STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. CUM-25-109

SHARK TANK STRATEGIES LLC, et al.

Petitioners-Appellants

v.

TOWN OF SCARBOROUGH,

Respondent-Appellee

On Appeal from the Order of the
Cumberland County Superior Court

Brief of Appellants Shark Tank Strategies, LLC, et al.

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INTRODUCTION

On October 2, 2024, the Scarborough Town Council ("Town Council") denied Appellants' applications to operate cannabis cultivation facilities under the Town's Cannabis Establishment Licensing Ordinance. The Town Council's denial was based solely on an amendment to the Scarborough Zoning Ordinance that became effective after Appellants' applications were "pending" pursuant to 1 M.R.S. Section 302.

Because the applications were pending when the zoning amendment became effective and the zoning amendment did not call for retroactive effect, the amendment was not legally applicable to the applications. Accordingly, the Town Council committed legal error when it denied the pending applications based on the newly enacted zoning amendment.

STATEMENT OF FACTS

Appellant Platinum Smoke, LLC ("Platinum Smoke") is a Maine company certified by the state as a medical cannabis caregiver with a legal address and place of business at 3 Commercial Road, #201-B, Scarborough, Maine. (R.0045, 0054, 0076.) On August 22, 2024, Platinum Smoke filed an application ("Application") pursuant to the Town of Scarborough Cannabis Establishment Licensing Ordinance ("Cannabis Ordinance") to operate a medical cannabis cultivation facility at 3 Commercial Road. (R.0045-0085.)

Appellant Shark Tank Strategies, LLC ("Shark Tank") is a Maine company certified by the state as a medical cannabis caregiver with a legal address and place of business at 3 Commercial Road, #201-A, Scarborough, Maine. (R.0001, R.0011-13, 0034.) On August 28, 2024, Shark Tank filed an application ("Application") pursuant to the Cannabis Ordinance to operate a medical cannabis cultivation facility at 3 Commercial Road. (R.0001-0044.)

The property at 3 Commercial Road has been a lawful cannabis cultivation facility since 2013. (Video of Oct. 2, 2024, Town Council Meeting ("Oct. 2 Meeting Video") at 3:35:24, 3:37:47, 3:38:47.)

Prior to September 4, 2024, Town staff vetted the Applications and deemed the Applications complete for Town Council review. (R.0095; Video of Sept. 4, 2014, Town Council Meeting ("Sept. 4 Meeting Video") at 3:30:40, 3:42:55; Oct. 2 Meeting Video at 3:19:45.) Under the Cannabis Ordinance, the Town Council is the licensing authority for cannabis establishments. (A.0028.) The Applications were placed on the Town Council's September 4, 2024 agenda for "first reading" of the Applications. (A.0061, 0074.)

At its September 4, 2024 meeting, the Town Council heard public comment on the Applications. (A.0088; Sept. 4 Meeting Video at 3:16:00-3:23:35.) The Town Council discussed the Applications, including questions and comments about odor, inspections, public safety, staff review of the Applications, procedures

for submission and review of the Applications, and whether the Applications would be subject to a newly passed amendment to the Scarborough Zoning Ordinance ("Zoning Ordinance") that imposes a 1,000-foot setback between cannabis cultivation facilities and residences ("Zoning Amendment"). (Sept. 4 Meeting Video at 3:23:35-3:39:30.) The Town Council then voted 6-1 "to move approval of the first reading" of the Applications and schedule a public hearing and second reading of the Applications. (A.0088-0089; Sept. 4 Meeting Video at 3:47:00-3:48:00.)

At the same meeting on September 4, 2024, the Town Council voted 7-0 in favor of the Zoning Amendment to impose a 1,000-foot setback between cannabis cultivation facilities and residences. (A.0069-0070, 0079-0082; Sept. 4 Meeting Video at 2:06:40-2:06:50.) Under the Town of Scarborough Charter, the passage of an ordinance becomes "effective at 12:00 A.M. on the day following enactment" unless specified otherwise. (A.0045.) The Zoning Amendment does not contain any language indicating immediate or retroactive application. (A.0079-0082.)

At multiple points during the September 4 meeting, Town Council members and Town staff advised that the Zoning Amendment would not apply to Appellants' Applications. (Sept. 4 Meeting Video at 2:05:25-2:06:30; 3:23:40-3:26:20; 3:38:10-3:44:40.)

On September 18, 2024, the Town Council voted 6-1 to table the applications to its next meeting. (A.0106-107.) On October 2, 2024, the Town Council held a second reading and public hearing on the Applications, then voted 6-1 to deny the Applications. (A.0132-133.)

The Town Council issued individual written "Findings and Order" on the Applications dated October 16, 2024. (A.0013-0020.) The Town Council's sole basis for the denials was that the Applications were "incomplete" at the Council's September 4 and October 18 meetings and that the Applications did not comply with the 1,000-foot residential setback in the Zoning Amendment. (A.0015, 0019.)

On November 1, 2024, Appellants filed a Rule 80B appeal in Cumberland County Superior Court challenging the Town Council's denial of the Applications. By order dated February 13, 2025, and entered on the docket February 18, 2025, the Superior Court denied the Rule 80B appeal and affirmed the Town Council's denial of the applications.

On March 11, 2025, the Appellants filed a notice of appeal to institute this proceeding before the Law Court.

STATEMEMENT OF ISSUES PRESENTED

1. Whether the Town Council erred by applying the Zoning Amendment to the Applications based on a determination that the Applications were not pending under 1 M.R.S. Section 302 at the time the Zoning Amendment took effect.

STANDARD OF REVIEW

This appeal calls on the Court to interpret and apply the provisions of 1 M.R.S. Section 302. Statutory interpretation is a question of law that the Court reviews de novo. *MacImage of Maine, LLC v. Androscoggin Cnty*., 2012 ME 44, ¶ 21, 40 A.3d 975, 985 (interpreting 1 M.R.S. Section 302 and stating that the court "review[s] de novo whether a statutory amendment will be applied retroactively or prospectively."); *Windham Land Tr. v. Jeffords,* 2009 ME 29, ¶ 12, 967 A.2d 690, 695. Interpretation of the Town's Charter and ordinances also presents questions of law that the Court reviews de novo. *Jade Realty Corp. v. Town of Eliot,* 2008 ME 80, ¶ 7, 946 A.2d 408.

Where the Superior Court acts in an intermediate appellate capacity in a Rule 80B appeal, as was the case here, the Law Court disregards the Superior Court decision and directly reviews the decision of the last municipal body with de novo authority. *Tomasino v. Town of Casco,* 2020 ME 96, ¶ 5, 237 A.3d 175, 178. Thus, the decision under review is that of the Town Council.

ARGUMENT

The Town Council committed legal error when it applied the 1,000-foot residential setback in the Zoning Amendment to Appellants' Applications even though the Applications were pending under 1 M.R.S. Section 302 at the time the Zoning Amendment took effect.

I. The Applications Became Pending under 1 M.R.S. Section 302 on September 4 when the Town Council Considered the Substance of the Applications and Voted to Approve the First Reading

Under 1 M.R.S. Section 302, pending licensing proceedings are exempt from changes in law absent an express statement of retroactivity. 1 M.R.S. § 302. ("Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby."). Proceedings covered by Section 302 include "applications for licenses or permits." *Id*. An application is deemed to be pending "when the reviewing authority has conducted at least one substantive review of the application and not before." *Id*.

"When the municipality accepts the plan for the purpose of evaluating the substance of the proposal, manifests that the plan is adequate to begin the review process, or fails to advise an applicant of any restriction on the significance of acceptance of the plan, an application can be said to be pending." *Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982). In *Littlefield*, an application was held to be pending under Section 302 based on meeting minutes stating only, "The Board accepted his [Littlefield's] application." *Id*. at 1232.

Where a reviewing authority considers and votes on an application, the application is deemed pending. *Maine Isle Corp., Inc. v. Town of St. George*, 499 A.2d 149 (Me. 1985). This is true even where the vote is a unanimous

determination that the application does not meet ordinance standards. *Id*. at 151-152.

In this case, at the Town Council's September 4, 2024 meeting, the Council heard public comment on and discussed the substance of the Applications, including questions and comments about odor, inspections, public safety, staff review of the Applications, procedures for submission and review of the Applications, and whether the Applications would be subject to the Zoning Amendment. (Sept. 4 Meeting Video at 3:16:00-3:39:30.) The Town Council then voted 6-1 "to move approval of the first reading" of the Applications and schedule a public hearing and second reading of the Applications. (A.0088-0089; Sept. 4 Meeting Video at 3:47:00-3:48:00.)

The Town Council's September 4, 2024 consideration and vote constituted substantive action on the Applications. As in *Littlefield*, the Town Council "accept[ed] the plan for the purpose of evaluating the substance of the proposal." 447 A.2d at 1235. Furthermore, the Town Council's vote did not include "any restriction on the significance of acceptance of the plan." *Id*. On the contrary, at several points during the September 4 meeting, Town Council members and Town staff confirmed that Council action on the first reading meant that the Zoning Amendment would not apply to Appellants' Applications. (Sept. 4 Meeting Video at 2:05:25-2:06:30; 3:23:40-3:26:20; 3:38:10-3:44:40.) As in *Maine Isle*, the Town

Council discussed and voted on the Applications, and therefore had "acted on the substance of the proposal." 499 A.2d at 152.

Accordingly, the Town Council's September 4 consideration of and vote on the Applications rendered them "pending" for the purpose of 1 M.R.S. Section 302 such that the Applications were not subject to the Zoning Amendment.

II. The Town Council Committed Legal Error when it Determined the Applications Were Subject to the Zoning Amendment on the Basis that the Applications Were "Incomplete" when the Zoning Amendment was Enacted

The Town Council denied the Applications because it found that the Applications were "incomplete" at the Council's September 4 meeting, and that the Applications were subject to and did not comply with the 1,000-foot residential setback in the Zoning Amendment. (A.0015, 0019.) However, an application's completeness is not relevant to the determination that the application is pending under 1 M.R.S. Section 302.

An application may be deemed pending under Section 302 regardless of whether it contains all application submission requirements. In both *Littlefield* and *Maine Isle*, the towns argued that applications were not "pending" because they didn't contain all the information required by ordinance and thus were not "complete." *Littlefield*, 447 A.2d at 1234; *Maine Isle*, 499 A.2d at 151. In both cases, the Law Court rejected this argument.

In *Littlefield*, the Court held that "when a municipality takes the threshold step of acting on the substance of a proposal, the application process has commenced and an application is pending for purposes of section 302" even where an application is not complete. 447 A.2d at 1235 (Me. 1982). In *Maine Isle*, the Court stated that characterizations such as "preliminary," "complete" or "final" "should not govern the question of whether an application is pending for the purposes of section 302." 499 A.2d at 151. Rather, "an application is pending 'when a municipality takes the threshold step of acting on the substance of a proposal.'" *Id*.

The denial based on incompleteness is also at odds with the fact that the Applications were vetted and deemed complete prior to the Town Council's September 4, 2024, meeting. (R.0095; Video of Sept. 4, 2014, Town Council Meeting ("Sept. 4 Meeting Video") at 3:30:40, 3:42:55; Oct. 2 Meeting Video at 3:19:45.) That the Town later changed course and found that the Applications were incomplete on September 4 does not undo or otherwise affect the Town Council's September 4 vote on the substance of the Applications. *Cf. Walsh v. Town of Orono*, 585 A.2d 829, 831 (Me. 1991) ("a municipality can screen a plan for the adequacy of the information required by the relevant land use ordinance without bestowing 'pending' status on the plan. Although plaintiffs submitted their applications prior to or simultaneously with the enactment of the zoning

amendment on August 23, the reviewing authority (the Planning Board) had not substantively reviewed them by that date.") (internal quotations and citation omitted).

Accordingly, the Town Council's denials based on a finding that the Applications were "incomplete" on September 4 and therefore subject to the Zoning Amendment were legal error.[1]

III. The Zoning Amendment Did Not Take Effect until After the Applications Were Pending

Under the Town's Charter, the Town Council's vote to enact the Zoning Amendment at its September 4 meeting became effective at midnight the morning of September 5. The Charter states, "The passage of [an] ordinance shall be effective at 12:00 A.M. on the day following enactment or at such other date

[1] Although the Superior Court's decision in this matter is not under review, its basis for affirming the Town Council's action was also inconsistent with the Law Court's interpretation of 1 M.R.S. § 302. Specifically, the Superior Court found that Law Court precedent "require[s] that the municipal agency take some substantive step, involving a vote deciding at least one review criteria" for an application to be pending. (A. 0007) (emphasis added). The Superior Court then held that the Applications were not pending because "Petitioners have not, however, identified any aspect of substantive review criteria that was decided by the Council at the time of the September 4 vote." (A. 0008.) By imposing a requirement that a municipal board vote on compliance with a substantive permitting standard for an application to be pending, the Superior Court created a new, more stringent test that the Law Court has never articulated. Rather, the Law Court's formulation has simply been that "an application is pending 'when a municipality takes the threshold step of acting on the substance of a proposal.'" *Maine Isle*, 499 A.2d at 151, quoting *Littlefield*, 447 A.2d at 1234. As noted above, in *Littlefield*, an application was held to be pending under 1 M.R.S. § 302 based on meeting minutes stating only, "The Board accepted [Littlefield's] application." 447 A.2d at 1232. It is commonplace for a municipal board to evaluate proposed plans, discuss applicable permitting standards, take public comment, request additional information, and otherwise act on the substance of an application at multiple meetings before it ever takes a formal vote on compliance with a permitting standard. Thus, the test created and imposed by the Superior Court to deny Appellants' Rule 80B appeal is unsupported by this Court's precedent and is at odds with municipal permitting practice.

specified therein." (A.0045.) As discussed above, the Applications were pending as of the Town Council's action on September 4.

Thus, the pending Applications are not subject to the Zoning Amendment. 1 M.R.S. § 302 ("Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby."); *see also Fryeburg Tr. v. Town of Fryeburg*, 2016 ME 174, ¶ 6 n.3, 151 A.3d 933, 936 ("The Ordinance in effect at the time of the Planning Board's decision, however, is controlling in this case. The text of the amended Ordinance is not before us.") (internal citations omitted); *Morrissette v. Kimberly-Clark Corp*., 2003 ME 138, ¶ 11, 837 A.2d 123, 126 ("Legislative amendments to the Workers' Compensation Act, however, will not apply to workers' compensation proceedings that are pending on the effective date of those amendments in the absence of express evidence of a legislative intent to that effect.); *Riley v. Bath Iron Works Corp*., 639 A.2d 626, 628 (Me. 1994) (Under 1 M.R.S. Section 302, "amendments do not affect actions or proceedings pending on the effective date of the amendment.").

Accordingly, it was legal error for the Town Council to apply the Zoning Amendment to the Applications.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court VACATE the October 2, 2024, vote of the Town Council to deny the

Applications and REMAND to the Town Council with instructions to review the Applications under applicable ordinance criteria absent the Zoning Amendment.

Dated at Portland, Maine this 27th day of June 2025.

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CERTIFICATE OF SERVICE

I, Gordon R. Smith, hereby certify that on this 27th day of June 2025, I served by electronic mail the foregoing Brief of Appellants and will serve a copy by first class mail, postage-prepaid when prompted by the Law Court to counsel of record as follows:

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