STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-25-109

August 20, 2025

SHARK TANK STRATEGIES LLC, et al.,

Petitioners/Appellants,

vs.

TOWN OF SCARBOROUGH,

Respondent/Appellee

On appeal from the Order of the Cumberland County Superior Court
Docket No. AP-2024-56

RESPONDENT/APPELLEE'S BRIEF

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Summary of the Argument

The present appeal turns on whether Respondent-Appellee Town of Scarborough's (the "Town") Town Council (the "Town Council") correctly applied an amendment to the Town's ordinances that imposed a 1,000-foot residential setback on prospective cannabis cultivation facilities (the "Zoning Amendment") to Petitioners-Appellants Shark Tank Strategies LLC's ("Shark Tank") and Platinum Smoke LLC's ("Platinum Smoke" and together with Shark Tank the "Petitioners") respective applications for cannabis cultivation facilities in the Town (the "Applications"). Because the record supports the Town Council's determination that the Applications did not become pending prior to the effective date of the Zoning Amendment, the Town Council correctly applied the Zoning Amendment to the Applications; and because the proposed facilities are within 1,000 feet of existing residences, the Applications were correctly denied.

Statement of Facts and Procedural History

Cannabis uses in the Town of Scarborough are subject to, among other things, the Town's Cannabis Establishment Licensing Ordinance. (Scarborough, Me., Town Ordinances ch. 1018, § 4 (Jan. 22, 2020); A. 26) (the "Licensing Ordinance"). The Licensing Ordinance sets out a specific application and review procedure whereby initial processing is undertaken by Town staff, and then review and approval of an

application is heard by the Town Council. (Licensing Ordinance, § 7(A); A. 28). Within the framework of the Licensing Ordinance, the Town Clerk receives the application and makes a threshold determination that an application is complete. (Licensing Ordinance, § 7(C); A. 28-29). From there, the Licensing Ordinance contemplates that an application is then scheduled for a fully-noticed public hearing and substantive review by the Town Council. *Id.* The Licensing Ordinance does not specify a certain time in this process in which an application becomes "pending."

While the Licensing Ordinance by its terms sets out a two-step, one meeting process, over the years the Town adopted an informal process by which an additional preliminary step was added to the procedure prescribed by the Licensing Ordinance which the Town has referred to as a "first reading" of a cannabis application before the Town Council. This preliminary proceeding occurs after initial processing by the Town Clerk but before a public hearing is scheduled. (September 4, 2024 Meeting Video, at 3:25:05 – 3:25:57). Although not codified, this "first reading" effectively lengthens the public window of the application process.

Against this backdrop, Petitioner Platinum Smoke submitted an application for a medical cannabis establishment to the Town on August 22, 2024, (R. 45), and Petitioner Shark Tank likewise submitted an application on August 28, 2024, (R. 1). Both Applications sought licenses for operation at premises located at 3 Commercial Road in the Town. (R. 1-44, 45-85). After preliminary processing by the Town

Clerk's office, on August 28, 2024 the Applications were, according to the customary process described above, scheduled for first reading by the Town Council to be held on September 4, 2024 (the "September 4 Meeting"). (A. 156). As noted in Town staff's memorandum to the Town Council dated October 2, 2024, Town staff understood that a required component of the Applications—a record of the proposed uses being located at a "registered cannabis property"—was missing from the Applications, but scheduled the Applications for "first reading" based on "the longstanding practice of placing an otherwise complete application from an applicant on the agenda for first reading, prior to the public hearing and action, even if an odd item was still in process." (A. 156). The incomplete Applications were taken up by the Town Council at the September 4 Meeting. (A. 156).

At that meeting, the Town Council took public comment, the first of which was related directly to the procedural question of why the "first reading" was occurring in the first instance and the legal impact of holding a first reading prior to notice of the application proceeding being received by abutters. (September 4 Meeting Video, at 3:17:50). The second public comment received primarily related to whether the Zoning Amendment, impending 1,000-foot residential setback requirement, would be effective as to these Applications. (September 4 Meeting Video, at 3:20:33). A Town staff member then stated in response to the public questions that in his view the "first reading" conferred "standing" to the Applications

prior to the impending September 5, 2024 effective date of the Zoning Amendment. (September 4 Meeting Video, at 3:24:00). That staff member, however, noted that the "first reading" process adopted by Council custom was "essentially meaningless," (September 4 Meeting Video, at 3:25:10), and that the purpose of the meeting was "to give more publicity and awareness" regarding cannabis applications (September 4, 2024 Meeting Video, at 3:25:17).

While staff orally represented that staff had received "a completed application" at the September 4 Meeting, (September 4, 2024 Meeting Video, at 3:30:47), at that time staff noted that it was common for components required for applications to be deemed complete, including inspections, to not be complete at "first reading," but "always before second reading." (September 4, 2024 Meeting Video, at 3:30:50). The Council then undertook a robust discussion regarding their own process of receiving applications for this "first reading" noting a "need to clean up these process issues" moving forward. (September 4, 2024 Meeting Video, at 3:34:10). The Town Council ultimately moved to advance the Applications to "second reading" and to schedule a public hearing for September 18, 2024. (A. 87-89). The motion did not indicate any determination by the Town Council that the Applications were complete or indicate that the Applications did or did not meet the standards contained in the Town's ordinances. *Id.*

On the same evening and prior to the Town Council's first reading, the Town Council had taken up and adopted the Zoning Amendment, which, among other things, imposes a 1,000-foot setback between cannabis uses and residential dwellings. (A. 80-82). The Zoning Amendment passed unanimously at the September 4 Meeting. (A. 82). Pursuant to the Town's Charter, the Zoning Amendment went into effect at midnight on the morning of September 5, 2024. (Scarborough, Me., Charter of the Town of Scarborough, § 213 (Dec. 1, 2022); A. 45).

Following the September 4 Meeting, the Applications were next taken up on September 18, 2024. The Applications were ultimately tabled at that meeting prior to public hearing because the necessary registration information had still not been received. (September 18, 2024 Meeting Video, at 3:29:05). Prior to the Town Council's October 2, 2024 meeting where the Applications were next taken up, the Town Council received further clarification regarding the completeness of the Applications, that in staff's view the Applications were not pending as of September 4 (or September 18), and that in fact the Applications had been erroneously placed before the Town Council. (A. 156-57). The Town Council finally held a "second reading" and public hearing on the Applications on October 2, 2024. (A. 132-33). Based on the Town Council's understanding that the now-effective Zoning Amendment applied to the Applications, the Town Council voted 6-1 to deny the

Applications upon finding that the Applications would violate the 1,000-foot setback. (A. 15, 19).

The Petitioners filed an appeal of the Town Council's denials to the Cumberland County Superior Court pursuant to M.R. Civ. P. 80B on November 1, 2024, (A. 3), asserting that the Town Council erroneously applied the Zoning Amendment to the Applications, (A. 11). Following briefing, the Superior Court denied the Petitioners' 80B appeal, finding that the "the [A]pplications were not pending at the time of the [Zoning A]mendment." (A. 5). The Superior Court reasoned that even when accepting the Petitioners' interpretation of what transpired at the September 4 Meeting, the "Petitioners have not . . . identified any aspect of substantive review criteria that was decided by the [Town] Council at the time of the September 4 vote." (A. 8). The present appeal followed.

Statement of Issues Presented

1. Did the Town Council correctly apply the Zoning Amendment to Petitioners' Applications based on a determination that the Applications had not become pending prior to the effective date of the Zoning Amendment?

Standard of Review

As the parties making the appeal, Petitioners bear the burden of persuasion,

Fitanides v. City of Saco, 2015 ME 32, ¶ 8, 113 A.3d 1088, and the Court "directly examine[s] the record developed before the [Town] . . . for abuse of discretion, error of law, or findings unsupported by substantial evidence in the record[,]" *Lane Constr. Corp. v. Town of Washington*, 2008 ME 45, ¶ 29, 942 A. 2d 1202 (citation omitted); *see also* M.R. Civ. P. 80B.[1] The Court must uphold the decision of a municipal board unless that board's conclusion was unlawful, arbitrary, capricious or unreasonable. *Juliano v. Town of Poland*, 1999 ME 42, ¶ 5, 725 A.2d 545 (quoting *Driscoll v. Greewalla*, 441 A.2d 1023, 1029 (Me. 1982)).

When the Court reviews a municipal board's interpretation of its own past conduct—including that board's interpretation of when it has accepted an application for review—the Court should "defer to [the board's] interpretation of its own past conduct" when record evidence supports that interpretation. *Duplessis v. Cobbossee Development Group*, 534 A.2d 674, 675 & n.2 (Me. 1987).[2] Likewise,

[1] The Town concurs with the Petitioners that the Town Council's Decision is the operative decision on review. (Blue Br. 8); *see Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, ¶ 11, 234 A.3d 214.

[2] The Petitioners assert that this Court's review is one of pure statutory interpretation and is therefore de novo, with no deference given to the Town. (Blue Br. 8). This is incorrect. As was the case in *Duplessis*, the question before this Court is whether the municipal board erred in its determination of when it had or had not accepted an application for review and when "the [board] acted on the substance of the proposal, thereby manifesting that the applications were adequate to begin the review process." *Duplessis*, 534 A.2d, at 675 (citing *Maine Isle Corp. v. Town of St. George*, 499 A.2d 149, 151 (Me. 1985); *Littlefield v. Inhabitants of the Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982)). This is a factual question, and one for which the Court has in the past stated explicitly requires deference to the municipal board's own interpretation. *Id.* at 675 & n.2; *see also Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 782 (Me. 1989) (evaluating whether record demonstrated board action constituted substantive review).

findings made by a municipal factfinder are reviewed with substantial deference and "[a] court will not substitute its judgment for that of a board." *Summerwind Cottage, LLC v. Town of Scarborough*, 2013 ME 26, ¶ 11, 61 A.3d 698 (quoting *Toomey v. Town of Frye Island*, 2008 ME 44, ¶ 11, 943 A.2d 563). When reviewing administrative findings of fact, the Court must "examine the entire record to determine whether, on the basis of all the testimony and exhibits before it, the [Town] could fairly and reasonably find the facts as it did." *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 26, 153 A.3d 768. "Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Id.* (internal quotations omitted). "The possibility of drawing two inconsistent conclusions from the evidence does not make the evidence insubstantial[,]" *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 8, 746 A.2d 368, and "[t]he fact that the record before the [Town] is inconsistent or could support a different decision does not render the decision wrong[,]" *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 22, 82 A.3d 148 (internal quotations omitted).

The Court reviews ordinance language de novo for its plain meaning and will "construe its terms reasonably in light of the purposes and objectives of the ordinance and its general structure." *Bizier v. Town of Turner*, 2011 ME 116, ¶ 14, 32 A.3d 1048 (internal quotations omitted). Likewise, the Court interprets statutes de novo, "looking first to the plain language and delving beyond the plain meaning

only if the language is ambiguous." *Friends of Lamoine*, 2020 ME 70, ¶ 7, 234 A.3d 214 (citation omitted).

Argument

A. The Town Council correctly applied the Zoning Amendment to the Applications because the Applications had not become pending prior to the effective date of the Zoning Amendment.

As noted in the Town's briefing below, Petitioners have not raised an argument that the Town Council erred in its factual findings that the proposed cannabis facilities were "located within 1,000 feet of a dwelling in the Residential Zone District, specifically from dwellings located on Pond View Drive[,]" (R. 88, 92), nor do the Petitioners challenge the Town Council's interpretation that Zoning Amendment prohibits "among other things, Cannabis Cultivation Facilities from being located within 1,000 feet of the property line of a lot on which a dwelling is located in a Residential Zoning District[,]" (R. 87, 91). This means that the Court's review here limited to the question of whether the 1,000-foot setback requirement is applicable to the Applications. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (noting waiver of issues not raised in brief). If the Zoning Amendment is applicable to the Applications, then the Town Council correctly denied the Applications on the basis that they did not meet the applicable setback.

As the Superior Court below noted, "[w]hether an amendment to an ordinance applies to an application is governed by statute." (A. 6). Title 1, Section 302 of the

Maine Revised Statutes sets out the general rule of construction regarding when the amendment of a municipal ordinance affects an application for a license or permit. 1 M.R.S. § 302. Per Section 302, absent specific language to the contrary "[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby." An action or proceeding is "pending" for Section 302 purposes when "the reviewing authority has conducted at least one substantive review of the application and not before." *Id.* In turn, Section 302 states that "a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law." *Id.*

Thus, it is only when "a municipality takes the threshold step of acting on the *substance* of a proposal, [that] the application process has commenced and an application is pending for purposes of section 302." *Littlefield*, 447 A.2d at 1235 (emphasis added). Mere "presentment of a plan to a municipal clerk or board may not, in and of itself, result in a pending application under [Section 302,]" but rather it is only 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." *Id.*

In their Brief, Petitioners assert that the Town Council's September 4, 2024 vote to "move approval of the first reading" of the Applications and to "schedule the second reading and public hearing" on a later date constitutes a consideration of the substance of the Applications such that the Applications became pending at the time of that vote. (Blue Br. 6, 9). This conclusion mischaracterizes the caselaw addressing the legal question, and conflates a purely procedural—indeed "essentially meaningless" vote—with an action on the substance of the proposal required to trigger pending status. The mere fact that a reviewing board takes up an application in a preliminary manner or makes a non-substantive vote to schedule an additional meeting on the application is insufficient as a matter of law to establish that an application has become pending.

The Court has dealt with this question extensively. For example, the Court determined that a subject application had become pending in *Maine Isle Corp., Inc. v. Town of St. George*, 499 A.2d 149 (Me. 1985) where that board both discussed the application and voted on a substantial component of the application— "voting that the proposal could not satisfy the Town's minimum lot size requirement." *Id.* at 152. The Petitioners shorthand *Maine Isle Corp.*'s holding to stand for the broad statement that "[w]here a reviewing authority considers and votes on an application, the application is deemed pending," (Blue Br. 9), but the nature of the board's vote in *Maine Isle Corp.* mattered to the holding. Indeed, the Court later characterized

Maine Isle Corp.'s holding as being that "an application was pending once the planning board acted on the substance of a development proposal by discussing the proposal and voting *on whether it satisfied a requirement of the applicable ordinance*." *Waste Disposal Inc.*, 563 A.2d at 781 (citing *Maine Isle Corp.*, 499 A.2d at 152) (emphasis added). The Court's holdings reflect that it was not the act of the board's vote itself, but the substance of that vote, that was significant to the analysis.

This point was further underlined in *Waste Disposal Inc.* In that case, the Court held that an application was not pending as a matter of law even where an applicant had presented its project to a reviewing board, and that board took action to determine that application's completeness. *Id.* at 780-82 ("the initial review conducted by the Planning Board . . . to determine whether the Plan was complete did not constitute substantive review."). Here again, the fact that the board in *Waste Disposal Inc.* took some action on its application was not dispositive, and the Court inquired further into the specific nature and substance of the board's action.

Likewise, the Court found that the subject application in *Walsh v. Town of Orono*, 585 A.2d 829 (Me. 1991) was not pending where the application had been submitted and received by the Town and received feedback from Town staff—but had not yet received a public hearing or substantive vote. *Id.* at 830-32. The Court noted explicitly that Section 302 applies to "proceedings which are pending *in fact* and not those that might have been pending if they had been handled in

accordance with directions contained in an ordinance." *Id.* at 832. These holdings reflect that the test to determine whether an application has become pending turns on whether the reviewing board actually reviewed the merits of the application, and then acted on the substance of those merits.

Applying this test to the present facts, the record amply supports the Town Council's own interpretation that it did not accept the Applications as complete, manifest that the Applications were adequate to begin the review process, or vote on the substance of the Applications until after the Zoning Amendment became effective on September 5, 2024. *See Duplessis*, 534 A.2d at 675 & n.2. First, notwithstanding Petitioners' assertions otherwise, the Town Council's September 4 Meeting vote to "move approval of the first reading" was—by the Town officials' own descriptions at the time— "superfluous" and intended to "create more awareness to the public." (September 4, 2024 Meeting Video at 3:32:18, 3:35:00). The creation of additional process for the benefit of public attention not otherwise contemplated by the Town's ordinances is not the sort of action on the substance of the proposal contemplated by *Littlefield* and by extension 1 M.R.S. § 302. While the Town Council permitted public comment at the September 4 Meeting, the meeting preceded the formal abutter notification and scheduling of a public hearing that signals the substantive process contemplated by the Town's ordinances. (*See* September 4, 2024 Meeting Video at 3:33:59).

Second, while the Town Council made inquiry as to whether the Applications were complete in staff's estimation at the September 4 Meeting, the Town Council's vote to "move approval of the first reading" of the Applications did not explicitly or implicitly include a determination by the Town Council that the Applications were complete. (R. 123-24). The Town Council—correctly—undertook the threshold step of evaluating whether the Applications were complete in advance of conducting its scheduled public hearing on September 18; determining that items were in fact missing from the Applications and tabling the public hearing and considerations of the Applications until the missing items were received. (September 18, 2024 Meeting Video at 3:29:04). Given that it is the Town Council's responsibility to review and ultimately decide these applications, it is the Town Council's—and not staff's—completeness determination (or lack thereof) that is relevant here. *See Littlefield*, 447 A.2d at 1235. Absent any action on the substance of the underlying proposals by the Town Council, the Applications cannot be construed as pending prior to the September 5 effective date of the Zoning Amendment.

The Petitioners argue that the incompleteness of the Applications on or after September 4 cannot by itself form the basis by which the Town Council denied the Applications or determine that the Zoning Amendment applied to the Applications. (Blue Br. 11-13). This is both true and beside the point. It is true that—had the Town Council both taken up discussion of and acted on the merits of the Applications prior

to the effective date of the Zoning Amendments—the status of the Applications as being either complete or incomplete would not bear on the analysis of whether the Applications became pending. *See, e.g.*, *Littlefield*, 447 A.2d at 1234-35. However, the Town Council did not act on the merits of the Applications prior to the September 5, 2024 effective date. The fact that the Town Council made no completeness determination on September 4, and affirmatively determined that the Applications were *incomplete* on September 18, only serves to factually support the Town Council's determination the Applications were not pending and that the Zoning Amendment applied to the Applications. *See Walsh*, 585 A.2d at 831 ("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").

The Petitioners finally note that the Superior Court's intermediate decision affirming the Town Council's decision held that "case law . . . require[s] that the municipal agency take some substantive step, involving a vote deciding at least one review criteria, beyond accepting completeness of the application[,]" (A.7), and assert that the line established by the Superior Court is more stringent than the test established by this Court, (Blue Br. 13 n.1). While it is clearly correct that voting on one of an application's substantive review criteria would be sufficient to render an application pending, the Court need not reach the question of whether that stage of review is necessary to do so because the Town Council did not vote on the substance

of the Applications at the September 4 Meeting, and took no action other than to advance the Applications to a second reading—the true beginning of the formal review process outlined in the Town's ordinances. This action falls well short of the tests established by this Court in *Waste Disposal Inc.*, *Littlefield*, or *Walsh*. Indeed, the Town Council failed to even go so far at the September 4 Meeting as declaring the Applications to be complete, placing the Town Council's actions on that date on an even more inchoate posture than the preliminary meetings at issue in *Waste Disposal inc. v. Town of Porter*. *See* 563 A.2d at 782.

Taken together, the Town Council did not err in denying the Applications on the grounds that the Applications did not comply with the Zoning Amendment, because (1) the Applications as a matter of fact did not meet the 1,000 foot setback imposed by the new ordinance, and (2) the Applications had not received substantive review and in turn became pending until after the Zoning Amendment went into effect.

Conclusion

For these foregoing reasons, the Respondent-Appellee Town of Scarborough respectfully requests that this Court AFFIRM the October 2, 2024 decision of the Town of Scarborough's Town Council to deny Petitioner-Appellants' Shark Tank Strategies LLC's and Platinum Smoke LLC's applications for cannabis cultivation licenses and DENY the present appeal.

Dated at Portland, Maine, this 20th day of August, 2025.

/s/ Grady R. Burns

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