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SUPREME COURT OF NEW JERSEY
Docket No. 090287

HOBOKEN FOR RESPONSIBLE CANNABIS, INC., AN NJ NONPROFIT CORPORATION, Plaintiff-Petitioner, and ELIZABETH URTECHO Intervenor/Plaintiff-Petitioner vs. CITY OF HOBOKEN PLANNING BOARD and BLUE VIOLETS, LLC, Defendants.	ON PETITION FOR CERTIFICATION FROM THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY Appellate Docket No.: A-556-23 Sat Below: Hon. Robert Gilson, P.J.A.D. Hon. Lisa Firko, J.A.D. Hon. Avis Bishop-Thompson, J.A.D. ON APPEAL FROM FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Law Division Docket No.: HUD-L-3520-22 Sat Below: Hon. Anthony V. D'Elia, J.S.C.

PLAINTIFFS-PETITIONERS HOBOKEN FOR RESPONSIBLE CANNABIS, INC. AN NJ NON-PROFIT CORPORATION'S AND ELIZABETH URTECHO'S REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR CERTIFICATION

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LEGAL ARGUMENT

I. Certification is warranted because the Appellate Division's decision raises questions of general public importance about what a "municipal agency" and an "application for development" under the MLUL are; these questions have never been addressed by the Court but should be.

Respondents do not dispute the Petition raises novel issues or that that they have not previously been addressed by the Court. The Board avers: "This case is different and unique from a land use perspective." [Bd. Rb17]. Blue Violets posits, "As part of its unique cannabis-related development process, the City of Hoboken created the City of Hoboken Cannabis Review Board (the "CRB") – an arm of the Planning Board . . ." [BV Rb1]. They present no cogent justification for the Appellate Division's expansion of the statutorily-defined term "municipal agency" in the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-5, to include the CRB – a board with no authority under the MLUL – within its ambit, or the term "application for development" as defined by N.J.S.A. 40:55D-3 to include the CRB application with the applications that are submitted to planning and zoning boards for relief under the MLUL. Since the parties agree that the issue is novel, the other requirement for certification of the petition under R. 2:12-4 – that the petition raise a question of general public importance. The MLUL does not allow subordinate boards to take action under the MLUL at all, but the Appellate Division's decision did by

modifying defined term in the statute. This Court must clarify whether the MLUL authorizes this significant change.

There are more than 500 municipalities in the State that exercise land use control under the MLUL, many with separate planning and zoning boards. The concept of home rule contemplates that substantive land use controls are different, but the organizational structure is the same – the land use approval process is only initiated by filing the application described in the definition of "application for development"[1] in N.J.S.A. 40:55D-3 with either a planning board or a zoning board. That is, until this decision upset that process.

The decision will upend the careful balance struck by the Legislature that affords municipalities the right to change their zoning until a complete application for development, defined by N.J.S.A. 40:55D-3, is filed. Although Blue Violets and the Board claim Hoboken's "unique" cannabis framework sets this case apart and it is not of general public importance, the claim rings hollow. The decision undermines the scrupulously constructed rule in Dunbar v. Franklin Twp. Bd. of Adj., 233 N.J. 546 (2018). The decision is just, if not more unfair to municipalities as the Time of Decision rule was to developers

[1] There are even "applications" that may be filed with a planning board, such as an application for conceptual review pursuant to N.J.S.A. 40:55D-10.1, that expressly not applications for development.

Municipalities do not "circumvent" the Time of Application ("TOA") Rule, N.J.S.A. 40:55D-10.5, by adopting new zoning. They have that power, which can be used at any time and for any reason listed in N.J.S.A. 40:55D-2. However, the decision encourages developers faced with new zoning ordinances that could torpedo projects still on the draftsmen's table to find another municipal board, file an application, and make the same argument that the Appellate Division adopted here. When millions of dollars are at stake, developers desperate to salvage a project will use every argument available; a reed as slender as this – an advisory board is a "municipal agency" and its application was an "application for development" under the MLUL to skirt Dunbar is too tempting to avoid, and opens the door to copycat scenarios.

Dunbar, provides the "roadmap" to insulate applications for development under the TOA Rule: file the application for development along with all documents required by the ordinance for approval of the application. 233 N.J. at 562-563. Nothing prevents developers from submitting an application for development to a planning or zoning board, except if it is not ready. Blue Violets, for instance, waited to prepare its architectural site plan until April 26, 2022[2] – which it could not give to the CRB – but necessary for the application

[2] These plans were prepared three weeks after the City Council adopted the 600-foot restriction, and two days before the restriction took effect. [Da392-393].

checklist filed with Board (Da331 at 14), until after that date. [Da316; Da396]. Whether it knew it was too late or not is irrelevant; the developer in Dunbar deliberately tried to beat the new zoning – it failed, because under the Court's objective standard, the required documents were not filed before the ordinance took effect. Id. at 552, 564-565.

And the notion that a municipality could lawfully create a gate to prevent a developer from filing an application for development is both wrong legally and as a matter of fact here, since neither Hoboken's Zoning Ordinance nor its Site Plan and Conditional Use Checklist required the CRB approval as a predicate document to the submission of the Board's application. [Da331-334; Da386]. In fact, § 196-33.1(E)(2) of the Zoning Ordinance merely required a letter of endorsement and community host agreement from the Cannabis Review Board prior to the operation of a cannabis retail store, just like site plan approval was required by § 196-33.1(E)(4). [Da386]. This is plainly the approval of another governmental agency required by the application for development that under N.J.S.A. 40:55D-22(b), is a condition of the Board's approval, just like a requirement that a developer obtain approval from the NJDEP or county planning board, or as here, the State Cannabis Regulatory Commission. [Da386]. An ordinance requiring submission of other agency permits as checklist items is *ultra vires* since an "application for development"

seeks relief pursuant to the terms of the ordinances that are adopted under the MLUL. The approval of a board or agency created outside the MLUL cannot be "required for approval" under an ordinance created pursuant to the MLUL.

However, the Appellate Division's decision lays out the pathway to avoiding new zoning through a deconstruction of the mandatory definitions in the MLUL, since "[f]or the purposes *of this act,* unless the context clearly indicates a different meaning," certain definitions will apply . . . [and] if a term used in the MLUL is mandatory, no alteration of it would be permitted." Rumson Est., Inc. v. Mayor and Council of the Bo. of Fair Haven, 177 N.J. 317, 327 (2003)(emphasis in original). There is no room for other municipal agencies or applications for development, however "unique" they may be, within the rubric of the MLUL, which identifies the only boards allowed to exercise land use approval power. Were this not true, the Legislature would have provided for other boards. Now, all it takes is a bit of creative thinking even when it is too late to finalize the actual "application for development" to skirt new zoning because there are no rules, no process and no controls for this new theory that municipal advisory boards established under other statutory regimes can be "municipal agencies" under the MLUL, irrespective of the requirement of "acting pursuant to this act" in N.J.S.A. 40:55D-3.

Neither the Appellate Division nor the Respondents explain how the MLUL authorizes an "arm" of a planning board, particularly in Hoboken as there is no ordinance that does this. The ordinance enabling the CRB to act as advisory body – though purportedly acting as a gatekeeper for cannabis applications – does not adopt a definition identifying the CRB as a "municipal agency" even if it could, nor is there any requirement in Hoboken's Zoning Ordinance that requires receipt of the CRB approval before proceeding. That exists only in an ordinance adopted pursuant to N.J.S.A. 24:6I-45.

The Court should grant certification and clarify that the only municipal agencies are the ones identified in N.J.S.A. 40:55D-5 and that an "application for development" is only what N.J.S.A. 40:55D-3 defines it to be.

II. Certification is warranted because the Appellate Division's decision directly conflicts with this Court's holding in Dunbar.

Contrary to the Respondents' positions, it is hardly disputable that the Appellate Division's decision improperly extends Dunbar, *supra*. The list of documents cataloged by the Appellate Division that Blue Violets needed to submit to the CRB (Pc5-8a), are not equivalent to what must be submitted to the Board to initiate an application for development. [Bd. Rb18]. This reasoning alludes to the one this Court rejected in Dunbar as "fatally imprecise." 233 N.J. at 562. While this Court "determined that, to be protected by the TOA Rule, applicants must submit precisely what N.J.S.A. 40:55D-3

requires – 'the application form and all accompanying documents required by ordinance for approval of a . . . site plan [and], . . . conditional use . . .' id. at 563-564 (emphasis added), the decision applied the TOA Rule because Blue Violets submitted different documents that required by Hoboken's Zoning Ordinance. The ruling does not adhere to the Dunbar precedent.

The "spirit" of the TOA Rule requires developers to file all documents required for approval, not just spend money, or even file some. And the "spirit" of the TOA Rule is set forth in its plain language, as interpreted by Dunbar to "bring consistency, statewide uniformity, and predictability to the approval process," id. at 563, not the judicial modification of the statute. Moreover, it is not absurd to have a developer seeking to violate the zoning ordinance obtain a conditional use variance upon "special reasons" pursuant to N.J.S.A. 40:55D-70(d)(3) in the same way it is to have a developer already approved once have to reapply to the same board under a new ordinance for an identical approval, as would have occurred in Jai Sai Ram, LLC v. Planning/Zoning Bd. of the Bo. of Toms River, 446 N.J. Super. 338 (App. Div. 2016).

Also problematic is that the Board deemed Blue Violets' conditional use and site plan application incomplete twice, after the 600-foot restriction took effect. These determinations, which demonstrate the plain departure from the rule established in Dunbar also highlight the problem of having separate

applications for development on file for the same project. The Appellate Division did not address how a developer can have an application for development that is both complete and incomplete at the same time, or as here, a complete application for development (according to the CRB) months before an application is filed with the planning board or zoning board. It is impossible to reconcile this duality within the comprehensive framework that is the MLUL since the completeness determination, in addition to triggering the TOA Rule, also triggers the time for action under the statute, N.J.S.A. 40:55D-10.3, or else, by its plain language, an automatic approval.

Neither the MLUL nor the Court's holding in Dunbar leave any room for special or "unique" types of land use proceedings outside those expressly sanctioned by the MLUL. The Court's holding – that submission of the application form and all documents required for approval of a site plan and conditional use means all of those documents, stands in stark contrast to the Appellate Division's ruling that an application to another agency was itself the application for development. But Dunbar is clear:. a developer seeking the protections under the TOA Rule must submit all the documents required by the municipal ordinance for the type of approval the developer seeks before the ordinance goes into effect. Blue Violets did not.

III. The Petition does not raise any new arguments.

As noted in Point I of the Petition brief, this Court has never addressed the definitions of "application for development" or "municipal agency" in N.J.S.A. 40:55D-3 and -5. The Petition cites to two instances, Ientile v. Bd. of Adj. of the Twp. of Colts Neck, 271 N.J. Super. 326 (App. Div. 1994), and Deegan v. Perth Amboy Redevelopment Agency, 374 N.J. Super. 80 (App. Div. 2005), where the Appellate Division previously confirmed that those definitions mean what they say and nothing more. This panel held the opposite.

Although these cases were not cited below, that is the exact argument Petitioners made to the Appellate Division on pages 17-18 of their brief – that because the statutory terms were clear, another municipal board could not be a "municipal agency" and its application form and documents could not be *the* "application for development. [HfRC App. Div. Rb17-18]. Likewise, Petitioners made this exact argument at the prerogative writ trial in the Law Division. [PcS10a-14a at 18-22 to 26-5]. This "issue" was presented to both the Law Division and the Appellate Division, is not new, and is not subject to the bar described in Nieder v. Royal Indem. Ins. Co., 62 N.J. 229 (1973).

CONCLUSION

The Appellate Division's decision is a wave-of-the hand dismissal of the plain language statutory definitions in the MLUL, the overall integrity of the

comprehensive land use scheme adopted by the Legislature, and an unwarranted and unauthorized dismantling of this Court's holding in Dunbar. The plain language of the MLUL is unambiguous that only planning boards, boards of adjustment or governing bodies are "municipal agencies" provided that they are acting pursuant to the MLUL. A municipal advisory board that is none of those and does not so act cannot be a "municipal agency." The law is even clearer with respect to what constitutes an "application for development." This Court must clarify that municipalities cannot, whether intentionally or unintentionally, deviate from these definitions.

Seven years ago, this Court held protection under the TOA Rule required a developer seeking conditional use and site plan approval to submit all the documents the municipal ordinance "checklist" required. The Appellate Division's decision unravels this ruling, and therefore, Plaintiffs-Petitioners Hoboken for Responsible Cannabis, Inc., and Elizabeth Urtecho respectfully request that this Court grant their petition for certification.

Respectfully submitted,

BEATTIE PADOVANO, LLC
Attorneys for Hoboken for Responsible Cannabis, Inc. and Elizabeth Urtecho

Dated: February 24, 2025

By: *__/s/ Daniel L. Steinhagen___*
Daniel L. Steinhagen, Esq.