



BOROUGH OF HIGHLANDS
COUNTY OF MONMOUTH

LAND USE BOARD RESOLUTION 2023-14

**MEMORIALIZATION OF DENIAL OF APPLICATION SEEKING d(3) CONDITIONAL
USE VARIANCE, ANCILLARY VARIANCE RELIEF AND MINOR SITE PLAN APPROVAL**

**Denied: June 8, 2023
Memorialized: October 12, 2023**

**IN THE MATTER OF THE SEA GRASS NJ, LLC
APPLICATION NO. LUB 2022-11**

WHEREAS, an application for minor site plan approval for a d(3) conditional use with ancillary variance relief has been made to the Borough of Highlands Land Use Board (hereinafter referred to as the "Board") by Sea Grass NJ, LLC (hereinafter referred to as the "Applicant") on lands known and designated as Block 72, Lot 12 and Block 73, Lot 2, as depicted on the Tax Map of the Borough of Highlands (hereinafter "Borough"), and more commonly known as 272 Bay Avenue and Sea Drift Avenue in the CBD Central Business ("CBD") Zone and CBD Redevelopment Overlay (C-RO-1) Zone; and

WHEREAS, public hearings were held before the Board on February 9, 2023, March 9, 2023, April 13, 2023, May 11, 2023, and June 8, 2023 with regard to this application; and

WHEREAS, the Board has heard testimony and comments from the Applicant, witnesses and consultants, and with the public having had an opportunity to be heard; and

WHEREAS, a complete application has been filed, the fees as required by Borough Ordinance have been paid, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised.

NOW, THEREFORE, does the Highlands Land Use Board make the following findings of fact and conclusions of law with regard to this application:

1. The subject Property No. 1 contains 2,300 square feet and subject Property No. 2 contains 7,000 square feet. Subject Property No. 1 is a developed corner lot with an existing commercial building (restaurant/bar) and subject Property No. 2 is an existing parking lot across

Bay Avenue from subject Property No. 1. The subject Properties are located in the Central Business District (CBD) Zone of the Borough with frontage along Bay Avenue (County Route 8)

2. The Applicant is seeking minor site plan approval for a d(3) conditional use variance approval. The Applicant is proposing to renovate and convert the existing commercial building into a cannabis retail store and improve the existing parking lot across Bay Avenue. The proposed cannabis retail use is a permitted conditional use in the CBD Zone. The existing and proposed parking lot use is a permitted conditional use in the CBD Zone.

3. The subject Properties are located within the CBD Zone. The Applicant has elected to prepare the application in accordance with the CBD Zone requirements and is not seeking approval under the Redevelopment Plan.

February 9, 2023 Hearing

4. Counsel for the Applicant, John B. Anderson, III, Esq., stated that the application involved two (2) separate properties. Mr. Anderson stated that one (1) property was located at 272 Bay Avenue and contained the existing restaurant. He stated that the second property was located on Sea Drift Avenue and was a conditionally permitted use as a parking lot that services the restaurant. Mr. Anderson also stated that the second floor of the restaurant contained a residential apartment. He stated that both subject Properties were located within the CBD Zone.

5. Mr. Anderson stated that the Applicant was the contract purchaser and was proposing to convert the restaurant into a cannabis retail store. Mr. Anderson represented that subject Property No. 1 was 1,054 feet from the closest school, therefore, subject Property No. 1 was compliant with the distance requirements of the conditional use ordinance as it relates to the proposed location of a cannabis retailer. Mr. Anderson also represented that there would not be any consumption of cannabis products on-site. Mr. Anderson further represented that there were minor design criteria for the zone that were existing as to the subject Properties that required the Applicant to obtain d(3) conditional use variance relief for the cannabis retailer use and the parking lot use. Mr. Anderson also stated that the Applicant was proposing some improvements to the subject Properties.

6. Mr. Anderson stated that subject Property No. 2 contained a stand-alone parking lot. Mr. Anderson argued that the principal use of subject Property No. 2, therefore it did not

have to comply with the conditional requirements for the cannabis retail use. He explained that stand-alone parking lots were permitted to service other properties and still be the principal use. He argued that the parking lot was not an accessory use to the restaurant or proposed cannabis retail store, therefore the proximity to the school condition did not apply.

7. Mr. Anderson further stated that the Applicant was seeking variance relief from the rear yard setback, side yard setback, lot coverage, building coverage, and for floor area ratio (FAR). He argued that the Applicant was not exacerbating anything that was already existing, and instead, three (3) items were being improved. He explained that the Applicant was proposing to remove the existing walk-in cooler at the rear of the building, which would improve the rear yard setback, FAR, and building coverage. He stated that the rear yard setback would be ten (10) feet, instead of the existing two (2) feet, but it still required variance relief because the minimum required rear yard setback was twelve (12) feet.

8. Mr. Anderson further stated that the Applicant was seeking design waiver relief for landscaping and the width of the loading zone. He stated that presently, there was no loading area and loading was done from the street. Mr. Anderson stated that the Applicant was proposing a loading area at the rear of the building where the walk-in cooler was being removed. He stated that the proposed loading area was ten (10) feet wide, where the minimum required width was fifteen (15) feet. He stated that the width would not be an issue because deliveries to the site were only being made by vans. Mr. Anderson also stated that the lot coverage for the restaurant building was 100%, so there was no space to provide landscaping. He stated that the Applicant was proposing landscaping around the parking lot. Mr. Anderson argued that the design waiver relief was *de minimis* and pre-existing.

Operations Testimony

9. Testimony was taken from Stephen James Whelan who identified himself as one of the owners of the Applicant, Sea Grass NJ, LLC. Mr. Whelan testified that the Applicant would be selling cannabis products and accessories, including flower, edibles, papers, bowls, and tincture. Mr. Whelan testified that the products would not be visible from outside because the windows would be opaque. He also stated that there would not be any advertising on the building. Mr. Whelan further testified that the Applicant would not be selling any tobacco or

alcohol products. He stated that the cannabis products would be in tamper-resistant containers, as received, which resulted in no odors being released. He also stated that the packaging was designed to be unappealing to children. Mr. Whelan testified that the cannabis product could not be purchased by individuals younger than 21 years old. He stated that there would not be any on-site consumption of any cannabis product, nor would any manufacturing occur on the premises.

10. Mr. Whelan further testified that the hours of operation would be 10 a.m. to 7 p.m. Monday through Saturday, and 10 a.m. to 5 p.m. on Sunday. He testified that there would be five (5) to eight (8) employees, including security, working at any given time. Mr. Whelan stated that it was the Applicant's goal to hire local residents in an effort to reduce traffic and parking demand. Mr. Whelan testified that deliveries would be three (3) times a week. He explained that the delivery van would park at the rear of the building and the delivery driver would bring the product in through a side door near the rear of the building. He stated that delivery time would take approximately five (5) minutes. Mr. Whelan testified that the product would be delivered in six (6) containers. He stated the delivery would then be processed and inventoried inside the building.

11. Mr. Whelan next testified that trash would be picked up by a private hauler. He stated that no cannabis product would be disposed of in the trash or recycling. He explained that the Cannabis Regulatory Commission (CRC) required any unused or defective cannabis product not be disposed of in regular trash or recycling. Mr. Whelan further testified that cardboard would be kept in a dumpster at the rear of the building. He stated that trash cans would be stored behind a gate, then brought out to the curb at the time of pickup. Mr. Whelan further stated that the product was delivered in plastic bins which are unloaded inside the building. The delivery drivers will retain the plastic bins.

12. Mr. Whelan next testified that the security would comply with CRC regulations. He stated that security would operate 24/7. Mr. Whelan testified that security cameras would connect to the Police Department and the police could access footage at any time. Mr. Whelan further testified that there would be a security guard on site.

13. Mr. Whelan next testified that the capacity of the waiting area would be fifteen (15) to eighteen (18) people. He also stated that the Applicant would use a texting service to communicate with customers in order to inform them when their orders were ready for pickup, so they would not have to wait on-site. Mr. Whelan further testified that customers could pre-order online and that the Applicant would offer discounts for pre-ordering online to encourage customers to pre-order. He explained that pre-ordering would allow the Applicant to schedule customers to arrive on site throughout the day instead of customers arriving all at the busiest times of day.

14. Mr. Whelan further testified that there would not be any odor emitted from the product because it is kept in a sealed package. He also stated that there would be a carbon filter on the air conditioning unit. Mr. Whelan further testified that the business would not be open any later than 7pm. He stated that the lights would be on a timer.

15. In response to questions from the Board, Mr. Whelan testified that product would be stored in a vault per CRC regulations. He stated that there would not be any display of cannabis. Mr. Whelan also testified that customers were limited to purchase a maximum of one (1) ounce of cannabis at a time.

16. In response to further questions from the Board, Mr. Whelan provided some background on his experience. Mr. Whelan testified that he was an entrepreneur. He stated that he owns several businesses, including restaurants and a construction business. Mr. Whelan further stated that he is one of the owners of Sea Grass NJ, LLC and that this application was his first venture into the cannabis retail industry. Mr. Whelan testified that he had a consultant to assist throughout his endeavor into the cannabis retail industry and to help navigate the regulations of the CRC. Mr. Whelan also testified that the CRC license was New Jersey wide and was not specific to Monmouth County.

17. In response to further questions from the Board, Mr. Anderson argued that the parking lot property did not violate the proximity to a school condition within the ordinance. He explained that the parking lot property was not adjacent to the cannabis property, therefore, the parking lot property could never be merged with subject Property No. 1. He stated that if the properties were adjacent to one another, then there was a possibility it may violate the condition.

Mr. Anderson further argued that the parking was the principal use of the lot and was not an accessory use. Mr. Anderson further explained that the parking lot property would be owned by a separate entity for legal and liability purposes which is a common business practice, not just specific to cannabis retail business. He explained that the parking lot would not be owned by Sea Grass NJ, LLC, but would be leased to Sea Grass NJ, LLC.

18. The Board Engineer agreed that the parking lot did not count in regard to the proximity to a school condition. The Board Engineer also advised that if the parking lot property did count, it would be 998 feet from the school, where a minimum of 1,000 feet was required. The Board Engineer stated that the proximity would be *de minimis*.

19. In response to further questions from the Board, Mr. Anderson represented that the Applicant was purchasing the subject Properties. He also confirmed that the Applicant was purchasing the vacant lot adjacent to the restaurant lot. Mr. Anderson explained that the vacant lot was not part of this application. He represented that the Applicant was not proposing to use the vacant lot for the cannabis retail business. He stated that the lot was separate, with a separate entity as owner, and the lots would not be merged.

Architectural Testimony

20. The Applicant's Architect, Al Shissias, R.A., R.L.A., introduced Architectural Plans dated January 25, 2023, which was part of Exhibit A-1. Mr. Shissias was accepted as an expert witness in the field of Architecture. Mr. Shissias also introduced into evidence a collection of seven (7) photographs as Exhibit A-4 and a Color Elevation as Exhibit A-6. Mr. Shissias testified that the existing building was on a corner lot and contained two (2) stories, although the second floor was not a full second floor. He stated that the first floor contained an existing restaurant, and the second floor contained a two-bedroom apartment. He stated that there was equipment mounted on the roof over a portion of the first floor of the building.

21. Mr. Shissias next testified that the Applicant was proposing to remove the first-floor vestibule, open up the glass seating area, and remove the bar, bathrooms, and walk-in cooler. Mr. Shissias further testified that the Applicant was proposing to remove the second-floor apartment and convert the second floor into an office space and break room. He explained that the existing bedrooms would become two (2) offices. The rest of the apartment would be

converted to a conference room, kitchen, and bathroom. Mr. Shissias testified that the office was for the Applicant to use and was not for rent.

22. Mr. Shissias further testified that the removal of the first-floor vestibule permitted space to install an ADA compliant access ramp to the building. He stated that the glass seating area would become the waiting area. He stated that the bar area would become the retail showroom area. Mr. Shissias testified that the products displayed in the showroom area would not include cannabis itself, rather the products would be accessory items. Mr. Shissias further testified that the Applicant was providing a unisex, ADA accessible bathroom. Mr. Shissias further testified that the rear of the building would contain the receiving and storage area. He stated that there would be one (1) or two (2) doors on the side of the building near the rear of the building to access the receiving area.

23. Mr. Shissias further testified that the Applicant was proposing to clean up the exterior façade by making repairs to the stucco. He stated that the façade would be a muted color. He stated that the Applicant's logo would be incorporated into a sign on the front façade. Mr. Shissias testified that a maximum of 15% of the façade is permitted for a building façade sign. Here, the Applicant is proposing a sign no greater than 11% of the façade. Mr. Shissias further testified that the façade would be accented with awnings and a wood panel. Mr. Shissias also stated that the Applicant was interested in having a local artist paint a mural on the side façade if the Borough were interested.

24. Mr. Shissias further testified that the existing building was not ADA compliant, whereas the Applicant was proposing to make the building ADA compliant. He stated that the existing 0.61 feet of side yard setback was not proposed to change. He stated that the rear yard setback, building coverage, and FAR would be improved with the removal of the walk-in cooler.

25. In response to questions from the Board, Mr. Shissias testified that the second-floor office space was accessible from an interior stairwell. Mr. Shissias also stated that glass area at the front of the building could be further improved by replacing or covering the existing block façade. Mr. Shissias further testified that the glass windows for the waiting area would be obscured per CRC Regulations. He stated that the windows would be made opaque, but he was open to suggestions of alternatives.

26. The Board expressed its concern that blacking out or making windows opaque were not compliant with the Redevelopment Plan. The Board also would like the Applicant to provide more specifics on how the architectural design would improve the existing aesthetics. In response, Mr. Anderson represented that the Applicant agreed to renovate the glass area. Mr. Anderson also argued that the Applicant was seeking to be governed by the CBD Zone ordinance, not the Redevelopment Plan. However, Mr. Anderson stated that the Applicant was willing to work with the Board to better comply with the Redevelopment Plan.

27. In response to further questions from the Board, Mr. Shissias testified that the capacity of the building would be fifty (50) persons, but the Applicant would limit the capacity to a maximum of thirty (30) persons, which included the waiting area and employees. Mr. Shissias further testified that the Applicant would keep a queue from forming outside of the building by posting "No Loitering" signs and the security guard would enforce the sign. Mr. Shissias also explained that the ADA ramp was internal to the structure, although it was outside. He stated that the internal ADA ramp would alleviate the impact of any queueing.

Engineering Testimony

28. The Applicant's Engineer, Brent Papi, Jr., P.E., C.M.E., testified before the Board. Mr. Papi was accepted as an expert witness in the field of civil engineering. Mr. Papi testified that the subject Property was 2,300 square feet and contained an existing two-story building. He stated that the building ran the entire length of the frontages. He stated that the footprint of the building was 1,411 square feet. He stated that the existing walk-in cooler would be removed.

29. Mr. Papi next testified that the parking lot property contained 7,000 square feet, fifteen (15) parking spaces, a 10'x10' shed, a fourteen (14) foot wide apron, a sign with the restaurant logo, and a historic Borough sign.

30. Mr. Papi next testified that the Applicant was seeking to convert the existing restaurant building to a cannabis retail store. He stated that with the conversion, the Applicant was proposing a new entry, façade, and removal of the walk-in cooler. He explained that a loading area of 19' x 10.8' would be provided in the location of the removed walk-in cooler. He stated that the loading area was a sufficient size to fit the delivery van. Mr. Papi further testified that the Applicant would provide a six (6) foot tall vinyl fence along the rear of the restaurant

property. Mr. Papi further testified that the Applicant would provide new sidewalk along the frontage on Sea Drift Avenue and Bay Avenue. He stated that the sidewalk along Bay Avenue would also include planters.

31. Mr. Papi next testified that the gravel parking lot would remain, but the Applicant would provide a new concrete walkway, apron, and ADA compliant parking space. Mr. Papi further testified that the Applicant would provide landscaping and two (2) bike racks to the parking lot property. He stated that the existing planters on the parking lot property would be reconstructed and planted with ornamental grass, perennials, and shade trees. Mr. Papi stated that a six (6) foot tall vinyl fence would also be provided along the property lines shared with adjacent properties. Mr. Papi stated that the gravel would remain, but lines would be painted on the curb and a delineator would be installed in the gravel to mark the parking spaces. Mr. Papi further testified that the four (4) parking spaces were required for the cannabis retail store, whereas the Applicant was providing seventeen (17) parking spaces. He explained that the Applicant was proposing to remove the existing shed and replace the shed with two (2) additional parking spaces.

32. Mr. Papi next testified that the existing lighting had residential-like fixtures and flood lights. He stated that none of the existing light fixtures were LED nor complied with Illuminating Engineering Society (IES) standards. Mr. Papi testified that the Applicant was proposing three (3) pole mounted LED lights that complied with IES and Borough ordinances. He stated that the light poles were fifteen (15) feet tall and would have a 0.3 average footcandle, where an average of 0.66 footcandles was permitted. He stated that the light intensity at the property lines would be 0.0 footcandles. He stated that the lighting would be on a timer and would be dimmed at night. He stated that there would be a light above the doorway.

33. Mr. Papi next testified that the stormwater of the parking lot property flowed east to west. Mr. Papi testified that the amount of disturbance was less than one (1) acre and less than 0.25 acres, therefore, the proposal was not considered a major development per State or Borough standards, therefore it did not require measuring the stormwater runoff. Mr. Papi testified that there were no issues with the existing drainage and the Applicant was not proposing any changes.

34. Mr. Papi next testified that the Applicant was proposing to use the existing utility connections. He stated that the proposed cannabis retail store use would have less demand on utilities than the existing restaurant use. He explained that a restaurant uses thirty-five (35) gallons of water per a seat daily, for a total of 2800 gallons per a day total. Mr. Papi further testified that there was no need for a new fire suppression system.

35. Mr. Papi next testified as to the design waiver relief the Applicant was seeking. Mr. Papi testified that the Applicant was seeking a design waiver for the setback of the parking lot along the southern property line, which required a minimum setback of twelve (12) feet, whereas five (5) feet was existing, and no change was proposed. Mr. Papi next testified that the Applicant was seeking design waiver relief for the restaurant property for the setbacks, FAR, and landscaping. He explained that the building was at the property line, so there was no space to provide landscaping.

36. In response to questions from the Board, Mr. Papi confirmed that the Applicant was purchasing the vacant lot adjacent to the restaurant property. He stated that the Applicant may consider using the vacant lot to provide ADA compliant parking closer to the building. Mr. Papi further testified that the Applicant could designate some parking spaces within the parking lot as employee only. The Board expressed its concern with the safety of pedestrian traffic crossing Bay Avenue from the parking lot to the building and vice versa. Mr. Papi, in response, stated that the restaurant business was different from the cannabis retail business making the pedestrian traffic safer than the existing restaurant. He explained that the cannabis retail store was safer because it was a daytime business, no alcohol was to be served, nor any cannabis was to be consumed on premises.

37. The Board Engineer advised that the design waiver relief being sought were for preexisting conditions to the properties. The Board Engineer asked about the ingress and egress of the loading area. Mr. Papi responded stating that the delivery van that would use the loading area was approximately 6.5 feet wide and 17-18 feet long. He stated that the curb cut was ten (10) feet wide, and the loading area is widened to eleven (11) feet wide. Mr. Papi stated that the delivery vans would likely go back into the loading area in order more pull out onto Sea Drift Avenue more easily.

38. In response to further questions from the Board Engineer, Mr. Papi testified that the loading area driveway was located a distance of twenty-nine (29) feet from the intersection, and therefore compliant with the required minimum distance of twenty-five (25) feet. Mr. Papi further testified that the number of parking spaces needed for the cannabis retail store was greater than the minimum requirement of four (4) spaces. He stated the parking lot would be used exclusively for the Applicant's business and would not be open for public parking. He explained that store employees or the security guard could enforce parking. He stated that there was an existing sign at the parking lot indicating that the parking lot was for the restaurant business. He stated that the Applicant would replace that sign with the sign indicating the cannabis retail business.

39. In response to questions from the Board Attorney, Mr. Anderson represented that a Memorandum of Lease would be recorded with the clerk in regard to the lease agreement for the parking lot. Mr. Anderson further represented that if there were any changes to the parking lot or lease agreement, the Applicant would return to the Board.

Public Portion

40. The hearing was opened to members of the public for questions of the testimony provided so far, at which time Brianna Santoro, 62 Sea Drift Avenue, asked if the parking lot would be available for public parking when the Applicant's business was closed. Mr. Anderson stated that there were no plans to do so, but if the Borough insisted, the Applicant would consider it. Ms. Santoro further asked where overflow parking would be located. Mr. Anderson, in response stated that the Applicant did not anticipate the proposed capacity of (30) persons to be maximized. He also stated that the ordinance only required four (4) parking spaces, which the proposal was compliant. Ms. Santoro further asked if customers walking out of the store with the product impacted the proximity to a school restriction. Mr. Anderson explained that the proximity restriction only applied to the cannabis retail property.

41. Ms. Santoro further asked where the CBD Zone was located. The Board Engineer explained that the CBD Zone was primarily along Bay Avenue. Ms. Santoro further asked how the CBD Zone was different from the Redevelopment Plan and how the CRC regulations impacted the proposal. Mr. Anderson explained that the subject Property was not part of the

Redevelopment Plan, and that the Applicant chose to be governed by the CBD Zone ordinances. He further explained that the proposal complied with all of the CBD Zone requirements, except for landscaping, driveway width, and parking setbacks.

42. Ms. Santoro further expressed her concern with customers consuming cannabis on the sidewalk in the area. Mr. Anderson stated that it was not the responsibility of the Applicant to police the Borough, but the Applicant would encourage its customers to be good neighbors. The Police Chief explained that consuming cannabis in public places was illegal and the penalty was a warning. Ms. Santoro also asked why some members of the Board recused themselves or were ineligible. The Board Chairman explained recusal and ineligibility, generally.

43. In response to a follow up question from the Board, Mr. Whelan testified that the parking lot would have security camera. He stated that the Applicant would encourage police to enforce laws within the parking lot.

44. David Wyss, 91 Sea Drift Avenue, asked if the cannabis retail business was a cash only business. Mr. Whelan in response, testified that customers could pay by cash or debit. Based upon Mr. Whelan's response, Mr. Wyss raised a concern with where armored bank trucks would park when collecting cash from the cash business. Mr. Whelan testified that the armored bank trucks could use the parking lot. He explained that bank trucks had their own security. He further explained that only the cannabis products would be delivered via the loading area. Mr. Whelan also stated that armored bank trucks used parking lots when making deliveries to banks.

45. Jill Karshmer, 131 Marina Bay Court, asked how the cannabis retail store would impact the school bus stop at the corner and children walking by the subject Property. Mr. Anderson argued that cannabis retailer was a conditionally permitted use in the zone and the only requirement was that cannabis retailers not be within 1,000 feet of a school.

46. Patricia Camarata, 63 Sea Drift Avenue, asked how many cannabis retailers were permitted in the Borough. The Board Chairman explained that CRC was only permitting one (1) cannabis retailer in the Borough. The Board Chairman further explained the permitting process and that Land Use Board approval was required for the Applicant to be considered for a CRC permit. Ms. Camarata asked if any of the witnesses lived near a cannabis retailer, which the witnesses testified that none did. Ms. Camarata further asked how many armed security guards

would be on site. Mr. Whelan in response testified that there would be one (1) security guard on site. He also stated that not all sales were cash only, but were also by debit, but also all cash would be secured. Ms. Camarata further asked if the cannabis retail store would decrease property values. The Board Chairman explained that the Board could not consider the impact of an application on property values. Mr. Anderson reiterated that the proposal was a permitted use in the Zone.

March 9, 2023 Hearing

47. An Objector, Arthur Robert Carmano, Jr., Esq. appeared representing himself. Mr. Carmano stated that he resided at 50 Sea Drift Avenue. Mr. Carmano objected to the Board's jurisdiction based on notice to property owners within 200 feet of the adjacent Lot 11.01. He argued that Lot 11.01 had been mentioned in previous testimony, but was not noticed properly. The Board determined that Lot 11.01 was not part of the Application nor had the Application been amended to include Lot 11.01, therefore no notice was necessary for Lot 11.01. The Board determined that notice was proper for the subject Properties included as part of the Application, therefore, the Board determined that it had proper jurisdiction.

48. Counsel for the Applicant, John B. Anderson, Esq., provided a summary of the previous hearing. He stated that there had been no change to the operation testimony. He stated that revisions to the architecture were made per comments from the Board. Mr. Anderson argued that the Application was for a conditionally permitted cannabis retailer on subject Property No. 1 and a conditionally permitted parking use on subject Property No. 2. He stated the variance relief was required because of the existing design criteria. He argued that none of the existing design criteria would be exacerbated and that some would be improved.

49. Mr. Anderson stated that issues that the Board raised at the previous hearing were about the logo on the sign and the existing atrium at the front of the building. He stated that the logo had been changed from a marijuana leaf to an anchor. He stated that the front façade architecture had been improved to eliminate the atrium.

Continuation of Architectural Testimony

50. Mr. Anderson introduced a Sea Grass NJ, LLC Interior Renovation Plan prepared by Al Shissias dated February 24, 2023 consisting of four (4) sheets as Exhibit A-7. He introduced

a Preliminary and Final Site Plan of Sea Grass prepared by East Point Engineering dated November 21, 2022, revised February 22, 2023 consisting of ten (10) sheets as Exhibit A-8.

51. Mr. Shissias testified that the architectural plans were revised. He stated that there were no changes to the second floor. He explained that the changes were to remove the glass atrium at the front of the building. Mr. Shissias stated that in place of the atrium, an ADA ramp access was provided with a covered porch. He testified that the revised design removed the 1.3 feet of encroachment into the county right-of-way of Bay Avenue. Mr. Shissias stated that the porch would have a standing seam roof. He explained that the entry would be at the right corner of the building instead of the existing left corner. Mr. Shissias testified that the revised design would allow more interior space for a waiting room.

52. Mr. Shissias next testified that the Board's concern of the aesthetics was addressed by reducing the tone of the color of the building to earth tones. He stated that the existing atrium was constructed with landscaping retaining wall block, which would be removed as part of the revised architectural plans. In addition, Mr. Shissias stated that the windows on the front would be symmetrical and would be translucent glazing. Mr. Shissias introduced Photographs of Opaque Glass as Exhibit A-9 as examples of the proposed windows.

53. Mr. Shissias further testified that the exterior of the building would have downward lighting for the porch and the façade. He stated that the anchor logo would remain in the initial proposed location. He stated that the roof would be level. He stated that the ramp would be wide enough to be ADA compliant. Mr. Shissias stated that the architecture was fitting for the character of the business district. He also stated that the capacity would be unchanged.

54. In response to a question from the Board Attorney, Mr. Shissias confirmed that a front yard setback of zero (0) feet was permitted, with which the revised architectural plans are in compliance. He explained that the improvement was the removal of the encroachment on the right-of-way. He stated that the porch and building were outside of the sight triangles.

55. In response to questions from the Board, Mr. Shissias explained that the square footage of the waiting room was improved because part of the existing doorway entry was on the exterior and with the revised plans, that exterior portion would be brought into the building

and would become part of the waiting room. He stated that the capacity of the waiting room was seventeen (17) persons, which was unchanged from the initial architectural plans.

56. In further response to the Board, Mr. Whelan explained that the total capacity of the building would be thirty (30), which would consist of a maximum of eight (8) employees and twenty-two (22) customers. The Board Engineer stated that the existing capacity was sixty-four (64) people. He stated that there would not be any seats in the waiting room and that the length of time that customers would be inside the building would be between five (5) to fifteen (15) minutes. Mr. Whelan also stated that the existing awning was at a non-compliant height and would be replaced with an awning with a compliant height of 7.6 feet. The Board Engineer explained that the minimum permitted height of a canopy was six (6) feet.

57. In response to further questions from the Board Attorney, Mr. Shissias confirmed that the sign complied with the ordinance and was less than the maximum permitted square footage. He explained that the maximum permitted square footage for signage was 16% of the façade. The proposed sign is only 11% of the area of the façade. He also stated that the sign would be illuminated with halo lighting, which would not have any spillover onto adjoining properties because it would be inwardly focused. Mr. Shissias stated that the lighting would comply with the lighting ordinance. He stated that the ADA parking spaces were located across Bay Avenue in subject Property No. 2 and that the crosswalk would be improved per the requirements of Monmouth County.

58. In response to further questions, Mr. Shissias testified that the loading space was a technical design waiver because the width of the loading driveway was ten (10) feet, whereas a minimum width of fifteen (15) feet was required. He stated that the driveway width was part of the d(3) variance relief. He explained that no loading area existed, and that the existing walk-in freezer would be removed to provide the space for a loading area. Mr. Shissias also stated that the trash would be stored in bins at the rear in a screened area. He explained that there would not be any trash storage inside the building because there would be little trash generated by the use. Mr. Shissias stated that the Applicant would comply with the utility requirements.

Public Portion

59. The hearing was then opened to the public for questions, at which time Justin Mele, 26 Sea Drift Avenue, asked if there would be a queue of people outside of the building. Mr. Shissias stated that the queue would be primarily inside the building. Mr. Whelan explained that customers could schedule time for pickup and would be notified by text message to arrive in order to reduce queueing. He stated that there would be no loitering signs and security would enforce loitering. Mr. Mele asked if customers would then loiter around the neighborhood. Mr. Anderson argued that a goal of the CBD Zone was to encourage walking in the zone to patronize area businesses. Mr. Anderson further argued that the issue at the cannabis retailer in Eatontown with queueing was that that location did not have a waiting room, whereas the Applicant was proposing a waiting room, therefore there would not be any issue with queueing. In response to a further question from Mr. Mele, Mr. Whelan testified that there would not be any medical marijuana sold. Mr. Mele also asked about parking and employees. Mr. Anderson argued that the Applicant was proposing four (4) times the required number of parking spaces and that there would be one (1) security guard among the employees.

60. The Objector, Mr. Carmano, asked about the rear and side doors. Mr. Shissias explained that there were two (2) existing side doors and one (1) at the rear. He stated that the doors would be employee only. He explained that one (1) of the two (2) side doors may be removed if permitted by the fire code. He explained that one (1) of the side doors was to access the second-floor apartments. He stated that the doors would comply with the fire code. Mr. Carmano further asked about the loading area curb cut, which Mr. Shissias stated the traffic engineer would address.

61. Steve Solop, 205 Bay Avenue, asked if the traffic study took into account children in the area. Mr. Solop also asked if the security guard would be inside or outside. Mr. Whelan testified that the security guard would be both inside and outside and was required per State regulations. He stated that the security guard would help control the queue. Mr. Whelan also confirmed that there would not be any consumption on site.

62. Melissa Pederson, 17 Bay Street, asked about the CBD Zone. Mr. Andreson explained that the CBD Zone was the zone along Bay Avenue and that cannabis retail, as well as, principal parking, were conditionally permitted uses in the zone. Ms. Pederson asked if the

subject Properties were more than 1,000 feet from a school. Mr. Anderson represented that the subject Property No. 2, the principal parking lot property was 994 feet from the school property, however, he argued that the parking was a stand-alone principal parking use, not an accessory use to the cannabis retailer, therefore the school proximity condition did not apply. Mr. Anderson further argued that Bay Avenue separated the two (2) subject Properties, therefore they could not be merged. He also stated that the subject Properties would have separate owners and the cannabis retailer would have a lease agreement to use the parking property.

63. Robert Fishler, 20 Gravelly Point Road, asked about the State regulations. Mr. Anderson represented that the Applicant would comply with the State regulations. Mr. Fishler asked about a hypothetical situation that the employees may unionize and require parking.

64. Mark Kiley, 39 Shore Drive, asked if this Application was for a license for cannabis retailer. Mr. Anderson explained that the Application was for site plan approval. Mr. Kiley further asked how the proximity to a school did not apply to the parking property if it was being used by the cannabis retailer. Mr. Kiley also asked if the encroachment on the right-of-way was removed, which Mr. Anderson confirmed. Mr. Kiley asked if the porch would have a queue. Mr. Shissias stated that the porch was for the ADA ramp and that the queue would be inside the building.

65. Tony Camarata, 63 Sea Drift Ave, asked how the product was secured inside the building. Mr. Whelan explained that the State regulations required the product be stored in a locked vault with card access. He stated that the vault would be located in the rear of the building. Mr. Whelan also confirmed that the guard would be armed and would have a law enforcement background in addition to the use of security cameras, which would be linked to the CRC and to the Highlands Police Department.

Continuation of Engineering Testimony

66. Mr. Papi next testified in reference to the revised site plan, which was marked Exhibit A-8. Mr. Papi testified that the proposed ADA ramp was setback at zero, whereas previously the existing atrium encroached over the property line into the right-of-way by 1.3 feet. He stated that the curb cut for the loading area was widened from ten (10) feet to 13.6 feet, whereas a minimum of fifteen (15) feet was required. He stated that the Applicant would install

an ADA compliant crosswalk across Bay Avenue per the request from the Monmouth County Planning Board. He stated that the proposed building was located outside of the sight triangles.

67. Mr. Papi next testified that the revised site plans improved some of the existing non-confirming bulk standards. He stated that the variance relief from the front setback was removed. He stated that the existing building coverage was 77.9%, which was reduced to 77.6%. He stated that the existing lot coverage was 100%, which was reduced to 99.7%.

68. In response to questions from the Board, Mr. Papi testified that the loading area at the rear was 19'x10.8' which he stated the turning circulation shown was sufficient for a Mercedes-Benz Sprinter van. He stated that there would be a fence around the loading area. He stated that a bank armored car would not use the loading area.

69. In response to questions from the Board Attorney, Mr. Papi introduced the Delivery Vehicle Turning Radius dated March 7, 2023 as Exhibit A-10. He stated that Exhibit A-10 depicted a Sprinter van with the dimensions of 18.2 feet in length and 6.5 feet in width with a turning radius of 20.17 feet. He stated that the Sprinter van was not a specific class of vehicle, but was a common van used for cannabis delivery. He stated that any larger vehicles would use the street, which would be an uncommon occurrence. He stated that the Applicant would comply with Section 21-65.13 of the Borough Ordinance for no on-street loading area.

Traffic Engineering Testimony

70. The Applicant's Traffic Engineer, Lee D. Klein, P.E., PTOE, testified before the Board. Mr. Klein was accepted as an expert witness in the field of traffic engineering. Mr. Klein stated that he performed a Traffic Impact Study (TIS) dated January 27, 2023. Mr. Klein testified that he based the trip generation in the TIS on the Institute of Transportation Engineers (ITE) manual. He explained that he examined the existing restaurant and second floor apartments and compared it to a cannabis retailer with ancillary office. He stated that the existing trip generation was twenty-two (22) trips during the morning peak hour, twenty-six (26) trips during the evening peak hour, and eighteen (18) trips during the Saturday peak hour. He explained the trips were twelve (12) trips in and ten (10) trips out during the morning, fourteen (14) trips in and twelve (12) trips out during the evening, and nine (9) trips in and nine (9) trips out during Saturday peak.

71. Mr. Klein next testified that the proposed cannabis use would generate twenty-six (26) trips during the morning peak hour. He explained that the morning peak hour for cannabis retailer use was after the general traffic peak hour of 7 a.m. to 9 a.m. because the cannabis retailer did not open for business until 10 a.m. Mr. Klein stated that thirty-seven (37) trips would be generated during the evening peak hour. The breakdown would be eighteen (18) trips in and nineteen (19) trips out. He stated that the Saturday peak hour would generate forty-four (44) trips. The breakdown would be twenty-two (22) trips in and twenty-two (22) trips out. He stated that the office would generate two (2) trips during peak hours.

72. Mr. Klein next testified that the general trips generated on Bay Avenue varied during summer months between 270 to 325 trips during the morning peak hour and 375 to 450 trips during the evening peak hour. He explained that he added 10% to the existing trips on Bay Avenue, which was greater than the variation during summer months. Mr. Klein testified that the increased trip generation of the proposed cannabis use with office would not be noticeable. He explained that uses that generate less than 100 trips during peak hours was not considered significant per NJDOT.

73. Mr. Klein next testified that the Borough Ordinance required one (1) parking space per 600 square feet of retail. Therefore, the proposed cannabis retail use required four (4) parking spaces, whereas seventeen (17) parking spaces were provided. He stated that even with providing employee-only parking, there would be nine (9) parking spaces for customers, which was sufficient parking for a retail use.

74. In response to questions from the Board, Mr. Klein stated that there was sufficient space inside the building for the number of customers per trip generated. He stated that the maximum capacity of the building was thirty (30) persons with a breakdown of eight (8) employees, and twenty-two (22) customers. Mr. Klein stated that the ITE did not specify any increase in trips during the summer months. He explained that the ITE trip generation was based on typical scenarios, not the possible worst case scenario volume, such as a retail store during Christmas shopping.

75. In response to further questions from the Board, Mr. Klein stated that there were only two (2) existing cannabis retailers located in Monmouth County at the time of this hearing.

However, there were several applications in other municipalities, such as Red Bank. Mr. Klein further stated that the trip generation was car traffic. He stated that the pedestrian impact would be similar to the existing restaurant use. Mr. Klein testified that the drive aisle width in the parking lot would be widened to twenty-four (24) feet to comply with the requirements of the Borough Ordinance.

76. In response to further questions from the Board, Mr. Klein stated that pedestrian walk in traffic could be added on top of the twenty-two (22) vehicle trips during peak hour. He explained that the CBD Zone was a downtown area, so pedestrian traffic was encouraged. Mr. Klein also stated that the morning peak hour was not during the morning commute, but the evening peak hour was during the evening commute.

77. In response to questions from the Board Attorney, Mr. Anderson stated that a design waiver was not needed for the parking lot drive aisle distance to the corner. He also stated that the parking agreement was a lease, not a cross easement. Mr. Papi further testified that the Applicant would replace the sidewalks on Sea Drift Avenue to ADA requirements. He explained that the parking lot would be gravel with wooden delineators. He stated that the sidewalks would be compliant with concrete and grade. Further, landscaping would be added to the parking lot. He stated that the parking stalls would be 9' x 18' with none being parallel. He stated that the drive aisle would be twenty-four (24) feet.

78. In response to further questions from the Board, the Board Attorney explained that cannabis retailer use was a conditionally permitted use within the CBD Zone. He explained that the Applicant had presented testimony that the proposal did not comply with all of the conditions for the cannabis retail use, therefore the Board was to determine if the site was still suitable for the proposed use. He stated that there was nothing that required the use be "discreet." Mr. Anderson argued that a condition of the cannabis retail use was to comply with the design standards and that bulk standards were included within the design standards, therefore the Applicant proposed cannabis retail use did not meet that condition. In response to address the Board's concern of "discreetness", Mr. Anderson argued that the Applicant was providing a six (6) foot tall vinyl fence, opaque windows, no advertising, and an anchor logo. He stated that the only other conditions were no consumption on-site and that the use would not

be located within 1,000 feet of a school. Mr. Anderson argued that the Applicant complied with the distance to a school requirement. Mr. Anderson stated that enforcement of no consumption in the parking lot would be by security guard and security cameras. He stated that any off-site consumption would be enforced by the Highlands Police Department.

Planning Testimony

79. The Applicant's Planner, Veena Sawant, P.P., AICP, testified on behalf of the Applicant. Ms. Sawant was accepted as an expert witness as a Land Use Planner. Ms. Sawant testified that the subject Properties included two (2) parcels, one at the northeast corner of the intersection and one at the southeast corner. Ms. Sawant testified that the Applicant was proposing a cannabis retail use and a principal parking use, which were conditionally permitted uses within the CBD Zone. She stated that the parking lot consisted of seventeen (17) parking spaces, which would remain. She stated that the Applicant was proposing to reuse the existing restaurant building, change the interior, convert the second floor from apartments to office space, and remove the walk-in freezer box at the rear. She stated that a six (6) foot tall vinyl fence was proposed along the eastern property line in lieu of a landscape buffer.

80. Ms. Sawant testified that the Applicant was seeking d(3) conditional use variance relief for subject Property No. 1, which was located at 272 Bay Avenue, to permit cannabis retail use. She stated that the conditions to permit the use was not to be located within 1,000 feet of a school, and no consumption on site, which she testified the Applicant complied with. She stated, however, the ordinance required that the proposal comply with all of the design standards, which included the bulk standards. She stated that the subject Property did not comply with all of the bulk standards. Ms. Sawant testified that the conditions of the site that were not compliant with the bulk standards were existing and were not being exacerbated by the proposed use.

81. Ms. Sawant testified that the bulk standards were in Section 21-65.1 of the Borough Ordinance. She stated that the Applicant was seeking relief for the side yard setback, rear yard setback, building coverage, lot coverage, Floor Area Ratio (FAR), 10% of the property being landscaped, and the driveway curb cut width for subject Property No. 1. She stated that the Applicant was seeking relief for the rear yard setback to parking spaces for subject Property

No. 2. Ms. Sawant testified that the Applicant would also require d(4) variance relief for subject Property No. 1, however, it would be subsumed within the d(3) variance relief for the cannabis retail use.

82. Ms. Sawant testified that the Applicant was improving the on-site loading. She explained that there was no loading area on site, whereas the Applicant was proposing a loading area. She explained that the minimum width of a curb cut for driveway was fifteen (15) feet, whereas the Applicant was proposing a curb cut to the loading area driveway was 13.6 feet wide.

83. Ms. Sawant testified that the design standards required 10% of the subject Property to be landscaped, whereas there was insufficient space on the existing subject Property No. 1 to provide any landscaping.

84. Ms. Sawant testified that the side yard setback pursuant to Section 21-91A4.a. permitted zero (0) foot setbacks or, if a setback exists, a minimum of five (5) feet was required. The Applicant was proposing a side yard setback to adjacent Lot 11.01 of 0.61 feet.

85. Ms. Sawant testified that the rear yard setback required a minimum of twelve (12) feet, whereas 2.1 feet was existing, and 10.8 feet was proposed with the removal of the walk-in freezer.

86. Ms. Sawant testified that the maximum permitted building coverage was 35%, whereas 83% was existing and 77.6% was proposed.

87. Ms. Sawant testified that the maximum permitted lot coverage was 80%, whereas 100% was existing and 99.7% was proposed.

88. Ms. Sawant testified that the maximum permitted FAR was 0.65, whereas 1.31 was existing and 1.26 was proposed.

89. Ms. Sawant next testified that the Applicant required variance relief from Section 21-65.14d(2) for subject Property No. 2, the parking lot. She explained that the minimum rear yard setback for parking spaces was twelve (12) feet, whereas the existing 6.7 feet was unchanged.

90. Ms. Sawant next testified in regard to the proofs to grant the variance relief. She explained that for a d(3) conditional use variance relief, the focus was on whether the subject Property was still suitable to accommodate the use and advance the purposes of the conditions

in spite of the deviations from the conditions. Ms. Sawant testified that the specific conditions for cannabis retail use were no consumption on site, and not be located within 1,000 feet of a school. She stated that subject Property No. 1 complied with these conditions. She stated that subject Property No. 1 did not comply with the general condition of complying with the design standards. She testified that the site still accommodated the cannabis retail use in spite of the deviation for the design standards.

91. Ms. Sawant next testified that most of the lots in the area were small. She stated that if the proposal complied with the building coverage, then a building of only 700 square feet would fit on subject Property No. 1. She stated that because the bulk standards were within the design standards ordinance, any conditional use would not comply. She argued that the deviation for the design standards should be granted. She stated that the Applicant was reducing the existing deviations, although slightly, and making improvements to the building.

92. Ms. Sawant further argued that the existing restaurant has a greater impact than the proposed cannabis retail use. She stated that the restaurant was open during the evening when most residents were home, increasing the impact on street parking for residents. She argued that there would not be any negative impact on the surrounding area. She stated that there would not be any odor because the product was in sealed containers, there was low trash volume, and was a clean use.

93. Ms. Sawant further testified that if the side yard setback were at zero (0) feet instead of 0.61 feet, it would be compliant. She stated that there was no change in the function of the use with the side yard setback. She stated that the rear setback was being improved from 2.1 feet to 10.8 feet. She stated that the difference between 10.8 feet and the minimum required twelve (12) feet was *de minimis* and the function of the use was unchanged. She stated that the building coverage was being improved from 83% to 77.6%, which had no impact on the function of the cannabis retail use. She stated that the lot coverage from 100% to 99.7% had no impact on the function of the cannabis retail use. She stated that the FAR deviation had no impact on the function of the cannabis retail use. She stated that the driveway width would not have an impact on the function of the loading area. She stated that 10% landscaping would not make the

cannabis retail use function better. Ms. Sawant testified that none of the deviations made the site unsuitable for cannabis retail use.

94. Ms. Sawant further testified that the wall of the building along Sea Drift was being improved and could have a mural painted on it to improve the aesthetics. She stated that the sign on subject Property No. 2 was being improved and the landscaping wall would be repaired. She stated that the rear side setback was existing and unchanged, which had no impact on the function of the parking use. She stated that a fence would be added to provide a buffer and the existing shed would be removed. She stated that the size of the parking stalls and drive aisle were adequate.

95. Ms. Sawant next testified that the proposal was consistent with the 2016 Master Plan. She stated that goals of the Master Plan were to promote and revitalize the CBD Zone, encourage a mix of retail, services, and entertainment, promote local employment, rehabilitation of existing commercial buildings, and provide adequate parking. Ms. Sawant argued that the proposed cannabis retail use advanced the goals of the Master Plan.

96. Ms. Sawant next testified that the proposal advanced the purposes of the Municipal Land Use Law (MLUL). In particular, the proposal advanced purpose a) to promote the general welfare and public safety by providing an ADA compliant ramp and crosswalk. The proposal advanced purpose d) by coordinating with County and State in development within the Borough. The proposal advanced purpose g) by providing sufficient space for a commercial use. The proposal advanced purpose i) by promoting a desirable visual environment in improving the building.

97. Ms. Sawant testified that the bulk variance relief should be subsumed within the d(3) conditional use variance. She stated that if the bulk variance relief were not subsumed, then the variance relief should be granted under the hardship criteria because of the existing building, or it could be granted under the flexible criteria for the same reasons she testified to for the d(3) variance relief.

98. In response to questions from the Board Attorney, Ms. Sawant testified that she could not find out if any of the existing conditions were previously approved. She stated that it

was difficult to determine any prior approvals because the existing building was old, Borough records had been lost to floods in the past, and archived records are difficult to search.

99. In response to further questions from the Board Attorney, Ms. Sawant testified that the purpose of the FAR was to control intensity in the zone. She stated that it was a goal of the governing body to control the intensity of the use. She stated that FAR variance relief should be granted in spite of the goal because most lots in the area were similarly small. She also stated that the proposal advanced the goal of revitalizing a commercial downtown, which required a higher FAR to create a streetscape. Ms. Sawant also testified that no FAR was required within the Redevelopment Zone, which overlayed the CBD Zone. However, the Applicant chose not to be governed by the Redevelopment Zone. She stated that complying with the FAR would be impracticable. She also stated that the proposed FAR would help the subject Property No. 1 blend with the Redevelopment Zone. Ms. Sawant further testified that the proposed cannabis retail use was less intense than the existing restaurant and residential apartments.

100. In response to a follow up question from the Board Attorney, Ms. Sawant explained that the Applicant chose not to be governed by the Redevelopment Zone because it did not permit cannabis retail, whereas the CBD Zone conditionally permitted the use. She also stated that the FAR requirements of the Redevelopment Zone would limit the building to 1,400 square feet, whereas 2,400 square feet existed. She stated that removing 1,000 square feet of the building would be a hardship.

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101. Mr. Anderson provided an overview of the Application and the hearings to this point. He stated that Ms. Sawant would continue the remainder of her direct testimony.

Continuation of Planning Testimony

102. Ms. Sawant testified that subject Property No. 2 contained parking as a conditionally permitted principal use, however, there was one design standard required of the conditional use that it did not comply. She explained that the rear yard setback required twelve (12) feet, whereas the existing parking spaces were 6.7 feet from the rear yard property line.

103. Ms. Sawant testified that subject Property No. 1 contained the existing restaurant, and which is proposed to be used as a cannabis retailer. A cannabis retail use is a conditionally

permitted use in the CBD Zone. She stated that the proposed cannabis retailer complied with the requirements of the conditional use, except for the design standards. She reviewed the bulk standards within the design standards that she testified to previously.

104. Ms. Sawant next testified that the focus of the review for a d(3) conditional use variance was to determine if the site was still appropriate for the proposed use in spite of the deviations from the conditions. She also stated that the bulk variance relief would be subsumed into the d(3) conditional use variance relief.

105. Ms. Sawant testified that subject Property No. 2 was still appropriate for the principal parking use in spite of the deviations. She explained that the Applicant could remove two (2) parking spaces within the setback to comply with the design standards, however, the Applicant believed that it was better to have seventeen (17) parking spaces instead of fifteen (15) parking spaces.

106. Ms. Sawant testified that subject Property No. 1 was still appropriate for the cannabis retailer use in spite of the deviations. She explained that the Applicant could add to the wall along the side yard to make the setback zero (0) feet, which would be compliant, but it would not change the appropriateness of the site for the cannabis retailer use. She stated that the rear yard setback deviation was *de minimis* and was a benefit by creating an off street loading area. She stated that the building coverage, lot coverage, and FAR were being improved from the existing conditions. She stated that the proposed driveway width was an improvement because none presently existed. She stated that there was no location on subject Property No. 1 to provide landscaping, but the Applicant would add to the landscaping on subject Property No. 2.

107. Ms. Sawant next testified that the proposal advanced the goals of the Master Plan and the CBD Zone. She stated that the aesthetics would be improved, the existing commercial building would be rehabilitated, and the subject Properties would be ADA compliant.

108. Ms. Sawant stated that there was no substantial detriment to the public good, to the Zone Plan or the Master Plan. She stated that there was no additional noise or odor not contemplated by the zone. She stated that the proposal provided adequate light, air, and open space. She stated that the proposed cannabis retail use produced less trash than the existing restaurant. She stated that there was no change in the traffic impact or Levels of Service (LOS).

She stated that the number of parking spaces exceeded the required four (4) parking spaces. She stated that the hours of operation were not at night. She also stated that the Master Plan permitted the use as a conditional use.

109. In response to questions from the Board, Ms. Sawant testified that adjacent Lot 11.01 was not part of the Application. Mr. Anderson explained that the owner of the Applicant had an option contract to purchase Lot 11.01. He explained that if the owner of the Applicant were to purchase Lot 11.01, it would be owned under a separate entity than the Applicant. He explained that testimony regarding Lot 11.01 was offered to demonstrate that the side yard setback would not have an impact on the public.

110. In response to further questions from the Board, Mr. Papi testified that the ADA parking space would be located on subject Property No. 2 closest to the intersection of Sea Drift Avenue and Bay Avenue. He explained that the ADA parking space would have a concrete surface as opposed to the gravel for the rest of the parking lot. He stated that the Applicant was also proposing in coordination with Monmouth County to make the crosswalk ADA compliant. She also stated that the atrium of the existing building would be removed to provide an ADA access ramp.

Public Portion

111. The hearing was then opened to the public for questions, at which time Justin Mele, 26 Sea Drift Avenue, asked how the Applicant's Planner determined that there would not be any detriment to the neighborhood. Ms. Sawant explained that the variance deviations would not have a detrimental impact to the neighborhood because they were existing, and the Applicant was improving some of the variances. Mr. Mele further asked how pedestrian traffic and queueing outside would not be a negative impact. Mr. Anderson argued that there was sufficient capacity within the building for queueing and that queueing was not relevant to the bulk variance relief being sought as part of the design standards.

112. Steve Solop, 205 Bay Avenue, asked if there was a study performed on pedestrian traffic. Mr. Anderson argued that pedestrian traffic was not relevant to the bulk variance relief being sought as part of the design standards.

113. In response to a follow up question from the Board, Mr. Anderson confirmed that security personnel and an “expeditor” would control queueing and ensure customers are processed rapidly.

114. Al Smuda, 215 Marina Drive, asked the process of the Land Use Board in relation to the Governing Body. The Board Chairman provided an explanation. Mr. Smuda also asked if the Applicant’s Traffic Engineer was familiar with the specific traffic conditions of the Borough. Mr. Anderson argued that the site could accommodate the demand for a cannabis retailer from the Borough and surrounding municipalities.

115. Melissa Pederson, 17 Bay Street, asked how the expected trips generated within the TIS were calculated. Mr. Klein explained that he used a computer software program, which was based on real life data collected for the ITE. He stated that the process was generally accepted among professional traffic engineers. He explained that the trips were based on the square footage of the building and included vehicular, bicycle, and pedestrian traffic.

116. Tony Camarata, 63 Sea Drift Ave, asked if the TIS considered summer traffic volume.

117. Blake Glassbere, unknown address, asked a procedural question.

118. Mark Kylie, B5 Oceanview Terrace, asked if the owner of the existing building was in agreement with the Applicant’s proposal. Mr. Anderson explained that an Owner’s Consent Form was submitted as part of the Application. Mr. Kylie also asked about the process of licensure with CRC and the time frame of obtaining the license. Mr. Kylie also asked if the conditions of a possible approval would apply to any future owners. The Board Attorney provided an explanation of resolutions, generally, and that Applicants could apply to the Board for extensions of time for site plan approvals. Mr. Kylie also asked about the encroachment on the county right of way. The Board stated that the encroachment would be handled by Monmouth County.

119. Jill Karshmer, 131 Marina Bay Court, asked if the proposal would have any impact on the school bus stop located at the intersection of Sea Drive Avenue and Bay Avenue at 2:15 p.m. on weekdays. She also asked if the summer camp was within 1,000 feet of the subject Property. The Board stated that proximity to summer camps was not a condition in the ordinance.

120. Danielle Dunn, 26 Sea Drift Avenue, asked how many data points that the TIS was based upon. Mr. Klein testified that the TIS was based upon the 11th Edition of the ITE Trip Generation Manual. He stated that within that manual, the morning peak hour trips were based upon six (6) studies, the evening 4pm to 6pm peak hour trips were based upon sixteen (16) studies, the evening overall peak hour trips were based upon twelve (12) studies, and the Saturday peak hour trips were based upon five (5) studies. Mr. Klein stated that the studies were created in 2010. Ms. Dunn asked if there was more current data that the traffic engineer could have relied upon. Mr. Klein stated that the 11th Edition was the most current ITE manual. Ms. Dunn further asked if the TIS considered that Bay Avenue was the main artery into the downtown area of the Borough with only two (2) entry ways downtown. Mr. Klein testified that the data for Bay Avenue was collected in June 2018, to which he added 10% annual growth to determine current traffic conditions. He explained that the traffic generated by the proposed use would account for 3-5% of the total traffic on Bay Avenue during peak hours. Ms. Dunn further asked if another cannabis retailer had obtained approval from the Board. The Board Chairman confirmed that there was a proposed cannabis retailer previously approved located near the Bay Avenue Bakery. Ms. Dunn also asked if this Application was properly noticed, which Mr. Anderson represented that notice was sent to the list of property owners within 200 feet of the subject properties by certified mail.

121. Tony Camarata, 63 Sea Drift Avenue, asked if there were other cannabis retailer use applications before the Board. The Board Chairman stated that one had been approved, one had been withdrawn, and this Application. Mr. Camarata asked if the subject Property was uniquely suited for cannabis retailer. The Board Attorney explained that it was the burden of the Applicant to make that argument. He stated that there were dozens of properties within the CBD Zone that had the potential to apply for cannabis retailer use.

122. The Objector, Arthur Robert Carmano, Jr., Esq., asked several questions referencing line by line each item within the Board Engineer's Report dated February 3, 2023. Mr. Anderson objected to Mr. Carmano's questioning as unduly cumulative. Mr. Anderson argued that the Applicant did not satisfy the items within the Board Engineer's Report, which was the reason the Applicant was before the Board seeking relief.

123. Mr. Carmano asked if the retaining wall located on subject Property No. 2 would be replaced. Mr. Anderson stated that the Applicant had testified that it would replace the retaining wall. Mr. Papi explained that the retaining wall was a small landscape wall less than one (1) foot in height. He explained that it was brick and in disrepair. He stated that the wall was approximately one (1) foot within the right of way of Sea Drift Avenue and approximately two (2) feet within the right-of-way of Bay Avenue.

124. Mr. Carmano asked if the gravel was a sufficient surface for the parking lot. Mr. Papi testified that the existing parking lot was entirely gravel. He explained that the Applicant was proposing to keep the surface gravel, except that the ADA parking space would be concrete. He stated that the Applicant was proposing delineators and striping within the gravel. He stated that the drive aisle width was compliant for two way traffic.

125. Mr. Carmano asked if the Applicant had contacted Monmouth County. Mr. Anderson stated that the Applicant had been working with Monmouth County and that a condition of approval would be to obtain all outside agency approval, which would include Monmouth County. Mr. Anderson argued that it was irrelevant to discuss specifics on items that were within the jurisdiction of Monmouth County.

126. Mr. Carmano asked if the proposed crosswalk improvements would include flashing lights. Mr. Klein testified that he was unsure if flashing lights would be included with the crosswalk, but that it would be constructed to Monmouth County standards.

127. Mr. Carmano introduced the Marijuana Dispensary Code as Exhibit O-2. Mr. Carmano asked several questions regarding the TIS. He asked about the number 4.25 trips during the peak hour of 2pm and 6pm for a 1,000 square foot cannabis retailer. Mr. Klein corrected Mr. Carmano that 4.25 referred to the number of parking spaces. Mr. Carmano asked several other questions about numbers within the TIS. Mr. Anderson objected to Mr. Carmano's questions, arguing that the Borough Ordinance regarding the required number of parking spaces was all that was relevant. He stated that four (4) parking spaces were required per the Borough Ordinance. Mr. Klein stated that the Applicant was proposing seventeen (17) parking spaces.

128. Mr. Carmano continued to ask several questions about the TIS, which Mr. Klein continued to provide explanation of the studies that he relied upon. Mr. Klein testified that he

used the average of the several studies for peak trips, which ranged from six (6) trips to 122 trips. The average was thirty-six (36) trips. He stated that the total daily trips ranged from forty-eight (48) trips to 781 trips for a 1,000 square foot cannabis retailer. Mr. Klein stated that seasonal fluctuations were not accounted for in the studies. He explained that the studies were performed in California, Colorado, and Massachusetts, which were locations with seasonal fluctuations, so he assumed that seasonal fluctuations were baked into the data. Mr. Klein stated that the data within the studies were collected by professionals in the field by manual counts.

129. Mr. Carmano next asked if Mr. Klein had manually counted traffic within the Borough for cannabis retailer use. Mr. Anderson argued that it was not possible to collect such data because there was no cannabis retailer use in the Borough. Mr. Carmano broadened his question to ask if Mr. Klein had manually counted traffic for any cannabis retailer use. Mr. Klein testified that he had manually counted traffic at two (2) locations in Union County and one (1) in Hoboken. Mr. Carmano asked how the Applicant would ensure that queueing would not wrap around the block similar to the cannabis retailer in Eatontown. Mr. Anderson objected to Mr. Carmano's question because there was nothing on the record about queueing at a cannabis retailer in Eatontown. Mr. Anderson further argued that the Eatontown cannabis retailer did not have a waiting room, whereas the Applicant was providing a waiting room and that security would control queueing.

130. Mr. Carmano next asked if there were any analysis on the increase of crime from cannabis retailer use. Ms. Sawant testified that no such study was required because cannabis retailer use was a permitted use.

131. Mr. Carmano introduced an article by Dr. Loraine Hughes of the University of Colorado as Exhibit O-4. Mr. Carmano stated that the article was about a study of the increase of crime related to cannabis between 2012 and 2015. He stated that the article notes that recreational cannabis consumption was legalized in Colorado in 2014. Mr. Carmano stated that the conclusion of the article was that property crime had increased from January 2015 and January 2014. Mr. Anderson objected to the statements about the article as hearsay. Mr. Anderson also argued that the study in the article states that the study was not valid outside of

Colorado. Mr. Anderson also argued that the crime was irrelevant to the bulk variance relief being sought.

132. Mark Kylie asked if density was relevant to the analysis of the variance relief. The Board Attorney stated that density was contemplated by the Governing Body when the conditionally permitted use was approved for the zone.

133. Lauren Newbaurer asked if the CRC could approve the other cannabis retailer before the Board voted upon this application. The Board stated that the CRC would make the determination, then the mayor and governing body would choose which cannabis retailer would receive the single license.

134. David, last name unknown, asked if the need for an armed security guard was evidence of an increase in crime. Mr. Anderson argued that banks and jewelry stores had armed security guards, so it was not dispositive.

135. Salvatore Albanese, 85 Sea Drift Avenue, asked if widening the drive aisle of subject Property No. 2 would decrease the number of available street parking spaces. Mr. Papi stated that the existing driveway was fifteen (15) feet and would be widened an additional nine (9) feet toward the southwest and away from the intersection.

136. Kelsey Smuda, 215 Marina Drive, questioned the accuracy of the TIS if it did not account for summer traffic. Mr. Klein explained how the impact of the proposed use would not change based upon the increased traffic volume from summer traffic.

137. There were no other members of the public with questions at this point in time.

Objector Carmano Presents His Case

138. The Board next asked the Objector, Mr. Carmano, to put on his case. Prior to Mr. Carmano presenting his case, Mr. Anderson asked questions of Mr. Carmano to establish standing. In response to questions from Mr. Anderson, Mr. Carmano stated that he was an attorney, but was representing himself. Mr. Carmano stated that he was not representing any other person or entity. He stated that he was not representing a commercial competitor to the Applicant. Mr. Carmano stated that he resided at 50 Sea Drift Avenue. The Board Secretary confirmed that Mr. Carmano's address was outside of the 200-foot radius of the subject Properties. Mr. Carmano stated that he has a home office for his law business and occasionally

sees clients at his home. Mr. Carmano stated that he was objecting to relief from the deviations that the Applicant was seeking. Mr. Carmano stated that he was unaware that home occupations were a conditional use and stated that he had not sought a permit to have a home office.

Objector's Planning Testimony

139. Mr. Carmano introduced a professional planner, Peter Steck, P.P., to testify. Mr. Anderson had no objection to Mr. Steck providing testimony. The Board recognized exhibits that were previously submitted by the Objector; Peter Steck's CV as Exhibit O-1, and The Objector's Planners Report dated April 13, 2023 prepared by Peter Steck, P.P., containing seven (7) pages as Exhibit O-3. Mr. Steck described each page of Exhibit O-3. He stated that page 1 was a copy of the zoning map with the subject Properties highlighted and a 1,000-foot radius around the subject Properties. Page 2 was a 2020 Aerial obtained from NJDEP GeoWeb with the zoning map superimposed. Page 3 were photos of the existing building taken by Mr. Steck on March 18, 2023. Page 4 was photos of the existing parking lot taken by Mr. Steck on March 18, 2023. Mr. Steck stated that there was a St. Patrick's Day celebration in the Borough on March 18, 2023, so the photos show a high degree of activity. Page 5 was a portion of the 2004 Master Plan with a land use map depicting the subject Properties. Page 6 was a portion of the 2016 Master Plan. Page 7 was a rendering of the two (2) subject lots with the adjacent Lot 11.01.

140. Mr. Steck testified that the existing restaurant had a capacity of 60-70 persons and second floor residential apartments. He stated that adjacent Lot 11.01 had a structure that was demolished and was presently gravel. Mr. Steck stated that he assumed that adjacent Lot 11.01 could be used by patrons of the restaurant for parking. He stated that the Applicant had presented testimony justifying the relief for the side yard setback because the owner of the Applicant had ownership interest in Lot 11.01. Mr. Steck argued that Lot 11.01 should have been included as part of the Application and notice should have been provided to property owners within 200 feet of Lot 11.01. Mr. Anderson argued that the Objector waived any objection to notice and that Lot 11.01 was not part of the Application. Mr. Steck further argued that the Applicant could have included Lot 11.01, merged it with Lot 12 and the use would be as of right.

141. Mr. Steck next testified that the subject Property No. 2 was located across the street from subject Property No. 1 and contained a gravel parking lot and shed. He stated that it was used as parking for the existing restaurant. He stated that the Applicant was proposing to alter the restaurant building by removing the walk-in freezer at the rear and the front façade. He stated that he was unsure whether those structures were permitted, therefore he disagreed with

the Applicant's position that removing those structures was an improvement. He explained that bringing the building into compliance by removing non-permitted structures would not count as an improvement because those structures should not have existed to begin with. Mr. Steck further made the similar argument regarding the shed on subject Property No. 2 because it was unknown if permits were obtained for the shed. He argued that removing structures that were not authorized is not a benefit to the community because they should not have existed to begin with.

142. Mr. Steck next stated that testimony had been provided on behalf of the Applicant that the Applicant would have eight (8) employees and twenty-two (22) customers permitted in the building at any one time. Mr. Steck also stated that cannabis retail was highly regulated and required frosted glass, which was not typical of a retail business in the zone. He stated that typical retail was contemplated in the master plan, whereas the proposed cannabis retail would not be typical retail.

143. Mr. Steck next testified that based on his observations of a cannabis retailer in Bloomfield, New Jersey, which had thirty (30) parking spaces, he observed illegal parking on the side streets by customers of the cannabis retailer. Mr. Steck argued that the subject Property would be substandard for a cannabis retail location. He stated that the surrounding area was residential uses. He argued that the parking lot, which the Applicant was relying on for the cannabis use, was 994 feet from the school making the subject Properties unsuitable for the proposed use.

144. Mr. Steck further testified that the Master Plan of 2004 had recommended the subject Properties be zoned SF-1 (Single Family) along with the surrounding uses. Mr. Steck testified that the goals of commercial use in the 2016 Master Plan were the same as the 2004 Master Plan, however, the recommended zoning for the subject Properties was changed to Central Business District (CBD). He stated that the CBD zone permitted a range of commercial uses and residential above, however, principal parking use and cannabis retail use were conditionally permitted uses pursuant at §21-96(a)3.

145. Mr. Steck testified that there was no record of the principal parking use on subject Property No. 2 ever being authorized or granted by the Board. He stated that the subject Property No. 2 was marked as residential on the 2004 Master Plan and on the Land Use Map.

146. Mr. Steck also stated that the conditions to permit a cannabis retail use were no consumption on site and not be within 1,000 feet of a school. Mr. Steck stated that the ordinance permitted parking as an accessory use to not be adjacent to the subject Property. He stated that accessory uses would be characterized with the requirements of the principal use. Here, he argued the accessory parking should be characterized with the requirements of the cannabis retail use, which does not comply with the condition of not being within 1,000 feet of a school.

147. Mr. Anderson objected to Mr. Steck's conclusion. He argued that the conclusion was determined at the first hearing by the Board Engineer and Board Attorney that the subject Property No. 2 was principal parking use and that the conditions of the cannabis retail use did not apply to it.

148. Mr. Steck further argued that the cross-easement deed recording would characterize the parking as being exclusively utilized by the cannabis retail use, therefore making accessory use to the cannabis retail use. Mr. Anderson argued that the Applicant would have a lease agreement with the parking lot, not a cross easement. He stated that the lease agreement would be recorded with Monmouth County.

May 11, 2023 Hearing

Objector's Planner Continues His Testimony

149. Mr. Steck continued his testimony. He stated that the subject Property consisted of two (2) properties, one (1) a restaurant and one (1) a parking lot. He stated that the Applicant also controlled the adjacent Lot 11.01. Mr. Anderson objected to Mr. Steck including Lot 11.01 in his testimony. Mr. Steck argued that he testified in regard to Lot 11.01 because the Applicant presented testimony that the side yard setback along the shared property line of Lot 11.01 was mitigated because the Applicant had an ownership interest in Lot 11.01.

150. Mr. Steck further testified that the subject Property No. 2 was 994 feet from the school. Mr. Steck stated that it was the Applicant's position that the only use on subject Property No. 2 was parking and that it was a conditionally permitted principal use. He disagreed with the

Applicant's position. He explained that if the parking lot was opened to the general public and was not exclusive to the cannabis retail use, then the principal use was for parking. However, he argued, that because the parking was exclusive to the cannabis retail use, it was accessory to the cannabis retail use. Therefore, Mr. Steck argued that an accessory use takes the character of the principal use. In this case, the principal use was cannabis use, which was not permitted to be within 1,000 feet of a school, whereas the subject Property No. 2 was 994 feet from the school.

151. Mr. Steck further stated that the Applicant proposed to remove existing non-conformities on the subject Properties. He argued that their removal was not a public benefit because they should have never existed. Mr. Steck also argued that the present aesthetic as a Mexican restaurant was visually desirable, whereas the Applicant's proposal was not an aesthetic improvement. He stated that the frosted glass was not characteristic of retail, which retail character was a goal of the zone and master plan.

152. Mr. Steck next testified that the surrounding area had residential uses and was characteristic of a residential area. He stated that the 2004 Master Plan and Land Use Map indicated both subject Properties were residential. He stated that it was the 2016 Master Plan that changed the zone to CBD.

153. Mr. Steck next testified that there were several existing non-conformities that the Applicant was not bringing into compliance. He stated that the rear setback was substandard and that the Applicant was improving, but was still not compliant. He stated that there was excessive building coverage that the Applicant was only making a slight improvement by 0.3%, so the impervious coverage was still excessive. He stated that the FAR was excessive and only a slight improvement was proposed.

154. Mr. Steck next testified that the proposed use was a dramatic change from the existing use. He argued that if the Applicant had included Lot 11.01, the proposal would be more compliant and a buffer could be provided.

155. Mr. Steck also disagreed with the calculation that a minimum of four (4) parking spaces was required. He argued that the calculation of one (1) parking space per 600 square feet was for permitted uses, whereas the cannabis retail use did not comply with the conditions to be a permitted use.

156. Mr. Steck introduced a page of the ITE parking manual with comments as Exhibit O-6. He stated that the Applicant claimed that only an average of four (4) parking spaces would be needed during peak weekday. He argued that the actual parking demand would exceed that average half the time. He argued that the parking lot should be designed to the 85th percentile of demand, not the average.

157. Mr. Steck further argued that the ITE parking manual only had four (4) data points, which was a small sample size. He stated that such a small sample size was statistically unreliable. He also argued that it was unknown which data point would be applicable to this area. He stated that the parking demand was unpredictable because one data point had a demand of three (3) parking spaces and another data point had a demand of forty-nine (49) parking spaces.

158. Mr. Steck further argued that the trip generation was unpredictable as well. He stated that the Applicant relied on the average rather than the 85th percentile. He stated that the average trip generation per the ITE was forty-four (44) peak trips, but there was a data point that had twenty-six (26) trips and another that had 282 trips.

159. Mr. Steck next stated that he disagreed with the Applicant's Planner that the improvements to the existing non-conformities were a public benefit. He disagreed that the use would not exacerbate the impact because the traffic and parking counts were based on unreliable data. He argued that the ITE recommends examining local uses when the data was unreliable, which it was the burden of the Applicant to provide that information. He stated that the four (4) data points were ten (10) years old from Colorado.

160. Mr. Steck stated that the undersized character of the lot did not create an undue burden on the use of the subject Property as demonstrated by the restaurant being able to function on the subject Property. Mr. Steck also argued that the proposal did not advance the goal of the master plan to promote commercial uses on Bay Avenue, establish parking for commercial and residential uses, and strict enforcement of signs. He reiterated that the 2004 Master Plan recommended that the subject Properties be residential.

161. Mr. Steck next testified that the proposed cannabis retail use did not advance purpose a) of the Municipal Land Use Law (MLUL) because the subject Properties were within 1,000 feet of a school, which the Governing Body had determined was not an appropriate

location. Mr. Anderson objected to Mr. Steck's testimony arguing that the parking use was separate from the cannabis use. He argued that that was determined at the first hearing.

162. Mr. Steck continued his testimony that purpose d) of the MLUL was not relevant to the application. He testified that purpose g) was not advanced because the subject Property was within 1,000 feet of a school and there were other areas within the CBD zone that were greater than 1,000 feet from a school.

163. Mr. Steck next testified that purpose i) was dependent on the eye of the beholder. He stated that the existing building looked like a Mexican restaurant with a colorful façade. He stated that the proposed façade was gray with frosted windows. He argued that frosted windows were not a good look for downtown retail. Mr. Anderson objected to Mr. Steck's characterization stating that the proposal was a permitted use. Mr. Steck continued to explain that the proposal was an unusual aesthetic for retail because a passerby could not see into the store. He stated that the proposal was a different aesthetic that was neither positive nor negative, but the frosted windows made the aesthetic negative.

164. Mr. Steck concluded that based on the content of his testimony, the Board should find that the Applicant had not met its burden of proof.

165. In response to questions from the Board, Mr. Steck explained that the CBD zone conditionally permitted parking as a principal use. He explained that the ordinances also permitted accessory parking to not be adjacent to the subject Property. However, he argued that when the principal parking is tied to another use, parking becomes an accessory to the other use.

166. Mr. Anderson responded arguing that Mr. Steck was wrong in his interpretation. He stated that the ordinance permitted parking off site and that off site parking did not become accessory to the proposed use. He explained that a property could not have only an accessory use and not have a principal use on the property, therefore the parking remained the principal use on subject Property No. 2. Mr. Anderson cited §21-78(a)1 that no accessory structure or use allowed on any lot without a principal use. He argued that parking was the only use on subject Property No. 2, therefore parking was the principal use. He argued that principal use parking was permitted to be used by other uses.

167. Mr. Steck argued that §21-65.14(a) required uses to have sufficient onsite or offsite parking and when offsite parking was relied upon, it required a cross access easement.

168. Mr. Anderson further argued that §21-97 conditionally permitted principal parking within the CBD Zone and that it can be used by other uses.

Public Portion and Cross-Examination of Objector's Planner

169. The hearing was then opened to the public for questions, at which time Alice (last name and address unknown) asked how the traffic counts were determined. Mr. Steck explained that the burden was on the Applicant to provide a specific traffic study. Mr. Anderson argued that the application was for a minor site plan, which did not require a traffic study.

170. Mark Kiley, B5 Oceanview Terrace, asked if separate ownership of the subject properties impacted the analysis. The Board Planner explained the owners would have to consent to the Applicant making the application to the Board. Mr. Kiley also asked how the 200-foot notice list was calculated. Mr. Anderson explained that the 200-foot notice list was calculated from the perimeter of both subject Properties. Mr. Kiley also asked how the 1,000 feet from a school was decided as the threshold. The Board explained that the Governing Body made that determination.

171. Mr. Anderson proceeded to cross examine Mr. Steck. In response to establishing questions from Mr. Anderson, Mr. Steck testified that his client was Arthur Carmano, Esq., and he did not have any other clients, nor did he discuss the matter with any other objector. Mr. Steck stated that he had never worked for a cannabis retailer in Highlands, but he did work for cannabis retailers in applications in Bloomfield and Union, NJ. He stated that he had only been hired once by an objector to a cannabis retail use, but not in Highlands.

172. In response to further questions from Mr. Anderson, Mr. Steck testified that he was a Professional Planner. He stated that he was not a licensed architect, professional engineer, traffic engineer, or appraiser.

173. In response to substantive questions from Mr. Anderson, Mr. Steck affirmed that subject Property No. 2 was a separate tax lot and did not abut subject Property No. 1 separated by a County Road. Mr. Steck also affirmed that there would not be any structures on subject

Property No. 2 other than the parking lot and ancillary landscaping and lighting. Mr. Steck affirmed that parking could be an accessory use even if located on a separate lot.

174. In reference to questions of §21-78, Mr. Steck testified that if there was no principal structure on the lot other than parking, parking could still be accessory to a use on another lot. He argued that the parking lot itself was a principal use but functioned as an accessory use to the restaurant.

175. In reference to questions of §21-97L, Mr. Steck affirmed that principal parking use was conditionally permitted in the CBD Zone. He stated that the proposed principal parking satisfied the no commuter parking condition. However, he stated that the principal parking did not satisfy the second condition of the parking being used by a permitted or conditionally permitted use because the cannabis retail use did not satisfy its condition of not being within 1,000 feet of a school.

176. In response to further questions from Mr. Anderson, Mr. Steck affirmed that the parking standard was one (1) parking space for 600 square feet of retail space, but argued that the parking standard did not apply because the proposed cannabis retail use was not permitted. Mr. Steck affirmed that §21-65.21 was silent on the parking schedule for non-permitted uses. Mr. Steck stated that the parking requirement for a use variance would be up to the Board. He stated that the Board should rely on the ordinance rather than industry standard. He stated that there was no other use in the ordinances more similar to the proposed cannabis retail use than retail. He stated that the ITE manual says to look at other similar uses. Mr. Steck stated that the Applicant provided testimony stating that the proposed seventeen (17) parking spaces were adequate. Mr. Steck stated that there was no standard within the ordinance for cannabis retail use and the ITE had insufficient data to determine the number of parking spaces. He stated that without any parking standard, the Applicant would have to count traffic to determine a standard.

177. In response to further questions from Mr. Anderson, Mr. Steck confirmed that Coventry was the appropriate test to apply to a conditional use variance. Mr. Steck stated that the ordinance was not specific on what use to apply when there was a deviation from parking. He stated that it was the burden on the Applicant to perform its own traffic impact study. Mr. Anderson argued that the Applicant presented traffic testimony that the most appropriate

parking standard in the ordinance for the proposed cannabis retail was to apply the retail standard. In response to further questions from Mr. Anderson, Mr. Steck stated that he did not perform a traffic study and reiterated that it was the Applicant's burden, not the objector's burden to present a traffic study.

178. In response to further questions from Mr. Anderson, Mr. Steck testified that the proposed deviations for the parking was in regard to the rear setback. He stated that there was no condition limiting the proximity of parking to a school, however, there was a condition limiting the proximity of the cannabis retail use from a school. Mr. Steck argued that because the parking was being used as exclusively to provide parking for the cannabis retail use, it was accessory to the cannabis retail use, therefore the condition limiting the proximity to the school applied to subject Property No. 2.

179. In response to further questions from Mr. Anderson, Mr. Steck confirmed that §21-97L permitted parking as a principal use and did not have a condition limiting the proximity to a school. Mr. Steck confirmed that §21-97M permitted cannabis retail use within the CBD zone, but had conditions that the subject Property had to comply with the design standards, not consumption of cannabis on-site, and that cannabis retail use was prohibited 1,000 feet from a school. Mr. Steck confirmed that subject Property No. 1 was more than 1,000 feet from the school. Mr. Steck also confirmed deviations from the bulk standards, which were part of the design standards. Mr. Steck also argued that ordinance §21-65.3 permitted a fence in the buffer, but it did not state that the buffer could be replaced by the fence. Mr. Steck argued that the proposal did not comply with the conditions for cannabis retail use. He argued that the proposal would have a significantly greater impact to traffic and parking than had been testified.

180. In response to further questions from Mr. Anderson, Mr. Steck agreed that the Coventry standard for a d(3) variance was appropriate and that the focus of the Board should be on the deviations from the Ordinance requirements and the suitability of the subject Property. Mr. Steck argued that the Applicant did not provide testimony regarding the 994-foot proximity to the school, so the Board should not find the site suitable. He argued that strict compliance with the standards was a better design. Mr. Steck also argued that the bulk standards that are incorporated into the design standards were generic for the CBD zone, so the Board could not

make a determination whether the site was suitable for the specific use in its d(3) analysis. He stated that the Board should focus on the conditions that are specific to the cannabis retail use, with which the subject Property did not comply. Mr. Steck also argued that the site was not suitable because the ADA parking spaces were not adjacent to the principal use of the cannabis retailer. He stated that incorporation of Lot 11.01 to provide ADA parking spaces immediately adjacent to the principal use would be better.

181. The Board Planner opined that the bulk standards should be considered by the Board in determining suitability. The Board Planner reviewed all of the bulk deviations as previously testified. Mr. Anderson stated that the design standards incorporated the bulk standards, so testimony was provided on the bulk standards in support of a d(3) use variance.

182. In response to further questions from Mr. Anderson, Mr. Steck stated that the deviations from the bulk standards made the site unsuitable because the proposed changes did not improve the subject Property because some of the existing deviations were not approved previously. He also stated that the bulk standards were not specific to the cannabis retail use, so it could not be determined whether deviations still made it suitable. Mr. Steck argued that the focus should be on the proximity to the school, which was specific to the cannabis retail use. Mr. Steck also argued that the school bus stop located at the corner of the subject Property was evidence to be properly evaluated in order to determine site suitability, although bus stops were not specified in the Ordinance. Mr. Steck argued that the Applicant had not provided testimony sufficient enough for the Board to determine suitability.

183. Mr. Anderson stated that principal parking did not comply with the bulk standards, which was a condition for principal parking. He stated that the principal parking required a minimum rear yard setback of twelve (12) feet, whereas 6.5 feet was proposed. He explained that two (2) parking spaces could be removed and the setback could be compliant. He argued that the deviation from the setback allowed the parking lot to function better by providing seventeen (17) parking spaces instead of fifteen (15) parking spaces, it could accommodate greater demand.

184. Mr. Anderson asked Mr. Steck if more parking was better. Mr. Steck responded that the burden was on the Applicant to provide evidence that the parking was sufficient. In

referencing Exhibit O-6, Mr. Anderson asked how Mr. Steck arrived at forty-nine (49) parking spaces being needed to meet demand when the ordinance required one (1) parking space per 600 square feet. Mr. Steck explained that he based it on the highest ratio for retail with office space. The Board Planner stated that the parking should not be based on trips generated and explained that he was not certain of the specific parking demand that the cannabis retail would need, but assured that it was not as high as forty-nine (49) as Mr. Steck suggested.

185. In response to further questions from Mr. Anderson, Mr. Steck stated that the 2004 Master Plan was superseded by the 2016 Master Plan. Mr. Steck also confirmed that some goals of the 2016 Master Plan were to promote commercial uses along Bay Avenue, improve existing commercial properties, encourage redevelopment, encourage small-scale commercial uses, and promote new businesses along Bay Avenue. Mr. Steck stated that the proposal advanced those goals. Mr. Steck also agreed that an economic goal was to provide a mix of commercial uses, which he argued that the proposed use would be too niche to fit with the mix of commercial uses. Mr. Anderson argued that the Borough was only permitting one (1) cannabis retailer, so any cannabis retailer would be considered too niche, not just this Applicant.

186. Mr. Anderson next asked Mr. Steck questions, establishing his experience with bars and restaurants. Mr. Steck stated that he likely had been hired as a planner for a restaurant or bar at some point in his career, but he could not specify. However, Mr. Steck's experience was established as a customer and general knowledge of bars and restaurants. Mr. Anderson then proceeded to ask Mr. Steck how the proposed cannabis retail use compared to the existing restaurant use. Mr. Steck provided answers regarding the impact on the surrounding area by the cannabis retail use.

187. Mr. Anderson next asked whether Mr. Steck's client was within 200 feet of the subject Properties, which Mr. Steck stated he was unsure. Mr. Anderson questioned the negative impact on Mr. Steck's client. Mr. Anderson further asked what negative impact proximity to the school the cannabis retail use would pose to children when children were not permitted within the building, the windows would be frosted to block view into the building, and there would not be any advertising on the building. Mr. Anderson argued that children would view the proposed cannabis retail use as a non-descript building. Mr. Steck argued that cannabis could be consumed

in the area just off of the subject Property but stated that he was uncertain whether consumption off site was illegal.

Continuation of the Public Portion and
Cross-Examination of the Objector's Planner

188. The hearing was opened to the public for questions on Mr. Steck's testimony and cross-examination, at which time a member of the public asked how the FAR was calculated. Mr. Steck explained that the Applicant had included the walk-in freezer in its FAR calculation, but he argued that the walk-in was not part of the building and that it was inappropriate to included as part of the FAR calculations. Mr. Steck also stated that there was no record of the walk-in freezer being previously approved. In response to further questions from the public, Mr. Steck argued that the Applicant could provide landscaping in order to satisfy the buffer requirement. Mr. Anderson argued that there would not be sufficient space for the loading zone or an ADA compliant parking space if a landscape buffer were provided. Mr. Anderson also questioned Mr. Steck's qualifications to make the determination of the sufficiency of the buffer.

189. Stephen Sully, a member of the public, asked who was responsible for enforcing the 1,000-foot proximity limits.

190. Justin Mele, 26 Sea Drift Avenue, asked how the impact of the cannabis retail use differed from the existing restaurant use. Mr. Steck stated that restaurant customers stayed longer than cannabis retail customers. He also stated that restaurant customers usually came in groups, which allowed for carpooling of customers, whereas cannabis retail customers would be single individuals, thereby increasing traffic impact. Mr. Steck also argued that the building capacity exceeded the number of parking spaces available, thereby necessitating customers to park on the street. Mr. Anderson countered arguing that the cannabis retail use would have higher rate of turnover. Mr. Steck further argued that the traffic and customer demand for cannabis retail use was not as well-known as restaurant uses.

191. Tony Camarata, 63 Sea Drift Avenue, asked if the Applicant had a business plan that would determine the number of expected customers.

192. Robert Fishler, 20 Gravelley Point Road, asked if the analysis of the suitability of the subject Property considered the two (2) lots separately. Mr. Steck stated that the analysis

would be to consider the lots collectively when part of one (1) application. He argued that the parking lot was inseparable from the cannabis retail use.

193. In response to follow up questions from the Board, Mr. Steck argued that the Applicant could eliminate the buffer issues, but not the proximity to the school issue. Mr. Steck also reiterated that the removal of the shed, walk-in freezer, and front sun room of the building were not improvements because they should not have existed in the first place.

194. Mr. Davidson, a member of the public asked about 'X's' on the building depicted in one of the photos. Mr. Steck did not know the purpose of the "X's".

195. Jerry Tokash, asked if delivery trucks could use the parking lot. Mr. Steck stated delivery trucks could use the parking lot if a spot were available, however, he argued that the Applicant did not provide reliable evidence that the number of parking spaces was sufficient to accommodate the parking demand.

196. Robert Fishler asked about the Board's determination that the parking lot was a principal parking use and not an accessory to the cannabis retail use. The Board Attorney provided an explanation of the Board's determination to find that the 1,000 feet limitation did not apply to subject Property No. 2.

197. Mark Kiley asked if it was the duty of the Board to accept all testimony.

Public Portion of Meeting For Public Comment

198. The hearing was then opened to the public for statements, at which time Anthony Camarata, 65 Sea Drift Avenue, testified that he considered entering the cannabis retail business and had done research in preparation. Based on his research, Mr. Camarata testified as to the financial needs of a cannabis retailer to turn a profit and questioned the truthfulness of the Applicant's testimony regarding customer volume because he believed it to not be enough customers to financially sustain the business. Mr. Camarata also expressed his concern with safety of having armed guards so close to residential area and the possibility of criminal activity that the cannabis retail use may attract. He stated that cannabis retailer was not similar to a bar or restaurant.

199. Jeffrey Milbauer, 109 Marina Ray Court, expressed his concern with the proximity of the cannabis retailer to residential area. Mr. Milbauer also expressed concern for pedestrian safety crossing Bay Avenue to and from the parking lot. He also expressed his concern with the proximity to the school and the image of armed security guards. Mr. Milbauer also questioned the accuracy of the Applicant's traffic study.

200. Steve Solop, 205 Bay Avenue, testified that he has experience with medical cannabis because he is a patient of a location in Woodbridge, New Jersey. He stated that he has observed an overwhelming number of customer traffic since recreational cannabis was permitted. He expressed his concern that the subject Property was insufficient to accommodate the volume of customers that he has observed.

June 8, 2023 Hearing

201. Mr. Anderson provided an overview of the hearings to and the public statement portion of the hearing continued.

Continuation of Public Portion of Meeting For Public Comment

202. Rosa Peterson, 17 Bay Court, expressed her concern with pedestrian safety of customers crossing Bay Avenue between the parking lot and the building. Ms. Peterson also questioned the accuracy of the traffic impact study. She also expressed her concern with the proximity to the school.

203. Justin Mele, 26 Sea Drift, expressed his concern that the customer volume will be greater than what the Applicant had testified to. Mr. Mele expressed his concern that the parking would be insufficient. He also expressed his concern that the traffic impact study was based on old data from elsewhere in the United States. He also expressed his concern for safety of armed guards. He also expressed his concern with the proximity to the school. Mr. Mele also stated that he believed the deviations from the design standards was a major issue and that it did not have a positive impact on the surrounding area.

204. Arthur Carmano, Jr. Esq., expressed to the Board that land use was not his field of practice. He questioned whether it was appropriate for the Board to make a determination on whether the proximity condition applied to the parking lot in the first hearing. He argued that there was a prima facie challenge to jurisdiction because of the timing of the Board's determination. Mr. Carmano provided an explanation of the difference between witness testimony and argument. He also provided an explanation on hearsay. He argued that the ITE manual should be considered hearsay. Mr. Carmano also expressed his concern with a cannabis retailer attracting criminal activity and being an attractive nuisance to children. He also expressed his concern with pedestrian safety. He also stated that he believed there was a lack of testimony by the Applicant regarding the proximity to the school.

205. Maggie Zeck, 213 Marina Bay Drive, expressed her concern with the risk of burglary and the cannabis retailer being a cash business. She also expressed concern for children in the area, customer volume, and the subject Property being adjacent to a residential area.

206. Sal Albanese, 85 Sea Drift Avenue, questioned the judgement of the Governing Body in conditionally permitting cannabis retail use in the area.

207. Tima Cameron, 164 Linden Avenue, expressed agreement with the concerns that the members of the public have expressed.

208. Kathleen Hands, 201 Marina Drive, expressed her concern with the subject Property being adjacent to a residential area.

209. Robert Fishler, 20 Gravelley Point Road, stated that he was an attorney licensed in New York and his practice was real estate. Mr. Fishler questioned the judgement of the Governing Body in permitting cannabis retail use in the Borough. He expressed his concern that

employees would collectively bargain with the Applicant to require parking for all employees, thereby limiting the number of parking spaces available for customers. Mr. Fishler also expressed his doubt that the two (2) lots would be owned separately but would operate as a single-purpose entity for liability purposes. He also expressed his doubt of the sufficiency of a lease agreement for the parking lot and that it should be a deed restriction. He also asked the Board to strictly apply the condition of proximity to the school.

210. Blake Chesbro, 273 Sea Drift Avenue, stated that he lived across the street from the subject Property. He expressed his concern with the numerous non-conforming deviations proposed, as well as the proximity to the school and bus stop. He also expressed his concern with the area being residential as well as insufficient on-street parking. He also expressed his concern with the use attracting criminal activity.

211. Eileen Skiff, 15 Ocean Avenue, expressed her concern with odor emitting from the cannabis retail use.

212. Al Smuda, 215 Marina Drive, stated that the deviations from the design standards were not a benefit to the surrounding area. He stated that the proposal would have a detriment to the quality of life for the area. He also expressed his concern on the traffic impact and the sufficiency of the number of parking spaces.

213. There were no other members of the public present expressing an interest in this application.

WHEREAS, the Highlands Land Use Board, having reviewed the proposed application and having considered the impact of the proposed application on the Borough and its residents to determine whether it is in furtherance of the Municipal Land Use Law; and having considered whether the proposal is conducive to the orderly development of the site and the general area in which it is located pursuant to the land use and zoning ordinances of the Borough of Highlands; and upon the imposition of specific conditions to be fulfilled, hereby determines that the Applicant's request for minor site plan approval pursuant to N.J.S.A. 40:55D-46.1 along with ancillary variance relief pursuant to N.J.S.A. 40:55D-70c(2) as well as conditional use approval pursuant to N.J.S.A. 40:55D-d(3) should be denied in this instance.

**I. Cannabis Retail Establishments Are Conditionally Permitted Uses Under
the Highlands Ordinance**

The Board finds that Borough of Highlands Ordinance 21-91.3d permits a Cannabis Retail Establishment as a conditionally permitted use subject to Highland Ordinance Section 21-97M. Section 21-97 of the Highlands Borough Ordinance is titled “Conditional Uses”. Subsection M reads as follows:

M. Cannabis retailer. One cannabis retailer as defined in Subsection 21-74.1A may be permitted in either the Central Business District or Highway Oriented Business Zone only upon receipt of a conditional use permit, provided that applicable Article XI Design Standards are met together with any other requirements deemed necessary by the Land Use Board, any other applicable requirements of this chapter, and subject to the following conditions:

1. The cannabis retailer shall not contain either an indoor or outdoor cannabis consumption area as defined in P.L. 2021, c. 16, known as the “New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act.” No consumption shall be permitted on the premises.
2. The cannabis retailer shall not be located within 1,000 feet of any school.

II. d(3) Conditional Use Variance Pursuant to the Municipal Land Use Law

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 the Applicant.

If the 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). The Highlands Land Use Board as a combined board exercises the powers and duties of a Board of Adjustment.

A d(3) conditional use variance has a lesser burden of proof than a d(1) prohibited use variance in the zone. It is because the municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied. Therefore, the proofs necessary to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the Ordinance. The standard of proof in a conditional use case was established by the New Jersey Supreme Court in 1994 in the case of Coventry Square Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994). The standard of proof of special reasons to support a variance from one or more conditions imposed on a conditional use should be relevant to the nature of the deviation from the ordinance. Proofs to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

That standard of proof will focus both the applicant's and the Board's attention on the specific deviation from conditions imposed by the ordinance and will permit the Board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does not affect the suitability of the site for the conditional use. Thus, a d(3) conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems. Coventry Square, supra. 138 N.J. at 298, 299.

With respect to the negative criteria, an applicant must demonstrate that the variance can be granted without substantial detriment to the public good, N.J.S.A 40:55D-70(d). The focus is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance. The Board of Adjustment must evaluate the impact of the proposed "conditional" use variance upon the adjacent properties and determine whether

or not it will cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good.

In addition, the applicant must also prove that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, N.J.S.A. 40:55D-70(d). The Board of Adjustment must be satisfied that the grant of the conditional use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district. Coventry Square, supra. 138 N.J. at 299.

First, the Board addresses the proposed cannabis retailer use for Block 72, Lot 12 (subject Property No. 1). Pursuant to §21-97M, one cannabis retailer as defined in Subsection 21-74.1A may be permitted in either the Central Business District or Highway Oriented Business Zones only upon receipt of a conditional use permit, provided that applicable Article XI Design Standards are met together with any other requirements deemed necessary by the Land Use Board, any other applicable requirements of this chapter, and subject to the following conditions:

1. The cannabis retailer shall not contain either an indoor or outdoor cannabis consumption area as defined in P.L. 2021, c. 16, known as the "New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act." No consumption shall be permitted on the premises.
2. The cannabis retailer shall not be located within 1,000 feet of any school.

Based upon testimony placed on the record, the Board finds that the Applicant will comply with Condition 1. The Board also finds that the proposed cannabis retailer complies with Condition 2.

However, the Applicant does not comply with the following applicable Article XI Design Standards thus necessitating d(3) variance relief:

1. Minimum rear yard setback where 12 feet is required, and 10.8 feet is proposed;
2. Minimum side yard setback where 5 feet is required, and 0.61 feet is proposed;

3. Maximum building coverage where 35% is permitted and 77.9% is proposed.
4. Maximum lot coverage (Lot 12, Block 72) where 80% is permitted and 99.7% is proposed;
5. Minimum width of commercial driveway where 15 feet is required, and 10.8 feet is proposed;
6. A minimum of 10% of the area of the site shall be landscaped in a non-residential zone which the Applicant does not provide;
7. Rear yard setback to parking spaces where 12 feet is required, and 6.7 feet is proposed.

In applying the analysis set forth in Coventry Square, Inc., the Board finds that a conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems. The Board finds that the number of deviations from the Article XI Design Standards as well as the degree of deviations to be excessive. The Board is in agreement with the testimony of Mr. Peter Steck, P.P., the Objector's Land Use Planner that several existing non-conformities although being improved would still not be compliant with the Borough Ordinances. More specifically, the Board finds that in regard to building coverage, the Applicant was only making a slight improvement from 83% to 77.9% such that the impervious coverage was still excessive. The maximum building coverage in the CBD Zone is 35%. The Board also notes that the minimum rear yard setback deficiency will continue with a setback of only 10.8 feet. The minimum side yard setback deficiency will continue at only 0.61 feet. The maximum building coverage at 77.9% is more than twice than the 35% allowed in the CBD Zone. Further, lot coverage at 100% greatly exceeds the 80% maximum permitted in the CBD Zone. The Board also notes that the commercial driveway width is approximately one-third deficient with a width of 10.8 feet where 15 feet is required. The Board notes that with a commercial business at this location the deficiency is significant based upon the projected amount of customer traffic coming to this retail cannabis facility.

III. Cannabis Retailer

This application is governed by the Borough of Highlands Code Section 21-91 Central Business District (CBD), Section 21-97 Conditional Uses as well as the bulk standards contained in the CBD Zone.

In addition, pursuant to Highlands Borough Ordinance Section 21-74.1, a Cannabis Retailer is defined as follows:

“Any licensed person or entity that purchases or otherwise obtains usable cannabis from cannabis cultivators and cannabis items from cannabis manufacturers or cannabis wholesalers, and sells these to consumers from a retail store, and may use a cannabis delivery service or a certified cannabis handler for the off-premises delivery of cannabis items and related supplies to consumers. A cannabis retailer shall also accept consumer purchases to be fulfilled from its retail store that are presented by a cannabis delivery service which will be delivered by the cannabis delivery service to that consumer.”

The Board finds that the Applicant has proposed a cannabis retailer as defined in §21-74.1A in the Central Business District.

IV. Parking as a Principal Use

The Board next addresses the proposed parking as a principal use. Pursuant to §21-97L, parking as a principal use may be permitted in specified zones only upon receipt of a conditional use permit, provided that applicable Article XI Design Standards are met together with any other requirements deemed necessary by the Land Use Board, any other applicable requirements of this chapter, and subject to following conditions:

1. Parking shall be used for permitted or approved conditional uses (except for other parking uses) in the CBD Zone.
2. Commuter parking shall not be allowed in any portion of the property.

First, the Board finds that the Applicant has not proposed commuter parking on any portion of the property and there has not been any evidence presented on the record to the

contrary, therefore the Board finds that the Applicant has satisfied Condition 2. Secondly, the Board finds that the Applicant had proposed parking as a principal use on subject Property No. 2 to be used by the proposed cannabis retailer of subject Property No. 2.

The Board finds that subject Property No. 1 is greater than 1,000 feet from any school, however, Block 73, Lot 2 (subject Property No. 2) is located within 1,000 feet of a school. The Objector's Planner argued that because subject Property No. 2 was being used as parking by the proposed cannabis retailer, the parking was accessory to the cannabis retailer use, therefore it adopted the characteristics of the that use. The Board rejects this argument. The only use on subject Property No. 2 is parking. When there is only one use on a property, that use must be the principal use. Therefore, the principal use of subject Property No. 2 is parking. The Board also finds that subject Property No. 1 and subject Property No. 2 are not adjacent to one another, therefore they can never be merged. Because the lots will never be merged, subject Property No. 2 will never adopt the characteristics of subject Property No. 1.

V. Sufficiency of On-Site Parking

The Board notes that the Applicant is proposing seventeen (17) on-site parking spaces. The Board notes that the Applicant has proffered the position that approximately nine (9) parking spaces would be available for patrons of the cannabis retail dispensary and the remaining parking spaces would be needed for employees and staff.

The Board has considered all of the evidence in this case and finds the proofs set forth on the record by the Objector's Planner, Mr. Steck, to be persuasive. Mr. Steck disagreed with the calculation that a minimum of four (4) parking spaces was required. Mr. Steck argued that the calculation of one (1) parking space per 600 square feet of commercial space was for permitted uses, whereas the cannabis retail use did not comply with the conditions of the conditional use ordinance to be a permitted use. Further, Mr. Steck introduced one page from the ITE Parking Manual with comments as Exhibit O-6. The Board finds Mr. Steck's comments to be persuasive. In that regard, the Applicant claimed that only an average of four (4) parking spaces would be needed during peak weekday. However, Mr. Steck represented that the actual parking demand would exceed that average half the time. Mr. Steck argued that the parking lot should be designed to the 85th percentile of demand, and not the average.

Further, Mr. Steck argued that the ITE Parking Manual only had four (4) data points which he characterized as being a small sample size. Mr. Steck stated that a small sample size was statistically unreliable. Mr. Steck also represented that in his opinion, it is unknown which data point would be applicable to this area. He further stated that the parking demand was unpredictable because one (1) data point had a demand of three (3) parking spaces and another data point had a demand of forty-nine (49) parking spaces.

Mr. Steck also addressed trip generation and he found the Applicant's proof to be unpredictable as well. Mr. Steck stated that the Applicant relied on the average rather than using data from the 85th percentile. Mr. Steck represented that the average trip generation per the ITE was forty-four (44) peak trips, but there was a data point that had twenty-six (26) trips, and another data point had 282 trips.

Furthermore, the Board finds the Applicant's traffic expert relied upon ITE manual information from out-of-state inclusive of studies in California, Colorado and Massachusetts. The Board also notes that the Applicant's traffic expert, Mr. Klein, represented that he manually counted traffic at two (2) locations in Union County and one (1) location in Hoboken. However, Mr. Klein did not perform traffic counts at the cannabis retailer in the Monmouth County community of Eatontown. The Board also finds that there are a number of existing cannabis retailer dispensaries located throughout the State of New Jersey and the Applicant could have done traffic counts at existing retail dispensaries to obtain data relative to anticipated traffic volume which was not done in this instance. The Board finds that relying upon ITE data from out-of-state to be less reliable than data that could have been obtained from actual operations here in New Jersey in general and in Monmouth County in particular. Therefore, the Board finds that the Applicant has not satisfied its burden of proof in regard to the sufficiency of on-site parking for the proposed use of this establishment as a cannabis retail dispensary.

The Board finds that the Applicant has failed to satisfy the positive criteria in order to be granted conditional use variance relief pursuant to N.J.S.A. 40:55D-70d(3). The Board finds that the parking is proposed to be used by an unapproved conditional use in the CBD Zone which is contrary to the goals and objectives of the conditions which are included in the Ordinance. Conditional use variance relief pursuant to N.J.S.A. 40:55D-70d(3) is therefore denied.

VI. d(4) Floor Area Variance ("FAR") Relief

Under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-4 Floor Area Ratio ("FAR") is defined as follows:

"means the sum of the area of all floors of buildings or structures compared to the total area of land that is the subject of an application for development, including non-contiguous land, if authorized by municipal ordinance or by a planned development."

The Board notes that variances from FAR controls may be granted only by Boards of Adjustment under subsection N.J.S.A. 40:55D-70d(4) and not by Planning Boards. Commercial Realty v. First Atlantic, 122 N.J. 546, 561 (1991), the reason is that variances of this type can pose a greater threat to the zone plan and public good than other dimensional controls which are regulated by subsection (c). Id. at 562-563. See also, Randolph Town Ctr. v. Randolph Twp., 324 N.J. Super. 412, 415 (App. Div. 1999).

The Board also notes that in establishing special reasons for a FAR variance, the standards set forth in Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) controls. Therefore, the Applicant for a FAR d(4) variance need not show that the site is particularly suited for more intensive development. Rather, such an Applicant must show that the site will accommodate the problems associated with a floor area larger than that permitted by the Ordinance. The Board notes that the permitted FAR in the CBD Zone is 0.65, and the Applicant is proposing an FAR of 1.26. The Board finds the proposed FAR to be significantly greater than that which is permitted under the Ordinance. The Board finds that the FAR in the Ordinance is necessary to control the intensity of the use in particular since the subject Property abuts nearby residential properties. The Board, therefore, finds that the FAR is too excessive and the approval of this application would be substantially detrimental to the public good and would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance.

VII. Bulk Variance Relief

The Applicant's Planner, Ms. Sawant, testified that several purposes of the Municipal Land Law pursuant to N.J.S.A. 40:55D-2 would be advanced by the approval of this application inclusive of a) to promote the general welfare and public safety by providing an ADA compliant

ramp and crosswalk; d) by coordinating with county and state in development within the Borough; g) by providing sufficient space for a commercial use; and i) by promoting a desirable visual environment in improving the building.

The Objector's Planner, Mr. Steck, refuted the testimony of the Applicant's Planner. Mr. Steck represented that purpose d) of the MLUL was not relevant to the application. He further testified that purpose g) was not advanced because the subject Property was located within 1,000 feet of a school and there were other areas within the CBD Zone that were greater than 1,000 feet from a school. He also testified that purpose i) is dependent on the eye of the beholder. He stated that the existing building looked like a Mexican restaurant with a colorful façade. He also argued that frosted windows as part of the building façade was not a good look for a downtown retail establishment. Mr. Steck stated that the proposal was a different aesthetic that was neither positive nor negative, but the frosted windows made the aesthetic negative.

The Board finds that the approval of this application does not promote the general welfare nor does it promote public safety. The Board finds that on balance that Mr. Steck's analysis of the purposes of zoning to be advanced, if any, with the approval of this application carried greater weight than the comments of the Applicant's Planner. The Board finds that any other permitted use in the CBD Zone could claim the same purposes of zoning to be advanced. The Board, therefore, finds that the request for "c" variance relief has not satisfied the positive criteria nor has it satisfied the negative criteria. The Board therefore finds that the granting of "c" variance relief could not be granted without substantial detriment to the public good and without substantial impairment of the Zone Plan and Zoning Ordinance. Further, the Board finds that the benefits of granting deviations from the Zoning Ordinance do not substantially outweigh the detriments and thus, "c" variance relief is denied.

The Board finds that all bulk variances are subsumed within the grant of use variance relief Puleio v. North Brunswick Zoning Board, 375 N.J. Super. 413 (App. Div.), certif. den. 184 N.J. 212 (2005). The Applicant, however, continues to have the burden to satisfy the negative criteria.

VIII. Minor Site Plan

As the request for conditional use variance relief pursuant to N.J.S.A. 40:55D-70d(3) has been denied, the request for minor site plan approval has become moot.

IX. Conclusion

The Board finds that although the principal structure and location for the cannabis retail dispensary complies with the 1,000-foot setback requirement from a school, the Board notes that there is a school bus stop on the corner of the property. Thus, although a school bus stop is not a specific requirement under the conditional use ordinance, the Board can't help but view this as being the functional equivalent of being within 1,000 feet of school property. The Board notes that the reasons why the Ordinance requires a 1,000 foot separation from a cannabis retail dispensary to a school are equally applicable to a school bus stop where school children will be dropped off on the corner in front of a cannabis retail dispensary.

The Board finds that the 1,000-foot separation requirement is necessary to protect the public inclusive of all the members of the public such as children from cannabis activities. The Board finds that the governing body has imposed conditions for this use due to the highly regulated nature of the cannabis industry in order to protect the public inclusive of the most vulnerable and sensitive members of the public such as children in order to protect and to promote their public safety and general welfare by imposing these conditions. The Board finds that it has evaluated the impact of the cannabis retail dispensary use on the surrounding properties and has determined that approval of this application will constitute a substantial detriment to the public good. Further, the Board finds that the numerous dimensional variances along with the extent of the deviations cannot be granted without substantial impairment of the zone plan and zoning ordinance. The Board concludes that the grant of a d(3) conditional use variance to permit a retail cannabis dispensary at this location is not appropriate because the location is not suitable for such proposed use. The Board further finds that the grant of a d(3) variance is not reconcilable with the Borough of Highlands legislative determination that a cannabis retail establishment must not only comply with the conditional use ordinance but rather the design standards for the CBD Zone. The Board finds that granting d(3) variance relief is not appropriate and the conditions of the conditional use ordinance including those contained in the design standards should continue to be imposed on the proposed retail cannabis dispensary use.

The Board further finds that the Applicant has not met its proofs in order to demonstrate that variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3) is warranted and can be granted in satisfaction of the requirements in the Municipal Land Use Law and cases interpreting same relative to granting d(3) conditional use variance relief.

NOW, THEREFORE, BE IT RESOLVED by the Land Use Board of the Borough of Highlands on this 12th day of October 2023, that the action of the Land Use Board taken on June 8, 2023, denying Application No. LUB 2022-11, for conditional use variance relief pursuant to N.J.S.A. 40:55D-70d (3), floor area ratio variance relief pursuant to N.J.S.A. 40:55D-70d(4), and minor site plan approval pursuant to N.J.S.A. 40:55D-46.1 with ancillary bulk variance relief pursuant to N.J.S.A. 40:55D-70c, is determined and hereby denied.

BE IT FURTHER RESOLVED that the Board secretary is hereby authorized and directed to cause a notice of this decision to be published in the official newspaper at the Applicant's expense and to send a certified copy of this Resolution to the Applicant and to the Borough Clerk, Engineer, Attorney and Tax Assessor, and shall make same available to all other interested parties.

ON MOTION OF: Vice Chair Tierney

SECONDED BY: Mr. Kutosh

ROLL CALL:

YES: Mr. Kutosh, Ms. LaRussa, Mr. Zill, Vice Chair Tierney, Ms. Chang, Mr. Cramer

NO: None

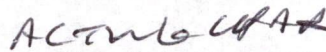
ABSTAINED: None

ABSENT: Chief Burton, Mr. Montecalvo, Chair Knox

DATED: October 12, 2023



~~Robert Knox, Chairman~~
Borough of Highlands Land Use Board



Bruce Kutosh, Acting Chair

I hereby certify this to be a true and accurate copy of the Resolution adopted by the Highlands Land Use Board, Monmouth County, New Jersey at a public meeting held on October 12, 2023.



Nancy Tran, Secretary
Borough of Highlands Land Use Board

BOROUGH OF HIGHLANDS PLANNING BOARD

EXHIBITS

Case No. LUB 2020-11 / Sea Grass, LLC

Minor Site Plan Denial

For a Conditional Use

With Ancillary Variance Relief

February 9, 2023

March 9, 2023

April 13, 2023

May 11, 2023

June 8, 2023

- A-1 Land Use Board Application, dated 12/6/2022 (13 pages)
- A-2 Borough of Highlands Resolution 22-217, dated October 5, 2022
- A-3 Cannabis Regulatory Commission Letter re: Final Agency Decision Approval of Conditional License Application, dated July 29, 2022 (3 pages).
- A-4 Photos of Building (2 pages).
- A-5 Photos of Parking Lot (2 pages).
- A-6 Color Elevation (1 page).
- A-7 Architectural Plans prepared by Shissias Design + Development, undated (3 pages).
- A-8 Preliminary and Final Major Site Plan Sea Grass NJ, LLC prepared by East Point Engineer, LLC, dated November 21, 2022. (10 pages).
- A-9 Borough of Highlands Cannabis Retailer License Application, dated January 5, 2023. (4 pages)
- A-10 Traffic Engineering and Parking Evaluation Letter by Lee D. Klein, P.E., PTOE, dated January 27, 2023 (9 pages).
- A-11 Site Layout / Signage & Striping Plan prepared by East Point Engineer, LLC, dated January 23, 2023 (1 page).

- A-12 Preliminary and Final Major Site Plan Sea Grass NJ, LLC prepared by East Point Engineer, LLC, dated February 22, 2023. (10 pages).
- A-13 Monmouth County Development Review Committee Letter, dated February 27, 2023 (16 page).
- A-14 Rendering of Window Treatment, undated (2 pages).
- A-15 Delivery Vehicle Turning Template, dated Marcy 7, 2023.
- B-1 Board Engineer Completeness Letter by Edward Herrman, dated 1/16/2023 (8 pages)
- B-2 Board Engineer Review Letter by Edward Herrman, dated 2/3/2023 (10 pages)
- O-1 Peter G. Steck CV
- O-2 Marijuana Dispensary Code
- O-3 Objector's Planners Report dated April 13, 2023 prepared by Peter Steck, P.P., containing seven (7) pages.
- O-4 Article title "Do marijuana dispensaries increase neighborhood crime?" dated February 20, 2019, published in Colorado University Denver News.
- O-5 Traffic Impact Statement for Marijuana Dispensary Applicant to Town of Tisbury Planning Board (Massachusetts) dated September 20, 2019.
- O-6 Marijuana Dispensary Code marked by Peter Steck, P.P. for Arthur Carmano, Esq. Regarding Applicant of Sea Grass, LLC dated May 11, 2023.