Sun Property Management, Inc d/b/a Sunrise Motel & Herb McGrath Family Partnership Inc. d/b/a Hersey Motel **Appellant,** **v.** **The Borough of Seaside Heights; The Borough Counsel of the Borough of Seaside Heights, JOHN DOES 1-100 (a fictitious name for persons presently unknown) and XYZ, INC. 1-100 (a fictitious name for a business entity presently unknown)** **Respondents**	:	Superior Court of New Jersey Law Division: Ocean County Docket Number: A-002683-24 On Appeal From An Order of Dismissal from the Superior Court of New Jersey Ocean County, Law Division, Civil Part, Ocean County (OCN-L-300-24) CIVIL ACTION Sat Below: Honorable Francis Hodgson, JR., J.S.C.

BRIEF ON BEHALF OF APPELLANT, SUN PROPERTY MANAGEMENT INC. D/B/A SUNRISE MOTEL

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Dated: August 27, 2024

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STATEMENT OF FACTS/PROCEDURAL HISTORY[1]

Plaintiffs are business owners who have operated Motels within the Borough of Seaside Heights for more than 30 years. (Pa 5a to 6a) Each business boasts a remarkable legacy of passion and commitment to their customers; many of whom visit so often that each Plaintiff has had the pleasure of seeing many customers arrive as young adults, grow up, and often return with children of their own. Id.

On August 16th, 2023, the Borough adopted the Ordinance 2023-24 and entitled: "An Ordinance of the Borough of Seaside Heights, County of Ocean, State of New Jersey Amending the Borough Code of the Borough Of Seaside Heights, So As To Amend Chapter 179, Entitled "Rental Property". "The Ordinance") the ordinance makes it unlawful for any Hotel or Motel within the borough to:

a. Allow someone under the age of 21 to rent a room or allow a room from April 15 to June 30th of each year; or
b. Allow a room to be occupied by anyone under the age of 21 unless those occupants are direct immediate family member or under legal guardianship of the primary occupant or another occupant that is 21 years of age or older from April 15 to June 30th of each year; or
c. Allow someone under the age of 18 to rent a room or allow a room from July 1 to April 14th of each year;
d. Allow a room to be occupied by anyone under the age of 18 unless those occupants are direct immediate family member or under legal guardianship of the primary occupant or another occupant that is 18 years of age or older from July 1 to April 14th of each year.

[1] [1]In the present matter the procedural history and statement of facts are inexplicitly intertwined.

2. Specifically, the ordinance states:

   a. During the period commencing April 15 and ending at midnight of June 30 of each year, no room in a hotel or motel shall be rented to any person under 21 years of age. The primary occupant of each room shall be 21 years of age or older and must actually occupy the unit during the term of the rental. In the event occupants are under 21 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 21 years of age or older. Both the primary occupant executing the rental agreement and the hotel or motel owner shall be responsible for compliance with this provision, and both shall be responsible for a violation; and

   b. During the period commencing July 1 and ending at midnight of April 14 of each year, no room in a hotel or motel shall be rented to any person under 18 years of age. The primary occupant of each room shall be 18 years of age or older and must actually occupy the unit during the term of the rental. In the event occupants are under 18 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 18 years of age or older. Both the primary occupant executing the rental agreement and the hotel or motel owner shall be responsible for compliance with this provision, and both shall be responsible for a violation.

   c. Violation and Penalties – a – any person violating or failing to comply with any of the provision of this article shell upon conviction there of the punishable by a fine of $1000, by imprisonment not to exceed 90 days, or buy a community service, if not more than 90 days, or any combination of fine, imprisonment, and community service, as determined in the discretion of the court. The continuation of such violation, for each successive days shall constitute a separate offense, and the person, or persons, allowing or permitting, the continuation of the violation may be punished as provided above for each separate offense.

(Pa 001a to 003a)

Moreover, the Defendants have repeatedly stated that the purpose enacting this 11 week restriction was narrowly tailored to serve the specific purpose of curtailing heightened disturbances that take place during the "prom season".(Pa 152a; Pa 174a; Pa 270a). Quizzically, Respondent's own mayor is on record stating that prom season "generally lasts 2 to 3 weeks before schools are let out for the summer and families occupy rental properties often at higher rates" (Pa 084a)

On January 23, 2024 Plaintiffs filed this complaint alleging the Ordinance is discriminatory and violates fundamental afforded by The New Jersey Civil Rights Act, The New Jersey Constitution, & New Jersey Law Against Discrimination.

On March 8th, 2024 Plaintiff sought a temporary restraining order because without such an order in place, the Ordinance will compel Plaintiff, under penalty of imprisonment, to discriminate and violate the fundamental rights of their guests in a manner which violates the New Jersey Law Against Discrimination, The New Jersey Civil Rights Act, & The New Jersey Constitution.

Specifically, Plaintiffs argued if the Defendants are permitted to enforce the Ordinance, as written, then Plaintiffs would suffer irreparable harm, as: (1) compliance with the Ordinance would require Plaintiffs operation of their business in a manner which they believe unconstitutionally violates the fundamental rights

of and discriminates against potential customers[2]; while; (2) refusing to comply with the Ordinance will result in a civil penalty of $1000, a term of imprisonment of up to 90 days for each instance Plaintiffs are found in noncompliance, and eventually destroy their business. See (Pa 22a; Pa 151a; Pa 194a)

On March 8, 2024, the Honorable Francis R. Hodgson, Jr., A.J.S.C. heard oral arguments and rendered his decision orally stating Plaintiff failed to demonstrate irreparable harm. It should be noted, after the Court issued its ruling, the Plaintiff asked for clarification: "my question is did Your Honor take [the violation of a fundamental right] into consideration as well as the income issue?" (1T:64, ln 17-25); (1T:65, ln 1-2). The Court responded, stating that, "the short answer is no." (1T:65, ln 3).

So while I understand Your Honor's reasoned complaint for -- Your Honor's claim for damages may be speculative, the violation of a fundamental right and a requirement for my client to violate that right is also something that might be causing irreparable harm. And a violation of the -- of a fundamental right is deemed funda -- is deemed to be irreparable harm under the United States Supreme Court and the New Jersey Supreme Court.

And my question is did Your Honor take that into consideration as well as the income issue?
THE COURT: Well I -- the short answer is no.

See (1T:64, ln 17-25); (1T:65, ln 1-3).

[2] Plaintiff argued enforcement of the Ordinance should be enjoined because: (1) it unconstitutionally infringes on fundamental rights that are protected from governmental intrusion by the first and fourteenth amendments to the United States Constitution (i.e. the fundamental right to freely associate & the fundamental right to privacy); (2) impermissibly vague in violation of the New Jersey and united states constitutions; (3) the ordinance violates the New Jersey law against discrimination's prohibition on race and age discrimination.

Moreover, on March 5, 2024, Defendants/Respondents filed a Motion to Dismiss pursuant to R.4:69-6(a) & R. 4:6-2(e) seeking to dismiss the Plaintiffs' Complaint with prejudice for failure to state a claim for which relief may be granted. See (Pa 173a)

Th motion advanced five separate arguments for dismissal. Frist, Defendants alleged the complaint should be dismissed pursuant to R.4:69-6(a) because a challenge to an ordinance must be brought within 45 days after its passage. Second, Defendants allege Plaintiffs' complaint should be dismissed pursuant to R.4-6(2)(e) because (2) the ordinance does not violate the New Jersey Law Against Discrimination, (3) the ordinance does not violate the New Jersey Civil Rights Act, (4) the ordinance does not violate substantive due process, (5) the ordinance does not violate equal protection. See (Pa 173a)

In response, Plaintiffs filed a Motion in Opposition to Defendants Motion to Dismiss which requested the court to convert this matter into a declaratory action. See (Pa 234a) Within its motion Plaintiffs argued Ordinance should be invalidated because: (1) the ordinance infringes on fundamental rights that are protected from governmental intrusion by the first and fourteenth amendment (See 2T:8, ln 24 to 2T:20, ln 12); (2) since fundamental rights are at stake in this case, the Ordinance is subject to strict constitutional scrutiny, and as such the ordinance must fail since it cannot demonstrate that it is narrowly tailored to further a compelling state interest (Id.); (3) the ordinance is impermissibly vague in violation of the new

jersey and united states constitutions (See 2T:20, ln 16-25 to 2T:22, ln 1); (4) classification based on youth constitutes a suspect or quasi-suspect class, therefore laws which burden a law-abiding adult citizen's liberties based on youth must be subject to heightened (intermediate) scrutiny (See 2T:20, ln 16-25 to 2T:22 ln 2-25 to 2T:26 ln 1-12); (5) the challenged ordinance fails even heightened (intermediate) scrutiny (Id.); (6) the motion should be denied because the ordinance violates the New Jersey law against discrimination's prohibition on race and age discrimination. See (2T:27, ln 2-20); See Generally Pa 226a

On April 12, 2024 the Trial Court held oral arguments at which time the court found: (1) the Ordinance does not violate the New Jersey Civil Rights Act because the Plaintiff lacks standing as the New Jersey Civil Rights Act does not contemplate a motel owner stepping into the shoes of a potential guest to file an action on their behalf. (2T:39, ln 3-13); (2) the ordinance does not violate the New Jersey Law Against Discrimination. (2T:44, ln 18-25 to 2T:46 ln 18) (see generally 2T:35, ln 15-25 to 2T:46); (3) that age is not a suspect criterion (2T:42 ln 2-25); (2T43 ln 11-19); (4) that the Ordinance is subject to rational basis review and survives under rational basis. (2T:42, ln 5-25) (2T:43 to 2T:45) (2T:45, ln 22-25); the Ordinance should not be analyzed under strict scrutiny due to the allegations of discriminations against racial groups. (2T:45, ln 3-11); & this Ordinance implicates neither the right to privacy, nor the right to associate. (2T46:13-18). Thereafter, the Trial Court granted the Motion to Dismiss. (Pa 277a)

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR

It is clear that the trial court committed a reversible error in dismissing the Plaintiff's complaint in addition to each of the points being appealed in the instant matter. The Appellate Division must not defer to the trial judge where the where the factual findings and legal conclusions of the judge are manifestly unsupported by, factual findings and legal conclusions of the judge are manifestly unsupported by, or inconsistent with, competent, relevant and reasonably credible evidence, such that the decision offends the interests of justice. Jacobs v. Walt Disney World. Co., 309 N.J. Super. 443 (App. Div. 1998) and Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270 (App. Div. 1998)

The trial judge's findings of fact are granted deference so long as they are supported by substantial, credible evidence. Rova Farms Resort. Inc. v. Investors Ins. Co. of America, 65 N.J. 474 (1974). The critical exception to this general rule is that "legal conclusions are always subject to... independent review. Adoption of Child by P.S., 315 N.J. Super. 91, 107 (App. Div. 1998). In the instant matter, Plaintiffs are appealing each legal conclusions reached by the Trial Judge.

Therefore, this Court has *significant* discretion in reviewing each point. Furthermore, as will be demonstrated below with respect to each point on appeal, the trial judge's findings of fact in this matter were not supported by substantial, credible evidence, therefore not requiring deference. As explained substantively below, the trial court's findings with regard to each of the points on appeal were wholly unsupportable and plainly unwarranted such that the interests of justice *demand* reversal. Matter of Guardianship of J.T., 269 N.J. Super. 172 (App. Div. 1993)

POINT TWO

PLAINTIFFS HAVE STANDING TO BRING THIS CLAIM
(2T:39, ln 3-13)

To begin, the trial Judge's finding that Plaintiffs do not have standing because "The civil rights act of New Jersey does not contemplate or permit a motel to step into the shoes of a hypothetical, potential guest and file an action on their behalf." (2T39:10-13) is entirely unsupported the law. To dispose of any question concerning Plaintiffs' standing this Court need look no further than United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1 (App Div. 2001) where the Appellate Division Court held Property owners had the right to challenge a rental ordinance. (2T:10 ln 22-25) (2T:11 ln 1-12).

Even further, it is well recognized that "New Jersey courts take a broad and liberal approach to standing." New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J.Super. 402, 415, 686 *A.*2d 1265 (App.Div.1997); New Jersey Chamber of Commerce, supra, 82 *N.J.* at 67, 411 *A.*2d 168 ("Entitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation. A substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for purposes of standing." (citation omitted)).

In the matter at hand, Plaintiffs are Motel Owners who have operated in the Borough for more than 30 years. As such, they have a substantial stake in the outcome and a likelihood of harm if the decision is adverse to them. Specifically, if the ordinance goes into effect it will effect the Plaintiffs' privacy interests as well as require Plaintiffs to violate the fundamental rights of their guest; including but not limited to their fundamental rights of privacy, fundamental right to associate socially, right to share his or her home with guests or visitors, & the right to be free from warrantless searches.

Plaintiffs are not strangers to the proceedings, and we are satisfied that they had standing to challenge the Ordinance. See United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J.Super. 1 (App Div. 2001) at 51 finding (Plaintiff property owners had standing to challenge the rental Ordinance) Pa 246a

POINT THREE

THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THE ORDINANCE IS NOT ENTITLED TO A PRESUMPTION OF VALIDITY SINCE FUNDAMENTAL RIGHTS ARE AT STAKE, AS SUCH THE ORDINANCE MUST BE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY REQUIRING THE BOROUGH TO DEMONSTRATE THE ORDINANCE IS THE LEAST RESTRICTIVE MEANS OF ATTAINING COMPELLING STATE OBJECTIVES
(2T:46, ln 10-18)

The Constitution protects individual liberties beyond those enumerated within its text. See Griswold v. Connecticut, 381 U.S. 479, 489-90 (1965); Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); Right to Choose v. Byrne, 91 N.J. 287 (1982). Unenumerated fundamental rights have been acknowledged through interpretation of the Due Process Clause of the Fourteenth Amendment and the Ninth Amendment to the United States Constitution. See Loving v. Virginia, 388 U.S. 1 (1967) (acknowledging the fundamental right to marriage); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (affirming the right to live with one's family); Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D. Tex. 1970), aff'd in part, rev'd in part, 410 U.S. 113 (1973) (holding that abortion rights are protected by the Ninth Amendment); State v. Baker, 81 N.J. 99 (1979) (upholding the right to arrange a household with people of one's choosing).

The New Jersey Constitution, Article I, Paragraph 1, similarly provides that "[a]ll persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const., Art. 1, ¶1. However, "'the New Jersey Constitution is not a mirror image of the United States Constitution,' and there may be circumstances in which the State Constitution provides greater protections." Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 107 N.J. 355, 368 (1987), quoting Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)).

Applying either the United States or New Jersey Constitution, it is well-settled that "[w]hen legislation impinges upon a fundamental right, or disparately treats a suspect class, it is subject to strict scrutiny, thereby requiring that the statute be the least restrictive alternative to accomplish a compelling governmental interest." McCann v. Clerk, City of Jersey City, 338 N.J. Super. 509, 526-27 (App. Div. 2001), citing Rinier v. New Jersey, 273 N.J. Super. 135, 140 (App. Div. 1994) and San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1016 (1995). (emphasis added)

Moreover, the Supreme Court has consistently held that fundamental rights command the protection of strict scrutiny analysis when a state attempts to infringe on those rights. See Zablocki v. Redhail, 434 U.S. 374, 388 (1978); see also Plyler v. Doe, 457 U.S. 202, 216-217 (1982). When a law "interferes with the exercise of a fundamental right, [the law] cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." Zablocki, 434 U.S. at 682; see also Allen v. Bordentown, 216 N.J.Super. 557, 567-73 (Law Div. 1987). (emphasis added)

As demonstrated below, there are multiple fundamental rights are at stake in this case. Consequently, and contrary the trial judge's finding, the Borough should not have been entitled the presumption that the Ordinance is constitutional. Instead, the trial judge should have made the Borough demonstrate that it narrowly tailored the Ordinance to achieve compelling state interests or that it is the least restrictive means of attaining compelling state objectives. See Zablocki, 434 U.S. at 388; Allen, 216 N.J.Super. at 567-73; Plyler, 457 U.S. at 216-217

A. <u>The Trial Judge Erred In Failing To Find The Ordinance Unconstitutionally Infringes On Rights That Are Protected From Governmental Intrusion By The First And Fourteenth Amendments To The Constitution.</u>

(2T:8 ln 24-25 to 2T:20 ln 1-12)

1) THE TRIAL JUDGE ERRED IN FAILING TO FIND THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHT OF PRIVACY

(1T:64, ln 17-25 to 1T:66, ln 12)
&
(2T46:13-18)

The trial judge finding that that the Ordinance does not implicate the Fundamental Right to privacy is simply not supported by the law or fact. <u>See</u> (Plaintiff's Oral Argument at 2T:11, ln 19 to 2T:20, ln 8) & (Pa 240a-248a); <u>see also</u> ((the trial judge's findings (1T:64, ln 17-25 to 1T:66, ln 12) & (2T46:13-18)).

The fundamental right of privacy protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. <u>See</u>, e.g., <u>Santosky</u>, 455 U.S. at 753.

Numerous Courts have "enforced the fundamental, if not immutable, principle that "zoning enabling acts authorize local regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who occupy the land."" <u>Tirpak v. Borough of Point Pleasant Beach Bd. of Adjustment</u>, 457 N.J. Super.

441, 443 (App. Div. 2019) citing "Kulak v. Zoning Hearing Bd., 128 Pa.Cmwlth. 457, 563 A.2d 978, 980 (1989) ("the personal identity of an apartment occupant obviously has no relationship to public health, safety, or the general welfare."); See also 5 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning, § 81.7 (4th ed. 2005); see also DeFelice v. Zoning Bd. of Adjustment of Borough of Point Pleasant Beach, 216 N.J. Super. 377, 381, 523 A.2d 1086 (App. Div. 1987)

The United States Supreme Court has recognized that guests of Hotels and Motels have the same expectation of privacy within their room as those held by property owners and tenants. See Georgia v. Randolph, 547 U.S. 103, 112 (2006) ("[A] hotel guest customarily has no reason to expect the manager to allow anyone... into his room." (citing Stoner v. California, 376 U.S. 483, 489 (1964); United States v. Jeffers, 342 U.S. 48, 51 (1951))). The New Jersey Supreme Court has acknowledged that this state requires a warrant to search hotel rooms, Hathaway, 222 N.J. at 468 (citing Stoner, 376 U.S. at 486), and has noted that federal courts have as well, see Hinton, 216 N.J. at 232 n.6 (citing United States v. Young, 573 F.3d 711, 716, 720-21 (9th Cir. 2009); United States v. Bautista, 362 F.3d 584, 590 (9th Cir. 2004)). As such, the New Jersey Constitution provides greater protections from warrantless searches than the that of the Constitution of the United States. Alston, 88 N.J. at 226.

Further, while there have been many efforts by communities, *particularly seashore communities*, to keep neighborhoods quiet and orderly by imposing zoning restrictions on rentals; Courts have consistently held municipal entity such as the defendant "cannot functionally delegate to a private landlord a portion of the municipality's police powers and its own exclusive responsibility to enforce the local laws and keep the peace" See Tirpak v. Borough of Point Pleasant Beach et al, at 445; see also Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 253-54 (1971); see also Urban v. Planning Bd. of Borough of Manasquan, 124 N.J. 651, 662, (1991) (citing Kirsch); State v. Baker, 81 N.J. 99, 111, 405 A.2d 368 (1979) (citing Kirsch)

Juxtaposed to the caselaw above, the Ordinance in this matter seeks to both regulates the 'identity or status' of persons who occupy the motel[3] and circumvents the guests' fundamental right of privacy by delegating the responsibility of enforcing the ordinance landlord/owner.[4]

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[3] See Tirpak v. Borough of Point Pleasant Beach Bd. Et al, at 443 (App. Div. 2019) "enforced the fundamental, if not immutable, principle that "zoning enabling acts authorize local regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who occupy the land.""

[4] In doing so, the Borough has functionally delegated the its police powers and its' own exclusive responsibility to enforce the local laws to private landlords. See Tirpak v. Borough of Point Pleasant Beach et al, at 445 stating ([a Borough] "cannot functionally delegate to a private landlord a portion of the municipality's police powers and its own exclusive responsibility to enforce the local laws and keep the peace")

The pertinent part of the ordinance is as follows:

d. During the period commencing April 15 and ending at midnight of June 30 of each year, no room in a hotel or motel shall be rented to any person under 21 years of age. The primary occupant of each room shall be 21 years of age or older and must actually occupy the unit during the term of the rental. In the event occupants are under 21 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 21 years of age or older. Both the primary occupant executing the rental agreement and **the hotel or motel owner shall be responsible for compliance** with this provision, and both shall be responsible for a violation; and

e. During the period commencing July 1 and ending at midnight of April 14 of each year, no room in a hotel or motel shall be rented to any person under 18 years of age. The primary occupant of each room shall be 18 years of age or older and must actually occupy the unit during the term of the rental. In the event occupants are under 18 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 18 years of age or older. Both the primary occupant executing the rental agreement and **the hotel or motel owner shall be responsible for compliance** with this provision, and both shall be responsible for a violation

f. Violation and Penalties – any person violating or failing to comply with any of the provision of this article shall .. be punishable by a fine of $1000, by imprisonment not to exceed 90 days, or buy a community service, if not more than 90 days, or any combination of fine, imprisonment, and community service, as determined in the discretion of the court. The continuation of such violation, for each successive days shall constitute a separate offense, and the person, or persons, allowing or permitting, the continuation of the violation may be punished as provided above for each separate offense.

(Pa 1a to 3a)

As such, beginning April 15, 2024, Hotel/Motel Owners will be required to (1) verify the primary occupant of the room, (2) verify the primary occupant is actually occupying the room during the entire term of the rental, (3) obtain the identity of every person[5] who is present in the primary occupant's room during the term of the primary occupant's rental, (4) obtain the age of every person who is goes into the primary occupant's room during the term of the primary occupant's rental as well as (5) obtain information necessary to determine whether that person is familiarly related or under guardianship of the primary occupant or another occupant that is 21 (or 18) years of age or older; if the guest of the primary occupant is younger than 21[6] or 18[7]; merely to ensure compliance with the Ordinance. (Pa 1a to 3a)

Thus, the Defendants' "zoning" ordinance attempts to regulate the identity of a room's occupant as well as circumvent the protection from warrantless searches by functionally delegating the policy power & exclusive responsibility to enforce local law onto the owner of the Motel/Hotel.

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5 The Borough does not define "occupants" as such we rely on the common usage of the term which is defined by the Oxford Languages dictionary is "a person who resides or is present in a house, vehicle, seat, place, etc., at a given time." See the Oxford English Language Dictionary.

6 See Pa 1a-3a Between the dates of April 15 and ending at midnight of June 30.

7 See Pa 1a –3a Between the dates of July 1 and ending at midnight of April 14.

Accordingly, the Court should find the trial judge's finding that the Ordinance does not implicate the fundamental right to privacy (1T:64, ln 17-25 to 1T:66, ln 12) & (2T46:13-18) as wholly unsubstantiated as there is ample evidence to support the assertion that both the Defendants and their Ordinance have violated the fundamental right to privacy. See (2T:11, ln 19 to 2T:20, ln 8) & (Pa 240a-248a)

2) THE TRIAL JUDGE ERRED IN FAILING TO FIND THE ORDINANCE IMPLICATES AND INFRINGES UPON THE FUNDAMENTAL RIGHT TO ASSOCIATE SOCIALLY (1T:64, ln 17-25 to 1T:66, ln 12) (2T46:13-18)

The fundamental right of association is social as well as political. As the Supreme Court has explained:

> The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such prohibition,... [discriminates] against those whose association together is "annoying" because appearance is resented by the majority of their fellow citizens.
> [Coates, 402 U.S. at 615.]

The New Jersey Supreme Court has explained that "the [federal and state] constitutional liberty to freely associate… also encompasses associational ties designed to further the social … benefit of the group's members and associations that promote a 'way of life.'" In re Martin, 90 N.J. 295, 326 (1982).

The New Jersey Supreme Court has held that this fundamental right is not limited to association with blood relatives. Baker, 81 N.J. at 122. Rather, the Court recognized the counter-intuitiveness of protecting the relationship between two distant cousins, but not protecting the relationship between two close but unrelated friends. "The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved." Baker, 81 N.J. at 108.

The Court in Baker went on to note the effect of attempted enforcement of such ordinances. The ordinance in Baker, "'for example, would prohibit a group of five unrelated widows, widowers...or even of judges from residing in a single [residential] unit within the municipality" while permitting "a group consisting of ten distant cousins … [to] reside without violating the ordinance." Id.; see also Glasboro v. Vallorosi, 117 N.J. 421, 422, 428, 432 (1990) (following Baker and recognizing a group of ten unrelated college students as the functional equivalent of a family for purposes of borough ordinance limiting use and occupancy of dwellings to "families" where the relationship was marked by stability and

permanency.)

In United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J.Super. 1 (App Div. 2001) the Appellate Court invalidated the Borough of Belmar's ordinance to be over and over broad intrusion of summers tenants fundamental privacy rights, their right to share their dwelling with others, and violates their right to substantive due process. Thus, the court held that:

> "the effect of this Ordinance provision is to either exclude guests when all occupants are present or exclude occupants so that guests may be present, during the specified hours," concluding that this interfered with "summer residents' right to have visitors in their homes, a component of their right to privacy, and that it is overbroad in accomplishing a legitimate municipal goal, in violation of summer residents' due process rights." Id.

As it relates to the summer residents' right to privacy, the appellate panel reasoned:

> We first observe that the right to have guests or visitors—non-occupants—present in one's home is not, in and of itself, a constitutional or fundamental right. However, as the United States Supreme Court has acknowledged, the right to privacy in one's home encompasses the right to host guests. In an unrelated context, the United States Supreme Court explored the relationship of social guests and privacy rights. In Minnesota v. Olson, 495 U.S. 91, 95–100, 110 S.Ct. 1684, 1687–90, 109 L.Ed.2d 85, 92–96 (1990), the Court held that an overnight guest had a reasonable expectation of privacy, so that a warrantless entry into the house to arrest him violated his Fourth Amendment right to freedom from an unreasonable search and seizure. The Court commented that its holding "merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." 495 U.S. at 98, 110 S.Ct. at 1689, 109 L.Ed.2d at 94.

[...]

[P]laintiffs and their summer tenants have no complaint about any physical intrusion into, or search of their homes. Nevertheless, their right to privacy in their homes includes the choice to share it with others. (emphasis added)

The right to privacy in New Jersey is expansive. It derives not only from the Search and Seizure Clause of the New Jersey Constitution, N.J. Const. art. I, ¶ 7, and New Jersey common law, but also from the "natural and unalienable rights" which all people have under Article I, Paragraph 1 of the New Jersey Constitution. N.J. Const. art. I, ¶ 1, *supra*, p. 17, 777 A.2d pp. 959–60. Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 94–99, 609 A.2d 11 (1992) (declining to decide whether a private employer's random urine testing of an employee for drugs violated the employee's right to privacy, but holding that "constitutional privacy protections may form the basis for a clear mandate of public policy supporting a wrongful-discharge claim"). A summer tenants' right to share their homes with guests or visitors, even when all occupants are present, is within the panoply of their right of privacy. Id. at 33-34.

[...]

> Our Supreme Court has admonished municipalities that zoning ordinances are inappropriate means to "prevent one segment of the summer population from ... adversely affecting other vacationers and permanent residents." Kirsch, *supra,* 59 N.J. at 253, 281 *A.*2d 513. The Court said: "Ordinarily obnoxious personal behavior can best be dealt with officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes.... Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations." Id. at 253– 54, 281 *A.*2d 513. See also Vallorosi, supra, 117 *N.J.* at 433, 568 *A.*2d 888; Baker*, supra,* 81 *N.J.* at 111, 405 *A.*2d 368. Although Ordinance section 26–7.4b is not a zoning ordinance, the same principles apply. Its broad application, like that of zoning provisions, makes it inappropriate to control "obnoxious personal behavior." Id. at 37

Despite the plethora of caselaw, the Borough proceeded to craft an Ordinance that infringes upon the fundamental privacy right to share his/her home with guests or visitors[8] :

> a. During the period commencing April 15 and ending at midnight of June 30 of each year, no room in a hotel or motel shall be rented to any person under 21 years of age. **… In the event occupants are under 21 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 21 years of age or older**...; and

[8] See Georgia v. Randolph, 547 U.S. 103, 112 (2006), where the United States Supreme Court has also recognized that Hotel and Motel guests have a reasonable expectation of privacy in their rooms akin to that held by property owners and tenants.

b. During the period commencing July 1 and ending at midnight of April 14 of each year, no room in a hotel or motel shall be rented to any person under 18 years of age. … **In the event occupants are under 18 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 18 years of age or older**.

(Pa 1a to 3a)

Simply stated, an ordinance that requires any occupants of the room to be related forces the Plaintiffs to deprive young adults from the very thing the Baker Court sought to promote - the development and maturation of intimate human relationships within the fabric of our constitutional scheme.

The impact of this Ordinance on the fundamental right to associate socially is not incidental. Rather, the Ordinance actively penalizes the innocent conduct of young adults.

Because the vast majority of social association in the Borough, like the interaction between Plaintiffs and young adults, are innocent and socially appropriate, this blanket prohibition criminalizing social association by merely sharing a room is overbroad and unconstitutional.

As such, this Court should find that trial judge's finding that this ordinance implicates neither right to privacy, or the right to associate to be entirely without basis and further find that this Ordinance directly infringes upon said rights. (2T46:13-18).

POINT FOUR

THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THE ORDINANCE WAS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST AND THUS FAILS TO SATISFY STRICT SCRUTINY

(2T:8, ln 24-25 to 2T:20, ln 12)

As noted above, since the Ordinance "impinges upon a fundamental right, or …, it is subject to strict scrutiny, thereby requiring that the statute be the least restrictive alternative to accomplish a compelling governmental interest." McCann, 338 N.J. Super. at 526-27 (App. Div. 2001) (additional citations omitted). The Ordinance is unconstitutional because it is not narrowly tailored to attain a compelling state interest, nor is it the least restrictive means to accomplish such an interest. Id.; Zablocki, 434 U.S. at 388.

The Ordinance is facially applicable to all persons under the age of 21 from April 15 to June 30th and under the age of 18 from July 1 to April 14th, not merely those who have committed crimes. For example, a 20-year-old military veteran, who stays at a hotel/motel in seaside is allowed to have 20 year old friends occupy his room on July 1 the busiest week of the year (July 4). However, if he engages in the same innocent conduct on June 30th, both he and the hotel/motel owner will be susceptible to detainment, fine, and imprisonment, equal to that of a "gang-

member" selling drugs on a street corner[9]. In essence, this Ordinance makes the innocent veteran a criminal simply because he invited his friends over on June 30th instead of July 1st. (Pa 1a to 3a)

By way of another example, an 18-year-old is returning home from college to decides to stay at a hotel/motel within the borough on April 14th, thereafter he or she decides invite their study group of fellow 17 and 18 year old's over. Again, although engaged in innocent conduct, this young adult and the hotel/motel owner are now susceptible to detainment, fine, and imprisonment, equal to that of a "gang-member" selling drugs on a street corner merely because that minor had a 17-year-old college student studying in his/her room.

Moreover, the Borough has yet to explain the how the 11-week time frame is narrowly tailored to compel a state interest. As stated by the Defendants response papers, the Ordinances "were narrowly tailored to curtail the "prom season" of heightened teen disturbances. That being said, Defendants do not explain how the 11-week time frame is necessary to curtail a season which Mayor Vaz admits "[prom rental season] generally lasts two to three weeks before school lets out". Likewise, Defendants have provided no explanation as to the compelling state

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[9] *The Ordinance provides for:* A fine of $1000, by imprisonment not to exceed 90 days, or buy a community service, if not more than 90 days. ***For each occurrence*** See Exhibit "A". For comparison see 2C:35-10 (c) Possession, use or being under the influence, or failure to make lawful disposition punishable by a fine of $1000 and a term of imprisonment not to exceed 90 days.

interest that would requires the Ordinance to begin on April 15th, [10] and terminate on June 30th [11] ; one week before the July 4th celebrations which is widely considered the busiest weekend of the borough. A fact demonstrated, by Defendants own response papers which demonstrates that during the holiday week of July 4th there were multiple incidents involving "hundreds of teens" gathering within the borough. See (Pa 100a)

As such, the Defendants cannot contrive a compelling state interest that would permit infringement of its fundamental rights to engage in perfectly innocent activities. See Papachristou, 405 U.S. at 163 (enjoining a Jacksonville vagrancy ordinance that "makes criminal activities which by modern standards are normally innocent"). As such, the Ordinance is unsalvageably overbroad in the manner that it is tailored.

Moreover, to the extent that the Defendants claim that the Ordinance is aimed at addressing "unlawful and unsafe conditions" caused by "crowds of minors" during "prom season", it is also admitting that the Ordinance is overbroad. It is elementary to observe that for all activities that both minors and young adults might engage in that could objectively be considered a "crime," there are corresponding criminal statutes, both on the state and federal level. Consequently,

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[10] Approximately two weeks *before* holiday weekend of Cinco De Mayo[10] (generally celebrated from Friday May 3 to Sunday May 5)

[11] also known as the weekend *after* Juneteenth[11] (generally celebrated over the weekend of **June 21st)**

the only conduct that this Ordinance could curtail, that is not already subject to criminal statutes, is innocent non-criminal conduct. See Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann, 2023) at 10:8.4 "regulation of social conduct" stating (The Court have repeatedly held that regulation of social conduct is not properly effectuated under the zoning power… There have been many efforts by communities, particularly seashore communities, to keep neighborhoods quiet and orderly by imposing restrictions on rentals. However, Court have consistently held that any socially disruptive behavior of seasonal and student tenants is a matter for control under the police power; not the zoning power… [a municipality] cannot functionally delegate to a private landlord a portion of the municipality's police powers and its own exclusive responsibility to enforce the local laws and keep the peace) See Tirpak v. Borough of Point Pleasant Beach et al, at 445; see also Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 253-54, 281 A.2d 513 (1971); see also Urban v. Planning Bd. of Borough of Manasquan, 124 N.J. 651, 662, 592 A.2d 240 (1991) (citing Kirsch); State v. Baker, 81 N.J. 99, 111, 405 A.2d 368 (1979) (citing Kirsch); United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1 (App Div. 2001); Ocean County v. Long Beach Tp. 252 N.J. Super 443 (Law Div 1991).

The Ordinance is fatally overbroad. Thus, the court should find the Ordinance does not pass constitutional muster.

POINT FIVE

THE TRIAL COURT ERRED IN ITS FAILURE TO FIND THE ORDINANCE TO BE IMPERMISSIBLY VAGUE IN VIOLATION OF THE NEW JERSEY AND UNITED STATES CONSTITUTIONS

(2T:20, ln 16-25 to 2T:22, ln 1)

"Generally, under federal constitutional law, a 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" Betancourt, 338 N.J.Super. at 422, quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see also Smith v. Goguen, 415 U.S. 566, 572, n.8 (1974). Similarly, "[a] penal statute offends due process if it does not provide legally fixed standards and adequate guidelines for police and others who enforce penal laws." Id., citing Papachristou, 405 at 170; Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). Thus, vague language and inadequate standards permit the subjective and therefore impermissible enforcement of penal ordinances by law enforcement personnel. Grayned v. City of Rockford, 408 U.S. 104 (1972).

A legislative enactment is unconstitutionally vague if: (a) it fails to define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited;" (b) if it fails to do so "in a manner that does not encourage arbitrary and discriminatory enforcement;" or (c) it "operates to inhibit the exercise of [basic First Amendment] freedoms." Betancourt, 338 N.J.Super. at 423, quoting

Kolender v. Lawson, 461 U.S. 352, 357 (1983); see also Grayned, 408 U.S. 108-09; Smith, 415 U.S. at 574; Papachristou, 405 U.S. at 162. New Jersey Courts have recognized that "[i]t is offensive to fundamental concepts of justice and violative of due process of law … to impose sanctions for violations of laws, whose language is doubtful, vague, and uncertain." Id. at 423, quoting Maplewood v. Tannenhaus, 64 N.J.Super. 80, 89 (App. Div. 1960), certif. denied, 34 N.J. 325 (1961). The Ordinance fails in all three respects. It does not provide fair notice of the conduct that is prohibited, it fails to discourage arbitrary enforcement, and it infringes on protected rights.

As stated in Kolender, the Supreme Court held that a state statute requiring citizens to provide "credible and reliable identification" violates the due process requirement of the Fourteenth Amendment, because individual police officers were left with "virtually complete discretion" to decide which forms of identification satisfied this requirement. Kolender, 461 at 358.

Given these principles, the Ordinance cannot survive a vagueness challenge. For example, the Ordinance's definition of "guardian" is impermissibly vague. The Ordinance provides exceptions for minors and/or adults under the age of 21 who are "immediate family members or under legal guardianship of the primary occupant, or another occupant that is 21 years of age or older" "Guardian" is generally defined as "[a] person other than a parent to whom legal custody of the minor has been given by court order or who is acting in the place of the parent or is

responsible for the care, custody, control and welfare of the minor." As was the case in Betancourt, the question remains whether an 21 or 18- year-old babysitter, teacher, cleric, or family friend is permitted occupy a room with a minor placed in their care. Likewise, immediate family member remains undefined. Does the Borough mean biological or constitutional? See State v. Baker, 81 N.J. 99 (1979) (upholding the right to arrange a household with people of one's choosing); see also Glasboro v. Vallorosi, 117 N.J. 421, 422, 428, 432 (1990) (following Baker and recognizing a group of ten unrelated college students as the functional equivalent of a family for purposes of borough ordinance limiting use and occupancy of dwellings to "families" where the relationship was marked by stability and permanency.)

By way of another example, the Ordinance's requirement that "in the event, any occupants are under 21(or 18 from July 1 to April 14th) years of age those occupants shall be the immediate family member, or under legal guardianship, or the primary occupant or other occupant that is 21 years of age or older. The hotel/motel owner shall be responsible for compliance" is impermissibly vague. How is a Hotel/Motel owner supposed to ascertain the identity of every occupant within their building at all times? How does the hotel/motel owner go about ascertaining the identity of these occupants? What does compliance mean? How does one go about demonstrating that they have complied? (2T:20, ln 23 to 2T:23, ln 1)

With so many terms left undefined and open to varying interpretations, the Ordinance does not provide the Hotel/Motel Owners or the residents of the Borough with a clear definition of what conduct is permissible. Even more significantly, it compels Motel/Hotel Owners to go into each room that is occupied to determine each person's identity, age, and relationship that primary occupant, irregardless of whether the activity is prohibited by the constitution.

POINT SIX

THE TRIAL COURT ERRED IN ITS FAILURE TO RECOGNIZE A CLASSIFICATION BASED ON YOUTH CONSTITUTES A SUSPECT OR QUASI-SUSPECT CLASS, THEREFORE LAWS WHICH BURDEN A LAW-ABIDING ADULT CITIZEN'S LIBERTIES BASED ON "YOUTH" MUST BE SUBJECT TO HEIGHTENED (INTERMEDIATE) SCRUTINY

(2T:22, ln 2-25 to 2T:26, ln 12)

Insofar as this memorandum is considered a "replacement" for prior briefing rather than supplementary, the Plaintiffs respectfully incorporate all previous arguments presented before the Court concerning claims that the laws at issue violate due process, equal protection, and rational basis scrutiny pursuant to those arguments raised in their prior briefing and argument. (Pa 255a to Pa 258a)

The Fifth Amendment states that "[n]o person shall be… be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Though it does not contain the Fourteenth Amendment's equal protection clause, the concepts of equal protection and due process are not mutually exclusive. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Fifth Amendment equal protection claims are "precisely the same" as equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975); Buckley v. Valeo, 424U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."). Not only does equal protection analysis require "strict scrutiny of a legislative classification" when the classification "impermissibly interferes with the exercise of a fundamental right," it also requires strict scrutiny when it "operates to the peculiar disadvantage of a suspect class." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976).

While the trial judge did not find the laws at issue impermissibly interfere with the Plaintiffs' rights, (2T:44, ln 3) it could have applied heightened scrutiny because the age classification at issue impacts a suspect or quasi-suspect class—"young legal adults" who are legally discriminated against because of their youth.

Both the Defendants and trial judge alleged that Supreme Court jurisprudence forecloses this argument because it once held that "[a]ge is not a

suspect classification under the Equal Protection Clause." (2T43:11-12) Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976). Mass. Bd. Of Ret. referenced a dispositive and materially different form of age-based classification, the use of a maximum age for older adults. Notably, age-based challenges have only been directly considered in that context before the Supreme Court of the United States. Id. (citing Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (upholding maximum age for state judges); Vance v. Bradley, 440 U.S. 93, 97 (1979) (mandatory retirement for foreign service personnel); Murgia, 427 U.S. 307 (mandatory retirement of police officers at fifty years old). The Supreme Court has never considered whether minimum age-based classifications, particularly those for young adults, create a suspect classification.

The most notable challenge on behalf of the youth in America came in Oregon v. Mitchell, 400 U.S. 112 (1970), just prior to the passage of the Twenty-Sixth Amendment, when the Court simultaneously upheld and struck portions of federal law attempting to universally lower the voting age from twenty-one-year-old adults to eighteen-year-old minors. Id. (finding that Congress could lower the age for federal but not state elections due to federalism concerns, prompting the passage of the Twenty-Sixth Amendment). A material factor that distinguishes the issue from that in Mitchell was that eighteen-year-olds were minors at the time. Now that they are adults, Justice Douglas's partial dissent in Mitchell carries even more weight in this equal protection challenge:

> Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection. The Act itself brands **the denial of the franchise to 18-year-olds as "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed" on them.** § 301 (a)(1), Voting Rights Act, 84 Stat. 318. The fact that only males are drafted while the vote extends to females as well is not relevant, for the female component of these families or prospective families is also caught up in war and hit hard by it. Congress might well believe that men and women alike should share the fateful decision. It is said, why draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude that 18-year-olds have that degree of maturity which entitles them to the franchise. They are "generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult." Moreover, we are advised that under state laws, mandatory school attendance does not, as a matter of practice, extend beyond the age of 18. On any of these items the States, of course, have leeway to raise or lower the age requirements. **But voting is a fundamental matter in a free and democratic society, [w]here "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."**
>
> Id.. at 142 (Douglas, J., dissenting in part) (internal citations omitted).

In Gregory v. Ashcroft, the Court considered discrimination against judges based on old age. 501 U.S. at 472. Gregory was consistent with intermediate scrutiny in that it considered the government's interest as "compelling" and declared the provision not merely rational but "reasonable." Id.

For a classification to be "suspect" or "quasi-suspect" for heightened scrutiny, there must have been: a history of legally imposed discrimination based on that classification; the individuals must exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they must constitute an insular minority or be politically powerless. Lyng v. Castillo, 477 U.S. 635, 638 (1986) (citing Murgia, 427 U.S. at 313–14). A suspect or quasi-suspect class "is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection youth and deem them unconstitutional in this case. from the majoritarian political process." Murgia, 427 U.S. at 313. **All three of these factors exist for young adults who are discriminated according to their youth**. **First**, young adults are politically insular minorities relegated to a position of relative powerlessness due to the overwhelming number of the population who are older and have had years, if not decades, of additional time and influence within the political system by the time these young citizens participate. **Second**, young adults suffer from an inherently immutable characteristic, their age. **Finally**, and most importantly, young adults have suffered from a lengthy and detailed history of purposeful and unequal treatment, oppression, and exploitation based on youth. For the following reasons heightened scrutiny must apply to laws that discriminate against adults based on their youth and deem them unconstitutional in this case.

POINT SEVEN

THE TRIAL COURT ERRED IN ITS FAILURE TO RECOGNIZE THE CHALLENGED ORDINANCE FAILS EVEN HEIGHTENED (INTERMEDIATE) SCRUTINY

(2T:22, ln 2-25 to 2T:26, ln 12)

Ultimately determining the correct standard of scrutiny is immaterial, however, because the Borough's Ordinance also flunks intermediate scrutiny.

By design, Defendants' restrictions will reduce violent and disorder behavior by minors *only by reducing the quantity of young adults (18-20) within their community*. That is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. Grace v. District of Columbia, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), aff'd sub nom. Wrenn v. District of Columbia, 864 F.3d 650. That conclusion follows directly from the Supreme Court's precedents in the secondary-effects area of free speech doctrine.

The Supreme Court has held that government restrictions on certain types of expressive conduct—most commonly, zoning ordinances that apply to adult theaters, bookstores, and the like—are subject to merely intermediate scrutiny, even though they are content-based, so long as the *purpose and effect* of the restrictions is to reduce the negative **"secondary effects"** of the expression—**such as the increased crime that occurs in neighborhoods near**

adult theaters—rather than to suppress the expression itself. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47– 51 (1986) (emphasis added). But as Justice Kennedy's controlling opinion in City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002), makes clear, in defending a restriction under this rubric, the government may not contend "that it will reduce secondary effects by reducing speech in the same proportion." Id. at 449 (Kennedy, J., concurring). "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450; see also Heller v. District of Columbia *(Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015); Drake, 724 F.3d at 455–56 (Hardiman, J., dissenting); Grace, 187 F. Supp. 3d at 148.

That is precisely analogous to what challenged Ordinance does here. The challenged Ordinance limits do not even regulate the *manner* in which young adults may associate or visit one another in the Borough, because it works to proscribe the conduct completely. No, their purpose and effect is to *limit the number of young adults in public* by banning that same subset of law-abiding adult citizens from being able to obtain a motel room and/or associate with other young adults; and to the extent this leads to a crime, that is only a byproduct of this blunt suppression of constitutionally protected conduct. That is "not a permissible strategy," Grace, 187 F. Supp. 3d at 148, under any level of heightened scrutiny.

Even if this threshold objection is set aside, the challenged limits still flunk constitutional scrutiny. To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. United States v. Virginia, 518 U.S. 515, 533 (1996). "The burden of justification is demanding and it rests entirely on the State." Id. To be sure, the Government's interest in protecting public safety from violent crime is important—indeed, compelling. But there is simply no persuasive evidence showing that specific the conduct at issue here poses any special risk to public safety.

As an initial matter, there is no justification for singling out 18-to-20-year- olds, as a group, because of their age. Government statistics indicate that in 2020, 18-to-20-year-olds were ***less*** likely to be arrested for a violent crime than 21-to-24- year-olds[12] And even if 18-to-20-year-olds disproportionately contributed to violent and disorder behavior when compared to their neighboring age groups (they do not), that alone could not be sufficient legal

[12] See Pa 266a PDF of https://ojjdp.ojp.gov/statistical-briefing-book/crime/faqs/ucr Off. Of Juvenile Justice & Delinquency Programs, Arrest rates by offense and age group,2020, Gender: All, U.S. DEP'T OF JUST demonstrating in 2020, 18-to-20-year-olds were arrested for violent crimes at a rate of 305.4 per 100,000, and 21-to-24-year-olds at a rate of 335.4 per 100,000.

reason to block *the entire population* of 18-to-20-year- olds from exercising their fundamental rights. As the data just cited shows, only a minuscule fraction of all crime was attributed to 18-to-20-year-olds—about 8%—in 2020. The Defendants thus strip *all* 18-to-20-year-olds of their fundamental rights because of the sins of a very, very few. Such a result would be unthinkable in the context of any other constitutional right. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) ("deeply etched in our law [is the theory that] a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand") (emphasis added); Hodgson v. Minnesota, 497 U.S. 417, 446–47 (1990) (" 'The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.'").

Indeed, if that reasoning were sound, then the government could ban other demographic groups simply because some number of that cohort commits crimes or violent offenses at a higher rate than the general population. The most obvious examples might be differentially rates by males or by the poor. Could these entire groups therefore be prevented from entering the Borough of Seaside Heights. The Supreme Court precedent indicates that the answer is no. See, e.g., Craig v. Boren, 429 U.S. 190, 191, 201–02 (1976) (statistics showing

that 18-to-20-year-old men were over ten times more likely than their female counterparts to be arrested for "alcohol-related driving offenses" "hardly can form the basis for employment of a gender line as a classifying device").

Even if the Ordinance's limits did advance public safety on balance, it still fails heightened scrutiny because it is not properly tailored. While laws subject to intermediate scrutiny "need not be the least restrictive or least intrusive means of serving the government's interests," they still must be narrowly tailored, possessing "a close fit between ends and means." McCullen v. Coakley, 134 S. Ct. 2518, 2534–35 (2014) (quotation marks omitted). Here, there is an utter lack of fit between the challenged limits and their purported objective of public safety.

The effect of the challenged ordinance, taken together, is that while law- abiding 18-to-20-year-olds may lawfully rent a hotel room or visit a friend within the Borough in *ordinary* times, they cannot do so at between April 15 and June 30 because of the existence of the a prom season that lasts only three weeks. That is a complete non-sequitur. There is no conceivable explanation why the need to address violent and disorderly behavior from minors in recent years somehow calls for limiting the rights of law-abiding 18-to-20-year-olds. The phenomena are completely unrelated. Indeed, the contention that a public-health emergency of this kind justifies a limit on the rights of law-abiding adults is so absurd that it would not pass *even rational basis review*

POINT EIGHT

THE TRIAL COURT ERRED IN ITS FAILURE TO FIND THE ORDINANCE VIOLATES THE NEW JERSEY LAW AGAINST DISCRIMINATION'S PROHIBITION ON RACE AND AGE DISCRIMINATION

(2T:27, ln 2-20)

To date, the Defendants have not addressed the allegation of racial discrimination. Instead, they dismiss it as merely brought up for the purpose of litigation without addressing the substance of Plaintiff's claims. (Pa 192a to 193a)

The NJLAD makes it unlawful N.J.S.A. 10:5-12(l): If shall be unlawful discrimination for any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age,…. It also forbids any person or entity to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by subsections (l), or to attempt, or to conspire to do so. see N.J.S.A. 10:5-12(n). They planted can establish a prima facia claim of discrimination under the NJLAD by showing that the challenge, the actions were motivated by intentional discrimination, or that the actions had a discriminatory effect on a protected class. Mitchell v. Walters, No. 10-1061, 2010 WL 3614210, at *6 (D.N.J. Sept. 8, 2010) (citing Cmty Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 176 (3d Cir. 2005)) Here Plaintiffs argue that the Borough has engaged in intentional discrimination that also have a

discriminatory effect on African Americans and Latinos.

Defendants state that the Ordinance was put in place to curtail the "substantial numbers of unsupervised minors who rent rooms in the Borough to celebrate high school proms and graduation". (Pa 268a*)* As such, the Borough enacted the Ordinance in question raising the rental age from 18 to 21 for approximately 11 weeks beginning April 15 and ending June 30. In its pertinent part the Ordinance states:

> a. During the period commencing April 15 and ending at midnight of June 30 of each year, no room in a hotel or motel shall be rented to any person under 21 years of age. The primary occupant of each room shall be 21 years of age or older and must actually occupy the unit during the term of the rental. In the event occupants are under 21 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 21 years of age or older. Both the primary occupant executing the rental agreement and the hotel or motel owner shall be responsible for compliance with this provision, and both shall be responsible for a violation (Pa 1a to 3a)

That being said, Defendants have failed to explain why the 11-week time frame is necessary to curtail a season which Mayor Vaz admits "[prom rental season] generally lasts two to three weeks before school lets out". Likewise, Defendants have provided no explanation as to the compelling state interest that would requires the Ordinance to begin on April 15, [13] and terminate on June 30[14] ;

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[13] Approximately two weeks *before* holiday weekend of Cinco De Mayo[13] (generally celebrated from Friday May 3 to Sunday May 5)

[14] also known as the weekend *after* Juneteenth[14] (generally celebrated over the weekend of **June 21st)**

one week before, the July 4th celebrations, which are widely considered the busiest weekend of the borough. A fact demonstrated, by Defendants own response papers which demonstrates that during the holiday week of July 4th there were multiple incidents involving "hundreds of teens" gathering within the borough. (Pa 100a)

Further, since no plausible explanation for the Ordinances April 15th to June 30th has been provided by the Defendants it must be presumed that Defendants were aware that the Ordinance was adopted for the unlawful purpose of deterring African Americans and Latinos from coming to the Borough.

CONCLUSION

Accordingly, for the foregoing reasons it is respectfully requested the Court vacate the dismissal and invalidate the Ordinance in its entirety.

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Attorneys for Plaintiffs

CHRISTOPHER R. SHEA, ESQ.

Dated: August 27, 2024

Sun Property Management, Inc. d/b/a Sunrise Motel & Herb McGrath Family Partnership, Inc. d/b/a Hersey Motel Plaintiff/Appellant	SUPERIOR COURT OF NEW JERSEY **APPELLATE DIVISION** DOCKET NOS: A-002683-24
v.	
The Borough of Seaside Heights; The Borough Counsel of the Borough Of Seaside Heights, JOHN DOES 1-100 (a fictitious name for persons presently Unknown) and XYZ, INC. 1-100 (a Fictitious name for a business entity Presently unknown) Respondents	ON APPEAL FROM SUPERIOR COURT **LAW DIVISION, DOCKET NO:** OCN-L-300-24 **Sat Below:** **The Honorable Francis L. Hodgson, Jr. A.J.S.C.**

BRIEF OF RESPONDENT, BOROUGH OF SEASIDE HEIGHTS

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PRELIMINARY STATEMENT

The Borough of Seaside Heights historically experiences a rise in destructive under-age behavior beginning in Mid-April and tapering towards the end of June each year. This activity is principally related to teens visiting the Borough after high school proms which are held on different weekends for many schools throughout the tri-state area. It has become a tradition for parents to ship their teens down un-chaperoned for the post-prom weekend, and the residents and Police Department of the Borough of Seaside Heights become their babysitters. It has been the Borough's experience that this teen season that lasts starts in mid-May and continues through the month of June. While the Borough remains busy for the rest of the summer, the visitors for the remainder of the summer season do not exhibit the reckless, careless and consequence-free behavior that is historically exhibited during the prom season. While the Boardwalk is still busy and there are indeed incidents during that time, the "teen problem" is not nearly as overwhelming as it is from April 15 through June 30.

Prohibiting the wave of misconduct and criminal behavior that accompanies the unmonitored teens on prom weekends is the rational basis behind the ordinance under appeal. The Borough Council could have limited rentals to those over the age of 21 year-round, but they chose not to. The ordinance is narrowly tailored to accomplish the goal of curtailing destructive behavior by unsupervised young people

during a specific time of year. It has been the experience of the Borough that when such groups are accompanied by a responsible adult, they behave more responsibly.

In this appeal, appellant attempts to lob every plausible constitutional argument against Borough of Seaside Heights ordinance, and some that are not. The subject ordinance is limited in scope, applying to only those select few weeks in which the Borough notices a marked increase in teen-related havoc. Many New Jersey laws make age-based distinctions. Adults under the age of 21 may not legally purchase alcohol or cannabis. Adults under the age of 21 may not purchase firearms, N.J.S.A. 2C:58-6.1; or real property N.J.S.A. 54:6-4(10); or apply for a Veteran's Loan. Ordinance 2023-24 was adopted in recognition of the fact that individuals are not automatically vested with adult behavior or cognizance of adult consequences upon turning 18. Prohibiting rentals to individuals under 21 without an adult chaperone is constitutional and within the legislative authority of the Borough Council.

STATEMENT OF FACTS

In 2021, the New Jersey Legislature adopted legislation decriminalizing cannabis, which also had the effect of sanctioning underaged drinking. S-3454 created a penalty of 3rd Degree Deprivation of Civil Rights if an officer uses the odor or possession of marijuana or alcoholic beverages as the reason for initiating an investigatory stop of a person. The new law states that a law enforcement officer cannot use the odor of marijuana or alcohol as reasonable articulable suspicion to initiate an investigatory stop. Under this law a minor cannot consent to be searched and a law enforcement officer no longer has probable cause to search a minor for illegally using marijuana or alcohol. If an officer violates a minor's rights by using pot or alcohol as the reason for a search, then the officer will be charged with the crime of deprivation of civil rights. (Pa1a)

Armed with this newfound immunity, teenagers took to the streets, beaches, and boardwalks in increasing numbers. Prom weekends in particular became an uncontrollable hazard up and down the coastline of New Jersey. (Pa56a-Pa101a)

Ordinance 2023-24, the ordinance being challenged herein, was part of a package of ordinances introduced by the Seaside Heights Borough Council in an attempt to combat the teen nuisance. The ordinances were narrowly tailored for the specific purpose of controlling the season of heightened teen disturbances which historically occurs from April through June of each year. The ordinances also

imposed a curfew on juveniles under the age of 18 between the hours of 10pm and 5am; adopted a regulatory scheme for short-term rentals; authorized the closure of beaches after 8:00pm; and implemented an occupancy tax on transient accommodations. (Pa153a)

Prior to the adoption of ordinance, Chapter 179 of the Borough Code prohibited the rental of a motel room to anyone under the age of 18 on a year round basis. This ordinance amends that section only for the period of April 15 – June 30 of each year. (Pa1a-3a)

Ordinance 2023-24 was adopted on August 16, 2023, notice of passage was published on August 29, 2023, the 45-day period by which a challenge to the ordinance had to be filed expired on October 13, 2023. (Pa3a)

The ordinance reads, in pertinent part:

> B. During the period commencing April 15 and ending at midnight on June 30 of each year, no room in a hotel or motel shall be rented to any person under 18 years of age. The primary occupant of each room shall be 18 years of age or older and must actually occupy the unit during the term of the rental. In the event any occupants are under 18 years of age those occupants shall be the immediate family member or under legal guardianship of the primary occupant or another occupant that is 18 years of age or older. Both the primary occupant executing the rental agreement and the hotel or motel owner shall be responsible for compliance with this provision, and both shall be responsible for a violation. (Pa2a)

PROCEDURAL HISTORY

Ordinance 2023-24 was adopted on August 16, 2023. On January 23, 2024 Plaintiffs filed a complaint in the Chancery Division of Ocean County together with an Order to Show Cause challenging the validity of the ordinance and seeking emergent relief, specifically an order prohibiting the Borough Council from amending the ordinance pending the final disposition of the underlying complaint.

Initially filed in the Chancery Division, on February 1, 2024, Judge Troncone, P.J. Civ. transferred the case to the Law Division. On March 8th, 2024, injunctive relief was denied in the Law Division. (Pa224a)

On March 5, 2024, Respondent Borough filed a Motion to Dismiss pursuant to R.4:69-6(a) & R. 4:6-2(e) seeking to dismiss the Plaintiffs' Complaint with prejudice for failure to state a claim for which relief may be granted. See (Pa 173a)

Following oral argument on April 12, 2024 the Trial Court dismissed the complaint, holding that the ordinance was valid, that it did not violate the New Jersey Civil Rights Act, (2T:39, ln 3-13) or the New Jersey Law Against Discrimination, (2T:44, ln 18-25 to 2T:46 ln 18) The Court held that the proper standard of review for an age based classification is the rational basis review, (2T:42, ln 5-25) (2T:43 to 2T:45) (2T:45, ln 22-25) and that the other constitutional arguments raised by the plaintiff were not applicable. (2T46:13-18). This appeal was filed on May 8, 2024.

LEGAL ARGUMENT

1. STANDARD OF REVIEW

The Appellate Division standard of review is well-settled. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). An appellate court, however, should defer to the factual findings of the trial judge that are supported by adequate, substantial and credible evidence in the record. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974).

In cases in which an appellant claims a plain error in the proceedings below, the error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court. The possibility for an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

2. APPELLANTS DO NOT HAVE STANDING UNDER THE CRA

The New Jersey Civil Rights Act permits a cause of action when a person is deprived of substantive due process or equal protection rights in an action brought by the Attorney General. The law also permits a person who has been deprived of

substantive due process or equal protection rights to bring an action for damages without the Attorney General. N.J.S.A. 10:6-2. The NJCRA does not contemplate or permit a motel to step into the shoes of hypothetical potential guests and file an action on their behalf. But lack of standing is not the only reason to dismiss Plaintiffs' complaint.

To establish a violation of the Civil Rights Act a proper plaintiff in a case such as this must prove that (1) "the Constitution or laws of this State" conferred on them a substantive right; (2) the Borough deprived them of that right; and (3) the Borough was "acting under color of law" when it did so. N.J.S.A. 10:6–2(c). Tumpson v. Farina, 218 N.J. 450, 473 (2014).

It has been held that an individual of a non-protected group may assert a claim under the Civil Rights Act, but that is limited to circumstances where the individual is the subject of adverse treatment because of their association with a member of a protected class. O'Lone v. Department of Corrections, 313 N.J. Super. 249 (App. Div. 1998). However, that is not the circumstance here. The appellant is claiming prospective violations of the rights of a hypothetical teenager who, at the time of the filing of the complaint, did not yet exist. This claim is not contemplated under the CRA, which only protects against actual deprivation of a substantive right.

Motel owners do not have standing to maintain a claim under the CRA, they are not personally aggrieved.

3. THE ORDINANCE IS NOT VAGUE

Municipal ordinances are presumptively valid. Brown v. City of Newark, 113 N.J. 565, 571 (1989). One who challenges an ordinance has the burden of proving that it is arbitrary, capricious, or unreasonable. Hutton Park Gardens v. Town Council of W. Orange, 68 N.J. 543, 564–65 (1975); Vineland Constr. Co. v. Twp. of Pennsauken, 395 N.J. Super. 230, 256 (App. Div.2007), appeal dismissed as moot, 195 N.J. 513 (2008). The presumption that an ordinance is reasonable "can be overcome only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest." Ibid.

Pursuant to N.J.S.A. 40:52-1, Municipalities are authorized to regulate and license hotels, boardinghouses, lodging and rooming houses, stores for the sale of meats, groceries and provisions, dry goods and merchandise, and goods and chattel of every kind, "and all other kinds of business conducted in the municipality other than herein mentioned, and the places and premises in or at which the business is conducted and carried on."

The standards set forth in the ordinance are more than reasonably specific, proscribing exactly what conduct is permitted during what days of each year. It is not necessary that each and every word in an ordinance be defined. If an individual

is over the age of 21 and has a familial and/or legal relationship with the other proposed occupants in a room, they may rent during April 15-June 30. If they are a group of high school students, they cannot. Appellants over complicate in an attempt to obfuscate and confuse a very clear and simple ordinance.

Prior to the enactment of this ordinance, the Borough had a minimum age requirement for room rentals of 18 years of age. This ordinance merely changes the age from 18 to 21 years for a two-and-a-half-month period. Plaintiffs can verify age the way that they have been doing so to date. If room-to-room checks and warrantless searches were not necessary before, they certainly are not now.

4. AGE BASED RESTRICTIONS IN PUBLIC ACCOMODATIONS ARE PERMITTED UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION

The allegation is that the Borough's conduct violates N.J.S.A. 10:5-1 et seq. because it makes a distinction based on the age of prospective tenants during a portion of the year. The complaint also alleges that because two "holidays" fall in the relevant time period, between April 15 and June 30 of year that the ordinance is racially discriminatory.

Under New Jersey's Law Against Discrimination, it is unlawful for a municipality "to exercise the power to regulate land use or housing in a manner that discriminates on the basis of ... race, creed, color, or national origin" N.J.S.A. 10:5–12.5(a). However, in order to prevail on a claim of discrimination, the plaintiff must

show (1) the exercise of the power to regulate land use or housing and (2) a discriminatory impact. The plaintiff has failed to demonstrate either of these criteria.

A hotel/motel is a place of public accommodation under the NJLAD, which defines public accommodations as follows:

> *l*. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation, or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water or in the air or any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic, or hospital; any public library; and any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education or the Commissioner of Education of the State of New Jersey. … nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry, gender identity, or expression or affectional or sexual orientation in the admission of students.

Unlawful discrimination for employers and of public accommodation are specifically defined at N.J.S.A. 10:5-12. It is an unlawful employment practice:

> For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age…

Unlawful discrimination applicable to public accommodations is separately and specifically defined at N.J.S.A. 10:5-12 (f) which states that it is unlawful:

> For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding status,

> sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality is unwelcome, objectionable or not acceptable, desired or solicited…

Age is conspicuously missing from this list because age discrimination under the LAD pertains to employment discrimination, not public accommodations. Hotels and motels are entitled to and routinely set a minimum age for rental of a unit, as are other businesses such as car rentals services.

Age is a permissible basis by which places of accommodation may filter and regulate guests. Other public accommodations specifically listed under the statute are implicitly permitted to filter based upon age, such as taverns and clubs, which may limit attendees based upon age and whether or not alcoholic beverages are sold to crowds over the age of 21; or under the age of 18 in the event of "teen nights"; summer camps which may bar attendees based on age; theaters, which may limit attendees based upon age and the rating of the film; kindergartens; shooting galleries and pool halls.

Plaintiff's reliance on N.J.S.A. 10:5-12(g) is misplaced. Subsection (g) pertains to the rental or lease of housing; public accommodations are not housing. Moreover, owners ARE permitted to refuse to sell, rent, lease, assign or sublet housing based upon age, because age is also specifically absent from that prohibition:

> g. For any person, including but not limited to, any owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:
>
> (1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, familial status, disability, liability for service in the Armed Forces of the United States, nationality, or source of lawful income used for rental or mortgage payments;
>
> …
>
> (5) To refuse to rent or lease any real property to another person because that person's family includes children under 18 years of age, or to make an agreement, rental or lease of any real property which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This paragraph shall not apply to housing for older persons as defined in subsection mm. of section 5 of P.L.1945, c. 169 (C.10:5-5).

This section does prohibit landlord from refusing to rent or lease to a family which includes children under 18 years of age, However, owners are permitted to refuse to sell, rent, lease, assign or sublet housing based upon age because age is also specifically absent from this prohibition. Ordinance 2023-24 does not prohibit families including children under 18 years of age during the relevant time period. It prohibits groups of teens from renting rooms or houses without a responsible adult.

Appellants cherry-pick portions of the NJLAD that mention age, sprinkling them throughout the brief completely out of context and regardless of the fact that they are completely inapplicable to places of public accommodation and the conduct that is regulated by the subject ordinance. Reference to N.J.S.A. 10:5-12(f) makes it clear that public accommodations may absolutely regulate their clientele based on age. The Borough of Seaside Heights Ordinance 2023-24 mandates those distinctions for a short portion of each year in the interests and benefit of the public health, safety and welfare. The ordinance is legal and valid on its face.

5. THE TRIAL COURT CORRECTLY DETERMINED THAT THE ORDINANCE AT ISSUE IS SUBJECT TO RATIONAL BASIS REVIEW

Plaintiff's brief can be distilled into two main, interrelated points: 1) age is an improper classification for the legislature to use; and 2) the Ordinance must be evaluated by strict or intermediate scrutiny, not rational basis review. Neither of these points has merit.

First of course Plaintiff is confused concerning the relationship between the Fifth and Fourteenth Amendments to the Constitution. The Fifth Amendment was passed as part of the "Bill of Rights" in 1791. These first ten amendments only restrict the powers of the federal government, not state governments. The Fourteenth Amendment was passed in 1868 as part of the Reconstruction Amendments. The

Fourteenth Amendment states that "no State shall . . . ." Thus, the Fifth Amendment has been held applicable to the states through the Fourteenth Amendment.

When analyzing the issues in this case, the Fifth and the Fourteenth Amendments provide the same protections. Buckley v. Valeo, 424 U.S. 1, 93 (1976); Pb32. The Fifth Amendment provides that the federal government shall not deprive any person "of life, liberty, or property, without due process of law;" the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Plaintiffs argue that "[w]hile the trial judge did not find the laws at issue impermissibly interfere with the Plaintiffs' rights, (2T:44, In 3) it could have applied heightened scrutiny because the age classification at issue impacts a suspect or quasi-suspect class—'young legal adults' who are legally discriminated against because of their youth." Pb at 32 (emphasis supplied). The trial court held that "[a]ge is not a suspect classification under the Equal Protection Clause," (2T43:11-12), relying on Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976).

Plaintiff attempts to distinguish Mass. Bd. Of Ret. by pointing out that Mass. Bd. Of Ret. referenced the use of a maximum age for older adults. Plaintiffs characterize this difference as "a dispositive and materially different form of age-based classification." Plaintiff then argues that because the Supreme Court has not addressed "minimum age-based classifications," it is necessary to torture the

Supreme Court's opinion in Oregon v. Mitchell, 400 U.S. 112 (1970). Pb32-34. Plaintiffs then argue that although minimum age requirements like those upheld in Mass. Bd. Of Ret. are subject to rational basis review, maximum age requirements like that ones at issue here should be subject to some form of heighted scrutiny.

> For a classification to be "suspect" or "quasi-suspect" for heightened scrutiny, there must have been: a history of legally imposed discrimination based on that classification; the individuals must exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they must constitute an insular minority or be politically powerless. Lyng v. Castillo, 477 U.S. 635, 638 (1986) (citing Murgia, 427 U.S. at 313-14). A suspect or quasi-suspect class "is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection youth and deem them unconstitutional in this case. from the majoritarian political process." Murgia, 427 U.S. at 313. All three of these factors exist for young adults who are discriminated according to their youth. Pb35.

But many Circuit Courts have addressed minimum age requirements; none of held that heightened scrutiny is required. This latter holding has been adopted by both the New Jersey Supreme Court, Wurtzel v. Falcey, 69 N.J. 401 (1976), and numerous other courts in a wide variety of contexts, see e.g. Manson v. Edwards, 482 F.2d at 1076, 1077 (6 Cir. 1973) (minimum age to hold public office); United States v. Spencer, 473 F.2d 1009 (9th Cir. 1973) (age limits for compulsory military service); United States v. Duncan, 456 F.2d 1401, 1404—05 (9 Cir. 1972), vacated

on other grounds, 409 U.S. 814 (1972) (minimum age for jury duty); Perdido v. Immigration & Naturalization Service, 420 F.2d 1179 (5 Cir. 1969) (minimum age limits for exercise of certain rights of aliens); Armstrong v. Howell, 371 F.Supp. 48, 51—53 (D.Neb. 1974) (mandatory retirement); Republican College Council of Pa. v. Winner, 357 F.Supp. 739 (E.D.Pa. 1973) (minimum age for purchase of alcoholic beverages).

The case relied on by Plaintiff, Lyng v. Castillo, did not employ strict scrutiny.

> The District Court was persuaded that the statutory definition had a rational basis. It observed that the amendment made it more difficult for individuals who live together to "manipulate" the rules "so as to obtain separate household status and receive greater benefits"; that the administrative burden of "attempting to make individual household determinations as to 'household' status" was time consuming; and that unrelated persons who live together for reasons of economy or health are more likely " 'to actually be separate households' " than related families who live together. App. to Juris. Statement 5a–6a.
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> It held, however, that "a stricter standard of review than the 'rational basis' test" was required. Id., at 7a. Relying primarily on United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973), a case which it construed as holding that a "congressional desire to harm a politically unpopular group" could not justify the exclusion of household groups which contained unrelated persons, the District Court reasoned that "if the Supreme Court is willing to protect unpopular political groups it should even be more willing to protect the traditional family value of living together." App. to Juris.Statement 8a.
>
> We noted probable jurisdiction, 474 U.S. 994, 106 S.Ct. 1511, 89 L.Ed.2d 911 (1985), **and now reverse**. Lyng

> v. Castillo, 477 U.S. 635, 637–38, 106 S. Ct. 2727, 2729, 91 L. Ed. 2d 527 (1986)

Prom going 18 year olds do not qualify as the type of group entitled to heightened scrutiny any more than did the Plaintiffs in Lyng.

> **The District Court erred in judging the constitutionality of the statutory distinction under "heightened scrutiny." The disadvantaged class is that comprised by parents, children, and siblings. Close relatives are not a "suspect" or "quasi-suspect" class**. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless. . . . In fact, quite the contrary is true. Id.

6. APPELLANT'S OTHER CONSTITUTIONAL CLAIMS ARE MERITLESS

The right to privacy claim is meritless. The ordinance states that the hotel or motel owner must verify that the primary occupant of a room is over 21. It does not require a hotel or motel owner to enter or search rooms, to "regulate the identity of a room's occupant", whatever that means, or perform warrantless searches. It sets a minimum age requirement for a short period of time.

The right to association claim is similarly without merit. The ordinance states that the hotel or motel owner must verify that the primary occupant of a room is over 21. It does not regulate the associations of young people in any other context. The ordinance does not criminalize social association, it is not a criminal ordinance.

Criminal laws are state laws and criminalizing conduct solely within the Borough is preempted by State Law.

There is no fundamental right at issue, the Ordinance is subject to rational basis review.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the appeal be dismissed. The Court below ruled that the Borough had the authority to acquire the subject property through condemnation. Defendant's arguments are not novel, the issue raised is not substantial. Defendant is recycling the same stale procedural argument against the Borough's public purpose that was offered in their opposition to the Order to Show Cause. Public parking is a proper public purpose, the Borough is entitled to possession.

Respectfully Submitted,

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Sun Property Management, Inc d/b/a Sunrise Motel & Herb McGrath Family Partnership Inc. d/b/a Hersey Motel **Appellant,** **v.** **The Borough of Seaside Heights; The Borough Counsel of the Borough of Seaside Heights, JOHN DOES 1-100 (a fictitious name for persons presently unknown) and XYZ, INC. 1-100 (a fictitious name for a business entity presently unknown)** **Respondents**	:	Superior Court of New Jersey Law Division: Ocean County Docket Number: A-002683-24 On Appeal From An Order of Dismissal from the Superior Court of New Jersey Ocean County, Law Division, Civil Part, Ocean County (OCN-L-300-24) CIVIL ACTION Sat Below: Honorable Francis Hodgson, JR., J.S.C.

REPLY ON BEHALF OF APPELLANT, SUN PROPERTY MANAGEMENT INC. D/B/A SUNRISE MOTEL

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Dated: November 4, 2024

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LEGAL ARGUMENT

POINT ONE

APPELLANT, MOTEL/HOTEL OWNERS, HAVE STANDING TO MAINTAIN THEIR CLAIMS IN THIS MATTER

In support of their misguided argument the defendants rely upon O'Lone v. Department of Corrections, 313 N.J. Super 249 (App Div. 1998) to argue that this case should be dismissed because Hotel/Motel owners, such as Appellants do not have standing because "they are not personally aggrieved". (Rb 10)

Such a statement, is provably false as the caselaw, including O'Lone, unquestionably conveys standing to landlords who assert the rights of their tenants.

To begin, in O'Lone, the Court ruled a Caucasian plaintiff "should be treated as if he were in a protected group because he was allegedly terminated for his refusal to stop dating an African–American woman." Id. at 254–55. "Regardless of the race of this plaintiff, he suffered the same injury as a minority when he was discharged for allegedly associating with a member of a protected group." Id. at 255. "[T]o achieve substantial justice, the Court conclude that where the plaintiff is wrongfully discharged for associating with a member of a protected group, that is the functional equivalent of being a member of the protected group." Ibid.

The Court followed O'Lone in in their next decision known as Berner v. Enclave Condo. Ass'n, 322 N.J.Super. 229 (App.Div.), certif. denied, 162 N.J. 131 (1999). In Berner, a Caucasian plaintiff alleged that he was not permitted to lease his condominium unit to an African–American. Id. at 231–32. In that matter the Court ruled the plaintiff was "directly affected" by the alleged discrimination, because he lost the opportunity to lease the apartment, which cost him three months' rent. Id. at 234 & n. 2. Further the Berner Court rejected the argument "that a LAD plaintiff need be a member of a protected group" to be "an aggrieved person" under N.J.S.A. 10:5–13. Id. at 234–35.

The next decision on this issue was known as United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J.Super. 1 (App Div. 2001) where the Appellate Court held that landlords, asserting the rights of their tenants, had standing to challenge the Borough of Belmar's rental ordinance. Id at 50. In that matter, the Appellate Court invalidated the Borough of Belmar's ordinance after finding that the ordinance constituted an overly broad intrusion of summers tenants: fundamental privacy rights, right to share their dwelling with others, and right to substantive due process.

Specifically the court held that:

> "the effect of this Ordinance provision is to either exclude guests when all occupants are present or exclude occupants so that guests may be present, during the specified hours," concluding that this interfered with "summer residents' right to have visitors in their homes, a component of their right to privacy, and that it is overbroad in accomplishing a legitimate municipal goal, in violation of summer residents' due process rights." Id.

As it relates to the summer residents' right to privacy, the appellate panel reasoned:

> We first observe that the right to have guests or visitors—non-occupants—present in one's home is not, in and of itself, a constitutional or fundamental right. However, as the United States Supreme Court has acknowledged, the right to privacy in one's home encompasses the right to host guests. In an unrelated context, the United States Supreme Court explored the relationship of social guests and privacy rights. In Minnesota v. Olson, 495 U.S. 91, 95–100, 110 S.Ct. 1684, 1687–90, 109 L.Ed.2d 85, 92–96 (1990), the Court held that an overnight guest had a reasonable expectation of privacy, so that a warrantless entry into the house to arrest him violated his Fourth Amendment right to freedom from an unreasonable search and seizure. The Court commented that its holding "merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." 495 U.S. at 98, 110 S.Ct. at 1689, 109 L.Ed.2d at 94.
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> [...]
>
> [P]laintiffs and their summer tenants have no complaint about any physical intrusion into, or search of their homes. Nevertheless, their right to privacy in their homes includes the choice to share it with others. (emphasis added)

> The right to privacy in New Jersey is expansive. It derives not only from the Search and Seizure Clause of the New Jersey Constitution, N.J. Const. art. I, ¶ 7, and New Jersey common law, but also from the "natural and unalienable rights" which all people have under Article I, Paragraph 1 of the New Jersey Constitution. N.J. Const. art. I, ¶ 1, *supra*, p. 17, 777 A.2d pp. 959–60. Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 94–99, 609 A.2d 11 (1992) (declining to decide whether a private employer's random urine testing of an employee for drugs violated the employee's right to privacy, but holding that "constitutional privacy protections may form the basis for a clear mandate of public policy supporting a wrongful-discharge claim"). A summer tenants' right to share their homes with guests or visitors, even when all occupants are present, is within the panoply of their right of privacy. Id. at 33-34.

Like the plaintiff in United Property Owners, the Appellants here, are Hotel/Motel owners who have a substantial stake in the outcome and a likelihood of harm if the decision is adverse to them. Specifically, Appellants content the Ordinance requires that they violate the fundamental rights of their guest as long as the ordinance remains in effect; including but not limited, to guests' fundamental rights of privacy, fundamental right to associate socially, right to share his or her home with other guests or visitors, & the right to be free from warrantless searches.

As such, Appellants are not strangers to this proceeding, and the Court should be satisfied that they have standing to challenge the Ordinance. See United Property Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J.Super. 1 (App Div. 2001) at 51 finding (Plaintiff property owners had standing to challenge the rental Ordinance)

POINT TWO

THE RESPONDENTS' INABILITY TO EXPLAIN AMBIGUITIES WITHIN THE ORDINANCE DEMONSTRATES THAT THE ORDINANCE IS IMPERMISSIBLY VAGUE

The "The constitutional doctrine of vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" State v. Borjas, 436 N.J. Super. 375, 395 (App. Div. 2014)(quoting State v. Emmons, 397 N.J. Super. 112, 124 (App. Div. 2007), certif. denied, 195 N.J. 421 (2008)).

> A statute [or rule] may either be vague facially or as applied. A statute is facially vague only if it is vague in all its applications, while a statute is vague as applied only if it is vague when applied to the circumstances of a specific case. A law is void as a matter of due process if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Vague laws are prohibited because they fail to give adequate notice that certain conduct will put the actor at risk of liability.

State v. Heine, 424 N.J. Super. 48, 65 (App. Div. 2012) (citations and internal punctuation omitted). See Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983) ("Vague laws deprive citizens of adequate notice of proscribed conduct, ... and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement.").

When interpreting a statute, Court Rule or administrative regulation, the overarching objective is to further the creator's intent. In re Young, 202 N.J. 50, 63 (2010). "[T]he best indicator of that intent is the plain language chosen by the [drafter]," State V. Gandhi, 201 N.J. 161, 177 (2010), and the composition and structure of the statute itself. State v. Smith, 197 N.J. 325, 333 (2009). The words used are to be given their ordinary meaning absent explicit indication of special meaning. Young, 202 N.J. at 63. "It is a cardinal rule of statutory construction that full effect should be given, if possible, to every word of a statute." McCann v. Clerk of City of Jersey City, 167 N.J. 311, 321 (2001); Cupido v. Perez, 415 N.J. Super. 587, 595 (App. Div. 2010). "If the plain language leads to a clear and unambiguous result, then [the court's] interpretive process is over." Gandhi, 201 N.J. at 177 (citation omitted). See Ryan v. Renny, 203 N.J. 37, 54 (2010).

In the present matter the Appellants allege that the Ordinance cannot survive a vagueness challenge because the terms "Guardian", "Immediate Family Member", & "Compliance" do not provide the Hotel/Motel Owners or the residents of the Borough with a clear definition of what conduct is permissible. (Ab 28 – 30)

Even further, the Respondents' opposition does not address the meaning of the terms "Guardian" "Immediate Family Member" or "compliance". (Rb 12-13) In fact, Respondents' opposition does not attempt to explain or clarify the language of the ordinance. Id.

Instead of an explanation the Respondents argue that definitions are not necessary while misstating the very language they claim does not need to be defined. See (Rb 13) stating ("If an individual is over the age of 21 and has a familial[1] and/or legal relationship[2] with the other proposed occupants in a room, they may rent during April 15-June 30.")

In doing so, Respondents demonstrate that the Ordinance does not provide Hotel/Motel Owners or the residents of the Borough with a clear definition of what conduct is permissible.

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[1] Respondent uses broader term of "familial" instead of the term "immediate family member"

[2] Respondent uses the term "legal relationship" instead of legal guardian.

Moreover, the question posed in Betancourt v. Town of West New York, 338 N.J.Super. 415 (App. Div. 2001), remains unanswered as Hotel/Motel owners do not know what whether 18, 19, 20 year-old babysitter, teacher, cleric, or family friend is permitted occupy a room with a minor placed in their care. Likewise, Respondents have not addressed whether immediate family member includes the legal definition as stated in Baker. See State v. Baker, 81 N.J. 99 (1979) (upholding the right to arrange a household with people of one's choosing); see also Glasboro v. Vallorosi, 117 N.J. 421, 422, 428, 432 (1990) (following Baker and recognizing a group of ten unrelated college students as the functional equivalent of a family for purposes of borough ordinance limiting use and occupancy of dwellings to "families" where the relationship was marked by stability and permanency.)

Last, Respondent's opposition does not address the question of how a hotel/motel owner shall actually complies with the ordinance. The questions concerning: (1) How is a Hotel/Motel owner supposed to ascertain the identity of every occupant within their building at all times? (2) How does the hotel/motel owner go about ascertaining the identity of these occupants? (3) What does compliance mean? How does one go about demonstrating that they have complied? all remain unanswered.

As such, with so many terms left undefined and open to varying interpretations, the Ordinance does not provide the Hotel/Motel Owners or the residents of the Borough with a clear definition of what conduct is permissible. Even more significantly, it compels Motel/Hotel Owners to go into each room that is occupied to determine each person's identity, age, and relationship that primary occupant, irregardless of whether the activity is prohibited by the constitution.

POINT THREE

THE APPELLANTS' CONSTITUTIONAL CLAIMS ARE NOT MERITLESS

Point 6 of Respondent's opposition argues that Plaintiff's claims to privacy are meritless because the "ordinance states that the hotel or motel owner must verify that the primary occupant of the room is over 21." And "it does not require a motel or hotel owner to enter or search rooms to regulate the identity of the rooms occupant".

Moreover, Point 6 also argues that Appellant's right to association claim is without merit because "the hotel motel owner must verify the primary occupant of a room is over 21" and "it does not regulate the association of young people in any other content"

Both arguments are fatally flawed for the reasons set out fully in Point Three (Ab 10 – 23) of Appellants Brief.

CONCLUSION

Accordingly, for the foregoing reasons it is respectfully requested the Court vacate the dismissal and invalidate the Ordinance in its entirety.

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