

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-000479-24**

NEW JERSEY MOTOR VEHICLE
COMMISSION, *Respondent*

V.

POWER MOTORS, LLC, *Appellant*

AND

NEW JERSEY MOTOR VEHICLE
COMMISSION, *Respondent*

V.

NORTH WARREN AUTO SALES,
LLC, *Appellant*

CIVIL ACTION

On Appeal from Final Agency
Decision by the New Jersey Motor
Vehicle Commission

Consolidated below, No. MVH
12898-23 & MVH 12901-23

Sat below: Latrecia Littles-Floyd,
Acting Chair and Chief
Administrator, New Jersey Motor
Vehicle Commission

**BRIEF OF APPELLANTS, POWER MOTORS LLC AND NORTH
WARREN AUTO SALES LLC, ON APPEAL**

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PRELIMINARY STATEMENT

The used-car multi-dealer location (“MDL”) business model is an established industry, recognized by the Legislature, that has existed in New Jersey for decades. An MDL is a building with numerous office spaces, each meeting the minimum requirements for dealer licensure, and each housing one unique used-car dealership licensed by the New Jersey Motor Vehicle Commission (“MVC”). MDLs allow entrepreneurs and small businesses to gain a foothold into the used-car industry before branching out onto their own independent lots. This appeal challenges the MVC’s improper denial of licensure for tenants of a new MDL in Washington, New Jersey.

Appellants here, Power Motors LCC (“Power Motors”) and North Warren Auto Sales LLC (“North Warren”) (collectively the “Applicants”), are acceptable dealer applicants to the MVC, which took no issue with them directly. Instead, the MVC below determined that the MDL building into which they want to open their respective businesses was constructed the wrong way. And because the particular MDL building was built the wrong way, the Applicants’ license requests were denied.

The determination is an unusual one, since the MDL in Washington is physically indistinguishable from another MDL in Hackettstown, which facility the MVC acknowledges was constructed to the MVC’s satisfaction. What

makes it even more unusual is that both locations were constructed in full compliance with the requirements of the Uniform Construction Code (“UCC”) promulgated by the New Jersey Department of Community Affairs (“DCC”), the exclusive arbiter of construction standards.

For Washington to have an MDL, what the MVC wants to see is remarkable. It wants the landlord to tear down the existing series of UCC-compliant offices and instead replace them with a honeycomb of concrete cinder blocks called “firewalls.” The MVC wants each 9x8 interior office to be a standalone tomb, constructed of concrete extending from the foundation all the way through the roof plus three more feet, such that one office space could burn completely to ash and not affect its neighbor. Then, the MVC maintains, the Washington MDL would be an appropriate “established place of business” for the Applicants, whose applications would then be approved.

As the MVC’s own investigator admitted during the underlying hearing, the resulting structure would be “crazy.” No other business is required to construct a concrete bomb shelter around every single interior office space to satisfy its regulator—the mandate applies only to the sellers of used cars. The “crazy” requirement is the epitome of arbitrariness and caprice, and as such is an irrational regulation that cannot stand. It is, moreover, ultra vires as inconsistent with the UCC, which is the exclusive rubric against which to judge

building construction in New Jersey.

This Court need not, however, reach the question of whether the MVC's "crazy" regulation is ultra vires. There is a far simpler solution to licensure for the Applicants, one that the Administrative Law Judge ("ALJ") accepted following the testimonial hearing below. Under the MVC regulations, the Washington MDL would be exempted from the "firewall" requirement if twenty years ago two "businesses" had operated on the property concurrently. As the ALJ concluded, there were indeed two separate businesses occupying the Washington location twenty years ago: one was a dealer of American-branded vehicles; the other was a dealer of Japanese-branded vehicles. The MVC erred when it rejected the ALJ's reasoned determination and concluded otherwise.

In short, the Applicants have complied with the MVC's (arbitrary) regulatory requirements governing their business premises. Alternatively, those regulatory requirements are ultra vires and irrational, and thus cannot stand as an obstacle to licensure. For either or both reasons, the Appellate Division should reverse the MVC's erroneous final agency decision.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The Washington MDL

Daniel DiCarlo is the owner and principal behind WNAG Realty LLC (“WNAG”). WNAG owns an MDL location in Hackettstown, New Jersey. Its interior office suites serve as the registered business locations of approximately 155 licensed dealers of used motor vehicles. (Pa9).

In or about 2022 Mr. DiCarlo decided that he would expand his business operations. The demand for office space by small businesses had exceeded his supply in Hackettstown, and he thus wanted to open a new facility. (1T77:12-21).² He located in Washington Township, New Jersey, a building that had previously served as the registered place of business for other car dealers’ years prior, and thus began the process of retrofitting it to serve as a new MDL. (1T77:22 to 78:6). A-Dan Dealer Enterprises LLC (“A-Dan”), also operated by Mr. DiCarlo, would serve as the landlord for the Washington location. (1T75:14 to 76:5).

Retrofitting the building would require a very significant investment, hundreds of thousands of dollars. (78:15 to 79:2). Prior to incurring that

¹ The Facts and Procedural History of this matter are intertwined and therefore set forth in a combined statement.

² The transcript says he made this decision in “late 2001, early 2002.” (1T:77:20). That is a clear typo. See (Pa7) (May 2022 letter to MVC stating intention to expand).

expense, in May 2022 Mr. DiCarlo (via counsel) proactively reached out to the MVC to advise them of his intentions. (Pa7). He requested a meeting with the regulator—with whom he interacted routinely via WNAG—to solicit any input into, and address any concerns they had over, the proposed new MDL location. (Pa7); (1T79:4-15). The MVC declined to accept the meeting or otherwise respond to the repeated outreach. (Pa9); (1T:80:12-20).

A-Dan thereafter expended approximately \$400,000.00 to retrofit the property and ready it for approximately sixty new used car dealers. (1T78:24 to 79:3). The building was appropriately permitted by the local officials. (Pa13). It was also fully compliant with all construction requirements set forth in the UCC for interior office spaces for unique businesses. (Pa13, 16). Indeed, each interior office space is constructed of a UCC-compliant fire partition such that a fire can rage in a single office space for over a solid hour without affecting any neighboring spaces. (Pa13-14, 18). As the MVC stipulated, “[t]he interior walls of the dealership units are separate and independent from any wall of any other dealership of other business occupying the same building.” (Pa32); accord (Pa242) (ALJ found same). Moreover, each office space has its own sprinkler system, set to operate in the case of a fire in any office. (Pa13, 18, 32, 127). Each office likewise has its own fire-proof safe, ensuring that any paperwork in the office would survive in the event the sprinklers failed to activate during a

fire. (1T86:7-12).

In January 2023 A-Dan³ reached out to the MVC again, this time to inform them that construction on the new MDL building was complete and that dozens of new business applications would soon be filed with the MVC. (Pa9). The MVC and A-Dan (via counsel) thereafter engaged in numerous meetings and shared multiple correspondences, in which the MVC expressed various concerns for A-Dan to address. A-Dan did so. See, e.g., (Pa15-29). In the end, the MVC declined formally to advise whether the Washington location was an appropriate “established place of business” for any used car dealers—the MVC would only so determine after receiving a formal application(s) for licensure. (Pa26).

The Applications and Proposed Denials

On March 15, 2023, A-Dan advised the MVC that two of its tenants had submitted applications for licensure at the Washington location (collectively the “Applications”) earlier that month. (Pa31, 34, 75, 200). A-Dan and the Applicants arranged to treat these two as “test” applications rather than flood the MVC with over sixty applications all at once. (Pa37-38). The MVC thereafter conducted a review of the Applicants to determine if they should receive licenses as used car dealers.

³ The January 24, 2024, letter to MVC states that the landlord was WNAG, not A-Dan. (Pa9). That scrivener’s error was subsequently corrected. (Pa64).

On August 21, 2023, the MVC issued a notice of proposed denial to both Applicants. (Pa32, 51, 55). The MVC did not take issue with Power Motors or North Warren themselves—those businesses and the people behind them are appropriate applicants as far as the MVC was concerned. Instead, the MVC only took issue with the Washington Location where they intended to conduct business. There were then three reasons: The road sign letters were too small, the parking spaces were not labeled, and the building was allegedly constructed the wrong way. (Pa51-61). The building’s construction is the focus of this appeal.⁴

By MVC regulation, each dealer of used cars must have an “established place of business” consisting of “a minimum office space of 72 square feet within a permanent, enclosed building.” N.J.A.C. 13:21-15.4(a)(2). A dealer’s place of business must be dedicated to that one dealership and will not be accepted if “there already exist one or more licenses issued for, or other business entities present at, the same premises.” See 56 N.J.R. 1032(a) (N.J.A.C. 13:21-15.4(d)). To establish that the office space is not part of “the same premises” as another business, MVC regulation requires either of two things: (i) each 9x8 office must be “separated by exterior walls or a firewall conforming to Section

⁴ The MVC withdrew its objections based on the road sign and parking spaces. (Pa244).

706 . . . of the Uniform Construction Code” or (ii) the offices must be “located in a building housing more than one business, within which there was at least one licensed dealer and one other business prior to March 6, 2006.” Ibid. (N.J.A.C. 13:21-15.4(d)(1)).

Here, the interior offices of the Washington location were not surrounded by “firewalls”—they were surrounded by “fire partitions,” which are “separate and independent from any wall of any other suite or business that may be located inside the building.” (Pa242). Thus, the MVC deemed the first regulatory option unsatisfied. And since the MVC took issue with how the building was used twenty years prior by other occupants, it proposed denial to the Applicants. (Pa51, 55).

On September 14, 2023, both Applicants timely disputed the proposed denials and requested a hearing before the Office of Administrative Law (“OAL”). (Pa32, 62, 66). On November 6, 2023, the MVC referred both matters to the OAL as contested cases. (Pa32). The OAL thereafter issued an Order of Consolidation dated January 10, 2024. (Pa233, 236).

The OAL Hearing

On March 21, 2024, the OAL conducted a consolidated evidentiary hearing, taking testimony from four fact witnesses. See generally (1T). As stated above, the MVC’s original objections based on parking spaces and road

signage were withdrawn—the focus of the evidentiary hearing was whether the Applicants’ office suites were “located in a building housing more than one business, within which there was at least one licensed dealer and one other business prior to March 6, 2006.” N.J.A.C. 13:21-15.4(d)(1); (Pa241).

As the MVC explained at the hearing, the operative question is not whether A-Dan (or anyone else) was operating an MDL at the Washington location in 2006—new MDLs are fine, including specifically at the Washington Location. (1T46:19-24). Instead, the question for the MVC is whether twenty years ago the Washington Location had one car dealer and at least one “other business.” The second business need not have been a car dealer—a coffee shop would have sufficed. (1T6:18-24). At the hearing, the Applicants thus focused their attention on how other people were using that particular parcel of land decades ago, which fact would then determine whether the Applicants today can have licenses. See generally (1T).

In support of their position at the hearing, the Applicants called Edward Rossi, the principal behind Rossi Auto Group and the functional owner of the Washington Location. (1T78:7-14, 90:5); (Pa45, 60).

In or about 1975, Rossi Pontiac Buick GMC, Inc., (“Rossi America”) was incorporated as a New Jersey corporation. (Pa2, 60). Rossi America’s registered place of business was 30 Route 31 South in Washington. (Pa2, 60).

Between 1975 and 2005, Rossi America conducted sales of new and used American-branded cars out of 30 Route 31 South in Washington, New Jersey. (1T90:10-22); (Pa45, 60). From time to time over the years, Rossi America changed its corporate name to comply with the restrictions of its business partner, the manufacturer of American-branded motor vehicles. (Pa1, 3-6); (1T101:22 to 103:16).

In the early 1990s, Rossi America determined that it wanted to branch out into the sale of Japanese-branded vehicles. (1T91:18-22). At that time General Motors (the manufacturer of the American-branded vehicles sold at 30 Route 31 South) did not allow its franchisees to sell Japanese-branded vehicles from the same dealership. (1T92:1-5). Thus, for Rossi America to sell Japanese-branded vehicles, it would need to have a new location run by a business separate from Rossi America. (1T91:18 to 92:1); see (Pa251) (ALJ concluded that an “alternative business” was needed to “expand its operations to include the sale of Suzuki motor vehicle products”).

On or about April 15, 1991, Rossi America applied to the New Jersey Secretary of State for permission to use the name “Suzuki of Washington” as an “alternate name” pursuant to N.J.S.A. 14A:2-2.1. (Pa2, 60). Suzuki of Washington’s registered place of business was 30 Route 31 South, the same as Rossi America’s. (Pa2, 60); (1T93:21 to 94:1). Suzuki of Washington’s

showroom was on a different parcel of land, 29 Route 31 South, which is directly across the street from 30 Route 31 South. (1T92:2-7); (Pa60-61).

Consistent with the mandates imposed by General Motors, Suzuki of Washington conducted itself internally, and held itself out to the world externally, as a separate business from Rossi America. (1T98:10-17); (Pa251) (ALJ concluded that “[t]he creation of [Suzuki of Washington] was necessary so that Rossi [America] would avoid contractual issues with General Motors”). Among other things,

1. Suzuki of Washington had its own bank account, distinct from Rossi America’s. (1T95:14-16).
2. Suzuki of Washington had its own accounting records and financial statements, distinct from Rossi America’s. (1T93:4-6).
3. Suzuki of Washington had its own employees, distinct from Rossi America’s. (1T95:17-19).
4. Suzuki of Washington had its own road sign advertising the name of its business, distinct from Rossi America’s. (1T95:20 to 96:5).
5. Suzuki of Washington had its own forms and business stationery, distinct from Rossi America’s. (1T96:9-21).
6. Suzuki of Washington submitted different paperwork to the MVC, distinct from Rossi America’s. (1T96:22 to 97:1).

7. Suzuki of Washington had its own license from the municipality to do business, distinct from Rossi America's. (1T95:5-8).
8. Suzuki of Washington had its own dealer's license from the MVC, distinct from Rossi America's. (1T92:8-15, 95:1-13, 104:2-6).
9. Suzuki of Washington's customers cut their checks to Suzuki of Washington's business name, distinct from Rossi America's. (1T97:2-6).
10. Suzuki of Washington's warranty service technicians were separately trained mechanics, distinct from Rossi America's. (1T97:10-15).

Despite the many distinctions between Suzuki of Washington and Rossi America, Suzuki of Washington did perform critical aspects of its business out of 30 Route 31 South. Specifically:

1. 30 Route 31 South was Suzuki of Washington's registered place of business. (Pa2); (1T94:20-22); (Pa249) (ALJ concluded that "[p]ursuant to N.J.S.A. 14A:2-2.1 Rossi [America] registered the alternate business name [Suzuki of Washington] with its business address at the proposed location").
2. Suzuki of Washington conducted its book-keeping and back-office operations out of 30 Route 31 South using its own employees.

(1T93:25, 95:17-19, 96:16-18); (Pa249) (ALJ concluded that Suzuki of Washington “conducted its accounting and general business operations at the proposed location”).

3. Suzuki of Washington conducted its parts and services operations out of 30 Route 31 South using its own mechanics. (Pa2); (1T97:7-15); (Pa249) (ALJ concluded that Suzuki of Washington “operated its parts and services department at the proposed location”).

Rossi America ceased conducting business at 30 Route 31 South in 2005. (1T98:18-23); (Pa45). Suzuki of Washington, however, continued to conduct business at 30 Route 31 South in 2007. (1T98:24 to 99:6); (Pa45). That is, the lifespan of each unique business at 30 Route 31 South was different.

Physical Characteristics of the Proposed Places of Business

By statute dealers of used motor vehicles must have an “established place of business consisting of a minimum office space of 72 square feet within a permanent, enclosed building located in the State of New Jersey.” N.J.S.A. 39:10-19. By regulation the MVC expands upon the minimum requirements of an “establish place of business,” mandating (for instance) a desk, a chair, a filing cabinet, a phone, a safe, and so forth. (1T14:4-16); N.J.A.C. 13:21-15.4.

WNAG operates an MDL in Hackettstown, which the MVC has agreed for decades offers appropriate “established places of business” for used-car

dealers in the state. (1T49:6 to 50:9, 86:13-16). As MVC's witness agreed, the offices in the Hackettstown MDL are virtually indistinguishable from the proposed offices at the Washington MDL. (1T50:6-14). As Mr. DiCarlo testified, his company spent approximately \$400,000.00 to make sure that the Washington and Hackettstown offices "look for all inten[ts and] purposes identical." (1T85:23 to 86:12); accord (1T86:3) ("You wouldn't know any difference.").

Yet the MVC maintains that the Hackettstown location contains appropriate "established places of business" while Washington does not, due to what did (or did not) happen at 30 Route 31 South twenty years ago. (1T86:13-23). From the perspective of an entrepreneur dealer sitting in an office at 30 Route 31 South, Mr. DiCarlo was unable to think of a factual reason why he/she would care how the property was used twenty years ago. (1T86:24 to 87:2). MVC's regulatory officer, when given the chance to articulate what difference it would make to a dealer how his/her office space was used in the early 2000s, likewise offered no explanation. (1T69:22 to 70:22).

The "Crazy" "Tombs" That MVC Demands by Regulation

The MVC has no problem with new MDL's coming online. (1T46:19-21). Indeed, 30 Route 31 South could be an appropriate location today given its current physical characteristics—if the MVC were to conclude that Rossi of

Washington shared the building with another business twenty years ago, be it Suzuki of Washington, a coffee shop, a nail salon, or anything else. (1T6:20-24, 46:22 to 47:8). But because the MVC disputes what happened on the property decades ago, the MVC instead would mandate a radically different construction for the property today.

Specifically, the MVC maintains that if A-Dan wants to turn 30 Route 31 South into a new MDL, it must construct “firewalls” around every single 72 square foot office space. (1T14:17 to 15:14, 36:13-17). A “firewall” is a barrier of concrete blocks that partitions a building from the foundation all the way through the ceiling and beyond, such that each office would in effect be a unique structure separated by masonry blocks and unaffected even if the neighboring office burns to ashes and crumbles to the ground. (1T); see 2021 International Building Code § 706.6 (“Fire walls shall extend from the foundation to the termination point not less than 30 inches (762 mm) above both adjacent roofs.”); id. at § 706.2 (“Fire walls shall be designed and constructed to allow collapse of the structure on either side without collapse of the wall under fire conditions.”).⁵

As MVC’s investigator candidly admitted under oath, only one MDL business (located in Philipsburg) ever attempted to construct such a thing.

⁵ Available online at https://codes.iccsafe.org/content/IBC2021P2/chapter-7-fire-and-smoke-protection-features#IBC2021P2_Ch07_Sec706 (reproduced at Pa276-278).

(1T44:20-21). “It’s crazy to look at.” (1T45:5-6). “There’s just all these little tombs of cinder block.” (1T45:6-7). “You have a bunch of 72 foot square feet locations . . . [of] cinder block walls and it’s just like rows of them.” (1T11-16). Indeed, the structure is so “crazy” that MVC personnel have created a mocking nickname for it: “[W]e call it the tombs.” (1T45:3).

These MDL “tombs” in Phillipsburg went out of business years ago. (1T17:21). There is no other industry anywhere in the state—ever—that is required to construct concrete bomb shelters around every single 9x8 interior office space to satisfy its regulator. (1T46:11-14).

The ALJ’s Initial Decision

On July 1, 2024, The Honorable William T. Cooper III, A.L.J., issued his Initial Decision. (Pa239). He accepted the factual testimony of Edward Rossi, who explained the history of the Rossi America and Suzuki of Washington. (Pa248). Based on that credible testimony and the documents submitted at the hearing, the ALJ concluded that there was “no doubt that [Suzuki of Washington] was an existing business located at the proposed location.” (Pa248) (emphasis added). As the ALJ found, “Rossi [America] created [Suzuki of Washington] so it could conduct an additional business that sold Suzuki automobiles.” (Pa249).

In his findings the ALJ continued,

An existing corporation which transacts any business in the State of New Jersey is prohibited from using a name other than its actual name unless it has first registered the alternate name with the Secretary of State. The registration of a corporate alternate name shall set forth a **“brief statement of the character or nature of the particular business or businesses to be conducted using the alternate name.”** N.J.S.A. 14A:2-2.1(2)(c).

The [MVC] argues that the use of a “trade name” or a “fictitious name” for a business entity does not create a separate entity, therefore there was only one business in existence at the proposed location as of March 6, 2006. This argument is unpersuasive because it overlooks the purpose and intent of N.J.S.A. 14A:2-2. That statute allows a business entity such as Rossi Auto to create and conduct other businesses without having to create a new legal entity. Here, Rossi Auto created the alternate business identified as SOW, so it could expand its operations to include the sale of Suzuki motor vehicle products. The creation of SOW was necessary so that Rossi Auto would avoid contractual issues with General Motors. Further, although SOW had a showroom at 29 Route 31, Washington Township, NJ, it conducted business activities at the proposed location. N.J.A.C. 13:21-15.4(d)(1)(i) does not define the term “other business” and does not require that the “other business” be owned and or operated by a separate legal entity.

[(Pa251-52) (second and third emphases added).]

In his Initial Decision the ALJ concluded as follows:

Applying the credible evidence to the law, I **CONCLUDE** that Suzuki of Washington was a business in operation at the proposed location on or before March 6, 2006. Accordingly, I further **CONCLUDE** that the respondents have met the criteria enumerated in N.J.A.C. 13:21-15.4 and are exempt from the firewall requirement.

[(Pa252).]

While the Applicants had alternatively challenged the validity of N.J.A.C. 13:21-15.4 (arguing that it was both ultra vires and irrational), the ALJ did not address those issues. (Pa252). He instead ordered that the MVC's proposed denial be reversed and the Applicants be issued licenses to operate as dealers of used automobiles. (Pa252).

The MVC's Final Agency Decision

On July 11, 2024, the New Jersey Division of Law (on behalf of the MVC) filed exceptions to the ALJ's Initial Decision. (Pa258). On September 27, 2024, the MVC issued a final agency decision. (Pa261). Therein the MVC determined to "modify, in part the findings and reject the conclusions contained in the Initial Decision and . . . reject the order and recommendation of the ALJ." (Pa262). The MVC did not reject any of the ALJ's factual determinations themselves, but instead rejected the ultimate licensure conclusion based on the undisputed facts.

Central to the MVC's determination was that Suzuki of Washington "was never established as a legal entity separate from Rossi Auto." (Pa264). While Suzuki of Washington did register a separate "doing business as" name and held itself out to the world as a unique business to be able to sell Japanese-branded vehicles without violating contractual obligations with General Motors (Pa249), "the legal use of an alternate name does not create anything separate from that

corporation. Thus, the ALJ’s conclusion that there was an ‘other’ or separate business created by use of an alternate name is incorrect.” (Pa264).

Put another way, if Mr. Rossi had established Suzuki of Washington as a separate limited liability corporation decades ago rather than a “doing business as,” then today the Washington Location would be acceptable as constructed. Or if someone had operated a nail salon, hot dog stand, coffee shop, or other business on the land twenty years ago, then the building would again be appropriate today. But given how the MVC believes the land to have been used by others long ago, today A-Dan must construct concrete tombs around every single interior office or else abandon the location. And because A-Dan has not yet installed many thousands of cinder blocks inside the office building, the Applicants were denied licensure. (Pa266).

On October 17, 2024, a timely notice of appeal followed. (Pa268). The Applicants now submit the within merits brief.

LEGAL ARGUMENT

Standards of Review

Given the procedural posture, there are multiple standards of review governing the issues on appeal.

An appellate court will “reverse an administrative agency decision that is arbitrary, capricious, or unreasonable, or not supported by the evidence in the

record as a whole.” In re Route 66, 477 N.J. Super. 22, 32 (App. Div. 2023) (quoting Zimmerman v. Sussex Cnty. Educ. Servs. Comm’n, 237 N.J. 465, 475 (2019)). “An agency action is arbitrary, capricious, or unreasonable if it violates the law, if the record does not contain substantial evidence to support it, or if the agency conclusion ‘could not reasonably have been made on a showing of the relevant factors.’” Ibid. (quoting In re Carter, 191 N.J. 474, 482-83 (2007)).

“[I]f in reviewing an agency decision an appellate court finds sufficient credible evidence in the record to support the agency’s conclusions, that court must uphold those findings even if the court believes that it would have reached a different result.” In re Taylor, 158 N.J. 644, 657 (1999). However, if the appellate court determines that the findings made below are “arbitrary, capricious, and unreasonable,” then “the appellate court should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions.” Ibid. (quotation omitted).

While an appellate court’s review of an administrative agency’s findings of fact is limited to a determination of whether those findings are supported by “sufficient credible evidence in the record,” an appellate court’s review “‘is not simply a *pro forma* exercise in which the court rubber stamps findings that are not reasonably supported by the evidence.’” In re Lalama, 343 N.J. Super. 560, 564–65 (App. Div. 2001) (quoting In re Taylor, 158 N.J. at 657 (1999)). Instead,

“[a]ppellate courts must engage in a careful and principled consideration of the agency record and findings.” Ibid. (quoting Mayflower Securities Co. v. Bureau of Securities, 64 N.J. 85, 93 (1973)).

When, as here, “an administrative agency’s findings of fact are contrary to the findings of an ALJ who heard the case, then there is a particularly strong need for careful appellate review.” Ibid. “Although an agency is not required to defer to an ALJ’s findings, it is not free to brush aside or disregard them without comment.” Ibid. (quotation omitted). And if an agency’s fact finding is based on the credibility of witnesses, ““a reviewing court need give no deference to the agency on the credibility issue.”” Ibid. (quoting Clowes v. Terminix Int’l, Inc., 109 N.J. 575, 587-88 (1988)).

An agency’s interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to deference. In re Protest of Cont. Award for Project A1150-08, N.J. Exec. State House Comprehensive Renovation & Restoration, 466 N.J. Super. 244, 259 (App. Div. 2021). However, deference to the agency is not warranted if the statute is not “in an area over which it has regulatory power.” Glukowsky v. Equity One, Inc., 180 N.J. 49, 65–66 (2004). Nor does an agency receive deference for its interpretation of judicial precedent. Bowser v. Bd. of Trustees, Police & Firemen’s Ret. Sys., 455 N.J. Super. 165, 171–72 (App. Div. 2018).

Courts are not bound by an administrative agency’s “interpretation of a statute or its determination of a strictly legal issue.” L.A. v. Bd. of Educ., 221 N.J. 192, 204 (2015) (quotation omitted). An appellate court must instead review questions of law *de novo*. In re Route 66, 477 N.J. Super. at 32.

Finally, “the interest of justice is always a valid invitation for intervention, and a reviewing court is free to abandon its traditional deference when an agency’s decision is manifestly mistaken.” In re Application for Medicinal Marijuana Alternative Treatment Ctr. for Pangaea Health & Wellness, LLC, 465 N.J. Super. 343, 373 (App. Div. 2020).

**POINT ONE The Washington Location Is an Appropriate
“Established Place of Business.” (Pa63, 67).**

As the ALJ concluded in his Initial Decision, the Washington Location is an appropriate “established place of business” for the Applicants under the existing MVC regulations. The MVC erred when it rejected the ALJ’s well-reasoned determination.

The Motor Vehicle Certificate of Ownership Law, N.J.S.A. 39:10-1 to -25 (“MVCOL”), governs, among other things, the statutory requirements to become a licensed dealer of motor vehicles. The Chief Administrator of the MVC has the power to issue or deny licensure “upon application in such form as the chief administrator prescribes.” N.J.S.A. 39:10-19. The MVCOL thus empowers the Chief Administrator to promulgate regulations “in addition

thereto but not inconsistent therewith.” N.J.S.A. 39:10-4.

In the MVCOL the Legislature set forth basic parameters for what is, and is not, an appropriate established place of business for car dealers. See *ibid.* If the applicant wishes to sell new motor vehicles, he must maintain “a place of business consisting of a permanent building not less than 1,000 square feet in floor space” along with requisite equipment to service motor vehicles in compliance with applicable law. Ibid.

If the applicant instead wants to sell used motor vehicles, the requirements are much less onerous. A “used motor vehicle dealer” is “a person engaged in the business of selling, buying or dealing in four or more used motor vehicles per year at an established place of business, but who is not a licensed new motor vehicle dealer.” N.J.S.A. 39:10-2. The term “established place of business” means “a permanent, properly identified location within the State where the books, records, and files necessary to buy, sell, or deal in motor vehicles are kept and maintained.” Ibid.

If the dealer was licensed at the enactment of L. 2021, c. 484 (i.e., January 18, 2022), the dealer must maintain “an established place of business consisting of a minimum office space of 72 square feet within a permanent, enclosed building located in the State of New Jersey.” Ibid. If the dealer is licensed thereafter, the dealer “shall meet the requirements for an established place of

business for a used motor vehicle dealer, which shall be established by the chief administrator by regulation.” Ibid. By regulation, those requirements are also the maintenance of “a minimum office space of 72 square feet within a permanent, enclosed building.” N.J.A.C. 13:21-15.4(c).

Thus, by both statute and regulation, used car dealers need not occupy standalone structures unto themselves, as is required for new car dealers. They instead may occupy a single office within a larger building, which office suite can be as small as 9x8 feet. However, no two dealers can occupy the same space—each dealer must obtain his own. See N.J.A.C. 13:21-15.4(d).

Current N.J.A.C. 13:21-15.4(d)⁶ provides,

A proposed place of business for a used motor vehicle dealer will not be considered suitable for approval if there already exists one or more licenses issued for, or other business entities present in, the same building. A proposed place of business of a used motor vehicle dealer is deemed to occupy the same building as another business if the two entities . . . [a]re not *completely separated by exterior walls or a firewall* as defined by and conforming to sections 202 and 706 of the 2021 International Building Code, known as the “IBC/2021,” as adopted by the New Jersey Department

⁶ While this litigation was pending, the MVC enacted certain changes to N.J.A.C. 13:21-15.4. See 56 N.J.R. 1032(a) (effective June 3, 2024); 56 N.J.R. 1249(a) (effective June 27, 2024). Among other things, earlier regulations had said that no two dealers could occupy the same “premises”—now the regulations say that no two dealers can occupy the same “building.” 56 N.J.R. 1032(a). Because this appeal is a test case that will also affect dozens of future applications at the Washington Location, the Applicants focus on the current regulatory text rather than earlier versions.

of Community Affairs, as the building subcode of the Uniform Construction Code pursuant to N.J.A.C. 5:23–3.14.

[N.J.A.C. 13:21-15.4(d)(1) (emphasis added).]

The regulation contains an exception. The used car dealer’s office need not be surrounded by firewalls if the office is

located in a building housing more than one business, within which there was at least one licensed dealer and one other business prior to March 6, 2006, and where there is a fire suppression system approved by a local building code official or the New Jersey Department of Community Affairs, [in which case] walls must be either exterior walls or standard walls constructed separately from any other wall.

[N.J.A.C. 13:21-15.4(d)(1)(i) (emphasis added).]

The MVC regulations do not define what is meant by “other business.” But at the hearing, the MVC did clarify that the “other business” need not be a licensed car dealer. Indeed, it could be a nail salon, a coffee shop, or a hotdog vendor for all the MVC cares. (1T6:20-24, 48:25 to 49:5). What the apparently concerns the MVC is whether there was any “other business” at the Washington Location twenty years ago doing absolutely anything—if there was such “other business” decades ago, then the building’s many offices are appropriate for new licensees today.

In New Jersey there are all manner of ways to start a “business.” Many people choose to embrace the formality of a limited liability company, a C

corporation, an S corporation, a limited liability partnership, or such other distinct corporate entity with a unique tax existence. But that is by no means required. Indeed, a natural person can register with the New Jersey Division of Taxation to conduct business as a sole proprietor without even obtaining a separate Federal Employer Identification Number (“EIN”).⁷ The same applies to general partnerships, which are “not required” to establish a separate existence with a unique EIN to conduct business in the state.⁸

Existing corporations are likewise permitted to branch into new businesses with separate “doing business as” designations. See N.J.S.A. 14A:2-2.1 (allowing for “corporate alternate names”). As that statute recognizes, “the *character or nature of the particular business or businesses* to be conducted using the alternate name” may be wholly distinct from that of the preexisting business. See N.J.S.A. 14A:2-2.1(2)(c) (emphasis added).

That is what happened here. Rossi America was a business that dealt in American-branded vehicles out of 30 Route 31 South. Given the strictures of

⁷ See New Jersey Division of Taxation, “New Jersey Tax Guide, Starting a Business in New Jersey,” available at <https://www.nj.gov/treasury/taxation/documents/pdf/guides/Starting-a-Business-in-New-Jersey.pdf> (last visited January 3, 2025) (reproduced at Pa279-285).

⁸ See New Jersey Division of Revenue and Enterprise Services, “Getting Registered,” available at <https://www.nj.gov/treasury/revenue/gettingregistered.shtml> (last visited January 3, 2025) (reproduced at Pa286).

its contractual relationship with General Motors, Rossi America was not permitted to engage in the business of selling Japanese-branded cars. It thus established another “business” (Suzuki of Washington) using a mechanism approved by the Legislature, N.J.S.A. 14A:2-2.1. Suzuki of Washington and Rossi America held themselves out to the world as separate businesses and strictly segregated their internal operations. But like Rossi America, Suzuki of Washington (i) had its registered place of business at 30 Route 31 South, (ii) conducted its accounting work at 30 Route 31 South, and (iii) serviced its customers’ vehicles at 30 Route 31 South. (Pa249) (ALJ so concluding).

In rejecting the ALJ’s ultimate determination, the MVC emphasized that Suzuki of Washington was not a “separate legal entity” from Rossi America. That focus is untethered to the MVC’s own regulations. The administrative code does not inquire whether there was a least one licensed dealer and “one other separate legal entity” twenty years ago—it asks if there was “one other business” decades prior. N.J.A.C. 13:21-15.4(d)(1)(i). As the ALJ concluded, there “no doubt” was. (Pa248). Suzuki of Washington was its own “business” in every sense of the word, keeping its own books and records, its own bank accounts, its own employees, and so forth. (Pa251-52).

The only published case cited by the MVC in its final agency decision, Zucker v. Silverstein, 134 N.J. Super. 39 (App. Div. 1975) (Pa264), is

inapposite. Zucker addressed whether certain preferential transfers by an impecunious person were void in insolvency proceedings. 134 N.J. Super. at 51. In that context, the panel merely observed that if an individual is using a “trade name” under N.J.S.A. 56:1-1, “he personally remains liable for all debts incurred” by whatever name he calls himself. Id. at 48. That case does nothing to inform the analysis here under N.J.A.C. 13:21-15.4(d)(1)(i).

Under the MVC’s regulations, the Washington Location is an appropriate MDL today if decades ago there existed “at least one licensed dealer and one other business” on that property. The MVC declined to define that term in its regulations. The Applicants satisfied that requirement, since Suzuki of Washington was a separate “business” from Rossi America under even the most basic definition of that word. See Blacks Law Dictionary (12th ed. 2024) (“business” is “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain”). The ALJ was correct in his finding and the MVC erred by rejecting that reasoned conclusion. The Appellate Division should reverse.

POINT TWO Alternatively, the MVC Regulations Are Invalid, Being Both Arbitrary and Capricious and Ultra Vires. (Pa63, 67).

Because the MVC was wrong to reject the ALJ’s recommendation of licensure, there is no need for the Court to address whether the regulations are

themselves invalid—the Washington Location satisfies the regulations even as drafted. But those regulations are nevertheless invalid for multiple reasons, either of which stands as an independent ground to reverse the MVC’s decision here.

A. The firewall requirement, and its “other business” exemption, are irrational.

When an administrative agency passes a regulation pursuant to powers set forth in its enabling statute, reviewing courts afford the regulation a “strong presumption” of validity. Lavezzi v. State, 219 N.J. 163, 171–72 (2014). But the statutorily bestowed power to promulgate regulations is not a license for despotism. Courts must “consider whether ‘there is any fair argument in support of the course taken or any reasonable ground for difference of opinion among intelligent and conscientious officials.’” In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6, 246 N.J. 462, 492 (2021) (quoting Flanagan v. Dep’t of Civ. Serv., 29 N.J. 1, 12 (1959)). If a regulation is “arbitrary or capricious,” “unreasonable or irrational,” it cannot stand. See Bergen Pines Cnty. Hosp. v. N.J. Dep’t of Human Services, 96 N.J. 456, 477 (1984).

“At bottom, an agency’s rulemaking ‘must be reasonable and not arbitrary’ and must further the Legislature’s goals.” In re N.J.A.C. 17:2-6.5, 468 N.J. Super. 229, 234 (App. Div. 2021) (quoting Pascucci v. Vagott, 71 N.J.

40, 50 (1976)); accord In re Adoption of Amendments and New Regulations at N.J.A.C. 7:27-27.1, 392 N.J. Super. 117, 133 (App. Div. 2007) (regulations that are “arbitrary, capricious, unduly onerous or otherwise unreasonable” are invalid) (quoting N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978)). If there is a “disconnect between the agency’s rule and its explanation,” the regulation is “arbitrary and capricious” and thus invalid. See, e.g., In re N.J.A.C. 17:2-6.5, 468 N.J. Super. at 245 (invalidating irrational regulatory amendments from the Public Employees’ Retirement System). Such an invalidating “disconnect” is present here.

The very inquiry that the ALJ, the MVC, and now this Court are conducting underscores the arbitrariness and caprice of the MVC regulation. As the MVC has admitted, there is nothing wrong with either North Warren or Power Motors; both are appropriate subjects of licensure. And there is no prohibition on new MDLs coming online, be they at the Washington Location or somewhere else. Nor is there anything inherently objectionable about how the Washington Location was constructed; indeed it is physically indistinguishable from another MDL in Hackettstown.

Instead, the central debate is how did other people use the land underneath the Washington Location twenty years ago, and what kind of business forms did those persons use decades ago when they conducted unrelated activities on the

property. If Mr. Rossi had decided to form an LLC rather than a d/b/a, the MVC would be satisfied with the Applications. Or if Mr. Rossi had permitted a Starbucks in the building long ago, the Applications would again be approved.

But why? None of those distinctions are tied to any legitimate regulatory objective. The Applicants are no more or less deserving of licensure today based on the particulars of Suzuki of Washington's formation years ago. Nor is the Washington Location any more or less suitable for other applications today based on whether someone could buy hotdogs while they shopped for an automobile in the early 2000s. But those irrelevancies are the demarcation between licensure and denial; whether the building is appropriate as constructed or whether A-Dan must remodel the entire premises with many tons of concrete.

The remodel that MVC would require to make the building "appropriate" is exactly as the MVC's investigator blurted out on the stand: "crazy." Rather than a series of standard office suits compliant with the UCC, every occupant would need to be in a concrete tomb whose walls pierce the roofline and head up a remaining three feet into the sky.

Knowing in advance that the Applicants were challenging the rationality of the regulation, see, e.g., (Pa10, 34, 63), during its opening remarks before the ALJ the MVC attempted to justify the firewall requirement: "The firewall is in place to [i] protect the security of documentation and [ii] essentially to protect

New Jersey consumers from fraud and unscrupulous business practices” (1T6:8-11). Both justifications are without merit.

No one in the state actually operates a used car dealership out of these concrete bunkers. They instead all have “a fixed safe” with fire suppression systems, which the MVC clearly thinks is sufficient to “protect” documents in the thousands of dealerships throughout New Jersey. See N.J.A.C. 13:21-15.4(h). And there is no correlation between the construction materials used for someone’s office walls—be it concrete, drywall, or even Japanese shoji—and their business scruples. The MVC’s rationalizations are empty with the regulation instead standing as an arbitrary barrier to entry.

Nor is the regulation saved by calling it a “grandfather” exception, as the MVC also attempted below. See, e.g., (1T15:2, 16:16, 21:8, 51:14-17); (Pa263). When either the Legislature or a regulator decides to “grandfather” something, they determine that a new law or regulation should apply prospectively rather than to preexisting actors or situations. See, e.g., Paul Kimball Hosp. Inc. v. Brick Twp. Hosp. Inc., 86 N.J. 429, 445-49 (1981) (upholding grandfather provision that exempted existing hospitals from new law). For instance, if the MVC had determined that MDLs existing as of the date of a new regulation could continue but new MDLs were thereafter prohibited, it would be fair to call that “grandfather” provision. But that is not what the MVC here did.

As the MVC stated at the hearing, it has no problem with new MDLs being created in the state. Indeed, it has no problem with the physical characteristics of 30 Route 31 South itself, which building contains offices virtually indistinguishable from those at the Hackettstown location. This is thus not a “grandfathering” scheme whereby existing businesses may continue operation notwithstanding new statutory or regulatory proscriptions.

Whether 30 Route 31 South is an appropriate place for dealerships today is answerable by the current characteristics of the property. A person sitting in an office today could not care less how the property was used ten, twenty, or even a hundred years ago. Indeed, during cross when MVC’s regulatory officer was given the open-ended opportunity to give a justification for the regulation, she deflected: “It’s not my place to say why it matters or to provide any insight into why the regulations say what they say. They’ve been in place for many years.” (1T70:18-21). That a regulation has been on the books for “many years” is not a defense to rationality.

The MVC’s investigator was correct in his blunt assessment of N.J.A.C. 13:21-15.4—it is “crazy.” The regulation cannot stand.

B. The MVC exceeded its statutory power when it dictated building standards inconsistent with the UCC.

“It is axiomatic that an administrative agency possesses only those powers expressly delegated to it by the Legislature or fairly implied from

the legislative conferral of authority.” Bd. of Educ. of Upper Freehold Reg’l School Dist. v. State Health Benefits Comm’n, 314 N.J. Super. 486, 492 (1998). Even if the firewall regulation were rational (it is not), it is outside of the MVC’s statutory powers to impose such a requirement on new businesses.

The MVCOL governs the statutory requirements to become a licensed dealer in new or used motor vehicles. That statute authorizes the MVC Chief Administrator to promulgate regulations “in addition thereto but not inconsistent therewith.” N.J.S.A. 39:10-4. While the dealers of new cars must have “a place of business consisting of a permanent building not less than 1,000 square feet in floor space,” ibid. (emphasis added), dealers of used cars need not. They instead must maintain an “established place of business,” that is “a permanent, properly identified location within the State where the books, records, and files necessary to buy, sell, or deal in motor vehicles are kept and maintained.” N.J.S.A. 39:10-2 (emphasis added). By both statute and regulation dating back decades, such “established place of business” can be as small as “a minimum office space of 72 square feet within a permanent, enclosed building located in the State of New Jersey.” Ibid. (emphasis added). Multiple used car dealers occupying unique office space within the same building is permissible under the statute.

When multiple businesses are to share discrete offices within a larger building, the UCC sets forth the requirements for how those businesses are to

be separated. By code, a multi-tenant office building does not need exterior firewalls between every single tenant—fire partitions are all that is required. See 2021 International Building Code, NJ Edition § 708.1 (Pa287). With a fire partition a fire can rage in a single unit for a full hour without affecting any neighboring tenant. See *id.* at § 708.3 (Pa287). The MVC ignores that requirement, mandating instead that each 9x8 interior office must instead be separated by firewalls. See N.J.A.C. 13:21-15.4.

As the Legislature declared in enacting the State Uniform Construction Code Act,

Any law or regulation to the contrary notwithstanding, the structure, design, construction, maintenance and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, maintenance, removal, or demolition of all buildings or structures already erected shall be regulated pursuant to the “State Uniform Construction Code Act,” P.L.1975, c. 217 (C.52:27D-119 et seq.).

[N.J.S.A. 52:27D-123.1 (emphasis added).]

The MVC’s firewall requirement is inconsistent with the UCC, the exclusive rubric against which buildings are constructed. It is likewise contrary to the MVCOL, which expressly contemplates that multiple used-car dealers can occupy a single building in separate office spaces. For either or both reasons, the MVC regulation is ultra vires and cannot stand.

CONCLUSION

For the foregoing reasons, the Court should reverse the MVC's decision and determine that that Applicants' proposed places of business are compliant with applicable MVC regulations. Alternatively, the Court should invalidate those MVC regulations for being ultra vires, arbitrary and capricious.

Respectfully submitted,

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VEHICLE COMMISSION,	:	APPELLATE DIVISION
	:	DOCKET NO.: A-000479-24
	:	
	:	<u>CIVIL ACTION</u>
Petitioner-Respondent,	:	
	:	ON APPEAL FROM A FINAL
v.	:	DECISION OF THE NEW JERSEY
	:	MOTOR VEHICLE COMMISSION
POWER MOTORS, LLC and	:	
NORTH WARREN AUTO	:	
SALES, LLC,	:	
	:	
Respondents-Appellants.	:	

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY
MOTOR VEHICLE COMMISSION
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PRELIMINARY STATEMENT

This appeal is from the MVC's denial of two used motor vehicle dealer license applications. Multi-dealer locations (MDLs), which are a subset of used motor vehicle dealerships, have been a serious problem in New Jersey for many years. Respondent, the Motor Vehicle Commission (MVC), which regulates motor vehicle dealers and dealerships, has undertaken efforts, including making the requirements for the physical infrastructure of used motor vehicle dealership locations more stringent, to crack down on questionable and unscrupulous activity at MDLs. This appeal challenges one of those efforts—an MVC regulation that has been in place since 2006, and that requires used motor vehicle dealers that operate from MDLs to have firewalls between business entities (the firewall rule). The firewall rule has a related exemption (the legacy exemption), under which used motor vehicle dealer license applicants that propose to operate in an MDL may have a fire suppression system (instead of a firewall), but only if they can show that there was at least one licensed motor vehicle dealer and one other business present in the proposed business location prior to March 6, 2006, the effective date of the firewall rule.

Appellants, two used motor vehicle dealer license applicants seeking to operate in a new MDL, allege that the MVC misapplied the legacy exemption in denying their applications. Appellants argue the phrase “other business” in

the exemption should be read more expansively to include an alternate business name for the underlying licensed dealership. However, it is undisputed that Appellants' proposed location does not have a firewall and the MVC's interpretation of a regulation within its implementing authority is entitled to deference. Moreover, the MVC's interpretation that the "other business" must minimally be a separate legal entity from the underlying dealership comports with the plain language of the regulation and aligns with the purpose of the legacy exemption—to exempt MDLs existing as of 2006 (and only those MDLs) from the newly promulgated firewall rule, which otherwise would have put them out of business. Further, the MVC's interpretation is consistent with the canon of construction that exceptions to a rule should be interpreted narrowly.

In a further attempt to sidestep the firewall rule, Appellants argue the firewall requirement/rule and legacy exemption are invalid as both unreasonable and ultra vires. However, the MVC's regulation is a valid exercise of its exclusive authority to regulate the licensing of motor vehicle dealerships and furthers the legislative goal of preventing fraud in motor vehicle transactions by ensuring the security/safety of both the transactional and motor vehicle documents involved in the sale of used motor vehicles.

Moreover, it is consistent with the Motor Vehicle Certificate of Ownership Law, N.J.S.A. 39:10-1 to -38 (MVCOL), since it does not prohibit MDLs, and it does not conflict with or undermine the structural requirements of the State Uniform Construction Code (UCC).

For these reasons, the firewall rule and the legacy exemption are valid, and the MVC's denial of Appellants' used motor vehicle dealer license applications should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

A. Background of the Firewall Rule and Legacy Exemption

In the early 1980s, New Jersey was first introduced to the unconventional strategy of turning a complex or location into a rental base for multiple used motor vehicle dealers (as opposed to “mom-and-pop” dealers on their own lots). See New Jersey State Commission of Investigation Report, Gaming The System: Abuse and Influence Peddling in New Jersey's Used-Car Industry (December 2015) (2015 SCI Report)². (Da17).³ These complexes or

¹ Because they are closely related, the procedural history and facts are combined for efficiency and the court's convenience.

² This court may take judicial notice of matters of public record. See e.g. Manata v. Pereira, 436 N.J. Super. 330, 337 n.3 (App. Div. 2014)(taking judicial

locations where used motor vehicle dealers were licensed in group settings became known as MDLs. (Da5-6). Under the MDL business model, a landlord leases space and provides other services to individuals or entities who are tenants, giving them an apparent base of operations within New Jersey and allowing them to meet the minimum requirements for obtaining used motor vehicle dealer licenses from the MVC. See State Commission of Investigation Report, Gaming The System II: Abuses in the Used-Car Industry (November 2018) (2018 SCI Report) (Da165). In 2015, the MVC identified eleven MDLs operating in New Jersey that served as the base of operation for approximately 2,450 used motor vehicle dealers. (Da18). As of November 2017, the MVC had identified 19 MDLs in New Jersey. (Da166).

Initially, New Jersey did not impose any distinct operating requirements for used motor vehicle dealerships operating at MDLs beyond

notice of MVC guide to police for preparing motor vehicle crash reports); State v. Marquez, 408 N.J. Super. 273, 286 n.5 (App. Div. 2009) (taking judicial notice of MVC manuals).

³ “Pa” refers to Appellants’ appendix; “Pb” refers to Appellants’ brief; “Da” refers to the MVC’s appendix; “T” refers to the transcript of the administrative hearing on March 21, 2024.

maintaining “an established place of business.”⁴ (Da20). It did not take much to satisfy this requirement. For example, as described by the State Commission on Investigation (SCI), the New Jersey Dealers Auto Mall (NJDAM), an MDL in Bridgeton:

had rudimentary cubicles constructed on the bare concrete floor of the old factory, each with a door to display the tenant-dealer’s name. Separated from one another by drywall and lined up along both sides of the hallway, the narrow spaces resembled rows of closets. The ceilings, meanwhile, remained open except for chicken wire strung from one cubicle to the next.

[Da20.]

As the MDL industry grew to accommodate more tenant dealers, consumer complaints increased. (Da23). In sworn testimony to the SCI in preparation for its 2015 report, one of the initial landlords of NJDAM recalled telephone complaints from customers who said dealers took their money without delivering vehicles. (Da23-24). Others complained of purchasing cars with hidden mechanical defects that rendered them unsafe and/or inoperable.

⁴ N.J.A.C. 13:21-15.3(a) (2004) provided, “All applicants shall submit satisfactory evidence that the applicant has established and maintained a permanent, properly identified location wherein there are facilities to display automobiles and at which place of business shall be kept and maintained the books, records and files necessary to conduct the business.” Ibid.

(Da24). Still others complained that dealers were not responsive to telephone messages left at NJDAM and could not be located. Ibid. The landlord testified that no dealers ever kept an inventory of vehicles at that location and most carried on business, including sales, from out-of-state homes, in violation of state regulations. (Da24). In 2003, while investigating allegations of deceptive and fraudulent business practices at the Bridgeton MDL, State Police found evidence of (1) dealers with criminal records conducting improper out-of-state vehicle transactions, (2) dealers manipulating odometers, (3) dealers failing to disclose vehicle salvage histories, and (4) circumstances suggesting the sale of stolen cars with false titles and altered vehicle identification numbers. (Da24). More recently, many consumer complaints for vehicles purchased at MDLs between 2014 and 2017, involved “as is” sales where there was no recourse for repairs or other issues. (Da167-169). Most recently, New Jersey has been faced with the problem of used motor vehicle dealers (primarily those operating out of MDLs) fraudulently issuing and often selling temporary license plates⁵.

⁵ See Jesse Coburn, “Ghost tags: Inside New York City’s black market for temporary license plates — Part 2,” New Jersey Monitor, Apr. 4, 2023, at

The unique challenge for buyers complaining about MDLs is that they have no physical location to visit to address problems related to a transaction. (Da167). “In most cases, buyers visiting the licensed location for an MDL-based dealer will find nothing but an empty building full of locked cubicles (offices) with one complex employee on-site serving as a representative for up to hundreds of dealers who often know little to nothing about the individual businesses and/or specific transactions.” Ibid.; see Coburn, supra (NJDAM had one person for hundreds of dealers on-site in December 2022).

In 2005, the MVC, which is statutorily charged with regulating motor vehicle dealerships and dealers, acknowledged weaknesses in its dealership regulatory framework and proposed sweeping changes to its dealership regulations. (Da24; 37 N.J.R. 1002(a) (Apr. 4, 2005); 38 N.J.R. 1324(a) (Mar. 6, 2006)). Among other changes,⁶ the MVC mandated upgrades in the physical infrastructure, including firewalls and climate controls, required for the

<https://newjerseymonitor.com/2023/04/04/ghost-tags-inside-new-york-citys-black-market-for-temporary-license-plates-2/>.

⁶ The MVC also imposed a requirement that licensed used motor vehicle dealers be present at their places of business a minimum of 20 hours per week. 38 N.J.R. 1324(a).

housing and support of legitimate dealerships. Ibid. These regulatory changes became effective March 6, 2006. 38 N.J.R. 1324(a).

The firewall rule, as it has become known in the industry, requires used motor vehicle dealers that operate from MDLs to have firewalls between business entities. N.J.A.C. 13:21-15.4(d)(1).⁷ The firewall rule “is necessary to protect documents and individuals, both dealers and customers, who are on the premises at the time.” 38 N.J.R. 1324(a). Because dealership locations must house all of the documents and records necessary for the conduct of the business, they must have sufficient security both inside the business and “outside the business in the form of either an exterior wall or a firewall to be protected from accidental or willful incursions.” 37 N.J.R. 1002(a).

Soon after the MVC’s regulatory push in March 2006, NJDAM sued the MVC on behalf of 27 Bridgeton dealers whose license applications had been denied for not complying with the firewall rule. (Da35). NJDAM argued

⁷ A firewall is “a fire-resistance-rated wall having protected openings, which restricts the spread of fire and extends continuously from the foundation to or through the roof, with sufficient structural stability under fire conditions to allow collapse of construction on either side without collapse of the wall, as defined by sections 202 and 706 of the 2021 International Building Code, known as the “IBC/2021,” as adopted by the New Jersey Department of Community Affairs, as the building subcode of the Uniform Construction Code pursuant to N.J.A.C. 5:23-3.14.” N.J.A.C. 13:21-15.1.

that the retro-fitting of firewalls would interfere with the facility's existing sprinkler system. Ibid. In mid-2007, the MVC agreed to the terms of a consent order exempting the 27 Bridgeton dealer litigants from the firewall rule so long as there were interior walls installed to separate the cubicles/offices and a fire suppression system. (Da106-12).

In the interests of fairness to other pre-existing licensed MDLs, the MVC agreed to extend the application of the legacy exemption from the 27 Bridgeton dealer litigants to include all present and future dealers licensed at MDLs prior to March 6, 2006 (the date the firewall rule was first imposed). (Da36). Thus, the legacy exemption, which is now codified at N.J.A.C. 13:21-15.4(d)(1)(i),⁸ exempts MDL facilities that were licensed and operating as MDLs prior to March 6, 2006. Ibid. So only dealers seeking to occupy an office in an MDL facility licensed prior to March 6, 2006 qualify for the exemption, which also benefits the landlords of the MDLs existing as of March 6, 2006, who do not have to retro-fit firewalls into their property. Ibid.

B. Appellants' License Applications

⁸ Though the MVC made a policy decision to apply the legacy exemption in practice, it was not formally codified until the dealer regulations were amended in 2017. See 49 N.J.R. 1443(b) (June 5, 2017).

In March 2023, the MVC received Appellants' applications for used motor vehicle dealer licenses. (Pa75-93; Pa200-13). Both of the applications had a proposed location of 30 Route 31 South, Washington Township, New Jersey (the proposed location). Ibid. The proposed location is a single-story building divided into approximately 60 smaller office space/suites measuring between 72 and 100 square feet each in size. (Pa117; Pa224). Power Motors proposed to occupy Suite 541 and North Warren proposed to occupy Suite 564. (Pa75; Pa200). In the applications, Appellants represented that the proposed location was an MDL containing more than one business and that a motor vehicle dealer had a valid dealership license in this facility as of March 6, 2006. (Pa86; Pa211). Appellants further submitted certifications from licensed professional architects attesting that the proposed location had a fire suppression system. (Pa87; Pa212).

On April 24, 2023, MVC personnel conducted a site investigation of the proposed location. (Pa94-95; Pa215-16). They found that the proposed location is intended to serve as a new MDL for approximately 60 used motor vehicle dealerships, but could be used by many types of small businesses. (Pa241). The interior walls of the units/suites within the proposed location are not firewalls as defined by the International Building Code. (Pa242).

Upon receiving Appellants' applications, MVC business licensing staff referred to the MVC's record of licensed dealers in existence before March 6, 2006; that record showed that Rossi Pontiac Buick GMC ("Rossi G.M.") was the only licensed motor vehicle dealership at the proposed location prior to March 6, 2006. (T57:12-19; Pa244). On July 17, 2023, the MVC requested that Appellants provide additional information to demonstrate that the proposed location contained at least one motor vehicle dealer (i.e., Rossi G.M.) and one other business prior to March 6, 2006. (Pa39-42). In response, Appellants provided a letter from Edward J. Rossi, President of the Rossi Automotive Group, dated July 20, 2023. (Pa43-50). Rossi stated that the "Rossi Automotive Group" operated a new and used motor vehicle dealership at the proposed location representing Chevrolet, Oldsmobile, Pontiac, Buick and GMC franchises until 2005. (Pa49). He further stated that from 1997 until 2007 Rossi Suzuki of Washington, which was located at 29 State Route 31 (across the street from the proposed location), was registered and licensed at the main office at the proposed location. Ibid.

Upon investigation, the MVC was unable to find any record that a motor vehicle dealer named "Rossi Suzuki of Washington" or "Suzuki of Washington" was ever licensed by the MVC as a dealership in New Jersey.

(T62:1-4; T62:5-9; Pa245). The MVC also obtained historical records from the New Jersey Division of Revenue and Enterprise Services, which showed that Rossi GM registered a fictitious business name of “Suzuki of Washington” (SOW) in April 1991 and the registered office location was the proposed location. (T62:10-24; Pa245).

On August 21, 2023, the MVC issued a notice of proposed denial of Appellants’ used motor vehicle dealer applications because Appellants failed to provide sufficient proof that the proposed location was a licensed MDL in that it contained at least one licensed motor vehicle dealer and one other business prior to March 6, 2006 in compliance with N.J.A.C. 13:21-15.4(d)(1)(i). (Pa128-31; Pa229-32).⁹

Appellants requested a hearing on September 14, 2023. (Pa62-69). In support of their contention that there was at least one licensed motor vehicle dealer and one other business at the proposed location prior to March 6, 2006, Appellants submitted a certification from Rossi dated September 12, 2023 and corporate formation documents. (Pa184-192). Rossi certified to the

⁹ The remaining reasons for denial provided in the MVC’s notice of proposed denial have since been cured by Appellants and are not at issue in this appeal. (Pb7).

following:

1. “Rossi [G.M.] was incorporated in or about 1975. Its registered office was 30 Route 31 South in Washington, NJ (the proposed location).” (Pa184).
2. “Between 1975 and 2005, [Rossi G.M.] was in the business of dealing in new and used American-branded cars, which business it conducted out of the proposed location.” Ibid.
3. “In or about 1991, [Rossi G.M.] applied for permission to use the fictitious name ‘Suzuki of Washington’ (‘SOW’) for a dealership with a showroom at 29 State Route 31 in Washington, New Jersey.” Ibid.
4. “[SOW’s] registered place of business was 30 State Route 31 South (the proposed location), at which the business operated its parts and services department.” Ibid.
5. “[SOW] held itself out to the public as a business dealing Japanese-branded vehicles, different from [Rossi G.M.], which dealt in American-branded cars.” (Pa185).
6. “[SOW] was in business at the proposed location from approximately 1991 until 2007.” Ibid.

The corporate formation documents provided with the hearing request show that on April 16, 1991 Rossi G.M. applied to the Secretary of State to register and use the fictitious name SOW for five years. (Pa188).¹⁰

The MVC granted Appellants' hearing request and transmitted the matters to the Office of Administrative Law (OAL) for a hearing on November 6, 2023. (Pa240). The matters were consolidated, and a virtual hearing occurred on March 21, 2024 before Administrative Law Judge William T. Cooper, III. (Pa241; T1-118).

Jessica O'Connor, MVC Regulatory Officer, testified at the OAL hearing on behalf of the MVC. (T52:23-70:25). She testified that the MVC had no record of ever licensing SOW as a motor vehicle dealership. (T62:1-9).

In addition, Ernest DiStefano, who has been a Compliance Officer in the MVC's Business Licensing Unit for seventeen years, testified regarding his investigation of the Appellants' proposed location as well as his general knowledge and understanding of the MVC's regulatory requirements for motor vehicle dealership locations. (T12:18-52:19). DiStefano referred to the

¹⁰ The corporate documents further show that Rossi G.M. filed amendments to the certificate of incorporation in which it officially changed the name of the corporation on several occasions in 1992, 1995, 1996, 2002, and 2010. (Pa187; Pa189-92).

Appellants' application as "highly unusual"; it was the first application for a newly constructed MDL that DiStefano had seen during his seventeen-year tenure with the MVC. (T18:1-6). By contrast, he testified that there are several "established" MDLs in New Jersey that have housed licensed used motor vehicle dealers since he first started working for the MVC in 2007. (T18:13-22). He pointed out that an MDL in Hackettstown (Hackettstown MDL) has "been around forever." (T18:13-15).

DiStefano testified that he is aware of only one MDL (in Phillipsburg) that is built with firewalls separating the individual units from one another. (T44:22-45:8). He testified that it's referred to as "the tombs" and that "it is crazy to look at," because:

You have a bunch of 72 square feet locations all cinder blocks and there is nothing in there except for like wee[d]s and stuff that grows and broken windows and it's dilapidated, but it has those cinder block walls and it's just like rows of them.

[T45:3-6; T45:9-16.]

He further explained, "It's unusual to see these little cinder block things with weeds and stuff growing throughout them as licensed businesses. That's unusual. With no one in them." (T46:4-10). When asked if there are licensed businesses located in the Phillipsburg MDL, DiStefano explained that there

were but the MVC eventually removed their licenses. (T45:17-21).

Dan DiCarlo, the managing member of WNAG Realty LLC (WNAG) and A-Dan Dealer Enterprises LLC (A-Dan), testified on behalf of Appellants. (T73:17-87:16). WNAG owns the Hackettstown MDL, which it currently leases to approximately 155 licensed used motor vehicle dealers. (Da9). DiCarlo testified that A-Dan would serve as the landlord of the proposed Washington location, which is owned by the Rossi family. (T75:14-78:10). He planned to lease the building from the Rossi family (Edward Rossi/Rossi Auto Group) and sublet the units within the building to used dealers such as Appellants. (T78:11-14). He testified that prior to beginning to retrofit the proposed location into an MDL, he attempted to obtain approval from the MVC that the proposed location would be suitable as an MDL. (T78:15-23; T79:4-80:20). He reached out to the MVC in advance because “history had shown that there had been issues with the [MDL] business model in the past.” (T79:9-12). However, with no indication whether the proposed location would qualify for the legacy exemption, he made “a business decision” to invest approximately \$400,000 to perform the work and get the proposed location ready to serve as an MDL. (T78:24-81:2; T85:13-22).

Rossi also testified on behalf of Appellants. (Pa246-47). He has been

an automotive retailer for 46 or 47 years. (Pa246). He operated Rossi G.M., a new motor vehicle dealership, out of the proposed location beginning in 1982. (T90:10-22). Rossi G.M. was licensed with the MVC on a yearly basis as required by law. (T91:6-16). At some point in the early 1990s, Rossi G.M. decided to branch out and sell foreign (Suzuki) vehicles. (Pa246). As a General Motors (G.M.) franchisee, Rossi was not authorized to sell Suzuki vehicles from a G.M. dealership, so his company opened a separate Suzuki franchise (SOW) across the street from the proposed location, where his family exclusively sold Suzuki vehicles. (Ibid.).

Rossi testified that SOW was created as a separate entity from Rossi G.M. with a “doing business as designation.” (T92:8-19). At first, Rossi testified that SOW’s showroom and registered place of business were both located at 29 Route 31 South, across the street from the proposed location. (T92:20-93:18). Rossi further testified that Rossi G.M. and SOW had separate bank accounts, invoices/stationary, employees and road signs. (T95:14-97:6). He explained, “we were restricted by General Motors, . . . they’re very possessive about allowing other brands at the same location, so we had to keep them separate and operate them separately.” (T93:1-4). However, on cross-examination he contradicted his earlier testimony and testified that SOW’s

registered place of business was located at the proposed location, along with Rossi G.M. (T94:20-22). He also claimed, without any documentary evidence, that the accounting and general business operations, as well as the parts and service department for SOW, were all conducted along with Rossi G.M. at the proposed location. (T94:2-22; T96:16-18; T97:7-25). However, any such commingling would have violated Rossi G.M.'s franchise agreement and risked the termination of Rossi G.M. as a G.M. franchisee. Rossi did not explain why he would have been willing to risk this possibility.

Rossi testified, contrary to O'Connor's testimony, that SOW had a motor vehicle dealership license from the MVC separate from the G.M. dealership license. (Pa246). However, he did not have any of the physical documentation from the SOW dealership, including the dealership license. (Ibid.).

The proposed location is owned by Rossi's father, Etsio Rossi, who no longer lives in the area. (T108:9-15; T111:24). A realtor introduced Rossi to DiCarlo, and acting on his father's behalf, Rossi has signed an intent to lease the property to DiCarlo and WNAG. (T111:16-25). As such, he acknowledged that his father would financially benefit if the proposed location were to be approved by the MVC as an MDL. (T112:1-13).

The ALJ issued an Initial Decision on July 1, 2024. (Pa239-57). He accepted the testimony of both MVC witnesses as credible, (Pa247), but made no findings regarding the credibility of DiCarlo and Rossi. (Pa239-53). The ALJ found that SOW was not a licensed motor vehicle dealer, but that it was an existing business located at the proposed location as of March 6, 2006. (Pa248). The ALJ rejected the MVC's argument that the use of a "trade name" or "fictitious name" for a business entity does not create a separate entity and that there was therefore only one business in existence at the proposed location as of March 6, 2006. (Pa251). The ALJ found the argument overlooked the purpose of N.J.S.A. 14A:2-2, which he found was to "allow[] a business entity such as Rossi Auto to create and conduct other businesses without having to create a new legal entity." Ibid. He further found that N.J.A.C. 13:21-15.4(d)(1)(i) does not define the term "other business" and does not require that the other business be owned or operated by a separate legal entity. (Pa252). Having found that SOW was a business in operation at the proposed location on or before March 6, 2006, the ALJ concluded that Appellants satisfied the legacy exemption and were exempt from the firewall rule. Ibid. He recommended that the MVC's notice of proposed denial be reversed and that the MVC issue used motor vehicle dealer licenses to Appellants for the

proposed location. Ibid.

On September 27, 2024, the MVC issued a final agency decision rejecting the Initial Decision. (Pa261-66). The MVC found that SOW had no separate legal existence from Rossi G.M. (Pa264). It modified the ALJ's factual finding that the Rossi Automotive Group created SOW so that it could conduct an additional business that sold Suzuki automobiles. Ibid. Instead, the MVC found:

Rossi did not produce documentation showing SOW was operating as anything other than under the guise of Rossi [G.M.'s] alternate business name, SOW. SOW was never established as a legal entity separate from Rossi [G.M.].

[Pa264.]

The MVC further explained that while New Jersey law permits a corporation to conduct business under an alternate name by filing a certification of registration with the Secretary of State, it is still the filing corporation that is transacting the business as the statute does not provide for the creation of a separate legal entity. Ibid. The MVC thus rejected the ALJ's conclusions that there was an "other" or separate business at the proposed location as of 2006 that had been created by the use of an alternate name. Ibid. It found the absence of a specific definition of the term "other business" to be

insignificant and that it would defy common sense to interpret the phrase “other business” to mean “the same business.” (Pa264-65). The MVC concluded that because there was no evidence that the proposed location was a licensed MDL that housed one licensed dealer and one other business prior to March 6, 2006, Appellants could not benefit from the legacy exemption. (Pa265).

This appeal followed. (Pa267-69).

ARGUMENT

POINT I

THE MVC PROPERLY DENIED THE APPELLANTS’ USED MOTOR VEHICLE DEALER LICENSES BECAUSE THE PROPOSED LOCATION DOES NOT CONTAIN FIREWALLS AND IS NOT EXEMPT FROM THE FIREWALL RULE.

Because Appellants admit that the proposed location does not have a firewall and they have not provided any evidence that another separate business operated out of the proposed location prior to March 6, 2006, the MVC properly denied their applications for failing to comply with the firewall rule and not meeting the legacy exemption.

Reviewing courts defer to an agency's rulemaking expertise. In re Adoption of N.J.A.C. 11:3-29 ex rel. State Dept. of Banking & Ins., 410 N.J. Super. 6, 24-25 (App. Div. 2009). An administrative agency's interpretation of statutes and regulations within its implementing authority is entitled to deference. Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001). An appellate court will not overturn the agency's interpretation unless it is "plainly unreasonable." In re N.J. Tpk. Auth. v. Am. Fed'n of State County & Mun. Employees, Council 73, 150 N.J. 331, 351 (1997). This deference derives "from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010).

Regulations are subject to the same rules of construction as a statute. Medford Convalescent & Nursing Ctr. v. Div. of Med. Assistance & Health Serv., 218 N.J. Super. 1, 5 (App. Div. 2007). "We first consider the plain language of the [regulation], affording those words their ordinary and commonsense meaning." In re Election Law Enf't, 201 N.J. at 263 (quotation omitted). "In determining the common meaning of words, it is appropriate to look to dictionary definitions." Macysyn v. Hensler, 329 N.J. Super. 476, 485 (App. Div. 2000). The paramount

goal is to determine the drafter's intent, which is ordinarily found in the actual language of the enactment. In re Eastwick College LPN-to RN Bridge Program, 225 N.J. 533, 542 (2016). However, a court should consider extrinsic evidence if the "statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective or is at odds with the general statutory scheme." Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012). Such extrinsic tools include the legislative history of the enactment; an examination of the overall policy and purpose of the statute, Cedar Cove v. Stanzione, 122 N.J. 202, 211-13 (1991); and the "long-standing meaning ascribed to the language by the agency charged with its enforcement," Bedford v. Riello, 195 N.J. 210, 222 (2008) (citation omitted). Further, the regulation should be construed in a manner that makes sense when read in the context of the entire regulation. Medford Convalescent, 218 N.J. Super. at 5.

Appellants bears the burden of showing that the denial of their used motor vehicle dealership license applications is "arbitrary, capricious, or unreasonable." N.J. Dep't of Cmty. Affairs v. Maione, 456 N.J. Super. 146, 154-55 (App. Div. 2018) (quotation omitted). They have not carried this burden.

The MVC's finding that the creation of a fictitious business name or DBA designation (DBA) does not creates a separate legal entity constituting

“another business” to qualify for the legacy exemption is entitled to deference. This interpretation is consistent with the plain meaning of the phrase “another business” and this court’s interpretation that the creation of a DBA does not create a separate legal entity. This interpretation further comports with the underlying purpose of the legacy exemption, which is to exempt those MDL locations that were licensed and operating as MDLs prior to the promulgation of the firewall rule. Finally, this interpretation is supported by the canon of construction that exceptions to a regulation should be construed narrowly.

SOW was not a separate legal entity from Rossi G.M., and therefore was not “another business” for purposes of the legacy exemption. Because the proposed location only contained one licensed dealer (Rossi G.M.) prior to March 6, 2006, it was not an MDL when the firewall rule was promulgated. Therefore, this location is not exempt from the firewall rule, and the MVC properly denied Appellants’ license applications.

Used motor vehicle dealer applicants¹¹ must maintain “an established place of business consisting of a minimum office space of 72 square feet

¹¹ A “used motor vehicle dealer” is “a person engaged in the business of selling, buying or dealing in four or more used motor vehicles per year at an

within a permanent enclosed building located in the State of New Jersey. N.J.S.A. 39:10-19; N.J.A.C. 13:21-15.4(c). An “established place of business is defined as “a permanent, properly identified location within the State where the books, records and files necessary to buy, sell or deal in motor vehicles are kept and maintained.” N.J.S.A. 39:10-2, accord N.J.A.C. 13:21-15.1. In addition, used motor vehicle dealers must maintain their own independent office unit or space. See N.J.A.C. 13:21-15.4(d). N.J.A.C. 13:21-15.4(d) provides:

A proposed place of business for a used motor vehicle dealer will not be considered suitable for approval if there already exists one or more licenses issued for, or other business entities present in, the same building. A proposed place of business . . . is deemed to occupy the same building as another business if the two entities . . .

(1) [a]re not completely separated by exterior walls or a firewall . . .;

- (2) Do not have separate entrances;
- (3) Do not have separate, fixed, clearly identified display facilities for motor vehicles;
- (4) Do not have separate mailboxes; and
- (5) Do not have separate, fixed-location (that is not mobile or cellular) telephone systems.

established place of business, but who is not a licensed new motor vehicle dealer.” N.J.S.A. 39:10-2.

[Ibid. (emphasis added).]

Thus, used motor vehicle dealer license applicants can either maintain their own stand-alone location (with exterior walls), or establish a unit or suite within a multi-unit building that is separated from other businesses by a firewall. Ibid.

The firewall rule contains an exception that provides that a used motor vehicle dealer's office need not be surrounded by firewalls if the office is "located in a building housing more than one business, within which there was at least one licensed dealer and *one other business* prior to March 6, 2006." N.J.A.C. 13:21-15.4(d)(1)(i) (emphasis added). Used motor vehicle dealer license applicants seeking to occupy a proposed location that meets this exemption need only have a fire suppression system,¹² and either exterior or standard walls. Ibid. Thus, applicants seeking this exemption must establish that two conditions existed prior to March 6, 2006: 1) a licensed motor vehicle dealer operated out of the proposed location; and 2) there was at least one

¹² The fire suppression system must be approved by a local building code official or the New Jersey Department of Community Affairs. N.J.A.C. 13:21-15.4(d)(1)(i).

other business that operated out of the proposed location in addition to the licensed motor vehicle dealer. Ibid.

In New Jersey existing corporations may adopt and use an alternate name by filing a certificate of registration of the alternate name with the Secretary of State. N.J.S.A. 14A:2-2.1. The certificate shall provide “a brief statement of the character or nature of the particular business or businesses to be conducted using the alternate name.” N.J.S.A. 14A:2-2.1(2)(c). However, the use of a “trade name” or a “fictitious name” for a business entity does not create a separate entity. Zucker v. Silverstein, 134 N.J. Super. 39, 48 (App. Div. 1975); see also Blanar v. Goldstein, 124 N.J.L. 523, 525 (E. & A. 1940) (holding that a business conducted by an individual through a trade name merely constituted an alternative designation for the same thing).

Here, it is undisputed that the proposed location does not contain firewalls. (Pa242; Pb8). Therefore, Appellants cannot be licensed as used motor vehicle dealers unless the legacy exemption applies. Moreover, Appellants have not shown that a second business, separate from Rossi G.M., a licensed dealer, existed at the proposed location prior to March 6, 2006. Appellants’ claim that Rossi G.M. “was a dealer of American-branded vehicles” and SOW “was a dealer of Japanese-branded vehicles,” (Pb3),

ignores the fact that SOW was simply an alternate name for Rossi G.M. (Pa184; Pa188), which could not sell Japanese-branded vehicles because of its franchise agreement with G.M. In short, SOW was a workaround for Rossi G.M.; it was not a separate legal entity from Rossi G.M. See Blonar, 124 N.J.L. at 525; Zucker, 134 N.J. Super. at 48. As such, SOW is not “another business” and the Appellants’ proposed location does not satisfy the legacy exemption. Accordingly, the MVC properly found that Appellants’ proposed location is not “suitable for approval” and thereby denied their license applications. N.J.A.C. 13:21-15.4(d).

The MVC’s interpretation of the legacy exemption is reasonable and therefore entitled to deference. As the agency charged with administering and enforcing the MVCOL, including the issuance of motor vehicle dealer licenses and determining suitable business locations, the MVC has specialized knowledge and expertise in this field. See N.J.S.A. 39:10-3; N.J.S.A. 39:10-4; N.J.S.A. 39:10-19. Further, the MVC’s long-standing interpretation of the legacy exemption—that the “other business” must be a separate legal entity from the licensed dealership—is entitled to deference.

Appellants argue that because the phrase “other business” is neither defined by the regulation nor defined as “one other separate legal entity,” it

should be interpreted to include an alternate business name for the underlying licensed dealership. (Pb25-27). However, the MVC's interpretation that the "other business" must minimally be a separate legal entity from the underlying dealership comports with the plain language of the regulation and is consistent with the underlying purpose of the legacy exemption—to exempt pre-existing MDLs from the newly promulgated firewall rule.

The plain meaning of the phrase "other business" supports the MVC's reasonable interpretation that it must be a separate entity distinct from the underlying dealership. The word "other" is defined as "not the same, different." Websters Ninth New Collegiate Dictionary 280, 1355 (9th ed. 1991). As Appellants correctly state, the nature of the other business is immaterial so long as it is different from the underlying licensed dealership business. (Pb25). Appellants contend the Legislature has recognized that corporations may use alternate names to conduct business. (Pb26). But that is not relevant. The fact that alternative names are permitted by the Legislature does not mean that their use creates a different business from the underlying filing corporation. Instead, as Blonar and Zucker instruct, the alternate name is simply another name for the same thing. Thus, an alternate business name

does not create a different business from the underlying corporation. See Blanar, 124 N.J.L. at 525; Zucker, 134 N.J. Super. at 48.

It follows that Appellants' contention that the legacy exemption does not require that the other business be recognized as a "legally" distinct entity (Pb27) should also be rejected. It is implicit that the phrase "other business" refers to a legal business and not an illegal business or one that is not recognized under the law. Under Appellants' logic, any prospective used motor vehicle dealer would be able to take advantage of the legacy exemption by proposing locations where underground, illegal and/or unlawful business activities occurred prior to 2006. Certainly, this was not the MVC's intention when it identified locations it intended to exempt under the legacy exemption. SOW was not a legally distinct business from Rossi G.M. as evidenced by State records showing it was merely a fictitious name (Pa188), and corroborated by the fact that SOW did not have its own motor vehicle dealership license from the MVC separate from Rossi G.M. (T62:1-9; Pa248). And even if this court were to accept the ALJ's finding that "SOW was not a licensed motor vehicle dealer, but that it was an existing business located at the proposed location as of March 6, 2006" (Pa248), it is still inescapable that SOW was not operating legally since it did not have a dealership license to

operate and sell motor vehicles from the MVC. See N.J.S.A. 39:10-19. As such, it was reasonable for the MVC not to accept an illegal business as “another business” for purposes of the legacy exemption.

Furthermore, the MVC’s long-standing interpretation that the “other business” must be a separate business from the underlying licensed dealership is consistent with the underlying purpose of the legacy exemption—to exempt existing locations that were already operating as MDLs at the time the firewall rule was promulgated. (Pa36). If the exemption were read to allow new MDL locations without firewalls, no MDL dealerships would ever have to construct a firewall. This would defeat the very purpose of the firewall rule. See 37 N.J.R. 1002(a); 38 N.J.R. 1324(a).

The MVC’s interpretation is further supported by a well-established canon of construction, which provides that exceptions to a statutory scheme should be interpreted narrowly. Young v. Schering, 141 N.J. 16, 25 (1995); State v. N.W., 329 N.J. Super. 326, 331 (App. Div. 2000). The firewall is the standard rule for MDLs. The legacy exemption is just that—an exception, which permits fire suppression systems instead of firewalls. As such it should be interpreted narrowly to apply to only those locations that were already licensed and functioning as MDLs, with one licensed dealership and at least

one other legal and legitimate business, before the firewall rule was promulgated in 2006.

The proposed location was never a licensed MDL. It was the stand-alone business location of one licensed dealer—Rossi G.M. (T57:12-19; Pa244). Because Appellants admit that the proposed location does not have a firewall and they have not provided any evidence that another business operated out of that location¹³ prior to March 6, 2006, the MVC properly denied their applications for failing to comply with the firewall rule.

POINT II

THE FIREWALL RULE AND LEGACY EXEMPTION ARE REASONABLE AND SHOULD BE UPHELD.

The firewall rule and legacy exemption are valid exercises of the MVC's authority to regulate the licensing of motor vehicle dealerships, and furthers the legislative goal of preventing fraudulent motor vehicle transactions. Further, the firewall rule does not conflict with or undermine the structural requirements in the UCC, but add to them because the MVC is tasked with the unique responsibility of

¹³ Even assuming that SOW was a separate legal entity, SOW's showroom was located across the street from the proposed location at 29 Route 31 South. (T91:23-92:7). Indeed, Appellants did not produce any physical evidence linking SOW to the proposed location. (T103:23-104:13).

regulating motor vehicle dealerships.

An administrative rule should be upheld unless it is arbitrary, capricious or unreasonable. Bergen Pines Cty. Hosp. v. N.J. Dep't of Human Serv., 96 N.J. 456, 477 (1984). Administrative regulations are accorded a presumption of validity and reasonableness. In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 629 (2013) (quotation omitted). Courts “give substantial deference to” an agency’s interpretation of “a statute that the agency is charged with enforcing,” provided that the interpretation “is not plainly unreasonable.” In re Musick, 143 N.J. 206, 216 (1996) (quotations omitted); Animal Prot. League of N.J. v. New Jersey Dep't of Env'tl. Prot., 423 N.J. Super. 549, 559 (App. Div. 2011) (when reviewing an “agency’s interpretation of statutes within its scope of authority and its adoption of rules implementing its enabling statutes,” courts “afford the agency great deference”). “[T]he grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and . . . courts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent.” N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 223 (1999) (quotation omitted).

As parties challenging an administrative regulation, Appellants “ha[ve] the burden of overcoming that strong presumption” of validity enjoyed by

administrative regulations. N.J. League of Municipalities, 158 N.J. at 222; In re Six Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 92 (App. Div. 2004).

Again, Appellants have not satisfied this burden.

A. The Firewall Rule and the Legacy Exemption Are Valid Exercises of the MVC's Exclusive Authority to Regulate Motor Vehicle Dealerships

The MVC is statutorily charged with enforcing the MVCOL, “to effectuate its general purpose to regulate and control titles to, and possession of, all motor vehicles in this state, so as to prevent the sale, purchase, disposal, possession, use or operation of stolen motor vehicles, or motor vehicles with fraudulent titles” N.J.S.A. 39:10-3; N.J.S.A. 39:10-4. The MVC is thus authorized to promulgate rules and regulations to effectuate the administration and enforcement the MVCOL. N.J.S.A. 39:10-4; N.J.S.A. 39:10-37. Further, the MVCOL mandates that “no person shall engage in the business of buying, selling or dealing in motor vehicles” without a dealer’s license, and license applicants must establish and maintain a place of business within a permanent building. N.J.S.A. 39:10-19. The Chief Administrator is authorized to determine the form and manner of such license applications. Ibid.

The MVC's promulgation of licensing regulations governing the physical location of motor vehicle dealerships (N.J.A.C. 13:21-15.4) falls squarely within the MVC's statutory authority pursuant to N.J.S.A. 39:10-19 to determine the form and manner of license applications whereby licensees must establish and maintain a place of business. Further, the licensing regulations advance the MVCOL's purpose to prevent fraud in motor vehicle transactions. N.J.S.A. 39:10-3. The firewall rule furthers this goal by ensuring that used motor vehicle dealerships maintain a suitable office location where documentation can be stored and protected. 49 N.J.R. 1443(b). Indeed, the rule was promulgated in 2006 as part of a sweeping reform to the lax dealership regulations and in direct response to the rampant reports of fraud and illegal activity pervading the MDL industry.¹⁴ (Da24; 37 N.J.R. 1002(a); 38 N.J.R. 1324(a)). Because dealership locations must house all of the documents and records necessary for the conduct of the business, they must have sufficient security both inside the business and outside the business in the

¹⁴ DiCarlo acknowledged that "history had shown that there had been issues with the [MDL] business model in the past." (T79:9-12). Those issues persist today. See Coburn, *supra*, page 7, ("The MDL, it's a sham, and it's a facilitator of all kinds of illicit and potentially illegal activity.") (quoting SCI spokeswoman).

form of either an exterior wall or a firewall to be protected from accidental and willful incursions. 37 N.J.R. 1002(a).

In the interests of fairness, the MVC made a policy decision to exempt all present and future used motor vehicle dealers licensed at MDLs prior to March 6, 2006 so long as a fire suppression system was installed. (Da36). The legacy exemption applies only to MDL facilities that were licensed and operating as MDLs prior to March 6, 2006. Ibid. The exemption excuses MDL landlords from having to retrofit their pre-existing (prior to March 6, 2006) licensed MDLs to install firewalls. Indeed, without the legacy exemption, DiCarlo would have been required to retrofit his entire Hackettstown MDL to install firewalls.

Appellants contend the firewall rule is contrary to the MVCOL, which expressly permits multiple used motor vehicle dealers to occupy a single building in separate office spaces. (Pb34-35). However, the firewall rule does not prohibit used motor vehicle dealers from occupying separate offices in a single building (MDL business model). It simply requires those offices be separated by firewalls (in new MDLs after March 6, 2006) or protected by fire suppression systems (in MDLs existing before March 6, 2006, where another business was on-site).

Appellants also contend that the legacy exemption is not a typical “grandfathering” scheme whereby “existing businesses [MDLs] may continue operation notwithstanding new statutory or regulatory proscriptions, but new MDLs are prohibited.” (Pb32-33). But there is no hard and fast rule as to how a legacy exemption must work. Here, the MVC has chosen not to ban the construction of new MDLs, but to require they be built with a firewall. Thus, while certain existing MDLs need not construct a firewall, newly constructed MDLs must do so. Thus, the legacy exemption benefits not only those existing MDLs (landlords), but also existing and future occupants (dealers) of existing MDLs.

Appellants’ contention that the MVC is concerned with how “other people used the building years ago” mischaracterizes the focus on whether the proposed location was an existing MDL that was legacy-exempted from the firewall rule. (Pb8; Pb30). As discussed at length above, by definition the legacy exemption only applies to locations that were existing MDLs prior to March 6, 2006. 49 N.J.R. 1443(b). Appellants acknowledge that the proposed location was not an existing MDL, but would be a new MDL. (Pb1, Pb4). Yet, they still contend that the legacy exemption should apply to them by arguing that Rossi G.M.’s use of an alternate business name created a second

and separate legal entity sufficient to constitute “another business” and, in turn, an MDL in 2006. (Pb22-28). Thus, it was Appellants, not the MVC, that raised the issue of how the former occupants of the proposed location used it to argue the proposed location was an existing MDL. If Appellants did not raise the issue of SOW’s alleged existence as a separate business entity, and “introduce the issue of how the building was used 20 years ago,” the MVC would have denied Appellants’ license applications as a routine matter without providing an OAL hearing, since there are no firewalls at the proposed location and/or evidence that the proposed location was an MDL existing in 2006. Moreover, DiStefano’s testimony that the “other business” could be a donut shop or nail salon (T47:4-7) confirms that the MVC is not concerned with the nature or form of the “other business,” but instead focused on whether the other business actually existed in 2006, which would qualify the proposed location for the legacy exemption.

Moreover, Appellants’ contention that the proposed location looks identical to the Hackettstown MDL, (Pb13-14; Pb30), misses the point. The fact that DiCarlo essentially copied the Hackettstown MDL in Washington has no bearing on whether the locations are legacy-exempted. The pre-existing MDLs, like the Hackettstown MDL, are legacy-exempted as a matter of

fairness because they were already constructed and operating when the firewall rule was promulgated. (Da36).¹⁵ New MDL dealers and landlords, like Appellants and DiCarlo in this matter, do not have that same legacy exemption. Instead, they had notice of the current regulations (in place since 2006), which require the construction of firewalls between business locations in new MDLs after 2006. See 37 N.J.R. 1002(a). Thus, while DiCarlo benefits from the legacy exemption with regard to his pre-existing Hackettstown MDL, he must comply with the firewall rule at the proposed Washington MDL as he had ample notice (16 years) of that rule when he started retrofitting the Washington MDL in 2022 without MVC approval. (Pa7; T77:20-78:6; Pb4).

Further, Appellants' implication that the firewall rule is irrational based on DiStefano's reference to the Phillipsburg MDL as the "crazy tombs," (Pb15-16; Pb31), is unavailing. It misconstrues DiStefano's explanation of

¹⁵ Appellants' claim that the Hackettstown MDL "was constructed to the MVC's satisfaction," (Pb1), is not only misleading but also a red herring. The Hackettstown MDL was constructed before the firewall rule. It is legacy-exempted for that reason alone, not because its construction is satisfactory.

why the Philipsburg MDL is “crazy to look at” by leaving out critical pieces of his testimony. (T45:3-6). He explained:

You have a bunch of 72 square feet locations all cinder blocks and there is nothing in there except for like wee[d]s and stuff that grows and broken windows and it’s dilapidated, but it has those cinder block walls and it’s just like rows of them.

It’s unusual to see these little cinder block things with weeds and stuff growing throughout them as licensed businesses. That’s unusual. With no one in them.

[T45:9-16; T46:4-19 (emphases added)].

Appellants left out the underlined portion of DiStefano’s testimony, which references the vacant, lifeless and abandoned nature of the Phillipsburg MDL. (Pb16-16). DiStefano’s full explanation, in context, shows that his references to “crazy” and “tombs” refer to the abandoned nature (with no employees and weeds growing throughout) of the location despite its apparent existence as an MDL housing open businesses, rather than that it was constructed with firewalls. Indeed, the former interpretation comports with the historical evidence that dealers operating out of MDL locations rarely maintain a physical presence at the business location. (Da23-24; Da147).

B. The Firewall Rule Does Not Conflict With the Uniform Construction Code

N.J.S.A. 52:27D-123 directs the Department of Community Affairs (DCA) to adopt the UCC, N.J.A.C. 5:23-1.1 to -12A.6, and N.J.S.A. 52:27D-123.1 further provides that “any law or regulation to the contrary notwithstanding,” the structure, design, and maintenance of all buildings shall be regulated by the UCC. Ibid. In adopting the UCC, the DCA provided that “[a]ny standards other than those provided herein are void and of no effect.” N.J.A.C. 5:23-3.2(a).

However, the DCA’s authority is not absolute. In Atlantic City Showboat, Inc. v. Dep’t of Community Affairs, 331 N.J. Super. 40 (App. Div. 2000), this court addressed the potential conflict between the UCC and the Casino Control Act (CCA). Id. at 41-42. Amendments to the UCC sought to expressly regulate the size, location, density, and height of slot machines in casinos. Id. at 50. The amendments conflicted with the exclusive control of the Casino Control Commission (CCC) regarding such devices. Id. at 50-51. The CCC had already promulgated a rule that regulated the location and density of slot machines in casinos, but did not limit height or aisle width. Id. at 50. Thus, CCA requirements could potentially be less restrictive, creating conditions that would contravene the UCC itself. Id. at 50-51. When a casino challenged the UCC amendments, this court declined to hold that the UCC

amendments preempted the CCA requirements and instead remanded the case for administrative proceedings. Id. at 41.

Here, N.J.A.C. 13:21-15.4(d)(1) mandates that motor vehicle dealerships be separated by exterior walls or a firewall “conforming to sections 202 and 706 of the 2021 International Building Code (IBC), as adopted by the New Jersey [DCA] as the [UCC] pursuant to N.J.A.C. 5:23-3.14.” Ibid. Section 15.4(d)(1) does not create new firewall standards that contradict the UCC. Instead, it follows the standards of the IBC as adopted as the UCC pursuant to N.J.A.C. 5:23-3.14. Therefore, it directly complies with the same standards required by the UCC. Further, it does not regulate the physical requirements of a properly constructed firewall, nor does it address the standards for construction other than to require firewalls adhere to IBC requirements.

Section 15.4(d)(1) complements the UCC. Additional requirements are not the same as conflicting requirements. Section 15.4(d)(1) is not unique in this respect. Other New Jersey regulations provide more particularized standards than the UCC for constructing firewalls in certain contexts. See, e.g., N.J.A.C. 8:43D-3.1(c) (buildings for pediatric community transitional homes with five beds or less must conform with the UCC and additionally require boiler/heating unit rooms to be enclosed with a one-hour rated

firewall); N.J.A.C. 15:3-6.3(c)(2) (providing that records storage facilities containing public records must be in a stand-alone structure, which if shared with other tenants, must be separated from other areas of the building by firewalls of approved construction).

Further, unlike in Atlantic City Showboat, the UCC does not purport to regulate standards for licensing motor vehicle dealerships. Conversely, the MVC is vested with the authority to license motor vehicle dealerships in the State, and to make rules and regulations to that effect. N.J.S.A. 39:10-4; N.J.S.A. 39:10-19. As discussed in Section A above, the firewall rule is a valid exercise of the MVC's authority in this regard, and furthers the legislative goal of preventing fraudulent motor vehicle transactions. Moreover, unlike the CCC's regulations in Atlantic City Showboat, Section 15.4(d)(1)'s firewall rule does not undercut the UCC's building standards, but specifically complies with them. Accord In re Sheppard (South Jersey Motorcars, LLC), No. A-2136-17T4, 2019 N.J. Super. Unpub. LEXIS 17, at **9-10 (App. Div. Jan. 3, 2019) (rejecting argument that the MVC's firewall

rule is inconsistent with the UCC and usurps the authority of the DCA related to building construction) (Da183-186).¹⁶

Therefore, Section 15.4(d)(1) does not conflict with or undermine the structural requirements in the UCC. Rather, it adds to them because the MVC is tasked with the unique responsibility of regulating motor vehicle dealerships. The firewall rule is a valid exercise of the MVC's authority to regulate the licensing of motor vehicle dealership locations and furthers the legislative goal of preventing fraud in motor vehicle transactions. Accordingly, Section 15.4(d)(1)'s firewall rule is valid and should be upheld.

¹⁶ The undersigned is unaware of any contrary unpublished opinions. While In re Sheppard is unpublished, the MVC was a party to that appeal and its denial of Appellants' license applications is consistent with the opinion.

CONCLUSION

For these reasons, the firewall rule and the legacy exemption are valid, and the MVC's denial of Appellants' used motor vehicle dealer license applications should be affirmed.

Respectfully submitted,

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-000479-24**

NEW JERSEY MOTOR VEHICLE
COMMISSION, *Respondent*

V.

POWER MOTORS, LLC, *Appellant*

AND

NEW JERSEY MOTOR VEHICLE
COMMISSION, *Respondent*

V.

NORTH WARREN AUTO SALES,
LLC, *Appellant*

CIVIL ACTION

On Appeal from Final Agency
Decision by the New Jersey Motor
Vehicle Commission

Consolidated below, No. MVH
12898-23 & MVH 12901-23

Sat below: Latrecia Littles-Floyd,
Acting Chair and Chief
Administrator, New Jersey Motor
Vehicle Commission

**REPLY BRIEF OF APPELLANTS, POWER MOTORS LLC AND
NORTH WARREN AUTO SALES LLC, ON APPEAL**

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PRELIMINARY STATEMENT

The regulation on appeal is arbitrary, capricious, and ultra vires, and was applied incorrectly in any event. Apparently unable to defend the regulation as written, the MVC instead attempts to recast the rule to say something other than what its plain language states. According to the MVC, as recast the regulation is an unremarkable “grandfather” exemption entitled to great deference to combat fraud. Moreover, the MVC claims, the Applicants cannot satisfy the exemption because an “other business” necessitates a “separate legal entity.” All such contentions are without merit.

It is not difficult to see what is happening here; the MVC states it on the first page of its brief. Even though MDLs are a legitimate form of business recognized time and again by the Legislature, the MVC has self-determined to create barriers to entry by making “the physical infrastructure of used motor vehicle dealership locations more stringent.” Both the improper means chosen by the MVC to stanch business, and improper way those regulations were applied here, mandate reversal.

LEGAL ARGUMENT

POINT ONE

The MVC Is Attempting to Salvage Its Arbitrary Regulation by Rewriting It on Appeal.

N.J.A.C. 13:21-15.4(d) prohibits multiple dealers from occupying the same established place of business at the same time. The MVC¹ deems the locations the same unless they are “completely surrounded by exterior walls or a firewall.” N.J.A.C. 13:21-15.4(d)(1). However, if the dealer’s office would be “located in a building housing more than one business, within which there was at least one licensed dealer and one other business prior to March 6, 2006,” then the offices can be separated by “standard walls constructed separately from any other wall.” N.J.A.C. 13:21-15.4(d)(1)(i). Firewalls are not then needed.

By that plain language, there is no requirement that the location must have been an MDL in 2006. The presence of one dealer and any other business—no matter the type—would suffice. For that reason, the MVC regulation in no way prohibits the creation of new MDLs, nor does it require new MDLs to have firewalls if there were two businesses there years prior. The MVC confirmed this construction through sworn witness testimony below. See (1T46:19 to 47:8)

¹ Acronyms and abbreviations utilized in the Applicants’ opening brief are continued here.

(confirming that “new MDLs are permissible”); (1T27:4-5) (“It does not have to be a dealership, it could be any other type of business.”); (1T47:4-8) (agreeing that if a dealership had “a Dunkin Donuts in the same location . . . that would be fine”). The MVC’s counsel concurred during opening statements. See (1T6:23-24) (“[t]hat second business does not have to be a dealership”).

In their appellate brief, however, the MVC offers a new, irreconcilable construction. Now the MVC claims that the regulation was designed “to exempt MDLs existing as of 2006 (and only those MDLs) from the newly promulgated firewall rule, which otherwise would have put them out of business.” (Db2); accord (Db31) (differentiating between “existing” and “new” MDLs (emphasis in original)). Indeed, the MVC repeats this claim on many occasions throughout its brief, doubling down on the theory that the regulation is a typical grandfather rule that merely exempts pre-2006 MDLs (and no one else) from new firewall requirements. See (Db9, 24, 29, 31, 36-38); see also (Db36) (“The legacy exemption applies only to MDL facilities that were licensed and operating as MDLs prior to March 6, 2006.”).

That is not what the regulation says. It is also not the position that the MVC took before the OAL. It is even inconsistent with the regulation as explained elsewhere in the MVC’s brief. If many years ago a building housed one dealer and some non-dealer business, then it was not an MDL in 2006. But

as the MVC states in its brief, the presence of even “a donut shop or nail salon . . . would qualify the proposed location for the legacy exemption.” (Db38); accord (Db38) (“the MVC is not concerned with the nature or form of the ‘other business’”); (Db26-27) (summarizing what the regulation’s text requires). That the MVC would attempt to recast its own regulation, and would further explain its application so inconsistently within the same legal submission, only underscores the regulation’s irrationality.

While such vacillations are telling of the MVC’s inability to justify its regulation, what ultimately matters is the regulation as written in the Administrative Code—not what the MVC pretends it to say after the fact.

POINT TWO

The Applicants Satisfied the Plain Language of the Regulation Exempting Them From the Firewall Requirement

The introductory question on appeal is whether Suzuki of Washington was an “other business” in 2006. After hearing the unrefuted testimony that Suzuki of Washington maintained its own functional identity, including its own bank accounts, business records, financial records, employees, show room, service personnel, stationary, signage, and many other such incidentals of business, the ALJ correctly answered that question in the affirmative. (Pa252). The MVC’s disagreement rings hollow.

Just as it attempted to rewrite the firewall requirement itself, the MVC here attempts to replace the phrase “other business” with “separate legal entity.” (Db23-24). That is unwarranted. As the Applicants explained in their opening brief—and as the MVC fails to rebut—there are all manner of ways to start a new business in New Jersey. (Pb25-26). Creating a “separate legal entity” is not required. Accordingly, prior precedent confirming the obvious, that a “doing business as” designation does not create a “separate legal entity” for liability purposes, see (Db24, 27-28), does not inform the analysis in this appeal.

Equally without merit is the MVC’s contention that its after-the-fact construction “comports with the underlying purpose of the legacy exemption, which is to exempt those MDL locations that were licensed and operating as MDLs prior to” 2006. (Db24). As explained in the prior point heading, the regulation does not require that. Adopting a construction to comport with an illusory standard is wrong.

The MVC likewise errs when it claims that its “long-standing interpretation of the legacy exemption—that the ‘other business’ must be a separate legal entity from the licensed dealership—is entitled to deference.” (Db28, 31). But as the MVC’s own witness explained under oath at the hearing, this is the very first time since 2006 that anyone has tried to open a new MDL. (1T18:2); accord (Db15) (this “was the first application for a newly constructed

MDL” the witness could recall (emphasis in original)). The question is thus one of first impression for both the MVC and this Court. Seeking “deference” based on non-existent historical practices is baseless. Likewise, claiming that the “other business” exception “should be interpreted narrowly” (Db31) adds nothing. The Washington Location, having both one licensed dealer and another business decades prior, is a veritable unicorn.

In another internally inconsistent attempt to support its position, the MVC claims that Suzuki of Washington was not a “business” because it was “not operating legally since it did not have a dealership license to operate and sell motor vehicles from the MVC.” (Db30-31); accord (Db11-12, 14). To begin, that statement is not supported in the record. During the hearing, an MVC employee testified that the MVC created a “spreadsheet” at some point in the 2000s, which “spreadsheet” showed what businesses had car-dealer licenses at a particular address “as of March 6th in ‘06.” (1T12:20-22, 27:18 to 28:7). That spreadsheet—which the MVC did not introduce into evidence and which is not provided on this appeal—allegedly does not reflect that Suzuki of Washington held a license at 30 Route 31 South. (1T27:18 to 28:7, 57:3-19). Since Suzuki of Washington’s separate MVC license was associated with 29 Route 31 South where it had its showroom—not 30 Route 31 South where it had its back office

(1T93:16-18)—the relevance of that 2000s-created spreadsheet about the existence of a 1990s license at 30 Route 31 South is dubious at best.

Regardless, the MVC is again flipflopping on its position. If (as the MVC claims) Rossi America and Suzuki of Washington were merely “another name for the same thing” (Db29), then Suzuki of Washington would not need a separate dealership license from the MVC. How then could Suzuki of Washington be operating “illegally”? The position also defies common sense, given that Suzuki of Washington operated for years and submitted untold amounts of paperwork and registrations to the MVC, with no evidence of the MVC earlier claiming that the business was “illegal.” And in any event, there is no requirement in the regulation that the “other business” must have been compliant with every single law on the books to qualify as an “other business.” The whole issue is a red herring.

As both the plain language of the regulation and (portions) of the MVC’s brief state, “the MVC is not concerned with the nature or form of the ‘other business.’” (Db38); accord (Db29) (“the nature of the other business is immaterial”). Suzuki of Washington held itself out to the world, and conducted itself internally, as a “business” separate and apart from Rossi America. It should not be outcome determinative whether Mr. Rossi chose to conduct that separate business as a C-corporation, a limited liability company, a partnership,

a sole proprietorship, or a “doing business as” designation under N.J.S.A. 14A:2-2.1. What matters are the facts accepted by the ALJ, which facts the MVC did not refute. As irrational and arbitrary as this entire inquiry is, the Applicants satisfied it. The Washington Location is exempt from the “firewall” mandates of N.J.A.C. 13:21-15.4.

POINT THREE

The Firewall Requirement Is Arbitrary and Capricious.

As explained in the Applicants’ opening papers, MDLs have been around for decades and have been repeatedly recognized by the Legislature. (Pb33-35). While dealers of new cars must occupy “a permanent building not less than 1,000 square feet in floor space,” dealers of used cars must instead have only “a minimum office space of 72 square feet within a permanent, enclosed building.” N.J.S.A. 39:10-4. That is, the Legislature has declared that used-car dealers can conduct business in MDLs.

Despite that clear legislative statement that MDLs are permissible for dealers in used cars, the MVC states that it dislikes the business model. It cites to generalized concerns that other actors—unconnected to Mr. DiCarlo, WNAG, A-Dan, or the Applicants, with whom the MVC takes no issue—have allegedly

engaged in sharp business practices in the past. (Db3).² Because of those generalized concerns with some other actors, the MVC has imposed a barrier to entry on everyone, making “the physical infrastructure of used motor vehicle dealership locations more stringent.” (Db1). Even assuming that stifling a legitimate business model recognized by the Legislature is within the MVC’s power (it is not), the means chosen by the MVC are irrational.

The MVC states that requiring firewalls around every single 9x8 interior office “furthers the legitimate goal of preventing fraudulent motor vehicle transactions.” (Db32). But other than to allege that there were concerns of other dealers engaging in unscrupulous conduct years ago (Db35), the MVC does not otherwise explain that justification for the regulation. If someone is intent on committing a fraud, the materials used to construct his/her walls will not act as a deterrent. There is no rational correlation between how honest someone is and how their office walls were built.

The MVC’s other purported justification is “sufficient security both inside the business and outside the business in the form of either an exterior wall or a firewall to be protected from accidental and willful incursions.” (Db8, 35-36). That makes no sense. If the goal is security “inside the business,” what

² It is not clear how a 2015 State Commission of Investigation Report informs the rationality of a 2006 regulation. See (Db3).

difference would it make to someone inside the office space how the surrounding walls were constructed? The person is already inside. And as for concerns over persons “outside the business” seeking to enter, should not the focus be on the door leading into the office rather than the walls? After all, doorways are how most people enter and exit a room, not through the walls. And the MVC otherwise covers security of documentation through the mandates of a “fixed safe” and a “secured area . . . for the storage of controlled [MVC] documents.” N.J.A.C. 13:21-15.4(l), (m). If documents are in a safe there is no reason to surround that safe in concrete. And again, no one among the many thousands of dealers in New Jersey has an office surrounded by concrete fire walls. A safe and sprinklers have always sufficed for everyone to protect documents and occupants alike.

The final claimed rationale for the firewall rule is a “legacy exemption” for MDLs that existed prior to 2006. (Db37). But as articulated above, that is not what the regulation says. It does not grandfather existing MDLs from new regulations. New MDLs are fine, so long as years ago at least one dealer and, e.g., a donut shop were on the same property. That is the height of caprice, as it makes no legitimate difference to anyone today how the property was used decades ago by other people.

Attempting to distance itself from its own investigator's assessment that any firewall-filled structure would be "crazy," the MVC claims that the Applicants are "leaving out critical pieces of his testimony." (Db40). What Mr. DiStefano really meant, the MVC claims, is that the so-called "tombs" are only "crazy" because they are "abandoned." (Db40). A simple block quotation refutes that misguided claim.

Q. When I say the word firewall, I mean like a big brick partition that will go from the foundation all the way through the roof and completely separate one area of the structure from the other. Are you saying that there is an MDL in the state that has firewalls?

A. Phillipsburg, actually we call it the tombs because it's built of completely masonry block, so that would be the only one I'm aware of. It's crazy to look at. There's just all these little tombs of cinder block. That's the only one that I know of that has concrete block walls everywhere throughout.

[(1T44:25 to 45:8) (emphasis added).]

Of note, the investigator called the structure of "tombs" "crazy" in a moment of complete candor using words of his own choosing. Much like the regulation itself, his testimony cannot be rewritten on appeal.

POINT FOUR

The Firewall Requirement Is Ultra Vires.

As irrational as the firewall requirement is, it is not even within the MVC's power to mandate. The UCC dictates the sorts of walls that must

separate different businesses within a multi-tenant office building, mandating fire partitions and preempting all contrary standards. See (Pb33-35). By statute any contrary building requirement that MVC attempts to impose is superseded. See N.J.S.A. 52:27D-123.1 (the UCC governs building standards “[a]ny law or regulation to the contrary notwithstanding”).

In response the MVC cites Atlantic City Showboat, Inc. v. Dep’t of Community Affairs, 331 N.J. Super. 40 (App. Div. 2000). That case is inapposite. There the Legislature gave to the Casino Control Commission (“CCC”) the exclusive power to regulate casino activity, preempting all inconsistent statutes and regulations. Id. at 48-50. When the DCA inserted into the UCC provisions governing the placement and characteristics of slot machines, including their height, litigation followed. Id. at 44. The panel there deemed the appeal premature, since the dispute was “abstract” and the CCC was not a party. Id. at 55-56. It therefore remanded while making no substantive holdings. Id. at 56. “If, or when, a true conflict emerges, we are confident that the DCA and the CCC will coordinate regulation in the overall public interest.” Id. at 42.

Whatever import Atlantic City Showboat has, it does not state that the MVC can dictate building requirements under the guise of business licensure. That is particularly the case since the MVC’s enabling legislation (unlike the

CCC's) does not supersede other statutes that might conflict with MVC's powers. See generally N.J.S.A. 39:10-1 to -25. Such preemption is reserved for the DCA and the UCC it promulgates. See N.J.S.A. 52:27D-123.1

That other regulations mention the word "firewall" also does not support the MVC's argument. See (Db42-43) (citing N.J.A.C. 8:43D-3.1, 15:3-6.3). No one has challenged those other regulations, and thus there is no precedent over their validity. Regardless, they do not actually say what the MVC claims.

N.J.A.C. 8:43D-3.1(c)(1) states that the boiler/heating unit in a pediatric community transitional home must be in a room with a "one-hour rated firewall." There is no such thing as a "one-hour rated firewall" under the UCC (a term apparently used in error in N.J.A.C. 8:43D-3.1), and that regulation does not require encasing the boiler in a concrete tomb from the foundation through the ceiling. See (Pb15) (defining "fire wall"); (Db8 n.7) (same). And N.J.A.C. 15:3-6.3(c)(2) states that the requirement of firewalls around government-records archives is in accord with "ANSI/NFPA 232A. Fire Protection for Archives and Records Centers, Chapter 2-3, Fire Risk Evaluation Factors." That is, the Code there is merely *repeating* established construction standards, not altering them.³

³ The MVC's invocation of a nonprecedential, unpublished opinion from years ago (Db43-44) warrants no response. But that case, wrongly decided, is distinguishable in any event. See (Pa20-24) (addressing In re Sheppard).

Ultimately, what the MVC seeks is the ability to supplement the UCC with additional, more-onerous requirements on the businesses the MVC regulates. See (Db32, 44). But if the MVC has that power, then what would prevent every other regulator from claiming its own variations for the persons they regulate? Could the Board of Psychological Examiners dictate the physical construction of rooms where patients obtain treatment, or the Board of Accountancy concerning offices where clients obtain services? A proliferation of conflicting construction standards could well develop for many licensed businesses, undermining the entire reason for the Uniform Construction Code. See N.J.S.A. 525:27D-120(d) (UCC's purpose is "[t]o eliminate restrictive, obsolete, conflicting and unnecessary construction regulations"). The MVC's argument is a slippery slope inimical to the uniformity entrusted to the DCA. The Court should not allow it.

CONCLUSION

The MVC's regulation is arbitrary, capricious, and ultra vires, but the Applicants complied with it regardless. For either or both reasons, the Court should reverse.

Respectfully submitted,

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