
B9 SCHOOLHOUSE OWNER, LLC

Plaintiff-Respondent,

v.

TOWNSHIP OF FRANKLIN,

Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appellate Docket No.:
A-1461-24

Superior Court Docket No.:
Consolidated Matter
SOM-L-1365-23

CONCORE REALTY, LLC,

Plaintiff-Respondent,

v.

TOWNSHIP OF FRANKLIN,

Defendant-Appellant.

Superior Court Docket No.:
SOM-L-1385-23

Sat Below:
Hon. William G. Mennen, J.S.C.

On appeal from the Order entered on
December 6, 2024, by the Honorable
William G. Mennen, J.S.C. awarding
Summary Judgment to Plaintiff-
Respondent B9 Schoolhouse Owner,
LLC and Plaintiff-Respondent Concore
Realty, LLC

**BRIEF ON BEHALF OF DEFENDANT-APPELLANT
TOWNSHIP OF FRANKLIN**

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PRELIMINARY STATEMENT

By way of the instant appeal, Defendant-Appellant, Township of Franklin (the “Township”) requests that this Court reverse the Trial Court’s erroneous decision that Franklin Township Ordinance No. 4419-23 (the “Ordinance” or “Ordinance 4419-23”) is not applicable to Plaintiff-Respondents’ respective development applications to construct warehouses in the Township of Franklin.

The Ordinance amended the Township’s stormwater management (“SWM”) rules to conform, in all respects but one, to updated model regulations promulgated by the New Jersey Department of Environmental Protection (“DEP”) on July 17, 2023. The sole provision at issue—Subsection 330-3(D) (the “Applicability Provision”)—provides that the Township’s amended SWM rules apply to any development application pending before a local land use board that had not received final approval prior to the Ordinance’s effective date.

The Applicability Provision comports with and is authorized by the *Municipal Land Use Law* (“MLUL”), N.J.S.A. 40:5D-1 to -136. That provision at N.J.S.A. 40:55D-10.5, which is commonly known as the Time of Application Rule (“TOA Rule”), includes an exception for ordinances relating to “health and public safety,” even if said ordinances are adopted after an application is deemed complete for purposes of commencing the applicable time period for action by a municipal agency. The record below left no doubt that the amended SWM rules directly serve

vital public health and safety interests, and thus fall within the TOA Rule's exception.

Despite the plain language of the MLUL and the New Jersey Supreme Court's recognition in Shipyard v. Hoboken, 242 N.J. 23 (2020), that municipalities may apply public health and safety ordinances to pending and preliminary applications, the Trial Court declined to do so here. Instead, it incorrectly treated the Ordinance as a zoning measure subject to the TOA Rule's general bar, a distinction relevant only in cases involving final approvals. In doing so, the Trial Court adopted a binary framework that Shipyard expressly limits. The Supreme Court recognized that an ordinance does not lose its character as a health and public safety measure merely because it might also function as a zoning regulation. The Trial Court's ruling misreads both statutory and precedential authority and undermines the clear legislative intent to preserve municipal authority in matters of public safety prior to final approval.

Although the Trial Court determined that this conclusion mooted the separate issue of preemption, the Township respectfully submits that the issue should nonetheless be addressed and resolved by this Court in the interest of judicial efficiency. The DEP's own rulemaking materials and responses to public comment confirm that municipalities retain the authority to adopt stricter local standards and

that such standards may apply independently to local development applications. This is the case even where DEP permits are reviewed under prior rules.

Because the Ordinance comports with both the MLUL and DEP policy, and because it does not interfere with the Department's review of DEP-level permit applications, it does not create a conflict of operational effect. Accordingly, this Court should reverse the Trial Court's decision and find that Ordinance 4419-23 is valid and applicable to Respondents' respective land use applications.

PROCEDURAL HISTORY

A. Trial Court Pleadings

On November 13, 2023, Plaintiff-Respondent B9 Schoolhouse Owner, LLC (“Respondent B9” or “B9”) filed a two count Complaint in Lieu of Prerogative Writs (the “B9 Litigation”) against Defendant-Appellant Township of Franklin (the “Township” or “Franklin”) in connection with the enactment of Ordinance No. 4419-23 (the “Ordinance” or “Ordinance 4419-23”) (Da1 to Da108). On November 16, 2023, Plaintiff-Respondent, Concore Realty, LLC (“Respondent Concore” or “Concore,” and together with B9, the “Respondents”) filed a two count Complaint in Lieu of Prerogative Writs (the “Concore Litigation”) (Da140 to Da241).

The two Complaints mirror one another. Count One of both Complaints seeks a declaration that the enactment of Ordinance 4419-23 was arbitrary, capricious, and unreasonable, and, thus, void and unenforceable (see Da12 to Da17; Da146 to Da150). Count Two of both Complaints assert that Ordinance 4419-23 is invalid, preempted by state law, and unenforceable either in full or, alternatively, in part. Ibid.

On January 26, 2024, the Township filed an Answer with Counterclaims to each respective Complaint (Da110 to Da131; Da242 to Da259). The Township’s Counterclaims seek a declaratory judgment that Respondents’ respective pending

land use applications to construct warehouses in the Township are subject to various Township Ordinances, namely Ordinance 4419-23. Ibid. On February 28, 2024, Respondent B9 filed an Answer to the Township's Counterclaim (Da132 to Da139). On July 17, 2024, Respondent Concore filed its own respective Answer to the Township's Counterclaims (Da260 to Da263).

B. Respondents' Respective Summary Judgment Motions

On April 4, 2024, the Trial Court entered a Consent Order of Consolidation to consolidate the B9 Litigation and Concore Litigation (Da264 to Da265). On May 15, 2024, the parties appeared before the Trial Court for a Case Management Conference and, thereafter, on May 23, 2024, the Trial Court entered a Case Management Order (the "CMO") providing Respondents until June 28, 2024 to file motions for summary judgment pertaining to two issues of law:

[W]hether Franklin Township Ordinance 4419-23 is preempted by State law and/or is invalid because it contravenes, is pre-empted by or not authorized by State Law or the regulations promulgated thereunder, including specifically N.J.A.C. 7:8, and/or the "time of application rule," N.J.S.A. 40:55D-10.5.

(Da266 to Da267). On May 28, 2024, pursuant to leave granted by the Trial Court in the CMO, Respondent B9 filed an Amendment to its Complaint to assert relief related to a due process claim (Da109 to Da110).

On June 28, 2024, pursuant to the CMO, Respondent B9 filed a motion for summary judgment pertaining to the subject issues of law (Da278 to Da279). On July 18, 2024, Respondent Concore filed its own request for summary judgment (Da438 to Da441). Although brought against the Township and not Respondent B9, said relief was sought pursuant to the filing of a Cross-Motion for Summary Judgment. Ibid. The brief filed by Concore in support of said cross-motion adopted and incorporated by reference the legal arguments submitted by Respondent B9.

C. Award of Summary Judgment To Respondents, Respectively

On December 3, 2025, the Trial Court received oral argument on Respondents' respective Motions for Summary Judgment.¹ Following argument, the Trial Court announced it would reserve and place a decision on the record on December 6, 2024 (1T46:9-18). On December 6, 2024, the Trial Court rendered its decision on the record, awarding summary judgment to both Respondents (Da268 to Da269; 2T4:1-18:2). In its oral Decision, the Trial Court affirmed that two legal issues were agreed to be at issue:

¹ "1T" refers to the transcript of the oral argument held on December 3, 2024.

"2T" refers to the transcript of the Trial Court's decision read onto the record on December 6, 2024.

By case management order that was entered by this Court on May 23rd of 2024, the aforementioned summary judgment application was limited to questions concerning the validity of the Franklin Township ordinance number 4419-23 as it relates to two avenues of inquiry: first of all, the Time of Application Rule under N.J.S.A. 40:55D-10.5; and questions related to preemption.

(2T5:16-23). Further, the Trial Court recognized that all parties acknowledged that no genuine issues of material fact existed:

Speaking of this case, by everyone's acknowledgment, there are no genuine issues of material fact. There were only two questions then before this Court. Is ordinance 4419-23 exempt from the Time of Application Rule? And then secondly, is ordinance 4419-23 by virtue of its deviation from NJDEP rules as to applicability preempted, and therefore of no effect to the plaintiff's respective – plaintiffs' plural – respective applications.

(2T10:6-14).

The Trial Court rendered its decision by addressing one of the two legal questions presented—namely, whether Ordinance 4419-23 applied to Respondents' respective, pending land use applications under the exception to the Time of Application Rule for health and public safety ordinances at N.J.S.A. 40:55D-10.5 (the "TOA Exception") (2T10:15-16:18). The Trial Court acknowledged the parties' opposing positions:

In this case, the municipal defendants argue that ordinance 4419-23 is a health and public safety ordinance and is therefore exempt from the Time of Application Rule or

that the carve-out within the Time of Application Rule applies. The plaintiffs disagree and assert that the ordinance is a zoning ordinance and therefore is subject to the Time of Application Rule.

(2T11:3-9).

The Trial Court framed the applicability of the TOA Exception as turning on whether the Ordinance constituted a zoning ordinance or a health and public safety ordinance:

Should this Court then determine that the ordinance is a zoning ordinance as opposed to a health and public safety ordinance, the Time of Application Rule carve-out would not apply and the Time of Application Rule then would limit the applicability of the new standards in ordinance 4419-23.

(2T12:7-12).

Among the cases analyzed, the Trial Court placed primary emphasis upon Shipyard Associates v. City of Hoboken, 242 N.J. 23 (2020). The Trial Court relied on Shipyard to narrow the question before it to a binary classification of whether Ordinance 4419-23 constitutes a zoning ordinance or, alternatively, a health and public safety ordinance:

The most recent reported decision addressing this question is Shipyard Associates versus the City of Hoboken, 242 N.J. 23. It's from 2020. In Shipyard, an ordinance adopted by the city was virtually identical to an NJDEP model ordinance to address flood damage prevention.

Here too the ordinance in question was expressly enacted pursuant to the city's policy power.

Yet in the Shipyards case, the Supreme Court tackled this question from the opposite viewpoint, finding that, quote, ***“Even if a zoning ordinance has an effect on public health and safety or is motivated by health and safety concerns, that does not recharacterize a zoning ordinance as a general policy power ordinance.”*** That's in the Shipyards case at page 41.

The Shipyards court found the ordinance in question, quote, “readily distinguishable from the ordinance in Jackson and Sparroween as those ordinances did not place limits on where or how one could build but instead regulated subject matter – planting trees and smoking respectively – which were divorced from typical planning and zoning concerns.”

The Shipyards court concurred that the Jackson and Sparroween ordinances merely touched upon the use of land but contrasted the ordinance in Shipyards which it found to be a planning or zoning initiative. It found the function of the ordinance in Shipyards to be the regulation of subdivisions and new development and the setting of specific standards, methods, and uses governing construction. That's from the Shipyards case at page 42.

(2T13:13-15:2).

Having set forth only those portions of Shipyards it deemed dispositive, the Trial Court then offered its reasons for concluding that Ordinance 4419-23 to constitute a “zoning ordinance” rather than a “generic environmental regulation” (2T15:3-13). The Trial Court concluded its analysis by suggesting that the

Township's argument for applying the TOA Exception rose or fell entirely on whether Ordinance 4419-23 should be characterized as a health and safety ordinance rather than a zoning ordinance:

Any suggestion that ordinance 4419-23 is simply or only a health and safety ordinance runs counter to the analysis in Shipyard which I just reviewed.

(2T15:10-13).

Based on that analysis, the Trial Court held that Ordinance 4419-23 is a zoning ordinance and, therefore, the TOA Exception could not apply to make it effective as to Respondents' respective pending land use applications:

Having found ordinance 4419-23 to be zoning ordinance, Franklin Township cannot deviate from the Time of Application Rule. That rule, the Court notes, is but one component of the MLUL. The Court therefore grants summary judgment to the plaintiff in finding that ordinance 4419-23 is not and was not applicable to the plaintiffs' – S apostrophe – respective applications for development.

Ibid.

Having concluded that Ordinance 4419-23 could not be applied to the development applications due to the TOA Rule, the Trial Court determined that the remaining issue of whether Ordinance 4419-23 was preempted by regulations of the New Jersey Department of Environmental Protection (the "Department" or "DEP") was rendered moot (2T16:14-17:23). Accordingly, as a matter of judicial restraint,

the Trial Court declined to adjudicate the preemption issue, which had been the subject of full briefing and oral argument by the parties. Ibid.; see also (1T9:21-25:31; 2T16:19-17:23).

The Township filed an Amended Notice of Appeal on February 7, 2025 (Da270 to Da274).

STATEMENT OF FACTS

On January 27, 2020, Governor Phil Murphy and the Commissioner of the New Jersey Department of Environmental Protection (“NJDEP”) directed the NJDEP to update New Jersey’s stormwater regulations (Da366 to Da374). The NJDEP amendments to the stormwater regulations were issued on July 17, 2023. N.J.A.C. 7:8-1.6.

In the DEP’s model ordinance, which was issued to assist municipalities revise their own SMW ordinances, the DEP recognized that the model “represents the minimum standards and expectations” to be adopted by municipalities (Da500 to Da535).

On September 12, 2023, the Township adopted Ordinance 4419-23, titled “Stormwater Management,” which amended Ch. 330 of the Franklin Township Municipal Code (the “Township Code”) (Da287 to Da315). The Ordinance added

a new subsection at §330-3(D) (“Applicability”) to the Township Code, which states:

Any application required pursuant to Sections A and B above, ***which has not received final approval*** prior to the effective date of this ordinance shall be subject to the provisions of this ordinance.

Ibid. at §330-3(D) (emphasis added). As acknowledged by the parties before the Trial Court, the Township’s SWM rules mirror the DEP’s model SWM rules in all respects except for the applicability provision (1T6:15-7:5).

On May 5, 2022, Respondent B9 applied to the Franklin Township Planning Board (the “Board”) for site plan approval to develop a warehouse on its property consisting of twenty-seven (27) acres at Schoolhouse and Mettlers Road in Franklin Township (Da284 to Da286). Respondent B9’s Application was deemed complete on August 4, 2022.² Ibid. On January 20, 2023, Respondent Concore submitted an application to the Board for site plan approval on its own respective property (the (Da444 to Da453). Unlike Respondent B9’s application, Respondent Concore’s application was marked complete but laid fallow by Respondent Concore as of the submission of Concore’s Summary Judgment Motion (1T5:22-6:1).

² The references herein to “completion” refer to the meaning set forth in N.J.S.A. 40:55D-10.3: “An application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency, when so certified by the municipal agency or its authorized committee or designee.”

APPELLATE STANDARD OF REVIEW

The within matter involves the appeal of a grant of Summary Judgment. The appeal of a ruling on Summary Judgment is reviewed de novo. Davis v. Brickman Landscaping, 219 N.J. 395, 405 (2014). Thus, the appellate court applies the same standard which governed the trial court and no deference is given to the trial court's interpretation of the law. Id. (internal citations omitted). That standard compels the grant of summary judgment:

if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged ***and that the moving party is entitled to a judgment or order as a matter of law.***

R. 4:46-2(c) (emphasis added); Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520 (1995); Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (emphasis added).

The New Jersey Supreme Court has encouraged trial courts not to refrain from granting summary judgment when proper circumstances present themselves. Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 541 (1995). As R. 4:46-5 provides, the non-moving party “may not rest upon the mere allegations or denials of the pleadings but must... set forth specific facts showing that there is a genuine issue for trial.”

LEGAL ARGUMENT

POINT I

ORDINANCE 4419-23 IS APPLICABLE TO RESPONDENTS' LAND USE APPLICATIONS BECAUSE ITS APPLICABILITY PROVISION CONFORMS WITH THE HEALTH AND PUBLIC SAFETY EXCEPTION TO THE TIME OF APPLICATION RULE AT N.J.S.A. 40:55D-10.5. (1T37:20-45:19; 2T11:3-16:14)

As acknowledged by all parties, the below matter raised two questions of law regarding the “applicability provision” set forth in Subsection 330-3(D) of Ordinance 4419-23 (the “Applicability Provision”) (Da266 to Da267; 2T5:16-23; 2T5:15-6:4). The Applicability Provision authorizes the Township’s amended stormwater management (“SWM”) rules to apply either to development applications pending before a land use board as of Ordinance’s effective date or, alternatively, applications that have received preliminary, but not final, approvals as of that same date. Ibid.

The Township’s Applicability Provision is a cognizable authority that can be exercised pursuant to the unique local authorities available to municipalities. Pursuant to the *Municipal Land Use Law* (“MLUL”), N.J.S.A. 40:5D-1 to -136, the so-called Time of Application rule (the “TOA Rule”) at N.J.S.A. 40:55D-10.5 provides that those “development regulations in effect on the date of submission of

an application for development shall govern the review of that application for development.” N.J.S.A. 40:55D-10.5. However, the TOA Rule also contains an exception for ordinance provisions that relate to “health and public safety,” even if those provisions were adopted after the date of an application’s submission:

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

Ibid. (emphasis added). The exception (the “TOA Exception”) is a cognizable mechanism to apply the Township’s DEP regulations retroactively to applications either deemed “complete” or for which preliminary approvals have been issued as of Ordinance enactment. As such, contrary to the Trial Court’s findings, Ordinance 4419-23 is in fact applicable to Respondents’ respective land use applications.

**A. The Applicability Provision Complies With The Health And Public Safety Exception of the TOA Rule, Which Is Broadly Written And Distinguishable From The Limitations Protecting Applicants With Final Land Use Approvals.
(1T37:20-45:19; 2T11:3-16:14)**

The TOA Rule at N.J.S.A. 40:55D-10.5 contains two key components. First, it provides that the “development regulations” in effect on the date an application

for development is deemed complete shall govern the review of that application. Ibid. Second, it sets forth a broad exception. The statute expressly allows for the application of ordinances adopted after submission if they relate to “health and public safety.” Ibid. Notably, the statute does not limit the exception to ordinances that are exclusively health and safety-related, nor does it exclude ordinances that may also overlap with zoning or development regulations. It draws no distinction between standalone health and safety measures and those that may also serve planning or land use functions.

At oral argument, Respondent B9’s candidly acknowledged, “There’s very little law on this, Your Honor, but I think it’s clear.” (1T32:23-24). However, contrary to Respondent’s argument and the Trial Court’s analysis, the New Jersey Supreme Court’s decision in Shipyard v. Hoboken, supra, 242 N.J. 23, which was so extensively relied upon by Respondents and the Trial Court, does not support Respondents’ position (see 1T32:21-33:11; 1T36:10-27:19; 2T13:13-15:2). In fact, provides for the very opposite conclusion. Both Respondents and the trial court misread the posture of the developer in Shipyard, and overlook the Court’s clear and structured analysis of how the MLUL governs the applicability of ordinances at different stages of the land use approval process.

- i. The MLUL imposes stricter limitations on applying new ordinances to final approvals than to pending or preliminary applications. (1T37:20-45:19).*

Indeed, the MLUL establishes distinct stages at which newly adopted regulations may apply to development applications. Each of the below-cited provisions address the applicability of subsequently enacted ordinances in a unique context. Considered collectively, these provisions support the conclusion that Ordinance 4419-23 may be validly and appropriately applied to Respondents' respective land use applications, which were pending at the time of the Ordinance's enactment.

As previously discussed, N.J.S.A. 40:55D-10.5 governs land use applications that are deemed complete upon submission but remain pending before a land use board. As noted above, this section creates a broad exception to the TOA Rule, permitting the application of ordinances related to public health and safety without restricting their overlap with zoning or development regulations. In contrast, N.J.S.A. 40:55D-52(a), which applies to final approvals, specifically prohibits the application of subsequently enacted "development requirements" or "zoning ordinance[s]" to such final approvals. Unlike Section 52(a), N.J.S.A. 40:55D-10.5 contains no such limitation, reflecting the Legislature's intent to afford municipalities greater regulatory flexibility earlier in the land use process.

N.J.S.A. 40:55D-49 governs application that have received preliminary land use approvals and affords applicants certain enumerated rights for a period of three-years. Similar to N.J.S.A. 40:55D-10.5, though, it includes an exception for ordinances relating to health and public safety:

That the general terms and conditions on which preliminary approval was granted shall not be changed, including but not limited to use requirements; layout and design standards for streets, curbs and sidewalks; lot size; yard dimensions and off-tract improvements; and, in the case of a site plan, any requirements peculiar to site plan approval pursuant to section 29.3 of P.L.1975, c.291 (C.40:55D-41); ***except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety.***

Ibid. (emphasis added). Even at this stage of the land use process, where an applicant has already obtained preliminary approval tied to specific parameters, the Legislature did not divest municipalities of regulatory authority in the critical area of public health and safety but struck a balance between vested rights and the ongoing need to protect the public. Although the exception in Section 49 is somewhat narrower—limited to the “general terms and conditions of preliminary approval”—its inclusion affirms the consistent legislative intent to preserve municipal authority over health and safety matters throughout the development review process.

Finally, N.J.S.A. 40:55D-52(a) addresses applications that have received final land use approvals. Unlike either N.J.S.A. 40:55D-10.5 or N.J.S.A. 40:55D-49, this provision contains explicit language exempting final approvals from newly enacted “zoning requirements.” Further, the Legislature did not include an exception for ordinances relating to health and public safety exception. These distinctions underscore the significant and distinct protections afforded to developers who have secured final approval:

The **zoning requirements** applicable to the preliminary approval first granted and all other rights conferred upon the developer pursuant to section 37 of P.L.1975, c.291 (C.40:55D-49), whether conditionally or otherwise, shall not be changed for a period of two years after the date on which the resolution of final approval is adopted

Ibid. (emphasis added).

- ii. ***The New Jersey Supreme Court has recognized that the MLUL permits health and safety zoning ordinances to apply to pending and preliminary approvals, and imposes stricter limits only once final approvals are granted. (1T37:20-45:19).***

The statutory structure established by the three referenced provisions of the MLUL has been expressly acknowledged by the Court in Shipyard v. Hoboken, supra, 242 N.J. 23. In Shipyard, the Court considered whether newly adopted flood control rules could be retroactively applied to a development project that had already received ***final*** land use approvals. Notably, in doing so, Court made clear that zoning

ordinances addressing health and public safety *are* applicable to pending land use development applications and preliminary approvals. Contrary to Respondents’ argument and the Trial Court’s analysis below, Shipyard does not stand for the proposition advanced that the applicability of an ordinance turns solely on whether it constitutes a “zoning requirement.”

To the contrary, the Supreme Court emphasized that zoning ordinances addressing health and public safety can be applied to pending land use applications and to applications with preliminary approval, pursuant to N.J.S.A. 40:55D-10.5 and N.J.S.A. 40:55D-49, respectively. Id. at 44-45. However, the Court found that the the Legislature deliberately excluded any such health and safety exception from N.J.S.A. 40:55D-52(a), which governs final approvals. Ibid. The Court concluded that this exclusion reflects the Legislature’s intent to afford greater protection to developers at successive stages of the approval process. Ibid. The Court’s assessment of the Legislature scheme and attention to its language is clear and explicit, and the Court emphasized the tenants of statutory interpretation that supported its reading. Indeed, a tenant of statutory interpretation requires that a statute is to be read as a whole with “related statutory provisions in context – giving each part meaning and rendering no part superfluous.” See In re Expungement Application of D.J.B., 216 N.J. 433, 440 (2014).

The Court's explanation emphasizes that ordinances affecting public health and safety, even those that may overlap zoning regulations, can be applied to a pending land use application:

We decline to read the exceptions from Sections 10.5 and 49 -- ***allowing municipalities to retroactively apply zoning ordinances affecting public health and safety*** -- into Section 52(a). By their own terms, those sections apply only to "application[s] for development" and "preliminary approval[s]," not final approvals. See N.J.S.A. 40:55D-10.5, -49. ***We find it significant that the Legislature included exceptions for the application of later-passed zoning ordinances relating to public health and safety in Sections 10.5 and 49 but excluded an analogous exception in Section 52(a)***. We presume the Legislature acted deliberately in doing so. See R.L.M., 236 N.J. at 148, 198 A.3d 934.

Considering Section 52(a) in context with Sections 10.5 and 49 "so as to give sense to the legislation as a whole," DiProspero, 183 N.J. at 492, 874 A.2d 1039, we agree with the NJBA's view that the Legislature likely contemplated greater protections for developers at successive stages of the development approval process. Indeed, ***zoning ordinances affecting public health and safety may govern applications for development***, N.J.S.A. 40:55D-10.5, but municipalities may only "modify[] by ordinance such general terms and conditions of preliminary approval," N.J.S.A. 40:55D-49(a) (emphasis added), and the MLUL makes no provision for municipalities to apply new zoning ordinances to final approvals, N.J.S.A. 40:55D-52(a).

Id. at 44-45.

Thus, contrary to the Respondents' and Trial Court's gloss, Shipyard confirms that developers benefit from progressively greater protections as they advance through the land use approval process but are not shielded from subsequently enacted ordinances relating to public health and safety, including those comprising zoning requirements, prior to obtaining final approvals. Accordingly, in Shipyard, which concerned the applicability of ordinances to a developer's final approvals, the Court held that Hoboken could not retroactively apply its ordinances to the developer's previously approved project because the ordinances constituted zoning requirements, and no exception to zoning ordinances of health and safety exception exists under Section 52(a) at the final approval stage of the development process. Id. at 41-43.

Thus, the Court concluded that for Hoboken's ordinance to apply retroactively, the City had to establish that it was not a zoning ordinance under the specific requirements applicable to final approvals. Ibid. However, because the ordinance regulated permitted uses, imposed height restrictions, and effectively altered zoning classifications, it fell squarely within the definition of a zoning ordinance. As a result, the Court held that the ordinance could not be retroactively applied to the project, which had already received final approval. Ibid.

iii. *The Trial Court Erred.*

The Trial Court below misapplied the statutory framework analyzed by the Supreme Court in Shipyard. At both oral argument and in its written decision, the Trial Court reduced the inquiry to a single question: whether Ordinance 4419-23 constituted a zoning ordinance (2T12:7-12; 2T13:13 –15:3-13). Upon concluding that it did, the Trial Court held that the Ordinance could not be applied to Respondents’ pending land use development applications. Ibid. This narrow analysis misreads Shipyard, which makes clear that the zoning-versus-health-and-safety distinction is relevant only in the context of final land use approvals—not applications that are pending or have received preliminary approval.

The Trial Court’s is inconsistent with both the statutory framework and controlling case law. In its analysis, the Trial Court improperly reduced the inquiry to a binary choice: whether the Ordinance was a zoning provision or, alternatively, a health and safety provision. However, the very Supreme Court decision the Trial Court relied upon—Shipyard—makes clear that such a binary framework is relevant only when evaluating the application of ordinances to final approvals. Both the Legislature and the Court have recognized that zoning ordinances addressing public health and safety may be applied to a pending application and those with preliminary approvals under the exception to the TOA rule.

At oral argument, the Trial Court expressed this flawed framing explicitly:

So obviously if this Court sides with the issue concerning applicability of the time of application which ***hinges on this question of whether the ordinance is a health and safety provision as opposed to a strict zoning provision***, that will inform subsequent decisions, subsequent determinations, and potentially kind of dictate where this case goes from here.

(1T7:20-8:2) (emphasis added).

In its decision, the Trial Court rejected application of Ordinance 4419-23 to Respondents' pending development applications solely on the basis that the Ordinance was a zoning regulation (2T13:22-16:5). It is not.³ However, even assuming,

³ The TOA Exception does not turn on the question of whether a regulation is a zoning ordinance or a public health and safety ordinance not classified as a zoning or planning initiative. Where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is generally presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion." Shipyard, supra, 242 N.J. at 38 (quoting DCPP v. R.L.M., 236 N.J. 123, 148 (2018)). The exception is written so as to permit the application of **any** public health and safety ordinance to pending development applications regardless of whether it is characterized as a zoning provision.

However, assuming arguendo that the Trial Court's emphasis on said distinction was determined to be relevant, the Township's SWM rules do not fit the mold of those provisions credited as cognizable zoning or planning initiatives. In Shipyard, the Court, which recognized that no public health or safety exception existed at N.J.S.A. 40:55D-52(a), assessed only whether the City's flood ordinance was a cognizable zoning ordinance for the purpose of applying the restriction at Subsection 52(a). Id. at 40-43. The Court credited various factors simply not at issue in the case of the Amended DEP Rules of the Township's own SWM regulations. Ibid. There, the Court emphasized how the City's flood ordinance specified floor heights for buildings, limited permitted uses to only two, and "fundamentally" changed the zoning of land in Hoboken. Ibid. Thus, the Court found that the flood ordinance did not simply touch on the use of the land. Ibid. Rather, the flood ordinance was effectively a planning and zoning initiative. Ibid.

In contrast, the Township's SWM regulations, which mirror the Amended DEP Rule, are environmental regulations that protect the larger community and environment that "touch on the use of land" without effectively modifying underlying zoning. See N.J. Shore Builders Ass'n v.

arguendo, that Ordinance 4419-23 constitutes a zoning ordinance, that determination alone should not have foreclosed its applicability to Respondents’ complete but pending applications. Under the MLUL, and consistent with Shipyard, zoning ordinances addressing public health and safety may be applied to such applications.

Because the Ordinance here addresses stormwater management—a matter of substantive and vital public health and safety—the trial court erred in concluding that the Ordinance could not be applied to Respondents’ development applications.

iv. The SWM Regulations enacted by Ordinance 4419-23 address significant health and public safety concerns. (1T37:20-45:19).

There can be no serious dispute that Ordinance No. 4419-23 was enacted to address pressing public health and safety concerns. As acknowledged by both parties before the trial court, the Township’s stormwater management (“SWM”) regulations closely mirror the DEP model SWM rules, differing only with respect to their applicability provision (1T6:2–24).

Twp. of Jackson, 199 N.J. 38, 54 (2009) (“[T]here are numerous ordinances, for example, health codes, environmental regulations, building codes, and laws regulating the operation of particular businesses, that touch on the use of land, but are not within the planning and zoning concerns of the MLUL.”) Both the Amended DEP Rules and Township SWM regulations avoid regulation of height restrictions or land use planning. Rather than limit development, Ordinance No. 4419-23 seeks to achieve flood control, groundwater discharge, and pollutant reduction through stormwater measures that do not alter underlying zoning. While it would be inappropriate to limit the TOA Rule exception only to non-zoning or planning ordinances, if this were found to be appropriate, the Township’s SWM rules still qualify as environmental regulations that are not characterized as planning and zoning initiatives.

The DEP’s published responses to public comments on its amended rules (the “Rule Adoption”) underscore that the DEP regulations were expressly intended to address the increasing threat to public safety posed by severe storm events and flooding. For example, in response to public concerns, the DEP explained:

The adopted rulemaking is intended to protect New Jersey's communities from the impacts of flooding. The rulemaking achieves this by requiring thoughtful consideration of flood risk and design and construction that minimizes the risk of damage and loss of life in all communities equally. While existing and future flooding events can impact property values negatively, investments in flood mitigation and resilience are well understood to accrue benefits over time and to foster the continued viability of a community.

See 55 N.J.R. 1385(b), Response to Comment No. 231; see also Id., Response to Comment No. 224 (“The Department has adopted this rulemaking to protect the people and communities of New Jersey from the devastating impacts of current and future flooding”); Id., Response to Comment No. 119 (“Withdrawing the rulemaking as the commenter suggests would endanger public health, safety, and welfare”); Id., Response to Comment No. 142 (“The Department has broad authority to protect the safety, health, and general welfare of the people of the State. The changes do not change the scope of statutory authority; rather they provide more nuanced examples of said authority.”)

The DEP's concern with immediately addressing stormwater risks is noted throughout the rules. By way of example:

RESPONSE TO COMMENTS 290 THROUGH 297:

The climate emergency is such that *allowance for a one-year grace period in the effective date of the notice of adoption would place structures and stormwater management facilities currently being designed at an unacceptably high risk of damage due to the worsening flooding expected over the lifetime of those structures.*

This rulemaking is being undertaken in response to the Department's statutory obligation to establish standards suitably protective for public health, safety, and welfare, for flood prone areas of the State. Therefore, to minimize this risk to the maximum extent practicable, the Department cannot make allowances for such a grace period.

Id., Response to Public Comments 290 – 297 (emphasis added); see also Responses to Public Comments 118 and 119.

Because the Township's amended SWM Rules closely mirror the DEP's model rules, they share not only their structure but also their explicit public health and safety purpose. This is not an instance of an ordinance with only tangential health and public safety concerns, enacted under the general police power authorized by N.J.S.A. 40:48-2. Rather, the Township's rules directly target the individual impacts of new development on runoff, flooding, and downstream consequences, in order to protect the broader community and environment in the timely manner acknowledged by the DEP was essential. See 55 N.J.R. 1385(b).

As stated in the Ordinance itself:

The standards in this ordinance apply only to new major and minor development and are intended to minimize the impact of stormwater runoff on water quality and water quantity in receiving bodies and maintain groundwater discharge.

(Da287 to Da315 at Article II, 330-6(B). The Ordinance further requires that applicants:

Demonstrate [...] that the increased volume or change in timing of stormwater runoff will not increase flood damage at or downstream of the site

Ibid. These standards are directly aimed at mitigating the environmental and public safety impacts of increased impervious coverage, including runoff, discharge, and localized or downstream flooding. As such, the SWM regulations enacted by Ordinance 4419-23 fall squarely within the category of ordinances addressing public health and safety and are eligible for application to pending development applications and development applications with preliminary approvals under N.J.S.A. 40:55D-10.5.

For these reasons, the Township respectfully requests that this Court reverse the Trial Court's decision and find that Ordinance 4419-23 is applicable to Respondents' pending land use applications.

POINT II

**THE APPELLATE DIVISION SHOULD ADDRESS
AND RESOLVE, AS A MATTER OF LAW, THAT
ORDINANCE NO. 4419-23 AMENDING CHAPTER
330, “STORMWATER MANAGEMENT,” IS NOT
PREEMPTED BY STATE DEP REGULATIONS
(1T9:21-25:31; 2T16:19-17:23)**

Although the trial court concluded that a ruling on the issue of preemption was unnecessary—having found that Ordinance 4419-23 could not be applied to Respondents’ pending land use applications under the Time of Application Rule—this Court may nonetheless address and resolve the preemption question in the interest of judicial economy and to provide clarity on an important question of law. The trial court correctly recognized that its determination regarding the Ordinance’s applicability mooted the need to decide whether the Ordinance’s applicability provision was preempted by state law. However, because the Township’s authority to enact and apply the Ordinance will remain central to the parties’ dispute in the event of a reversal pursuant to Point I above, adjudication of this legal issue is appropriate. The Appellate Division should find that the Township was correct in its arguments below, namely that the Township was authorized to enact stricter SWM rules in compliance with the MLUL.

As addressed above, the instant matter concerns the Applicability Provision of Ordinance No. 4419-23 at Subsection 330-3(D), which permits the retroactive

application of the Township's SWM rules to any pending local land use application that has not received "final approval" prior to the Ordinance's effective date (Da287 to Da315). This Applicability Provision differs from the minimum applicability standards in amended SMW rules (the "Amended DEP Rules") adopted by the DEP on July 17, 2023. However, for the reasons set forth below and before the Trial Court in briefing and oral argument, the Applicability Provision is valid and does not trigger a preemption conflict (see 1T9:21-25:31)

At the outset, it is important to recognize the dual structure of the Amended DEP Rules' applicability provisions. N.J.A.C. 7:8-1.6 address two types of developments: those that do not require DEP-level permit review and those that do require DEP-level permit review. Subsections (B)(1) to (3) establish minimum applicability criteria for developments that do not require DEP permits. In such cases, should a municipality to enact stricter local requirements for such developments, its local rules would not affect DEP review procedures because the development would not have necessitated or triggered a DEP permit review in the first place.

On the other hand, Subsection (B)(4) provides grandfathered protection to developments that do require DEP permit review. The subsection provides that such applications are to be reviewed pursuant to prior rules in the event a "technically

complete” application is submitted to the DEP prior to the adoption of the Amended DEP Rules on July 17, 2023. As discussed below, were a municipality to enact stricter local requirements for such developments, such local rules would not in fact affect DEP review procedures as the DEP could continue to review said applications pursuant to the Amended DEP Rules without any interference by a municipality’s application of its own amended SWM rules.

A preemption analysis and examination of DEP rulemaking shows that the DEP acknowledged and anticipated the potential use of municipality’s distinct authorities to craft stricter rules. The DEP explicitly left the door open to such mechanisms. A preemption analysis also establishes that, despite the applicability standards set forth in the Amended DEP Rules, a municipality’s election to apply local amended SWM rules retroactively at the local level to pending development applications does not create a conflict. Ordinance No. 4419-23 is valid and not preempted.

Preemption is "a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Terrace Management Corp. v. Rent Control Bd. of W. New York, 71 N.J. 451, 461 (1976); see also Mack Paramus Co. v. Paramus, 103 N.J. 564, 573 (1986). The preemption doctrine turns upon the intention of the Legislature. Where it

appears that the Legislature intended "its own actions, whether it exhausts the field or touches only part of it, to be exclusive," the local ordinance is preempted. Mack Paramus at 573 (citation and internal quotation marks omitted).

Ordinarily, a municipality may exercise its police powers for the protection of its residents without triggering a preemption conflict absent clear legislative intentions:

In order for preemption to apply, the legislative intent to occupy the field must appear clearly. "The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act."

McGovern v. Borough of Harvey Cedars, 401 N.J. Super. 136, 149 (App. Div. 2008) (emphasis added) (quoting S. Brunswick Twp. v. Covino, 142 N.J. Super. 493, 498 (App. Div. 1976)).

Five questions have long been recognized as pertinent to a preemption analysis:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the legislature has permitted or does the ordinance permit what the legislature has forbidden)?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?

3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the legislature?

Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 453 (1976). An analysis of the Overlook Terrace factors establishes that the Ordinance is not preempted because of the Applicability Provision.

A. The Amended DEP Rules Expressly Authorize Municipalities To Implement Stricter Local SWM Regulations And Are Not So Pervasive As To Preclude Coexistence Of Municipal Regulation.

DEP regulations do not intend, expressly or impliedly, to be exclusive in the field. The regulations carve out an important role for localities. The starting place for statutory interpretation is legislation's plain language. N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 557 (2017). The Amended DEP Rules explicitly recognize municipalities' authority to enact stricter local regulations than the rules governing the DEP's own review of permit applications at the DEP level. The amended SMR provides:

Nothing in this chapter shall be construed as preventing the Department or other agencies ***or entities from imposing additional or more stringent stormwater management requirements*** necessary to implement the purposes of any enabling legislation[.]

N.J.A.C. 7:8-1.5 (emphasis added). In its responses to public comments published at the adoption of the Amended DEP Rules (the “Rule Adoption”), the DEP acknowledged municipalities’ authority to share regulation within the field:

152. COMMENT: Local governments should adopt new related coastal, wetland, and stormwater regulations as soon as possible.

RESPONSE: The commenter's recommendation for local government action is beyond the scope of this rulemaking. The Department has the responsibility to implement the statutes through rules at the State level. *Local governments may have further authority to adopt local ordinances, but these rules will apply Statewide.*

55 N.J.R. 1385(b) (2023), NJDEP Responses to Public Comment No. 152 (emphasis added). Further, in response to an affirmative statement that municipalities could impose stricter standards on development applications for local land use approvals, the DEP acknowledged that municipalities could indeed exercise such authority:

144. COMMENT: Other government entities (such as municipalities) may impose stricter standards than the State, specifically, to protect from stormwater runoff and increased flood risk[.]

RESPONSE: *Municipalities, and other government entities, have statutory authority to pass ordinances, regulations, rules, and bylaws of a stricter nature than the existing statutory framework, provided they are not contrary to State or Federal law and are **necessary and proper for good government and for the preservation of public health, safety, and welfare of the municipality and***

its inhabitants, or necessary to carry out conferred powers and duties. See N.J.S.A. 40:48-2; see also, N.J.S.A. 40:55D-2, 40:48-1, and 40:42-4.

Id., Response to Comment No. 144 (emphasis added). The DEP’s explicit intention to not preempt local regulation stands in contrast to those regulatory schemes where the DEP has maintained its authority and completely preempted the exercise of local regulation. See e.g. United Water N.J., Inc. v. Borough of Hillsdale, 438 N.J. Super. 309, 314 (App. Div. 2014) (finding that the DEP explicitly maintained its authority under the Safe Dam Act and the Water Supply Management Act, N.J.S.A. 58:1A-1 to -26, and completely preempted local regulation concerning dams and reservoirs). In the DEP’s model ordinance, which was issued to assist municipalities revise their own SMW ordinances, the DEP again recognized that the model “represents the *minimum standards* and expectations” (Da504) (emphasis added). The DEP specified that municipalities could share the field by enacting more strict regulations, and even cited to applicability standards as an example of such potential stricter regulations:

A municipality may choose these stronger or *additional measures in order to address local water quality and flooding conditions as well as other environmental and community needs*. For example, municipalities may choose to define “major development” with a smaller area of disturbance and/or smaller area of regulated impervious cover or regulated motor vehicle surface; *apply stormwater requirements to both major and minor*

development; and/or require groundwater recharge, when feasible, in urban redevelopment areas.

Ibid. (emphasis added). In contrast to other regulatory regimes, the Amended DEP Rules were not adopted with the intention of being exclusive within the field of stormwater management, and the NJ DEP's regulations, rule proposals, and documentary guidance establish that it did not intend to be so pervasive as to bar municipal regulation concerning stormwater management.

B. The Applicability Provision Does Not Conflict With The Amended DEP Rules Because It Neither Disturbs The DEP's Own Ability To Review Permit Applications At The DEP Level Nor Conflicts With The Policies Of The Amended DEP Rules. (1T9:21-25:31).

As discussed above, the DEP acknowledged in the Amended DEP Rules, the Rule Adoption, and the DEP's guidance materials that authorities exist by which municipalities could enforce stricter regulations than those provided by the Amended DEP Rules. See, supra, Point II(A). The Township's Applicability Provision is a valid, cognizable provision under the unique authorities of local control. As discussed above, the TOA Rule codified at N.J.S.A. 40:55D-10.5 provides that the "development regulations in effect on the date of submission of an application for development shall govern the review of that application." The statute, however, includes a clear exception for ordinances that relate to "health and public safety," permitting their application even if adopted after an application's

submission. The exception is a cognizable mechanism to apply the Township's DEP regulations retroactively to pending applications. See, *infra*, Point I.

In contrast, the DEP is limited to only apply the regulations in effect at the time a complete permit application was received by the DEP. N.J.A.C. 7:13-21.1 (“In reviewing an application, the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review.”); see also 54 N.J.R. 2169(a) (2022), NJDEP Rule Proposal (Acknowledging the limitations set forth at N.J.A.C. 7:13-21.1 concerning the DEP permit review procedure, writing “[I]n reviewing an application, ‘the Department shall apply the requirements of this chapter in effect at the time the application is declared complete for review.’”); Id., Responses to Public Comment No. 475 (“The Department cannot retroactively apply newly adopted standards to developments that have already been authorized or which were submitted prior to the rulemaking in question.”)

Notably, the DEP did not acknowledge the TOA Rule's exception in either the amended SWM regulations or its rulemaking process. The DEP's silence as to the TOA Rule exception is telling. The DEP did not in fact foreclose its applicability. To the contrary, the DEP consistently affirmed the authority of municipalities to adopt and enforce stricter local standards. A particularly telling example appears in the Rule Adoption itself, where Comment No. 473 specifically

referenced the TOA Rule exception. In response, the DEP offered no comment whatsoever on the exception's applicability or limitations—further underscoring that it did not seek to displace or preempt local exercise of that statutory authority:

473. COMMENT: The commenter reminds the Department, in reference to a warehouse project in West Windsor, that *N.J.S.A. 40:55D-10.5, at the time of application rulemaking, contains an important exception for health and public safety.*

RESPONSE TO COMMENTS 455 THROUGH 475:

The Department received a number of comments concerning ongoing warehouse development across the State, and the potential for such development to exacerbate flooding. Comments were also made with regard to specific warehouse projects that have already been approved by the Department or for which permit applications were submitted prior to this rulemaking. *In cases where an applicant has proposed a major development and applied for a flood hazard area, freshwater wetlands, or coastal zone management permit*, which triggered a review of stormwater management, the rules in effect at the time of the application govern *the Department's review of the project*. The *Department* cannot retroactively apply newly adopted standards to projects that have already been authorized or which were submitted prior to the rulemaking in question. However, the Department acknowledges the potential deleterious effects on flooding and water quality that can occur as a result of unchecked development and improperly managed stormwater runoff.

Id. Responses to Public Comment No. 455 – 475 (emphasis added). The DEP was silent as to the applicability of the TOA Rule exception at the local level. More tellingly, even when presented with affirmative statements that a locality could exercise local rules retroactively to local applications, the DEP simply does not address how a locality exercises that review. The DEP’s focus is entirely on the DEP own review process for DEP permit applications. The Township’s Applicability Provision does not interfere with that review.

The absence of any explicit foreclosure of the TOA Rule exception and DEP’s explicit acknowledgment of municipality’s authorities to exceed the Amended DEP Rules makes clear that the Applicability Provision is a valid mechanism to exercise the TOA Rule exception and apply the Township’s amended SWM rules to pending development applications. The provision does not create an operational conflict with this DEP review process and, in fact, serves the policies of the Amended DEP Rule.

i. The Township’s Applicability Provision Creates No Operational Conflict.

The Township’s Applicability Provision does not create any conflict of operational effect with the DEP’s regulatory framework. It does not interfere with or limit the DEP’s ability to apply its own Amended Rules. In fact, in its Rule Amendment Training materials, the DEP expressly acknowledged the possibility that different regulatory regimes might apply simultaneously to a proposed

development at the state and local level. Notably, the DEP raised no objection to a scenario in which it would review a permit application under the prior round rules, while a municipality evaluated a local land use application for the project under updated local SMW regulations (see Da397 to Da398).

The DEP training materials support a conclusion that there is no preemption. Most notably, Applicability Example 2 directly illustrates this point (Da398). In that example, the DEP recognizes, consistent with N.J.A.C. 7:13-21.1, that a permit application deemed technically complete upon submission **to the DEP** but prior to adoption of the Amended DEP Rules would be reviewed **by the DEP** under the existing prior rules. Ibid.

However, the hypothetical also posits that the relevant municipality has adopted revised local SMW regulations aligned with the Amended DEP Rules. In that context, the DEP explicitly states that the local land use board application would be reviewed under the revised local SMW regulations. In doing so, the DEP has explicitly acknowledged the precise regulatory outcome produced by the Township's Applicability Provision: a development application may be subject to the prior DEP rules for permit review, while simultaneously subject to updated municipal regulations at the local level.

Moreover, the DEP further recognizes that, in such a scenario, a development might need to be redesigned to satisfy updated local requirements. This is so even if it continues to qualify under prior DEP standards. This conclusion reinforces the absence of preemption: the Township's Applicability Provision does not impede or override the DEP's review of permit applications under its own time-of-application framework. Rather, it complements the state scheme by independently regulating matters squarely within the Township's authority. In short, no conflict of operational effect exists.

ii. The Township's Applicability Provision Creates No Conflict of Policy.

The determination of whether an ordinance conflicts with state law so to support preemption also considers whether a conflict of policy arises from a municipal regulation. The Applicability Provision creates no such conflict. As acknowledged by the DEP in its Applicability Example 2, scenarios may exist where a development's permit applications at the DEP level and local development applications for land use approvals at the local level may be reviewed pursuant to inconsistent rules (Da398). The DEP envisions that possibility without raising an issue as to the inconsistency. Ibid. In fact, the Applicability Provision supports the DEP's expressed policies.

Throughout its Rule Adoptions, the DEP emphasizes the need to employ resiliency measures and flood-informed project design to protect the community, lives, and property, which will in turn ensure the health of the economy and the business community. See 55 N.J.R. 1385(b), Responses to Public Comment No. 1 – 7, 104, 247. Moreover, though, the DEP acknowledges the potential increased short-term costs of resilience measures but concludes that long-term economic savings weigh in favor of adoption. Id., Responses to Public Comments 242 – 244. Perhaps, most notably though, the DEP emphasizes the need for urgency and to take action “now” so to protect imminent development and address its potential effects:

It should also be noted that this rulemaking applies only to new and reconstructed or improved structures and does not otherwise affect existing structures. Given that structures constructed or improved in the near future are likely to still be in use at the end of the century, ***it is imperative that the proposed new flood elevations are adopted now in order to protect these structures from anticipated future flood conditions.*** Withdrawing the rulemaking as the commenter suggests would endanger public health, safety, and welfare.

Id., Responses to Public Comments 118 and 119 (emphasis added). Similarly, in the Rule Adoption, the DEP rejected calls to provide a grace period for implementation, noting the need to take immediate action:

RESPONSE TO COMMENTS 290 THROUGH 297:
The climate emergency is such that ***allowance for a one-year grace period in the effective date of the notice of***

adoption would place structures and stormwater management facilities currently being designed at an unacceptably high risk of damage due to the worsening flooding expected over the lifetime of those structures. This rulemaking is being undertaken in response to the Department's statutory obligation to establish standards suitably protective for public health, safety, and welfare, for flood prone areas of the State. Therefore, to minimize this risk to the maximum extent practicable, the Department cannot make allowances for such a grace period.

Id., Response to Public Comments 290 – 297 (emphasis added). The Applicability Provision, which requires that developments with pending land use applications meet updated local SMW regulations, serves this policy by protecting community, life, property, and business, and doing so by immediately addressing imminent development.

Importantly, though, the Applicability Provision is not an unending retroactive clause. It limits the applicability of the Township's updated SMW regulations only to developments that have not received land use approvals. This limitation aligns with the policies of the Amended DEP Rules. The Applicability Provision does not mandate modifications to existing completed construction or, even, ongoing construction or developments with final land use board approvals. In the Rule Adoption, the DEP emphasizes that the revised DEP regulations “provide criteria and safety factors for new development” and “are not intended to force

reconstruction, retrofitting, or removal of existing, legal, development.” Id., Responses to Public Comments 108 through 117; see also Id., Responses to Public Comments 263 and 264 (“[T]his rulemaking applies only to new development and reconstruction activities. Existing buildings and infrastructure will not be affected unless and until the owner intends to modify or improve the structure.”) The applicability Provision is properly tailored so to not burden projects where construction is complete or underway.

The Applicability Provision may indeed require that elements of a development be revised, even if development has satisfied old rules applied by the DEP during DEP permit review. However, this does not create a conflict with DEP policies. This result does not disturb the DEP’s own review procedures, and the DEP has explicitly acknowledged the possibility that developers may need to incur such costs due to distinct rules applied at the local and state level. See, supra, Point II(A)(i); see also Da398 (DEP Hypothetical No. 2).

Ultimately, this Court should conclude that the DEP permitted municipalities to adopt stricter standards and that the exception to the TOA Rule is a cognizable mechanism for applying such stricter SWM regulations at the local level. Respectfully, this Court should find that the Applicability Provision does not create a preemption conflict and is not preempted by the Amended DEP Rule.

C. The Applicability Provision Does Not Disturb The Uniform Implementation Of Minimum SWM Standards Across New Jersey And The DEP's Ability To Treat DEP Permit Applications In A Uniform Manner.

The Applicability Provision also does not disturb the uniform implementation of minimum standards throughout New Jersey. Although the Applicability Provision differs from the applicability standard set forth in the Amended DEP Rules for local review of local development applications, the Applicability Provision does not limit or intrude upon the DEP's own ability to apply its own standards in a uniform manner to DEP permit applications. In its own guidance materials, the DEP acknowledged its ability to implement prior round rules during DEP permit review even when amended local SWM rules are applied at the local land use board level (see Da397 to Da398). The Applicability Provision does not disturb the DEP's ability to uniformly address DEP applications.

Moreover, the regulatory structure welcomes and does not prohibit the implementation of stricter regulations at the local level. The DEP has recognized the potential for the non-uniform implementation of locally crafted standards at the local level. The Applicability Provision does not lower the threshold of minimum standards for local review. Rather, the Applicability Provision implements local control just as the Amended DEP Rules permit by creating "stronger or additional measures," and does so in a way that carries out the DEP's purpose of immediately

addressing the threats of increased stormwater flow, runoff, and discharge. See, supra, Point II(B)(ii).

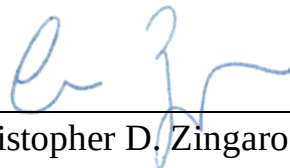
For these reasons, the Township respectfully requests that this matter be remanded to the Trial Court for an order and/or judgment declaring that Ordinance 4419-23 is not preempted by DEP Regulations.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the determination of the trial court granting summary judgment to Respondents should be reversed and, further, that this matter be remanded for entry of judgment declaring that Ordinance 4419-23 is applicable to Respondents' respective land use applications.

Respectfully submitted,

RAINONE COUGHLIN MINCHELLO, LLC

By: 
Christopher D. Zingaro, Esq.

Dated: April 7, 2025

B9 SCHOOLHOUSE OWNER,
LLC,

Plaintiff/Respondent,

v.

TOWNSHIP OF FRANKLIN,

Defendant/Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-001461-24

CIVIL ACTION

On Appeal from:
Superior Court of New Jersey
Law Division, Civil Part, Somerset County

CONCORE REALTY, LLC

Plaintiff/Respondent,

v.

TOWNSHIP OF FRANKLIN,

Defendant/Appellant.

Submitted: May 7, 2025

Consolidated Matter

Major Trial Court Docket No.:
SOM-L-001365-23

Minor Trial Court Docket No.:
SOM-L-001385-23

Sat Below:
Hon. William G. Mennen, J.S.C.

**BRIEF ON BEHALF OF THE PLAINTIFF/RESPONDENT
CONCORE REALTY, LLC**

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PRELIMINARY STATEMENT

The plaintiff-respondent, Concore Realty, LLC ("Concore" or "Plaintiff"), respectfully submits this brief in response to the appeal filed by the defendant-appellant, Township of Franklin ("Township" or "Defendant"). This appeal arises from the trial court's well-reasoned decision in favor of Plaintiff, which struck down the Township's attempt to retroactively impose its newly adopted stormwater management and land development regulations. Specifically, the trial court held that the Township's retroactive applicability provision—set forth in Section 330-3(D) of Ordinance 4419-23 ("Ordinance")—violates the Time of Application Rule ("TOA Rule") under New Jersey's Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-10.5. This decision is critical not only for the parties involved but for the broader development community, as it addresses an unlawful attempt by the Township to impose new requirements retroactively, with far-reaching and devastating consequences for developers and the economic health of the region.

The trial court rightly held that the retroactive applicability provision improperly applies new stormwater management requirements to development applications that are already deemed complete but still pending final approval, violating the fundamental principle of fairness and the TOA Rule, which is meant to ensure developers can rely on the regulations in effect when they

submit their applications. The court further correctly found that the Township's retroactive imposition of the Ordinance's provisions on applications that were not yet approved would disrupt established legal norms and create enormous uncertainty in land use and zoning regulation. This decision brings much-needed clarity to a murky and unjustifiable regulatory move that would otherwise undermine public trust in municipal governance and devastate long-standing development plans.

In addition to its violations of the TOA Rule, the Township's stormwater management provisions conflict directly with regulations and standards set forth by the New Jersey Department of Environmental Protection ("NJDEP"). The State has clearly preempted municipal authority in this critical area, ensuring that stormwater management is uniformly regulated to protect the environment and public health. The Township, in its overreach, attempts to impose conflicting requirements that would create chaos and inconsistency in an already heavily regulated field. While the trial court did not address the issue of preemption, finding it to be moot based on its ruling on the TOA Rule, it is undeniable that the Township's Ordinance violates NJDEP's comprehensive regulations and guidance. The Township's efforts to impose new, inconsistent requirements not only contravene state law but would also create an environment

of uncertainty and instability that is deeply damaging to developers, municipalities, and communities alike.

The Township's retroactive application of Ordinance 4419-23 imposes an unlawful and unwarranted burden on developers. The retroactive provisions are nothing short of an economic and legal landmine for property owners and developers who rely on predictable, stable regulations to guide their projects. If permitted to stand, this Ordinance would disincentivize development, create untold delays, and introduce unnecessary regulatory complexity, all while undermining the spirit of fairness that is fundamental to land use law. Furthermore, it would undermine the broader economy by discouraging investment in projects critical to the growth of the Township and the region.

The trial court's decision was correct, soundly supported by law, and should be affirmed. The Township's appeal represents an unfounded challenge to a ruling that protected the interests of developers, the economy, and the public at large. The Township's retroactive application of Ordinance 4419-23 is not only legally flawed but poses significant long-term harm to developers, the public, and municipal regulatory stability. The trial court's judgment must be upheld, and the Township's appeal must be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the sake of brevity, Plaintiff hereby incorporates by reference, as though fully set forth and repeated herein at length, the Procedural History and Counter Statement of Facts as set forth in the Brief of Plaintiff/Respondent B9 Schoolhouse Owner LLC ("B9 Brief") at pages 4 through 12 therein, in lieu of reiterating incidental information.

Additionally, Concore owns real estate located at 403 Elizabeth Avenue, Franklin Township, Somerset County, New Jersey 08873 ("Property"), which is also designated as Block 502.02, Lot 9.01 on the Tax Maps for Franklin Township. Da141.¹ On January 20, 2023, Concore submitted the Application to the Franklin Township Planning Board ("Board") proposing to construct a 15,425 square foot building consisting of 14,925 square feet of warehouse space and 500 square feet of office space at the Property. Da142. As part of the Application, Concore prepared and submitted a stormwater management plan in accordance with then existing and applicable stormwater management regulations. Concore's Application was deemed complete on February 21, 2023. Da142. The Application has languished for more than two years, as it has been stayed pending the results of this litigation.

¹ "Da __" designation refers to the Appendix filed by Defendant.

LEGAL ARGUMENT

POINT I

THE ORDINANCE IS UNDENIABLY A LAND USE DEVELOPMENT REGULATION, GOVERNED BY THE MUNICIPAL LAND USE LAW AND SUBJECT TO THE TIME OF APPLICATION RULE, N.J.S.A. 40:55D-10.5, AND THE ORDINANCE'S RETROACTIVE APPLICABILITY PROVISION FAILS TO MEET THE REQUIREMENTS OF THE "HEALTH AND PUBLIC SAFETY" EXCEPTION TO THE TIME OF APPLICATION RULE AND CANNOT BE JUSTIFIED AS SUCH.

A. The Ordinance is a Land Use Regulation Governed to the MLUL and the Time of Application Rule.

The Township's attempt to retroactively apply new stormwater design standards not only defies the core purpose of the Municipal Land Use Law ("MLUL") but also directly undermines the protections established by the Time of Application Rule ("TOA Rule"), N.J.S.A. 40:55D-10.5. This Rule mandates that:

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

The Township's arguments in favor of retroactive application have been squarely rejected by New Jersey courts, including in the unpublished decision Dimauro v. Monroe Twp. Plan. Bd., 2024 N.J. Super. Unpub. LEXIS 221 (App. Div. February 14, 2024). (Da425-428.) In Dimauro, the appellate panel unequivocally held that stormwater management ordinances adopting new NJDEP standards are subject to the TOA Rule and cannot be retroactively applied to pending applications. Ibid.

In 2011, the New Jersey Legislature adopted the TOA Rule, replacing the outdated and inequitable "time of decision" rule. As explained by the Supreme Court of New Jersey in Dunbar Homes, Inc. v. Zoning Board of Adj. of the Twp. of Franklin, 233 N.J. 546, 560 (2018), the TOA Rule was specifically designed to ensure fairness and protect developers who have already invested substantial time and financial resources in designing projects in compliance with the regulations in effect at the time their development applications were submitted. The Legislature understood that under the time of decision rule, developers faced unfair consequences, such as the loss of substantial investments when ordinances were amended after they had spent significant resources on studies and professional services. Ibid.

The preparation of a site plan application is no small undertaking. It involves comprehensive technical work, including drainage calculations, environmental studies, and engineering designs for stormwater management—efforts that can cost hundreds of thousands or sometimes, even millions of dollars. As the Supreme Court emphasized in Dunbar, the TOA Rule is meant to protect developers from the inequitable results that would arise if the design requirements changed after they had made these substantial investments. The TOA Rule is specifically designed to shield pending applications from regulatory changes like those implemented by the Township in this case.

Judge Mennen correctly ruled that the Ordinance is fundamentally a zoning ordinance, not a “health and public safety” regulation. (Tr. 16:6-13). This decision aligns with New Jersey case law, distinguishing zoning ordinances from regulations enacted under a municipality's general police power, such as health codes and building codes. N.J. Shore Builders Ass'n v. Jackson, 199 N.J. 38 (2009) and Sparroween v. Tp. of West Caldwell, 452 N.J. Super. 329 (App. Div. 2017). Zoning ordinances and other land-use regulations do not fall within the “health and public safety” exception to the TOA Rule, as they primarily govern the use of land and development, as opposed to conduct that generally impacts health and safety.

The Township's argument—that the Ordinance falls within the exception—fundamentally misinterprets the scope of the exception and fails to account for the nature of the Ordinance. (Def. Brief at 23.)² Even if this Court disagrees with Judge Mennen's reasoning on this point, the result His Honor reached is still correct: the Ordinance does not qualify for the "health and public safety" exception.

The stormwater design standards in the Ordinance are not mere "environmental regulations" that only touch on the use of land. These provisions are land development regulations that directly dictate how major development projects must be designed and constructed. Under the MLUL, municipal ordinances governing land development must require compliance with stormwater management standards. N.J.S.A. 40:55D-38(b)(14). The Ordinance specifies engineering design requirements that are applicable only in the context of a site plan application submitted under the MLUL. (Da22). These provisions mandate detailed calculations and technical specifications, including drainage methods, pipe sizes, and outlet locations. (Da28-39).

This is precisely the type of regulation that the TOA Rule was designed to protect developers against. By applying these requirements retroactively, the

² "Def. Brief" designation refers to the Brief filed by Defendant.

Township is violating the fairness protections that the MLUL and TOA Rule provide to developers.

The Township's argument that the Ordinance should be considered a health and public safety regulation is without merit and unsupported by the Ordinance's own provisions. Key sections of the Ordinance, such as §330-7J, which dictates stormwater management objectives like "taking into account existing conditions" and "minimizing maintenance," are clearly development regulations, not regulations concerning health or safety.

Finally, the Township's position is not only legally unsound but highly impractical. Under their theory, a major development project that receives preliminary approval could be forced to redesign entirely, adding new drainage structures, altering the building footprint, and requiring new public hearings—all after months of investment. This would render the preliminary approval meaningless, wasting valuable time and resources, not only for the developer but also for the public.

In conclusion, the stormwater design standards implemented by the Ordinance are development regulations that should be governed by the TOA Rule. The Township's retroactive application of the Ordinance violates the MLUL and undermines the TOA Rule's intended protection for developers. The

Township's appeal should be denied, and the trial court's judgment should be upheld.

B. The Ordinance's Retroactive Applicability Provision Does Not Fall Within the Health and Public Safety Exception to the TOA Rule.

The Township's attempt to circumvent the clear and unambiguous application of the Time of Application ("TOA") Rule by asserting that the Ordinance's applicability provision falls within the "health and public safety" exception is not only legally flawed, but also directly undermines the intent and purpose of the MLUL.

The Township attempts to justify its retroactive application of the new stormwater design standards by invoking the exception to the TOA Rule, which excludes from its scope “any provisions of an ordinance, except those relating to health and public safety.” N.J.S.A. 40:55D-10.5. However, as the Court will find, this argument fails on several fronts. First and foremost, the challenge in this case is not to the entire Ordinance, but to the retroactive applicability provision only. This provision, which governs when the new stormwater standards are to be applied, is not, and cannot be, characterized as a “health and public safety” measure.

The Township's reading of the “health and public safety” exception is overly broad and fundamentally mistaken. The exception was never meant to create an expansive carve-out for any ordinance that "relates" in some way to

public health and safety. Rather, the legislative intent was clear: the exception applies only to ordinances that specifically address health and safety concerns pursuant to a municipality's general police power—not to land use ordinances setting detailed development design criteria that apply exclusively to development applications. The stormwater management ordinance adopted here, under the authority of the MLUL, which dictates critical design details and applies exclusively to development applications, is not a health and public safety ordinance.

The MLUL itself, as cited in N.J.S.A. 40:55D-2, clearly differentiates between land use regulations and general police power ordinances. The Township's suggestion that zoning and land use ordinances fall within this exception undermines the very purpose of the TOA Rule. As courts have clarified, such as in N.J. Shore Builders Ass'n v. Jackson, 199 N.J. 38 (2009) and Sparroween v. Township of West Caldwell, 452 N.J. Super. 329 (App. Div. 2017), municipalities may adopt ordinances pursuant to their police powers, but those ordinances are not within the purview of the TOA Rule.

Judge Mennen correctly concluded that the Ordinance, and specifically the retroactive applicability provision, cannot be classified as a "health and public safety" regulation. (Tr. 16:6-13.) The Supreme Court has already acknowledged that zoning ordinances, even if they touch on health and safety

concerns, are fundamentally different from regulations enacted for public health and safety, which typically address community-wide issues such as environmental hazards, sanitation, and public health matters that affect everyone, not just developers. See NJ Shore Builders, 199 N.J. at 53-54.

Furthermore, even if zoning ordinances could, in rare instances, fall within the health and public safety exception, it is clear that the stormwater design standards imposed by the Ordinance are far removed from traditional public safety regulations. The changes imposed by the Ordinance concern detailed technical specifications for development plans, including drainage calculations, pipe sizes, and the design of stormwater systems. These are, in every sense, land development regulations, not matters of public safety.

This is not a case where the Ordinance is addressing a pressing public health issue or emergency. Rather, it's a land use regulation with specific design requirements that impact how development projects are planned and executed. The Township's attempt to broaden the exception to include any regulation touching upon health and safety would render the TOA Rule meaningless. If every land use ordinance—even those with no direct impact on health or safety—were treated as an exception, developers would be left in an unpredictable environment where regulations could change midstream without regard to the TOA Rule's protective framework.

If the Township's argument were accepted, municipalities would effectively have free rein to retroactively apply newly adopted regulations to ongoing applications. As an illustrative example, the Township could impose new stormwater requirements that would force developers to completely re-engineer their plans, spending significant additional resources and time, and requiring new public hearings—all after an application had already been submitted. This is precisely the situation the TOA Rule was designed to prevent.

Lastly, it is crucial to note that the NJDEP has already taken public health and safety concerns into account when formulating the regulations that govern stormwater management. As the NJDEP explicitly noted in response to public comments, its own regulations strike the appropriate balance to protect public health, safety, and welfare, and therefore do not require additional exemptions or retroactive provisions. NJDEP Response to Cmt. 286 states, "Therefore, to protect public health, safety, and welfare, it is necessary to limit exemptions from these adopted new stormwater management and flood hazard area standards to the situations set forth at N.J.A.C. 7:8-1.6 and 7:13-2.4(c), respectively." 55 N.J.R. 1385(b). The NJDEP has already addressed the pertinent public safety issues in a manner consistent with the TOA Rule, further undercutting the Township's claim that the new Ordinance is justified by health and public safety concerns.

In conclusion, the retroactive applicability provision of the Township's stormwater management ordinance is neither a "health and public safety" provision nor an exception to the TOA Rule. The trial court's decision correctly found that the Ordinance's retroactive applicability violates the TOA Rule and should not be upheld. The Township's arguments to the contrary are legally unfounded and should be rejected.

C. NJDEP Acknowledges that the TOA Rule Applies to the Ordinance.

The Township's contention that the TOA Rule does not apply to the new stormwater regulations is not only flawed but directly contradicted by the NJDEP. The NJDEP has consistently recognized that the TOA Rule governs the applicability of stormwater management regulations, contrary to the Township's arguments.

In its response to public comments, the NJDEP addressed concerns raised about the so-called "legacy" provisions of the new regulations, which would apply the prior stormwater management standards to applications that were already deemed complete but still pending. The NJDEP clearly rejected the notion that the new stormwater regulations could apply retroactively, stating, "Even if Department approval is not required, the [MLUL] requires that development applications be evaluated pursuant to the ordinances in effect at the time of application." 55 N.J.R. 1385(b), NJDEP Response to Cmt 572.

This confirms that the NJDEP agrees with Concore's position: the TOA Rule controls, and the Application should be governed by the regulations that were in effect when it was submitted, not by the Ordinance that took effect well after the Application was already deemed complete months prior.

The NJDEP further clarified that "[i]f...[the municipality] determine[s] the application to be complete, then the project should be considered exempt from any amendments to their ordinance, as it would be reviewed in accordance with the ordinance that was in place at the time of a complete submission pursuant to N.J.S.A. 40:55D-10.5." 55 N.J.R. 1385(b), NJDEP Response to Cmt 615.

This language is unequivocal. The NJDEP has expressly confirmed that the TOA Rule applies to complete development applications, meaning that the new stormwater design standards cannot be retroactively applied to pending applications such as Concore's. The Township's attempt to retroactively impose new stormwater standards is directly at odds with the NJDEP's stance and is legally untenable.

This further underscores the critical point that the Township cannot impose changes to the development process in violation of the TOA Rule. NJDEP's position aligns with the fundamental principle that developers must be

protected from regulatory changes after they have already submitted complete applications, as outlined by the MLUL and reinforced by the courts.

D. The Shipyard Case Does Not Support the Township's Position.

The Township's reliance on dicta from Shipyard Assocs. v. Hoboken, 242 N.J. 23 (2020) is misguided and fundamentally irrelevant. In an attempt to bypass the requirements of the TOA Rule, the Township distorts language from Shipyard—a case that did not address, and was not concerned with, retroactive application of new regulations. The Township's interpretation of the case is not only legally flawed, but directly contradicts New Jersey law and undermines fair regulatory practices.

The Shipyard court did indeed reference "zoning ordinances affecting health and public safety," 242 N.J. at 45-46, but this language is far removed from any finding or ruling on the scope of the "health and public safety" exception to the TOA Rule. The Shipyard case dealt with a completely different issue — the interpretation of a MLUL provision, specifically N.J.S.A. 40:55D-52, as it relates to changes in zoning requirements after final approvals; not whether an obvious zoning regulation falls with the "health and public safety" exception under N.J.S.A. 40:55D-10.5. Shipyard, 242 N.J. at 39-46.

First and foremost, the Township's assertion that the Applicability Provision of the Ordinance falls within the "health and public safety" exception

is both legally and practically unsound. As Shipyard makes clear, the health and public safety exception does not blanketly apply to all ordinances that may have some connection to public health or safety. Id. at 47. In this case, the retroactive applicability provision — which dictates when the new stormwater regulations take effect — has nothing to do with public health or safety. Rather, it directly addresses the timing of stormwater management standards in development applications. This is a classic example of a land use regulation — not a health or safety provision — that falls squarely under the TOA Rule.

In Shipyard, the Court rejected the argument that ordinances designed to prevent flooding could be characterized as “health and public safety” ordinances, stating that such ordinances, though potentially addressing public safety concerns, do not automatically qualify as falling within the exception. Id. at 41. Similarly, the stormwater management ordinance in this case is a land use regulation, not a health and public safety measure.

The Township’s argument would, if accepted, open the floodgates to municipal authorities making significant, retroactive changes to development regulations under the guise of public safety. The Ordinance’s retroactive applicability provision sets specific stormwater design and construction standards that directly impact major development projects and must be reviewed by land use boards as part of the development approval process under the

MLUL. The Ordinance makes no claim of addressing health or safety concerns but instead addresses engineering standards for stormwater management. This is not the type of regulation that the "health and public safety" exception was designed to address.

The Shipyard court's analysis focused on zoning ordinances that place limitations on construction and establish design standards. Ibid. The court emphasized that such ordinances are typically governed by the MLUL and should not be deemed to automatically fall within an exception to the TOA Rule just because they may impact public safety. Ibid. Similarly, the Township's stormwater design standards, while potentially aimed at mitigating environmental risks like flooding, are plainly land development regulations subject to the TOA Rule.

The Township's argument hinges on a fundamental misapplication of the Shipyard case and fails to recognize the distinction between zoning ordinances designed to regulate land use and police power ordinances that address public safety. The Shipyard court itself rejected the argument that ordinances tangentially affecting public safety should automatically fall within the health and public safety exception to the TOA Rule. Ibid.

The legislative history of the TOA Rule further supports this interpretation. As outlined in the Senate Committee Statement on the TOA

Amendment, the Legislature intentionally distinguished between "development regulations" and ordinances addressing public health and safety. See Senate Community and Urban Affairs Committee Statement, Senate No. 82, February 4, 2010. The TOA Rule was designed to prevent municipalities from retroactively applying ordinances that would alter the terms and conditions of development projects after an application has been submitted and deemed complete. Ibid. The legislative history clearly shows that the exception was meant to cover ordinances concerning public safety in a broader, general sense, not those specifically intended to regulate land use or development.

In summary, the trial court correctly ruled that the Applicability Provision of the Township's Ordinance violates the TOA Rule. The Township's argument that this provision falls within the "health and public safety" exception is both legally flawed and inconsistent with the language of the statute, the legislative history, and the case law, including Shipyard. The retroactive applicability of the new stormwater regulations is a land development issue, not a health and public safety matter, and must be governed by the TOA Rule.

POINT II

THE ORDINANCE'S RETROACTIVE APPLICABILITY PROVISION DIRECTLY CONFLICTS WITH NJDEP REGULATIONS, WHICH EXPLICITLY BAR THE APPLICATION OF THE NEW STORMWATER STANDARDS TO DEVELOPMENT APPLICATIONS THAT WERE DEEMED COMPLETE AND STILL PENDING WHEN THE NEW STANDARDS WERE ENACTED.

The Township's attempt to apply its retroactive stormwater management requirements directly contradicts State regulations adopted by the NJDEP, which govern the applicability of stormwater standards to development applications that have already been deemed complete. The NJDEP's regulations are clear—new stormwater management standards cannot be applied retroactively to complete, but still pending applications when the new standards took effect on July 17, 2023. N.J.A.C. 7:8-1.6(a).

The NJDEP Regulations, specifically N.J.A.C. 7:8-1.6(b), provide a detailed applicability framework, which specifically excludes applications that were submitted prior to the effective date of the new stormwater standards. Despite this unambiguous State mandate, the Township's Ordinance aims to apply these new stormwater standards retroactively to development applications that were already deemed complete before the new standards were adopted. This conflict between the Township's Ordinance and NJDEP's Regulations cannot be

ignored and should be resolved in favor of the clear intent and mandate of state law.

In this section, Plaintiff will demonstrate that the Ordinance's retroactive applicability provision is in direct conflict with NJDEP's stormwater management regulations, which mandate prospective application, and that under New Jersey law, municipal ordinances must conform to State law. When a municipal ordinance conflicts with State regulations, State law takes precedence, and the Ordinance's provision must be invalidated.

A. The Applicability Provision of the Ordinance Conflicts with NJDEP Regulations and Is Preempted by State Law.

Municipal ordinances that conflict with State law are invalid, as State law preempts local legislative action. As the courts have repeatedly held, "[t]he presumption of the validity of local legislative action is constrained by the obvious understanding that '[a] statute has supremacy over an ordinance,' and that 'a local municipality is but a creature of the State, capable of exercising only those powers granted by the Legislature.'" Timber Glen Phase III, LLC v. Township of Hamilton, 441 N.J. Super. 514, 524 (App. Div. 2015) (quoting Moyant v. Paramus, 30 N.J. 528, 535 (1959)). Thus, a municipality's authority to regulate land use and zoning must be exercised in strict alignment with the enabling legislation, such as the MLUL. NJ Shore Builders Ass'n v. Twp. of Jackson, 401 N.J. Super. 152, 161 (App. Div. 2008) (quoting Toll Bros., Inc. v.

Bd. Of Chosen Freeholders, County of Burlington, 194 N.J. 223, 243 (2008)).

Our courts have consistently reaffirmed that "a municipality may not contradict a policy of the Legislature, either by permitting what a state statute forbids or by forbidding what a state statute permits." Asbury Park City v. Castagno Tires, 13 N.J. Tax 488, 504 (Tax Ct. 1993). Consequently, when a municipal ordinance conflicts with State law, the State law must prevail, and the ordinance is preempted. Id.

New Jersey courts have consistently invalidated local ordinances in conflict with State law. For instance, in NJ Shore Builders, the court struck down a municipal ordinance for failing to comply with the MLUL, and in Sprint Spectrum L.P. v. Borough of Ringwood Zoning Bd. of Adjustment, 386 N.J. Super. 62 (Law Div. 2005), the court invalidated a municipal ordinance provision that conflicted with the MLUL. Similarly, the courts in Auto-Rite Supply Co. v. Mayor & Township Committeemen of Woodbridge, 25 N.J. 188 (1957) and United Water New Jersey, Inc. v. Borough of Hillsdale, 438 N.J. Super. 309 (App. Div. 2014) both held that municipal ordinances conflicting with State statutes were preempted. The courts have been equally resolute in striking down municipal ordinances that contradict State-level stormwater regulations, as demonstrated in Builder's League of S. Jersey v. Borough of

Haddonfield, 2021 N.J. Super. Unpub. LEXIS 346 (App. Div. March 3, 2021). (Da429-435.)

Here, the Township's Ordinance is invalid because it directly conflicts with NJDEP regulations that prohibit retroactive application of new stormwater standards to development applications that already have been deemed complete. The Ordinance is directly at odds with the State regulations. As mandated by N.J.S.A. 40:55D-93 and N.J.S.A. 40:55D-95, municipalities are required to ensure that their ordinances comply with all relevant State and Federal statutes governing stormwater management. The NJDEP's stormwater regulations are clear: they should only apply prospectively, and any municipal ordinance that conflicts with the State's regulations is preempted and invalid. The Township's attempt to apply the new NJDEP stormwater standards to applications that are already pending before land use boards contradicts the regulatory framework established by NJDEP.

This Court has already addressed a similar situation in Dimauro v. Monroe Twp. Plan. Bd., 2024 N.J. Super. Unpub. LEXIS 221 (App. Div. Feb. 14, 2024), (Da425-428), where a municipal attempt to apply the updated 2021 stormwater regulations to a completed application was rejected. The court held that applying the updated NJDEP stormwater regulations to a development

application that had already been deemed complete was "contrary to the explicit language of NJDEP regulations." Id. at *12. (Da428.)

The NJDEP's stormwater regulations are explicit: they apply prospectively, requiring major development projects to comply with the new regulations unless a complete application was submitted before July 17, 2023. N.J.A.C. 7:8-1.6(b)(1). Furthermore, N.J.A.C. 7:8-1.6(b)(3) specifies that development applications submitted between March 2, 2021, and July 17, 2023, must comply with the stormwater management standards in effect as of March 2, 2021. The use of "shall" in these provisions underscores the mandatory intent of the regulations to apply them prospectively. State v. Thomas, 188 N.J. 137, 150 (2006).

The Township's Ordinance imposes stricter stormwater standards on pending applications, directly violating the NJDEP's regulatory framework and disrupting the uniformity of State-level stormwater management standards. This is directly contrary to NJDEP regulations. Not only does the Township admit that its retroactive applicability provision "differs" from the NJDEP standards, but, more importantly, it fails to recognize the significant number of instances where its Ordinance contradicts the NJDEP regulations. The Township's selective interpretation of the regulations, which purports to allow for scenarios where the Ordinance may align with State law, overlooks the broader, more

fundamental conflict where the Ordinance attempts to apply its new regulations retroactively.

The Ordinance's retroactive application of stricter stormwater standards to pending applications undermines the regulatory framework established by NJDEP. As this action directly contradicts State law, it is preempted and must be declared invalid.

B. The State Regulations Reflect a Clear Intent for Uniformity in Stormwater Management, and the State's Limited Grant of Authority to Municipalities Does Not Allow for Local Ordinances that Directly Conflict with State Law.

If this Court agrees with Plaintiff, that a direct conflict exists between the Ordinance's Applicability Provision and the State Regulations, as outlined in N.J.A.C. 7:8-1.6(b)(1)–(4), then the Ordinance must be preempted by State law. That said, exploring the statutory framework and the broader scope of the NJDEP Regulations only further solidifies the fact that the Township's approach cannot be substantiated.

The NJDEP Regulations, on their face, are designed to establish a uniform, State-wide approach to stormwater management, requiring that “all major development shall comply with the requirements of this chapter.” N.J.A.C. 7:8-1.6(a). This regulatory framework was created to ensure that stormwater management is handled consistently throughout New Jersey. While the State allows municipalities to adopt “more stringent” standards, as stated in N.J.A.C.

7:8-1.5, this power is not without limits. The NJDEP has consistently emphasized that municipalities cannot create ordinances that are contrary to State law.

The NJDEP's position is clear and unambiguous: municipalities have the authority to pass ordinances that impose stricter stormwater standards, but only so long as those ordinances do not conflict with the broader State regulatory framework. The language is unequivocal: "Municipalities...have statutory authority to pass ordinances, regulations, rules and by-laws of a stricter nature than the existing statutory framework, provided they are not contrary to State or Federal law..." 55 N.J.R. 1385(b) (2003), NJDEP Response to Comment No. 144.

The MLUL further underscores this point, requiring municipal stormwater management plans to conform to both Federal and State regulations on stormwater management. N.J.S.A. 40:55D-93; N.J.S.A. 40:55D-95. The Township's Ordinance blatantly violates these principles by attempting to apply the NJDEP's stormwater regulations retroactively to applications that have already been deemed complete—a move explicitly forbidden by the NJDEP's own regulatory framework.

The Ordinance's retroactive application of the new stormwater rules conflicts directly with the NJDEP's mandate, which explicitly provides that

major development projects whose applications were completed before July 17, 2023, are excluded from these new requirements. N.J.A.C. 7:8-1.6(b)(1). By aiming to apply the new regulations to applications that were already submitted and deemed complete, the Township is acting outside of its limited, delegated authority.

To make matters worse, the Township argues that the NJDEP's regulations allow for certain scenarios where a municipality can apply the new rules even in the face of applications already pending before land use boards. This argument ignores the plain meaning of the regulations, which clearly stipulate that applications that are already deemed complete are governed by the previous standards, not the newly adopted ones. The use of the word "shall" in N.J.A.C. 7:8-1.6(b)(3) reinforces that these regulations must be applied prospectively, with no exceptions for retroactive application.

The Township's misguided argument rests on an incorrect interpretation of the regulatory framework. It attempts to rationalize retroactive applicability, but the NJDEP's response to public comments clarifies that such a broad application is entirely outside the scope of the NJDEP's intent. N.J.A.C. 7:8-1.6 specifically defines when and how the new regulations apply, and municipalities are not empowered to ignore these guidelines or apply them to pending

applications. Any suggestion to the contrary is inconsistent with both the plain language of the regulations and the regulatory intent.

In conclusion, the Township's retroactive application of the stormwater regulations to pending applications is a clear violation of State law. The State's regulations have been established to provide uniformity and consistency, and the Township's attempt to impose a more stringent local ordinance that contradicts those regulations is not only unjustified but also unlawful. The Court should find that the Ordinance's applicability provision is preempted by State law and therefore invalid.

C. The Ordinance's Applicability Provision Conflicts with State Regulations and NJDEP Guidance, which Mandate Prospective Application of the New Stormwater Rules.

The NJDEP has unequivocally established that the new stormwater regulations are to be applied prospectively. The NJDEP's Rule Amendment Training materials, Model Ordinance, and responses to public comments all consistently reinforce this intent. Contrary to the Township's assertions, these authoritative sources do not support the retroactive application of the new standards to development applications submitted prior to July 17, 2023.

The NJDEP's Rule Amendment Training materials provide clear guidance on the applicability of the new stormwater regulations. Pages 17 and 18 of the training document present hypothetical scenarios illustrating how the new

stormwater management rules apply to development applications. (Da213-214.) In each example, the determinative factor is the date on which the application was submitted and deemed complete. Ibid. Applications submitted before July 17, 2023, are evaluated under the previous rules, while those submitted after that date are subject to the new regulations. Ibid. These examples do not support the Township's position that the new standards can be applied retroactively to earlier applications.

In responses to public comments during the adoption of the new stormwater regulations, the NJDEP explicitly addressed concerns about the applicability of the new rules to pending applications. The Department confirmed that complete applications submitted prior to the adoption date of the rulemaking are not subject to the new standards: "Pursuant to the SWM rules at N.J.A.C. 7:8-1.6, complete applications that have been submitted for certain types of approvals prior to the adoption date of this rulemaking are not subject to the new standards." 55 N.J.R. 1385(b) (2023), NJDEP Response to Comment No. 286.

Furthermore, the NJDEP clarified that the new stormwater regulations do not apply to applications that have already been submitted for approval and deemed complete by either the Department or a municipality before the rulemaking: "The Department cannot retroactively apply newly adopted

standards to projects that have already been authorized or which were submitted prior to the rulemaking in question." Id., NJDEP Response to Comment Nos. 455- 475.

These responses directly contradict the Township's argument that the new standards can be applied to pending applications.

The NJDEP's Model Stormwater Control Ordinance further reinforces the prospective application of the new stormwater regulations. Section 1(C)(3) of the Model Ordinance exempts development applications submitted or pending prior to the adoption of the ordinance from the new standards. This provision aligns with the NJDEP's guidance and underscores the Department's intent to apply the new regulations prospectively.

The NJDEP's Rule Amendment Training materials, responses to public comments, and Model Ordinance collectively demonstrate the State's clear intent to apply the new stormwater regulations only prospectively. The Township's Ordinance, which attempts to retroactively apply the new standards to development applications submitted before July 17, 2023, directly conflicts with this intent. As such, the Ordinance's retroactive applicability provision is preempted by State law and must be declared invalid.

D. Allowing the Township's Interpretation of the NJDEP Regulations to Stand Would Devastate the Development Community.

The Township's interpretation of the NJDEP regulations is not only legally flawed but would have catastrophic consequences for the development community. The regulations were designed with careful thought to ensure that developers are protected from retroactively imposed, more stringent standards after they have already made significant investments in their projects. To allow the Township to enforce its interpretation would result in devastating financial harm and an unworkable, inequitable burden on developers who have already dedicated substantial resources.

Imagine the chaos and waste of resources if major, multi-million dollar development projects—already underway—were forced to completely redesign and re-engineer every aspect of their plans simply because the Township wants to retroactively apply new stormwater standards. After years of costly planning, studies, and public hearings, projects would be forced to start from scratch. This would force developers to go through redundant, costly public hearings and review processes for projects that have already been approved—essentially undoing the work of months or even years.

The Township conveniently ignores the fundamental policy principles that the NJDEP incorporated into the regulations. These provisions were designed to protect developers from retroactive changes and avoid inequitable outcomes,

as recognized by the court in Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of the Township of Franklin, 233 N.J. 546 (2018). The NJDEP's legacy provisions were clearly drafted to prevent this very kind of unfair disruption. Rather than recognizing these policy considerations, the Township seems committed to disregard the principles of fairness that the NJDEP carefully embedded into the regulations.

The Township's position also leads to an absurd and backwards outcome. As the Township concedes, under the NJDEP regulations, a development application not requiring NJDEP permits is not subject to the new stormwater rules, regardless of whether such application has been deemed complete. (Def. Brief at 30.) Yet, the Township argues that, for applications requiring NJDEP permits, the municipality would then have the authority to apply the new, more stringent standards to all applications, including those that have already been deemed complete. (Def. Brief at 30-46.) This is an outright contradiction, and the Township's interpretation ignores the fact that the applicability deadlines for both NJDEP and municipal approvals are the same. There is no "dual structure" as the Township claims. Both municipal land-use applications and NJDEP permit applications fall under the same cutoff date—the date the regulations went into effect. If a development application was submitted before that date, it should be governed by the prior regulations, not the new rules.

Take, for example, Concore's January 2023 development application for the Property. Under the Township's flawed interpretation, even though a new NJDEP permit would not be required under the new NJDEP regulations, the municipality could still apply the new stormwater standards. This is in direct conflict with the plain meaning of the regulations, which mandate that the prior rules apply. In contrast, the NJDEP would be bound to apply the old rules when evaluating the same project for a permit.

This nonsensical scenario leads to absurd results that undermine the very purpose of the NJDEP regulations. As stated by the New Jersey Supreme Court in State v. Williams, 218 N.J. 576, 586 (2014), "[w]e will not interpret a statute in a way that 'leads to an absurd result.'" (quoting DiProspero v. Penn, 183 N.J. 477, 493 (2005).) Likewise, Turner v. First Nat'l Bank, 162 N.J. 75, 84 (1999), reminds us that when the literal interpretation would produce absurd consequences, "the spirit of the law should control."

In conclusion, the Township's interpretation of the NJDEP regulations is legally untenable and would wreak havoc on the development community. The Court should reject this argument and uphold the prospective application of the regulations as intended by the NJDEP, as it was clearly designed to avoid the very chaos that the Township's position would create.

CONCLUSION

The Township's attempts to retroactively impose stormwater management regulations on development applications that were already submitted and deemed complete is not only a flagrant violation of the MLUL and the NJDEP regulations but also a reckless disruption of the stability and predictability essential to the development community. If allowed to stand, the Township's actions would create an environment of chaos and uncertainty, undermining the entire framework of municipal land use law. The trial court's decision was sound, rooted in established legal principles, and its affirmation is crucial for preserving fairness, protecting developers from undue harm, and maintaining the integrity of New Jersey's regulatory system. The Township's misguided appeal should be unequivocally rejected, and the trial court's ruling should be upheld. The rule of law demands no less.

Respectfully submitted,

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Dated: May 7, 2025

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B9 SCHOOLHOUSE OWNER
LLC,

Plaintiff,

v.

TOWNSHIP OF FRANKLIN,

Defendant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-001461-24

On Appeal from:
Superior Court of New Jersey
Law Division, Somerset County

Docket No.: SOM-L-001365-23

Consolidated Matter

CONCORE REALTY, LLC

Plaintiff,

v.

TOWNSHIP OF FRANKLIN,

Defendant.

Docket No.: SOM-L-001385-23

Sat Below:
Hon. William G. Mennen, J.S.C.

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Date Submitted: May 7, 2025

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PRELIMINARY STATEMENT

Defendant, Township of Franklin ("Defendant" or "Township"), has a theory of the case that could wreak havoc throughout the State if adopted by this Court. Under the Township's theory, virtually any new land use regulation could be applied retroactively to pending development applications, and to projects with preliminary approvals, under the "health and public safety" exception to the MLUL Time of Application Rule ("TOA" Rule) - which is intended to shield developers from changes in development regulations after development applications are submitted. The "broad" exception advocated by the Township would swallow the rule.

The new stormwater management standards adopted by NJDEP on July 17, 2023, which the Township seeks to apply retroactively, impose design standards that materially change the requirements in effect prior to adoption of these new standards. Obviously, developers throughout the State relied on, and were required to meet, the standards in effect when they designed projects and filed applications for development prior to the change that occurred in July 2023. The new standards require different technical analysis, calculations and ultimately, in many instances, an alternative project design.

Nevertheless, the Township asserts that it can — by ordinance that is only applicable in the context of development applications — retroactively

impose the new stormwater standards on all development applications, and projects with preliminary approvals pursuant to N.J.S.A. 40:55-D-49, that were pending or approved as of the date the Township adopted Ordinance 4419-23 (the "Ordinance"). In other words, absent a final approval pursuant to N.J.S.A. 40:55D-50 as of October 5, 2023 (when the Ordinance became effective), pending development applications, and projects with preliminary site plan approval, would be required to be reanalyzed and potentially redesigned — meaning submissions of new stormwater studies, revised plans and additional hearings.

Significantly, the Ordinance establishes detailed design requirements that dictate project engineering of site plans that are only reviewed in conjunction with development applications heard by planning or zoning boards, as applicable, as an "integral part" of the land use approval process. These design standards are not health and public safety mandates applicable to the community at large or similarly situated developments, but instead only pertain to what must be addressed in engineered plans for proposed real estate development projects.

Adoption of the Township's position would neuter the TOA Rule, the essence of which is to preclude municipalities from doing exactly what the Township is attempting to do here, i.e., imposing new development standards

and requirements on complete, pending land use applications. Under the Township's theory, a municipality could require new analysis and redesign of major development applications filed well before an enactment of a new stormwater ordinance pursuant to NJDEP's July 2023 regulations.

The pertinent NJDEP regulatory scheme, N.J.A.C. 7:8-1.6 (the "NJDEP Regulations"), sets forth which of the prior stormwater management standards (i.e., those in effect as of March 1 or March 2, 2021) govern development applications that were submitted prior to July 17, 2023 when the new stormwater standards went into effect, depending on the date of the submission. Plaintiffs moved for summary judgment, arguing that — on its face — the Applicability Provision was violative of the NJDEP Regulations and the TOA Rule. The Regulations explicitly preclude application by municipalities of the new stormwater standards to certain previously submitted development applications. Furthermore, the Applicability Provision — establishing when the new standards govern — is not a more stringent regulatory measure permitted under the Regulations. Finally, the Township's argument effectively renders the explicit applicability provisions in the Regulations meaningless when both NJDEP and municipal approvals are required. That result makes no sense and surely was not the intent.

PROCEDURAL HISTORY

This matter came before the Trial Court by way of a Motion for Summary Judgment filed by Plaintiff-Respondent B9 Schoolhouse Owner, LLC ("Plaintiff" or "B9"), asserting a facial challenge to §330-3(D) of Franklin Township Ordinance 4419-23 and seeking its invalidation on the basis that it is preempted by State law, namely the NJDEP Regulations and the TOA Rule (N.J.S.A. 40:55D-10.5) of the Municipal Land Use Law, N.J.S.A. 49:55D-1 to -163 (the "MLUL"), which precludes the application of newly-adopted ordinances to completed, pending land use applications. Da278 – 437.¹ As the Trial Court recognized, the scope of Plaintiff's Motion was limited to certain legal issues in the case²:

By virtue of an earlier entered case management order in this case, this summary judgment is limited to a couple of issues specifically questioning the validity of local Franklin Township ordinance 4419-23 vis-à-vis alleged inconsistencies with NJDEP regs and/or violation of the Time of Application Rule.

[1T4:23-25 – 5:1-4.]

¹ The "Da __" designation refers to the Appendix filed by Defendant-Appellant.

² The Case Management Order providing for a limited summary judgment motion contemplates that the parties would proceed with discovery and trial on the remaining issues that were the subject of Plaintiff's Complaint, including whether the Ordinance was arbitrary, capricious and unreasonable, was the result of improper bias by Township Councilmembers and constituted inverse spot zoning, if the case was not fully adjudicated by summary judgment. See Da12 – Da14.

In its decision, the Trial Court first addressed the Township’s argument that the Ordinance constituted a health and public safety exception to the TOA Rule, N.J.S.A. 40:55D-10.5. 2T11:3-9. Relying on the analysis set forth in N.J. Shore Builders Ass’n v. Township of Jackson, 199 N.J. 38 (2007) and Sparroween v. Township of West Caldwell, 452 N.J. Super. 329 (App. Div. 2017), the court below made a distinction between zoning ordinances enacted pursuant to the MLUL and health and public safety ordinances enacted under a municipality’s police power: “Both Jackson and Sparroween distinguished such health and public safety ordinances as having been enacted under a municipality’s general police power and, importantly, as applying to everyone.” 1T13:17-21 (citing N.J. Shore Builders, 199 N.J. at 53-54; Sparroween, 452 N.J. Super. at 339) (emphasis added).

Judge Mennen analyzed the function of the Ordinance and determined that it “is far more than a generic environmental regulation” and “does not apply to everyone but instead only to those who make an application for development.” 1T15:3-7. Moreover, the Trial Court found that the Ordinance “represents a regulation on where or how one can build.” 1T15:7-8.

Accordingly, Judge Mennen held that the Ordinance was not a health and public safety regulation like the ordinances before the courts in N.J. Shore Builders and Sparroween (which were enacted under the municipal police

power), but was a zoning ordinance subject to the TOA Rule. Judge Mennen, therefore, concluded that the Ordinance could not be retroactively applied to Plaintiff's application given that Plaintiff's application was submitted and deemed "complete" prior to the adoption of the Ordinance. 1T16:6-13.

COUNTER STATEMENT OF FACTS

Plaintiff-Respondent is the owner of property in Franklin Township, upon which Plaintiff proposes a warehouse development (the "Project"), as set forth in Plaintiff's application to the Franklin Township Planning Board for site plan approval (the "Application"). Da285. In connection with the Application, Plaintiff obtained a watershed and land management permit from the New Jersey Department of Environmental Protection ("NJDEP") in May 2023, constituting its approval of the Project, including the proposed stormwater management system. Da9, ¶32. After multiple nights of hearings, the Township Planning Board denied the Application on September 26, 2023 and adopted its resolution memorializing its decision on November 1, 2023.³ Da9, ¶¶ 33-35; Da114, ¶¶ 33-35.

³ The Board's denial of the Application was reversed and Plaintiff's Application was approved by the Trial Court pursuant to an April 24, 2025 Decision in Docket No. SOM-L-1537-23.

NJ Stormwater Regulations

Nearly one (1) year after the Application was deemed “complete” and after Plaintiff received the requisite NJDEP approvals of its stormwater management plan, the NJDEP issued Stormwater Regulation amendments on July 17, 2023. N.J.A.C. 7:8-1 et seq. The amendments included the following mandates regarding the applicability of the new stormwater regulations:

7:8-1.6 Applicability to major development

- (a) Except as provided in (b) below, all major development shall comply with the requirements of this chapter.
- (b) Major development shall be subject to the stormwater management requirements in effect prior to July 17, 2023 as follows:

1. Major development that does not require any of the Department permits listed at (c) below and for which a complete application has been submitted prior to July 17, 2023 shall be subject to the stormwater management requirements in effect pursuant to (b)2 or 3 below, provided that the application includes both the application form and all accompanying documents required by ordinance for one of the following approvals pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.):
 - i. Preliminary or final site plan approval;
 - ii. Final municipal building or construction permit;
 - iii. Minor subdivision approval where no subsequent site plan approval is required;
 - iv. Final subdivision approval where no subsequent site plan approval is required;
 - v. Preliminary subdivision approval where no subsequent site plan approval is required.

2. An application required by ordinance for approval pursuant to (b)1 above that has been submitted prior to March 2, 2021 shall be subject to the stormwater management requirements in effect on March 2, 2021;
3. An application required by ordinance for approval pursuant to (b)1 above that has been submitted on or after March 2, 2021, but prior to July 17, 2023 shall be subject to the stormwater management requirements in effect on March 2, 2021; and
4. Major development for which a technically complete application was submitted to the Department for one of the approvals listed at (c) below prior to July 17, 2023, shall be subject to the stormwater management requirements as follows, provided that the application included a stormwater management review component:
 - i. A technically complete application submitted to the Department for any of these approvals prior to March 2, 2021, shall be subject to the stormwater management requirements in effect on March 1, 2021; and
 - ii. A technically complete application submitted to the Department for any of these approvals on or after March 2, 2021, and prior to July 17, 2023 shall be subject to the stormwater management requirements in effect on March 2, 2021.

[N.J.A.C. 7:8-1.6 (emphasis added).]

NJDEP Guidance to Municipalities

NJDEP provided municipalities with guidance on how to interpret and incorporate the new Regulations, all of which confirm the State's intention that the new requirements only be applied prospectively:

- NJDEP Rule Amendment Training (Da64 – 105) - provides hypothetical examples on the applicability of the State’s amended stormwater Regulations and a municipality’s new local stormwater management regulations on development applications, and make clear that the determinative factor is when the complete application was submitted: complete, pending applications submitted *prior* to July 17, 2023 are not subject to the newly adopted rules, while those submitted *after* July 17, 2023 must comply with the new rules, as set forth in N.J.A.C. 7:8-1.6. Da80 – Da81.
- NJDEP Model Ordinance (Da501 – 534) – sample ordinance that municipalities can adapt to implement the new stormwater management requirements, including specific provisions that would exempt applications that were pending prior to the effective date of any stormwater ordinance provisions adopted after July 17, 2023. Da502.
- NJDEP Responses to Public Comment, 55 N.J.R. 1385(b) (2023) - the NJDEP addressed public concerns regarding the applicability of the new rules, including whether they would apply to pending warehouse applications, and confirmed that the new stormwater rules and regulations do not apply to completed applications that

have been submitted for approval by the Department or a municipality. See, e.g., Response to Public Comment No. 286 (“complete applications that have been submitted...prior to the adoption date of this rulemaking are not subject to the new standards.”)(emphasis added). The NJDEP further addressed the applicability of the MLUL’s TOA Rule to the new Regulations, and confirmed that the TOA Rule governs municipal review of development applications. See Response to Public Comment Nos. 572, 615.

Franklin Township Stormwater Ordinance

Ordinance No. 4419-23, amending Ch. 330 of the Township Code entitled “Stormwater Management” and Ch. 112 entitled "Land Development," was adopted on September 12, 2023, and became effective on October 5, 2023, more than one (1) year after Plaintiff's site plan Application had been deemed complete and after multiple Planning Board hearing nights on the Application, and prior to the Planning Board voting to deny Plaintiff's site plan and subdivision application.⁴ The Ordinance largely incorporates the newly adopted NJDEP rules, except for subsection §330-3(D), which makes the new

⁴ Da9, ¶¶33-35; Da114, ¶¶33-35.

stormwater requirements retroactively applicable to all pending development applications and those with preliminary approvals, exempting only projects with final approvals (the “Applicability Provision”). Da22.

The new stormwater design standards only apply to development applications for proposed real estate developments. Da22 – 49, §330-2; §330-3; §330-4; §330-6B; and §330-12. The Ordinance states: "Development approvals issued pursuant to this ordinance are to be considered an integral part of development approvals ..." §330-4. The Ordinance then sets forth specific and technical design standards (§330-6 and 7) including such details as pipe sizes (i.e., specific diameters), inlet locations, grading standards (§330-7T), and curb opening inlet sizes and locations (§330-10(K)) that must be addressed in development plans. The required stormwater management plans are site plan submission items, which are reviewed by the applicable municipal board as an integral part of the development approvals process. Ordinance Articles II and III; §330-4. These stormwater plans must be submitted in accordance with the applicable development application checklist "as part of the submission of the application for approval." §330-12A(1). The stormwater management plan is subject to the approval of the governing Township board (i.e., planning or zoning) in conjunction with its consideration of the applicable development

application. §330-12(B). Waivers from design standards for minor developments can be granted by the board with jurisdiction. §330-14B.

ARGUMENT

POINT I

THE ORDINANCE IS A LAND USE DEVELOPMENT REGULATION SUBJECT TO THE MLUL AND ITS TIME OF APPLICATION RULE, N.J.S.A. 40:55D-10.5, AND THE RETROACTIVE APPLICABILITY PROVISION DOES NOT FALL WITHIN THE “HEALTH AND PUBLIC SAFETY” EXCEPTION

A. THE ORDINANCE IS A LAND USE REGULATION SUBJECT TO THE TIME OF APPLICATION RULE

The Township’s attempted retroactive application of new stormwater design standards directly conflicts with the very purpose of MLUL’s TOA Rule, N.J.S.A. 40:55D-10.5, which provides as follows:⁵

Developmental regulations, certain, govern review of application.

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

⁵ The Township's arguments have been considered and rejected by this Court in the unpublished decision in Dimauro v. Monroe Twp. Plan. Bd., 2024 N.J. Super. Unpub. LEXIS 221 (App. Div. February 14, 2024). Da425. In Dimauro, the panel held that a stormwater management ordinance adopting new NJDEP standards is subject to the TOA Rule and that application of the health and public safety exception would be contrary to the NJDEP Regulations.

development, shall not be applicable to that application for development.
(emphasis added)

The TOA Rule, effective May 2011, replaced the prior time of decision rule, which the legislature deemed to be unfair and inequitable to developers. As explained by the Supreme Court in Dunbar Homes, Inc. v. Zoning Board of Adj. of the Twp. of Franklin, 233 N.J. 546 (2018), the TOA Rule was adopted in recognition of the fact that developers should have protection against changes in development regulations after expending time and money designing projects to comply with the regulations in effect at the time of submission of development applications:

The Legislature acknowledged that the time of decision rule had produced “inequitable results, such as when an applicant has expended considerable amounts of money for professional services and documentation that becomes unusable after [an] ordinance has been amended.”

[233 N.J. at 560, quoting *A. Housing & Local Gov’t Comm. Statement to A437* (2010).]

Site plan applications include technical professional reports and studies, including drainage calculations, resulting in engineered plans that include stormwater retention or detention facilities and the like. For large development projects, those plans and studies require substantial expenditures of time and money. As explained by the Supreme Court in Dunbar, the intent of the TOA Rule was to avoid the “inequitable results” that inevitably would

occur if the project design requirements were changed after a developer-applicant made the investment required to submit a complete development application relying on the land use regulations in effect at the time. Id. In short, the TOA Rule is intended to insulate pending applications from precisely the type of land use regulation changes effectuated by the Ordinance.

Judge Mennen was correct when he found that the Ordinance — which was adopted pursuant to the MLUL (N.J.S.A. 40:55D-93) and only applicable in the context of development applications — is the type of land use ordinance that is within the scope of the TOA Rule as opposed to a health and public safety ordinance of general application that would be exempt from the Rule.⁶ 2T16:6-13. In reaching its decision, the Trial Court relied upon cases distinguishing zoning ordinances from health and public safety ordinances that touch on the use of land enacted pursuant to a municipality's police power. 1T:12-13, citing N.J. Shore Builders Ass'n, 199 N.J. 38; Sparroween, 452 N.J. Super. 329. As the N.J. Shore Builders court explained:

Indeed there are numerous ordinances, for example, health codes, environmental regulations, building codes, and

⁶ The Township's central argument on this point is that Judge Mennen erred in drawing a bright line in finding that zoning ordinances do not fall within the health and public safety exception to the TOA Rule. Even if the Court disagrees with such bright line test, the substance and result of Judge Mennen's decision is nevertheless correct — that the Ordinance, which establishes stormwater management design standards, does not fall within the TOA Rule health and public safety exception.

laws regulating the operation of particular businesses, that touch on the use of land, but are not within the planning and zoning concerns of the MLUL. Those ordinances are enacted pursuant to the general police power and apply to everyone.

[199 N.J. at 54.]

The new stormwater design standards set forth in the Ordinance are not merely “environmental regulations” that touch on the use of land without effectively modifying underlying zoning as the Township argues in footnote 3 of its brief, but are land development regulations.⁷ The Ordinance includes detailed engineering design requirements that are only applicable to major developments in the context of the development approval process required by the MLUL. Da22 (§330-2). The Ordinance dictates how drainage calculations are to be conducted, which calculations impact on various elements of a project's design, and mandates such design details as pipe sizes and outlet locations. Da28 – 39 (§330-7 through §330-8). Section 330-7J sets forth "design standards" which include generalized objectives to be addressed in stormwater management plans (e.g., "designed to take into account the existing conditions" or "designed to minimize maintenance ..."). These Ordinance

⁷ Municipal ordinances requiring approval by a planning board of a site plan must require conformity with stormwater management ordinances adopted pursuant to the MLUL. See N.J.S.A. 40:55D-38(b)(14); N.J.S.A. 40:55D-93; N.J.S.A. 40:55D-95.1.

requirements are implemented through civil engineering and preparation of the resulting requisite studies, reports and plans that must be submitted for approval of a development application. In sum and substance, these are exactly the types of municipal ordinance changes from which pending development applications are to be shielded under N.J.S.A. 40:55D-10.5, regardless of how one were to characterize the Ordinance.

Finally, the Township's position is untenable as a practical matter. Assume, for example, a major project received a preliminary approval in the summer of 2023, with vested rights under N.J.S.A. 40:55D-49, after months of hearing nights and expenditure of hundreds of thousands of dollars by the developer applicant. Under the Township's theory, the municipality could effectively require a completely new plan submission, with new drainage structures, changes to the building footprint and more, which would now require the application to be heard again by the planning or zoning board, with new public notices. See N.J.S.A. 40:55D-11. And, the preliminary approval would be rendered meaningless.⁸

⁸ This highlights another issue to be litigated if the Court reverses the grant of summary judgment. The Township is not the proper municipal body to assert that the Ordinance standards govern Plaintiff's Application inasmuch as the Ordinance is only applicable in the context of development applications, and the Planning Board is the only municipal body with jurisdiction over the Application.

In sum, the changes in new stormwater design requirements imposed by the Ordinance, which dictate elements of a real estate project's design, that are only reviewable by a planning or zoning board in conjunction with an application for development of a real estate project pursuant to the MLUL are "development regulations," subject to the TOA Rule.

B. THE ORDINANCE’S APPLICABILITY PROVISION DOES NOT FALL WITHIN THE HEALTH AND PUBLIC SAFETY EXCEPTION TO THE TOA RULE.

In an attempt to avoid the application of the TOA Rule, the Township argues that the Applicability Provision falls within the “health and public safety” exception, which, as stated above, provides in pertinent part: “Any provisions of an ordinance, except those relating to health and public safety...” N.J.S.A. 40:55D-10.5 (emphasis added). The "provision" at issue in Plaintiff's summary judgment motion is the sentence that makes the Ordinance retroactively applicable, not the Ordinance design standards. The applicability "provision" pertains to "when" the new standards govern, which is not a "health and public safety" provision.

The Township’s attempt to expand the reach of the TOA exception to the entire Ordinance (not other "provisions" of the Ordinance) is beyond the scope of Plaintiff’s original motion, and contrary to the language of the TOA Rule.⁹

⁹ Although the Township acknowledges that it is the Applicability Provision that is

Moreover, the contention that the Ordinance, as a whole, fits within the “health and public safety” exception is undercut by the various provisions of the Ordinance that have nothing to do with health and public safety, including, for example, §330-7J (requiring plans to take into account existing conditions; designing to minimize maintenance and repairs); §330-10 (specifying type of grates to be used and size of curb-opening inlets); and §330-12 (listing requirements for site development stormwater plans, including the number of copies of the materials that must be submitted). If these provisions were considered to fall within the “health and public safety” exception — virtually every land use ordinance requirement would fit the bill.

Contrary to the Township’s argument, the “health and public safety” exception is not intended to create a “broad” exception to the TOA Rule encompassing any and all ordinances of any nature that “relate” to health and public safety. Instead, as the language of the statute and the legislative history indicate, the exception was intended to be limited to those health and public safety regulations of general application — like police power types of ordinances — not land use ordinances that establish design criteria applicable only to real estate development applications. Most importantly, even if provisions of

at issue (see Db14), it argues throughout its brief that the entire Ordinance falls within the exception. Plaintiff, however, is not seeking to invalidate the entire Ordinance, it is only challenging the retroactivity provision of §330-3.

zoning ordinances can, under some circumstances, fall within the health and public safety exception, this Ordinance, adopted pursuant to N.J.S.A. 40:55D-93 of the MLUL, is neither a "provision" of nor an ordinance that fits within the health and public safety exception.

The Ordinance was adopted pursuant to the authority granted to municipalities by the MLUL, the very purpose of which is to “guide the development of lands in this State, in a manner which will promote the public health, safety, morals, and general welfare,” including “safety from fire, flood, panic and other natural and man-made disasters.” N.J.S.A. 40:55D-2(a), (b) (emphasis added). See also N.J.S.A. 40:55D-95; Builders League of S. Jersey v. Borough of Haddonfield, 2021 N.J. Super. Unpub. LEXIS 346 (App. Div. March 3, 2021), Da429. Accordingly, many aspects of zoning ordinances relate, in some fashion, to health or public safety — including stormwater ordinances that are intended to mitigate against flooding. Under the Township's broad interpretation, all such ordinances would be exceptions to the TOA Rule — effectively undercutting the essence of the Rule.

C. THE LEGISLATIVE HISTORY AND PURPOSE OF THE TOA RULE.

The legislative history of the TOA Rule is enlightening and supports the Trial Court’s rationale. In drafting the TOA statutory provision, the Legislature purposefully differentiated between "development regulations" and

ordinances relating to health and public safety. In the Senate's Statement on the TOA Amendment, as noted in the highlighted language below, the Legislature explained that it was creating an exception pertaining to ordinances other than development regulations that addressed health and public safety:

SENATE COMMUNITY AND URBAN AFFAIRS COMMITTEE

STATEMENT TO

SENATE, No. 82

STATE OF NEW JERSEY

DATED: FEBRUARY 4, 2010

The Senate Community and Urban Affairs Committee reports favorably Senate Bill No. 82.

This bill would amend the "Municipal Land Use Law," P.L. 1975, c.291 (C. 40:55D-1 et seq.) to change a general rule governing land use decision-making.

Under current law, a planning board or zoning board of adjustment applies the law in effect at the time it renders its decision rather than the law in effect when the issues were initially presented. Thus, a municipal governing body can currently amend its zoning ordinance after an application for development has been filed with a land use board, even in direct response to the application, and the land use board would decide the matter based upon the amended ordinance.

Under the bill, a land use board would be required to make its decision on an application for development in accordance with the development regulations that are in effect on the date the application for development is submitted. The "Municipal Land Use Law" defines the term "development regulation" as a zoning ordinance, subdivision ordinance, site plan ordinance, official map ordinance or other municipal regulation of the use and development of land, or amendment thereto. [N.J.S.A. 40:55D-3].

The bill would also exempt an application for development from changes made to ordinances other than development regulations, except for those relating to health and public safety, that are adopted after the application for development is submitted.

This bill was pre-filed for introduction in the 2010-2011 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.

The MLUL defined term "development regulation" broadly encompasses all zoning and land use ordinances. N.J.S.A. 40:55D-4. The Legislature used the term "development regulation" — which it expressly highlights as an MLUL defined term — to distinguish land use requirements from general police power ordinances.

The TOA “exception” is meant to carve out provisions in ordinances designed to protect health and public safety that govern conduct of the community at large, adopted under municipal police powers. Such ordinances would include, for example, an ordinance requiring bars to stop serving alcohol at midnight, fire safety retrofits, property maintenance codes, and ordinances addressing the clearing of sidewalks or cutting of trees, all of which globally apply to all landowners and are enforced by municipal code officials. These types of ordinances are distinct from land use ordinances adopted under the MLUL that pertain to design elements of civil engineering of plans that are only reviewed by local planning or zoning boards in conjunction with

development applications. See N.J.S.A. 40:55D-93. See also N.J. Shore Builders Ass’n, 199 N.J. at 53-54; Sparroween, 452 N.J. Super. at 338-339 (courts rejected argument that municipalities’ ordinances, enacted pursuant to police powers, were subject to MLUL). Under the Township's construct¹⁰, however, nearly every land use or zoning ordinance, or some aspect thereof, could fall within the TOA’s “health and public safety” exception, as most land use and zoning ordinances, in one way or another, properly relate to health and public safety. After all, the purpose of municipal land use regulations under the MLUL is to “promote the public health, safety, morals and general welfare” in the development of land. N.J.S.A. 40:55D-2(a). See Dunbar Homes, 233 N.J. at 560.

Logically, for the TOA Rule to accomplish its intended purpose, the “health and public safety” exception to the TOA Rule cannot encompass every ordinance that in any way relates to health and public safety. Otherwise, virtually every zoning and land use ordinance requiring project design to mitigate noise, pollution, drainage, flooding, traffic, or to require buffering, or limit building heights, or protect view sheds could fall within the exception.

¹⁰ The Township contends that the exception is written “so as to permit the application of *any* health and public safety ordinance to pending development applications regardless of whether it is characterized as a zoning provision.” Db24, FN3.

If the Township's position were adopted, the door would be opened for municipalities to enact ordinances to require changes in project designs well after applications are submitted — or approved — under the guise of health and public safety initiatives. By way of a stark but apt example, municipalities would have free reign to adopt land use regulations that reduce maximum permissible impervious coverage standards to combat flooding problems, meaning smaller building footprints, effectively rendering completely meaningless the protections that the TOA Rule is intended to afford. There is no discernable substantive difference between the purpose of new stormwater management regulations — designed to reduce potential flooding — and an ordinance reducing allowable impervious coverage designed to achieve the same result.

D. NJDEP FOUND THE TOA RULE APPLIES

Contrary to the Township's argument at page 37 of its Brief, NJDEP has opined that the new stormwater regulations are subject to the TOA Rule. The NJDEP was confronted with public comments opposing the “legacy” provisions of the regulations (applying the prior stormwater management rules to completed, pending applications), but in response determined that the MLUL’s TOA Rule governs:

Even if Department approval is not required, the [MLUL] requires that development applications be evaluated

pursuant to the ordinances in effect at the time of application.

[55 N.J.R. 1385(b), NJDEP Response to Comment 572.]

If...[the municipality] determine[s] the application to be complete, then the project should be considered exempt from any amendments to their ordinance, as it would be reviewed in accordance with the ordinance that was in place at the time of a complete submission pursuant to N.J.S.A. 40:55D-10.5.

[Id., NJDEP Response to Comment 615 (emphasis added).]

E. THE SHIPYARD CASE

The Township relies at length on dicta in Shipyard Assocs. v. Hoboken, 242 N.J. 23, 42-44 (2020) that does not address the issue before the Court. The Township argues that Judge Mennen's decision conflicts with Shipyard because of language in that opinion which suggests that some zoning ordinances may affect health and public safety. First and foremost, regardless of how one characterizes the Ordinance, a retroactivity provision in an ordinance that establishes project design standards (§330-6 and 7) only applicable in the context of development applications (§330-6(B)) is not a provision that falls within the health and public safety exception to the TOA, and nothing in Shipyard is to the contrary.

In Shipyard, the Court did not find that Hoboken ordinance Z-263, which was designed, among other things, to prevent flooding, constituted the

type of ordinance that falls within the TOA exception. The Shipyard Court's analysis focused on the language in N.J.S.A. 40:55D-49 and 52, which is completely different from the TOA language in N.J.S.A. 55:40-10.5. N.J.S.A. 40:55D-52, the statutory provision at issue in Shipyard, protects a developer from any changes in "zoning requirements applicable to the preliminary approval" for two (2) years after obtaining final approval. The TOA Rule protects an applicant against changes in "development regulations" as defined in the MLUL after a complete application is submitted relying on the rules in effect at the time.

In analyzing whether Hoboken's ordinance Z-263 constituted a change in "zoning requirements," the Supreme Court disagreed with Hoboken's attempted characterization of an ordinance designed to prevent flooding as a health and public safety measure, finding such an ordinance to be a zoning ordinance subject to the MLUL and recognizing that "even if a zoning ordinance has an effect on health and public safety, or is motivated by health and public safety concerns, that does not re-characterize the ordinance as a general police power ordinance." Id. at 41 (emphasis added).¹¹ That language

¹¹ The Shipyard Court looked at "how the ordinance functions in practice" (id. at 31) emphasizing that the Z-263 ordinance placed limits on where or how one can build, and set "specific standards, methods and uses governing construction." Id. at 42. Similarly here, the Township's stormwater management rules set specific standards and construction limits that pertain

supports Plaintiff's argument. In other words, merely because an ordinance has an effect on health and safety does not mean that it is a health and public safety type ordinance that should be exempt from the TOA Rule.

In Shipyards, the Court next considered the argument that the zoning ordinance should nonetheless be applied to the development application at issue because a “health and public safety” exception should be read into the statute making an "incorporation by implication" argument. The Court rejected this argument, because N.J.S.A. 40:55D-52, which governs applications that have received “final approval,” does not include such an exception. Id. at 45-46.

In sum, for all of the foregoing reasons the Trial Court was correct in granting summary judgment to Plaintiff finding that the Applicability Provision contravened the TOA Rule and neither the Applicability Provision nor the Ordinance constitute a health and public safety provision that falls within the exception to the TOA Rule.

only to land use applications. The Township’s Land Development Code, FTMC Ch. 112, requires that all site plan applications include a stormwater management plan that complies with the NJDEP Regulations.

POINT II

THE ORDINANCE’S APPLICABILITY PROVISION IS IN DIRECT CONFLICT WITH THE NJDEP REGULATIONS.

Plaintiff B9’s summary judgment preemption argument based on the NJDEP Regulations provides further grounds for invalidation of the Ordinance. Plaintiff’s position is straightforward. The NJDEP Regulations set forth a comprehensive regulatory scheme intended to apply to “all major development[s]”, including a mandate that the new stormwater management rules are not to be applied to completed development applications that were submitted to municipalities or the NJDEP prior to July 17, 2023 (when the new rules went into effect). N.J.A.C. 7:8-1.6(a), (b). Here, the Applicability Provision applies the State’s new stormwater standards to all development applications that have not yet received “final approval” – including those applications that the NJDEP Regulations specifically exempted from the new standards. On its face, this provision of the Ordinance is in direct conflict with the Regulations.

The Township's argument — that the language in the Regulations allows for instances where a municipality may apply the new standards to pending applications if an NJDEP approval is required — is not only wrong but is not responsive to Plaintiff's summary judgment argument that the Applicability

Provision conflicts with the express language in the Regulations. The question is whether the Ordinance, on its face, conflicts with State law by applying the new stormwater standards to applications that the NJDEP Regulations specifically and unambiguously require municipalities to exclude from the new rules. For these reasons and as explained below, the Court should find that Plaintiff was entitled to summary judgment declaring the Applicability Provision to be violative of the NJDEP Regulations.

A. THE ORDINANCE’S APPLICABILITY PROVISION EXPRESSLY CONFLICTS WITH THE APPLICABILITY RULES SET FORTH AT N.J.A.C. 7:8-1.6(B)(1) – (4) AND STATE LAW GOVERNS.

Under New Jersey law, any ordinance enacted by a municipality must comply with State law. As the courts recognize, “[t]he presumption of the validity of local legislative action...is constrained by the obvious understanding that ‘[a] statute has supremacy over an ordinance,’ and ‘a local municipality is but a creature of the State, capable of exercising only those powers granted by the Legislature.’” Timber Glen Phase III, LLC v. Township of Hamilton, 441 N.J. Super. 514, 524 (App. Div. 2015), quoting Moyant v. Paramus, 30 N.J. 528, 535 (1959). Therefore, “a municipality’s power to effectuate planning schemes...must be exercised in strict conformity with the delegating enactments – the MLUL.” N.J. Shore Builders Ass’n v. Township of Jackson, 401 N.J. Super. 152, 161 (App. Div. 2008), quoting Toll Bros., Inc. v. Bd. Of Chosen

Freeholders, County of Burlington, 194 N.J. 223, 243 (2008). Our courts consistently hold that “a municipality may not contradict a policy of the Legislature, either by permitting what a state statute forbids or by forbidding what a state statute permits.” Asbury Park City v. Castagno Tires, 13 N.J. Tax 488, 504 (Tax Ct. 1993). Therefore, “[i]f a municipal ordinance conflicts with state law, either because of conflicting policies or operational effect, the state law preempts the municipal ordinance.” Id. (emphasis added).

Local ordinances that conflict with State statutes are routinely declared to be invalid. See, e.g., N.J. Shore Builders, 401 N.J. Super. at 161 (invalidating municipal ordinance because it was not in “strict conformity” with delegating state statute, the MLUL); Sprint Spectrum L.P. v. Borough of Ringwood Zoning Bd. of Adjustment, 386 N.J. Super. 62 (Law Div. 2005) (municipal ordinance provision held invalid because it conflicted with MLUL); Auto-Rite Supply Co. v. Mayor & Township Committeemen of Woodbridge, 25 N.J. 188 (1957) (municipal ordinance held void because it conflicted with State law); United Water New Jersey, Inc. v. Borough of Hillsdale, 438 N.J. Super. 309 (App. Div. 2014) (because the State statute on dam safety “reflects the Legislature’s intention that regulation of such matters should be uniform on a state-wide basis,” the municipal ordinance adding requirements in direct conflict with the State regulations was preempted); Builder’s League of S. Jersey v. Borough of

Haddonfield, 2021 N.J. Super. Unpub. LEXIS 346 (App. Div. March 3, 2021), Da429 (Appellate Division invalidated municipal stormwater ordinance because it was inconsistent with State statute).

As noted above, the MLUL requires that municipalities adopt stormwater management plans and ordinances, and mandates that such regulations “conform to all relevant federal and State statutes, rules and regulations concerning storm water management or flood control.” N.J.S.A. 40:55D-93; N.J.S.A. 40:55D-95. Accordingly, any municipal ordinance adopted pursuant to the NJDEP Regulations, including one that creates stricter standards than those enumerated by the State, is only valid when the ordinance does not conflict with an applicable State statute or regulation.¹²

The amended stormwater Regulations provide that all projects classified as major development shall comply with its requirements except for major development projects “for which a complete application has been submitted prior to July 17, 2023.” N.J.A.C. 7:8-1.6(b)(1). The new Regulations spell out when

¹² Notably, as set forth in footnote 5 *supra*, this Court has already rejected a municipal attempt to bypass the applicability provisions set forth in the NJDEP Regulations. In Dimauro v. Monroe Twp. Plan. Bd., the Court rejected a municipality’s attempt to apply the updated 2021 stormwater regulations to an application that had been deemed “complete” prior to the deadlines set forth in the NJDEP Regulations. The panel concluded that application of the new stormwater regulations to the pending application was “counter to the explicit language of NJDEP regulations.” *Id.* at *12 (Da428).

the new rules are to be applied to municipal land use applications that do not require specific NJDEP permits as follows:

2. An application required by ordinance for approval pursuant to (b)1 above that has been submitted prior to March 2, 2021, shall be subject to the stormwater management requirements in effect on March 1, 2021;

3. An application required by ordinance for approval pursuant to (b)1 above that has been submitted on or after March 2, 2021, but prior to July 17, 2023 shall be subject to the stormwater management requirements in effect on March 2, 2021;

[N.J.A.C. 7:8-1.6(b)(2), (3) (emphasis added).]

Nevertheless, the Township adopted the Applicability Provisions in direct conflict with these provisions of the Regulations. While the NJDEP regulations unequivocally mandate that certain development applications pending before municipal planning or zoning boards cannot be subject to the new NJDEP stormwater management standards or new municipal standards adopted pursuant to the new NJDEP Regulations, the Ordinance subjects all pending applications, and even projects with preliminary approvals, to the new standards — not the standards in effect on the dates dictated by the Regulations. Plaintiff's summary judgment argument was premised on the direct conflict between the Applicability Provision and the specific provision

in the Regulations that pertain to when the new standards can be applied to pending applications.¹³

The Township spends a considerable amount of time discussing a limited scenario where the Ordinance's Applicability Provision may not conflict with the State Regulations. However, the Township does not address all of the other circumstances where its Ordinance directly contradicts the State's mandate. Because the Ordinance's Applicability Provision, on its face, "permit[s] what a state statute forbids," it should be declared to be preempted by State law and, therefore, invalid.

B. NJDEP REGULATIONS AND GUIDANCE DICTATE THAT THE NEW STORMWATER RULES WILL NOT BE APPLIED RETROACTIVELY TO APPLICATIONS SUBMITTED PRIOR TO JULY 17, 2023.

If the Court agrees with Plaintiff that there is a direct conflict between the Ordinance's Applicability Provision and the Regulations' applicability provisions, such as N.J.A.C. 7:8-1.6(b)(2), it need not undergo an analysis of the breadth of the Regulations, because, for the reasons set forth above, the Applicability Provision is preempted and, therefore, facially invalid. Nonetheless, an examination of the

¹³ While the Township argues that the NJDEP Regulations, as written, anticipate a scenario where NJDEP would evaluate an application for a permit under the prior rules and a municipality could review that same application under the new Rules, it does not address the fact that the Ordinance, on its face, does not make such distinctions but instead applies the new rules to all applications that have not received final approval, regardless of whether NJDEP permits are required.

regulatory scheme evidences NJDEP’s intent to create a new set of stormwater management rules to be applied prospectively, whether the development application was being reviewed by a municipality or the NJDEP, or required an NJDEP permit or not.

1. NJDEP Was Not “Silent” Regarding What Rules Apply to Local Development Applications That Also Involve NJDEP Review.

The Township argues there is a “dual structure” in the Regulations purposefully created by the State, distinguishing between developments that require NJDEP permits/approvals, and those that do not. Db30. According to the argument, while the Regulations provide that a municipality must apply the old rules to pending development applications if an NJDEP permit is not involved (N.J.A.C. 7:8-1.6(b)(2), (3)), the Regulations are silent concerning what rules a municipality can apply when an NJDEP permit is required. Db39 (arguing “the DEP’s focus is entirely on the DEP own review process for DEP permit applications”). While a municipality cannot apply the new Rules retroactively to pending, completed applications, if a development project that requires a municipal approval also requires a NJDEP permit — according to the Township — a municipality is then permitted to subject such pending applications to the new stormwater rules. Such a result would be contrary to the substance of the Regulations and the guidance issued by NJDEP.

According to the Township's argument, because the Regulations do not explicitly address the circumstance where a municipality is reviewing a development application that requires a NJDEP permit, the State intended to allow a completely different set of rules to govern such applications. The Township's conjecture about the impact of the Regulations' "silence" in this scenario is belied by NJDEP's formal pronouncements, and completely ignores the interplay with the TOA Rule as recognized by NJDEP. In every scenario addressed in the Regulations and in every example examined by the NJDEP in its response to public comments or in its Training Materials (discussed more fully below), the NJDEP unequivocally states that projects with completed applications filed *before* the July 17, 2023 deadline would not be subject to the new Rules.

Contrary to the Township's premise, there was no need for the NJDEP to address every possible scenario encountered by municipalities in the Regulations because the TOA Rule, as a matter of State law, limits retroactive application of new ordinances and development regulations to pending development applications. NJDEP repeatedly deferred to the MLUL's TOA Rule to support its mandate that the new rules not be applied retroactively by municipalities:

Even if Department approval is not required, the [MLUL] requires that development applications be evaluated

pursuant to the ordinances in effect at the time of application.

[55 N.J.R. 1385(b), NJDEP Response to Comment 572 (emphasis added).]

If...[the municipality] determine[s] the application to be complete, then the project should be considered exempt from any amendments to their ordinance, as it would be reviewed in accordance with the ordinance that was in place at the time of a complete submission pursuant to N.J.S.A. 40:55D-10.5.

[Id., NJDEP Response to Comment 615.]

Moreover, the Township's position would lead to a nonsensical result. A complete application for development submitted to a municipality before July 17, 2023 would not be subject to the new standards if no NJDEP approval is required. N.J.A.C. 7:8-1.6(b)(3). However, if an NJDEP approval is required with applications filed within the same timeframe, where the Regulations mandate that NJDEP can only require the project to meet the prior stormwater standards, then — according to the Township — the municipality would be free to apply the new standards to the same project with an application filed at the same time as the application to NJDEP.¹⁴ For example, consider a site plan

¹⁴ While the Township notes the Regulations' distinction between land use applications reviewed by municipalities pursuant to N.J.A.C. 7:8-1.6(b)(1)-(3) and NJDEP review of permit applications pursuant to N.J.A.C. 7:8-1.6(b)(4), it ignores the fact that all of the applicability timeframes are the same regardless of whether the application is reviewed by the NJDEP or the municipality, or whether it involves an NJDEP permit or not. Complete applications submitted

application for development of a warehouse filed with a municipality in 2022, with no NJDEP permit required. Pursuant to N.J.A.C. 7:8-1.6(b)(3), the municipality would apply the old rules to the project because the application was submitted prior to July 17, 2023. However, if the applicant decided to amend its site plan a month later (but still in 2022, prior to the July 17, 2023 cutoff date) to extend the parking lot, triggering the need for an NJDEP Wetland Permit, then according to the Township's argument: the NJDEP would be required to review the project stormwater plans under the old rules per N.J.A.C. 7:8-1.6(b)(4), but the municipality could then retroactively apply the new stormwater requirements to the same exact site plan, because an NJDEP permit was required. That makes no sense. State v. Williams, 218 N.J. 576, 586 (2014) (“we will not interpret a statute in a way that ‘leads to an absurd result.’”), quoting DiProspero v. Penn, 183 N.J. 477, 493 (2005); Turner v. First Nat’l Bank, 162 N.J. 75, 84 (1999) (“where a literal interpretation would create a manifestly absurd result contrary to public policy, the spirit of the law should control.”)

2. NJDEP Guidance Reflects an Intent to Require Only Prospective Application of the New Stormwater Requirements.

The NJDEP guidance evidences the State’s intent to apply the new stormwater regulations prospectively in all circumstances, whether NJDEP

prior to July 17, 2023 are within the “legacy” exceptions subject to the prior rules in all of the instances addressed by the Regulations.

approval is required or not.¹⁵ As set forth below, in every example, comment or proposed form of language announced by NJDEP, there is no indication that the new Stormwater Regulations can be applied to a development application that was submitted to a municipality or the NJDEP *prior* to July 17, 2023. The NJDEP’s Rule Amendment Training, Model Ordinance and responses to public comments all refute the Township’s argument.

NJDEP Rule Amendment Training

The NJDEP Rule Amendment Training materials produced to provide guidance to municipalities highlight the State’s intent to apply the new rules prospectively. Da80 – 81. Pages 17 and 18 of the Rule Amendment Training provide hypothetical examples on the applicability of the Regulations and a municipality’s new local stormwater management regulations on development applications, and make clear that the proper standards to be applied to an application turns on what Rules were in place on the date the application was submitted and deemed complete. In all of the examples, the determinative factor is the date of the submission – with applications submitted prior to July 17, 2023 evaluated under the old rules, and applications submitted after July 17, 2023 evaluated under the new

¹⁵ DiProspero v. Penn, 183 N.J. at 492-93 (while a court should not consider “extrinsic interpretative aids” when statutory language is “clear and unambiguous”, the court may look to extrinsic evidence “if there is ambiguity in the statutory language that leads to more than one plausible interpretation.”)

rules. None of the examples provided by the NJDEP support the Township's contention that a municipality can apply the new stormwater rules to an application that was submitted to a municipality or NJDEP prior to July 17, 2023.

NJDEP Responses to Public Comment

In its responses to public comments when adopting the new Regulations, the NJDEP specifically addressed concerns regarding the applicability of the new rules, including whether they would apply to pending warehouse applications such as Plaintiff's, and confirmed that the new stormwater rules and regulations do not apply to completed applications that have been submitted for approval by the Department or a municipality:

Pursuant to the SWM rules at N.J.A.C. 7:8-1.6, complete applications that have been submitted for certain types of approvals prior to the adoption date of this rulemaking **are not subject to the new standards**.

[55 N.J.R. 1385(b), NJDEP Response to Comment 286 (emphasis added).]

Moreover, NJDEP responses to public comment confirm its intent that the new rules should not apply to "completed applications" submitted to either a municipality or the NJDEP prior to July 17, 2023:

The amended standards will not apply to any major development that does not require permits from the Department...provided that the applicant has submitted an application [for municipal approval] prior to the effective date of this rulemaking. Similarly, adopted standards will not apply to any major development that does require

Department approval...provided that the Department has received an administratively and technically complete application that includes a stormwater management review component prior to the effective date of this rulemaking.

[Id., NJDEP Response to Comment 279.]

Contrary to the Township's contention, the NJDEP has never indicated that a municipality is free to apply the new stormwater management standards to pending, completed applications or projects with preliminary approval prior to July 17, 2023. Indeed, every guidance from the NJDEP specifically states otherwise.

NJDEP Model Ordinance

Furthermore, the NJDEP's Model Ordinance confirms that NJDEP envisions municipal applicability provisions that apply stormwater management requirements that went into effect *after* July 17, 2023. Da502. Contrary to Ordinance 4419-23, the Model Ordinance includes specific provisions that exempt development applications that were submitted/pending *prior* to the date of adoption of the ordinance. See, e.g. Section 1(C)(3) of Model Ordinance.

All of the foregoing interpretative aids evidence the State's intent to only have the new stormwater Regulations apply prospectively, i.e., excluding completed applications submitted prior to the Regulations' enactment on July 17, 2023 from the new rules.

C. THE APPLICABILITY PROVISION IS NOT A PERMISSIBLE "MORE STRINGENT" STANDARD.

To justify its departure from the NJDEP Regulations, the Township argues that the NJDEP's acknowledgment that municipalities may adopt "more stringent" stormwater management requirements (N.J.A.C. 7:8-1.5) gives municipalities the authority to depart from the explicit provision in the Regulations dictating when/how to apply the new standards to land use applications pending or approved at the time the Regulations were adopted. However, as explained by the NJDEP in its Model Ordinance, this grant of limited authority is intended to enable municipalities to address local conditions or environmental concerns specific to their communities.¹⁶ Deviation from the NJDEP's very specific applicability provision at N.J.A.C. 7:8-1.6 is an entirely different action that is not sanctioned by the State Regulations.

"More stringent" stormwater management requirements might include, for example, stricter controls on stormwater runoff, pollutant discharge to better protect local water sources, specific higher water quality standards or

¹⁶ Even in these circumstances, the NJDEP clarified that any "stricter" standards imposed by the municipality are proper "provided they are not contrary to State or Federal law." 55 N.J.R. 1385(b), NJDEP Response to Comment 144; Db34.

different site modeling standards. As NJDEP explained in the preamble of its Model Stormwater Control Ordinance:

A municipality may choose these stronger or additional measures in order to address local water quality and flooding conditions as well as other environmental and community needs. For example, municipalities may choose to define “major development” with a smaller area of disturbance and/or smaller area of regulated impervious cover or regulated motor vehicle surface; apply stormwater requirements to both major and minor development; and/or require groundwater recharge, when feasible, in urban redevelopment areas.

[Da501 (emphasis added).]

The stronger “measures” anticipated by the NJDEP are completely different from an ordinance provision that establishes when the new standards govern. NJDEP has stated the stricter standards anticipated by the NJDEP involve necessary changes to address local conditions. This is not a grant of authority to municipalities to apply its new stormwater standards to pending development applications that the State specifically excluded from these new rules. See, e.g., N.J.A.C. 7:8-1.6(b)(3) (development applications seeking “preliminary or final site plan approval” submitted after March 2, 2021 but prior to July 17, 2023 “shall” be subject to the prior rules.) Furthermore, the Township’s argument that the retroactive application of the Ordinance to pending development applications is permitted renders the Regulations’ mandatory “shall” meaningless. The Applicability Provision is not a

permissible "stronger measure", but instead runs counter to the State mandate that makes the new regulations prospective only.

D. ADOPTING THE TOWNSHIP'S INTERPRETATION OF THE NJDEP REGULATIONS WOULD WREAK HAVOC ON THE DEVELOPMENT COMMUNITY.

The Township also fails to recognize the logic and policy considerations behind the NJDEP Regulations that protect pending development applications from retroactive application of new, more stringent regulations adopted after the applications have been submitted. Requiring developers to redesign projects after making substantial investments of time and money would be fundamentally unfair and counterproductive. One can imagine the dire consequences if pending complex development applications, requiring multi-million dollar investments in professional fees, including engineering, architectural and legal, must be completely redesigned, reevaluated, and public hearings retried to address new stormwater design requirements after months, or more often years, of work by applicants and municipalities. This would effectively necessitate a do-over of public hearings for projects that have already received preliminary site plan approval since the new stormwater regulations will often require changes to building footprints, locations and size and location of detention facilities and the like. Loan commitments and

construction schedules would likewise be jeopardized. The Township ignores these policy considerations.

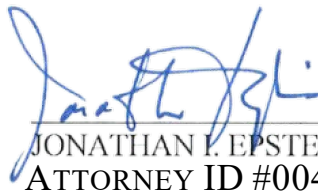
The State was likely considering the substantial investment made by developers, and the impact a change in the stormwater standards would have upon pending applications before municipal boards. In deciding to adopt an applicability provision, which like the TOA Rule, precludes the application of newly-adopted ordinance to completed, pending land use applications, the NJDEP sought to avoid the type of “inequitable results” the Supreme Court described in Dunbar, 233 N.J. at 560. The Township's argument completely disregards the inequities that would result were the Court to adopt the position it advocates in this case.

CONCLUSION

For the reasons set forth herein, the Court should affirm the Trial Court's Order granting Plaintiff B9's Motion for Summary Judgment declaring the Applicability Provision of the Ordinance, §330-3(D), contrary to the Time of Application Rule, N.J.S.A. 40:55-10.5 and/or declare the Applicability Provision of the Ordinance, §330-3(D), is preempted by the NJDEP Regulations at N.J.A.C. 7:8-1.6 et. seq. and, therefore, invalid and unenforceable.

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Dated: May 7, 2025

B9 SCHOOLHOUSE OWNER, LLC

Plaintiff-Respondent,

v.

TOWNSHIP OF FRANKLIN,

Defendant-Appellant.

CONCORE REALTY, LLC,

Plaintiff-Respondent,

v.

TOWNSHIP OF FRANKLIN,

Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appellate Docket No.:
A-1461-24

Superior Court Docket No.:
Consolidated Matter
SOM-L-1365-23

Superior Court Docket No.:
SOM-L-1385-23

Sat Below:
Hon. William G. Mennen, J.S.C.

On appeal from the Order entered on
December 6, 2024, by the Honorable
William G. Mennen, J.S.C. awarding
Summary Judgment to Plaintiff-
Respondent B9 Schoolhouse Owner,
LLC and Plaintiff-Respondent Concore
Realty, LLC

**REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT
TOWNSHIP OF FRANKLIN**

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PRELIMINARY STATEMENT

Plaintiffs’ opposition papers confirm the central errors made in the Trial Court’s ruling and fail to rebut the plain statutory, precedential, and policy foundations supporting the Township’s position. At its core, this appeal turns on whether a stormwater ordinance, which indisputably relates to public health and safety and was adopted in direct response to urgent flooding risks identified by the New Jersey Department of Environmental Protection (“NJDEP”), may be applied to pending land use applications under the statutory exception to the Time of Application Rule at N.J.S.A. 40:55D-10.5.

The statute’s language is unambiguous and the legislative history confirms the exception’s breadth. Further, the Supreme Court’s authoritative interpretation of the *Municipal Land Use Law* (“MLUL”), N.J.S.A. 40:5D-1 to -136 in Shipyards Associates v. City of Hoboken, 242 N.J. 23 (2020), which examined how health and safety ordinances may apply to projects lacking final land use approval, compels a conclusion that such regulations may apply to incomplete projects.

Rather than confront these clear principles, Plaintiffs ask this Court to judicially narrow the health and safety exception by reading into it a limitation that the Legislature pointedly declined to include. Their attempts to reframe Ordinance 4419-23 as a “zoning” measure are equally unavailing. The MLUL does not impose a binary framework for ordinances applicable to pending applications, and our

Supreme Court has already confirmed that, when applied to development applications without preliminary land use approvals, regulations advancing public safety objectives retain their force, even if they also operate within the land use context.

Plaintiffs' arguments concerning preemption are similarly misplaced. NJDEP regulations expressly allow municipalities to enact more stringent stormwater controls, and NJDEP rulemaking materials repeatedly affirm local authority in this space. The NJDEP's own training documents envision concurrent application of different regulatory regimes at the state and local level, which is exactly the scenario presented here.

This Court should reverse the Trial Court's decision, confirm that Ordinance 4419-23 is applicable to Plaintiffs' pending land use applications, and declare that it is not preempted by state regulation.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant-Petitioner, Township of Franklin (the "Township" or "Franklin") relies upon the Statement of Facts and Procedural History set forth in its briefing filed on April 7, 2025.

LEGAL ARGUMENT

POINT I

THE PLAIN LANGUAGE OF N.J.S.A. 40:55D-10.5 PERMITS ORDINANCE 4419-23 TO APPLY TO PLAINTIFFS' PENDING APPLICATIONS, REGARDLESS OF WHETHER ITS PROVISIONS CONSTITUTE LAND USE REGULATIONS.

The central error in the Trial Court's decision, and in Plaintiffs' arguments supporting it, is the failure to give effect to the clear and unambiguous language of the Time of Application Rule's ("TOA") exception for ordinances "relating to health and public safety." N.J.S.A. 40:55D-10.5. The Legislature's intent is manifest from the plain terms of the TOA Rule. When public health and safety are at stake, the general rule freezing applicable regulations at the time of an application's completeness gives way.

A. The TOA Rule's Exception for Ordinances "Relating to Health and Public Safety" is Broad, Unambiguous, and Clearly Encompasses the Township's Stormwater Management Ordinance.

A court's role in statutory interpretation is to determine and effectuate the Legislature's intent. Marino v. Marino, 200 N.J. 315, 329 (2009). The analysis begins, and often ends, with the statute's plain language. Ibid. Words are to be given their ordinary meaning, and courts are not to rewrite plainly written statutes or presume a legislative intent other than that expressed by the clear language chosen.

Ibid.; DiProspero v. Penn., 183 N.J. 477, 492 (2005). “‘The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language.’” Id. at 492 (quoting Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)).

The law is clear that courts “will not add ‘an additional qualification which the Legislature pointedly omitted in drafting its own enactment, or engage in conjecture or surmise which will circumvent the plain meaning of the act.’” Am. Fire & Cas. Co. v. N.J. Div. of Tax., 189 N.J. 65, 79 (2006) (quoting DiProspero, 183 N.J. at 492). A court must ascribe to the Legislature an intent that all of its words have meaning. “When that language clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.” Ibid. The plain text of N.J.S.A. 40:55D-10.5 states:

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

Ibid. (emphasis added).

This statutory language could not be clearer. Plaintiffs attempt to muddy these

clear waters by arguing that stormwater management ordinances are merely “land use regulations” that cannot qualify for the health and safety exception. (B9 Opp. Br. at 15-20). However, this argument ignores the statute’s plain language, which does not distinguish between types of ordinances based on their characterization as “land use” or “non-land use” regulations. The statutory language “relating to health and public safety” is explicitly broad. It does not demand the ordinance be characterized as something other than a “development regulation.” It simply requires a demonstrable connection or a relation to health and public safety.

Plaintiffs’ arguments that the health and safety exception should be narrowly construed contradicts basic principles of statutory interpretation. It is this Court’s “duty is to construe and apply the statute as enacted.” *Ibid.* The Legislature could have written a narrow exception. Instead, it chose expansive language targeting any ordinances “relating to” health and public safety. This Court should not rewrite the statute to narrow what the Legislature made broad.

Plaintiffs attempt to evade the plain and expansive language of the TOA Rule by relying on N.J. Shore Builders Ass’n v. Township of Jackson, 199 N.J. 38 (2007), and Sparroween v. Township of West Caldwell, 452 N.J. Super. 329 (App. Div. 2017). However, neither case supports the narrow construction Plaintiffs urge. In Jackson, the Supreme Court concluded that the tree preservation regulation at issue

constituted an environmental measure enacted under the municipality's police powers. Id. at 53-56. The Court did not address, let alone limit, whether such a regulation could fall within the TOA Rule's health and safety exception if the provision were to have been found to constitute a development regulation. Ibid.

Similarly, in Sparroween, the Appellate Division upheld a local smoking ordinance as a valid exercise of police power, finding it plainly related to public health concerns. 452 N.J. Super. at 337-340. The court did not consider the ordinance's status under the TOA Rule or whether a potential characterization of the ordinance as a land use or non-land use regulation would have any bearing on the TOA Rule exception's applicability. Ibid. Neither of these decisions support a restrictive reading of the statutory exception. They do not challenge a plain reading showing that the TOA Rule's exception speaks broadly and inclusively to any ordinances "relating to health and public safety." Ibid. Plaintiffs' efforts to qualify this clear statutory language should be rejected.

i. The TOA Rule's Exception Operates Within a Clear and Integrated Statutory Scheme.

A tenant of statutory interpretation requires that a statute is to be read as a whole with "related statutory provisions in context – giving each part meaning and rendering no part superfluous." See In re Expungement Application of D.J.B., 216 N.J. 433, 440 (2014). That is precisely the interpretive approach the New Jersey

Supreme Court adopted in Shipyard Assocs. v. Hoboken, 242 N.J. 23 (2020), where it examined the interplay of multiple provisions in the *Municipal Land Use Law* (“MLUL”), N.J.S.A. 40:5D-1 to -136 addressing the temporal application of ordinances.¹

In their opposition papers, Plaintiffs fail to grapple with the controlling guidance set forth in Shipyard. Plaintiff Concore Realty, LLC (“Concore”) dismisses the Township’s reliance on Shipyard as “fundamentally irrelevant.” See Concore Opp. Br. at 22. Plaintiff B9 Schoolhouse Owner, LLC (“B9”), by contrast, downplays the decision’s significance by suggesting that the Court was merely addressing the distinct statutory provision at N.J.S.A. 40:55D-52, which governs the applicability of ordinances to developments with final approvals. See B9 Opp. Br. at 24-25. These arguments miss the mark.

As discussed in detail in Defendant’s opening brief, [Def. Br. at 19–22], the Supreme Court did not cite the TOA Rule in passing. Rather, the Court engaged in a comprehensive analysis of three statutory provisions governing the retroactive

¹ Plaintiffs rely on the unpublished case, Dimauro v. Monroe Twp. Planning Bd., No. A-0619-22, 2024 N.J. Super. Unpub. LEXIS 221 (App. Div. Feb. 14, 2024). Unpublished opinions are not precedential. R. 1:35-3. Moreover, the court’s cursory reference to the TOA Rule in that case offers no meaningful guidance. In setting aside the TOA Rule, the court merely noted: “Plaintiff also argues Lidl’s application nevertheless must comply with the new ordinances because of the health and public safety exception within the TOA Rule.” Id. at 12. The court considered the exception in passing, and assessed neither principles of statutory interpretation, the MLUL’s tiered scheme for applying health and public safety exceptions to developments at different stages of the land use process, nor the assessment of that framework in Shipyard.

application of ordinances to developments either in the pipeline for land use approvals or in receipt of land use approvals. It distinguished between the protection afforded by N.J.S.A. 40:55D-52 for projects with final approvals and the exception to the TOA Rule at N.J.S.A. 40:55D-10.5 for projects with complete applications but without land use approvals.

The Supreme Court's analysis in Shipyard is directly relevant here, as it affirms what is evident from the statutory scheme. The absence of identical language in sections governing final approvals and the distinct language in the statutory section concerning developments with preliminary approvals reflects the different stages of the development process and the differing levels of vested rights at each stage. The Legislature treated these provisions as a cohesive whole, underscoring the continued applicability of health and safety ordinances to pending but complete land use applications.

ii. The Court Should Not Rely on Plaintiffs' Selective Use of a Single Line from Legislative History.

Plaintiffs invoke a slippery slope argument, asserting that allowing the Township to apply the health and safety exception under the TOA Rule would eviscerate its protections. However, this argument lacks merit. Courts are more than capable of distinguishing legitimate public health and safety regulations from pretextual ordinances aimed at undermining vested rights.

Here, Ordinance 4419-23 was adopted in direct response to documented flooding concerns identified by the New Jersey Department of Environmental Protection (“NJDEP”) and the need identified by the NJDEP for immediate, prompt local action. See Df. Br. at 42–44. This is precisely the type of scenario that should be recognized by the TOA Rule exception. The legislative history makes clear that while the TOA Rule was intended to prevent municipalities from frustrating applications through post-hoc ordinance amendments, it preserved the authority to adopt ordinances necessary to protect public health and safety. The TOA Rule was not intended to prevent a scenario by which developers would be cushioned from shouldering any additional costs.

For instance, in its March 4, 2010 Statement to Assembly Bill No. 437, the Assembly Housing and Local Government Committee recognized the possibility under prior statutory regimes that inequitable results could be borne by developers with projects blocked by a municipality, but also immediately acknowledged municipality’s ability to enact public health and safety regulations:

Under current law, applicants are subject to changes to municipal ordinances that are made after the application has been filed, and even after a building permit has been issued, as long as the applicant has not substantially relied on the permit. Application of this rule sometimes causes inequitable results, such as when an applicant has expended considerable amounts of money for professional services and documentation that become unusable after the

ordinance has been amended. While effectively prohibiting municipalities from responding to an application for development by changing the law to frustrate that application, the bill recognizes that ordinance changes necessary for the protection of health and public safety would apply to pending applications.

See Legislative History of Senate Bill No. 82 (2010), available at N.J. State Library, <https://repo.njstatelib.org/server/api/core/bitstreams/a50ff824-4f51-4d66-9d3d-5c14ecf81ece/content>.

Plaintiffs ignore this explicit legislative acknowledgment and instead isolate a single sentence from the Senate Community and Urban Affairs Committee's February 4, 2010 Statement:

The bill would also exempt an application for development from changes made to ordinances, other than development regulations, except for those relating to health and public safety, that are adopted after the application for development is submitted.

See B9 Def. Br. at 20–21. However, the phrase, “other than development regulations,” is not reflected in the enacted statute, N.J.S.A. 40:55D-10.5, nor is it found in any subsequent legislative materials following the Committee's statement issued on February 4, 2010. The modifier does not appear in:

- Senate Bill No. 82 as filed on February 5, 2010;
- Assembly Bill No. 437 as introduced on February 26, 2010;
- The Assembly Housing and Local Government Committee Statement dated March 4, 2010; or
- Senate Bill No. 82 as filed on March 16, 2010.

See Legislative History of Senate Bill No. 82 (2010). Rather, every subsequent piece of legislative history adopts the broad language originally set forth in proposed Senate Bill No. 82 and Assembly Bill No. 437. Ibid.

Courts have cautioned against overreliance on extrinsic legislative committee statements, as urged by Plaintiffs. Lamie v. United States Trustee, 540 U.S. 526, 539 (2004) ("Though we find it unnecessary to rely on the legislative history behind the [statute being interpreted], we find it instructive that the history creates more confusion than clarity about the [legislative] intent."). While statements of a bill's sponsors can be a helpful tool in understanding legislative intent, such extrinsic evidence has limitations. Deaney v. Linen Thread Co., 19 N.J. 578, 584-85 (1955).

"Although statements of a bill's sponsor may give insight into legislative purpose, such statements also may represent the viewpoint of just one person, or a small group of lawmakers." DiProspero v. Penn., 183 N.J. 477, 498-99 (2005). A sponsor or committee statement may also be "contradictory, ambiguous or otherwise without substantial probative value in determining legislative meaning." Ibid. (quoting Deaney at 585). Therefore, as with all extrinsic aids enlisted to divine legislative intent, a court must proceed with caution and exercise "considered judgment" in determining the weight that should be accorded to a committee or sponsor's statement. DiProspero at 498-99.

Plaintiff B9's reliance on a single, non-codified phrase is misplaced and cannot override the clear statutory text and broader legislative intent supporting the applicability of health and safety ordinances, even those that may qualify as development regulations, under the TOA Rule's exception.

It is axiomatic that the statutory text is to be accepted as written. "If the plain language yields the meaning of the statute, then our task is complete." In re A.D., 441 N.J. Super. 403, 410-11 (App. Div. 2015) (quoting State v. Williams, 218 N.J. 576, 586 (2014)). Where the meaning of a statutory provision is clear, a court "need not consider committee reports or other extrinsic aids." Robertelli v. New Jersey Office of Atty. Ethics, 224 N.J. 470, 484 (2016). Indeed, only if the language of a statute is unclear or susceptible to multiple meanings may courts look to extrinsic aids like legislative history. Marino, supra, 200 N.J. at 329. In the case of the TOA Rule and its exception, the language should be applied as written.

The Township's Ordinance 4419-23, which amends its stormwater management regulations in response to severe and immediate flooding risks identified by the NJDEP, undeniably "relat[es] to health and public safety." Da287–315. Plaintiffs do not meaningfully dispute either the seriousness of those risks or the connection between the Ordinance and public safety concerns. Instead, they attempt to recast the Ordinance as a mere "zoning" or "land use development

regulation” to argue that the statutory exception is inapplicable. See B9 Br. at 12–17; Concore Br. at 5–10. This reflects the same flawed, binary framework the Trial Court adopted, which was one that the MLUL simply does not impose for pending applications. 2T12:7–12.

The plain language of N.J.S.A. 40:55D-10.5 requires only that a retroactively applicable ordinance “relate[] to health and public safety.” Ordinance 4419-23 clearly satisfies that standard.

POINT II

ORDINANCE 4419-23 IS NOT PREEMPTED BY NJDEP REGULATIONS AS IT IS A VALID EXERCISE OF THE TOWNSHIP’S AUTHORITY TO ENACT STRICTER LOCAL STORMWATER MANAGEMENT RULES FOR THE PROTECTION OF PUBLIC HEALTH AND SAFETY.

As set forth in its opening papers at length, though the trial court did not reach the issue of preemption, this Court should resolve the question in the interest of judicial economy. If the Township’s retroactive stormwater ordinance is found applicable to Plaintiffs’ respective applications, its validity under state law should be confirmed. Ordinance 4419-23’s Applicability Provision, [Da287–315], which applies updated local stormwater rules to pending land use applications, does not conflict with state stormwater rules and is not preempted.

Preemption turns on legislative intent. Courts ask whether the Legislature

intended to occupy a field exclusively or whether local regulation may coexist. See Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 453 (1976); Mack Paramus Co. v. Paramus, 103 N.J. 564, 573 (1986). No such intent appears here. In fact, NJDEP regulations expressly allow stricter local stormwater controls. N.J.A.C. 7:8-1.5 provides: “Nothing in this chapter shall be construed as preventing the Department or other agencies or entities from imposing additional or more stringent stormwater management requirements.”

In response to public comments on its 2023 rule amendments, the NJDEP reiterated that municipalities may adopt more stringent local rules to protect health and safety. See 55 N.J.R. 1385(b), Responses to Comments 144, 152. The NJDEP even issued a model ordinance clarifying that localities may apply stormwater rules more broadly, including to smaller projects or urban areas. Da504.

The Township’s Applicability Provision also does not frustrate the NJDEP’s own review authority. The NJDEP reviews permit applications under the rules in effect at the time of submission. See N.J.A.C. 7:13-21.1. However, NJDEP guidance acknowledges that NJDEP and local reviews may proceed under different regulatory regimes. For example, NJDEP training materials explicitly acknowledge a scenario in which NJDEP might apply prior SWM rules while a local board applies updated ones. Da397–398. The NJDEP raised no preemption concern in such cases. Ibid.

Finally, Ordinance 4419-23 advances, rather than frustrates, state policy. The NJDEP emphasized the urgency of new rules to combat flood risks and rejected grace periods in rule implementation. See 55 N.J.R. 1385(b), Responses to Comments 118–119, 290–297. The Township’s Ordinance, which applies only to applications without final approval, aligns with this public safety imperative.

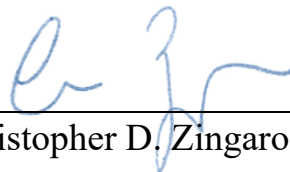
Because Ordinance 4419-23 is consistent with NJDEP policy and does not impair the State’s ability to regulate, this Court should declare it not preempted.

CONCLUSION

For the reasons set forth above, and those set forth in its papers filed April 7, 2025, the Township of Franklin respectfully submits that the determination below granting summary judgment to Respondents should be reversed and, further, that this matter be remanded for entry of judgment declaring that Ordinance 4419-23 is applicable to Respondents’ respective land use applications.

Respectfully submitted,

RAINONE COUGHLIN MINCHELLO, LLC

By: 
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Dated: May 23, 2025