NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1342-21

JOSEPH BERARDO,

Plaintiff-Appellant,

v.

CITY OF JERSEY CITY, ZONING BOARD OF ADJUSTMENT OF THE CITY OF JERSEY CITY, HISTORIC PRESERVATION COMMISSION OF THE CITY OF JERSEY CITY, and MARGARET A. O'NEILL, in her official capacity as the Historic Preservation Officer,

Defendants-Respondents.

APPROVED FOR PUBLICATION
July 14, 2023
APPELLATE DIVISION

———————————————————

Argued May 2, 2023 – Decided July 14, 2023

Before Judges Geiger, Susswein, and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-0324-21.

Jameson P. Van Eck argued the cause for appellant (Wells, Jaworski & Liebman, LLP, attorneys; Jameson P. Van Eck, of counsel and on the briefs; Kathryn J. Razin and Jennifer M. Berardo, on the briefs).

Mailise Rose Marks, Assistant Corporation Counsel, argued the cause for respondents City of Jersey City, Historic Preservation Commission of the City of Jersey City, and Margaret A. O'Neill (Peter J. Baker, Corporation Counsel, attorney; Maura E. Connelly, Assistant Corporation Counsel, on the brief).

Vincent J. LaPaglia argued the cause for respondent Zoning Board of Adjustment of the City of Jersey City.

The opinion of the court was delivered by

BERDOTE BYRNE, J.S.C. (temporarily assigned)

Defendant City of Jersey City's (City) Code of Ordinances Section 105 permits any individual to request a determination of significance from the City's Historic Preservation Officer (HPO) regarding whether a subject building warrants preservation. Consistent with local ordinances, plaintiff Joseph Berardo, who owns a circa-1900 building in Jersey City, sought a determination of significance before applying for a demolition permit. Defendant Margaret O'Neill, the City's HPO, concluded plaintiff's building likely would not be approved for demolition due to its historic, architectural, and cultural significance.

Plaintiff appealed to defendant Zoning Board of Adjustment of the City of Jersey City (ZBA), which upheld the determination of significance. Thereafter, he filed a complaint in lieu of prerogative writs alleging defendants'

actions were arbitrary, capricious, and unreasonable. The Law Division found the ZBA's decision was not arbitrary, capricious, or unreasonable and dismissed the complaint.

We conclude the HPO's issuance of a determination of significance — an advisory opinion seemingly intended to prevent plaintiff's submission of an application for a demolition permit — is not a procedure authorized by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163. We reverse and remand to allow plaintiff to apply for a demolition permit in accordance with the MLUL. We also conclude Jersey City's Code of Ordinances Sections 105-3, 105-4, and 105-7 are ultra vires and inconsistent with objectives and procedures concerning historic preservation mandated by the MLUL to the extent they delegate powers reserved for a municipality's historic preservation commission to the HPOs.

Plaintiff purchased the building in 1987. It is a two-and-one-half-story, wood-framed, four-unit apartment building located between two similar apartment buildings constructed in or around the 1920s. The majority of the buildings on the block were constructed between 1896 and 1910. The building "was a representative example of a Victorian or Queen Ann-style residence" with a "highly decorative" open front porch with balustrade, bay windows,

shingle-clad walls, siding on the first floor, and a slate roof. At some point prior to 1982, its main façade was altered significantly by removing its original front door, front porch, columns, and "large Victorian-era windows." Plain stucco walls, asphalt shingles, and faux aluminum shutters were added. An "asphalt covered parking lot" replaced the front lawn, walkway, and low iron fence. However, the turret and gable at the third level, the "peaked roofline," and the "brick core blade" chimney remain intact to this day.

The MLUL authorizes municipalities to create, by ordinance, a historic preservation commission with five, seven, or nine regular members. N.J.S.A. 40:55D-107. Historic preservation commissions are tasked with, among other duties, reviewing permit applications pertaining to historic sites, considering the application of zoning ordinance provisions thereto, and rendering written recommendations regarding the issuance or denial of permits to the appropriate administrative officer. N.J.S.A. 40:55D-109(e); 40:55D-111.

The City established a historic preservation commission (the Commission) in accordance with the MLUL. See Jersey City, N.J., Code of Ordinances § 345-9 (2001). Section 345-9(B) sets forth the Commission's many duties, which include providing the Administrative Officer "with written reports

on the application of the Zoning Ordinance provisions concerning historic preservation."

Section 345-9(D) of the City Code of Ordinances describes the role of the City Historic Preservation Specialist (HPS), an employee of the Division of City Planning. O'Neill is the City's HPS.[1] The MLUL does not reference HPSs or HPOs; however, it does authorize historic preservation commissions to "employ, contract for, and fix the compensation of experts and other staff and services as it shall deem necessary." N.J.S.A. 40:55D-108(b).

According to Section 345-9(D), although not a member of the Commission, the HPO advises the Commission "on each application" that comes before it. The HPO may also recommend to the Commission "buildings, objects, sites, structures and districts for nomination to the State and/or National Register of Historic Places" and "recommend to the City Council buildings, sites, structures and districts for Council resolution directing the [Commission] to review and comment for possible designation."

Section 105 of Jersey City's ordinances governs building demolition in Jersey City. In 2018, Section 105 was amended to require the HPO to review

[1] O'Neill is also referred to in the record and in Section 345-9(D) as the City's HPS. For consistency and because the majority of the ordinances use HPO, we use HPO.

applications for demolition permits before permits are issued by the Office of the Construction Official "to ensure that . . . buildings and structures which possess cultural, historical and/or architectural significance are preserved whenever possible."

Section 105-3, "Permit procedures," requires that demolition permit applications "be reviewed by the [HPO] for a prior approval." A related provision at Section 105-7, titled "All permit applications to be reviewed by the City's [HPO] and Zoning Officer," states:

> Prior to the issuance of a permit to demolish any building and/or structure, the [HPO] must review the permit application and certify to the Construction Code Official that the subject building or structure possesses no cultural, historical or architectural significance which would merit its preservation consistent with the standards set forth in 36 C.F.R. 60.4, entitled "Criteria for Evaluation" as promulgated by the U.S. Secretary of the Interior, and which is adopted and incorporated by reference herein.

Section 105-7 further provides the HPO shall present the requisite certification in a written report containing details specifically enumerated in seven prongs of the ordinance.

Per Section 105-7, if the HPO "concludes that the building or structure possesses no cultural, historical or architectural significance which would merit its preservation, or . . . fails to file [their] . . . findings within [forty-five] days,

the Construction Official may issue a demolition permit." However, if the HPO "concludes that the subject building and/or structure does possess[] sufficient cultural, historical or architectural significance which merits its preservation . . . then the Zoning Officer shall deny the permit application request." The ordinance provides the HPO's decision is appealable to the ZBA, "who may then refer the application to the Historic Preservation Commission for review."

The 2018 amendments to the City Code of Ordinances added a process, at Section 105-4, by which "any individual" may request a preliminary determination of significance from the HPO, which is "a formal opinion detailing whether or not the subject building or structure warrants preservation in accordance with [Section] 105-7." Such determinations may be sought "[p]rior to, or in the absence of, an application for a demolition permit."

In accordance with Section 105-4, plaintiff applied for a determination of significance to the City Planning Division. On February 11, 2019, O'Neill issued a one-page determination of significance. She concluded the building "clearly possesses significant integrity and would likely not be approved for demolition in accordance with . . . [Section] 105."

O'Neill acknowledged "[t]he building is not mentioned . . . in the Phase One or Two NJ Historical Sites Inventory Survey of the City of Jersey City, nor

is it listed as eligible for inclusion on the National, State, or Municipal Historic Register." However, she opined "the building should have been included on the NJ Historical Sites Inventory Survey . . . and could possibly be designated individually on the National or State Register of Historic Places under criterions A or C."

O'Neill found "[i]n its current condition, the building maintains integrity of location, setting, and feeling." She opined the building "is an excellent example of a late Victorian Shingle Style residential dwelling" and the alterations "have not adversely affected the character of the building." She further explained, "the building's door openings and peaked roofline remain relatively unaltered" and that those original characteristics, "along with the structure's presence during the early development of the neighborhood, are important and contributing features."

Plaintiff appealed the HPO's determination of significance to the ZBA. On October 8, 2020, the ZBA held a public hearing regarding plaintiff's appeal via Zoom. Several witnesses testified, including twelve community members, O'Neill, and plaintiff's expert, Robert J. Wise, Jr.

O'Neill's testimony echoed the content of her determination of significance, acknowledging the building had been altered but reiterating it

"retains enough historic significance, especially in relation to its setting[,] to deny a demolition permit." She explained the City's historic sites inventory had not been updated since 1985 due to budgetary issues despite the State Historic Preservation Office's recommendation it be updated every ten years, and the building's lack of inclusion therein "does not mean that the building does not have historic significance."

Wise offered a competing opinion, noting the building "underwent an extreme amount of alteration" prior to 1982 that "severely undermin[ed] [its] architecture[al] integrity." He described the alterations as "an absolute defacement of the architectural features that were there" and concluded the building could be approved for demolition pursuant to Section 105.

Wise testified "[w]ith the exception of the roofline, alterations made to the building . . . virtually destroyed the notable design features which gave the building its Victorian style and character." He also disagreed with O'Neill that the building "could possibly be designated individually on the National or State Register of Historic Places under [criteria] A or C."

The ZBA unanimously voted to deny the appeal and uphold O'Neill's determination of significance. It memorialized its findings and conclusions in a Resolution proclaiming N.J.S.A. 40:55D-70.2 vested the ZBA with jurisdiction

to hear appeals of determinations of significance issued by the HPO. The ZBA found the record contained "ample evidence of historic, architectural and cultural character possessed by" the building and thus found no error by the HPO.

Regarding the disagreement between O'Neill and Wise as to whether the building should have been included in the City's Historic District Sites Inventory, the ZBA concluded it was irrelevant because "[Section] 150 presupposes that there would be unincluded examples of significant architecture, which is why demolition permits for 'any building and/or structure' (Sec. 150-7) must be reviewed for significance by the [HPO]."

On January 25, 2021, plaintiff filed a complaint in lieu of prerogative writs against defendants seeking, among other relief, an order for the issuance of a demolition permit. Counts one, three, and four alleged the ZBA's denial of plaintiff's appeal was arbitrary, capricious, and unreasonable. Counts two and five alleged the "Commission's actions relative to the demolition permit" were arbitrary, capricious, and unreasonable and it abused its discretion "in determining that the building maintained historical significance." Count six alleged O'Neill acted arbitrarily, capriciously, and unreasonably "in denying the demolition permit." Counts seven and eight alleged the ZBA's resolution was

"defective," "unsupported by the evidence," and ZBA failed to "turn square corners." Counts nine and ten alleged the decisions rendered by ZBA were tantamount to an inverse condemnation of the building as plaintiff was "deprived of the productive and beneficial use of the Property."

On November 23, 2021, the Law Division entered judgment in favor of defendants and issued a written opinion.[2] The court found the ZBA "was authorized to make a determination as to an appeal of the decision of the [HPO] pursuant to N.J.S.A. 40:55D-70.2 and [Section] 105-7." It then rejected plaintiff's contention O'Neill's testimony before the ZBA constituted a net opinion and the determination of significance was arbitrary, capricious, or unreasonable.

The court found "no basis for liability as to the" Commission or the City because there was no evidence to establish that either entity was involved with O'Neill's actions, as HPO, in issuing the determination of significance. It rejected plaintiff's contentions "that the City [d]efendants did not comport with the 'square corners doctrine'" and "denial of the demolition permit deprives plaintiff of the 'full benefit of the [underlying] zoning and . . . MLUL process,'"

[2] On December 2, 2021, the court issued an amended judgment to correct a clerical error in the original judgment.

reasoning plaintiff "failed to show that there were any procedural or substantive violations or any interference in the prosecution of the appeal."

Additionally, the Law Division rejected plaintiff's claim, "the City [d]efendants' actions subject them to liability for inverse condemnation" and instead found plaintiff may still use the property by leasing the apartment units, living there, or selling it. Finally, the court rejected plaintiff's claim defendants violated his equal protection rights and held that "[t]here was no challenge to the City's ordinance establishing the mechanism by which the HPO decides an application for a Determination of Significance."

On appeal plaintiff claims:

> POINT I
> ABSENT PROPER DESIGNATION IN THE HISTORIC ELEMENT OF THE MASTER PLAN AND PROPER ACTION BY THE [COMMISSION], THE ACTION TAKEN BY THE HPO AND ZBA WAS UNLAWFUL AND [ULTRA VIRES] AND THE [LAW DIVISION]'S DECISION AS TO SAME MUST BE REVERSED.
>
> POINT II
> THE [LAW DIVISION] ERRED IN FAILING TO RECOGNIZE THAT THE ORDINANCE IS INVALID, AS THERE IS NO AUTHORITY IN THE MLUL FOR AN HPO TO DEEM OR REGULATE PROPERTIES AS HISTORIC.
>
> POINT III

THE [LAW DIVISION] ERRED IN UPHOLDING THE ZBA'S ARBITRARY, CAPRICIOUS AND UNREASONABLE DENIAL BECAUSE IT RELIED UPON THE NET OPINION OF THE HPO AND IGNORED THE CREDIBLE EVIDENCE OF APPELLANT'S WITNESS THAT THE . . . BUILDING WAS NOT DESIGNATED AS AND WOULD NOT QUALIFY AS HISTORIC.

A. The ZBA was Arbitrary, Capricious and Unreasonable in its Decision as the HPO Determination and HPO's Commentary at the ZBA Appeal Constituted Improper Net Opinion.

B. The ZBA Improperly Ignored the Credible and Well-Supported Testimony in Support of the Applicant's Position.

C. The ZBA and [Law Division] Decisions Must Be Reversed for Reliance on Improper and Irrelevant Lay Person Conjecture.

POINT IV
THE [LAW DIVISION] ERRED IN DISMISSING APPELLANT'S CLAIMS FOR INVERSE CONDEMNATION.

POINT V
RESPONDENTS HAVE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

"[W]hen reviewing the decision of a trial court that has reviewed municipal action, [appellate courts] are bound by the same standards as was the trial court." Fallone Props., L.L.C. v. Bethlehem Twp. Plan. Bd., 369 N.J. Super.

552, 562 (App. Div. 2004). Zoning board decisions are presumed valid and entitled to deference "because of [the board's] peculiar knowledge of local conditions." Price v. Himeji, LLC, 214 N.J. 263, 284 (2013) (quoting Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). "[A] court may not substitute its judgment for that of the board unless there has been a clear abuse of discretion." Ibid. "[T]he burden is on the challenging party to show that the zoning board's decision was 'arbitrary, capricious, or unreasonable.'" Ibid. (quoting Kramer, 45 N.J. at 296). However, "a board's decision regarding a question of law . . . is subject to a de novo review by the courts, and is entitled to no deference since a zoning board has 'no peculiar skill superior to the courts' regarding purely legal matters." Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Franklin, 233 N.J. 546, 559 (2018) (quoting Chicalese v. Monroe Twp. Plan. Bd., 334 N.J. Super. 413, 419 (Law Div. 2000)).

Plaintiff contends "[t]he entirety of the process followed by the HPO and the ZBA was ultra vires and unauthorized" by the MLUL because "there is no authority in the enabling statute for the HPO or the ZBA to take action relative to property that is not designated as historic" in the Master Plan; and the HPO lacks statutory authority pursuant to the MLUL "to make recommendations

regarding properties whatsoever." We conclude the first contention is unavailing, but the second contention has merit and warrants reversal.

We note initially, plaintiff did not raise either contention before the Law Division until his reply brief; "[r]aising an issue for the first time in a reply brief is improper." Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001). "[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)).

Here, although the issue was not raised properly before the trial court, the court did address the issue in its opinion. More importantly, plaintiff raises novel legal questions regarding a matter of public interest, warranting our consideration. Whether an HPO may unilaterally determine the historic nature of a property such that a demolition permit will not issue, circumventing the consideration of the Commission, is a matter of public interest.

It is well established "[m]unicipalities do not possess the inherent power to zone, and they possess that power, which is an exercise of the police power,

only insofar as it is delegated to them by the Legislature." Riggs v. Twp. of Long Beach, 109 N.J. 601, 610 (1988). "A zoning ordinance is insulated from attack by a presumption of validity, which may be overcome by a showing that the ordinance is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.'" Id. at 610-11 (alteration in original) (quoting Bow & Arrow Manor, Inc. v. Town of W. Orange, 63 N.J. 335, 343 (1973)). In Riggs, the Court set forth a four-part test for evaluating a zoning ordinance's general validity:

> First, the ordinance must advance one of the purposes of the [MLUL] as set forth in N.J.S.A. 40:55D-2. Second, the ordinance must be "substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements," N.J.S.A. 40:55D-62, unless the requirements of that statute are otherwise satisfied. Third, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process, . . . equal protection, . . . and the prohibition against confiscation. Fourth, the ordinance must be adopted in accordance with statutory and municipal procedural requirements.
>
> [Id. at 611-12 (citations omitted).]

Of particular relevance to this appeal, "a zoning ordinance must conform to MLUL requirements and further MLUL goals." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 253 (2015). "Although the judicial role is circumscribed,

a court may declare an ordinance invalid if in enacting the ordinance the municipality has not complied with the requirements of the [MLUL]." Riggs, 109 N.J. at 611; see also Riya Finnegan LLC v. Twp. Council of South Brunswick, 197 N.J. 184, 189-90, 197-99 (2008) (upholding the trial court's invalidation of a rezoning ordinance because the ordinance amounted to "impermissible inverse spot zoning," rendering it arbitrary and capricious); Tirpak v. Borough of Point Pleasant Bd. of Adjustment, 457 N.J. Super. 441, 443-46 (App. Div. 2019) (invalidating as ultra vires a variance condition requiring one unit in a two-family dwelling be occupied by the owner because it discriminated against renters and zoning is intended to regulate land, not the individuals who occupy it); Tennis Club Assocs. v. Plan. Bd. of Teaneck, 262 N.J. Super. 422, 433 (1993) (finding ultra vires and unenforceable the zoning board's mandate that the developer purchase "non-owned property needed for off-site improvements" because "N.J.S.A. 40:55D-41 [only] permits acquisition costs to be added to installation costs in determining a developer's pro rata share for street improvements").

Zoning ordinances may "[p]rovide for historic preservation." N.J.S.A. 40:55D-65(i). Specifically, "[a] zoning ordinance may designate and regulate historic sites or historic districts and provide design criteria and guidelines

therefor." N.J.S.A. 40:55D-65.1. While municipalities are empowered "to place their local imprint on historic site and district selection," their actions "must be exercised according to the enabling authority and local planning and zoning scheme provided by" the MLUL. Est. of Neuberger v. Twp. of Middletown, 215 N.J. Super. 375, 381-82 (App. Div. 1987).

Procedurally, the MLUL requires a historic designation made by zoning ordinance be based either on identifications in the historic preservation plan element of the municipality's master plan, or the governing body's clearly set forth reasons for the designation in a duly adopted ordinance:

> Except as provided hereunder, after July 1, 1994, all historic sites and historic districts designated in the zoning ordinance shall be based on identifications in the historic preservation plan element of the master plan. . . . The governing body may, at any time, adopt, by affirmative vote of a majority of its authorized membership, a zoning ordinance designating one or more historic sites or historic districts that are not based on identifications in the historic preservation plan element, the land use plan element or community facilities plan element, provided the reasons for the action of the governing body are set forth in a resolution and recorded in the minutes of the governing body.
>
> [N.J.S.A. 40:55D-65.1.]

It is undisputed the building at issue is not identified as historic in the City's Master Plan. However, failure to include a property in a master plan is

not dispositive as the statute clearly provides an alternate method of deeming a property historic. "The goal of all statutory interpretation is 'to determine and give effect to the Legislature's intent.'" State v. Lopez-Carrera, 245 N.J. 596, 612 (2021) (quoting In re Registrant H.D., 241 N.J. 412, 418 (2020)). "Courts start with the plain language of the statute, 'which is typically the best indicator of intent.'" Id. at 612-13 (quoting State v. McCray, 243 N.J. 196, 208 (2020)). "If the language of a statute is clear, a court's task is complete." Id. at 613. "If the text is ambiguous, courts may consider extrinsic materials, including legislative history, committee reports, and other sources, to discern the Legislature's intent." Ibid.

N.J.S.A. 40:55D-65.1 clearly and unambiguously states municipalities may designate historic sites by zoning ordinances if the reasons for the designation are explained by the governing body in a resolution and in its minutes. Indeed, our Supreme Court has previously recognized the MLUL authorizes "the governing body to adopt a zoning ordinance [or amendment thereto] that is inconsistent with the Master Plan, but 'only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons . . . set forth in a resolution and recorded in its minutes.'" Riya Finnegan, L.L.C., 197 N.J. at 192 (quoting N.J.S.A. 40:55D-62(a)).

In the present matter, the MLUL's plain language belies plaintiff's contention a building must be identified in the City's Master Plan to be designated as historic, and his reliance on dicta in a non-precedential Law Division opinion, Stochel v. Planning Board of Edison Township, 348 N.J. Super. 636, 653 (Law Div. 2000), is unavailing.

However, the ZBA's adoption of a resolution upholding O'Neill's determination of significance and denying plaintiff's appeal does not comply with the historic site designation procedures mandated by the MLUL. The MLUL does not authorize HPOs to unilaterally grant or deny historic preservation designations that bind a zoning officer in determining whether a demolition permit shall issue; that advisory function belongs solely to the Commission, as detailed in the MLUL at N.J.S.A. 40:55D-111, and cannot be delegated to other entities or individuals. The Commission, in turn, may designate a site as historic only if it is voted upon a majority of the full governing body. "In order to effectuate the legislative intent to create statewide uniformity, [our courts] have generally held that the requirements established in the MLUL are to be applied strictly." Northgate Condo. Ass'n v. Borough of Hillsdale Plan. Bd., 214 N.J. 120, 137 (2013). "[M]unicipalities are not free to add to the statute's requirements where the Legislature has utilized mandatory language."

Ibid. The City's ordinance reverses the process by allowing an HPO to unilaterally make the initial determination, then allows the applicant to appeal to the ZBA, by-passing the Commission completely, at which point the ZBA may or may not refer it to the Commission for consideration. Unless the ZBA refers the matter to the Commission for consideration, the ordinances allow an HPO to unilaterally deem a property not identified in the Master Plan as historic.

Nothing in the MLUL authorizes HPOs to issue "determinations of significance" dispositive to the issue of whether demolition permits will issue. In fact, the MLUL does not contain any mention of HPOs or "determinations of significance." Instead, the MLUL mandates that a Commission made up of five, seven, or nine people review demolition permit applications involving property for historical significance and render written recommendations to the administrative officer or planning board:

> If the zoning ordinance designates and regulates historic sites or districts pursuant to subsection i. of section 52 of P.L.1975, c.291 ([N.J.S.A.] 40:55D-65), the governing body shall by ordinance provide for referral of applications for issuance of permits pertaining to historic sites or property in historic districts to the historic preservation commission for a written report on the application of the zoning ordinance provisions concerning historic preservation to any of those aspects of the change proposed, which aspects were not determined by approval of an application for development by a municipal agency

> pursuant to the [MLUL]. The historic preservation commission shall submit its report either to the administrative officer or the planning board, as specified by ordinance. If the ordinance specifies the submission of the historic preservation commission's report to the planning board, the planning board shall report to the administrative officer.
>
> [N.J.S.A. 40:55D-111.]

"As with other legislative provisions, the meaning of an ordinance's language is a question of law that [is] review[ed] de novo." Bubis v. Kassin, 184 N.J. 612, 627 (2005). Notably, the City's Code of Ordinances Section 345-9(B), which states the Commission is tasked with providing the City Zoning Officer "with written reports on the application of the Zoning Ordinance provisions concerning historic preservation," is consistent with the MLUL.

The additional procedure adopted in the 2018 amendments at Section 105-4, by which HPOs may issue determinations of significance "detailing whether or not the subject building or structure warrants preservation in accordance with [Section] 105-7," and the City Zoning Officer is bound by that decision in granting or denying a demolition permit, runs contrary to the mandatory language of N.J.S.A. 40:55D-111 because it bypasses the Commission's review entirely. Our statutes make clear the City may not bypass the procedures set forth at N.J.S.A. 40:55D-111 and create its own process by which an HPO issues

advisory opinions unilaterally designating properties as historic sites, preventing property owners from obtaining demolition permits. Northgate, 214 N.J. at 137.

Although the Commission was empowered to hire O'Neill as an expert and have her issue a report to it, the Commission was then required to consider that report and vote regarding any resolution. In bypassing the Commission, O'Neill found herself in the untenable position as the City's expert on appeals, defending a decision she unilaterally made. We have previously held municipalities cannot, by ordinance, delegate powers granted to the Commission under the MLUL to other entities. See Est. of Neuberger, 215 N.J. Super. at 381-82 (holding township failed to comply with the MLUL "when it delegated historic site and district designation power to its Landmarks Commission"). In adopting Sections 105-3, 105-4 and 105-7, the City did just that; it unlawfully delegated powers granted to the Commission under the MLUL to the HPO that is neither contemplated nor authorized by the MLUL.

For these reasons, we conclude the MLUL neither authorizes an HPO to unilaterally designate a building as historic, nor authorizes an HPO to prevent a zoning official from issuing demolition permits. To the extent Sections 105-3, 105-4, and 105-7 are inconsistent with the objectives and procedures concerning historic preservation mandated by the MLUL, we declare those ordinances ultra

vires on their face and void as an invalid exercise of the municipal zoning power. See Rumson Ests., Inc., 350 N.J. Super. at 331 (quoting Riggs, 109 N.J. at 611); Magnolia Dev. Co. v. Coles, 10 N.J. 223, 228 (1952).

We further conclude the Law Division erred, as a matter of law, in holding the ZBA was authorized to review the HPO's Determination of Significance pursuant to N.J.S.A. 40:55D-70.2 and Section 105-7.

N.J.S.A. 40:55D-70.2 states:

> If, in the case of an appeal made pursuant to subsection a. of section 57 of P.L.1975, c.291 ([N.J.S.A.] 40:55D-70), the board of adjustment determines there is an error in any order, requirement, decision or refusal made by the administrative officer pursuant to a report submitted by the historic preservation commission or planning board in accordance with section 25 of P.L.1985, c.216 ([N.J.S.A.] 40:55D-111), the board of adjustment shall include the reasons for its determination in the findings of its decision thereon.

N.J.S.A. 40:55D-70.2 was not intended to grant the ZBA jurisdiction to hear appeals of advisory "determinations of significance" made unilaterally by the HPO. The plain language of N.J.S.A. 40:55D-70.2 clearly applies only to determinations "by the administrative officer pursuant to a report submitted by the historic preservation commission or planning board in accordance with" N.J.S.A. 40:55D-111. See generally Mullen v. Ippolito Corp., 428 N.J. Super. 85, 105 (App. Div. 2012) (stating, pursuant to N.J.S.A. 40:55D-72(a), "the

interested party's right to seek appellate review does not accrue until the administrative officer makes a decision" (emphasis omitted)). There is no evidence in the record the Commission voted upon the HPO's report to the City Zoning Officer.

Plaintiff has not yet filed for a demolition permit; thus, the administrative officer has not yet denied such an application. The Commission has neither issued a report in accordance with N.J.S.A. 40:55D-111, nor taken any action. The fact that Section 105-7 states HPO decisions are appealable to the ZBA is unavailing and does not confer jurisdiction upon the ZBA. The court erred in finding the ZBA was authorized, pursuant to N.J.S.A. 40:55D-70.2, to consider plaintiff's appeal.

We need not address plaintiff's remaining points, including his constitutional due process claims, because they are premature and not properly before us. Instead, plaintiff is permitted to file a request for a demolition permit, to be considered by the Commission and, if necessary, exhaust his administrative remedies. We offer no opinion as to whether a demolition permit should issue.

Reversed and remanded. We do not retain jurisdiction.