SUPREME COURT OF NEW JERSEY

HOBOKEN FOR RESPONSIBLE CANNABIS, INC., AN NJ NONPROFIT CORPORATION, Plaintiff-Petitioner, and ELIZABETH URTECHO, Intervenor/Plaintiff-Petitioner, v. CITY OF HOBOKEN PLANNING BOARD and BLUE VIOLETS LLC, Defendants-Respondents.	SUPREME COURT DOCKET NUMBER: 090287 Civil Action On Petition for Certification of Appeal From the Superior Court of New Jersey, Appellate Division Docket No.: A-556-23 Sat Below: The Honorable Judges Robert Gilson, P.J.A.D., Lisa Firko, J.A.D., and Avis Bishop-Thompson, J.A.D. Submitted: February 13, 2025

MEMORANDUM OF LAW ON BEHALF OF DEFENDANT/RESPONDENT BLUE VIOLETS LLC IN OPPOSITION TO PLAINTIFFS/PETITIONERS' PETITION FOR CERTIFICATION

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SHORT COUNTERSTATEMENT OF THE MATTER INVOLVED

Defendant-Respondent, Blue Violets LLC ("Blue Violets") respectfully submits this Memorandum of Law in opposition to the Petition for Certification (the "Petition") of Plaintiffs-Petitioners, Hoboken for Responsible Cannabis, Inc. and Elizabeth Urtecho (together, "Plaintiffs"), as to the December 30, 2024 final judgment of the Appellate Division (the "Opinion"). Blue Violets respectfully submits that the Petition should be denied in its entirety.

This case involves a fact-specific dispute concerning the approval of a single cannabis micro-dispensary in Hoboken, New Jersey. 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 tasked with reviewing certain cannabis-related development applications. Pursuant to Hoboken's local ordinances, any applicant seeking approval for a cannabis-related use in Hoboken is required to first obtain approval from the CRB prior to proceeding to the Planning Board. In order to obtain approval from the CRB, an applicant is required to submit a robust land use development application, attend a public hearing, and testify before, and respond to questions from, the public and members of the CRB.

Blue Violets – a certified minority/women-owned small business – spent several months and tens of thousands of dollars securing and preparing all

necessary components of the CRB application in compliance with Hoboken's local ordinances. Immediately after Blue Violets submitted a complete application to the CRB – and in direct response to that application – certain members of the City of Hoboken's local governing body introduced and eventually enacted an ordinance that would frustrate Blue Violets' application.

As reflected in the thorough Opinion, the three-judge appellate panel unanimously held that Blue Violets' submission of a complete application to the CRB triggered the Time of Application Rule (the "TOA Rule") – a rule providing that development regulations in effect on the date of submission of an application for development shall govern the review of that application. In rendering its well-reasoned decision, the Appellate Division acknowledged that the TOA Rule was enacted specifically to avoid situations – like this one – where a developer spends time and money pursuing an application, only to have the municipality change the zoning to the developer's detriment while the application was pending. The Appellate Division gave due consideration to the Legislative intent and applied it in a way to avoid a gravely inequitable result. In that regard, the Opinion is grounded in the New Jersey Legislature's expressly stated intent underpinning the TOA Rule, as well as unambiguous New Jersey statutory and decisional law, and does not warrant review by this Court.

Dissatisfied with the outcome, Plaintiffs now seek to have this Court scrutinize the Appellate Division's unanimous, prudent decision. Plaintiffs, however, fail to provide any legitimate basis warranting certification. In reality, no grounds for certification exist in this party-specific, fact-dependent dispute arising out of a unique land use process specific to the City of Hoboken and limited to this one cannabis-related development. To that end, the Appellate Division's decision does not raise any issues of general public importance, nor does it conflict with controlling New Jersey case law. The entire Petition is nothing more than a proverbial second bite at the apple by Plaintiffs to have another Court review their claims (and new arguments) after those claims were rejected by the Appellate Division. That, however, is not sufficiently "important" to justify certification.

At bottom, Plaintiffs' Petition fails to articulate, much less satisfy, the stringent criteria required to warrant certification. Certification is plainly not warranted here, and Blue Violets respectfully requests the Petition be denied.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the panel correctly hold that Blue Violets' submission of a complete application to CRB – a separate arm of the City of Hoboken Planning Board tasked with reviewing and approving cannabis-related site plan applications pursuant to the land use powers delegated to it by Hoboken's ordinances – triggered the Time of Application Rule under the MLUL?

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION FAILS TO SATISFY THE REQUISITE STANDARD PURSUANT TO RULE 2:12-4

The Petition should be denied for the simple reason that it fails to meet the stringent criteria required for this Court's review. Rule 2:12-4 provides:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

In support of their Petition, Plaintiffs advance two contradictory arguments which they contend warrant the grant of certification. First, Plaintiffs argue the Appellate Division's decision raises questions of "general public importance" that have never been addressed by any court. Second, Plaintiffs

argue that the Appellate Division's decision directly conflicts with this Court's holding in Dunbar Homes, Inc. v. Bd. of Adj., 448 N.J. 546 (2018). As explained below, both of those arguments lack merit.

A. The Appellate Division's Decision Does Not Present Any Issue of General Public Importance

Rather than presenting any legitimate issues of general public importance (because none exist), Plaintiffs' Petition simply reargues[1] the merits of the fact-specific issues that were decided by the Appellate Division. In reality, the Appellate Division's cogent decision articulates an exceedingly narrow holding based on a thorough analysis of a fact-intensive situation.

The Appellate Division reviewed and analyzed, in painstaking detail, a very limited question premised on a unique set of facts. To that end, the Appellate Division was tasked with deciding whether, under the specific facts and circumstances presented in this case, Blue Violets submission of a complete application to the CRB triggered the TOA Rule. In answering that narrow question in the affirmative, the Appellate Division thoroughly examined the CRB's mandatory role in Hoboken's cannabis-related development process, the onerous requirements necessary to apply for and obtain CRB approval, and the

[1] In addition to rearguing the merits, Plaintiffs attempt to raise several new arguments not raised at any stage below. As set forth in Section III, *infra*, the Court should refuse to consider those improper arguments.

significant amount of time and resources Blue Violets expended to satisfy the CRB's application requirements. The Appellate Division also performed a robust analysis of the New Jersey Legislature's intent in adopting the TOA Rule, as well as the binding case law in this State interpreting both the TOA Rule and the legislative intent. Applying those principles to the fact-specific matter, the Appellate Division unanimously concluded that "Blue Violets' submission of a complete application to the CRB triggered the TOA Rule." (PcA29.) That holding – while certainly important to the parties in this matter, particularly Blue Violets – does not implicate any issue of general public importance. See Bandel v. Friedrich, 122 N.J. 235, 237 (1991) ("Unsettled questions of general importance" do not arise from decisions that "reflect the application of established principles [] to an intensely-factual situation.")

Unable to articulate any legitimate issue of "general public importance" arising from the Appellate Division's decision, Plaintiffs engage in wild hyperbole in an attempt to manufacture a far-reaching public impact where one simply does not exist. For example, Plaintiffs baselessly contend that the Opinion somehow "handcuffs the governing body's ability to protect the community's safety and welfare." (Pb12.) Not so. The Appellate Division's decision does not, in any way, prohibit local governing bodies from protecting the community's safety and welfare. Rather, the Appellate Division's decision

simply affirmed the conclusions made by one Planning Board in one municipality (*i.e.*, the City of Hoboken), in this one specific instance, that a change to the local zoning ordinance made after the submission of an application for development should not frustrate that developer's application. In other words, the Appellate Division prevented one municipality from violating the TOA Rule.

Even more absurd is Plaintiffs' argument that the Opinion can somehow be interpreted in a manner that strips local planning boards and/or zoning boards of their respective powers. Plaintiffs' contention that the Appellate Division's decision will somehow permit any so-called "inferior body" ever established[2] to usurp the zoning powers of a local planning board or zoning board strains all levels of credibility. In fact, nothing could be further from the truth. The Appellate Division's decision does not opine on or otherwise implicate any so-called "inferior body" other than Hoboken's unique CRB. Nor can any aspect of the Appellate Division's decision be realistically construed as conferring ultimate land use power on that one so-called "inferior body" addressed in the Opinion. Simply put, the Appellate Division's decision does not implicate,

[2] Relatedly, Plaintiffs' contention that the CRB plays "no role in the land use approval process" is simply disingenuous. As the Appellate Division correctly noted, Hoboken's ordinances make clear that CRB approval is a necessary requirement for obtaining cannabis-related approvals. (PcA3.)

much less impede upon, the zoning powers of local planning boards or zoning boards. The Appellate Division simply concluded that an application to this specific municipal agency (the CRB) triggered the TOA Rule in this specific instance. Nothing more.

Significantly, had the Appellate Division reached the opposite conclusion on the narrow issue presented in this matter – *i.e.*, that Blue Violets' submission of a complete application to the CRB *did not* trigger the TOA Rule – such a ruling could have raised drastic issues of public importance. That conclusion could have given a roadmap to every other municipality on how to circumvent the TOA Rule. A municipality could simply create a board to act as a gate in any feasible scenario, require applicants to comply with onerous application requirements and obtain final approval from that agency, and in the meantime change local ordinances to frustrate undesirable development applications. That is the ***exact*** scenario the New Jersey Legislature sought to avoid when enacting the TOA Rule.

Thankfully, that is not what has occurred here. The Appellate Division, reviewing this highly fact-specific scenario, understood that the City of Hoboken intended the CRB to serve as the beginning of the development application process for cannabis within the municipality, and upheld the Planning Board's conclusions. Notwithstanding their desperate hyperbole,

Plaintiffs have utterly failed to establish that the Opinion raises any question of general public importance. Accordingly, Plaintiffs' Petition should be denied.

B. The Appellate Division's Unanimous Decision Does Not Conflict with New Jersey Precedent

After arguing that certification is warranted because the issues "have never been addressed by this Court," Plaintiffs contend that the Opinion somehow conflicts with this Court's decision in Dunbar. Plaintiffs' inherently contradictory argument lacks merit.

Plaintiffs' flawed argument ignores the unique facts and circumstances at play in this matter. In Dunbar, unlike in this matter, the issue before this Court was whether an incomplete application submitted to the planning board for site plan approval and a (d)(3) variance triggered the TOA Rule's protections. Dunbar, 233 N.J. at 550. Significantly, the applicant, who sought approval to build garden apartments in Franklin Township, was aware the township was in the process of adopting an ordinance eliminating garden apartments. Id. at 551. Understanding the implications and timing of the forthcoming ordinance, the developer rushed to submit a woefully deficient application with the planning board, the day before the township formally adopted the ordinance, in an attempt to avail itself of the protections of the TOA Rule. Id. Based on the facts presented in that case, this Court held that the developer's admittedly incomplete application did not benefit from the TOA Rule. Id.

This matter is completely inapposite. Unlike in Dunbar, this matter does not involve a typical conditional use application submitted to the planning board. Rather, this matter involves an issue not contemplated or addressed by Dunbar – a situation where the City of Hoboken created a unique "review board" (*i.e.*, a municipal agency) and required all cannabis-related developers to comply with arduous application requirements in order to secure CRB approval. Under Hoboken's local ordinances, CRB approval was required before an applicant was permitted to proceed to the planning board or zoning board. Moreover, unlike the developer in Dunbar, Blue Violets did not submit a knowingly deficient application at the eleventh hour in an attempt to avail itself of the protections of the TOA Rule. In fact, the exact opposite is true. At the time Blue Violets submitted a complete application with the CRB, it was compliant with all local ordinances. Immediately after Blue Violets submitted a complete application to the CRB – and in direct response to that application – certain members of the City of Hoboken introduced and eventually adopted an ordinance specifically designed to frustrate Blue Violets' application.

As explained below, the Appellate Division correctly found that Blue Violets' submission of a complete application to the CRB triggered the TOA Rule. That decision does not conflict with the holding in Dunbar in any way. Contrary to Plaintiffs' argument, the holding in Dunbar did not create a "clear

and unambiguous" rule applicable to every feasible scenario. Instead, the Court in Dunbar rendered a well-reasoned decision based on the facts and circumstances of that matter. The Appellate Division did the same thing in this matter. In fact, the Appellate Division performed a thorough analysis of the decision in Dunbar and relied, in part, on Dunbar in rendering its decision. (PcA 21-23.) The Appellate Division, however, correctly acknowledged that the current matter is not analogous to Dunbar and endeavored to (and did, in fact) reach a correct decision based on the unique facts and circumstances in this matter. The Appellate Division's unanimous and well-reasoned decision should not be disturbed. See, e.g., In re Cont. for Route 280, Section 7U Exit Project, 89 N.J. 1, 2 (1982) (dismissing petition because, in relevant part, the decision at issue reflected an application of the Court's prior jurisprudence and did not present a conflict of judicial decisions.)

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

Not only are Plaintiffs unable to meet the procedural standard to justify certification, but the single substantive "error" they contend occurred is without merit, further warranting denial of the Petition. As explained below, Plaintiffs' hyper-technical argument outright ignores the actual issue decided by the Appellate Division, the unique facts and circumstances at play in this matter, and the New Jersey Legislature's stated intent and purpose for enacting the TOA

Rule. The Appellate Division – understanding those issues – unanimously rendered the correct decision.

II. THE PANEL CORRECTLY APPLIED THE TOA RULE IN A MANNER WHICH EFFECTUATED THE SPIRIT AND INTENT OF THE RULE AND AVOIDED AN ABSURD RESULT

Although not addressed by Plaintiffs in their Petition, the Appellate Division applied the well-settled principles underlying the TOA Rule to the narrow matter before it to effectuate the Legislature's intent and to avoid a manifestly unjust result.

The TOA Rule provides:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance. . .that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.
>
> [N.J.S.A. 40:55D-10.5.]

In construing legislative provisions, the court's "overriding goal is to give effect to the Legislature's intent." State v. D.A., 191 N.J. 158, 164 (2007) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). While the plain language of the statute is ordinarily the best indicator of legislative intent, New Jersey courts "do not follow that rule when to do so would produce an absurd result, at odds

with the clear purpose of the legislation." Jai Sai Ram, LLC v. Planning/Zoning Bd. of Borough of Toms River, 446 N.J. Super. 338, 345 (App. Div. 2016)[3] (citing Perrelli v. Pastorelle, 206 N.J. 193, 200-01 (2011)). Indeed, the New Jersey Supreme Court has made clear that "where a literal interpretation would create a manifestly absurd result, contrary to public policy, the spirt of the law should control." Id. (quoting Hubbard v. Reed, 168 N.J. 387, 392 (2001)); see also Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 540-41 (2012). "Thus, when a literal interpretation of individual statutory terms or provisions would lead to results inconsistent with the overall purpose of the statute, that interpretation should be rejected." Hubbard, 168 N.J. at 392-93 (citation omitted); see also N.J.S.A. 40:55D-136 ("The provisions of this act shall be liberally construed to effectuate the purpose of this act.")

As the panel correctly acknowledged, the clear purpose of the TOA Rule "was to assist developers and property owners by obviating the time of decision rule." Jai Sai Ram, 446 N.J. Super. at 343 ("The time of decision rule allowed municipalities to block proposed developments by changing applicable zoning ordinances while the development applications were being considered.") "The

[3] Plaintiffs spend significant time attempting to distinguish the facts of this matter from the facts in Jai Sai Ram. The panel, however, relied on Jai Sai Ram to articulate the well-settled legislative intent behind the TOA Rule, not to draw factual analogies between that matter and this matter.

Legislature was concerned about situations in which a developer would spend time and money pursuing an application, only to have the municipality change the zoning to the developer's detriment while the application was pending." Id. at 344. Indeed, the Sponsor's Statement reflects the statute's purpose, and provides as follows:

> Under current law, applicants are subject to changes to municipal ordinances that are made after the application has been filed, and even after a building permit has been issued. . .Application of this rule sometimes causes inequitable results, such as when an applicant has expended considerable amounts of money for professional services and documentation that become unusable after the ordinance has been amended. [The TOA Rule] effectively prohibit[s] municipalities from responding to an application for development by changing the law to frustrate the application. . .
>
> [Id. (quoting Sponsor's Statement to A. 437 (2010).]

The Governor's Message, issued upon signing the bill, further explained the goals of the TOA Rule:

> The legislation does not guarantee approval of land-use application, but instead allows for the application process to move forward without the unnecessary hurdle of constantly changing requirements while the application is pending.
>
> New Jersey's business and entrepreneurs – the job creators of our state – invest considerable amounts of financial and human resources in navigating a vast landscape of rules and regulations at the state and local level. . .Prior to the signing of this legislation, the system allowed for those rules to be changed in the

> middle of the process, even after an application has been submitted. This legislation makes common sense changes to improve the application process and move New Jersey in the right direction of providing a friendlier environment for job creation, while keeping safeguards for public health and safety in place.
>
> Currently, regulations do not 'lock-in' until preliminary approval is granted for an application, allowing municipalities to change the requirement of an application after its initial submission, resulting in a business that is investing in New Jersey having to start the costly, time-intensive application process over, or abandoning the project altogether.
>
> [Id. (quoting Governor's Message to S. 82 (May 5, 2010).]

Applying those principles to this matter, the Appellate Division correctly concluded that the Planning Board acted reasonably when it determined that an application submitted to and deemed complete by the CRB triggered the TOA Rule. The City of Hoboken specifically created the CRB to act as an authorized municipal agency – as defined by N.J.S.A. 40:55D-5[4] – which would review applicants for cannabis-related development to protect "the public, health, safety, and general welfare of the City of Hoboken and its residents[.]" See

[4] N.J.S.A. 40:55D-5 defines "Municipal Agency" as: "[A] municipal planning board or board of adjustment, or a governing body of a municipality when acting pursuant to this act ***and any agency which is created by or responsible to one or more municipalities when such agency is acting pursuant to this act***." (emphasis added). In their Petition, Plaintiffs intentionally omit the emphasized language in a clear attempt to deceive the Court. (Pb7-8.)

Hoboken City Ordinance § 196-33.1. As the Appellate Division correctly acknowledged, the CRB application process is not merely a submission or "checklist" requirement. Rather, it is a rigorous application process that includes the submission of all materials required for the CRB's cannabis-related site plan approval and requires a public hearing, notice of that public hearing via certified mail, testimony from the applicant's operators, questions from members of the CRB and public, and final agency approval via vote of its members. (PcA3-7.) In fact, it took Blue Violets several months and tens of thousands of dollars to prepare for and complete the CRB application process.

The CRB deemed Blue Violets' application complete on February 18, 2022. Just days later, the City of Hoboken – ***in direct response to Blue Violets application*** – introduced an ordinance prohibiting the sale of cannabis within 600 feet of any primary or secondary school. The prior ordinance prohibited the sale of cannabis on the same block (*i.e.*, corner-to-corner) as a school. Blue Violets' micro-dispensary is approximately 300 feet from a school. In other words, certain legislators responded to Blue Violets' application by attempting to change the law to frustrate the application.

After reviewing the TOA's legislative history, the nature and onerous requirements of the CRB and the timeline of events, the Appellate Division correctly found that this matter presented the ***exact*** scenario the legislature

sought to avoid. A scenario where a developer expended substantial time and money pursuing an application, only to have the municipality change the zoning to the developer's detriment. Accordingly, in order to avoid an absurd result, the Appellate Division found that Blue Violets' submission of a complete application to the CRB triggered the TOA Rule.

III. THE COURT SHOULD DISREGARD PLAINTIFFS' ATTEMPT TO RAISE NEW LEGAL ARGUMENTS NOT PRESENTED BELOW

In their Petition, Plaintiffs improperly attempt to raise numerous arguments not raised at any stage below. The Court should refuse to consider any of Plaintiffs' newly minted arguments.

It is well settled that appellate courts will not consider an issue raised for the first time on appeal. See, e.g., Docteroff v. Barra Corp. of Am., 282 N.J. Super. 230, 237 (App. Div. 1995) (citing Nieder v. Royal Indemnity Insurance Company, 62 N.J. 229, 234 (1973)). In their Petition, Plaintiffs raise the following substantive arguments/authorities for the very first time:

- Argument that the decision in Deegan v. Perth Amboy Redevelopment Agency, 374 N.J. Super. 80 (App. Div. 2005) supports a finding that the CRB is not a municipal agency (Pb8, 16);

- Argument that the concurring opinion in Ientile v. Bd. of Adj. of the Twp. of Colts Neck, 271 N.J. Super. 326 (App. Div. 1994) supports a finding that the CRB is not a municipal agency (Pb13, 16); and
- Reliance on N.J.S.A. 40:55D-17 (Pb8), N.J.S.A. 40:55D-20 (Pb8), N.J.S.A. 40:55D-25 (Pb8), N.J.S.A. 40A:12A-22(n) (Pb16).

Because Plaintiffs never raised the above-listed arguments and authorities at any level below, the Court should refuse to consider same in connection with the Petition.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court deny Plaintiffs' petition for certification. There is simply no legitimate basis to disturb the Appellate Division's unanimous, well-reasoned Opinion.

Respectfully submitted,

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DATED: February 13, 2025