STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. YOR-24-478

DAVID NEWSON
Plaintiff/Appellant

v.

TOWN OF KITTERY, et al.
Defendants/Appellees

ON APPEAL FROM THE
YORK COUNTY SUPERIOR COURT
Docket No. YORSC-AP-24-13

BRIEF OF APPELLEE TOWN OF KITTERY

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I. INTRODUCTION

Plaintiff / Appellant David Newson (the "Appellant") has alleged that the Town of Kittery Planning Board (the "Board") committed various procedural and parliamentary errors in its review and approval of IDC 5, LLC's (the "Applicant's") site plan application to operate a marijuana retail store in the Town of Kittery (the "Application"). Newson's allegations rest on a misinterpretation of the Town's Land Use and Development Code (the "Code") and the Board's Bylaws (the "Bylaws"). His appeal should be denied. The Town substantially joins in the brief of Party-in-Interest IDC 5, LLC, dated February 18, 2025, and submits this brief in support of its own arguments.

The Code provides that the Board can take no action on any substantive matter except by the vote of four members. The Board was scheduled to consider final approval of the Application on March 28, 2024. On March 27, 2024, the Board received written comment from Newson's attorney requesting that the Board table the Application to a future meeting. Newson's comment was provided to the Board and included in the packet for the Board meeting scheduled the next day. The next evening, the Board considered the Application and a related request from the Applicant to extend a zoning boundary line on its property to adjust certain landscaping requirements. The Board first took up the requested boundary line extension and three members of the Board voted in favor, with one member

abstaining and one opposing. The Board chair explained, on the record, that without four votes either in favor or against the motion, the Board had taken no action on the motion. The Board subsequently tabled its consideration of the boundary line extension and the Application until its next available meeting. At the Board's next regular meeting on April 11, 2024, the Board voted simultaneously on the boundary extension and final approval of the Application. Five members of the Board voted in favor, with two against. Having obtained four like votes, the Board approved the boundary line extension and Application. The Board's actions fully complied with its establishing ordinance and Bylaws. Newson has not and cannot demonstrate any error by the Board or any deprivation of his procedural due process rights and his appeal should be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Applicant submitted its preliminary site plan application on November 22, 2023 and, as required by the Code, sent notices to all abutting property owners, including Newson. (R. 48, 286-291). On December 14, 2023, the Board deemed the Application complete. (A. 54, 67.) In accordance with Section 16.7.10(C)(2) of the Code, the Board scheduled a public hearing on the Application for January 11, 2024. (A. 34-35, 67.)

On January 11, 2024, the Board held a public hearing on the Application (the "January Hearing"). (A. 71, 83.) Prior to the January Hearing, Newson, and

all other abutters, were sent individualized notices of the hearing and notice was also published in The Weekly Sentinel, and posted to the Town's website, all in accordance with the Code. (A. 140-146.) 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 submit or offer any public comment at the January Hearing. (*Id.*) The Board unanimously voted to preliminarily approve the Application and advanced it to final plan review. (*Id.*)

The Application was scheduled for final review on March 28, 2024. (A. 86.) On March 27, 2024—more than two months after the January Hearing—Newson's attorney submitted a letter to the Town Planner, which requested that the Board table the application to allow Newson time to procure and submit additional public comment consisting of an independent traffic study assessing the effects of the Application. (A. 134.) The Town's Director of Planning and Development shared Newson's letter with the Board in advance of its March 28, 2024 meeting (the "March Meeting") and included the letter in the Board's meeting packet. (A. 134.)

At the March Meeting, the Board heard presentations on the Application, including a supplemental traffic analysis prepared by the Applicant's consultants, Mike Sudak of Attar Engineering, and Jeffrey Dirk of Vanasse and Associates. (A. 101.) After those presentations, the Board moved to approve a boundary line extension for the Project. (*Id.*) The motion received three affirmative votes, with Vice Chair Bensley abstaining and Member Wells voting against, resulting in a 3-

1-1 vote. (*Id.*) After additional discussion of the Application and traffic study, the Board voted unanimously to continue its review of the Application to the next available meeting. (*Id.*)

The Application was subsequently scheduled for final plan review at the Board's April 11, 2024 meeting (the "April Meeting"). (A. 104.) All members of the Board attended the April Meeting. (A. 130.) Member White moved and Member Kalmar seconded a combined motion to approve the final plan and boundary line extension, which the Board adopted by a vote of five in favor and two against. (A. 131.) The Board then proceeded to review and approve the findings of fact and finally approved the entire Application by a vote of five in favor and two against, with Vice Chair Bensley and Member Wells voting against. (*Id.*)

On May 23, 2024, Newson appealed the Board's decision pursuant to M.R. Civ. P. 80B. (A. 18.) On October 1, 2024, the Cumberland County Superior Court issued an order denying Newson's appeal. (A. 6-17.) Newson filed a notice of appeal on October 22, 2024. (A. 5.)

III. STANDARD OF REVIEW

Where the Superior Court has acted in an appellate capacity, the decision of the municipal body is reviewed directly for abuses of discretion, errors of law and findings not supported by the evidence and the party seeking to overturn the municipal body's decision bears the burden of persuasion. *See Lane Constr. Corp*

v. Town of Washington, 2008 ME 45, ¶11, 942 A.2d 1202. Interpretations of local ordinances are reviewed de novo and the Court "first evaluate[s] the plain meaning of the Ordinance and, if the meaning is clear, 'need not look beyond the words themselves.'" *See Fryeburg Trust v. Town of Fryeburg*, 2016 ME 174, ¶ 5, 151 A.3d 933 (quoting *Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903).

IV. ARGUMENT

A. The Board took no action on the Application at the March Meeting and reconsideration was therefore unnecessary.

At its March Meeting, the Board was faced with a motion on a substantive issue—the approval of the Applicant's requested boundary line extension. (A. 101). While not central to the success of the Application as a whole (A. 90), the requested extension constituted a substantive decision that the Code and Bylaws require four like votes to pass. (A. 28, 49). The Board's 3-1-1 vote did not satisfy the four-vote threshold for a decision to be made and, therefore the Board took no action. (A. 101). This result was explained by the Board Chair after the vote at the March Meeting (R. 741, March 28, 2024 Planning Board Meeting Video ("March Meeting Video") at 00:23:15) and again at the April Meeting (R. 741, April 11, 2024 Planning Board Meeting Video ("April Meeting Video") at 00:05:30). Section 17 of the Bylaws provides that "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. 51-52.) Neither the Code nor the Bylaws require reconsideration where a vote is not "passed" and interpreting them to the contrary would conflict with the plain language of the Bylaws and have harmful and illogical results.

Newson's assertion that the Board improperly reconsidered its vote on the boundary line extension rests on a strained interpretation. Under the plain meaning of the Bylaws, the Board did not "pass" any vote or reach any "decision" on the boundary line extension at the March Meeting. Newson's attempt to distinguish between a "vote" and "decision" of the Board (Blue Br. at 13-15) is meant to muddy a simple question: What constitutes the Board's "passage" of a vote?

Under standard tenets of ordinance interpretation, "passed", as used in Section 17 of the Bylaws, is given its plain and ordinary meaning. *See Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 12, 772 A.2d 256 ("Statutory language should be given its plain and ordinary meaning."). In the context of a deliberative body, "passage" is defined as the adoption or "the passing of a legislative measure into law." *See* Passage, Black's Law Dictionary (12th ed. 2024). "Adoption" is further defined as "A deliberative assembly's act of agreeing to a motion or the text of a resolution, order, rule or other paper or proposal, or of endorsing as its own statement the complete contents of a report." *See* Adoption, Black's Law Dictionary (12th ed. 2024). Under these ordinary definitions, a vote is "passed" only when it is adopted, not merely when it is voted upon. No vote can

be adopted without the requisite number of votes. Here, the Board's motion on the boundary line was a substantive question and could therefore only be adopted by four like votes under the Code and Bylaws. (A. 28, 49). The Board's vote on the boundary line extension garnered only three votes in favor, one against, and one abstaining. (A. 131). Since both the Code and Bylaws require that *all* decisions of the Board receive four like votes (A. 28), the Board's vote did not result in *either* a positive or negative decision on the motion. As a result, the Board did not agree to or adopt anything and the vote was not "passed" under the Code, Bylaws, or the normal sense of the word.

Newson contends that "passing" a vote is functionally equivalent to the mere taking of a vote. Under this interpretation, any vote taken by the Board on any issue would be subject to the Bylaws' reconsideration process, regardless of its effectiveness. In addition to being contrary to the Bylaws' plain meaning, this interpretation is untenable for multiple reasons. First, as Newson points out in support of his own claims, "[W]hen a legislature [or town board] uses different words within the same statue [or ordinance] it intends for the words to carry different meaning." (Blue Br. at 16 (*quoting Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶29, 252 A.3d 504).) Here, the Board chose to use "passed" as the triggering event for reconsideration rather than "taken", which it employs elsewhere in Bylaws in the context of voting. (A. 51). Adopting Newson's selective interpretation would ignore the Board's intentional word

choice and effectively read it out of the Bylaws—a result that is anathema to ordinance interpretation. *See Home Builders Ass'n of Me., Inc. v. Town of Eliot*, 2000 ME 82, ¶7, 750 A.2d 566 ("[I]t is well established that 'nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible.") (internal citations omitted).

Second, in addition to ignoring the plain language of the Code and Bylaws, Newson's interpretation runs contrary to the central purpose of reconsideration. The underlying rationale of the motion to reconsider is to insulate a successful motion from later attack by its opponents. *See* Robert's Rules of Order, 12th Ed. (2020), §37:10 ("This requirement for making the motion to Reconsider is a protection against its dilatory use by a defeated minority[.]"). There is no need for this protection where the motion at issue has no effect and the "majority" has nothing to protect.

Third, Newson's interpretation would have harmful effects on the Board's function and applicants' rights that militate against its adoption. In Newson's view, requiring reconsideration for any Board vote would act as a panacea for procedural due process and administrative finality concerns. (Blue Br. at 17). In reality, it would only result in tyranny of the minority. A 3-1 vote by the Board, such as at the March Meeting, would simultaneously have no effect *and* prevent the Board from taking any further vote or reaching a decision unless the sole dissenting member condescended to move for reconsideration. A single-member

minority would possess the power to cripple the Board's function and put applicants in limbo, without a final decision capable of appeal and without any way to bring the question back before the Board. An interpretation of the Bylaws that would result in such severe limitations on applicants' procedural due process rights and the Board's ability to function should not be endorsed. *See Fryeburg Trust*, 2015 ME 174, ¶5 ("We construe the terms of an ordinance reasonably, considering its purposes and structure and to avoid absurd or illogical results."). Given the absence of any Board action and the lack of support for Newson's desired interpretation of the Bylaws, his appeal should be denied.

B. The procedure followed by the Board did not deprive Newson of any procedural due process.

Newson's alleged violation of procedural due process rests almost entirely on his assertion that the Board was required by Section 17 of the Bylaws to follow a reconsideration process, which it was not. *Supra*, 8-11. Even if it had been, the Board's actions at the March and April Meeting did not result in any "fundamental procedural unfairness." (Blue Br. 19.) Since the motion on the boundary line extension did not pass, the Board discussed how to proceed and voted to continue its review of the Application until its next available meeting to allow other Board members to participate. (A. 101, March Meeting Video at 00:26:20.) Newson was therefore on notice of the fact that the Board had not finally acted upon *either* the boundary line extension or the Application. Newson also had actual or

constructive notice that the Board intended to continue action on the Application to its next available meeting. (*Id*). Newson was not deprived of any information essential to his participation in the April Meeting or prevented from doing so and his due process rights were not violated.

The authorities relied upon by Newson to support his claims of procedural unfairness actually support the Board's actions. In *Town of Wiscasset v. Board of Environmental Protection*, the Court held that there was no violation of procedural due process where all parties were on notice of the procedure being followed. 471 A.2d 1045, 1049 (Me. 1984). Similarly, in *Jackson v. Town of Kennebunk,* the Court found no violation of due process where, after a tie vote, a planning board reconsidered an application and interested parties were given the opportunity to participate. 530 A.2d 717, 717 (Me. 1987). In *Jadd, LLC v. Inhabitants of the Town of Old Orchard Beach*, the Superior Court held that a board action to table an application for reconsideration at a later meeting did not violate abutters' due process rights. 2010 WL 3218038, at *2-3. While the boards in each of these cases were in a reconsideration posture, which the Board here was not, the public statements made by the Board Chair at the March Meeting amply informed Newson of the Board's continuing review of the Application and enabled his continued participation. (A. 101). The fundamental holding of all of these cases is that a procedural departure does not rise to the level of a due process violation if the interested parties are on notice of the process being utilized and have an

opportunity to participate. Throughout the Board's review of the Application, it provided all of the required public and individualized notices and afforded Newson the opportunity to participate at both the January Hearing and through the submission of his letter on March 27, 2024. While Newson was not entitled to offer public comment after the January Hearing, the Board did not deny Newson any right to participate at the April Meeting, as Newson did not appear at or offer comment in advance of that meeting and has not alleged any errors in the Town's notices. *See Dineen v. Town of Kittery*, 639 A.2d 101, 102-103 (Me. 1994) (holding denial of an opportunity to speak at a final hearing, after passage of the pre-established time for public comment was not a violation of due process). The Board cannot be said to have violated any of Newson's procedural due process rights and Newson's appeal should be denied.

C. The Board received Newson's Letter and Newson had proper notice of and an opportunity to participate at the April Meeting.

There is similarly no merit in Newson's claim that the absence of his March 27th letter from the Board's April Meeting packet violated his due process rights. First, Newson's March 27th letter was provided to the Board prior to the March Meeting and included in the Board's packet. (Blue Br. 22.) The Board was aware of his request and there is nothing that requires the Board to have public comments in all future packets relating to the same application.

Newson has not alleged that he lacked notice of the April Meeting or that

any notices relating to the Application were defective. Instead, Newson asserts that he was entitled to receive individualized notice of the April Meeting because the Board was "reopening consideration" of the Application. (Blue Br. 19.) This claim is entirely unsupported by the record and the clear statements and actions of the Board at the March Meeting. *Supra*, 8-11. As an abutter, Newson was entitled to individualized notice only upon the Applicant's submission of a preliminary site plan and for the January Hearing. (A. 33, 34). The Code contains no similar requirement for at the final plan approval phase conducted at the March and April Meetings. (A. 39-47). Newson was sent all of the required notices (A. 140-146; R. 286-91) and has not alleged otherwise. Newson chose not to participate at the January Hearing (A. 82) or any other Board meetings on the Application with the sole exception of his March 27, 2024 letter. After the March Meeting, Newson had actual or constructive notice of the Board's intentions for the April Meeting and has not alleged any errors in any required noticing of the April Meeting. Newson was sent all of the required notices and was provided with all of the required opportunities for participation to which he was entitled under the Code and Bylaws and his procedural due process rights have not been violated. *See Mutton Hill Estates, Inc. v. Oakland*, 468 A.2d 989, 992 (Me. 1983) ("It is essential to a party's right to procedural due process that he be given notice of and an opportunity to be heard[.]"). Newson has not demonstrated any procedural unfairness in the Board's process or the April Meeting and has already been afforded more opportunity to

participate than he was due. His complaint rests on a belief that he is entitled to process *beyond* that required by the Code and Bylaws, which is not the case. *See Dineen*, 639 A.2d at 102-103. As such, his appeal should be denied.

V. CONCLUSION

For the foregoing reasons, Defendant/Appellee Town of Kittery respectfully requests that this Court affirm the Superior Court's October 1, 2024 Order and deny the appeal of Plaintiff/Appellant David Newson.

Dated: February 27, 2025

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CERTIFICATE OF SERVICE

I, Stephen E. F. Langsdorf, hereby certify that on this 27th day of February 2025, I served by electronic mail the foregoing Brief of Appellee Town of Kittery and will serve two copies by first class mail, postage-prepaid when prompted by the Law Court:

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