STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. YOR-24-478

DAVID NEWSON

Plaintiff-Appellant

v.

TOWN OF KITTERY, et al.

Defendants-Appellees

On Appeal from the Order of the
York County Superior Court

Brief of Appellee IDC 5 LLC

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INTRODUCTION

Appellee IDC 5, LLC ("IDC 5") hereby opposes the appeal filed by Appellant David Newson ("Newson"). In April 2024, the Town of Kittery Planning Board ("Board") properly issued a site plan permit ("Permit") to IDC 5 for the construction and operation of a cannabis retail store ("Project"). The Permit issuance was the culmination of a permitting process that began with IDC 5's submission of a sketch plan application in June 2022. Over the intervening two years, the Board considered the IDC 5 application and numerous subsequent submittals at eight separate Board meetings, including a public hearing and a public site walk. Newson was sent individual mailed notice of the Board's consideration of the IDC 5 application on three separate occasions from November 2023 to February 2024.

Newson did not attend any of the Board meetings held on the application. Newson did not submit any comment until the day before the Board's March 28, 2024 meeting at which the IDC 5 application was set to receive final site plan review. The sole request made in Newson's March 27, 2024 letter to the Board was that the Board delay proceedings for 30 days to give Newson time to conduct a peer review of IDC 5's traffic impact study. The traffic impact study was submitted to the Board in November 2023 and, as Newson noted in his letter to the

Board, the Project's potential traffic impacts had been scrutinized by the Board since IDC 5 first submitted an application in June 2022.

In this appeal, Newson does not argue that the Project failed to meet the Town's traffic standards or any other substantive standard. Newson does not argue that the Board's conclusion that the Project meets all relevant standards is not supported by the record. Rather, Newson challenges the Board's issuance of the Permit on the grounds that the Board deprived Newson of his procedural due process rights.

As discussed below, Newson received more than ample notice and opportunity to be heard during the Board's lengthy and thorough review of the IDC 5 application. The Board's review of the IDC 5 application complied with all the procedural requirements set forth in the Kittery Code of Ordinances ("Code"), the Kittery Planning Board Bylaws ("Bylaws"), the Maine Freedom of Access Act, and case law addressing the protections provided by the constitutional right of due process. And Newson has not identified any actual harm that he suffered due to the procedures followed by the Board.

Importantly, the procedural defect Newson alleges relates only to a subsidiary vote on a zone boundary line extension that would waive certain landscaping standards on five percent of the Project site. Newson does not and

cannot allege any procedural error in the Board's principal vote to approve the Project based on the substantive site plan review standards in the Code.

Because Newson has not identified any procedural defect in the Board's review and approval of the IDC 5 application, let alone any harm suffered by Newson, IDC 5 respectfully requests that the Court deny Newson's appeal.

STATEMENT OF FACTS

On November 22, 2023, IDC 5 submitted a site plan application (the "Application") to operate a marijuana retail store at 181-185 State Road in Kittery (the "Property").[1] (R. 48.) On the same date, IDC 5 mailed individual notice of the Application to Newson and other abutters. (R. 286-291.) The Board conducted preliminary site plan review of the Application on December 14, 2023 (the "December Meeting") and deemed the Application to be complete. (A. 54, 67.) Newson did not attend or submit public comment at the December Meeting. In accordance with Section 16.7.10(C)(2) of the Town's Land Use and Development

[1] IDC 5 initially submitted a sketch plan of the Project to the Board in 2022. (A. 56.) The Board considered IDC 5's sketch plan at meetings in 2022 and denied the Project based on traffic concerns. (A. 56.) That denial violated Code procedures. (A. 56-57.) The Town and IDC 5 entered into a settlement agreement requiring the Town to continue sketch plan review of the Project. (A. 57.) The Board continued sketch plan review of the Project at its meeting held on August 24, 2023. (A. 57.) The minutes of the 2022 and 2023 Board meetings at which the IDC 5 Project was reviewed were omitted from the administrative record that was submitted to the Superior Court. When IDC 5 submitted its Rule 80B brief it provided the minutes from the Board's June 23, 2022, July 28, 2022, November 17, 2022, and August 24, 2023 meetings to the Superior Court and the parties without objection. The minutes constitute "a transcript or other record of any hearings" in the administrative proceeding and are properly part of the administrative record on appeal. M.R. Civ. P. 80B(e)(2).

Code (the "Code"), the Board scheduled a public hearing on the Application for January 11, 2024. (A. 34, 67.)

On December 28, 2023, in advance of the public hearing, IDC 5 submitted revised plans and additional materials responsive to the Board's comments from the December 14th meeting, including amendments to include traffic arrows and sight distance measurements. (R. 328.) In advance of the public hearing, the Town Planner sent notices of the public hearing to all abutters, including Newson, published notice of the public hearing in The Weekly Sentinel, and posted notice of the public hearing to the Town's website, all in accordance with Code Section 16.7.10(C)(2)(c). (A. 140-146.)

On January 11, 2024, the Board held a public hearing on the Application (the "January Meeting"). (A. 71.) At the public hearing, the Board heard a presentation from the Applicant and comments from several members of the public. (A. 83.) Newson did not offer public comment at the January 11th public hearing or submit public comment in advance of the Board's meeting. The Board unanimously voted to preliminarily approve the Application and advanced it to final plan review. (A. 83; Planning Board Meeting Video, January 11, 2024 (R. 741), 0:35:30.)

On February 27, 2024, IDC 5 submitted its final plan application to the Town Planner. (R. 399.) On the same date, IDC 5 mailed individual notice of the

final plan application to Newson and other abutters. (R. 412-15.) The final plan application included revised site distance measurements for the Property's entrance and exits (R. 400), correspondence between IDC 5 and the Maine Department of Transportation relating to traffic flows (R. 400), an addendum to IDC 5's Traffic Impact Study (R. 403), and modifications to IDC 5's plan sets to adjust the entrance design and post signage to encourage one-way traffic flows (R. 403). The Application was scheduled for final plan review on March 28, 2024. (A. 87.)

On March 27, 2024, counsel to Newson submitted a letter to the Town Planner regarding the Application (the "Newson Letter"). (A. 134, 136-137.) The Town's Director of Planning and Development shared the Newson Letter with the Board in advance of the Board's March 28th meeting (the "March Meeting") and the Newson Letter was included within the Board's meeting packet for the March Meeting. (A. 134, 136-137.)

At its March Meeting, the Board heard a presentation from IDC 5's engineer, Mike Sudak of Attar Engineering. (A. 101; Video of March 28, 2024 Planning Board Meeting (R. 741) ("March Meeting Video"), at 00:04:40.) Mr. Sudak presented the Board with an overview of the various changes that had been made between IDC 5's preliminarily approved plan and the final plan before the Board. (March Meeting Video, 00:05:00.) These changes included modifications to

the Property entrance from an adjacent traffic circle to provide more reasonable entrance angle. (*Id*. at 00:07:00.)

Mr. Sudak also introduced Jeffrey Dirk, of Vanasse & Associates, Inc. to discuss an addendum to the traffic impact study prepared in response to comments received from the Board. (*Id*. at 00:07:30.) Mr. Dirk explained that, at the Board's request, Vanasse had conducted additional review of traffic impacts of the Application during the hours of 1pm to 3pm, which correspond to shift changes at the nearby Portsmouth Naval Shipyard. Mr. Dirk stated that the addendum confirmed the results and conclusions of the traffic impact study previously submitted to the Board. (*Id*. at 00:08:30-00:09:30.)

At the conclusion of Mr. Dirk's comments, the Board moved to approve a boundary line extension for the Project that would have the effect of making landscaping requirements uniform on the Project site. (*Id*. at 00:15:40.) Three members voted in favor, with Vice Chair Bensley abstaining and Member Wells voting against. (A. 101.) In response to this vote, Chair Dunkelberger explained that four affirmative votes are required for any decision by the Board. (March Meeting Video, 00:23:15.) In a subsequent discussion involving the Chair and Director of Planning and Development, the Board was informed that it could proceed with its review of the Application and either require IDC 5 to comply with

the landscaping requirements of the Business Local Zone or choose to waive those requirements. (*Id*. at 00:24:45.)

Vice Chair Bensley proceeded to ask Mr. Dirk additional questions relating to the data relied upon by Vanasse for its traffic study. (*Id*. at 00:16:45-00:23:15.) In response, Mr. Dirk informed the Board that Vanasse had relied upon the Institute of Transportation Engineers Traffic Engineering Handbook, 11th Edition (the "ITE Handbook") for data relating to the traffic generated by marijuana dispensaries and indicated that the ITE Handbook's data was statistically valid and generally comparable to or higher than what he had observed through actual monitoring of multiple marijuana dispensaries in Maine. (*Id*. at 00:19:50-00:23:00.) The Board did not have any further questions and Member Doyle moved to continue review of the Application to the Board's next available meeting and that motion passed unanimously. (*Id*. at 00:26:20; A. 101.)

The Application was scheduled for final plan review at the Board's next available meeting, which was April 11 (the "April Meeting"). (A. 104.) At the April Meeting, at least one member of the Board that was absent from the March Meeting informed the Chair that he had reviewed the video of the prior meeting. (April 11, 2024 Planning Board Meeting Video (R. 741) ("April Meeting Video"), 00:04:05.)

Board member Kalmar moved to approve the Project's final site plan. (*Id*. at 00:04:30.) Board member White then stated that, because the Board's prior vote on the zone boundary line extension had not received four votes in favor or against, no decision had been made, and the question of the zone boundary line extension was still available for the Board's consideration without reconsideration. (*Id*. at 00:05:30.) Board member White proposed an amendment to Board member Kalmar's motion that would add approval of the zone boundary line extension to the approval of the site plan. (*Id*. at 00:06:15.) The motion was seconded and Chair Dunkleberger stated that the Board now had a "dual motion" before it. (*Id*. at 00:06:45.) The Board then approved the amended motion "to approve the boundary line extension and the plan" by a vote of five in favor and two against, with Vice Chair Bensley and Member Wells voting against. (*Id*. at 00:07:00-00:07:30; A. 131.)

The Board then proceeded to review and approve the itemized findings of fact for the project and approved the Application by a vote of five in favor and two against, with Vice Chair Bensley and Member Wells voting against. (*Id*. at 00:07:30-00:18:30; A. 131.)

Newson appealed the Board approval to the York County Superior Court, which denied Newson's appeal and affirmed the Board's action. (A. 6-17.)

STANDARD OF REVIEW

The Court's review of municipal "administrative decision-making is deferential and limited." *Wolfram v. Town of N. Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835. "In the absence of a controlling agency rule or a contrary requirement of statutory and constitutional law, the procedure adopted by an administrative agency in any particular case should receive the deferential respect of a reviewing court." *Jackson v. Town of Kennebunk*, 530 A.2d 717, 717–18 (Me. 1987). Newson "bear[s] the burden of persuasion because [he] seeks to vacate" the Boards' decision. *Bryant v. Town of Wiscasset*, 2017 ME 234, ¶ 11. "As the party bearing the burden of proof," Newson "must demonstrate that the evidence compels a contrary conclusion." *Veilleux v. City of Augusta*, 684 A.2d 413, 415 (Me. 1996). The Court "accord[s] substantial deference to local characterizations or fact-findings as to what meets ordinance standards." *Balano v. Town of Kittery*, 2017 ME 110, ¶ 2, 163 A.3d 144, 145 (per curiam affirmance of Kittery Planning Board site plan approval). Interpretations of statutes and of local ordinances are reviewed de novo as questions of law. *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903, 909. "In interpreting a statute or ordinance, we look first to the plain meaning of its language to give effect to the legislative intent, and if the meaning of the statute or ordinance is clear, we need not look beyond the words themselves." *Id*.

ARGUMENT

I. The Planning Board's April 11 Vote to Approve the Project and the Zone Boundary Line Extension Was Procedurally Valid and Did Not Result in Any Harm to Newson

Newson argues that the Board's 5-2 vote on April 11 to approve the Project violated the Bylaws because it was not preceded by a vote to approve a motion for reconsideration of a vote taken on March 28 and therefore resulted in "fundamental procedural unfairness." (Blue Br. 11-19.) However, no motion for reconsideration was required on April 11 because the Board did not "pass" any vote on the Application on March 28. Even if the Board had "passed" a vote on March 28, the motion that was voted on at the March 28 meeting was not the same motion that was voted on at the April 11 meeting. Finally, even if reconsideration procedures had been called for, Newson did not suffer any harm, let alone fundamental unfairness, based on the process that the Board followed.

A. Because No Vote Was "Passed" on March 28, No Reconsideration Procedures Were Applicable on April 11

Section 17 of the Bylaws states, "When a vote is passed, it is in order for any member who voted on the prevailing side to move reconsideration thereof at the same meeting, or at the next succeeding meeting." (A. 51.) Thus, the Section 17 procedures on reconsideration apply only after "a vote is passed." Newson urges the Court to broadly interpret the term "a vote is passed" to mean "that a vote

occurred or that an outcome was reached." (Blue Br. 14.) Newson further argues that "Section 17 applies by its plain language to any vote of the Board" regardless of whether the vote resulted in a decision by the Board. (Blue Br. 18) (emphasis added).

On the contrary, the plain meaning of the term "passed" in Section 17 renders reconsideration applicable only after the Board has taken affirmative action by approving a motion. Black's Law Dictionary defines the term "pass" as "to pronounce or render an opinion, ruling, sentence, or judgment . . . to enact . . . to adopt . . . to approve or certify (something) as meeting specified requirements." PASS, Black's Law Dictionary (12th ed. 2024). "[I]f the meaning of the statute or ordinance is clear, we need not look beyond the words themselves." *Wister*, 2009 ME 66, ¶ 17. The more general, lay meaning of "pass" argued by Newson, i.e., merely that an event occurred (Blue Br. 14), does not make sense in the context of the Board's procedural bylaws, which relate to the technical aspects of conducting Board business.

At the Board's March 28 meeting, a motion was made and seconded to adjust a zoning boundary line that divided the Project parcel. Approximately 95 percent of the Project parcel was zoned Old Post Road Commercial (C-3) and the small remainder was zoned Business Local (BL). (R. 49.) IDC 5 requested a zone boundary line extension so that landscaping requirements would be uniform under

standards applicable in the C-3 Zone. (A. 90.) The Board has authority to make such an adjustment under Code Section 16.1.8.B(5).

Of the five Board members present at the meeting, three voted in favor of the motion, one voted against, and one abstained. (A. 101). Under Kittery Code and the Bylaws, "All decisions [of the Board] must be made by a minimum of four (4) like votes, except on procedural matters." (A. 28, 49.) Because only a three-member majority instead of a four-member majority voted for the motion to pass, the motion failed. The Board then voted unanimously to continue review of the application at its next available meeting when a full seven-member board might be present. (A. 107; March Meeting Video 00:26:20.)

Thus, the Board did not "pass a vote" on March 28 to deny IDC 5's request for a zone boundary line extension. The Board did not "render a judgment" or "enact," "adopt," or "approve" anything. Rather, the motion to approve IDC 5's zone boundary line request did not pass. The Board did not make or pass a motion to deny IDC 5's request. The only action by the Board that received four like votes was the Board's unanimous decision to continue review of the Application at its next available meeting.

Furthermore, at the Board's April 11 meeting, Board member White articulated the basis for the Board to address the issue of the zone boundary line extension without the need for formal reconsideration:

> Since that motion didn't have four affirmative votes, it failed. So there was no motion actually approved. So we can continue the discussion of the motion, of the issue I should say, and another motion can be made. I don't think there is any procedural bar to that as far as Robert's Rules.

(April Meeting Video, 00:05:30-00:06:00.) Under the Bylaws, Board meetings are conducted according to Robert's Rules of Order. (A. 53.)

Interpreting the term "pass" to mean enact, adopt, or approve also makes more sense from a policy perspective. In instances when a vote is passed and reconsideration procedures are applicable, "any member who voted on the prevailing side" may move for reconsideration. (A. 51.) Newson argues that the "prevailing side" of the 3-1-1 vote on March 28 was the single Board member (Wells) who opposed the motion to extend the zone boundary. (Blue Br. 13, 18.) As a result, Newson argues, only Board member Wells, a single member of a seven-member Board, was authorized to initiate a vote on the zone boundary extension at the April 11 meeting. (Blue Br. 18.) Under this view, in which reconsideration is required for any vote rather than only for votes that pass a motion, a minority of the Board or, as is the case here, a single Board member can effectively deny an application and prevent any subsequent vote. The Court should not endorse this counter-majoritarian outcome.

Because no vote regarding the zone boundary extension was "passed" according to the plain meaning of that term at the Board's March 28 meeting, the

Section 17 reconsideration procedures were not applicable to the Board's subsequent vote at its April 11 meeting.

B. The Board Did Not Need to Reconsider its March 28 Vote on the Zone Boundary Line Extension to Vote to Approve the Project as a Whole at the April 11 Meeting

Even if the Board passed a vote on March 28, it was not the same vote that was passed on April 11. The March 28 vote was on a motion solely to approve IDC 5's request for a zone boundary line extension. (A. 101.) The zone boundary line extension was sought to allow alteration of landscaping standards on the five percent of the Project site in the B-L zone to be consistent with the landscaping standards on the 95 percent of the Project site in the C-3 zone. (A. 90; R. 49.)

In contrast, the April 11 vote was on a motion to approve both the zone boundary line extension and to approve the Project site plan as a whole. (A. 131.) At the April 11 meeting, a motion was first made to approve the Project's proposed site plan. (April Meeting Video, 00:04:30.) Then the motion was amended to add approval of the zone boundary line extension to the approval of the site plan. (*Id*. at 00:06:15.) The Board Chair stated that the Board now had a "dual motion" before it. (*Id*. at 00:06:45.) The Board then approved the amended motion "to approve the boundary line extension and the plan" by a vote of five in favor and two against. (*Id*. at 00:07:00-00:07:30.)

Thus, on April 11 the Board voted independently to approve the Project site plan and to approve the zone boundary extension. There was no motion or vote to approve the site plan at the March 28 meeting. As such, there is no conceivable argument that the April 11 site plan approval was subject to reconsideration procedures.

Newson's reconsideration argument conflates the Board's vote on IDC 5's zone boundary line extension request with the Board's review of the Application's overall compliance with site plan criteria. In Newson's argument, the Board's vote on the zone boundary line extension somehow foreclosed any further Board review of the entire Application. However, the request to alter landscaping requirements on a small fraction of the property was not necessary for the Project to comply with the Code. If the Board denied the zone boundary line extension, the result would not be denial of the Project but rather imposition of different landscaping standards in the different zones in which the Project site is located. (March Meeting Video, 00:24:45.)

That the vote on the zone boundary line extension was not dispositive of the entire Application is evidenced by the Board's unanimous vote on March 28 to continue review of the Application at its next available meeting. (A. 107; March Meeting Video 00:26:20.)

Thus, even if the there was some procedural defect in the April 11 vote to approve the zone boundary line extension (which there was not) the independent vote to approve the Project site plan would not be affected. And even if the Court decided to vacate the vote on the zone boundary line extension relating to a minor landscaping issue on five percent of the Project site, it would not invalidate the vote on the substance of the Project. The Court avoids remand where it "would not serve any purpose." *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 21, 82 A.3d 148, 156 (affirming planning board approval despite ex-parte communication between applicant and town where remand would not change the outcome of the proceeding).

C. Newson Does Not Identify Any Actual Harm Suffered

Even if Section 17 reconsideration procedures applied and the Board had erred by not following them, there would still be no basis to disturb the Board's approval of the zone boundary extension because there was no prejudice or harm to Newson. "Procedural errors are harmless and will not be grounds to vacate a decision unless they are inconsistent with substantial justice and result in prejudice." *Wolfram*, 2017 ME 114, ¶ 20; *see also Bryant*, 2017 ME 234, ¶ 15 "an adjudicative body may disregard nonprejudicial failure to comply strictly with notice requirements."); *Fitanides v. City of Saco*, 2015 ME 32, ¶ 22, 113 A.3d 1088, 1094 (no violation of abutter's due process rights where inappropriate email

from city planner to board of appeals did not cause prejudice); *Zegel v. Bd. of Soc. Worker Licensure*, 2004 ME 31, ¶ 17, 843 A.2d 18, 22 ("We need not determine whether the process used here crossed the line because the error, if any, was harmless.").

Newson claims that the Board's action resulted in "fundamental procedural unfairness that necessitates reversal." (Blue Br. 19.) But Newson does not identify any specific unfairness or harm that he suffered based on the Board's procedures. At the Board's duly noticed public meeting on March 28, it voted 3-1-1 to approve the zone boundary extension. Immediately after that vote, the Board voted to continue review of IDC 5's Application at its next available meeting. At the Board's duly noticed public meeting on April 11, it voted 5-2 to approve the zone boundary extension, along with the Project as a whole. Newson claims that this was "an outright reversal of a prior decision without adhering to procedural safeguards." (Blue Br. 19.) On the contrary, the Board followed a transparent, public process to go from a simple majority to the required supermajority decision to approve the zone boundary line extension.

Newson cites to *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, for the proposition that "this Court will vacate an agency's action if it results in procedural unfairness." (Blue Br. 19.) That is an accurate quotation, but the *Lane Construction* Court rejected due process claims akin to those that Newson raises in

this appeal. Abutters in *Lane Construction* claimed that their due process rights were violated when the planning board allowed the applicant to amend its application "without a corresponding opportunity for public comment." *Lane Const. Corp*, 2008 ME 45, ¶ 34. The Law Court, in denying this claim, stated, "An administrative board needs to strike a fair and reasonable balance between its interest in efficiency and the public's right to speak, and in view of the extensive hearings and deliberations conducted in this case, that balance was properly struck in this instance." *Id*.

In this case, Newson was sent individually mailed notices of IDC 5's Application on at least three separate occasions. He had actual or constructive notice of every instance in which the Board addressed IDC 5's Application, including the April 11 meeting at which the Application was ultimately approved. Newson could have attended any of the Board meetings, the public hearing, or the public site walk at which the Board addressed IDC 5's Application. He did not attend any of them.

What Newson claims is fundamental procedural unfairness is simply his dissatisfaction with the outcome of the Board proceeding. The procedures that led to the Board's approval of the Application provided Newson with more than ample opportunity to be heard and did not prejudice him in any way. Rather, Newson is seeking to weaponize the Board's reconsideration procedures to leverage a "no"

vote by a single Board member to prevent a 5-2 majority of the Board from manifesting its will.

As discussed above, the Board committed no procedural error and Newson suffered no deprivation of due process rights in the Board's April 11 vote to approve the zone boundary line extension and the Project site plan Application.

II. Newson Had Ample Opportunity to Participate and Submit Comment in the Board's Review of IDC 5's Application

Newson claims that the Board violated his procedural due process rights when it did not provide him individual notice that it would continue review of IDC 5's Application on April 11, "did not explain its basis for doing so," and "did not include his March 27 Letter in the April 11 meeting materials." (Blue Br. 19.) On the contrary, the Board's actions provided and exceeded the notice and opportunity to be heard required by the Code, Maine's Freedom of Access Act, and the constitutional right to due process.

A. The Board Was Not Required to Provide Newson with Individual Notice of its April 11 Meeting

Newson's claim that the Board violated his procedural due process rights by not noticing him that it would consider IDC 5's Application at its April 11 meeting is unsupported by law or fact. Under the Code procedures governing site plan review, individual mailed notice to abutters is only required when an applicant submits an application for preliminary site plan review and when the Board holds a

public hearing. (A. 33, 34.) IDC 5 sent Newson individual mailed notice of its preliminary site plan review application in November 2023 (R. 286-91) and the Town sent Newson individual mailed notice of the public hearing in January 2024. (A. 140-146.) Although not required to do so by the Code, IDC 5 also sent Newson individual mailed notice of its final site plan review application in February 2024. (R. 412-15.) Thus, the individual notice provided to Newson met and exceeded that required by the Code.

There is no requirement under the Code or elsewhere that individual mailed notice be sent to abutters for regular meetings of the Board. The Maine Freedom of Access Act requires that public notice be given for Board meetings and that such notice "shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned." 1 M.R.S.A. § 406. Notice by newspaper publication and posting at a town office satisfies this requirement. *See Crispin v. Town of Scarborough*, 1999 ME 112, ¶¶ 25-27, 736 A.2d 241, 249. This is true even where such notice is provided only one day before a meeting, especially where, as here, the proceeding spanned several months and prior notice and opportunity to be heard had been provided throughout the process. *Id.* ¶ 27.

Regularly scheduled meetings of the Kittery Planning Board are noticed by newspaper publication, posting at the Town Office, and posting on the Town

website. Newson does not allege that such notice was not provided for the April 11 meeting.

Critically, the Board passed a unanimous public vote at its March 28 meeting that it would "continue review" of the IDC 5 application at the next available Board meeting, which was April 11. (A. 101, 107.) Thus, when Newson claims that the Board "did not notice him that it was reopening consideration of [IDC 5's] Application" (Blue Br. 19), his implication that the Board took final action on the Application on March 28 and Newson was taken unawares by further review is entirely unsupported.

Accordingly, Newson was provided all the notice of the Board's April 11 meeting that was required by law and then some.

B. The Board Explained its Process in Considering the Zone Boundary Line Extension at the April 11 Meeting

Newson claims that the Board committed a procedural error because "the Board never explained the basis for its reconsideration of the Application." (Blue Br. 21.) As discussed above there was no "reconsideration" of IDC 5's zone boundary line extension, let alone reconsideration of the Application as a whole. Thus, there was nothing for the Board to explain. Even if there had been reconsideration, neither the Bylaws nor concepts of due process require that reconsideration be supported by an explanation. Newson does not identify any authority that would require the Board to provide such an explanation.

Furthermore, at the Board's April 11 meeting, the Board did explain the process it was adopting and the basis for doing so. Regarding the March 28 vote on the zone boundary line extension, Board member White stated:

> Since that motion didn't have four affirmative votes, it failed. So there was no motion actually approved. So we can continue the discussion of the motion, of the issue I should say, and another motion can be made. I don't think there is any procedural bar to that as far as Robert's Rules.

(April Meeting Video, 00:05:30-00:06:00.)

Accordingly, Newson's claim that the Board's procedures were defective due to a lack of explanation for reconsideration is without merit.

C. Newson's March 27 Letter Was Provided to the Board

As Newson acknowledges, his March 27 letter was included in the packet provided to the Board for its March 28 meeting. (Blue Br. 22.) The Board's Bylaws state, "Comments received by noon on the day of the meeting will become part of the public record and may be read in whole or in summary by the Planning Board or Town Staff." (A. 50.) Town staff complied with this requirement by providing Newson's comments to the Board for its March 28 meeting. (A 134-37.)

Neither the Bylaws, Code, nor any concepts of constitutional due process require that Newson's letter be included in materials provided to the Board at subsequent meetings. Under Newson's argument, every Board packet would have to be cumulative to include all materials submitted to the Board at prior meetings

on a given application, in this case stretching back two years. Such a requirement would be unworkable and must be avoided. *See Desfosses v. City of Saco*, 2015 ME 151, ¶ 16, 128 A.3d 648, 653 (court must "avoid absurd, illogical, unreasonable, inconsistent, or anomalous results if an alternative interpretation avoids such results.").

Newson claims that his March 27 letter "offered comment on the traffic component of the site plan portion of the Application." (Blue Br. 22.) That is a mischaracterization of the letter. Newson's March 27 letter does not contain any substantive comment and functions only as a request for the Board to delay action for 30 days to allow Newson to have IDC 5's traffic impact study peer reviewed.[2] (A. 136-37.) In other words, Newson submitted a request the day before the Board's scheduled final site plan review in March 2024 to have more time to review potential traffic impacts that had been the subject of Board discussion since

[2] Newson's letter to the Board stating his concern about the Project's traffic impacts omits the fact that a competing cannabis business has applied to operate a marijuana retail store on Newson's property. In April 2023, MMJ Strategies LLC submitted a pre-application to the Town for a Marijuana Business Retail Store to be located on Newson's property. A record of the MMJ Strategies pre-application obtained from the Town's website was submitted to the Superior Court with IDC 5's Rule 80B brief. *See In re Scott S.*, 2001 ME 114, ¶ 13 ("A judge may take judicial notice of any matter of record when that matter is relevant to the proceedings at hand."). Newson's property at 187 State Street is adjacent to IDC 5's property at 181 State Street. (R. 349.) Both properties are in Kittery's C-3 zoning district. (R. 190.) Under the Kittery Code, only one marijuana retail store is permitted per zoning district. Code § 5.11.9(a). MMJ Strategies submitted comments to the Board opposing IDC 5's application. (R. 364, 736.) Those comments acknowledged that MMJ Strategies would not be able to operate a marijuana business in Kittery's C-3 zoning district unless the Board denied the IDC 5 application. (R. 364.) Thus, Newson's stated concern about traffic impacts from IDC 5's proposed marijuana retail store rings hollow when Newson is planning to house the exact same use, presumably with the same traffic impacts, on his own property if the IDC 5 Project does not go forward.

IDC 5 first submitted an application in June 2022. The Newson letter states as much. (R. 705.)

The IDC 5 traffic impact study was included in IDC 5's application for preliminary site plan review submitted to the Board in November 2023. (R. 85-234.) As discussed above, Newson was mailed individual notice of that application. (R. 286-91.) The IDC 5 traffic impact study was also included in IDC 5's application for final site plan review submitted to the Board in February 2024. (R. 448-234.) Newson was mailed individual notice of that application as well. (R. 412-15.) The only change to the "amended" traffic impact study submitted in February was the inclusion of an addendum of "additional trip counts and traffic volume data for the 2:00 – 3:00pm weekday window." (R. 403, 598-99.) The analysis of that additional traffic window did not alter the study's conclusion that the Project would not cause any change to the existing level of service. (R. 599.) The traffic study was evaluated and approved by the Board's third-party engineer peer reviewer. (R. 107.) Thus, Newson waited four months from the submission of the traffic impact study to request a stay of the Board's proceedings to give him additional time to review the study.

Accordingly, Newson's claim that he was deprived of due process rights because his eleventh-hour request to delay Board action was included in the Board

materials for the March 28 meeting but not for the April 11 meeting is entirely without merit.

D. Newson Was Given Ample Notice and Opportunity to Be Heard Throughout the Permitting Proceeding

Stepping back from the specific incidents Newson claims violated his due process rights, the Planning Board proceeding as a whole provided Newson the degree of notice and opportunity to be heard that the Court has deemed sufficient to protect the rights of abutters. IDC 5's Application was considered at four publicly noticed meetings of the Board from December 2023 to April 2024. (A. 54, 71, 87, 104.) Prior to that, a sketch plan of IDC 5's Project was reviewed by the Board at four additional publicly noticed meetings. *See* supra Note 1. As stated above, Newson was mailed individual notice of the IDC 5 Application on at least three occasions. He was mailed notice of IDC 5's application for preliminary site plan review (R. 286-91), of the Board's public hearing on the application (A. 140-146), and of IDC 5's application for final site plan review. (R. 412-15.)

As such, Newson was provided more than ample notice and opportunity to be heard as required by due process. *See Bryant*, 2017 ME 234, ¶ 16 (no violation of abutters' due process rights where abutters were given notice and opportunity to be heard at some but not all planning board meetings on permit application); *Anderson v. New England Herald Dev. Group*, 525 A.2d 1045, 1046 (Me. 1987) (no due process violation where abutters were not noticed of meeting where

planning board voted to reconsider denial of developer's application because abutters received notice and opportunity to be heard at other meetings on substance of application); *Cunningham v. Kittery Planning Bd*., 400 A.2d 1070, 1079 (Me. 1979) (holding that beyond participation at a public hearing, members of the public had no further protected right "to the opportunity to participate in the deliberations of the Planning Board").

That Newson chose not to participate until he submitted a letter requesting a continuance late in the process does not alter the fact that he was provided ample notice and opportunity to be heard consistent with due process requirements.

E. The Cases Cited by Newson Do Not Support His Appeal

In every case cited by Newson the Court either affirmed board or agency procedures against claims of procedural unfairness, or the facts are inapplicable to the Board action in this matter. Newson cites *Duffy v. Town of Berwick*, 2013 ME 105, for the proposition that "the Board denied Mr. Newson's right, as an abutter, to be heard in opposition to the Application." (Blue Br. 19.) However, in *Duffy* the Court rejected abutters' claims that their due process rights were violated by ex-parte communication between the town planner and the project applicant. 2013 ME 105, ¶¶ 14-21. Thus, the facts of *Duffy* are inapposite to this matter and the holding contradicts Newson's claim.

Newson goes on to discuss three cases in which the Court denied claims of procedural errors related to reconsideration. (Blue Br. 19-20.) In *Town of Wiscasset v. Board of Environmental Protection*, the question before the Court was whether the board committed error by its ad hoc determination that a prior permit approval was nullified by the board's unanimous vote to engage in reconsideration. 471 A.2d 1045 (Me. 1984). The Court found no source of law that prohibited the board's determination. *Id*. at 1048. In so ruling, the Court noted that "The Town makes no contention, and can make none, that the Board's complete reopening of the proceeding violated due process or any similar concept of procedural fairness." *Id*. at 1049. Thus, *Town of Wiscasset* does not even address the due process concerns raised by Newson in this appeal.

In *Jackson v. Town of Kennebunk*, the Court rejected abutters' claims that a planning board lacked authority to reconsider a developer's application after an initial motion to approve failed on a tie vote. 530 A.2d 717 (Me. 1987). As in *Town of Wiscasset*, the *Jackson* Court found that "The [abutters] make no contention, and can make none, that the procedure adopted by the Board for its reconsideration of the subdivision plan violated due process or procedural fairness." *Id*. at 718. The Court also found the appeal to be frivolous and ordered the abutters to pay costs and attorney's fees. *Id*. *Jackson* therefore supports the validity of the Board's action.

Finally, in *Jadd, LLC v. the Inhabitants of the Town of Old Orchard Beach*, a landowner sought and obtained a variance from a zoning board of appeals. 2010 WL 3218038 (Me. Super. Ct.). An abutter made a timely request for reconsideration, which failed by a tie vote. *Id*. The board considered the reconsideration request at its next meeting when an additional board member was present and voted 3-2 to reconsider. *Id*. On appeal the landowner claimed, much as Newson does in this appeal, "that the motion to reconsider was presented, heard and failed on a tie vote and no further action on that motion was authorized or appropriate." *Id*. The Superior Court affirmed the board's procedure, stating "there has been no showing of a violation of state or local law and no showing of fundamental unfairness." *Id*. Again, *Jadd*, if anything, affirms that the Board's procedures in this matter were appropriate.

Accordingly, the authority relied on by Newson does not call into question the procedures followed by the Kittery Planning Board in approving IDC 5's Application. Rather, these cases support affirmance of the Board's approval where the Court "has indicated that administrative boards should be accorded some latitude to fashion procedures as needed for their efficient functioning, provided these are basically fair to all parties." *Id*. (citing *Town of Wiscasset*, 471 A.2d 1045 and *Jackson*, 530 A.2d 717).

CONCLUSION

For the foregoing reasons, IDC 5 respectfully requests that the Court DENY Newson's appeal and affirm the Kittery Planning Board's April 11 approval of the Application.

Dated at Portland, Maine this 18th day of February 2025.

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