does the evidence suggest, that the Subcommittee failed to review the submissions for cannabis licenses and submit a recommendation to the Council. (Appellant’s Br. 6-8; 65a-66a; 74a).

Instead, KGNJ erroneously claims that the Borough’s adoption of the Resolution was arbitrary, capricious, and unreasonable because the Subcommittee members failed to (1) fill out the Evaluation Sheet for each applicant, and (2) solely consider the criteria listed on the Evaluation Sheet. Neither claim, even if true, provides a basis for the Court to vacate the Resolution and remand to the Borough to consider the applications pursuant to KGNJ’s preferred process.

Nothing in the record supports KGNJ’s claim that the Subcommittee was required to make a recommendation to the Council based solely on the criteria

identified in the Evaluation Sheet. (Appellant Br. 20). The Evaluation Sheet provides, in full, that “[t]he Borough’s Cannabis Subcommittee will review and evaluate each Applicant based on the following criteria in making its recommendation to the Borough Council. A maximum of ten (10) points may be awarded in each category.” KGNJ’s mistaken assumption, unsupported by the language of the Evaluation Sheet, that the Subcommittee would evaluate each applicant based on the Evaluation Sheet alone, cannot provide a basis for relief. The record is similarly devoid of any suggestion that the Subcommittee was required to score the Evaluation Sheet for each Applicant and make an arbitrary recommendation to the Council in support of the Applicant with the highest score. Indeed, not even Subcommittee member Rose Araneo, the sole Subcommittee member that filled out an Evaluation Sheet, could have reasonably believed that the Subcommittee was required to use the Evaluation Sheets to score each applicant, as Ms. Araneo completed the Evaluation Sheet for KGNJ only, and chose not to complete the Evaluation Sheets for any other applicant.

Contrary to KGNJ’s position, the record suggests that the Evaluation Sheet was merely one metric, among others, that the Subcommittee would consider in making its recommendation. See 233a (Subcommittee Chairperson explaining that the Subcommittee was guided by the Evaluation Sheets, the applications, interviews, and public hearing). Specifically, the Application requested a litany of information

that was unrelated to the Evaluation Sheet.<sup>1</sup> For example, the Application included questions about:

1. The applicant's status as a veteran-owned, minority-owned, woman-owned, social equity, or Keyport Resident business;
2. Whether the applicant would provide on-site parking;
3. Whether the applicant would commence operation of the business immediately upon issuance of a State license and all other approvals;
4. Whether the applicant owned or leased the proposed premises;
5. Whether any person named in the application would fail to qualify for ownership of a cannabis license due to a criminal conviction or holding a prohibited interest in other licenses;
6. Whether any person who has an ownership interest in the applicant's business has a license in any other municipality in New Jersey or another state;
7. Whether any person who has an ownership interest in the applicant's business had any cannabis license or permitted suspended or revoked;
8. The applicant's plans to hire local residents;
9. The applicant's plans to provide employees with benefits;
10. The applicant's commitment to diversity at the proposed facility;

---

<sup>1</sup> As explained below, the Application also requested information relating to each criterion listed on the Evaluation Sheets. See Point II, *infra*.

11. The steps the applicant will take to provide security in and around its location;
12. The steps the applicant will take to prevent minors from purchasing cannabis at its location;
13. The applicant's environmental impact and sustainability plan;
14. The applicant's nuisance mitigation plan that specifically addresses: (a) noise; (b) odor; (c) waste disposal; and (d) vehicular congestion mitigation;
15. The applicant's community impact plan; and
16. Any additional information that the applicant would like to be considered in connection with its application.

[48a-58a.]<sup>2</sup>

Given the Borough's broad request for information through the Application, including a request for "*any additional information that the Applicant would like to be considered*," (58a) (emphasis supplied), KGNJ cannot reasonably claim that it was duped into believing that the Evaluation Sheet was the lone criteria that the Subcommittee would consider in making a recommendation to the Council.

---

<sup>2</sup> KGNJ cannot plausibly claim that it did not know that the Subcommittee would use the information requested through the Application to make a recommendation to the Council. Contra Appellant Br. 19 ("[P]ublication of the evaluation sheet did not foster any transparency in the process because the actual criteria would be known only to the Borough and remain hidden from the public").

KGNJ's reliance on Matter of the Application for Med. Marijuana Alt. Treatment Ctr. for Pangea Health and Wellness, LLC, 465 N.J. Super. 343 (App. Div. 2020) is misplaced because it is factually distinguishable. In Pangea, the Court held that the Department of Health made an arbitrary, capricious, and unreasonable decision in awarding permits to alternative treatment centers because the Department review committee members were *required* to provide scores for particular criterion, and in averaging out the scores for each criterion, tolerated too great a degree of "relative error" in its scoring. 465 N.J. Super at 363. Pangea Health is not applicable here because the Subcommittee was not required to provide scores for any criterion.

Ironically, to the extent that Pangea Health has any relevance to this appeal, it supports Blaze Keyport and the Borough's positions. In Pangea Health, the Court criticized the Department because it failed to do anything more than "compile and tabulate the votes and declare winners based on [a] raw computation" of the average scores of each applicant. Id. at 380. But that is exactly what KGNJ is asking this Court to require the Borough to do: score each applicant based on the Evaluation Sheet and select (without any further inquiry into the criteria scoring or additional considerations) the applicant with the highest score. Pangea Health provides no legal basis to do so.

**POINT II**

**THE BOROUGH MADE A REASONED DECISION IN PASSING THE RESOLUTION BECAUSE IT ADEQUATELY CONSIDERED ALL THE EVIDENCE BEFORE IT, INCLUDING THE EVALUATION SHEETS AND APPLICATIONS**

Notwithstanding their right to apply a totality of the circumstances review to the applications, the Subcommittee actually reviewed each applicant through the proverbial lens of the Evaluation Sheets. Indeed, KGNJ’s claim that the Subcommittee applied “arbitrary, subjective, and biased criteria,” Appellant Br. 6, is wholly without merit. KGNJ points to several Subcommittee member comments to support its claim that the Subcommittee employed subjective and arbitrary criteria. Ironically, each allegedly arbitrary comment is rationally related to criteria listed on the Evaluation Sheet.

One Subcommittee member, in reference to KGNJ, noted that “[w]hile [she is] not ‘afraid’ of large companies or international investors[, she] lean[s] toward more midsize organizations[.]” See Appellant Br. 7 (citing 80a). Although KGNJ claims that this comment was inappropriate because “the size of the company” was not part of the criteria for scoring, the Evaluation Sheet specifically lists “Applicant’s ties to the Borough” as a consideration. (63a). Undoubtedly, international investors and companies would have less ties to the Borough than smaller, more local companies.

Another comment noted that the Subcommittee member was “[c]oncerned about the # of cars entering and leaving [KGNJ’s proposed location], visibility coming out into high speed [sic] travel lane.” See id. (citing 79a-80a). The same Subcommittee member thought that another applicant’s location provided for “safety of entry.” Id. (citing 79a-80a). KGNJ claims that these comments were inappropriate because “traffic safety” was not part of the criteria for scoring. The Evaluation Sheet, however, identifies “[p]ublic input regarding Applicant’s proposed cannabis facility in the Borough.” The cannabis facility site, including the purported safety of the site, clearly falls into this category, and could be considered by the Subcommittee.<sup>3</sup>

Further, the Evaluation Sheet does nothing more than repeat the information required to be produced as part of the Application. (48a-63a). For comparison:

- The Evaluation Sheet requests information regarding, “[a]pplicant’s owners’ or principals’ qualifications and experience operating in highly regulated industries, including cannabis, healthcare, pharmaceutical manufacturing, and retail pharmacies, with presence to experience

---

<sup>3</sup> Additionally, the Application asks “whether the Applicant will offer on-site parking at the business facility,” “the extent to which parking will be offered,” “the steps the Applicant will take to provide security in and around its location,” and “Applicant’s nuisance mitigation plan that specifically addresses . . . vehicular congestion mitigation.” The Subcommittee member’s comments are reasonably related to these inquiries as well.



operating such business within the State of New Jersey.” (63a.) Similarly, the Application requests, “information that relates to the Applicant’s qualifications to operate a cannabis related business, including, but not limited to experience in the cannabis industry and/or other highly regulated industries.” (56a.)

- The Evaluation Sheet requests the “[r]esults of Applicant’s background check conducted by the Keyport Police Department.” (63a.) Similarly, the Application provides that, “[a]pplications will be sent to the Keyport Police Department for background check processing. Following review and approval by the Keyport Police Department.” (48a.)
- The Evaluation Sheet requests, “Applicant’s written commitment to employ Borough residents in at least 50% of full-time equivalent positions.” (63a.). Similarly, the Application asks the applicants to “[d]escribe the Applicant’s plans to hire local residents as employees in the proposed facility. Please include the proposed percentage of such employees and the proposed positions.” (55a.)
- The Evaluation Sheet requests information about the applicant’s “ties to the Borough, demonstrated by at least one owner’s proof of residency in the Borough for five or more years or at least one owner’s continuous ownership of a business based on the Borough for five or more years in the

past ten years.” (63a.) Similarly, the Application requests “documents evidencing community and/or local support for the Applicant’s business.” (59a.)

- The Evaluation Sheet requests information about, “Applicant’s proposal to provide community benefits in the Borough.” (63a.) Similarly, the Application requests information about the “Applicant’s community impact plan, and/or whether the Applicant will be offering a community host agreement with the Borough, summarizing” the Applicant’s intent to leave a positive impact on the community, ties to the community, its economic impact plan, and a description of community outreach activities planned. (58a.)
- The Evaluation Sheet requests information about the applicant’s “demonstrated commitment to diversity in its ownership composition and hiring practices.” (63a.) Similarly, the Application asks the applicant to “[d]escribe the Applicant’s commitment to diversity at the proposed facility.” (56a.)
- The Evaluation Sheet asks about “[p]ublic input regarding Applicant’s proposed cannabis facility in the Borough.” (63a.) Similarly, the Application states that following the Subcommittee’s review, the Applicant “will be invited to attend the next scheduled public meeting of

- the Borough Council to make a presentation to Borough Council and the public and to respond to questions raised.” (48a.)
- The Evaluation Sheet asks about the applicant’s “financial capability to open and operate the cannabis establishment for which the Applicant is seeking a permit.” (63a.) Similarly, the Application requests “[p]roof of financial capability to open and operate the cannabis establishment for which the Applicant is seeking a permit, including a detailed description of the proposed financial plan for the development, operation, and maintenance of the facility” (59a.)
  - The Evaluation Sheet states that the applicant will be reviewed based on the “Applicant’s completed Application for a Municipal Cannabis Business License, including all required documents set forth on Page 13 of the Application; Applicant’s interview with the Subcommittee.” (63a.) Similarly, the Application states that “[t]he Cannabis Subcommittee’s review will also include an interview with the Applicant.” (48a.)

As evidenced by the above comparisons, the Subcommittee and Council’s review of the applications necessarily encompassed a review of the criterion identified on the Evaluation Sheets. As such, KGNJ cannot claim that the Borough failed to evaluate the applications based on the Evaluation Sheet criterion.

KGNJ has not—and cannot—identify any arbitrary or unreasonable consideration that the Subcommittee made when making its recommendation to the Council to award a resolution of support in favor of Blaze Keyport. As a result, the Council’s decision to issue the Resolution in favor of Blaze Keyport was not “arbitrary, capricious or unreasonable,” and this Court should affirm the Order.

**POINT III**

**THE BOROUGH HAS IDENTIFIED ITS REASONS FOR ISSUING THE RESOLUTION.**

KGNJ falsely claims that the record evidences a “total absence of identifiable criteria” that was “applied to Blaze[ Keyport’s] application.” Appellant Br. 13. Instead, the Resolution specifically states that the Subcommittee and Council conducted a “thorough and comprehensive review and evaluation of all the applications, together with the interviews conducted by the Subcommittee with each applicant and the presentations made by each applicant and public comments made at a Borough Special Public Meeting.” (65a-66a). Moreover, after the comprehensive review, the Council selected Blaze Keyport because it is “appropriately located and is suitable for activities related to the operations of the proposed retail cannabis business in the Borough.” (66a). As such, the Resolution confirms that Blaze Keyport was selected because the Council believed that it was appropriately located and suitable for a cannabis retail facility.

In addition to the reasons articulated in the Resolution, Subcommittee Chairperson Kathleen McNamera's September 20, 2022 meeting notes provides additional clarification as to why she, and the Subcommittee, recommended Blaze Keyport. (78a-79a). Chairperson McNamera noted that Blaze Keyport had experience in complex regulatory businesses, was familiar with the relevant regulations, planned to utilize online ordering to help the flow of business and traffic, and sought to hire local residents and become active participants in the community. (79a). Moreover, at an October 18, 2022 Council meeting, Chairperson McNamara explained to the Council:

In addition to forming a sub-committee there were discussions about the application process itself. What forms, procedures, considerations, input, review, process, public comment and so much more would we need to develop and collect, without the guidance of the state.

...

In its deliberations, the subcommittee was guided by the evaluation criteria, the applications, interviews and public hearings. The two councilmembers that were part of the subcommittee shared their determination of what facility they deemed most favorable, based on these factors.

The council voted 5 to 1 recently to issue a resolution of support the Blaze Cannabis, one of the three Highway Corridor applicants. Today I want to take a few minutes to review some of the many steps and considerations involved in the decision.

Initially the members of the sub-committee received and reviewed the applications. As we met to evaluate the

merits of each we also acknowledged that some of the criteria would be reviewed in much more detail at the state level, allowing us to look closer at the local pieces.

Presentations by all applicants to the sub-committee were scheduled, and then followed by a public meeting on May 7 when all applicants had the opportunity to present to the complete governing body and the public.

...

At a subsequent sub-committee meeting, it as decided to address the Highway Corridor license applications first. A closed session was requested for the September 20<sup>th</sup> council meeting. Governing body members were asked to review each of the three Highway Corridor applications in detail. A copy of the evaluation guidance form as also provided to each member with the instruction that they use the form to help guide in their review. It was also recommended that they drive past the locations to familiarize themselves with the sites, particularly based on the type of facility that was being proposed by the applicant as shown in their application.

(233a-234a).

The forgoing notes suggest the Subcommittee recommended Blaze Keyport, and the Council issued the Resolution, based on a comprehensive review of all the applications. As such, KGNJ’s subjective belief that it was a “better” or “more worthy” applicant than Blaze Keyport is insufficient grounds to question the validity of the Borough’s decision. See Worthington v. Fauver, 88 N.J. 183, 204-05 (1982) (decision is valid “when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached”).

**CONCLUSION**

For all the reasons stated herein, and in Respondent Borough of Keyport's Brief, the Court should affirm the trial court's Order.

Respectfully submitted,

**FOX ROTHSCHILD LLP**



By: \_\_\_\_\_

Timothy J. Bloh, Esquire  
Jacqueline A. Davis, Esquire

*Attorneys for Defendant-Respondent  
Blaze Keyport, LLC*

Dated: June 17, 2024

KGNJ OPERATIONS, LLC,

*Appellant,*

v.

BOROUGH OF KEYPORT,  
BLAZE KEYPORT, LLC, AND  
GARDEN STATE MARIJUANA,  
LLC,

*Respondents.*

SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION

Docket No. A-001424-23

Civil Action

On Appeal From:

Superior Court of New Jersey, Law  
Division, Monmouth County  
Docket No. MON-L-2997-22

Sat Below:

Hon. Linda Grasso Jones, J.S.C.

---

**REPLY BRIEF OF APPELLANTS**

---

MANDELBAUM BARRETT PC  
3 Becker Farm Road, Suite 105  
Roseland, New Jersey 07068  
(973) 736-4600 (p)  
(973) 325-7467 (f)  
jbauchner@mblawfirm.com  
agimigliano@mblawfirm.com  
marabia@mblawfirm.com  
*Attorneys for Appellant, KGNJ  
Operations, LLC*

Of Counsel and On the Brief:  
Joshua S. Bauchner (051242013)  
Andrew Gimigliano (016792012)  
Marlene M. Arabia (403672022)



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

LEGAL ARGUMENT ..... 1

    I.    Respondents Misrepresent the Relief KGNJ Seeks (1a)..... 1

    II.   The Borough’s Failure to Follow Its Own Process Resulted in an Arbitrary, Capricious, and Unreasonable Result (1a)..... 3

    III.  Pangaea Is Analogous and a Guiding Published Precedent (1a) ..... 6

CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp.,  
172 N.J. 75 (2002) .....6

F.M.C. Stores Co. v. Borough of Morris Plains,  
100 N.J. 418 (1985) .....6

Kane Props., LLC v. City of Hoboken,  
325 N.J. 199 (2013) .....2, 5

Klumpp v. Borough of Avalon,  
202 N.J. 390 (2010) .....6

Muirfield Constr. Co. v. Essex Cnty. Improvement Auth.,  
336 N.J. Super. 126 (App. Div. 2000) .....7

In re New Brunswick Municipal Employees Association,  
453 N.J. Super. 408 (App. Div. 2018) .....3

New Concepts For Living, Inc. v. City of Hackensack,  
376 N.J. Super. 394 (App. Div. 2005) .....5

State v. Hemepele,  
120 N.J. 182 (1990) .....3

In the Matter of the Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC,  
465 N.J. Super. 343 (App. Div. 2020) .....6, 7, 8

**Statutes**

N.J.S.A. 24:61-36.....2, 3, 4

**TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALED**

Order dated December 12, 2023.....1a

## PRELIMINARY STATEMENT

Respondents set up a straw-man argument to distract the Court from the actual issue raised in this appeal. Respondents contend that KGNJ is asking the Court to determine that the Borough should have issued the resolution of support to KGNJ rather than Blaze. Not so. This appeal bears on the process the Borough followed (or failed to follow) in adopting the resolution of support. This appeal is not centered on which party should have obtained the resolution of support, but instead focuses on the lack of transparency and integrity in that process undermining its validity.

Because the Borough failed to follow the very review process it created, its adoption of the resolution of support was arbitrary, capricious, and unreasonable. To ensure fairness and public trust in the Borough's actions, the trial court's order affirming the resolution of approval should be reversed, and this matter should be remanded for the Borough to consider the applications pursuant to the process and criteria it adopted.

## LEGAL ARGUMENT

### **I. Respondents Misrepresent the Relief KGNJ Seeks. (1a).**

Respondents not only contort the issue raised in this appeal but also misrepresent the relief sought by KGNJ. The issue raised in this appeal is whether the Borough can create and publish a process to evaluate applications related to retail cannabis licenses and then failed to follow the very process it adopted. KGNJ

respectfully submits that the Borough cannot abandon the process in mid-stream and must adhere to the review criteria it publicly announced it would use in evaluating applications. See Kane Props., LLC v. City of Hoboken, 325 N.J. 199, 229 (2013) (stating that when governing body adopts an ordinance it must follow that ordinance). The Borough's failure to follow its own process resulted in an arbitrary, capricious, and unreasonable decision.

Respondents spend pages of their briefs discussing whether the Borough complied with N.J.S.A. 24:61-36. KGNJ, however, is not arguing that the Borough did not comply with N.J.S.A. 24:61-36. Rather, the record confirms that the Borough adopted a process and criteria that the Borough publicly announced it would be using to evaluate applications. But the Borough did not follow its own process, and KGNJ is challenging the Borough's failure to adhere to its process, as it is required to do.

To be certain, on October 11, 2022, the Borough published a document titled, "Municipal Cannabis Business License Application Evaluation Criteria" ("Evaluation Sheet"), via the Borough's website stating:

The criteria enumerated thereunder were provided to the public via the Borough's website, *to ensure transparency* in the evaluation process and as previously stated, were discussed during various Subcommittee meetings *as a means to direct* the Subcommittee's deliberations.

[(48a-63a (emphasis added))].

The Evaluation Sheet states: "The Borough's Cannabis Subcommittee *will review* and evaluate each Applicant based on the following criteria in making its

recommendation to the Borough Council.” (Ibid. (emphasis added)). Any suggestion by Respondents that the Borough did not adopt or formally announce criteria to evaluate the applications, therefore, is contradicted by the record before the Court.

Moreover, KGNJ is not asking the Court to substitute its judgment for that of the Borough or the trial court. KGNJ simply is asking this Court to conclude that it was arbitrary, capricious, and unreasonable for the Borough to adopt a process and criteria for evaluating applications and then fail to abide by its own procedure. If the Court reaches that conclusion, the trial court’s order affirming the resolution must be reversed and the matter remanded for the Borough to consider the applications pursuant to the process and criteria it adopted.

**II. The Borough’s Failure to Follow Its Own Process Resulted in an Arbitrary, Capricious, and Unreasonable Result. (1a)**

N.J.S.A. 24:61-36 sets a floor, not a ceiling, on what the Borough could require from itself throughout its application process. Cf. State v. Hempele, 120 N.J. 182, 197 (1990) (noting federal constitution sets floor of constitutional right but states are free to expand those rights). While N.J.S.A. 24:61-36 did not require the Borough to adopt a specific process or impose any specific requirements or criteria, nothing prohibited the Borough from adopting an explicit process or imposing requirements or criteria more stringent than any contained in N.J.S.A. 24:61-36. See In re New Brunswick Municipal Employees Association, 453 N.J. Super. 408, 415

(App. Div. 2018) (discussing how state statutes create floor for municipalities and condominium associations).

Even though N.J.S.A. 24:61-36 does not contain factors that a local governing body must consider in evaluating retail cannabis licenses, the Borough chose to establish a process and evaluation criteria for assessing applications. This evaluation criteria *required* the Borough's Subcommittee adhere to the standards contained in the Evaluation Sheet when reviewing applications and making a recommendation to the Council. (48a-63a (“The Borough’s Cannabis Subcommittee *will review*. . .”). But the Subcommittee failed to do so, tainting the entire process and undermining the very transparency and integrity it sought to ensure.

Respondents claim that the Evaluation Sheet, along with the Chief of the Borough Police Department’s questionnaire, were strictly “internal guidance.” (Keyport Db7; Blaze Db7). That too is inconsistent with the record before the Court. The Borough’s published Evaluation Sheet states: “The criteria enumerated thereunder were provided to the public via the Borough’s website, *to ensure transparency in the evaluation process.*” (48a-63a (emphasis added)). Moreover, the Evaluation Sheet states: “The Borough’s Cannabis Subcommittee *will review* and evaluate each Applicant based on the following criteria in making its recommendation to the Borough Council.” (Ibid. (emphasis added)). Once the Borough published the Evaluation Sheet, announcing the Evaluation Sheet was “to

ensure transparency in the evaluation process,” the Borough bound itself to doing what it said it would do. Kane Props., LLC, 325 N.J. at 229.

Further, the instructions for the application provided to applicants, stated that “[a]pplications must be completed and include all required documents,” that all legal documents which are part of the application must “be properly signed and executed,” and that “[i]ncomplete [a]pplications will be rejected and returned to the [a]pplicant.” (48a). Nevertheless, Blaze failed to “sign and execute” the required certification as to the accuracy of the information contained in its application, but the Borough considered it anyway, again in stark contravention of its own review criteria. (290a-416a).

The trial court concluded “there is no obligation under any statute or administrative code provision requiring an applicant to a local governing body to submit a signed application for a resolution of support.” (8a). But that is not the correct lens through which to view this case. The Borough set that standard and failed to follow its own rules, and the trial court missed that crucial distinction.

Indeed, local governing bodies must deal fairly with the public. The government’s “primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.” New Concepts For Living, Inc. v. City of Hackensack, 376 N.J. Super. 394, 401 (App. Div. 2005). Put another



way, in dealing with the public, public bodies must “turn square corners.” F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985). Those principles apply here. The Borough set a process, announced criteria, and then did not act in accordance with those criteria. That is a failure to turn square corners. See Klumpp v. Borough of Avalon, 202 N.J. 390, 413 (2010).

The Borough’s failure to follow its own process and criteria was an abuse of discretion. The trial court’s order should be reversed, and the matter remanded for the Borough to evaluate the applications consistent with the process the Borough adopted. See Cell South of N.J., Inc. v. Zoning Bd. of Adjustment of W. Windsor Twp., 172 N.J. 75, 81-82 (2002) (noting that local decision should be overturned on finding of abuse of discretion).

### **III. Pangaea Is Analogous and a Guiding Published Precedent. (1a).**

In In the Matter of the Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC, 465 N.J. Super. 343 (App. Div. 2020), Judge Clarkson Fisher, Jr., writing on behalf of the Court, considered the appeals of numerous unsuccessful applicants challenging the Department of Health’s (“Department”) award of vertically integrated alternative treatment center permits. Because the Department failed to provide an explanation regarding the disparities of the application score the Court noted that “the Department has done little to justify these anomalies or explain why they should be disregarded.” Id. at 370.

The Court was also concerned about whether “members understood or followed instructions” and noted “there [was] no evidence that the scores were verified in some manner or whether anomalies . . . have been harmonized in some reasonable, non-arbitrary way.” Ibid. In short, the Court was concerned with whether the Department was following the very process it implemented.

Ultimately, the Court concluded that it must intervene “to ensure the public’s confidence in both the results achieved at the agency level so far and to ensure that future similar proceedings will be likewise subjected to a measure of scrutiny at the agency level that will guarantee the process does not produce determinations that are arbitrary, capricious or unreasonable.” Id. at 382-83. The Court’s intervention was necessary because “[b]oth the public interest and the public’s perception that the process is fair, competitive and trustworthy are critical components and objectives.” Id. at 383 (quoting Muirfield Constr. Co. v. Essex Cnty. Improvement Auth., 336 N.J. Super. 126, 137-38 (App. Div. 2000)). The Court therefore vacated the final agency decisions on appeal and remanded to the Department for further proceedings “in conformity with the spirit of this opinion.” Id. at 400.

The Court should follow the precedent set by Pangea. The Borough adopted a process and set criteria which it then failed to follow. The Borough’s failure undermines the outcome of the process, compromising the public’s trust and confidence that the process was fair, competitive, and trustworthy. This is especially

important where the Legislature adopted a statute giving enormous discretion to local governments in evaluating applications for retail cannabis licenses. Thus, the Court should intervene, as in Pangaea, to remind local governments that they must do what they tell the public they will do and that local governments must act fairly and transparently to engender public trust in their actions.

### **CONCLUSION**

Based on the foregoing, KGNJ respectfully requests that the trial court's order affirming the resolution of approval be reversed, and this matter be remanded for the Borough to consider the applications pursuant to the process and criteria it adopted.

Respectfully submitted,  
**MANDELBAUM BARRETT PC**

Dated: July 15, 2024

By: /s/ Andrew Gimigliano  
Andrew Gimigliano