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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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By their attorneys,

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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By their attorneys,

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020,
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COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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**Land Court**
**Docket Number: 26 MISC 000403**

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, SS DOCKET NO. 26 MISC 000403

MISTY MOUNTAIN SHOP LLC, and HALONA MUI, Plaintiffs,
PLAINTIFF,

v.

CITY OF MALDEN, and PEG CROWE, PAUL CONDON, AMANDA LINEHAN, RYAN O'MALLEY, ARI TAYLOR, STEPHEN WINSLOW, CHRIS SIMONELLI, JADEANE SICA, MICHELLE LUONG, KAREN COLÓN-HAYES, and CAREY MCDONALD, as Members of the CITY OF MALDEN CITY COUNCIL; DMS TRINITY, LLC, BEACH HOUSE CANNABIS, LLC; and ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020, Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DMS TRINITY, LLC AND ROSEANNE J. SPINNEY, as trustee of the CHARLES STREET REALTY TRUST 2020'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

## INTRODUCTION

On June 23, 2026, the Malden City Council granted DMS Trinity's application to amend the special permit for a cannabis retailer at 36 Charles Street to allow transfer of the business to Beach House Cannabis, LLC. A business competitor whose only alleged injury is economic and an abutter who alleges no particularized injury then appealed under G.L. c. 40A, § 17. Their appeal should be dismissed, and the Court can resolve it

without ever reaching the ordinance-validity question the plaintiffs have placed at the center of the case.

First, neither plaintiff has standing, and standing is jurisdictional. Misty Mountain is a competing cannabis retailer in Malden whose only asserted injury is to the "integrity" of the licensing process. That is a competitor's interest, and the Zoning Act does not protect businesses from competition. Mui is an abutter who pleads only her abutter status, statutory notice, and a conclusory interest in parking and traffic. Under the 2024 amendment to G.L. c. 40A, § 17, she is entitled to no presumption of standing and must instead plead a measurable injury, special and different to her, to a protected interest. She has not. A plaintiff who is not aggrieved is not entitled to merits review, and the Court should dismiss without reaching the balance of the complaint.

Second, if the Court reaches the merits, the plaintiffs' lead theory fails as a matter of law. The Second Amended Complaint now concedes that all three predecessor special permit decisions were recorded on September 10, 2026. Its new argument, that the recordings came too late to retroactively validate the June 23 vote, misreads the statute. The Supreme Judicial Court has been clear that recording is not what gives a special permit life. Use or construction does. A special permit that has been substantially used, and there is no dispute that DMS Trinity’s special permit has been, does not lapse for failure to record. Nor does a later recording unwind the special permit's validity. Moreover, the City Council had authority as a special permit granting authority to modify issued permits upon application, including removing the non-transferability condition, so the contention that it acted beyond its power fails as well.

Third, the Host Community Agreement and competitive-licensing theories are not properly before the Court. This is a land use appeal, and review under § 17 reaches only whether the Council exceeded its zoning authority. Whether the petitioner has or has not satisfied a Host Community Agreement or cleared the City's cannabis licensing process is a contract and licensing question that lies outside a zoning appeal, is not an interest the Zoning Act protects, and in all events is immaterial to whether the Council exceeded its zoning authority, because the decision effectuated no transfer and conditions any transfer on those very approvals.

Separately, Mui cannot use this appeal to attack features of the underlying special permit that the June 23, 2026 amendment did not change. She owned her dwelling unit through the prior approval in Case 77-25 and never appealed that approval. The matters she now raises that predate the amendment (and that the amendment left in place), including the site's parking and the licensing framework, are not open for review on an appeal of an amendment that did not touch them.

Fourth, the Court need not, and under settled principles of judicial restraint should not, decide whether the Land Court's judgment in *Benevolent Botanicals* voided the decision. Standing disposes of the appeal. The recording and lapse theories dispose of it again. A court decides a case on the narrowest available ground and leaves larger questions for a case that requires them.

## BACKGROUND

On June 23, 2026, the City Council voted to amend the special permit in Case 77-25 and grant a new special permit in Case 334-26, removing the non-transferability condition to allow transfer of the cannabis retailer business at 36 Charles Street to Beach

House Cannabis, LLC. The written decision was filed with the City Clerk on July 6, 2026. Second Am. Compl. ¶ 51. Misty Mountain and Mui appealed and, following the September 8, 2026 case management conference, filed the operative Second Amended Complaint on October 9, 2026, adding Beach House Cannabis, LLC and the property owner, Roseanne J. Spinney as trustee of the Charles Street Realty Trust 2020, as parties. Second Am. Compl. ¶¶ 18, 19.

The Second Amended Complaint alleges that Misty Mountain operates a licensed marijuana retail establishment at 323 Commercial Street, Malden, "within the same municipal market (standing 0.59 miles away as the crow flies)," and that approval of a transfer to "a new, unvetted operator" through a process that "bypasses the CLEC's competitive evaluation process" affects "MMS's defined, protected interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. It pleads no injury to any property or use interest of Misty Mountain.

The Second Amended Complaint alleges that Mui resides at and owns Unit 303 at 260 Main Street, which she has owned since December 21, 2005, that her property is "within 300 feet of the property line of 36 Charles Street," that she is an abutter who "received statutory notice," and that she "is a person aggrieved." Second Am. Compl. ¶¶ 4, 52. Her only substantive assertion of harm is a "documented, particularized interest in preventing the parking encroachment and traffic impacts that the Council's own findings confirm the proposal will generate." Second Am. Compl. ¶ 118. The only concrete parking allegation concerns a different abutter, R.K. Malden, LLC, whose lot sits roughly 68 feet from the property. Second Am. Compl. ¶ 117. Mui did not apply for the permit, did not petition for a variance, and did not appeal any decision to the board.

The non-transferability condition and the licensing framework the plaintiffs attack did not originate with the June 23, 2026 vote. The City Council granted the operative special permit in Case 77-25 on February 11, 2025, subject to the same twenty conditions, including the Condition 8 non-transferability and non-assignability restriction. Second Am. Compl. ¶ 29. No new site plans were submitted with the Case 334-26 petition, and no changes to the plans approved in Case 77-25 were proposed. Second Am. Compl. ¶ 39. The only change the June 23, 2026 decision made was the removal of the non-transferability condition.

The Second Amended Complaint concedes that on September 10, 2026, all three predecessor decisions, Cases 202-22, 233-23, and 77-25, were recorded at the Middlesex South Registry of Deeds, each bearing the City Clerk's Certificate of Non-Appeal. Second Am. Compl. ¶ 45. The plaintiffs allege the recordings "postdate every legally operative event" and argue they create "prospective legal effect at most" that cannot retroactively supply the authority § 11 required at the time. Second Am. Compl. ¶¶ 46, 59, 63.

The decision did not effectuate any transfer. Its Condition 15 requires, before any final occupancy permit can issue, a valid Cannabis Control Commission license, a fully executed Host Community Agreement with the City, and any required CLEC and Board of Health approvals. Second Am. Compl. ¶ 50. The plaintiffs concede that the City's own officials stated the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶¶ 40, 91.

## LEGAL STANDARD

Standing to appeal under G.L. c. 40A, § 17 is a question of subject matter jurisdiction, properly raised under Mass. R. Civ. P. 12(b)(1), and the sufficiency of the plaintiffs' standing allegations is equally testable under Mass. R. Civ. P. 12(b)(6). Only a person aggrieved may appeal, and that status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Nickerson v. Zoning Board of Appeals of Raynham*, 53 Mass. App. Ct. 680, 681 n.2 (2002). The injury claimed must be to a private legal interest that the Zoning Act is intended to protect. *Picard v. Zoning Board of Appeals of Westminster*, 474 Mass. 570, 573 (2016). A plaintiff who is not aggrieved is entitled to no review of the merits. *Nickerson*, 53 Mass. App. Ct. at 682.

Since 2024, a plaintiff other than the original applicant, appellant, or petitioner must "sufficiently allege and must plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision through credible evidence." G.L. c. 40A, § 17. That amendment removed the presumption of standing abutters formerly enjoyed, and imposed a heightened pleading burden. *Vernooy v. Riordan*, No. 24 MISC 000726, 2026 WL 185896, at *3 (Mass. Land Ct. Jan. 22, 2026).

On the merits, review under § 17 is de novo as to the facts but circumscribed as to the result. The Council's decision "cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 127 (2009).

## ARGUMENT

### I. Neither Plaintiff Is A Person Aggrieved, And The Court Should Dismiss For Lack Of Jurisdiction Without Reaching The Merits.

Standing is the threshold question. Because person aggrieved status is jurisdictional, a court that finds a plaintiff is not aggrieved does not proceed to the merits. In *Nickerson*, the Appeals Court concluded the plaintiff lacked standing and therefore held that "we do not reach his arguments on the merits." *Nickerson*, 53 Mass. App. Ct. at 682. Because the plaintiff "did not meet an essential prerequisite to judicial review of the zoning board's decision, the case should have been dismissed." *Id.* at 684. Standing may be tested at any stage, because person aggrieved status is an essential prerequisite to judicial review under G.L. c. 40A, § 17. *Id.* at 681 n.2. Here, neither plaintiff clears that threshold.

#### A. Misty Mountain asserts only a competitor's interest, which the Zoning Act does not protect.

Misty Mountain's asserted injury is the injury of a business competitor. It alleges that it operates a rival cannabis retailer "within the same municipal market" and that the challenged transfer harms its "interest in the integrity of that licensing process." Second Am. Compl. ¶ 53. Massachusetts law has foreclosed any standing on that theory for more than seventy years. Without more, Misty Mountain has no right to challenge the decision of the City Council and its claims must be dismissed.

The Supreme Judicial Court has stated that "[a] business competitor does not have standing as an aggrieved party." *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 572 n.4 (1989). The purpose of zoning regulations is not to protect businesses from competition. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427,

429-431 (1949). The Appeals Court applied the same principle in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, holding that a person alleging injury from a zoning decision due to an increase in competition is not a person aggrieved for purposes of an appeal under G.L. c. 40A, § 17. *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 598-599 (2018).

A competing permit holder can have no legitimate interest in preserving the integrity of the district from the introduction of further similar uses, and the only such potential interest, "the protection of existing [cannabis retail] facilities from the anticipated effects of business competition," is not cognizable. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 217 (1975).

Misty Mountain's attempt to recast its competitive grievance as a concern for the integrity of the licensing process does not rescue it, particularly under the limitations of a zoning appeal under G.L. c. 40A, § 17. An interest in enforcement of the ordinance, untethered to any injury to the plaintiff's own property, is only a "general civic interest in the enforcement of the zoning ordinance," which does not suffice to confer standing. *Id.* at 218.

Zoning protects property-related interests, not a competitor's interest in how its rivals are vetted. To the extent Misty Mountain asserts an injury to its own business use, that is the economic injury of a competitor, which is not an injury the Zoning Act recognizes. It pleads no injury to its own property, or to its use of that property, that zoning law protects. It must be dismissed. Misty Mountain fails for the independent reason that it, too, bears the heightened pleading burden the 2024 amendment imposes on

any plaintiff who is not the original applicant, appellant, or petitioner, and, pleading only a competitive grievance from a store 0.59 miles away, it alleges no measurable injury, special and different to it, to any interest the Zoning Act protects. G.L. c. 40A, § 17; *Vernooy*, 2026 WL 185896, at *3-4.

B. Mui is not entitled to a presumption of standing and has not pleaded a particularized, measurable injury.

As for Mui, she bears the heightened pleading burden. The 2024 amendment to § 17 requires every plaintiff other than the original applicant, appellant, or petitioner to "sufficiently allege and ... plausibly demonstrate that measurable injury, which is special and different to such plaintiff, to a private legal interest that will likely flow from the decision." G.L. c. 40A, § 17. This Court has consistently held that the amendment "removed the presumption of standing previously afforded to plaintiffs who are not the original applicant, appellant or petitioner," and now requires such plaintiffs to meet a heightened pleading standard. *Vernooy*, 2026 WL 185896, at *3. The carve-out is narrow. It preserves the presumption only for a plaintiff who was the actual applicant or who appealed a decision to the board below, not for one who is merely an abutter or received notice. *Id.* at *4. In Case 334-26 the only applicant or petitioner was DMS Trinity. Mui, an abutter who alleges only that she "received statutory notice," Second Am. Compl. ¶ 52, is subject to the heightened standard and enjoys no presumption. *Honan v. Baird*, No. 23 MISC 000337, 2025 WL 3532675, at *4 (Mass. Land Ct. Dec. 8, 2025).

Mui's pleaded allegations do not satisfy that standard. A non-exempt plaintiff must plead facts that "identify the private legal interest affected, whether and how that interest is one protected by the relevant bylaw and G.L. c. 40A, what injury the

challenged permit would do to that interest, and how that injury is special and different to the plaintiff," pleaded "with particularity and specificity, as opposed to by opinion, speculation or conjecture." *Id.* The aggrievement must be "specific and personal to the plaintiff" and "cannot merely reflect the general concerns of the community." *Vernooy*, 2026 WL 185896, at *4.

Mui's complaint recites only residence, 300-foot abutter status, statutory notice, and the bare conclusion that she "is a person aggrieved." Second Am. Compl. ¶ 52. Her sole substantive assertion is a "documented, particularized interest in preventing the parking encroachment and traffic impacts" the proposal will generate. Second Am. Compl. ¶ 118. Labeling an interest particularized is not the same as pleading facts that make it so. The complaint alleges no fact showing how any parking or traffic impact will measurably affect Mui's own property, as distinct from the community generally. Generalized traffic and parking concerns do not confer standing. In *Nickerson* the plaintiff's traffic grievance was "not substantially different from that of all of the other members of the community," and the court held that he "does not qualify as an aggrieved person under G.L. c. 40A, § 17" and that "the case should have been dismissed." *Nickerson*, 53 Mass. App. Ct. at 684. Tellingly, the only concrete parking allegation in the complaint concerns a different abutter's property, not Mui's. Paragraph 117 alleges in full that "R.K. Malden, LLC, owner of the abutting property at 99 Charles Street approximately 68 feet from the property line of 36 Charles Street, submitted a public comment on February 3, 2025, confirming that no agreement is in place for its property to be used for overflow parking and that any such use would constitute trespassing." Second Am. Compl. ¶ 117. That is an alleged injury to R.K. Malden's property, not to

Mui's. R.K. Malden is not a plaintiff, and Mui cannot establish her own standing by borrowing an injury pleaded as to another party's land. The aggrievement § 17 requires must be "specific and personal to the plaintiff," *Vernooy*, 2026 WL 185896, at *4, and Mui has pleaded none. Mui should be dismissed.

## II. If The Court Reaches The Merits, The Recording Theory Fails As A Matter Of Law Because Use, Not Recording, Governs A Special Permit's Validity.

Among the plaintiffs' theories, they claim that the special permit chain never took effect under G.L. c. 40A, § 11 because the predecessor decisions were unrecorded when the Council acted, and that the September 10, 2026 recordings came too late to cure the defect. This is simply not the law. The Appeals Court rejected precisely this argument in *McDermott v. Board of Appeals of Melrose*, 59 Mass. App. Ct. 457 (2003).

### A. *McDermott* forecloses the "never took effect" theory.

*McDermott* presented the identical syllogism the plaintiffs press here. There, the board argued that because § 11 provides that a special permit shall not take effect until recorded, a special permit that had gone unrecorded for nine years had never taken effect and so could not have been "used" within the meaning of the § 9 lapse provision. *McDermott*, 59 Mass. App. Ct. at 457-458. The Appeals Court reversed. It held that, although § 11 requires recording for a permit to take effect, "the failure to record is not necessarily fatal," and that under § 9 it is use, not recording, that must commence within the lapse period to prevent a permit from lapsing. *Id.* at 461-462. Because the permit holder had substantially used the premises, the permit "did not lapse because it was substantially used within two years of its grant even if it was not recorded at that time."

*Id.* at 458. The permit remained valid despite a recording that came nine years after issuance.

The Supreme Judicial Court confirmed this principle in *Lobisser*. Under § 9, "either substantial use or construction must commence within the applicable time period" to avoid lapse, and "nothing in G.L. c. 40A, § 9, indicates that anything more is necessary." *Lobisser*, 454 Mass. at 129. *Lobisser* cited *McDermott* approvingly for the proposition that a special permit does not lapse where substantial use occurs within the statutory period even though the special permit was not recorded. *Id.* Recording is not the event that keeps a special permit alive. Use or construction is.

B. The plaintiffs' own allegations establish substantial use and construction.

The plaintiffs plead the facts that defeat their own theory. They allege that a building permit issued on May 8, 2024, that construction was performed and passed final inspection, and that the City issued an occupancy permit for a marijuana retailer on March 12, 2025. Second Am. Compl. ¶¶ 31, 32. Construction of the authorized premises is exactly the substantial construction that § 9 makes sufficient to prevent lapse, independent of use. *Lobisser*, 454 Mass. at 129. The plaintiffs' contrary contention, that construction buildout is not use of the retail use under *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), conflates the two disjunctive alternatives. Section 9 is satisfied by substantial use **or** construction, and construction alone suffices. *Lobisser*, 454 Mass. at 129. The statute's disjunctive phrasing compels that reading. The word "or" carries its ordinary disjunctive meaning unless context demands otherwise, so the two alternatives are independent and either one, standing alone, satisfies the statute. *Miller v.*

*Miller*, 448 Mass. 320, 329 (2007); *Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transportation Authority*, 350 Mass. 340, 343 (1966).

C. The September 10, 2026 recordings confirm validity rather than defeat it, and no retroactivity problem exists.

The plaintiffs' amended theory, that the recordings operate prospectively only and cannot retroactively supply authority, rests on the same misreading *McDermott* rejected. The premise of a retroactivity problem is that the permit lacked validity until recording. But *McDermott* holds that the permit was valid all along because it was used, and that the recording requirement governs a permit's effect for purposes such as notice, but not for purposes of whether a permit has been substantially used (or has lapsed for non-use). *McDermott*, 59 Mass. App. Ct. at 461-462. A decision treating non-recording as voiding a used permit rests on a legally untenable ground and cannot stand. *Lobisser*, 454 Mass. at 127. There is accordingly nothing for the September 10 recordings to supply. They confirm what § 9 already established, and they moot any non-recording defect the plaintiffs continue to assert.

D. *Cornell* does not help the plaintiffs.

The plaintiffs rely on *Cornell*, but *Cornell* is a variance case and is expressly constrained. *Cornell* held that under § 11 a variance "does not 'take effect' until it is recorded" and that recording within one year was necessary to exercise it. *Cornell*, 453 Mass. at 889-890. Three features confine that holding.

First, *Cornell* arose under § 10, governing variances, not § 9, governing special permits, and the Court emphasized that the Legislature, unlike in § 9, "has not required

commencement of construction as a prerequisite for 'exercise' of a variance." *Id.* at 890 n.9.

Second, *Cornell* turned on the holder's failure to exercise the variance at all, not on recording as a standalone voiding defect, because the holder "did not sell either lot or engage in construction on the lot for which the variance was granted." *Id.* at 890 n.7.

Third, the Court expressly declined to decide the issue the plaintiffs press here, stating that it would "leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied," and in the same breath distinguished *McDermott* as holding that failure to record a special permit is not fatal where the holder substantially used it. *Id. Cornell* thus leaves *McDermott* intact for special permits and does not support voiding a special permit that, as here, was built out and used.

## III. If The Court Reaches The Merits, The Council Had Authority To Remove The Non-Transferability Condition.

Count IV alleges that the Council acted beyond its authority, and ultra vires, when it removed the non-transferability condition from the special permit. Second Am. Compl. ¶¶ 83-92. The premise is wrong. A special permit granting authority has broad authority under the Zoning Act both to impose conditions and to modify them, and the Council's removal of this condition was a lawful exercise of that authority.

General Laws c. 40A, § 9 authorizes a special permit granting authority to issue special permits in harmony with the ordinance and provides that such permits "may also impose conditions, safeguards and limitations on time or use." G.L. c. 40A, § 9. The power to impose a condition on a special permit application carries with it the authority

to relax or remove that condition on a later application. The Supreme Judicial Court has recognized that a special permit granting authority "may be asked by a successful petitioner to modify a condition" imposed in a special permit in light of changed conditions, and that a decision on such a modification request is part of the ordinary § 17 framework rather than a time-barred collateral attack on the original permit. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 385 (2009); see also G.L. c. 40A, § 14 (board may "modify any order or decision" in connection with applications for special permits). A decision on such a request is reviewed under the ordinary special-permit standard and stands unless it rests on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary. *Lobisser*, 454 Mass. at 127. See *Barlow v. Planning Board of Wayland*, 64 Mass. App. Ct. 314, 323 (2005) (reviewing a decision on an application to amend a special permit under that standard).

That is what the Council did here. Having granted the special permit with the non-transferability condition, the Council entertained DMS Trinity's petition to amend the permit and, in the exercise of its discretion, removed that condition and granted a new special permit subject to nineteen conditions. Second Am. Compl. ¶¶ 43, 50. The Second Amended Complaint identifies no legally untenable ground for that choice. It argues only that non-transferability was compelled by Malden Code § 12.12.190.H and so could not be removed. That contention depends on the validity and applicability of § 12.12.190.H, which the plaintiffs' own pleading acknowledges the Land Court found unreasonably impracticable, and which, as explained below, does not control the Council's authority here. Second Am. Compl. ¶¶ 35, 86. If § 12.12.190.H does not govern, the condition was

an ordinary permit condition that the Council was free to modify under § 9. Either way, the removal was within the Council's authority and was not ultra vires.

## IV. The Host Community Agreement And CLEC Licensing Theories Are Not Cognizable In This Land Use Appeal.

Counts V and VI allege that the transfer violates the Host Community Agreement and bypasses the competitive CLEC licensing process. Second Am. Compl. ¶¶ 93-106. Whether the petitioner has or has not satisfied those requirements is beside the point in this proceeding. This is a land use appeal, and the only question for the Court is a zoning question, namely whether the City Council exceeded its authority under the Zoning Act and the ordinance when it amended the special permit. The licensing and contract issues the plaintiffs raise fall outside that question. They are not within the scope of a § 17 appeal. They are not interests the Zoning Act protects, so the plaintiffs lack standing to raise them. And they are immaterial to the zoning decision the Court reviews.

### A. A § 17 appeal reviews only the Council's zoning authority, and marijuana licensing and the Host Community Agreement are separate regimes.

Section 17 confines the Court to the zoning decision before it. The statute authorizes the Court to hear evidence pertinent to the authority of the special permit granting authority and to annul the decision if it is found to exceed that authority. G.L. c. 40A, § 17. The Supreme Judicial Court has made clear that this grant is narrow. In *Bask, Inc. v. Municipal Council of Taunton*, a § 17 appeal from the denial of a cannabis special permit, the Court held that the statutory phrase authorizing "such other decree as justice and equity may require" does "not grant to the Land Court general equitable powers" and instead confers only "limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application." *Bask, Inc. v.*

*Municipal Council of Taunton*, 490 Mass. 312, 318 (2022). The Land Court exceeded that authority when it reached the municipality's marijuana licensing procedure, because "[t]here was no claim pending in the Land Court concerning the licensing procedure." *Id.* The injunction directed at the licensing process "exceeded the permissible scope of the judge's authority." *Id.* at 313.

*Bask* governs the framework here. The SJC instructed that a challenge to the cannabis licensing stage must be pursued in its own proceeding, separate from the zoning appeal, for example by certiorari in the Superior Court. *Id.* at 319. A Host Community Agreement, executed under the Commonwealth's cannabis statute, G.L. c. 94G, and the vetting conducted by the Cannabis Control Commission and the City's Cannabis Licensing and Enforcement Commission are precisely that separate licensing and contractual stage. They are not zoning controls, and whether they have been satisfied does not bear on whether the Council exceeded its zoning authority on June 23, 2026. The plaintiffs' own pleading confirms the separation, because it alleges that CLEC approval, a new Host Community Agreement, and Cannabis Control Commission approval remain necessary steps that the June 23 vote did not accomplish. Second Am. Compl. ¶ 40. Those steps are for the licensing authorities, not for this Court sitting in a zoning appeal.

The Land Court's own jurisdiction confirms the point. The Land Court is a court of limited, statutory jurisdiction and may hear only the matters the Legislature has enumerated in G.L. c. 185, § 1. *Bask*, 490 Mass. at 317. Jurisdiction over this case arises under § 1(p), which reaches actions brought under G.L. c. 40A, §§ 7 and 17, and the related equity jurisdiction under § 1(k) extends only to matters where a right, title, or

interest in land is involved. G.L. c. 185, § 1(k), (p). A claim that the petitioner has not satisfied a Host Community Agreement sounds in contract, and a claim that the transfer bypassed the CLEC process challenges a municipal licensing decision. Neither is an action brought under § 17, and neither involves a right, title, or interest in land. Review of a municipal licensing authority's action "is not a matter cognizable under the general principles of equity jurisprudence" and must instead be sought in the Superior Court, including by certiorari. *Bask*, 490 Mass. at 318-319. The Host Community Agreement and CLEC theories thus fall outside this Court's subject matter jurisdiction as well as outside the scope of a § 17 appeal.

B. The plaintiffs lack standing to raise licensing and contract interests, which the Zoning Act does not protect.

The same separation defeats standing to press Counts V and VI. A § 17 plaintiff's asserted interest "must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *Picard*, 474 Mass. at 573. In *Picard*, the Supreme Judicial Court held that a plaintiff's private interest that was not a zoning concern, there an easement, fell outside "the scope of concern of the Zoning Act" and could not support aggrievement. *Id.* at 575.

An interest in the enforcement of a licensing scheme, or in the terms of a host community contract to which the plaintiff is not a party, is no more a protected zoning interest than the easement in *Picard* or the competitive interest the court rejected in *Clear Channel*. *Clear Channel*, 94 Mass. App. Ct. at 598-599. Neither plaintiff has standing to annul a zoning decision on the ground that a separate licensing or contractual process has not run its course.

C. In all events, the Host Community Agreement and CLEC theories are immaterial to the zoning question.

Even if these theories were cognizable zoning grounds, which they are not, they are immaterial to whether the Council exceeded its zoning authority on June 23, 2026, because the special permit effectuated no transfer. Condition 15 requires a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before any final occupancy permit. Second Am. Compl. ¶ 50. The plaintiffs concede that the June 23 vote "did not effectuate a transfer and that multiple additional legislative, regulatory, and contractual steps would remain necessary before any transfer could occur." Second Am. Compl. ¶ 91. If the plaintiffs' real objection is to those later licensing and contractual steps, their remedy is to challenge those steps if and when they occur. A successful challenge would mean only that the applicant cannot satisfy a condition of the special permit, not that the Council exceeded its zoning authority when it granted the amendment.

The need for later approvals does not render the decision itself defective, because "[t]he necessity for favorable planning board action would not invalidate the grant of a special permit by the board of appeals, despite the fact that, without the favorable action, the special permit might prove unavailing." *SMI Investors (Delaware), Inc. v. Planning Board of Tisbury*, 18 Mass. App. Ct. 408, 414 (1984). The Host Community Agreement and CLEC theories supply no basis to annul a decision that itself withholds the transfer until those very approvals are obtained.

## V. Mui Cannot Revive Challenges To Pre-Existing Features Of The Permit That The June 23, 2026 Decision Did Not Change.

Even if Mui had standing, her theories attack features of the permitted use that were fixed by the prior, unappealed approval in Case 77-25 and that the June 23, 2026 amendment did not change. Review of an amendment reaches only what the amendment changed. A plaintiff who did not appeal the earlier decision cannot use an appeal of a later amendment "to revive matters unchanged by that modification and not reconsidered by the board," and that is so "even if the original decision ... was invalid." *Sergi v. Planning Board of Kingston*, 60 Mass. App. Ct. 918, 919 (2004). The twenty-day appeal period in § 17 is the exclusive remedy, and a belated challenge is barred regardless of its form. *Iodice v. City of Newton*, 397 Mass. 329, 333-334 (1986). Having failed to appeal the conditions of the earlier permit, a party "did not have the right to challenge the validity of ... the condition[ ] in a proceeding which, regardless of its form, was the equivalent of an appeal." *Bonfatti v. Zoning Board of Appeals of Holliston*, 48 Mass. App. Ct. 46, 50 (1999).

Mui owned her unit since December 21, 2005, and so owned it throughout the Case 77-25 proceeding, which the Council decided on February 11, 2025 subject to the same twenty conditions. Second Am. Compl. ¶¶ 4, 29. She did not appeal that decision. The Case 334-26 petition submitted no new plans and proposed no change to the approved use. Second Am. Compl. ¶ 39.

That the June 23, 2026 decision took the form of both an amendment to the Case 77-25 permit and a new special permit in Case 334-26 does not open the unchanged features to review. The controlling question under *Sergi* is what the later decision actually changed,

not the case number under which it issued. *Sergi*, 60 Mass. App. Ct. at 919. The Case 334-26 decision carried forward the identical twenty conditions and the identical approved plans and changed one thing only, the removal of the non-transferability condition. Second Am. Compl. ¶¶ 29, 39. Every feature Mui now attacks, the site's parking and the Host Community Agreement and CLEC prerequisites, was fixed by Case 77-25 and reissued unchanged. A plaintiff cannot obtain review of unchanged features because the authority reissued them in a new decision any more than she could by appealing a bare amendment. *Sergi*, 60 Mass. App. Ct. at 919; *Bonfatti*, 48 Mass. App. Ct. at 50.

A. The parking theory attacks a pre-existing deficiency the Council did not change.

Mui's only pleaded injury concerns parking, and Count VIII alleges that the approval "compounds existing parking deficiencies." Second Am. Compl. ¶¶ 114-119. By its own terms, that theory attacks a condition that predates the challenged vote. The Council expressly found that the petition "does not change the proposal's existing deficiencies in parking requirements." Second Am. Compl. ¶¶ 48, 115. The parking arrangement was set by the earlier approvals, on plans the June 23, 2026 decision did not alter. Second Am. Compl. ¶ 39. Mui, who has owned her unit since 2005 and did not appeal Case 77-25, cannot litigate the site's parking for the first time on an appeal of an amendment that left parking untouched. *Sergi*, 60 Mass. App. Ct. at 919. The allegation that the required number of off-site spaces rose from five to twelve, Second Am. Compl. ¶ 116, does not change the analysis, because the Council found the deficiency itself unchanged and no new plans were submitted. Second Am. Compl. ¶¶ 39, 48. And in any

event, as Part I.B explains, Mui has not pleaded any particularized, measurable parking injury to her own property.

B. The Host Community Agreement and licensing theories attack unchanged prerequisites.

The same bar applies to the Host Community Agreement and CLEC theories. Those prerequisites were features of the use approved in Case 77-25, which Mui did not appeal, and the June 23, 2026 decision did not remove or relax them. To the contrary, the decision reaffirmed them by requiring, in Condition 15, a Cannabis Control Commission license, a fully executed Host Community Agreement, and CLEC and Board of Health approvals before occupancy. Second Am. Compl. ¶ 50. Mui's challenge to that framework was due, if at all, on an appeal of Case 77-25, and it is now barred.

## VI. The Court Need Not Reach Whether The *Benevolent Botanicals* Judgment Voids The Decision.

The plaintiffs have organized their appeal around the contention that Malden Code § 12.12.190, the marijuana zoning provision addressed in *Benevolent Botanicals*, controls the Council's authority. The Court should decline the invitation to decide that question, because the appeal can and should be resolved on narrower grounds.

A. If the Court reaches the question, the *Benevolent Botanicals* judgment does not void the decision.

Even if the Court were to reach the issue, the plaintiffs' own pleading defeats it. The Second Amended Complaint now concedes that the Clarified Judgment in *Benevolent Botanicals* strikes § 12.12.190 and related provisions only to the extent they would require Benevolent Botanicals to obtain a special permit, and that the strike "is expressly limited to the plaintiff in that action." Second Am. Compl. ¶ 35. By the

plaintiffs' own account, the judgment "does not purport to decide the ordinance's validity as applied to DMS Trinity." Second Am. Compl. ¶ 86. A judgment that is limited by its terms to another party does not void this decision. The Court need not resolve anything further to reject the theory.

B. In all events, the plaintiffs must clear Rule 12 before the Court reaches the ordinance-validity question.

The Court need not reach the ordinance-validity question at all unless the plaintiffs first survive Rule 12. Standing is tested under Mass. R. Civ. P. 12(b)(1), and the recording, lapse, and authority theories are tested under Mass. R. Civ. P. 12(b)(6). If neither plaintiff has standing, the appeal ends and the Court never reaches the ordinance. If the recording and lapse theories fail, the decision stands on the Council's authority over a valid, used permit, again without any need to adjudicate the scope or effect of the *Benevolent Botanicals* judgment. That sequencing accords with the settled principle that Massachusetts courts resolve cases on the narrowest available ground and avoid unnecessary rulings on the validity of enactments. *Commonwealth v. Bartlett*, 374 Mass. 744, 748-749 (1978); *Beeler v. Downey*, 387 Mass. 609, 613-614 (1982). The Court should take the narrower path and decline the plaintiffs' invitation to decide the validity of § 12.12.190.

## CONCLUSION

For the foregoing reasons, DMS Trinity respectfully requests that the Court dismiss the Second Amended Complaint as to Misty Mountain and Mui under Mass. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of standing, and, in the alternative, for failure to state a claim, and grant such other and further relief as is just and equitable.

**Respectfully submitted**

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