FILED, Clerk of the Supreme Court, 13 Feb 2025, **090287**

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.

DEFENDANT, CITY OF HOBOKEN PLANNING BOARD'S BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

Blue Violets, LLC (hereinafter "Blue Violets") filed an application for development with the Hoboken Planning Board (hereinafter "Planning Board" or "Board") seeking approval in order to operate an adult use "micro" cannabis retail business in Hoboken. A cannabis retail use is a conditionally permitted use under the Hoboken Code. However, Hoboken has a requirement that before an Applicant can proceed before the Planning Board or Zoning Board of Adjustment, an Applicant must first apply to the Cannabis Review Board (hereinafter "CRB") in order to obtain an endorsement or a report to the contrary which shall then be provided to the appropriate Land Use Board exercising jurisdiction over the Applicant's conditional use application. (Da381).

Blue Violets in accordance with the requirements of the Hoboken Code, filed an application with the CRB in order to obtain an endorsement regarding its cannabis retail business. Finally, on April 22, 2022, Blue Violets received a favorable endorsement from the CRB confirming that Blue Violets will have a positive impact on the City's community and further finding that the application is consistent with the intent of the City's Cannabis Ordinances. (Da423).

Having secured the endorsement from the CRB, Blue Violets filed its application seeking conditional use approval with the Planning Board on April

29, 2022. However, on April 6, 2022, Hoboken amended Ordinance 196-33.1 which Ordinance was signed by Mayor Bhalla on April 8, 2022 and which Ordinance became effective on April 28, 2022. The amendment to the Zoning Ordinance now prohibited a cannabis retail dispensary from operating within 600 feet in all directions of any primary or secondary school or of any early childhood learning facility. Ordinance 196-33.1 was not in effect at the time that Blue Violets filed its application with the CRB and prior to the time when Blue Violets received its endorsement from the CRB. (Da387).

The Planning Board exercised jurisdiction over the application filed by Blue Violets and over objections from the public, ruled that under the Time of Application Rule ("TOA") Rule, Blue Violets' application was not subject to the amended ordinance because Blue Violets had been proceeding with its application before the CRB as mandated under the Hoboken Code. Blue Violets' application was approved by the Planning Board on September 15, 2022 and memorialized in a Resolution adopted by the Planning Board on October 13, 2022. (Da454).

The legislature enacted the TOA rule specifically to prevent situations such as occurred here where an Applicant is proceeding in good faith to obtain all required municipal approvals in reliance on the ordinance in existence at the

time that the application is commenced only to have the ordinance amended while the matter is proceeding thereby attempting to prevent Blue Violets from obtaining conditional use approval in order to operate a cannabis retail facility. The Appellate Division did not commit error in finding that the CRB is a municipal agency and an arm of the Planning Board as an Applicant is not permitted to file an application with the Planning Board until the Applicant first goes through the process of obtaining an endorsement from the CRB. Thus, the CRB Ordinance controls when a cannabis application can be filed with the Planning Board.

PROCEDURAL HISTORY

The Planning Board granted conditional use approval to Blue Violets on September 15, 2022, which approval was memorialized in a Resolution adopted by the Planning Board on October 13, 2022. (Da454). Hoboken For Responsible Cannabis, Inc., a New Jersey non-profit corporation and Elizabeth Urtecho (collectively "HFRC") challenged the Planning Board's grant of approval. The Law Division then reversed the decision of the Planning Board finding that the amendment to the Ordinance prohibiting a cannabis retail dispensary from operating within 600 feet in all directions of any primary or secondary school or of any early childhood facility was applicable to Blue Violets' application before

the Planning Board under the TOA Rule. [Pc40-43a]. On appeal, the Appellate Division reversed the Law Division finding that the CRB was both a municipal agency and arm of the Planning Board and, as a result, Blue Violets was not subject to the amended Ordinance which imposed the 600-foot distance requirement from the cannabis retail dispensary to any primary or secondary school or to any early childhood learning facility. [Pc29-30a].

STATEMENT OF FACTS

Blue Violets filed an application with the Planning Board seeking approval to operate an adult use "micro" cannabis retail business in a mixed-use building located at 628 Washington Street, Hoboken, New Jersey in the Commercial C-2 Zone. The proposed use is a conditionally permitted use under the Hoboken Code.

Blue Violets complied with Hoboken Code Section 36-4A and filed its application with the CRB seeking an endorsement from the CRB prior to its submission of a conditional use application to the Planning Board. The Blue Violets' application before the CRB was scheduled for a public hearing on March 24, 2022. However, Blue Violets' application was not heard on March 24, 2022 due to time constraints from the CRB hearing other applications. As a result, Blue Violets' development application was carried to the next CRB

meeting scheduled for April 21, 2022 (Da482-83). Blue Violets' development application was approved by the CRB at the April 21, 2022 hearing. (Da485-486). Thereafter, on April 28, 2022 Hoboken Zoning Ordinance Section 196-33.1 was amended which now prohibited a cannabis retail dispensary from operating within 600 feet in all directions of any primary or secondary school or to any early childhood learning facility. (Da387).

The Planning Board exercised jurisdiction over this application and on September 15, 2022, the Planning Board unanimously voted to approve Blue Violets' conditional use application. (Da311-313). Thereafter, the Planning Board on October 13, 2022 adopted a memorializing Resolution approving its earlier decision. (Da454-458). The Planning Board both during the hearing and in its memorializing Resolution addressed the issue of the TOA Rule and whether or not the amendment to Ordinance 196-33.1 was applicable to Blue Violets' application. More specifically, the Resolution provides as follows:

> "Notably, a condition placed upon retail cannabis use is that cannabis dispensaries may not be located within 600 feet of a primary or secondary school. However, the Board finds that Applicant began its approval process by applying to the Cannabis Review Board prior to the adoption and applicability of that Ordinance. Accordingly, Applicant is entitled to application of the Ordinance as it existed at the commencement of its approval process, and this

> proximity requirement does not apply to the subject application." (Da455-456).

Therefore, the Planning Board correctly determined that Blue Violets was entitled to the protection of the TOA Rule under N.J.S.A. 40:55D-10.5 and that the amendment to Section 196-33.1 which imposed the distance requirement was not applicable to Blue Violets' conditional use application before the Planning Board. (Da455-456).

LEGAL ARGUMENT

I. THE PETITION FILED BY HFRC SHOULD BE DENIED BECAUSE THE APPELLATE DIVISION PROPERLY APPLIED WELL SETTLED LAW AND THERE HAVE NOT BEEN ANY ISSUES RAISED WHICH MERIT REVIEW BY THE NEW JERSEY SUPREME COURT

The grounds for certification are detailed in R. 2:12-4 which 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."

See also In re Route 280 Contract, 89 N.J. 1 (1982). The New Jersey Supreme Court has generally denied petitions for certification where established principles are applied and where the result reached "by the Trial Court, regardless of the legal doctrine employed, is not palpably wrong, unfair or unjust." Mahony v. Danis, 95 N.J. 50, 51-52 (1983)(Handler J., concurring). Furthermore, the New Jersey Supreme Court has generally denied Petitions for Certification when the case does not present a conflict between the Appellate Division and "any other decision of the same or a higher court, R. 2:12-4, it similarly does not call for an exercise of this Court's supervisory powers." Bandel v. Friedrich, 122 N.J. 235, 237 (1991).

A. The Appellate Division Correctly Determined That Blue Violets' Application to the Planning Board Had the Protection of the TOA Rule Against Subsequent Zoning Changes.

The TOA Rule was codified within the Municipal Land Use Law (MLUL) pursuant to N.J.S.A. 40:55D-10.5.

N.J.S.A. 40:55D-10.5 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, except those relating to health and public

> safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to the application for development."

In Jai Sai Ram, LLC v. Planning Bd., 446 N.J. Super. 338, 343-345 (App. Div. 2016), the Appellate Division held:

> The clear purpose of N.J.S.A. 40:55D-10.5, adopted as L. 2010, c. 9, § 1, was to assist developers and property owners by obviating the time of decision rule. *See Sponsor's Statement to A. 437* (2010) (stating the bill's intent to "override…the 'time of *344 decision rule.' "); *S. Cmty. & Urban Affairs Comm., Statement to S. 82* (2010). The Legislature was concerned about situations in which a developer would spend time and money pursuing an application, only to have a municipality change the zoning to the developer's detriment while the application was pending. The Sponsor's Statement reflects the statute's purpose:
>
> > 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. While effectively prohibiting municipalities from responding to an application for development by changing the law to frustrate that application, the bill recognizes that ordinance changes necessary for the protection of health and public safety would apply to pending applications.
> >
> > [*Sponsor's Statement to A. 437* (2010).]

> The Governor's Message, issued upon signing the bill, likewise explained its goals:
>
> > The legislation does not guarantee approval of a 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…
> >
> > Currently, regulations do not "lock-in" until preliminary approval is granted for **411 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-sensitive application process over, or abandoning the project altogether.
> >
> > [*Governor's Message to S. 82* (May 5, 2020.] as cited in Jai Sai Ram, LLC, 446 N.J. Super. at 343-344.

The amendment to Hoboken Code Section 196-33.1 in April 2022 imposed additional conditions which directly impacted Blue Violets' application, which conditions were not present in the ordinance when Blue Violets first filed its application with the CRB seeking an endorsement to operate an adult "micro" cannabis retail dispensary. Application to the CRB was a necessary and mandatory step in the process prior to Blue Violets even being permitted to file its application seeking conditional use and site plan approval from the Planning Board. (Da381).

The amendment to Section 196-33.1 which now imposed the 600-foot distance requirement, was to the detriment of Blue Violets. In Jai Sai Ram, LLC v. Planning Bd., 446 N.J. Super. 338 (App. Div. 2016), the Appellate Division held:

> "In construing legislation our "overriding goal is to give effect to the Legislature's intent." (citations omitted). . . However, we do not follow that rule when to do so would produce an absurd result, at odds with the clear purpose of the legislation. (citations omitted) Id. at 344, 345

The Appellate Division in Jai Sai Ram determined that any land use amendment which occurs during the pendency of an application, and which is beneficial to an application for development pending before the local board or on appeal must be applied. Therefore, in accordance with the holding in Jai Sai Ram, the TOA Rule only bars the use of a new ordinance which is detrimental to the Applicant and not an amendment to an ordinance which is favorable to an Applicant.

The evidence is clear that as Blue Violets' application was nearing a decision by the CRB, efforts were underway to amend the Cannabis Ordinance in such a way as to be detrimental to Blue Violets' application.

A cannabis retail dispensary is a conditionally permitted use under Hoboken Code Section 196-33.1. A conditional use is defined under the

Municipal Land Use Law pursuant to N.J.S.A. 40:55D-3. Conditional use means a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the Zoning Ordinance and upon the issuance of an authorization therefore by the Planning Board. Jurisdiction is vested in the Planning Board pursuant to N.J.S.A. 40:55D-67 when all of the conditions of the Conditional Use Ordinance have been complied with by an Applicant. On the other hand, if an Applicant is unable to comply with all of the conditions of the Conditional Use Ordinance, jurisdiction vests in the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70d(3).

Hoboken amended the Conditional Use Ordinance to include a condition that a cannabis retail dispensary shall not be located within 600 feet in all directions of any primary or secondary school or located directly adjacent to any early childhood learning facility. If the ordinance as amended applies to Blue Violets, jurisdiction would vest with the Hoboken Zoning Board of Adjustment ("Zoning Board") and Bue Violets would be required to obtain variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3). The Zoning Board would then exercise jurisdiction over the application and would be required to consider Blue Violets' application and apply the standard of

review as set forth in Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. Super. 285 (1994). In Coventry, the court held:

> "generally a conditional use is 'suitable to a zoning district but not to every location within that district.'…citations omitted. Conditional uses are 'uses ordinarily requiring special standards relating to traffic patterns, street access, parking and the like in order to assure their functional and physical compatibility with the district as a whole and their appropriate integration into the district." Citations omitted. Id. at 294.

Blue Violets' application to the CRB contained all of the requirements identified in Hoboken City Ordinance Section 196-33.1(M). The CRB deemed the application complete in February 2022. The Planning Board correctly found that the amendments proposed in Ordinance B-446, which did not go into effect until April 28, 2022 did not apply to Blue Violets' application before the Planning Board. The determination by the Planning Board was consistent with the holding in Jai Sai Ram. The Appellate Division correctly concluded that the "trial court erred in holding the TOA Rule did not apply to Blue Violets' application to the CRB." [Pc28a].

II. THE APPELLATE DIVISION'S DECISION DOES NOT RAISE QUESTIONS OF GENERAL PUBLIC IMPORTANCE REGARDING WHAT A MUNICIPAL AGENCY AND APPLICATION FOR DEVELOPMENT ARE UNDER THE MLUL.

A. Under the Facts of This Case, The CRB Is a Municipal Agency Under the MLUL.

The MLUL pursuant to N.J.S.A. 40:55D-5 defines a municipal agency. "A municipal agency means 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." Id.

HFRC argues that the CRB is not a municipal agency and relies upon the holding in Deegan v. Perth Amboy Redevelopment Agency, 374 N.J. Super. 80 (App. Div. 2005).

However, the issue in Deegan was whether or not a member of the redevelopment agency who was absent from a prior meeting had to certify that he or she had read the transcript of that meeting in order to be eligible to vote on the matter before it as is required under the MLUL pursuant to N.J.S.A. 40:55D-10.2.

The Appellate Division held:

> "the Local Redevelopment and Housing Law does not contain a provision comparable to N.J.S.A. 40:55D-10.2 that requires a member of a redevelopment agency who is absent from a prior meeting to certify that he or she has read a transcript of that meeting. In fact, the law does not require any evidentiary hearing or even an opportunity for public comment before a redevelopment agency may approve a redevelopment project and enter into an agreement with a developer for construction of the project. N.J.S.A. 40:A-12A-8(f); simply authorizes a redevelopment agency to "contract with...redevelopers for the planning, replanning, construction, or undertaking of any project or redevelopment work." Id. at 86.

The MLUL requirement pursuant to N.J.S.A. 40:55D-10.2 was not applicable to a matter under consideration by a redevelopment agency. Therefore, the issue in Deegan regarding the legal status of a redevelopment agency is factually distinguishable from the facts in this case, nor is the issue relevant to the issue to be determined by the Supreme Court. In Deegan, the redevelopment agency was not required, nor did it hold a public hearing. In this case, the CRB was required by ordinance and did in fact hold a public hearing on notice to the public. The Applicant was required to provide notice to the public of the CRB hearing in accordance with the notice requirements of the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-12b.

HRFC's reliance on Ientile v. Bd. of Adj. of the Twp. of Colts Neck, 271 N.J. Super. 326 (App. Div. 1994) is misplaced and the issues in that case are not

relevant to the issues in this case. In that case, the Applicant appealed the Board of Adjustment's decision on an application for an interpretation of an ordinance. The vote ended in a tie. The trial court and the Appellate Division determined that the Board intended to deny the application and that is what occurred. The decision of the Trial Court was affirmed.

Here, the Appellate Division correctly determined that:

> "the CRB is a 'municipal agency' as defined in N.J.S.A. 40:55D-10.3, with the goal 'to ensure the public health, safety and general welfare of …Hoboken and its residents, business establishments and visitors." [Pc29a].
>
> "We conclude the CRB falls within the definition of the MLUL as a 'municipal agency." Serving as an 'arm' to the Planning Board by reviewing cannabis-related applications and holding hearings." [Pc30a]

B. The Appellate Division Correctly Determined The CRB Is An Arm of the Planning Board and A Municipal Agency.

Hoboken established a CRB under Chapter 36 of the City of Hoboken Code. Pursuant to Section 36-1A the City of Hoboken created a CRB "which shall serve as an Advisory Committee to the City of Hoboken whose duty it shall be to review applications for a cannabis wholesaler, cannabis retailer, medical cannabis dispensary and cannabis delivery operations based within the City of Hoboken." (Da380).

Section 36-2 of the CRB Ordinance establishes the purpose of the CRB which is to "assure the public health, safety and general welfare of the City of Hoboken and its residents, business establishments and visitors." (Da380).

Section 36-4A of the CRB Ordinance permits the CRB among other things, to receive and review all applications for a cannabis retail establishment and the CRB "**shall provide an endorsement or report to the contrary, to the land use board of jurisdiction "prior to the applicant's submission of a conditional use application to the board."** (Emphasis supplied). (Da381).

Section 36-4A(1) of the CRB Ordinance mandates that hearings before the CRB are required to be on notice to the public with notice of the application and hearing before the CRB to be served upon all property owners as shown on the current tax duplicates located within 200 feet in all directions of the proposed location. Furthermore, the notice is required to comply with the notice procedures of the MLUL pursuant to N.J.S.A. 40:55D-12b and notice shall be provided at least 10 days prior to the date of the hearing. (Da381, 382).

In accordance with Section 36-4D of the CRB Ordinance, the CRB has 45 days from the conclusion of the hearing to issue its endorsement or a report to the contrary to the land use board exercising jurisdiction over the application. (Da382).

Based upon the record presented, the Appellate Division correctly determined CRB is a municipal agency and an arm of the Planning Board.

This case is different and unique from a land use perspective. Normally, there is no condition precedent to an Applicant filing an application with the Planning Board for a conditionally permitted use. Hoboken has created a scenario where an Applicant is required to first obtain a decision in the form of an endorsement or report to the contrary from another municipal agency i.e., the CRB before the Applicant can even file a Cannabis application with the appropriate land use board let alone proceed to a public hearing before such board, which in this instance is the Hoboken Planning Board.

C. The Appellate Division Properly Considered and Determined The Application Before the CRB To Be An Application for Development Under the MLUL.

The Municipal Land Use Law pursuant to N.J.S.A. 40:55D-3 defines application for development. An application for development means the "application form and all accompanying documents required by Ordinance for approval of a subdivision plan, site plan, planned development, cluster development, conditional use, zoning, variance or direction of the issuance of a permit pursuant to Section 25 or Section 27 of P.L. 1975c.291 (C.40:55D-34 or C.40:55D-36).

In Dunbar Homes, Inc. v. Zoning Board of Adjustment, 233 N.J. 546, 561 (2018) this Court held:

> "Thus, the term 'application for development' must be interpreted to mean 'the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, cluster development, conditional use, zoning variance or direction of the issuance of a permit.'" N.J.S.A. 40:55D-3. Dunbar Homes, supra, 233 N.J. at 561.

The application process before the CRB was onerous. The appellate Division Opinion identifies 19 items with subparts that were required to be submitted to the CRB in order for the CRB to review the application. [Pc5,6,7a].

More specifically in item (5), an Applicant before the CRB was required to submit a neighborhood impact report. The report requires an applicant to address any anticipated increase in vehicular and pedestrian traffic to and from the site, queuing of customers on the right-of-way, noise, odor, deliveries, parking, loading and unloading, etc. Further, in item (6), an applicant is required to submit an environmental impact plan which includes addressing issues such as light pollution, refuse and recycling as well as incorporating environmental recommendations from the Hoboken Green Team. [Pc5a].

The requirements of the CRB, which Blue Violets was obligated to satisfy, are clearly site plan related items and justify the Appellate Division's conclusion

that the CRB is a municipal agency and an arm of the planning board. In creating the CRB, Hoboken has legislatively created a separate arm of the planning board but strictly limited to cannabis related matters. Reading the various sections of the Hoboken Code as outlined herein, it is clear that the commencement of the review process before the Planning Board was delayed and could not even begin to occur until after Blue Violets filed an application and completed the review process with the CRB culminating in obtaining a "endorsement" or "report to the contrary" from the CRB. (Da381).

The CRB considered Blue Violets' application at a public hearing on April 22, 2022 after Blue Violets provided notice to property owners within 200 feet of the Property as required under the MLUL. At the conclusion of the public hearing, the CRB determined that "Blue Violets will have a positive impact on the City's community and the Board finds that this application is consistent with the intent of the City's Cannabis Ordinances." As a result, the CRB issued a Resolution endorsing Blue Violets' application and plan which approval was granted on April 22, 2022. (Da423). Once the CRB issued its endorsement, Blue Violets satisfied one of the mandatory ordinance requirements in order to initiate and prosecute a land development application before the Planning Board for an adult "micro" cannabis dispensary which application complied with all of

the conditions of the conditional use ordinance. The Planning Board properly exercised jurisdiction over this conditionally permitted variance free application.

CONCLUSION

HRFC has not satisfied the grounds for granting certification pursuant to R. 2:12-4 and the cases interpreting same and the Planning Board respectfully requests the Petition for Certification be denied.

Respectfully submitted,

WEINER LAW GROUP LLP
Attorneys for the Defendant, City of Hoboken Planning Board

Dated: February 11, 2025

s/Richard Brigliadoro, Esq.
Richard Brigliadoro, Esq.