SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002596-23T1

IN THE MATTER OF THE APPLICATION OF TAMBRE, LLC TO THE CASINO REINVESTMENT DEVELOPMENT AUTHORITY FOR MINOR SITE PLAN APPROVAL WITH VARIANCES PURSUANT TO N.J.S.A. 40:55D-70(C) TO PERMIT THE OPERATION OF A CLASS 5 DISPENSARY FOR THE SALE OF ADULT USE RECREATIONAL CANNABIS AT THE SUBJECT PROPERTY LOCATED AT 1926 ATLANTIC AVENUE, BLOCK 158, LOT 3.01, IN THE CITY OF ATLANTIC CITY, APPLICATION #2023-05-3453	:	On Appeal from: The Casino Reinvestment Development Authority, Land Use Regulation and Enforcement Division, Resolution No. 24-23 **CIVIL ACTION**

BRIEF OF APPELLANT, TAMBRE, LLC

On the brief:
Robert S. Baranowski, Jr., Esq.
NJ Attorney ID #005172000
baranowski@hylandlevin.com

Jennifer L. Cordes, Esq.
NJ Attorney ID #024201997
cordes@hylandlevin.com

HYLAND LEVIN SHAPIRO LLP
6000 Sagemore Drive, Suite 6301
Marlton, New Jersey 08053
(856) 355-2900
Attorneys for Appellant, Tambre, LLC

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I. PRELIMINARY STATEMENT

This is an appeal from the arbitrary and capricious denial of an application to develop property with a permitted use. The Appellant, Tambre, LLC ("Tambre" or "Appellant") presented an application to the Casino Reinvestment Development Authority ("CRDA") seeking Minor Site Plan approval and bulk variances related to the proposed development of the subject property with a Class 5 Retail Cannabis Dispensary ("Application"), a use that is indisputably permitted within the Tourism District of Atlantic City where the property is located. Based on traffic "concerns" raised by objectors, CRDA improperly denied the Application.

Specifically, the denial was based on whether the use was compatible with existing, off-site traffic. Where a land use regulator is reviewing an application for a permitted use, such concerns are not valid considerations, as the zoning rules governing development in any given area are legislative determinations that cannot be usurped by any planning board or authority such as the CRDA. The determination of whether a use is suitable for a location is made through adoption of zoning and development regulations. Where the zoning rules provide a use is permitted for a property, the land use agency reviewing an application for development cannot render a decision to the contrary, on grounds that the area is already too congested, or that the use is

purportedly not a good fit given such conditions. Where a decision has been reached on such basis, it is contrary to law and should be reversed.

Moreover, the proposed development, within the first floor of an existing multi-story structure on Atlantic Avenue, would be an adaptive re-use of an existing "grandfathered" building that functioned as a popular restaurant in that location for over 40 years. Again, while the CRDA was swayed by objectors who fretted over how parking for patrons and deliveries would be accommodated at the site, the applicant Tambre addressed all of these issues and noted that there were thousands of parking spaces available nearby through a network of parking garages developed for the multitude of retail outlets in the area, and that patrons would generally be walking to and from the premises from those parking areas, not driving up.

Tambre also presented testimony as to how loading and deliveries would be effectuated, consistent with the same manner as loading and unloading had previously been handled by the restaurant at that same location for 40 years and at other businesses throughout the City. The position expressed by the objectors that such activities would now be inappropriate and somehow unsafe is meritless. CRDA was improperly swayed by this specious postulation in denying the application.

As a matter of law, an application for site plan approval of a permitted use, even one that requires reasonable variance relief, may not be denied on the basis of existing, off-site traffic conditions. The CRDA acted in an arbitrary, capricious and unreasonable manner in denying the application based on such purported traffic concerns, and denial of the Application should be reversed.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

In January 2011, the Tourism District Act, N.J.S.A. 5:12-218 through 5:12-233 (the "Act"), was passed by the New Jersey Legislature, authorizing the CRDA to manage and regulate land use within the Tourism District in Atlantic City. N.J.S.A. 5:12-219(b). In furtherance of the development of "an economically viable and sustainable tourism district," the CRDA was directed to adopt a Tourism District Master Plan establishing goals, policies, needs, and improvement of the Tourism District, placing special emphasis on, among other things, the facilitation of the investment of private capital in the Tourism District in such a matter that promotes economic development. N.J.S.A. 5:12-219(e), (g), (h). The CRDA was also authorized to adopt development and design guidelines and land use regulations for the Tourism District that are

[1] The Procedural History and Facts of this matter are closely intertwined and have been combined to avoid repetition.

consistent with and in furtherance of the Tourism District Master Plan. N.J.S.A. 5:12-220(a). As a result, the Casino Reinvestment Development Authority Tourism District Land Development Rules, N.J.A.C. 19:66-1.1 et seq. (the "Land Development Rules") were adopted. In consultation with the City of Atlantic City (the "City"), the Land Development Rules govern the review and approval or denial of site plans and development proposals for development on and improvements to land within the Tourism District, and the CRDA reviews such applications applying the standards set forth in the Land Development Rules and the Municipal Land Use Law, which would otherwise be performed by the City planning or zoning boards. N.J.S.A. 5:12-220(b).

On August 17, 2022, the City introduced Ordinance No. 8-E, which, subject to the CRDA's consent, proposed a Green Zone Redevelopment Plan (the "Redevelopment Plan") to allow recreational cannabis retail and consumption operations as permitted uses within the Redevelopment Area. In providing its consent to the establishment of the Redevelopment Plan as set forth in Resolution 22-112, the CRDA noted the reasoning behind the proposed Plan, which included "diversifying the local economy, increasing opportunities for private investment, anticipated revenue streams…, increasing pedestrian traffic, with collateral reduction in crime, and [reducing] the

existing commercial vacancy rate and abandoned commercial space along Atlantic Avenue and Pacific Avenue and in the Orange Loop." (Aa246[2]).

The property at issue in this matter and owned by Appellant is located at 1926 Atlantic Avenue, Block 158, Lot 3.01, Atlantic City, Atlantic County, New Jersey, situated between Michigan and Ohio Avenues (the "Property"), within the Central Business (CBD) Zoning District, the Green Zone Redevelopment Area, and the CRDA Tourism District. The Property is bordered by AtlantiCare Health Systems ("AtlantiCare") to the northeast, and by retail shops to the south and west (also known as "The Walk"). The Property consists of 3,691.23 square feet of land with an existing structure consisting of approximately 4,800 square feet.

On or about May 2, 2023, Appellant submitted an application for Minor Site Plan with bulk variances to the CDRA, seeking approval for the development and operation of a Class 5 Retail Cannabis Dispensary (the "Project") within the first floor of the existing multi-story structure located at the Property (the "Application") (Aa34). Other than façade improvements and signage, no other exterior alterations were proposed. (*Ibid.*)

The proposed retail cannabis dispensary is a permitted use under the Green Zone Redevelopment Plan (Aa246); however, due to the pre-existing

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[2] "Aa__" refers to Appellant's appendix, filed concurrently herewith.

condition of the Property, which lacks any on-site, off-street parking, the Applicant sought bulk variance relief under N.J.S.A. 40:55D-70(c) from the requirements of Section 19:66-5.8(b)(1) of the Land Development Rules, which otherwise mandates one parking space for each 300 square feet of floor area. The Property has not had any exclusive, off-street parking for decades and had previously been operated as the Los Amigos Restaurant since the 1970's. Under the current dimensional zoning provisions, there are also other pre-existing, non-conforming conditions present at the Property that do not exacerbate or impact the proposed development, including but not limited to minimum lot area, width, frontage, and setback requirements, as well as maximum building coverage and impervious coverage limitations.

Indeed, during the Initial Hearing, as defined and discussed further herein, Robert Reid, the CRDA Land Use Enforcement Officer, noted for the record that the existing building dates to approximately 1910; there was no land development ordinance before 1929; and from 1929 to 1979, there were no bulk and area requirements in applicable regulations. The Property, therefore, "was not required to have parking, was not required to have setbacks, coverage, none of that, so this building certainly predated any requirements for bulk and area requirements." (T1/78:19-79:9).

Prior to the hearing, and in support of the Application, the Applicant filed with the CRDA the following materials: site plans prepared by Arthur W. Ponzio Co. & Associates, dated June 29, 2022, comprised of an existing conditions survey and proposed site development plan; Resolution 267 from the City of Atlantic City and letter(s) of support from the Mayor; photos and maps of the Property from May and June 2022; the required checklists; and the Application itself. The Application was initially heard by a Land Use Hearing Officer at a hearing conducted on July 6, 2023 (the "Initial Hearing").

At the Initial Hearing, Appellant presented the testimony of three (3) witnesses in support of the Application: (1) Sherry Gartino, one of the owners of Tambre ("Ms. Gartino"); (2) Jason Sciullo, P.E., P.P., of Sciullo Engineering Services, LLC ("Mr. Sciullo"); and (3) Tony Gallo, Managing Partner of Sapphire Risk Advisor Group ("Mr. Gallo").

Ms. Gartino testified that she has extensive experience in the retail cannabis business, providing a thorough summary of the Project, including the site selection process and operational details of the proposed development. (T1/13:15-17; 16:7-18:9)[3]. She discussed hours of operation, number of employees, anticipated customer volume, customer flow, and queuing.

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[3] "T1" denotes the transcript of the July 6, 2023 hearing before the Land Use Hearing Officer; "T2" denotes the transcript of the January October 5, 2023 hearing before the Land Use Hearing Officer.

(T1/18:10-23; 20:20-23:3; 40:21-43:5). Ms. Gartino explained that before deciding to purchase the Property for the Project, Tambre consulted with City officials and reviewed Ordinances that confirmed the proposed development was a permitted use in the CBD Zone. (T1/25:16-26:6; 27:2-28:13).

Ms. Gartino addressed the loading and unloading of product at the Property, explaining that the product will be prepackaged on the retail side, with no raw product on site. (T1/31:13-18). She explained that security personnel will transport the product from a legally parked vehicle into the store, utilizing one of the two designated parking spaces located at the rear of the building; no curbside pickup is proposed. (T1/31:19-33:1; 44:10-13).

Finally, Ms. Gartino described the proposed appearance of the building renovations, including signage and lighting (T1/35:13-37:13). Further, she confirmed that the proposed designs are "consistent with and actually exceed the requirements [of the Cannabis Regulatory Commission] with regards to [customer] flow, security, and visualization." (T1/17:6-16).

Next, Mr. Sciullo[4] testified as a duly qualified expert in the fields of professional engineering and professional planning. Mr. Sciullo described the location of the Property, existing conditions, the development proposal and

[4] Scuillo Engineering Services, LLC stepped in to serve as Appellant's engineering firm after Appellant learned of a conflict of interest based upon the former firm's work with one of the objectors (AtlantiCare) in this matter.

site layout. Specifically, Mr. Sciullo described how and where customers will access the building, the location of security guards, and where loading will occur. (T1/61:64:5). With respect to loading, Mr. Sciullo noted that the Land Development Rules do not require a loading space for commercial uses of less than 10,000 square feet and moreover, the Green Zone Redevelopment Plan does not address loading spaces. (T1/70:17-71:7). Nonetheless, Mr. Sciullo testified that the any loading or unloading would take place "from Michigan Avenue, either in the shared loading area in the back of building 700 at The Walk or in that small loading space that's on the side of the road there, side of Michigan Avenue." (T1/63:21-25). Delivery persons would walk around the corner to the front of the store, go in through the exit corridor and make the delivery, typically at times when customers are not queuing in line, and from a small delivery vehicle, with security being present the entire time. (T1/63:25-64:5; 65:10-15).

Mr. Sciullo further testified that there is currently a shortfall of parking at the Property, which was being addressed because of a change in use. (T1/55:15-56:1). Here, because the proposed use is considered a retail use, the Land Development Rules require sixteen (16) parking spaces and in fact, would have required thirty-two (32) spaces for the restaurant that previously operated at the Property. However, Mr. Scuillo opined parking for patrons

could readily be accommodated in the garage behind the Property or via parking on the side streets in the vicinity of the Property. (T1/56:22-57:10). Mr. Sciullo noted the Property's proximity to The Walk retail shopping center, whose customers also utilize parking in a garage or on surrounding streets. (T1/57:10-21). He also noted that based on the proposed use, it was expected that customers would also arrive on location on foot. (T1/57:24-58:7). Moreover, Mr. Sciullo testified that "there are tens of thousands of parking spaces in the garages that are around the site and within easy walking distance." (T1/58:13-15).

Mr. Sciullo noted that the building on the Property was built long before the Land Development Rules were adopted, which is essentially grandfathered, so there are numerous nonconformities related to certain development standards, including but not limited to lot area, lot width, lot frontage, building coverage, maximum lot coverage, impervious coverage, and front and rear yard setbacks, all of which are existing conditions that the Appellant is not changing or exacerbating; the building footprint will not change. (T1/69:12-20). Mr. Sciullo specifically noted that they are all a hardship to modify because there is no land available to make those conditions compliant, concluding that the Applicant has satisfied the criteria set forth at N.J.S.A. 40:55D-70(c)(1). (T1/69:20-23; 77:4-78:7).

Next, Mr. Gallo testified as a duly qualified expert in the field of cannabis security. Mr. Gallo outlined the Applicant's security plan and protocols, ensuring they meet the requirements of the Cannabis Regulatory Commission and the City. (T1/98:13-17; 100:9-101:2; 106:12-23). Mr. Gallo also confirmed that the queuing issue is not something he sees often and that no one will be allowed to queue on the sidewalk; customers will be in a queuing vestibule area, with security guards present an hour before and after opening. (T1:102:2-5; 109:2-12).

After the presentation by Tambre, there were objections to the Application presented by AtlantiCare, a neighboring property owner, from three (3) witnesses: (1) Matthew Levinson, a Government Relations Officer and Corporate Director for Construction and Real Estate for AtlantiCare ("Mr. Levinson"); (2) Ravi Nasser, P.E., P.P. ("Mr. Nasser"), who was qualified as an expert in planning and engineering; and (3) David Shropshire, P.E., P.P. of Shropshire Associates ("Mr. Shropshire"), who was qualified as an expert in the field of traffic engineering.

Mr. Levinson expressed concerns with the lack of parking at the Property. He speculated that Tambre's customers would utilize AtlantiCare's emergency department parking spaces, next door to the Property. (T1/139:1-6). Mr. Levinson also believed that ambulance traffic trying to access AtlantiCare

could somehow be impacted. (T1/135:2-8). On cross-examination, however, Mr. Levinson conceded he would be equally concerned about parking with another restaurant, a Starbucks, or a 7-11 convenience store operating at the Property – all of which are permitted uses in the CBD Zone. (T1/142:12-143:17;147:25-148:5). Mr. Levinson also admitted that AtlantiCare did not attend any public hearings objecting to the implementation of the Green Zone at the Property, nor did AtlantiCare object to any of the related ordinances passed by the City and the CRDA. (T1/151:14-19; 152:17-153:17; 154:1-4).

Next, Mr. Nasser expressed concerns about the lack of loading and parking spaces. (T1/162:7-166:8). On cross-examination, Mr. Nasser also admitted that he would have similar concerns if a Starbucks or Dunkin' Donuts wanted to operate at the Property. (T1/170:3-10). More importantly, Mr. Nasser also conceded that due to the pre-existing building on the Property, the Property is undersized and cannot accommodate any parking because of the shape of the Property. (T1/177:1-16).

Finally, Mr. Shropshire opined on behalf of the objector that the parking demand for the proposed development would be higher than anticipated. (T1/178:21-183:8). However, Mr. Shropshire admitted on cross-examination that if the proposed development were for a Starbucks or a Dunkin' Donuts, he would have the same concerns regarding parking and loading activities, but in

those instances, the Applicant would be able to operate at the Property without having to undergo the approvals process. (T1/183:21-184:12). Mr. Shropshire also conceded that the seven-to-nine-minute process of a visit to this proposed retail cannabis location would be similar to the time it takes to visit a Starbucks. (T1/185:4-17). He also agreed that Atlantic City, unlike most communities, has the benefit of "a lot of parking spaces, public parking spaces." (T1/186:18-187:6).

The Initial Hearing concluded with brief testimony from members of the public, both in support of and opposition to the Application. After hearing these comments, Ms. Gartino committed to hiring another security officer for the purposes of ensuring there would not be illegal parking and that the operations will not affect traffic flow in front of the Property. (T1/207:6-13). She also offered to provide an incentive to customers offering a credit towards parking costs. (T1/207:14-208:10).

On October 5, 2023, the CRDA convened a second hearing on the Application (the "Second Hearing"), during which the Applicant presented additional witnesses and testimony in support of the Application, including: (1) Mary Ellen Taylor, a prior owner of the subject Property ("Ms. Taylor"), who testified that she had previously offered the Property for sale to AtlantiCare (T2/9:13-19); (2) Patricia Shemeley, managing partner of the

former restaurant that operated at the Property ("Ms. Shemeley"), who testified as to the number and types of deliveries at the restaurant as having been larger and more frequent that what the Applicant proposed, without complaints (T2/10:22-14:2); and (3) Justin Taylor, P.E. of Dynamic Traffic ("Mr. Taylor"), an expert in the field of traffic engineering. Mr. Sciullo and Mr. Gallo, who testified at the Initial Hearing, also presented additional testimony at the Second Hearing.

At the Second Hearing, after being qualified as an expert witness in traffic engineering, Mr. Taylor testified that the Applicant had amended the Application to create an approximately nine foot (9') by twenty foot (20') loading space on the northeast corner of the Property along Atlantic Avenue. (T2/18:3-14). He explained that the loading space will be gated to discourage parking by customers. (T2/29:9-21). Mr. Taylor also noted the presence of a designated loading space on Michigan Avenue for utilization by any of the businesses in the area, which recognizes that a business may not always have a loading driveway available on site. (T2/42:3-10). The Applicant was not proposing, however, to have any cannabis or cash deliveries out of the Michigan Avenue loading area, although paper products or UPS deliveries may utilize that area. (T2/98:1-6; 98:20-24).

Mr. Taylor further testified that the Applicant anticipates deliveries two to three times per week, with a maximum of once per day, occurring before or after hours of operation, which equates with an "insignificant impact to the surrounding roadway network" based on thresholds established by the New Jersey Department of Transportation. (T2:/18:14-19:17).

Mr. Taylor also testified that, based on his data, the volume of pedestrian traffic near the Property is light, therefore, with the added security to aid in the delivery operations, he saw no safety implication for the operation of the proposed loading area. (T2/19:17-21:11). He conducted traffic counts two days mid-week between 8:00 a.m. and 10:00 p.m., to determine any potential effect on pedestrians in the area in connection with the proposed loading area, and concluded that the operation of the proposed driveway would similarly have no negative interaction with pedestrians. (T2/21:12-25:3).

Next, Mr. Sciullo offered additional testimony on the Applicant's behalf, again noting that pursuant to the Land Development Rules, a loading zone is not required for a building of this size and proposed use. (T2/50:1-11). In particular, he noted that retail cannabis facilities typically utilize small loading vehicles such as a van for their product. (T2/51:16-24). He also notes that the existing delivery corridor that serves the Property had a more frequent, intense use with larger vehicles previously compared to what was proposed for the

retail cannabis operations; therefore, the Application presented an improvement over existing conditions dramatically. (T2/52:25-53:13).

Mr. Sciullo also explained that "back-in loading" is not uncommon throughout the City, providing numerous examples. (T2/57:8-64:17). He further clarified that ambulances arriving at the AtlantiCare facility do not use the driveway next to the Property – they have their own entrance – and the parking spaces that AtlantiCare is concerned about are for visitors to the emergency department. (T2/67:1-9).

Finally, Mr. Gallo presented additional testimony on the Applicant's behalf, noting that the Applicant intended to install additional cameras and would have security guards assist with product deliveries. (T2/91:17-92:3; 93:12-15).

In continued objection to the Application at the Second Hearing, AtlantiCare next presented the testimony of David Scheidegg, P.E., P.P. of Schaeffer Nassar Scheidegg Consulting Engineers ("Mr. Scheidegg"), who was qualified as an expert in professional engineering and planning. Mr. Scheidegg expressed his concerns about the practicality and convenience of the proposed loading zone. (T2/120:23-121:22; 126:10-18; 127:17-128:7). On cross-examination, Mr. Scheidegg conceded that while he thought the loading

area was "inconvenient," he would not go so far as to say it was unsafe. (T2/135:1-136:7).

Next, Mr. Shropshire offered additional testimony on AtlantiCare's behalf, opining that he did not believe the proposed loading area utilizing a backing maneuver from the street was a safe option. (T2/150:1-2). Tambre then re-called its traffic expert Mr. Taylor to rebut that conclusion. Mr. Taylor confirmed that in his opinion, the proposed design "provides for safe and efficient access to the property." (T2/163:9-11).

Lastly, one additional member of the public spoke in opposition to the Application simply because of its proposed use as a cannabis dispensary, (T2/165:21-167:5), notwithstanding that the use is permitted. The Second Hearing was then concluded.

On November 9, 2023, the Land Use Hearing Officer for the Land Use Regulation and Enforcement Division of the CDRA submitted a Report and Recommendation to the Members of the CDRA, recommending denial of the Application based on issues relative to off-site traffic, notwithstanding that a planning agency does not have authority to deny a development application for a permitted use because of off-site traffic conditions. (Aa228). The Hearing Officer acknowledged that the CDRA Development Rules do not require a loading space for commercial uses less than 10,000 square feet, and that

several pre-existing, non-conforming conditions at the Property were not exacerbated or impacted by the development proposal; nonetheless, the Hearing Officer took issue with the traffic concerns expressed by the objectors and the proposed loading space in connection with the recommendation for denial. (Aa228, Aa234-Aa235a).

On March 19, 2024, without hearing any further input or evidence from the Applicant in response to the Hearing Officer's recommendation, the CRDA adopted Resolution 24-23, "Approving the Denial of an Application for Minor Site Plan Approval with Variances Pursuant to N.J.S.A. 40:55D-70(c) to Permit the Operation of a Class 5 Dispensary for the Sale of Adult Use Recreational Cannabis at the Subject Property Located at 1926 Atlantic Avenue, Block 158, Lot 3.01, in the City of Atlantic City Under Application #2023-05-3453 (the "Denial"). (Aa236). Public notice of the CRDA's Denial was dated April 9, 2024 and published on April 13, 2023. This appeal now follows, pursuant to N.J.A.C. 19:66-17.2(a).

III. STANDARD OF REVIEW

"[A]n appellate court reviews agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). The "scope of review of an administrative decision is the same as that [for] an appeal in any non-jury case, *i.e.*, whether the findings

made could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole." In re Taylor, 158 N.J. 644, 656 (1999) (internal quotations omitted). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27–28 (2007). However, such review "is 'not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence.'" In re Taylor, 158 N.J. at 657 (*emphasis added*).

An appellate court's role in reviewing a final agency action is limited to three inquiries: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (*quoting* In re Stallworth, 208 N.J. 182, 194 (2011)). The court only owes "substantial deference to the agency's expertise and superior knowledge of a

particular field" if the agency's decision passes this analysis. In re Herrmann, 192 N.J. at 28.

The Court is, however, "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).[5] The Courts "will intercede if the agency's action exceeds the bounds of its discretion." In re Taylor, 158 N.J. at 657; see also, L.M. v. State Div. of Med. Assistance and Health Servs., 140 N.J. 480, 490 (1995) ("When an agency's decision is manifestly mistaken . . . the interests of justice authorize a reviewing court to shed its traditional deference to agency decisions.").

Indeed, "[i]f the act of an administrative agency is found to be so 'clearly against the logic and effect' of the facts as to demonstrate that it is 'unreasonable, arbitrary or capricious,' [the court's] duty is to reverse that action." Elizabeth Lodge No. 289 v. Legalized Games of Chance Control Commission, 67 N.J. Super. 239, 246 (App. Div. 1961). "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances." Bayshore

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[5] It is noteworthy that in the recent matter of Loper Bright Enters. V. Raimondo, No. 22-451, 2023 U.S. LEXIS 1847 (May 1, 2023), the United States Supreme Court expressly reversed its ruling in Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), providing for deference to an agency's interpretation of a statute.

Sewage Co. v. Dep't. of Env. Prot., 122 N.J. Super. 184, 189 (Ch. Div. 1973), *aff'd*, 131 N.J. Super. 37 (App. Div. 1974).

In the present matter, the CRDA's actions in denying the Application were arbitrary, capricious, and unreasonable. The Board acted contrary to established law in denying Appellant's Application for a permitted use. The Appellant also demonstrated that it was entitled to the bulk variance relief requested as part of its Application. The record below does not support the CRDA's so-called findings that would otherwise justify the CRDA's ruling and therefore, must be reversed.

IV. ARGUMENT

A. The CRDA Unreasonably Denied the Application to Develop the Property with a Permitted Use (T1/25:16-26:6; 27:2-28:13; 200:7-16, 201:13-15; T2/71:15; Aa246).

The record is replete with confirmation that the proposed use is a permitted one. The hearing officer confirmed, "The City of Atlantic City opted into the cannabis, recreational cannabis and medical cannabis in the city. They passed a redevelopment area that permits it in this Green Redevelopment Area, Redevelopment Zone. We certainly supported that because it was statewide. This is something that is supposed to enhance the rehabilitation of properties in the city. That is a goal of the Green Zone Redevelopment Plan." (T1/200:7-16).

Where a use is expressly permitted by ordinance, a planning board must approve a conforming application. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 229 (1994). Generally, "[a] planning board's role in considering a site plan application is circumscribed. The object of site plan review is to assure compliance with the standards under the municipality's site plan and land use ordinances. Generally, the Board concerns itself with on-site conditions." Shim v. Wash. Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997); see also, Meridian Quality Care, Inc. v. Bd. of Adjustment of The Tp. of Wall, 355 N.J. Super. 328, 344 (App. Div. 2002); Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 581 (App. Div. 2002); W.L. Goodfellows & Co. of Turnersville, Inc. v. Wash. Tp. Planning Bd., 345 N.J. Super. 109, 116 (App. Div. 2001).

While "site plan review affords a planning board wide discretion to [as]sure compliance with the objectives and requirements of the site plan ordinance, 'it was never intended to include the legislative or quasi-judicial power to prohibit a permitted use.'" PRB Enters., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 7 (1987) (*citing* Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 268 (Super. Ct. 1978)). Rather, the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., ("MLUL") makes abundantly clear that "[t]he planning board shall, if the proposed development complies with the

ordinance and this act, grant … site plan approval." N.J.S.A. 40:55D-46(b) (*emphasis added*).

As the Supreme Court has noted, the use of the word "shall" in the statute is telling; it limits a planning board's authority in reviewing an application for site plan approval to determining whether or not the development conforms with the zoning ordinance and the applicable provisions of the site plan ordinance. Pizzo Mantin Grp. v. Twp. of Randolph, 137 N.J. 216, 226-229. The Court elaborated that:

> [t]he MLUL evinces a legislative design to require consistency, uniformity, and predictability in the subdivision-approval process. The legislative scheme contemplates that a planning board's review of a subdivision proposal, including the layout of the entire design, must be made within the framework of the standards prescribed by the subdivision and, if pertinent, the zoning ordinances.
>
> Because a municipality must exercise its zoning and subdivision powers by enacting ordinances, the conclusion follows that the municipality may not exercise such powers based directly on the general statutory purposes of the MLUL. Municipalities may effectuate those statutory purposes only by incorporating them as standards in duly-enacted zoning and subdivision ordinances.
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> The mandate under N.J.S.A. 40:55D-48 that on compliance with the subdivision ordinance and the MLUL the application "shall" be approved supports such a conclusion.

[Id. at 229 (*emphasis in original*)].

While Pizzo Mantin dealt with a subdivision rather than a site plan, the two are very closely related. In fact, the language of N.J.S.A. 40:55D-48 is virtually identical to N.J.S.A. 40:55D-46. Per the former, "[t]he planning board shall, if the proposed subdivision complies with the ordinance and this act, grant preliminary approval to the subdivision" (*emphasis added*); and per the latter, ""[t]he planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval." (*Emphasis added*); see also, Cox & Koenig, New Jersey Zoning and Land Use Administration, (GANN 2024), at § 23-5, p. 319 (noting that court decisions interpreting the statutes relating to subdivision approvals are also generally applicable to site plan approvals).

As further stated in the Cox treatise, "since the use is, when a site plan is being considered by a planning board, always a permitted use, in most cases the board must grant site plan approval and, where appropriate, waivers and exceptions from ordinance provisions." Cox & Koenig, at § 23-10, p. 335 (*emphasis added*). A denial of a permitted use, then, would "be a drastic action and one which would have to find authorization in the statute." Id.; see also, Shim, 298 N.J. Super. at 411.

In the matter at bar, Appellant's proposed use is a permitted use in the CBD Zone and should have been approved. In denying the Application, the CRDA acted contrary to established law.

1. The Proposed Development Did Not Require a Loading Zone. (T1/70:16-71:7).

In ignoring the fact that the Applicant's proposed development is a permitted use, the CRDA instead focused on whether the Property had an adequate loading zone, even though one is not required by the Land Development Rules for a building of this Property's size. See N.J.A.C. 19:66-5.8(c); (T1/70:16-71:7). There is also no such requirement in the Adult Use Cannabis Rules. See N.J.A.C. 17:30-14.

Recognizing that the issue of loading was quickly becoming a red herring, even though the Property could have sought access to an existing loading space on Michigan Avenue, the Applicant was willing to revise its proposal and provide for a loading zone on the Property. (T1/51:6-22; T2/25:4-24; 41:15-44:11). The Applicant provided testimony that deliveries would be occurring similar to how other businesses address deliveries in that vicinity, and would occur less frequently and in a much smaller vehicle from the prior restaurant use, thereby reducing the intensity and frequency of deliveries. (T2:51:16-24; 53:10; 68:8-14).

In addition to the typical security protocols in place for retail cannabis facilities, the Applicant also offered to make security personnel available during loading – which would occur either before or after the retail store was open for business – to ensure the security of the Property, the product and that there would be no conflict with pedestrian or vehicular traffic in or around the Property. (T1/110:3-18; T2/69:16-70:4; 70:21-71:2). As Mr. Sciullo testified, "[t]his is safe. It's beyond what the regs required. They're doing more from a security perspective than what every agency requires...." (T2/72:4-7).

In the Hearing Officer's Report and Recommendations to the CRDA, dated November 9, 2023, Mr. Landgraf recognizes that the "Land Development Rules do not require a loading space for commercial uses less than 10,000 square feet and the Green Zone Redevelopment Plan does not address loading spaces." Nonetheless, in recommending denial of the Application, the hearing officer expressly relied on an alleged, unpromulgated "established practice" that the CRDA has of "reviewing loading operations for all cannabis operations within the Tourism District" even though there is nothing in the rules to require they do so. (Aa234). If "heightened scrutiny" of cannabis operations was warranted and the CRDA intended that to be the standard, the CRDA should have amended its Land Development Rules in the

manner required under the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"). CRDA failed to do so, yet applied an unwritten rule here.

The APA defines an "administrative rule" or "rule" as an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2. "A State agency shall follow the administrative rule-making requirements set forth in the [APA], and shall only implement rules that have been adopted in accordance with those rule-making requirements." N.J.S.A. 52:14B-3a(a).

Moreover, "[n]o State agency shall utilize regulatory guidance documents that have not been adopted as rules in accordance with [the APA] unless the agency makes such documents readily available to the regulated community through appropriate means, including but not limited to posting in a prominent place on the website for the agency." N.J.S.A. 52:14B-3a(b). "A regulatory guidance document that has not been adopted as a rule pursuant to [the APA], shall not: (1) impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain; or (2) be used by the State agency as a substitute for the State or federal law or rule for enforcement purposes." N.J.S.A. 52:14B-3a(c)(*emphasis added*). "Regulatory guidance document" is

defined to mean "any policy memorandum or other similar document used by a State agency to provide technical or regulatory assistance or direction to the regulated community to facilitate compliance with a State or federal law or a rule adopted pursuant to [the APA]." N.J.S.A. 52:14B-3a(d).

The New Jersey Supreme Court has recognized that "[i]t is particularly appropriate that parties affected by the proposed agency action have the opportunity to participate in the process leading to the agency determination." Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 330 (1984), *citing* Bergen County Pines Hosp. v. Dept. of Human Servs., 96 N.J. 456 (1984); see also Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 854 (E.D. Va. 1980)(stating that "[W]ithout published rules of procedure and substantive criteria for [the taking of the proposed action], affected parties] have been denied any meaningful opportunity for informal response to the proposed action"). "When an agency's determination alters the *status quo*, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination." Metromedia, 97 N.J. 330 (*citations omitted*).

It is clear through the hearing officer's report that an unwritten rule here was applied in effecting denial of the Application. (Aa228). As a land use

agency subject to the APA, the CRDA cannot hold the Applicant to an unpublished standard, and in the same vein, the agency cannot utilize unadopted rules to deny an application for an otherwise permitted use.

2. The Board Cannot Rely on Off-Site Conditions as a Basis for Its Denial of the Application. (Aa234).

Significantly, while attempting to focus the denial on the issue of ingress and egress, the Hearing Officer "takes notice" of traffic conditions around the Property, claiming in his Report and Recommendations that these off-site traffic conditions will affect the proposed operations at the Property and result in unsafe ingress and egress therefrom. (Aa234). Such a conclusion, however, is neither permitted by law, nor supported by the record.

Case law in New Jersey is clear that a planning board has no authority to deny an application for a permitted use based on existing off-site traffic conditions. PRB Enterprises, Inc. v. South Brunswick, 105 N.J. 1, 3 (1987); Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 268 (App. Div. 1978); Dunkin' Donuts of N.J., Inc. v. N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984); Tennis Club Assocs. v. Planning Bd. of Tp. of Teaneck, 262 N.J. Super. 422 (App. Div. 1993). A planning board may consider off-site traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site; however, the "authority to prohibit or limit uses generating traffic into already congested streets…is an exercise of the

zoning power vested in the municipal governing body." Dunkin' Donuts v. North Brunswick, 193 N.J. Super. 513 (App. Div. 1984).

The CRDA hearing officer relied heavily on the Law Division opinion in the matter of Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257 (Law Div. 1978). In that matter, the court found that "defendant planning board had no power to deny defendant's application for site plan approval because of off-site traffic conditions unless it had found that the proposed means of ingress and egress created vehicular traffic problems." Id. at 269. (*Emphasis added*). For reasons unclear from the record, the hearing officer attempted to frame the denial recommendation here on the premise that ingress and egress to the site was "unsafe and inefficient." However, that analysis was offered only in regard to the loading area, which was not a required element of the site plan under the zoning standards.

Further, the hearing officer's analysis disregards that the majority of access to the site was by means of walking to the property from nearby parking areas, as to which there was no finding whatsoever relating to allegedly unsafe ingress and egress. The hearing officer's opinion that ingress and egress to the site was somehow unsafe and inefficient therefore has no basis in either the factual record or the controlling law.

The Lionel's Appliance decision is otherwise emphatic about the inability of the board to deny a site plan application for a permitted use based on existing off-site traffic. In that matter, the court encountered a similar situation wherein the objector "plaintiffs attempted to persuade defendant board to deny the site plan application because of the traffic problems allegedly existing at the intersection where the proposed uses [we]re to be constructed." 156 N.J. Super. at 262. The court upheld the board's approval of the site plan, stating:

> If a site plan is to significantly affect an off-site condition such as traffic, the governing body by ordinance and planning board in its site plan review may require contribution from the developer for the widening of the streets as a result of the additional traffic created by the development. In light, however, of the historical limitations of site plan review, it is improper to construe those provisions to mean that the planning board can deny a site plan because of an existing off-site condition at or near the site in question. In its review function the planning board may require the planner to contribute for off-site costs for improvements. In this case it made no such determination.

[Id. at 268 (*emphasis added*)].

In the matter at bar, the Applicant provided expert testimony from a traffic engineering expert, who evaluated current traffic patterns and any potential impacts from or upon the proposed development. Mr. Taylor concluded:

> ...we've reviewed this project from a purely traffic impact and the amount of traffic to be generated by the project is insignificant when compared to state and national standards. We've looked at the interaction with the existing pedestrians that are out there just to make sure there won't be any safety concern and based upon the volume that we are generating, and even the volume of the adjacent driveway...there isn't any negative interaction so I don't see a safety concern in that. The design that we proposed for the loading zone will provide safe and efficient access for that loading and delivery vehicle.

(T2/25:25-26:14). The CRDA made no findings that the testimony presented by Mr. Taylor (or any of the Applicant's witnesses) was not credible or that it chose to accept one expert witness' testimony over another. See Klug v. Bridgewater Twp. Planning Bd., 407 N.J. Super. 1, 13 (App. Div. 2009) (noting that if the testimony of different experts conflicts, it is within the Board's discretion to decide which expert's testimony it will accept). Had the CRDA made such findings, nonetheless, the correct remedy would have been to place conditions on the proposed use or require a contribution to help ameliorate any potential impact to the area. The Board did neither.

Instead, the CRDA improperly diverted its attention to the loading zone at the Property and how deliveries of product would occur.[6] In response,

[6] A review of the transcripts confirms how often the word "loading" is mentioned, in comparison to either "ingress" or "egress". (T1/226, 235, 239; T2/186, 192, 195-196).

Tambre presented several witnesses who testified regarding logistics and frequency of deliveries to the Property, which were entirely consistent with the operations of other businesses in the area and appropriate to an urban environment. (T2/40:9-11; 42:13-17; 43:8-17). In fact, the Applicant proposed to hire additional security personnel to assist with deliveries and ensuring a smooth flow of traffic in and out of the Property, as needed. (T2/69:21-70:2).

On the other hand, AtlantiCare contended that due to the location of its driveways, not the Property's, and the use of the public street by ambulances, they believed they would "run into a conflict with [the proposed] facility."[7] (T1/133:3-7). Mr. Levinson further expressed concern that the retail customers might use one of the four (4) parking spaces available near the hospital entrance. (T1/137:2-4). He also referred to bus traffic, stating, "there's a lot of traffic on Atlantic Avenue, you know." (T1/138:5-6). Mr. Levinson acknowledged that he would have the same concerns for any retail or restaurant use (e.g., Starbucks, 7-11) at the Property. (T1/142:12-143:5).

AtlantiCare also presented expert witnesses with conflicting opinions. Mr. Scheidegg admitted that the Applicant's proposed plan for loading may

[7] Notably, Mr. Levinson also confirmed that AtlantiCare never appeared at any public hearings or noted its objection to the Property being included within the Green Zone Redevelopment Area, which expressly permits retail cannabis facilities. (T1/151:5-155:25).

have been "inconvenient" or simply "not easy to get in and out of there," while not opining it was unsafe, whereas Mr. Shropshire stated that he thought the loading zone would be unsafe. (T2/135:10-13; 153:9-154:11). Notwithstanding conflicting opinions on this issue, and the lack of any findings that any of Tambre's witness were not credible, the CRDA simply leaped to an errant, sweeping and unsound conclusion that ingress and egress to and from the Property, overall, was unsafe.

3. The Shape and Configuration of the Property, Along with the Pre-Existing, Non-Conforming Lack of Parking at the Property, Justified the Bulk Variance Relief Sought. (T1/69:14-23, 77:14-19).

As part of the Application, the Applicant sought variance relief pursuant to N.J.S.A. 40:55D-70(c) regarding the number of parking spaces required. Based on the pre-existing, non-conforming conditions at the Property, the Applicant presented testimony that a "(c)(1) variance" would be appropriate.

The core question presented by an application for a (c)(1) variance is whether the Applicant can show peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the Applicant arising out of: exceptional narrowness, shallowness or shape of a specific piece of property; exceptional topographic conditions or physical features uniquely affecting a specific piece of property; or an extraordinary and exceptional situation

uniquely affecting a specific piece of property or the structures lawfully existing thereon. Cox & Koenig, § 29-2.2 at p. 424; N.J.S.A. 40:55D-70(c)(1).

Undue hardship refers solely to the particular physical conditions of the property as those are described in subsection (c)(1) of the statute. Lang v. Zoning Bd. of Adjustment of Borough of North Caldwell, 160 N.J. 41, 56 (1999). It does not refer to personal hardship, financial or otherwise. See Smith v. Fair Haven Zoning Bd., 335 N.J. Super. 111, 122 (App. Div. 2000). A (c)(1) variance "requires proof of the 'positive criteria,' which are predicated on 'exceptional and undue hardship' because of exceptional shape and size of the lot." Lang, 160 N.J. at 55, *quoting* Bressman v. Gash, 131 N.J. 517, 522-23 (1993).

An applicant for a (c)(1) variance must also satisfy the negative criteria, which requires a showing that the variance can be granted without substantial detriment to the public good and the variance will not substantially impair the intent and the purpose of the zone plan and zoning ordinances. N.J.S.A. 40:55D-70; see also, Lang, 160 N.J. at 57.

It must also be noted that the Land Development Rules provide that "Any nonconforming use or structure existing as of January 2, 2018, may be continued upon the lot or in the structure so occupied," N.J.A.C. 19:66-12.1. This directly correlates to the MLUL on non-conforming conditions: "Any

nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied." N.J.S.A. 40:55D-68. Case law further confirms that where "property had been used for a particular business purpose for many years prior to the passage of the ordinance, and during this period of time the premises had no off-street parking facility... the continued utilization of the property in this fashion -- without off-street parking facilities – [is] legally protected..." as a pre-existing non-conformity. Dresner v. Carrara, 69 N.J. 237, 240 (1976).

As Mr. Sciullo testified, the pre-existing nonconformities of the Property "are all a product of the existing conditions.... They are a hardship to modify, which is classic (c)(1) criteria because the – there's no land available to make it compliant." (T1/69:14-23). He further states, "We didn't create [the nonconforming conditions]. We're not worsening them. It would be a hardship to change them. It's a unique circumstance of this lot in this existing building which we understand has been here since 1910 or so." (T1/77:14-19). The former restaurant owner/operator confirmed they had engaged in discussions with AtlantiCare about selling the Property to them; however, AtlantiCare was not interested. (T2/9:13-19). The Applicant also had obtained the City's support and approval for the Project, entering into an

Agreement of Sale for the Property based on its existing zoning. (T1/23:9-28:13).

In addressing the Property's parking limitations, Mr. Sciullo also explained that the Applicant's proposed change in use would result in less of a parking demand as compared with when the restaurant operated at the Property, which did not previously meet the ordinance requirements. (T1/56:1-57:6). Sciullo opined that the reduction in demand is, in fact, a positive impact according to the Land Development Rules. (T1/78:2-7). Given the existing property configuration and nonconformities, Mr. Sciullo also explained that the Property's proximity to a pay to park garage (a unique feature in the City) and nearby street parking would provide more than enough parking for the proposed use, and would in fact, be similar to what persons visiting the hospital next door did. (T1/57:6-13; 58:7-15). Even Mr. Nasser, who testified on behalf of AtlantiCare admitted that due to the size of the existing building and the shape of the property itself, there was no place for on-site parking. (T1/177:1-16); see also, N.J.A.C. 19:66-7.2(e) (permitting shared parking arrangements in the Tourism District).

With no on-site parking, ingress and egress to the Property would be primarily by way of pedestrian access, plus deliveries that would occur no more than once per day and either before or after business hours. (T2/19:13-

17; 35:4-6). Moreover, security personnel would be on-site to facilitate not only those deliveries, but to direct customers to where parking is available off-site, thereby further limiting frequency of visits to the Property by vehicle. (T1/63:25-64:5; 65:10-15; 207:6-13).

Resultantly, in reference to the negative criteria, the recognition that the use was permitted, and taking place at a location with a pre-existing, non-conforming lack of on-site parking, with limited vehicular deliveries, demonstrated a lack of any substantial detriment to the public good, and a lack of any significant detriment to the zone plan.

The record demonstrates that Tambre satisfied its burden of proving both the positive and negative criteria. By contrast, the CRDA's alleged concerns over ingress and egress are simply not supported by the record.

B. The Resolution Sets Forth Hollow Conclusions That Are Unsupported by the Record and Should Be Rejected (Aa236).

The Resolution adopted by the CRDA fails to set forth the Board's true reasoning for the denial of the Application, or rather, the lack thereof. Findings set forth in a resolution "cannot consist of a mere recital of testimony or conclusory statements couched in statutory language." New York SMSA v. Bd. of Adjustment of Tp. of Weehawken, 370 N.J. Super. 319, 332-333 (App. Div. 2004), *citing* Harrington Glen, Inc. v. Bd. of Adjustment of Leonia, 52 N.J. 22, 28 (1968); Loscalzo v. Pini, 228 N.J. Super. 291, 305 (App. Div.

1988), *certif. denied*, 118 N.J. 216 (1989). Instead, "the resolution must contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the applicant's variance request in accordance with the statute and in light of the municipality's master plan and zoning ordinances." Id. at 333, *citing* Medici v. BPR Co., 107 N.J. 1, 23 (1987). If the resolution is lacking these elements, "the reviewing court has no way of knowing the basis for the board's decision." Id., *citing* Morris Cty. Fair Hous. Council v. Boonton Tp., 228 N.J. Super. 635, 646 (Law Div.1988).

Here, the CRDA Board members made no findings and failed to explain any reasons for their decision on the record contemporaneously with their decision, except by referring to the Hearing Officer's Report and Recommendations, which itself is devoid of the required findings and instead, relies upon vague overgeneralizations. More than six (6) of the Report's eight (8) pages contains nothing more than a summary of the Application and the testimony presented at both public hearings – which, despite being entitled "Findings of Fact" – contain none. See, Loscalzo, 228 N.J. Super. at 305; Cox & Koenig, at § 19-7.2, p. 300 (mere recitals of testimony are not "findings"). These deficiencies certainly do not "reflect the deliberative and specific findings of fact necessary to support the board's conclusions that the statutory requirements for relief are or were not met. [Citations omitted]." Lincoln

Heights v. Cranford Planning Bd., 314 N.J. Super. 366, 386 (Law Div. 1998), *aff'd o.b.*, 321 N.J. Super. 355 (App. Div.), *certif. den.*, 162 N.J. 131 (1999).

Moreover, the Report's "Conclusions of Law" failed to address any actual legal arguments, including whether the Applicant met its burden of proof regarding the requested (c)(1) variance. Instead, the Hearing Officer referenced the Board's "established practices" of reviewing loading operations for all cannabis operations within the Tourism District, and the need for "heightened scrutiny," yet how those practices and standards came to be are unknown and therefore, could never be met. (Aa234). As noted herein, this is contrary to both the Land Development Rules and the APA.

The Board also claims in the Resolution that no reasonable condition could be imposed on the Appellant to sufficiently mitigate proposed loading procedures, which occur at other businesses throughout the City on a daily basis, yet the record contains evidence of numerous conditions that the Appellant was willing to self-impose, none of which were adequately considered by either the hearing officer or the Board. (See, e.g., T2/69:21-70:2). Not to mention, whether the proposed loading zone is "practical" or "convenient" is of no moment, because it is not a requirement. (Aa14).

It is evident that the Board merely rubber-stamped the Hearing Officer's deficient Report and Recommendations. Resultantly, this Court should find

that CRDA acted in an arbitrary, capricious, and unreasonable manner and contrary to law in denying the Application, and that decision should be reversed.

V. CONCLUSION

Because the Board improperly disregarded its obligation to approve an application for a permitted use needing only reasonable and justified variance relief, and because the Board improperly considered off-site traffic conditions in denying the Application, the CRDA's denial is contrary to the MLUL and the Board's Land Development Rules, and the denial should be reversed.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: August 16, 2024

By: _____
Robert S. Baranowski, Jr.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

In the Matter of the Application of Tambre, LLC to the Casino Reinvestment Development Authority for Minor Site Plan Approval with Variances Pursuant to N.J.S.A. 40:55D-70(c) to Permit the Operation of a Class 5 Dispensary for the Sale of Adult Use Recreational Cannabis at the Subject Property Located at 1926 Atlantic Avenue, Block 158, Lot 3.01, in the City of Atlantic City, Application #2023-05-3453	Docket No.: A-002596-23T2 Civil Action On Appeal from the Casino Reinvestment Development Authority, Resolution No. 24-23 dated March 19, 2024

BRIEF AND APPENDIX OF RESPONDENT CASINO REINVESTMENT DEVELOPMENT AUTHORITY

RIKER DANZIG LLP
Stuart M. Lederman, Esq. (Bar No. 029541985)
Diane N. Hickey, Esq. (Bar. No. 015652009)
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(973) 538-0800
slederman@riker.com
dhickey@riker.com

Attorneys for Respondent,
Casino Reinvestment Development Authority

Dated: October 17, 2024

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PRELIMINARY STATEMENT

Pursuant to the Tourism District Act, P.L. 2011, c. 18 (N.J.S.A. 5:12-218 et seq.), Respondent Casino Reinvestment Development Authority is charged with jurisdiction over land use and planning within the established boundaries of the Tourism District in Atlantic City. At issue in this appeal is the Authority's denial of the development application filed by Appellant Tambre, LLC for a retail cannabis dispensary proposed to be located in the Tourism District.

Based on the testimony and evidence presented over the course of two hearings on Appellant's application, and for the reasons set forth in the Hearing Officer's Report and Recommendation, the Authority properly denied Appellant's application based on legitimate safety considerations. Specifically, the Authority determined that the unconventional "backing maneuver" proposed by Appellant from a live lane of traffic along Atlantic Avenue to access the site was unsafe and inefficient. The Authority further found that the proposed loading area's location and dimensions were not practical or convenient.

While Appellant argues that the Authority was constrained to approve Appellant's application because its proposed cannabis dispensary is a permitted use, the Authority had the discretion to factor on-site access and circulation considerations into its decision-making denying Appellant's application. Considering the record as a whole, and in light of the Authority's unique

knowledge and understanding of local conditions, the Authority's decision is entitled to deference and should be affirmed.

COUNTER STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The Casino Reinvestment Development Authority ("CRDA" or the "Authority") offers the following to supplement the Statement of Facts and Procedural History set forth in Appellant Tambre, LLC's ("Appellant") Brief to focus the Court on the specific considerations underlying the Authority's denial of Appellant's application.

At hearing, the Hearing Officer and CRDA professionals raised legitimate concerns regarding the loading and unloading of cannabis product and cash having an adverse impact on on-site considerations. These concerns were shared by an adjacent property owner AtlantiCare Health Systems ("AtlantiCare"), a regional medical center. While a loading space is not required for Appellant's intended use, the Authority nonetheless appropriately reviewed Appellant's proposed loading operations and determined that Appellant's application created an unsafe and inefficient condition related to on-site access and circulation and the potential for vehicular and pedestrian safety hazards. (Aa236-45).[2]

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[1] The Counter Statement of Facts and Procedural History are inextricably related and have been combined to avoid repetition for the Court's convenience.

[2] "Aa" refers to the Appellant's appendix; "Ab" refers to Appellant's brief. "T1" and "T2" refer to the transcripts of the July 6, 2023 and October 5, 2023 hearing, respectively.

Appellant proposed not one, not two, but **three** different plans for loading and unloading. Each of these proposals were rejected in turn. At the July 6, 2023 hearing on the application, Appellant initially proposed that any loading and unloading occur via a driveway off Michigan Avenue at the rear of a building adjacent to the subject property (Building 700 of the Tanger Walk). (T1/31:19-34:8). In response to questioning, however, Appellant acknowledged that it did not own or control this area and thus the proposed loading area could not be used for this purpose. (T1/33:8-16; T1/90:13-91:22; T2/44:17-45:4).[3] Next, Appellant proposed that loading and unloading could be accomplished from a remote loading space along Michigan Avenue by traversing a public sidewalk. (T1/34:9-25). In response, the Hearing Officer raised concerns regarding this operation and advised that loading and unloading had not been permitted from the public right-of-way in any other cannabis application.[4] (T1/34:19-25 ("You can't just pull to the side of the street and unload cannabis"); T2/47:8-16). Through counsel and expert testimony, AtlantiCare raised specific safety

[3] A representative of the adjacent property owner also spoke during public comment and offered that the adjacent property owner would not grant Appellant access to its property for loading and unloading purposes. (T2/166:17-167:4).

[4] In addition to concerns regarding public safety, the Authority's position regarding remote loading from the public right-of-way is consistent with its land use regulations which require that loading "shall be located off-street and on the same lot occupied by the use served." N.J.A.C. 19:66-7.3(a)(2).

concerns regarding loading and unloading of cannabis product and cash from the public right-of-way along Michigan Avenue, over 200 feet away, around the corner and with no direct line of sight to the subject property. (T1/120:11-121:6; 165:19-21).[5] In response, Appellant's security expert conceded that the security plan for utilization of this remote loading and unloading within the public right-of-way were "not fully defined." (T1/121:7-8).

Following the conclusion of the July 6, 2023 hearing, CRDA counsel advised Appellant that the Hearing Officer "has determined that the Applicant did not present sufficient evidence on the loading and unloading of cannabis product or cash at the hearing to support a recommendation to the Authority that the application be approved" and invited the Appellant to reopen the hearing and present additional evidence on these issues. (Aa182-83).

Thereafter, at a second hearing on the application held on October 5, 2023, Appellant proposed to utilize a driveway off Atlantic Avenue to access a loading area at the northeast corner of the subject property. (See T2/25:4-24).[6] Under

[5] While Appellant suggested that the prior restaurant use on the subject property may have employed similar methods for loading and unloading, Appellant acknowledged that these arrangements were not legal, (T1/50:20), and were not "the right way to do it." (T1/51:5-6).

[6] Under this scenario, Appellant left open the possibility that non-cannabis product deliveries would occur from the remote parking space on Michigan Avenue. (T2/98:1-6; 98:20-24).

this alternative, a vehicle traveling eastbound on Atlantic Avenue would pause within a live travel lane adjacent to the driveway and back reverse into the driveway to access the loading area located within the subject property. Id. In making this movement, a vehicle would cross the public sidewalk along Atlantic Avenue and pull into the loading area which then dead ends on the site. Id. In order to appreciate the Authority's concerns with Appellant's application, a picture is worth a thousand words. The site plan submitted with Appellant's application depicts the driveway off Atlantic Avenue and proposed loading area and illustrates the unconventional nature of Appellant's backing maneuver into the site. (See Aa197).

In discussing this alternative, AtlantiCare's counsel questioned whether a vehicle accessing this driveway could safely reverse into the driveway from a live lane of traffic along Atlantic Avenue. (See T2/37:15-22). AtlantiCare's traffic engineer echoed this concern and opined "a backing maneuver from a live lane would not be considered safe." (See generally T2/149:3-150:2; 150:1-2).

While Appellant's engineer argued that the backing maneuver was safe and pointed to several examples of existing loading zones in the area that are backed into, under cross-examination, he acknowledged that these pre-existing conditions likely would not be approved today. (T2/82:11-15; 86:4-11; 150:21-151:13).

The Hearing Officer also raised concerns regarding a vehicle mistakenly turning into the site via the driveway and then being unable to circulate the site. (T2/29:15-20). AtlantiCare's traffic engineer further noted that, under that scenario, the only option would be for that vehicle to back out into live traffic on Atlantic Avenue. (T2/157:14-21).

Finally, AtlantiCare's expert raised concerns that the proposed loading area may be too narrow for a loading van. (See generally T2/126:10-130:16). The Hearing Officer shared these concerns. (T2/130:5-6). Specifically, it was noted that the proposed loading area would be 8 feet, 11 inches wide and would allow for only "4 inches of clearance on either side of the mirrors when you're trying to back off Atlantic Avenue, across the sidewalk and into this confined area, about 4 inches on either side." (T2/126:10-18).

Based on the totality of the testimony and evidence presented over the course of the two public hearings on the application, the Hearing Officer's Report and Recommendation (the "Hearing Officer Report") recommended denial of Appellant's application reasoning:

> The proposed "backing maneuver" from a live lane of traffic along Atlantic Avenue is unsafe and inefficient. It will interfere with vehicular and pedestrian traffic along Atlantic Avenue in a manner than cannot be mitigated by any reasonable condition. In addition, the dimensions of the proposed loading zone do not provide a practical or convenient opportunity for the loading and unloading of product and cash, and loading will most likely occur from the traveled lane along Atlantic Avenue. (Aa245).

By Resolution 24-33, the Authority adopted the findings, conclusions and recommendations of the Hearing Officer, and based on the record in this matter, denied Appellant's application. (Aa236-45).

ARGUMENT

I. THE AUTHORITY PROPERLY DENIED APPELLANT'S APPLICATION AND ITS DECISION IS ENTITLED DEFERENCE. (Aa236-45).

Appellate review of an administrative agency's determination is limited in scope. In re Herrmann, 192 N.J. 19, 27 (2007). A "strong presumption of reasonableness attaches" to the agency's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div. 2001) (quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)). The role of an appellate court is to determine whether the findings of the agency "could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). The burden of demonstrating that the agency's action is arbitrary, capricious, or unreasonable rests upon the party challenging it. See Barone v. Dep't of Human Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987).

A reviewing court "'may not substitute its own judgment for the agency's, even though the court might have reached a different result.'" In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). See also Brady v. Bd. of Review, 152 N.J. 197, 210 (1997) (quoting Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985) ("[T]he test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs.")).

Moreover, recognizing that the Authority acts similarly to a Planning Board in reviewing Appellant's application, is it well settled that "public bodies, because of their peculiar knowledge of local conditions [,] must be allowed wide latitude in the exercise of delegated discretion." Price v. Himeji, LLC, 214 N.J. 263, 285 (2013) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). Therefore, "[t]he proper scope of judicial review . . . is not to suggest a decision that may be better than the one made by the board, but to determine whether the board could reasonably have reached its decision." Davis Enters. v. Karpf, 105 N.J. 476, 485 (1987).

A. The Authority Properly Denied Appellant's Application Based On Valid On-Site Considerations. (AA236-45).

The gravamen of Appellant's appeal is that the Authority wrongly denied its application due to existing, off-site traffic impacts. (See, e.g., Ab29-34). This

assertion is factually and legally incorrect. As discussed further herein, in accordance with well-established precedent, the Authority properly denied Appellant's application finding that it would create an unsafe and inefficient condition related to on-site access and circulation and the potential for vehicular and pedestrian safety hazards. (See Aa236-45).

Importantly, Appellant fails to appreciate the nuance of this Court's decision in Dunkin' Donuts of N.J. Inc. v. Twp. of N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984). While Appellant is correct that a planning board may not consider off-site traffic conditions, it is well-established that "[a] planning board should consider off-site traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site." Dunkin' Donuts, 193 N.J. Super. at 515 (citing N.J.S.A. 40:55D-7 (definition of "site plan" includes "means of ingress and egress") and N.J.S.A. 40:55D-41(b) (authorizing municipalities to adopt site plan ordinances that include the "[s]afe and efficient vehicular and pedestrian circulation, parking and loading")). Indeed, it is well-settled that site plan review "typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking,

loading and unloading, lighting, screening and landscaping." Stop & Shop Supermarket Co. v. Bd. of Adj. of Springfield, 162 N.J. 418, 438-39 (2000).[7]

In addition, a planning board may deny a site plan application for a permitted use if the means of ingress and egress proposed create "an unsafe and inefficient vehicular circulation." Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 268-69 (Law. Div. 1978); see also Dunkin' Donuts, 193, N.J. Super. at 515 (approving of the Lionel analysis). This legal principle was more recently cited with approval in this Court's decision in Last Frontier v. Blairstown Twp. Zoning Bd. of Adj., No. A-5205-08 *12-14 (App. Div. May 24, 2010) (zoning board acted reasonably in denying plaintiff's application for a variance based on concerns about traffic safety for ingress and egress).[8]

Under these principles, the Authority properly exercised its discretion in evaluating the testimony and evidence presented over the course of the two public hearings on the Appellant's application. The Authority's denial was not

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[7] The loading area design standards under the Authority's regulations, N.J.A.C. 19:66-7.3, offer guidance to the Authority in undertaking its site plan review. Relevant here, where a loading area is proposed, the location of a proposed loading area should consider the "[s]afe and efficient layout" and "[p]edestrian and vehicular circulation." N.J.A.C. 19:66-7.3(a)(3)(i) and (iii). Additionally, "[a]ll entrances and exits to loading areas shall be located in a safe and convenient manner with minimal impact on traffic movement on the site and adjacent streets." Id. at (iv).

[8] Pursuant to R. 1:36-3, a copy of this Court's unpublished decision in Last Frontier v. Blairstown Twp. Zoning Bd. of Adj., No. A-5205-08 (App. Div. May 24, 2010) is included in Respondent's Appendix at Ra1-Ra7.

due to a general increase of traffic or traffic conditions on Atlantic Avenue, but the safety of the ingress and egress to the site. In reaching this conclusion, the Authority correctly considered Appellant's application in context with its location along Atlantic Avenue, a main thoroughfare, with "two traveled lanes in each direction at the site's frontage and is heavily congested with vehicular and pedestrian traffic associated with Tourism District and The Walk shopping plaza." (Aa244). Against this backdrop, and with CRDA's knowledge of local conditions, the Hearing Officer questioned whether a vehicle accessing the site could safely reverse into the driveway from a live lane of traffic along Atlantic Avenue. (T2/37:15-22). AtlantiCare's traffic engineer echoed this concern and opined "this backing maneuver from a live lane would not be considered safe." (T2/150:1-2). While Appellant's engineer attempted to defend the proposed access pointing to several examples of existing loading zones in the area that are backed into, Appellant acknowledged that many of these existing conditions were located on side streets with less traffic and would likely not be approved today. (T2/82:11-15; 86:4-11; 150:21-151:13).

In addition, the Hearing Officer raised concerns regarding a vehicle turning into the driveway and then being unable to circulate the site. (T2/29:15-20). AtlantiCare's traffic engineer opined that, under that scenario, the only option would be for that vehicle to back out into live traffic on Atlantic Avenue.

(T2/157:14-21). Finally, the Hearing Officer and AtlantiCare's traffic engineer raised similar questions regarding whether the proposed loading area was too narrow to permit access to the site for its intended purposes. (See generally T2/126:10-130:16). Appellant did not present credible evidence to refute these concerns. The unorthodox backing maneuver to access the site was determined to be inherently unsafe, and the Hearing Officer reasonably concluded that Appellant could not effectively mitigate the public safety concerns and adverse impacts presented by its application. (See Aa245).

The Authority's decision is entitled to deference and should be affirmed. Based on the totality of the testimony and evidence presented at hearing, the Authority's denial of Appellant's application based on legitimate on-site access and circulation considerations was in its discretion and supported by the record, and this Court must defer to its knowledge of the area and local conditions.

B. The Authority Was Not Required to Approve Appellant's Application. (Aa236-45).

Appellant also argues that CRDA was required to approve its application simply because its application presented a permitted use. (See Ab21-25). However,

> to require a planning board to approve an application merely because the lot conforms to bulk requirements would remove a board's discretion, turning it into a rubber stamp. The power of the planning board exists to protect and secure what is good for the public welfare.

Kaplan v. City of Linwood, 252 N.J. Super. 538, 545 (Law Div. 1991) (citing Hamlin v. Matarazzo, 120 N.J. Super. 164, 172 (Law Div. 1972). As noted, supra, the Authority appropriately considered how Appellant's application will more broadly impact safety considerations related to access to and from the site, not just the proposed loading area, and the record demonstrates that the Hearing Officer noted legitimate safety concerns regarding on-site access and circulation. In light of these concerns, CRDA may not simply rubberstamp Appellant's development application. Rather the Authority's decision to deny the Application is entitled to deference and should be affirmed.

C. CRDA Had the Authority to Review Appellant's Proposed Loading Operations Without Rulemaking. (Aa236-45).

Appellant's rulemaking argument is a red herring. (See Ab25-29). Appellant focuses on a single statement in the Hearing Officer's Report regarding the Authority's "established practice" of "reviewing loading operations for all cannabis operations within the Tourism District" (Aa244) and argues that the Authority was required to undertake rulemaking regarding loading. Appellant, however, ignores the fact that the Hearing Officer acknowledged that the Authority's land development regulations do not require a loading area for Appellant's application. Id. Accordingly, this appeal does not turn on whether a loading area was required, but instead on the Authority's

sound determination that Appellant's application created an unsafe and inefficient condition related to on-site access and circulation and the potential for vehicular and pedestrian safety hazards under Dunkin' Donuts and related case law. (Aa236-45). As discussed more fully supra, the Authority's consideration of these on-site impacts was in its discretion and its decision to deny Appellant's application based on these factors is well supported by the record.

II. CRDA DID NOT REACH THE QUESTION OF WHETHER APPELLANT JUSTIFIED ANY PARKING VARIANCE. (Aa236-45).

Because CRDA denied Appellant's application for the reasons set forth in the record, it ultimately did not reach the issue of whether Appellant justified any bulk variance relief for parking. If this Court were to reverse the Authority denial of Appellant's application for the reasons set forth in the Hearing Officer's Report, remand to the Authority on Appellant's requested variance relief would be appropriate. In re Vey, 124 N.J. 534, 544 (1991).

III. THE HEARING OFFICER'S REPORT AND RESOLUTION 24-23 ARE BASED ON SUFFICIENT EVIDENCE. (Aa236-45).

Appellant argues that the Hearing Officer Report and Resolution 24-23 do not set forth a sufficient basis for CRDA's decision denying Appellant's application. (See Ab32; Ab38-41). These arguments must fail.

Resolution 24-23 was the culmination of the hearing process required under Authority land use regulations. Consistent with N.J.A.C. 19:66-14.1(m), the Hearing Officer's Report articulated a written summary of findings and conclusions, which are grounded in the evidentiary record and based on his assessment of the credibility of competing expert testimony, and further recommended denial of Appellant's application to the Authority. Under Resolution 24-23, the Authority then adopted the findings, conclusions, and recommendations of the Hearing Officer as detailed in his report. Id.

The Authority's decision to adopt the Hearing Officer's Report is entitled to deference where, as here, the decision is amply supported by sufficient credible evidence in the record as a whole. See Stallworth, 208 N.J. at 194 (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980) ("Ordinarily, an appellate court will reverse the decision of the administrative agency only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole.")).

Further, in making this determination, it is well settled that the Authority "'has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal.'" Kramer, 45 N.J. at 288 (quoting Reinauer Realty Corp. v. Nucera, 59 N.J. Super. 189, 201 (App. Div.), certif. denied, 32 N.J. 347 (1960)). See also Logan v. Bd. of Review, 299 N.J.

Super. 346, 348 (App. Div. 1997) (recognizing that an appellate court must give due regard to an agency's credibility determinations).

Contrary to Appellant's contentions, the Hearing Officer considered the totality of the testimony and evidence presented at the two public hearings on the application and weighed the competing arguments made by the parties' expert witnesses. On balance, the Hearing Officer found Appellant's presentation to be unpersuasive. The record reveals that the Authority had good reason to question the expert testimony provided by Appellant. For example, the Authority's engineer questioned the traffic report offered by Appellant's traffic engineer stating:

> I just think it's a little misleading in your report on page 2 to say site generating traffic is -- it makes it look like we're just going to have two delivery vans visit the site and then there's not going to be any other traffic associated with the site, like the customers or the employees, etcetera. That's all. I don't know. I think it's hard to evaluate the level of service without including that data.

(T2/30:18-31:1). In addition, in attempting to justify its proposed loading operations, Appellant's engineer suggested that the prior restaurant use on the subject property may have employed similar methods for loading and unloading. (T1/50:11-51:6). However, on cross-examination, Appellant's engineer acknowledged that if the prior use had utilized similar methods to accomplish loading and unloading those arrangements were not legal, (T1/50:20), and were not "the right way to do it." (T1/51:5-6). Similarly, while Appellant's engineer

argued that the backing maneuver was safe relying on several examples of existing loading areas in the vicinity that are backed into, upon cross-examination, Appellant's engineer acknowledged that those operations would likely not be approved today. (T2/82:11-15; 86:4-11; 150:21-151:13).

While Appellant may disagree with the Authority's findings, mere disagreement, even if based on conflicting expert opinion, is insufficient to overcome the presumption of reasonableness afforded to the Authority's findings. Animal Protection League of N.J. v. N.J. Dept. of Envtl. Prot., 423 N.J. Super. 549, 562 (App. Div. 2011). Furthermore, to the extent Appellant asks this Court to weigh the testimony and evidence and arrive at a different result than the Authority, it is not for Appellants or this Court to second guess the Authority's decision.[9] As noted supra, appellate review of an agency decision is limited in scope and this Court "may not substitute its own judgment for the agency's, even though the court might have reached a different result." Stallworth, 208 N.J. at 194.

[9] Contrary to Plaintiff's assertion there is nothing "willful or unreasoning" about the Authority's decision. Bayshore Sewerage Co. v. Dept. of Envtl. Prot., 122 N.J. Super. 184, 199 (1973). Even this authority cited by Plaintiff recognizes that "[w]here is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Id.

In the event this Court finds for Appellant and reverses the Authority's denial of Appellant's application, the Authority submits that remand to the Authority would be appropriate. In re Vey, 124 N.J. at 544 ("When the absence of particular findings hinders or detracts from effective appellate review, the court may remand the matter to the agency for a clearer statement of findings and later reconsideration.")

CONCLUSION

For the foregoing reasons, the Authority's decision denying Appellant's application based on legitimate access and circulation considerations was within its discretion and amply supported by the record and, therefore, should be affirmed.

Respectfully submitted,

/s/ Stuart M. Lederman _____
Stuart M. Lederman

Dated: October 17, 2024

Hyland Levin Shapiro LLP
ATTORNEYS AT LAW

6000 Sagemore Drive, Suite 6301
Marlton, NJ 08053-3900
main 856.355.2900
fax 856.355.2901
www.hylandlevin.com

Robert S. Baranowski, Jr.
Direct 856.355.2955
baranowski@hylandlevin.com

November 12, 2024

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Hughes Justice Complex
Trenton, New Jersey 08625

Re: In the Matter of the Application of Tambre, LLC to the Casino Reinvestment Development Authority for Minor Site Plan Approval with Variances Pursuant to N.J.S.A. 40:55D-70(c) to Permit the Operation of a Class 5 Dispensary for the Sale of Adult Use Recreational Cannabis at the Subject Property Located at 1926 Atlantic Avenue, Block 158, Lot 3.01, in the City of Atlantic City, Application #2023-05-3453
DOCKET NO. A-002596-23T2

On Appeal from The Casino Reinvestment Development Authority, Land Use Regulation and Enforcement Division Resolution No. 24-23

Dear Mr. Orlando:

Pursuant to R. 2:6-5, please accept this letter brief on behalf of the Appellant Tambre, LLC ("Appellant" or "Tambre") in reply to the Respondent, Casino Reinvestment Development Authority's (the "Respondent" or "CRDA") response brief.

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I. PRELIMINARY STATEMENT

As a matter of law, an application for site plan approval of a permitted use, even one that requires reasonable variance relief, may not be denied based upon off-site traffic concerns. The decision to place the use in the subject location is one made by the governing body and rejection of the location due to traffic conditions is an inappropriate arrogation of the zoning power by a land use board. While the CRDA attempted to mask the improper denial of the application here based on purported concerns about ingress and egress to the site, these alleged concerns related only to a loading area, not the point of access for patrons, and the loading area at issue was both pre-existing and not specifically required for the proposed use.

Resultantly, the rationale advanced by CRDA for the denial is specious, and the Court should find that the CRDA acted in an arbitrary, capricious and unreasonable manner, and denial of Tambre's application should be reversed.

II. COUNTERSTATEMENT OF FACTS

The Appellant submits the following with respect to the Respondent's Counterstatement of Facts:[1]

(1) The CRDA acknowledges that a loading space is not required for Appellant's intended use. (Rb2).

(2) Notwithstanding the fact that a loading space is not required for Appellant's intended use, the CRDA's line of questioning at the Initial Hearing prompted the Appellant to appease the CRDA by proposing alternatives to how its product would be loaded and unloaded. (T2/50:1-23). Specifically, the Appellant amended the Application to create a loading space on the northeast corner of the Property along Atlantic Avenue, which would be gated to discourage customers looking for on-site parking and therefore limit the intensity of ingress and egress that might occur from the Property. (T2/18:3-14; T2/29:9-21). The Appellant also offered expert testimony confirming that it would have security officers assist with deliveries, by having that individual

[1] Respondents' brief is hereafter referred to as ("Rb"); Respondents' appendix is hereafter referred to as ("Ra"); and Appellant's Appendix is hereafter referred to as ("Aa").

stop pedestrians, and allow the delivery vehicle to turn into its driveway safely and efficiently. (T2/25:4-24, 69:19-70:4).

(3) Proposed deliveries to the Property would occur via small loading vehicles (e.g., vans) and would occur less frequently than other businesses that utilize the existing delivery corridor (i.e., two to three times per week, with a maximum of once per day, occurring before or after business hours), resulting in an improvement over existing conditions. (T2/18:14-19:17, 51:16-24, 52:25-53:13).

(4) The Property's current configuration, with numerous pre-existing conditions that do not meet current development standards, necessarily limits how invitees access the Property – including a need to possibly utilize a "back-in loading" procedure. (T1/69:10-70:10).

(5) A "back-in loading" procedure may be inconvenient, but inconvenience is not the standard by which the CRDA must make its decisions. (T2/86:8-14).

III. ARGUMENT

A. The CRDA's After-the-Fact Justification for Denying the Application is Unsupported by the Record Below. (T1/25:16-26:6; 27:2-28:13; 200:7-16, 201:13-15; T2/71:15; Aa246).

Our courts have determined that where a denial of a land use application is based on a recitation of "conclusionary" language that is not grounded in

evidence, vacating that decision is appropriate. See Griffin Const. Corp. v. Bd. of Adjust. of Teaneck, 85 N.J. Super. 472, 477 (App. Div.1964), *certif. den.*, 44 N.J. 408 (1965) (denial of variance not sustainable upon perfunctory finding, phrased in conclusionary language of statute that the applicant failed to satisfy its burden, unless grounded in evidence supportive of the substance of such conclusion). See also Pagano v. Zoning Bd. of Adjustment of Tp. Edison, 257 N.J. Super. 382, 392-393 (Law Div. 1992). Where, as here, the record does not support the findings and conclusions that are set forth in the agency's written decision, such decision is not entitled to deference, and should be reversed.

The CRDA seeks to rewrite history by asserting that its denial of the Application was based upon "legitimate safety considerations" when the record does not support this argument. (Rb1). The CRDA claims on appeal that a loading area, *which the Appellant is not required to account for as part of its site plan* was "unsafe" and "inefficient," despite ample support in the record to the contrary. (See, *e.g.*, T2/63:22-64:4, 68:7-68:25, 69:14-70:2, 86:8-87:14, 160:18-161:7). Even a witness testifying for a third party objector would not commit to giving an opinion that the proposed loading practices were unsafe: "[a]ll I'm saying is [the proposed loading zone is] inconvenient,

it's not easy to get in and out of there, or is it easy to unload, it's just a difficult practice." (T2/135:1-13).

The Resolution also states, contrary to the record, that "the Applicant failed to demonstrate that the means of ingress and egress to the site conforms to the site plan standards and technical requirements of the Tourism District Land Development Rules and the Green Zone Redevelopment Plan." (Aa245). This hollow and conclusionary assertion fails to specify what "standards" or "requirements" the Appellant's proposed means of ingress and egress failed to meet – precisely because the CRDA cannot point to any applicable standards or requirements in the Land Development Rules concerning ingress and egress that the Appellant failed to meet.

The Appellant recognizes that the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"), requires site plan ordinances to include standards and requirements relating to, among other things, "safe and efficient vehicular and pedestrian circulation, parking and loading." N.J.S.A. 40:55D-41. However, while the Land Development Rules, which are applicable here, contain design standards relating to parking lot and loading area design, and onsite parking and loading requirements, there are no specific standards or requirements that govern the CRDA's review of safe and efficient vehicular

and pedestrian circulation that Appellant failed to meet. See N.J.A.C. 19:66-5.8, -7.2, -7.3.

Regarding parking lot design, pedestrian circulation must be accounted for "between parking areas and the structures and uses served, and shall include methods to separate pedestrian and vehicular traffic." N.J.A.C. 19:66-7.2(a)(4). Further, "entrances and exits to parking areas shall be located in a safe and convenient manner with minimal impact on traffic movement on adjacent streets." N.J.A.C. 19:66-7.2(c)(2). These standards, however, do not reflect the factual circumstances in the present matter, because Appellant was not proposing to create any entrances or exits to parking areas.

At the subject property, there is no on-site parking due to pre-existing non-conforming conditions, so there could not and cannot be any contention that the Application did not present a means of safe ingress and egress from the site, since there is no new proposed entrance or exit. An objector's planner/engineer acknowledged that due to the existing configuration of the Property, it is undersized and cannot accommodate any on-site parking. (T1/177:1-16). A CRDA official, Robert Reid, offered further clarification that there were no bulk and area requirements in the regulations until 1979, and because the building was constructed before 1929, it was not required to have parking. (T1/7817-79:9). Where there is no on-site parking, the design

standards for ingress and egress are of no moment, as customers would not be entering or exiting the property through vehicular means. (T1/69:10-70:10, 76:7-78:7). Thus, any safety concerns over ingress and egress expressed by CRDA as a reason for the denial is readily exposed as pretextual.

Due to the size of the building, there are also no loading area requirements for the subject property. N.J.A.C. 19:66-5.8(c). As confirmed by the Hearing Officer, "the [CRDA's] Tourism District Land Development Rules do not require a loading space for commercial uses less than 10,000 square feet and the Green Zone Redevelopment Plan does not address loading spaces." (Aa244).

Nonetheless, the CRDA concentrated on its "established practice" – not on any design standard or land use regulation – of reviewing loading operations within the Tourism District under the guise of "safety and efficiency." (Aa244; T1/128:21-129:7). This review was allegedly based on the value and type of the product to be sold at the premises; however, neither the value of the product nor the payment methods accepted by a business have any bearing on whether ingress and egress to the Property is either "safe" or "efficient." This suggests that perhaps these alleged safety concerns were more about the *type* of business that would occupy the Property, especially given its proximity to AtlantiCare Health Systems, a very influential neighbor.

The Hearing Officer also concluded that Atlantic Avenue is "heavily congested" with vehicular and pedestrian traffic and that the proposed "backing maneuver" into the loading space is "unsafe and inefficient." (Aa244-245). He further stated that this concern "cannot be mitigated by any reasonable condition." (Aa245). The expert opinions expressed on the record below, however, indicate that there would be "minimal interaction and pedestrian activity during the times that [the Appellant's] delivery vehicle would be traveling to and from the site." (T2/20:12-14). The same expert also opined that he saw "no safety implication for the operation of the proposed loading area" based on that alleged concern. (T2/20:22-24). Moreover, he confirmed that the Appellant would have a security officer to aid in the delivery operations, who would be able to "stop any pedestrians that are traveling along Atlantic Avenue at the time the vehicle needs to back into the site to further improve the safety of that maneuver." (T2/20:24-21:7). The Appellant's traffic engineer also noted the low speeds of Atlantic Avenue and that backing into a property for loading in an urban environment is "completely common." (T2/40:9-11). The same could also be said for parallel parking.

Finally, the Appellant was consistently amenable to agreeing to numerous options or conditions that the CRDA proposed during the hearings,

including but not limited to moving the location of a loading zone to meet a setback requirement, changing the gate design, and putting no parking signs at the Property. (See, *e.g.*, T2/98:7-19, 108:14-21, 111:9-11, 122:5-9, 123:5-11). For the CRDA to suggest that there are no conditions that might alleviate the concerns at issue is again not supported by the record.

The CRDA also concluded that the dimensions of the loading zone do not provide "a practical or convenient opportunity" for loading and unloading at the Property. (Aa245). Putting aside the fact that no loading zone is required at the Property, the CRDA cannot deny the Application because the one that has been proposed at its own insistence does not meet an amorphous requirement. Nor is there a standard in the CRDA land use regulations requiring "practical or convenient" loading areas, where no loading area is required at all.

In this case, the CRDA's attempts to buttress the legitimacy of its denial of the Application fail. As the Court noted in Lionel's Appliance Center v. Citta, 156 N.J. Super. 257, 268-269 (Law. Div. 1978), a land use agency may deny a site plan application "only if the ingress and egress proposed by the plan creates an unsafe and inefficient vehicular circulation." Where land use agencies "'should' consider traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site," the Court qualified its finding,

stating that site plan approval may be conditioned upon a contribution to necessary off-street improvements to counter those concerns. Dunkin' Donuts of N.J. v. Twp. of N Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984).[2] As discussed *infra*, there would be no measurable traffic entering and exiting the Property and therefore, there is no legitimate issue of "vehicular circulation" here.

B. The CRDA's Denial of the Application Runs Contrary to the Stated Intent of the City's Green Zone Redevelopment Plan. (T1/200:7-16).

In defending its denial of the Application, the Respondent relies on the deference courts are typically required to give board decisions. However, such deference only applies when those decisions are based on the facts in the record and when the correct legal standard is properly applied to those facts.

The appropriate legal standard provides while "site plan review affords a planning board wide discretion to ensure compliance with the objectives and requirements of the site plan ordinance, 'it was never intended to include the legislative or quasi-judicial power to prohibit a permitted use.'" PRB Enters., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 7 (1987) (*emphasis added, citing* Lionel's Appliance, 156 N.J. Super. at 268).

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[2] The Court's unpublished opinion in Last Frontier v. Blairstown Twp. Zoning Bd., 2010 N.J. Super. Unpub. LEXIS 1106 (App. Div. May 24, 2010), carries no precedential value. R. 1:36-3.

On the contrary, the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL"), makes abundantly clear that "[t]he planning board shall, if the proposed development complies with the ordinance and this act, grant...site plan approval." N.J.S.A. 40:55D-46(b) (*emphasis added*). Moreover, "[a] planning board is without authority to deny a site plan based on its [subjective] view that a use permitted under the zoning ordinance is inconsistent with the principles of sound zoning. Cox & Koenig, New Jersey Zoning and Land Use Administration, (GANN 2024), at §23.10(b).

Here, the proposed use is expressly permitted and entirely consistent with the planning objectives that the CRDA expressed in Resolution 22-112, including "reducing existing commercial vacancy rate[s] and abandoned commercial space...[at and around the Property]. (Aa246). The CRDA and the City both agreed that a retail cannabis dispensary would be a permitted use as part of that redevelopment initiative. Thus, the CRDA's decision not only runs contrary to that stated intent – but also effectively prevents the Property from being used for any commercial purpose.

Commercial uses, by their very nature, depend on customers patronizing their businesses and deliveries occurring for restocking inventory or in support of those operations. As the Appellant's expert noted, "[r]eally no other use except for cannabis has a loading vehicle small enough to really utilize that

loading zone so it works really well in that the loading zone can accommodate the CRC mandated van delivery." (T2/51:16-20). No other business that would be a permitted use for the site will be able to satisfy the CRDA's so-called safety concerns for the loading area, a fact which the objector's traffic engineer admitted. (T2/153:19-154:11). Further, the existing conditions would be a hardship to modify because there is no land available to either make those conditions compliant or to provide an alternative means of ingress and egress from the Property for loading. (T1/69:20-23; 77:4-78:7).

IV. CONCLUSION

For the foregoing reasons, the Court should find that the CRDA improperly disregarded its obligation to approve an application for a permitted use needing only reasonable and justified variance relief. The denial rendered here by the CRDA is simply unjustified and erroneous based on the record presented. The Denial is therefore contrary to both the MLUL and the CRDA's Land Development Rules, and the Denial should be reversed.

Respectfully submitted,

HYLAND LEVIN SHAPIRO LLP

Dated: November 12, 2024

By: _____
Robert S. Baranowski, Jr.

cc: All Counsel of Record – **Via ECourts Appellate**