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

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

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INTRODUCTION

Appellant Platinum Smoke, LLC and Appellant Shark Tank Strategies, LLC (collectively "Appellants") submit this reply to the Red Brief of Appellee Town of Scarborough (Town"). Appellants agree with the Town that the sole issue on appeal is whether the Town's ordinance amendment imposing a 1,000-foot residential setback ("Zoning Amendment") applies to Appellants' applications to engage in medical cannabis cultivation ("Applications"). As discussed below, the Applications were pending under 1 M.R.S. Section 302 ("Section 302") at the time the Zoning Amendment became effective such that it cannot be applied to the Applications.

The Town misconstrues the Court's test for determining whether an application should be deemed pending under Section 302. Specifically, the Town argues that for the Applications to be pending, the Scarborough Town Council ("Town Council") had to have "reviewed the merits of the application, and then acted on the substance of those merits" prior to the Zoning Amendment taking effect. (Red. Br. 16.) However, the Court has never required that a municipality "act on the substance of the merits" of an application for it to be pending under Section 302. Rather, under the test set forth by the Court, an application is pending when a 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." *Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982).

The Town also seeks to convince the Court that the absence of a Town Council vote to deem the Applications complete should weigh against a finding that the Applications were pending under Section 302. (Red Br. 17-18.) However, the Court has repeatedly held that an application's completeness is irrelevant to the inquiry of whether a municipality has acted on an application such that it should be deemed pending. *See, e.g., id.* at 1234-35.

Under an accurate application of the Court's framework for determining pending status under Section 302, the Town Council's actions at its meeting on September 4, 2024 ("September 4 Meeting") rendered the Applications pending prior to the Zoning Amendment's effective date of September 5, 2024. As such, it was legal error for the Town to apply the Zoning Amendment to the Applications.

ARGUMENT

I. The Town Misconstrues the Court's Test Governing when an Application Is Pending under 1 M.R.S. Section 302

By focusing on whether the Town Council voted on any substantive permitting criteria or voted to find the Appellants' Applications complete at the September 4 Meeting, the Town ignores the Court's consistent interpretation of Section 302.

A. The Court Has Never Imposed a Requirement that a Municipality Vote on the Merits of an Application for it to Be Pending under Section 302

The Town states that the test for whether an application is pending under Section 302 "turns on whether the reviewing board actually reviewed the merits of the application, and then acted on the substance of those merits." (Red. Br. 16.) The Town, like the Superior Court, appears to erroneously interpolate a requirement that the permitting authority vote on the application's compliance with a substantive permitting criterion for it to be considered pending. (Blue Br. 13, n.1.)

However, the actual test set forth on multiple occasions by the Law Court to determine whether an application is pending under Section 302 is much broader:

> 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, 447 A.2d at 1235; *see also Walsh v. Town of Orono*, 585 A.2d 829, 831 (Me. 1991); *Brown v. Town of Kennebunkport*, 565 A.2d 324, 327 (Me. 1989); 1 Maine Prac., Real Estate Law & Prac. § 20:20 (2d ed.). Thus, under this test first set forth in *Littlefield* ("*Littlefield* Test"), the Court has established three separate triggers that will render an application pending: A) when a municipality "accepts" an application to begin "evaluating the substance of the proposal"; B) when a

municipality "manifests" that the application is "adequate to begin the review process"; and C) when a municipality "fails to advise an applicant of any restriction on the significance of acceptance of the plan."

None of these three triggers require that the municipality "review the merits of the application, and then act on the substance of those merits" as argued by the Town. (Red. Br. 16.) Accordingly, the Town's formulation of the test to determine when an application is pending under Section 302 does not reflect the Court's precedent and should be disregarded.[1]

B. The Court Has Never Imposed a Requirement that a Municipality Deem an Application to Be Complete for it to Be Pending under Section 302

The Town's argument relies heavily on whether the Applications were "complete" at the September 4 Meeting, repeatedly referencing the concept of completeness or incompleteness. (Red Br. 5-8, 15-19.) For example, the Town states that "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

[1] In the Town Council's written findings, the 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 Zoning Amendment. (A.0015, 0019.) The Town's post-hoc attempt to justify the denial on separate legal grounds need not be considered by the Court. *See Stickney v. City of Saco*, 2001 ME 69, 770 A.2d 592, 605, n.11 ("We have repeatedly held that, '[n]o principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue").

Council that the Applications were complete." (Red Br. 17.) The Town asserts that "it is the Town Council's—and not staff's—completeness determination (or lack thereof) that is relevant here." *Id*. And the Town argues, "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." (Red Br. 18.)

However, the Court has consistently held that the completeness of an application is irrelevant to a determination of whether the application is pending under Section 302. *See Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 782 (Me. 1989) (review conducted by planning board to determine whether application was complete did not confer pending status); *Maine Isle Corp., Inc. v. Town of St. George*, 499 A.2d 149, 151 (Me. 1985) (characterizations such as preliminary, complete, or final "should not govern the question of whether an application is pending for the purposes of section 302."); *Littlefield*, 447 A.2d at 1234-35 (rejecting town's argument that applicant's failure to submit a complete application precludes a finding that an application is pending); *Cardinali v. Planning Bd. of Lebanon*, 373 A.2d 251, 254 n.4 (Me. 1977) ("We are not called upon to decide whether Cardinali has filed a completed application, but only whether any

application, completed or not, was pending.").

Thus, the Town's argument is erroneously built on whether the Council accepted the Applications as complete, an inquiry that the Court has rejected, rather than whether the Council accepted the Applications "for the purpose of evaluating the substance of the proposal," the inquiry that the Court has expressly adopted. The Town's conflation of completeness and acceptance for review should be disregarded by the Court.

II. Correct Application of the *Littlefield* Renders Appellants' Applications Pending under 1 M.R.S. Section 302 Prior to the Effective Date of the Zoning Amendment

The Town Council's review of and action on the Appellants' Applications at the September 4 Meeting rendered the Applications pending under each of the *Littlefield* triggers.

A. The Town "Accepted" the Applications "for the Purpose of Evaluating the Substance of the Proposal"

The Town seeks to characterize the September 4 Meeting at which the Council voted to "move the first reading" as "superfluous." (Red Br. 16.) However, the fact is that at the September 4 Meeting the Town Council heard public comment on the Applications (A.0088; Sept. 4 Meeting Video at 3:16:00-3:23:35), discussed permitting issues such as odor, inspections, and public safety (Sept. 4 Meeting Video at 3:23:35-3:39:30), 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 vote to schedule a public hearing and second reading of the Applications signifies that the Council "accepted the plan for the purpose of evaluating the substance of the proposal." *See Littlefield*, 447 A.2d at 1235. The Council's action is analogous to the facts in *Littlefield*, in which an application was held to be pending under Section 302 based on meeting minutes stating, "The Board accepted [Littlefield's] application." *Id*. at 1232.

If the Council vote to schedule further process to review the Applications did not constitute acceptance of the Applications for the purpose of evaluating their substance, what did it constitute? The direct result of the Council's vote at the September 4 Meeting was to schedule a public hearing and further evaluation of their substance. The Town's argument that the September 4 vote was "superfluous" and had no meaning at all should not be credited.

The *Littlefield* Court also distinguished between "presentment" of an application, which would not confer pending status, and "acceptance" of an application, which would. *Id*. at 1235. One of the factors the Court considered to find that the municipality had accepted the application was the applicant's payment

of the filing fee. *Id*. In this case, the Town accepted the Appellants' payments of the filing fees prior to the September 4 Meeting. (R. 0044, 85.)

B. The Town "Manifested" that the Applications Were "Adequate to Begin the Review Process"

For the same reasons that the Town accepted the Applications for the purpose of evaluating them, the Town Council manifested that the Applications were adequate to begin the review process. The Council's vote "to move approval of the first reading" and schedule a public hearing and further review of the Applications "manifests commencement of the evaluation process." *Littlefield*, 447 A.2d at 1235.

C. The Town "Failed to Advise" the Appellants "of Any Restriction on the Significance of Acceptance of the Plan"

Not only did the Town Council not advise the Appellants that the vote to accept the Applications for further review was subject to any restrictions, the Council members and Town staff affirmatively stated multiple times at the September 4 Meeting 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.) A municipality's representation to an applicant that its application would not be subject to an ordinance amendment has been treated by the Court as a factor in determining that an application was pending under Section 302. *Cardinali*, 373 A.2d at 254.

Accordingly, the Town Council's September 4, 2024 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 that became effective on September 5, 2024.

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 10th day of September 2025.

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