IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION

218 WAYNE LLC; MNG PENNSYLVANIA HOLDINGS LLC; and MNG 2005, INC. d/b/a CBD KRATOM, Plaintiffs,	:	
v.	:	NO. CV-2022-002234
TOWNSHIP OF RADNOR and KEVIN KOCHANSKI in his official capacity, Defendants	:	

ORDER DENYING PLAINTIFFS' PETITION FOR PRELIMINARY INJUNCTION

AND NOW, this 27th day of October, 2022, upon consideration of the Petition for Preliminary Injunction (the "Petition") filed by Plaintiffs 218 Wayne LLC ("218 Wayne"), MNG Pennsylvania Holdings, LLC ("MNG Pennsylvania"), and MNG 2005, Inc. d/b/a CBD Kratom ("CBD Kratom" and, together with 218 Wayne and MNG Pennsylvania, the "Plaintiffs") and the accompanying papers in support thereof, and the Answer and Brief in Opposition to the Petition, filed by Defendants Township of Radnor ("Radnor") and Kevin Kochanski ("Kochanski" and, together with Radnor, the "Defendants"); having conducted an evidentiary hearing on the Petition on July 20, 2022 (the "Injunction Hearing") at which witnesses for all parties testified[1] and a variety of documents were admitted into evidence;[2] having considered the testimony and documents admitted at the Injunction Hearing and having reviewed the parties' submissions, including the above-referenced filings and the submissions of the parties after the Injunction Hearing,[3] as well as the relevant case law, including but not limited to the

[1] By agreement of the parties, Plaintiffs introduced sworn affidavits of two of their witnesses as direct testimony; these witnesses appeared at the Injunction Hearing and were cross-examined by Defendants, and their affidavits were marked and admitted as Exhibits 56 and 57.

[2] The parties agreed to the admission of joint exhibits 1-69.

[3] All parties submitted proposed findings of fact and conclusions of law in mid-September. Plaintiffs made an

applicable standards and the burden that the law imposes on the party seeking preliminary injunctive relief; it is HEREBY **ORDERED** and **DECREED** that the Petition is **DENIED** as set forth below.

Plaintiffs are sellers of various ingestible products, some of which contain Δ-8 THC and Kratom. Plaintiffs assert that a certain Radnor Township Ordinance No. 2022-03 (the "Ordinance") that prevents businesses in Radnor from selling products containing Δ-8 THC and Kratom within 1,000 feet of a school, playground or daycare (1) is unconstitutional and discriminatory against Plaintiffs and (2) if continued to be enforced against Plaintiffs, will put their store, located at 218 Lancaster Avenue, Wayne, Radnor Township, Pennsylvania, out of business. In furtherance of those claims, Plaintiffs seek immediate, preliminary injunctive relief in the nature of an Order directing Defendants to (1) cease enforcing the Ordinance against Plaintiffs and (2) issue to Plaintiffs certain certificates of occupancy and construction permits that would allow Plaintiffs to sell their products at the current location in Radnor where Plaintiffs lease certain retail property. Plaintiffs' Amended Complaint also requests (1) a declaratory judgment that the Ordinance is unconstitutional and invalid and (2) money damages against Defendant Kochanski.

Defendants oppose the relief sought in the Petition, advancing a series of arguments, including but not limited to the following:

a. The Ordinance was passed pursuant to Radnor's police powers to protect the health, welfare and safety of its residents. It regulates activity, not land use, and is not a zoning ordinance. As such, the Ordinance satisfies the applicable rational basis review, as it is reasonably related to accomplishing the

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additional submission on October 11, 2022 in the form of a Motion for Leave to File a Reply in Support of their Post Hearing Brief. Having made clear at the Injunction Hearing that a single set of post-hearing submissions would avoid an endless back and forth of a party wanting to have the proverbial last word, the Court has not considered the arguments set forth in the proposed Reply Brief, and notes only that none of the many cases cited therein were previously unavailable. The parties made extensive arguments in the several filings made in connection with the Petition, which the Court considers sufficient for purposes of resolving the Petition.

promotion of a legitimate state interest and/or public value.

b. The Ordinance applies to *all* individuals and businesses in Radnor. As such, it is not discriminatory as to Plaintiffs.

c. If, as Plaintiffs contend, the Ordinance is a zoning ordinance, the Petition must be denied because Plaintiffs did not raise their challenges to the Radnor Township Zoning Hearing Board.

d. Plaintiffs cannot establish that an injunction is necessary to prevent irreparable harm because (i) their injuries are compensable by money damages, as evidenced by their own witnesses and documents and (ii) there is no evidence to support the suggestions that (a) Plaintiffs have suffered a loss of goodwill or reputation, or (b) Defendants actions will cause Plaintiffs' business to fold.

e. An injunction requiring Defendants to issue permits and allow Plaintiffs to open their store in Wayne will not restore the parties to the status quo that existed prior to the failure to provide him with such permits.

f. An injunction enjoining enforcement of an Ordinance designed to protect the public will, by definition, negatively affect the public interest, which is served by *enforcing* the Ordinance.

The evidence adduced at the Injunction Hearing established the following facts pertinent to the resolution of the Petition:

- Plaintiffs own and operate more than 50 retail stores that trade as "CBD Kratom" throughout Delaware County, the Commonwealth of Pennsylvania, and the United States, and have hundreds of thousands of customers. See Ex. 57 ¶¶ 6 & 43; N.T. at 18-19, 64.

- Plaintiffs sell various hemp-derived cannabinoid-based products, including *but not limited to* products containing Δ-8 THC and Kratom. See Ex. 57 ¶ 8. Plaintiffs sell other items in their stores, including at least five other cannabis products and a variety of accessories. See N.T. at 42-42. Sales of products containing Δ-8 THC and Kratom account for at least 75% of Plaintiffs' revenue. See Ex. 57 ¶ 109.

- On August 30, 2021, 218 Wayne executed a ten-year lease agreement for certain retail property located at 218 Lancaster Avenue, Wayne, Radnor Township, PA (the "Property"). The lease calls for, *inter alia*, certain monthly payments ranging from $8,000 to $11,000 over its term. Stip. ¶ 1; Exs. 4 & 57 ¶ 44.

- 218 Wayne intended to use the Property to sell, among other things, products containing Δ-8 THC and Kratom. Stip. ¶ 2. Plaintiffs projected revenue from its retail store in Wayne to total $12 million over the term of its lease. Ex. 57 ¶ 111.

- Approximately 14 states have legislation controlling the sale of Δ-8, including bans and regulations. Kratom is currently banned and criminalized in six states and in certain cities, counties, and municipalities. Stip. ¶¶ 4-6.

- The Property is located in the Wayne Business Overlay District, within 1000 feet of the property line of at least one school. Stip. ¶ 8.

- In December 2021, Plaintiffs began to renovate the interior of the Property, using a variety of contractors and sub-contractors. Stip. ¶¶ 13. Plaintiffs incurred start-up costs in connection with this business location in the amount of approximately $175,000, representing employee training and renovations. Ex. 57 ¶ 113; N.T. at 43.

- Beginning in January 2022, Radnor residents began to express concern about the opening of Plaintiffs' CBD Kratom store and the potential health dangers posed by products containing Δ-8 THC and Kratom. See, e.g., Ex. 5; see also N.T. at 137.

- On February 9, 2022, officials from Radnor became aware that Plaintiffs' representatives were bringing in supplies and stocking shelves at the Property. Stip. ¶ 17.

- On February 10, 2022, there was a soft opening of Plaintiffs' Wayne store, but the store closed that same day on instructions from Radnor due to Plaintiffs' failure to obtain construction or sign permits, a certificate of use and occupancy, and a business license. The store has been closed since February 10, 2022. Stip. ¶¶ 18-20

- On February 10, 2022, Plaintiffs submitted to Radnor an application for a certificate of use and occupancy, and on February 11, 2022, they submitted an application for a New Business License. Stip. ¶¶ 21 & 23

- On February 14, 2022, the Radnor Township Board of Commissioners held a meeting, at which Plaintiffs' store at the Property was discussed. Stip. ¶ 25.

- On February 18, 2022, the Radnor Township Zoning Officer issued a Zoning Enforcement Notice to Plaintiffs, citing several violations of the Radnor Township Zoning Ordinance pertaining to lack of permits and sign ordinance violations. Plaintiffs never appealed this Zoning Enforcement Notice to the Radnor Township Zoning Hearing Board. Stip. ¶¶ 27-28.

- Multiple applications for permits related to Plaintiffs' use of the Property were submitted by Plaintiffs to Radnor between February 24, 2022 and March 26, 2022. Each of the applications was rejected for a variety of reasons. Plaintiffs never appealed any of these denials of the various applications to the Township Code Appeals Board. Stip. ¶¶ 29, 31-33, 35.

- On February 28, 2022, the Radnor Township Board of Commissioners held another meeting, at which the Plaintiffs' store at the Property was discussed again. Stip. ¶ 36.

- At the request of the Radnor Township Board of Commissioners, the Radnor Township Board of Health held a meeting on March 7, 2022 at which, *inter alia*, products containing Δ-8 THC and Kratom were discussed. Several days after the meeting, the Radnor Township Board of Health issued a report to the Radnor Township Board of Commissioners on March 11, 2022. Stip. ¶¶ 39, 41.

- The Board of Health Report summarizes health issues raised by three areas of concern—(1) the CBD Kratom store (at issue in this litigation); (2) products containing Δ-8 THC and Kratom; and (3) substance abuse and addiction—and makes a series of recommendations based on the "significant potential for public harm" posed by the three areas of concern. See Ex. 36. The bulk of the Board or Health Report discusses products containing Δ-8 THC and Kratom and substance abuse and addiction. See Ex. 36 at 2-5. Its recommendations to the Board of Commissioners relate solely to these two subjects. Id.

- On March 14, 2022, the Radnor Township Board of Commissioners held another meeting, at which the Board of Commissioners introduced Ordinance No. 2022-03. Stip. ¶ 43.

- The Ordinance prohibits the sale or distribution of Kratom or Δ-8 THC at any location, dispensary, or store within 1,000 feet of a school, playground, or daycare in Radnor. See Ex. 43.

- The Ordinance notes expressly, *inter alia*, that Δ-8 THC and Kratom products can pose a potential for abuse and harm to the health, welfare, and safety of the Radnor community and its residents; that the various federal agencies have raised such and other concerns about Δ-8 THC and Kratom; and that the Ordinance "is enacted to protect, preserve, and promote the health, safety, and welfare of the citizens of Radnor Township". See Ex. 43.

- The Ordinance does not ban the sale of products containing Δ-8 THC and Kratom within Radnor Township. See Ex. 43. Indeed, there are many locations within Radnor where a business can sell such products. See Ex. 68.

- On March 28, 2022, the Radnor Township Board of Commissioners held another meeting, at which the Board of Commissioners voted to enact the Ordinance, which subsequently went into effect on April 28, 2022. Stip. ¶¶ 52 & 54.

The foregoing facts require the Court to reject the request for preliminary injunctive relief for failure to satisfy at least one, if not several of the six prongs that a movant must establish before a preliminary injunction may issue.[4] Indeed, for a preliminary injunction to issue, every

[4] A party seeking a preliminary injunction must show that (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from

one of the six prerequisites must be established, and if the petitioner has failed to establish any one of them, there is no need for the court to address the others. See Warehime v. Warehime, 860 A.2d 41, 46-48 (Pa. 2004) (affirming denial of preliminary injunctive relief where trial court found that any one of the six essential prerequisites was not satisfied); see also Comm. of Seventy v. Albert, 381 A.2d 188, 190 (Pa. Commw. Ct. 1977) (preliminary injunction is harsh and extraordinary remedy, which can be granted only when and if each and every criteria has been fully and completely established). The Court addresses below those factors where it finds that Plaintiffs have failed to carry their burden.[5]

First, Plaintiffs have not established immediate and irreparable harm that cannot be adequately compensated by money damages. On a request for preliminary injunctive relief, a petitioner must present "concrete evidence" demonstrating "actual proof of irreparable harm". See City of Allentown v. Lehigh County Auth., 222 A.3d 1152, 1160-61 (Pa. Super. Ct. 2019). The claimed "irreparable harm" cannot be based solely on speculation and hypothesis; moreover, it must be irreversible before it will be deemed irreparable. Id.; see also Greenmore, Inc. v. Burchick Constr. Co., 908 A.2d 310 (Pa. Super. Ct. 2006) (reversing trial court's preliminary injunction where there was a "paucity of demonstrable evidence" regarding petitioner's economic future, and therefore insufficient evidence "to demonstrate satisfactorily that an irreparable and irreversible harm will result to [Petitioner]'s business as a result of [Defendant's] actions."). As in Greenmore, Plaintiffs in this case fail to satisfy their burden on

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refusing an injunction than from granting it; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) petitioner's right to relief is clear; (5) the injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

[5] The failure to discuss a factor should not be construed as a finding that such other factor was established by Plaintiffs.

this prong of the injunction analysis.

In this case, Plaintiffs claim that, absent a preliminary injunction, they will suffer at least five forms of "immediate and irreversible harm"—forced closure of their business, squandered costs incurred in opening the CBD Kratom store, potential imposition of criminal liability, suppression of free speech rights, and reputational harm. Id. at 15-18; accord Pls.' Mem. at 1-2. Notably, Plaintiffs identify themselves as thriving entities with 450 employees and 50 stores nationwide. See, e.g., Ex. 57 ¶¶ 6 & 43; N.T. at 18-19, 64. It defies credulity to believe that the closing of one location, in Wayne, Radnor Township, would imperil Plaintiffs' business existence to such a degree that preliminary injunctive relief would be appropriate. Further, Plaintiffs' "squandered costs" (the *funds* they spent to renovate the Property and train prospective employees) are, by definition, compensable via *money* damages; this, therefore, does not help Plaintiffs' establish the type of injury that justifies preliminary injunctive relief.[6] Plaintiffs also suggest that Defendants' actions "have irreparably harmed Plaintiffs' goodwill with potential customers," see Pls.' Post-Hearing Br. at 18, but there is no proof in the record to allow a Court, at this juncture, to so find. Contra West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295 (Pa. Super. Ct. 1999) (cited by Plaintiffs, upholding injunction—in non-compete context involving physician—where record demonstrated that doctor's defection from practice damaged existing relationships and created significant loss of business opportunity and market advantage).[7] At best, the record in this case contains Plaintiffs' projected revenue for their

[6] Plaintiffs argue that Radnor "does not say how" Plaintiffs could be compensated in damages. See Pls.' Post-Hearing Br. at 18. But this is not the Defendants' burden on this Petition *and* Plaintiffs' own witnesses establish "how" (and by what measure) their alleged damages could be calculated. See, e.g., Ex. 57 ¶ 111 (Plaintiffs projected revenue from its retail store in Wayne); id. ¶ 113 (Plaintiffs incurred calculable start-up costs); id. ¶ 109 (sales of products containing Δ-8 THC and Kratom account for approximately 75% or Plaintiffs' revenue); see also Stip. ¶ 1 & Exs. 4 & 57 ¶ 44 (lease calls for, inter alia, monthly payments ranging from $8,000 to $11,000 over ten-year term).

[7] The Court finds unavailing Plaintiffs' comparison of this case with Porter v. Chevron Appalachia, LLC, 204 A.3d

Wayne store over ten years and their projected loss of 2/3 of their planned revenue from this store. See Ex. 57 ¶¶ 111-13. These facts do not establish anything with respect to goodwill or potential customers, and there is nothing else in the record that would provide a basis for the conclusion Plaintiffs urge.

Moreover, abundant testimony at the Injunction Hearing demonstrated not only that Plaintiffs are *not* foreclosed from operating their business in Radnor—they just cannot do so at its present location—but also that Plaintiffs' business is not limited to the sale of products containing Δ-8 THC and Kratom; this calls into question the suggestion that Plaintiffs' entire business would close absent preliminary injunctive relief. In other words, the potential harm to Plaintiffs' business is neither immediate nor non-compensable by money damages—their business(es) may not only continue (via sale of other products) but may continue, albeit in another location within Radnor, even *with* the sale of products containing Δ-8 THC and Kratom. Stated simply, the hypothetical scenario in which Plaintiffs would be "put out of business" is just that: hypothetical and speculative and, moreover, compensable by money damages.[8]

Although the Petition could be denied just on the foregoing basis, it could be denied for additional reasons. For example, Plaintiffs' right to relief is *not* clear; as such, they are not

411 (Pa. Super. Ct. 2019), in which the court granted an injunction to enforce property rights of a lessee who had rights to oil and gas resident on the property, which the lessor attempted to prevent the lessee from extracting. In that particular circumstance involving "the unique and intrinsic value of land" the Court noted that interference with contractual rights to ownership of that land must be deemed irreparable harm. 204 A.3d at 417. The situation presented in the case before the Court does not involve "the unique and intrinsic value of land" and, as noted above, there is no proof that the claimed harm from Defendants' actions is not compensable by money damages.

[8] With respect to the other forms of alleged immediate and irreparable harm not compensable by money damages—potential imposition of criminal liability, suppression of free speech rights, and reputational harm—there is simply no *evidence* to support those claims in the record adduced during the Injunction Hearing. Advocacy in briefs is not evidence. Notably, Plaintiffs not only do not point to any record evidence in support of these claims, but also do not even re-raise these arguments in their Post-Hearing Brief.

likely to prevail on the merits of the claims alleged. Before addressing why the Court so concludes, the Court clarifies the appropriate standard for this prong: "[T]he moving party must produce sufficient evidence to satisfy the essential elements of the underlying cause of action. . . . [T]he evidence [must] clearly satisf[y] the essential prerequisites of the cause of action." Synthes USA Sales, LLC. v. Harrison, 83 A.3d 242 n.4 (Pa. Super. Ct. 2013) (internal citation omitted) (emphasis added). While "[t]he mere possibility that the claim might be defeated does not preclude a finding of probable success", id., if the petitioner's right to relief is unclear, then a preliminary injunction should not issue. Id. at 250. In this case, Plaintiffs' pleading asserts three "causes of action": Injunctive Relief, Mandamus, and Declaratory Judgment. "Injunctive Relief" is a form of relief and relates to the underlying substantive cause of action set forth in the cause of action for declaratory judgment.[9] As such, to establish a clear right to relief, there must be sufficient evidence to satisfy the essential elements of Plaintiffs' claim that the Ordinance should be declared unconstitutional in the way(s) described in Plaintiffs' pleading. At this juncture, the record lacks such sufficient evidence and, therefore, Plaintiffs' right to relief on this claim is unclear.[10]

First, despite Plaintiffs' strident advocacy, there is no evidence in the record to support the claim that the Ordinance discriminates against Plaintiffs or that it "prevents ***only*** Plaintiffs",

[9] Mandamus, similarly, is a form of relief and factors that must be satisfied before such relief can issue, as opposed to elements of a cause of action requiring proof of each element.

[10] Presumably for persuasive value, Plaintiffs cite to Notarianni v. O'Malley, 2017 WL 1337564 at *4, an unreported decision in which the court denied a request for mandatory injunctive relief. The Notarianni Court noted, as Plaintiffs point out (see Pls. Post-Hearing Br. at 40), that "where the other elements for a preliminary injunction are shown, a moving party 'need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties,'" and need not prove the elements of the underlying claim to show a reasonable likelihood of success on the merits. Id. (emphasis added). This scenario is not present in the instant case, where, as explained hereinabove and -below, several of the other elements for a preliminary injunction have not been shown.

see Pls.' Mem. at 1 (emphasis in original), from selling products containing Δ-8 THC and Kratom in Radnor. Indeed, the evidence adduced at the Injunction Hearing and set forth in the joint exhibits is to the contrary: The Ordinance not only applies equally to ***all*** businesses in Radnor, but there are also abundant locations within Radnor where the sale of products containing Δ-8 THC and Kratom (by Plaintiffs or any other individuals or entities) would not run afoul of the Ordinance.[11] Thus, it is simply untrue to suggest, as Plaintiffs state, see Pls.' Post-Hearing Br. at 17, that the "impact" of the Ordinance "is effectively a ban on Plaintiffs selling of Kratom and Δ-8 products".[12] See Exs. 43 & 68; see also N.T at 113. The Ordinance does not prevent Plaintiffs (and others) from selling the products in Radnor—they can do so, but not at the Property. In light of the foregoing, Plaintiffs' right to relief under the argument that the Ordinance is discriminatory to Plaintiffs is belied by the evidence and certainly far from clear.

Second, although the parties dispute vehemently the nature of the Ordinance—is it a zoning ordinance? was it enacted pursuant to the general police powers of Radnor Township?—the Plaintiffs' right to relief under *either* of these characterizations is not clear.[13] If

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[11] Plaintiffs argue that the way in which Radnor reviewed and rejected Plaintiffs' various applications for permits was "strategic" and reflects an "outright animus and hostility towards Plaintiffs" on the part of Radnor, see Pls.' Post-Hearing Brf. at 8, but there is little, if any evidence in the record to support these conclusions. To be clear, the record includes evidence of animus and hostility toward Plaintiffs on the part of various residents of Radnor, but nothing in the record establishes clearly that the Defendants' review of Plaintiffs' applications was strategic or that their decisions were motivated by anything other than to ensure compliance with all applicable legal requirements. Plaintiffs' highlighting of the "bright red letters" used in one of the letters in which one of Plaintiffs' applications was rejected does not indicate an improper motivation behind Defendants' actions. Indeed, the lettering simply reflected the items that were updated between the date of the April 19, 2022 rejection letter and the March 4, 2022 rejection letter.

[12] The credible testimony of one of the Radnor Commissioners at the Injunction Hearing also diffuses (if not dispels) the suggestion that Radnor acted with an intent to discriminate against Plaintiffs in enacting the Ordinance. See N.T. at 113 ("I'm aware that CBD and Kratom are both sold as sort of check out items at a lot of gas stations, at Wawa's and other places. . . . I'm frankly under the assumption that there were other stores in Radnor Township who sold them and we actually sent notices to all the stores in Radnor Township telling them after the ordinance was passed if you're not in these areas you cannot sell the products. . . . It came up [in discussion with other board members] that the ordinance would affect every other store that wanted to sell or did sell Kratom or CBD.").

[13] The governing case law directs that, if the Ordinance is a land use ordinance, the municipality's zoning hearing

a "general powers" ordinance, the Ordinance appears to satisfy the "rational basis review" standard applicable to Radnor's police powers to enact regulations promoting the public health, morals, or safety and general well-being of the community. See Berwick Area Landlord Ass'n v. Borough of Berwick, 48 A.3d 524 (Pa. Commw. Ct. 2012) (municipal ordinance withstood constitutional challenge where its stated purpose was for general welfare of the borough's citizens and was intended to address the decline in safety and maintenance of rental homes and simultaneous decline in the behavior of tenants on those homes, even though ordinance likely would force some landlords to change the manner in which they operated their residential rental business). In our case, the evidence supporting this conclusion includes the following:

- Radnor and/or its Board of Commissioners held several public meetings to consider concerns raised by members of their community with respect to with the sale of products containing Δ-8 THC and Kratom. Stip. ¶¶ 25, 36, 39, 43, 52.

- Radnor commissioned its Board of Health to consider the issue, and the Board of Health issued a report concluding that products containing Δ-8 THC and Kratom posed "a significant potential for public harm" and recommended implementing certain restrictions on businesses seeking to sell products containing Δ-8 THC and Kratom in Radnor. Stip. ¶ 39, 41 & Ex. 36.

- Radnor's Commissioners, several of whom have advanced degrees, including in

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board, if any, has jurisdiction to hear challenges to the substantive validity of the Ordinance. See Delchester Developers, L.P. v. Zoning Hrg. Bd. of the Twp. of London Grove, 161 A.3d 1082, 1087 (Pa. Commw. Ct. 2017); cf. Land Acquisition Servs., Inc. v. Clarion County Bd. of Comm'rs, 605 A.2d 465 (Pa. Commw. Ct. 1992) (where no zoning hearing board exists, court of common pleas has jurisdiction to hear challenges related to *defects in the* enactment process of zoning and other land use ordinances). If the Ordinance regulates *activity* (as opposed to land use, as that term is defined in section 107 of the Municipalities Planning Code), then challenges to the substantive validity of the Ordinance are heard by the court of common pleas. Delchester, 161 A.3d at 1087. Although the stated intent of the municipality is not controlling as to whether the nature of the ordinance falls under the land use/zoning umbrella (and therefore the initial jurisdiction of the zoning hearing board), it is certainly not irrelevant to the analysis. See Delchester, 161 A.3d at 1088 (observing that a court looks first at the purpose of the contested ordinance and then examine whether the ordinance "stays within the limits to which that purpose extends or goes beyond its scope"); accord Land Acquisition, 605 A.2d at 468-70 (examining primary objective of ordinance and concluding that, because the terms of the ordinance did not go further than the scope of that objective, ordinance regulated activity, not zoning) (citing IA Constr. Corp. v. Twp. of Bradford, 598 A.2d 1347 (Pa. Commw. Ct. 1991) (rejecting argument that ordinance was de facto zoning ordinance, and concluding that ordinance was valid exercise of township's police power)).

the medical field, or have worked extensively in the health care industry, conducted independent research prior to enacting the Ordinance. See Ex. 58-A through 58-E. The materials considered by the Commissioners included the following:

- Materials about Kratom published by the DEA, the National Institute on Drug Abuse, the NIH, the Mayo Clinic, the Journal of the American Medical Association, and other sources[14]
- Materials about Kratom published by Kratom.org
- Information provided by Plaintiffs at an information session they hosted

- Abundant evidence in the record (and considered by Radnor in enacting the Ordinance) shows that products containing Δ-8 THC and Kratom, after having been studied closely by, among others, the DEA, FDA, CDC, and various state and local municipalities, are products of concern. See Exs. 63-65; see also Stip. ¶¶ 4, 6.

- The Radnor Commissioners who voted to approve the Ordinance explained the reasons for their decision to vote in favor of enacting the Ordinance and the materials they had considered prior to doing so. See Ex. 58.[15] These reasons included:
  - The need to balance the potential for harm posed by the sale of products containing Δ-8 THC and Kratom with the promotion of retail establishments' opportunities to sell those products in Radnor but not in areas frequented by children
  - The unnecessary risk posed to children by sale of products containing Δ-8 THC and Kratom at a close proximity to schools, playgrounds, or daycare centers
  - The marketing of products containing Δ-8 THC and Kratom in ways appealing to minors and the lack of regulations concerning these products
  - The responsibility to look out for the health and welfare of the community, in particular minors, in light of the information on products containing Δ-8 THC and Kratom set forth in various studies from medical and health

[14] One of the Commissioners attached a "bibliography" to her Affidavit, stating that she had undertaken a "relatively comprehensive literature search . . . which [she] shared with some of [her] fellow Commissioners." See Ex. 58-B.

[15] Although Plaintiffs argue that the Court should discount the Commissioners' affidavits, the Court declines that invitation; each of the Commissioners could have been subpoenaed to appear at the Injunction Hearing by Plaintiffs, who bear a heavy burden on their Petition.

experts and pending legislation related to products containing Δ-8 THC and Kratom.

Moreover, the Ordinance itself, as noted hereinabove, expressly does *not* target the Plaintiffs but applies across the board to all individuals and/or businesses in Radnor that sell products containing Δ-8 THC and Kratom, products that all parties agree are unregulated products that potentially pose hazards to the community.[16]

The evidence in the record at this juncture does not demonstrate to the contrary. Plaintiffs make much of the alleged statements by various Radnor residents at various meetings, and whether the residents' concerns were valid, founded in truth, or otherwise motivated by hostility toward the Plaintiffs. See Pls.' Post-Hearing Br. at 10-16, 27-40. Many, if not all, of the excerpted statements in Plaintiffs' brief are not part of the record—Plaintiffs did not call any residents or any Commissioners other than Commissioner Larkin to testify at the Injunction Hearing, nor did they introduce the recordings of the various events as evidence in this matter. Moreover, Plaintiffs' witnesses at the Injunction Hearing did not provide credible testimony to support the suggestions that the residents' concerns and/or the Radnor Board of Health's conclusions about products containing Δ-8 THC and Kratom were unfounded, overreactive, or grounded in ignorance, bias or falsehood. See, e.g., Pls.' Post-Hearing Br. at 10, 12-14. For example, although Mr. Palatnik points in his Affidavit to certain studies and articles about the purported health benefits of products containing Δ-8 THC and Kratom, he conceded at the Injunction Hearing that (1) he was only familiar with the highlights of these sources, (2) neither he nor any of the Plaintiffs has done any studies himself/themselves, and

[16] Indeed, Plaintiffs' witnesses and documents include evidence of the safety precautions Plaintiffs themselves claim to take to prevent their products containing Δ-8 THC and Kratom from being misused. See, e.g., N.T. at 45-46, 53, 59, 61-64.

(3) he holds no post-secondary degrees, medical or otherwise. See N.T. at 29-32, 36. Mr. Palatnik was also not familiar with the FDA statement from 2018 or the CDC health advisory that raise similar concerns as many of the sources of information considered by the Radnor Commissioners in enacting the Ordinance at issue. See N.T. at 34-36 & Exs. 58, 64-65.

In light of the foregoing, Plaintiffs' attempts to suggest, through Mr. Palatnik's testimony, either that their products containing Δ-8 THC and Kratom do not pose the risks that Defendants cited and/or relied on in enacting the Ordinance, or that Defendants' concerns motivating enactment of the Ordinance were unfounded, must fail, as Mr. Palatnik's testimony in this regard is not credible. In short, Plaintiffs' zealous advocacy is just that, and does not provide an evidentiary basis to conclude that their right to relief is clear so as to warrant preliminary injunctive relief. In light of the foregoing, the Court finds that to the extent the Ordinance is a "general police powers" ordinance, there was a rational basis for Radnor to enact the Ordinance—to protect the health, safety and well-being of Township residents, in particular its children and young people, from the dangers posed by products containing Δ-8 THC and Kratom.

If, as Plaintiffs urge, the Ordinance is a zoning ordinance, then their right to relief in this Court—certainly with respect to their request for an order directing issuance of the requested permits—is not clear because Plaintiffs did not pursue all applicable remedies under the Municipalities Planning Code before initiating this suit. That is, Plaintiffs never appealed either the February 18, 2022 Zoning Enforcement Notice or the denial of their various applications for permits related to the Property. Challenges related to zoning ordinances must be brought initially to the zoning hearing board of the local municipality. See 53 P.S. §§ 10909.1 & 10916.1. A petitioner cannot request an order directing the issuance of permits where the

invalidity of an ordinance has not been established. Lindy Homes, Inc. v. Sabatini, 453 A.2d 972, 973-74 (Pa. 1982) (noting that Unger v. Twp. of Hampton, 263 A.2d 385 (Pa. 1970) requires that the issue of an ordinance's validity be raised in an administrative appeal before a petitioner may seek, via mandamus, an order directing issuance of permits). Moreover, to the extent Plaintiffs' challenge to the Ordinance-as-a-zoning-ordinance involves claims that the Ordinance infringes on constitutional rights, that does not remove the matter from the zoning hearing board's ability to hear such a claim. See Delchester, 161 A.3d at 1092-93 ("The introduction of constitutional issues into a challenge to a zoning ordinance does not alter the zoning hearing board's role as the fact finder"). In that instance, the zoning hearing board can determine whether the ordinance is a valid exercise of the municipality's police powers, balancing the public interest to be served by the ordinance against the impact of the ordinance on individual property rights. See id. at 1091-92, 1105-06 (party challenging ordinance failed to overcome presumption of constitutionality by demonstrating that the ordinance is unreasonable, arbitrary, or not substantially related to a township's power to protect the public health, safety and welfare).

Plaintiffs also have not demonstrated that an Order *enjoining* enforcement of the Ordinance (that, based on the record evidence adduced at the Injunction Hearing, was enacted to *protect* the public) will not adversely affect the public interest. In the context of this case, satisfying this factor is certainly a tall order—in other words, Radnor enacted the Ordinance to protect the public, and enforcing it serves that purpose; in asking the Court to stop Radnor from enforcing the Ordinance, the public will arguably no longer be protected, by way of the Ordinance, from the potential harms of selling products containing Δ-8 THC and Kratom within 1,000 feet of a school, playground, or daycare. Nevertheless, the law governing

requests for preliminary injunctive relief requires Plaintiffs to demonstrate that not enforcing the Ordinance will not adversely affect the public interest. Plaintiffs have presented no reasonable argument and have not proffered any evidence to establish this factor. At best, Plaintiffs point to their business model—for example, their purported adherence to safety precautions to safeguard their unregulated products from minors—and "all of the drinking that freely occurs out in the open in other parts of Wayne where minors congregate" See Pls.' Post-Hearing Br. at 42. Other activities are not at issue in this analysis, where Plaintiffs must show (by record evidence) that their requested injunction (a Court Order that prohibits Radnor from enforcing an Ordinance that was enacted to promote public safety with respect to the sale of products containing Δ-8 THC and Kratom) will not adversely affect the public interest. There is simply no such evidence in the record and Plaintiffs' request must be denied on this ground as well.

As for maintaining the status quo—"the last actual, peaceable and lawful non-contested status which preceded the pending controversy", see Lewis v. City of Harrisburg, 631 A.2d 807, 812 (Pa. Commw. Ct. 1993)—Plaintiffs point to the state of affairs before the introduction and enactment of the Ordinance, and argue that an injunction to preclude enforcement of the Ordinance would allow Plaintiffs to open and operate its store while it litigates whether the Ordinance is unconstitutional. See Pls.' Mem. at 33. Before the introduction and enactment of the Ordinance in March 2022, however, Plaintiffs were occupants of the Property who had made changes to that Property without appropriate permits and whose conduct, prior to enactment of the Ordinance, resulted in citations that Plaintiffs never appealed to the appropriate local authority. Moreover, one of the cited reasons for Defendants' inability to issue the requested permits was the very Ordinance that was enacted prior to the final communication advising Plaintiffs that one or more of their applications had been denied. A

preliminary injunction that would allow the Plaintiffs to open and operate its store (including the sale of products containing Δ-8 THC and Kratom at the Property) would, by definition, *alter* that status quo. Thus, Plaintiffs have failed to establish that this preliminary injunction would restore the parties to the status quo.

Having failed to carry their heavy burden on several of the six prerequisite criteria, Plaintiffs' request for the preliminary injunctive relief they seek fails. As such, IT IS HEREBY **ORDERED** and **DECREED** that the Petition is **DENIED.**

BY THE COURT:

KELLY D. ECKEL, J.