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.*
Defendant / Appellee

ON APPEAL FROM THE
YORK SUPERIOR COURT

Docket No. YORSC-AP-24-13

REPLY BRIEF OF PLAINTIFF / APPELLANT DAVID NEWSON

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INTRODUCTION

Plaintiff / Appellant David Newson ("Mr. Newson") respectfully submits this Reply Brief in response to the briefs of Defendant / Appellee Town of Kittery (the "Town") and Party-in-Interest IDC 5 LLC (the "Applicant"). Mr. Newson respectfully requests that this Court reverse the decision of the Town Planning Board (the "Board") that approved the Applicant's application for a zoning boundary line extension and site plan to operate a marijuana retail store at 181-185 State Road in Kittery, Maine (the "Application").

ARGUMENT

As an abutter to the property that the Applicant seeks to convert into a marijuana retail store, Mr. Newson has a basic right to have the Board hear his concerns over the impacts on his property. The Board violated this right when it improperly reconsidered its rejection of the Application in violation of its Bylaws, failed to notice Mr. Newson that it would reconsider the Application, and failed to consider Mr. Newson's submission.

The Town and Applicant urge the Court to elevate the Board's own construction of the Bylaws above this Court's duty to interpret the Bylaws de novo. They further invite the Court to sidestep the plain meaning of Bylaws Section 17 and to disregard the policy implications of allowing defeated applicants endless bites at the approval apple. Moreover, the Town and Applicant attempt to distract from the

Board's failure to afford Mr. Newson notice of its April 11 reconsideration vote, or to consider his prior public comment, by focusing on the prior meetings of which Mr. Newson received notice. Notice of those prior meetings is, however, irrelevant. What matters, for the purposes of due process and fundamental procedural fairness, is whether the Board noticed Mr. Newson of the April 11th meeting at which the Board reconsidered the Application and whether the Board duly considered his prior public comment. The Board did not. Accordingly, Mr. Newson respectfully requests the Court reverse the Board's April 11, 2024 decision.

I. The Applicant Invokes the Wrong Standard of Review, and the Board's Interpretation of the Bylaws is Immaterial.

"The interpretation of an ordinance is a question of law that we review de novo, with no deference to the local board's interpretation." *Clark v. Town of Phippsburg*, 2025 ME 25, ¶ 29, __ A.3d __ (quotation and citation omitted). Deference, which the Applicant's brief emphasizes (Applicant Br. 13), is afforded to a municipal board only for questions of fact. *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 26, 252 A.3d 504.

Here, the only questions before this Court are: (1) whether Bylaws Section 17 prohibits the Board from reconsidering a vote without a motion from a member of prevailing side of the prior vote; and (2) whether the Board's combined failure to notice Mr. Newson of its intent to reconsider the Application or to consider his prior public comment violated his right to due process and procedural fairness. These are

pure questions of law. No factual determinations are at issue. *See, e.g.*, *15 Langsford Owner LLC v. Town of Kennebunkport*, 2024 ME 79, ¶ 20, 327 A.3d 1093 (concluding that the question of whether a term in an ordinance applied to certain structures was a question of law "properly addressed de novo, without deference"). Accordingly, this Court owes no deference to the Board's interpretations of the Bylaws or to the Board's opinion of what degree of notice and consideration satisfies due process and procedural fairness. For the same reasons, the Town and Applicant's reliance on one Board member's interpretation of the Bylaws is unavailing. (*See* Town Br. 8-9; Applicant Br. 25-26).

II. The Applicant Concedes that the Plain Meaning of Bylaws Section 17 Permits Reconsideration Only If a Member of the Prevailing Side of the Prior Vote Moves for Reconsideration.

Bylaws Section 17 requires that "when a vote is passed, it is in order for any member who voted on the prevailing side to move reconsideration thereof." (A. 51-52.) The plain language meaning of this provision is that only a member who voted for the prevailing side—whether the prevailing side was for or against the initial motion—may move for reconsideration after the vote has occurred.[1] The Applicant concedes that this interpretation reflects the "general, lay meaning of [the term]

[1] This interpretation is consistent with how motions that fail to receive sufficient affirmative votes to obtain approval are typically interpreted. *See, e.g.*, *Silsby v. Allen's Blueberry Freezer, Inc*., 501 A.2d 1290, 1292 (Me. 1985) (where vote tied two to two and "the ordinance required the concurring vote of at least three members for approval of the application, the vote constituted a denial").

'pass,'" but argues that the Court should instead adopt a more "technical" interpretation "in the context of the Board's procedural bylaws." (Applicant Br. 15.)

This invitation to ignore the plain meaning of the provision contravenes well-settled precedent that ordinances, like statutes, must be construed according to their plain and ordinary meaning. *See, e.g., Desfosses v. City of Saco*, 2015 ME 151, ¶ 8, 128 A.3d 648 ("We first evaluate the plain language of the [town's] ordinance provisions in light of the entire [ordinance] scheme . . . [and i]f the meaning of the statute or ordinance is clear, we need not look beyond the words themselves to interpret the provision according to that plain meaning" (quotations and citations omitted)); *Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bridgton*, 2009 ME 64, ¶ 12, 974 A.2d 893 ("When interpreting an ordinance, we look first to the plain meaning of the language in the ordinance and give any undefined terms their common and generally accepted meaning unless the context clearly indicates otherwise").

Here, the Bylaw's reference to the "prevailing side" provides the contextual clue necessary to discern the plain meaning of the term "passed." This reference to the "prevailing side" confirms that Bylaws Section 17 applies to a vote that has occurred regardless of whether the moving or opposing side prevailed. *See Home Builders Ass'n of Maine, Inc. v. Town of Eliot*, 2000 ME 82, ¶ 7, 750 A.2d 566 ("it is well established that [n]othing in a statute may be treated as surplusage if a

reasonable construction supplying meaning and force is otherwise possible" (quotations and citation omitted)). Accordingly, by the Applicant's own admission, Bylaws Section 17 requires that whenever a vote has occurred, the vote may be reconsidered only if a member of the prevailing side so moves. Here, no such motion was made by a member of the prevailing side. (A. 131.) Accordingly, the outcome of the March 28 vote must stand.

III. The Town and Applicant Ignore the Policy Implications of Their Position.

The requirement in Bylaws Section 17 that the Board may reconsider a prior vote only if a member who voted for the prevailing side makes a motion for reconsideration has an apparent and important policy purpose. It ensures the finality of outcomes, and enables judicial review, by preventing a defeated side from exploiting reconsideration votes to impose delay. The "tyranny" of the prevailing side that the Town and Applicant decry is the very purpose of Bylaws Section 17: to bring finality.[2] (Town Br. 11; Applicant Br. 17.) Indeed, the Bylaws support this finality principle by limiting reconsideration votes to "the same meeting, or at the very next succeeding meeting." (A. 51.) The inclusion of this limitation

[2] The Town argues that application of Bylaws Section 17 would somehow permit a single member to "cripple" the Board and leave applicants "in limbo, without final decision capable of appeal." (Town Br. 11-12). But the opposite is true: a failed application immediately is susceptible to judicial review unless a member who voted with the prevailing side by opposing the application successfully moves for reconsideration.

demonstrates that the purpose of this provision is to ensure the finality of outcomes.[3] Permitting failed applications to evade finality, as the Town and Applicant urge, undermines this purpose. Moreover, the Town's Land Use and Development Code and Bylaws ameliorate the Applicant's and Town's concerns about antimajoritarian rule because the Code and Bylaws require a quorum of at least four members for the Board to meet. (A. 28, 49). Accordingly, the plain language of Bylaws Section 17 promotes an important policy purpose by preventing a defeated side from exploiting reconsideration votes to evade finality.

IV. Newson's Notice of Prior Meetings Is Irrelevant; What Matters Is His Lack of Notice of the April 11th Meeting.

The Town and Applicant contend that the Board complied with due process and fundamental procedure fairness because Mr. Newson received notice of the March 28 meeting and prior meetings, and his public comment was included in the March 28 meeting packet. (Town Br. 12-16; Applicant Br. 23-30). This, however, does not excuse the Board's subsequent failure to notice Mr. Newson of its intent to

[3] The finality principle also is well ensconced in case law. For instance, municipal boards generally should not rehear and revote substantially similar applications on the same issue. *See Silsby*, 501 A.2d at 1295 (noting that renewed consideration of an application generally is inappropriate "unless a substantial change of conditions [has] occurred or other considerations materially affecting the merits of the subject matter [have] intervened between the first application and the subsequent application"); *Lentine v. Town of St. George*, 599 A.2d 76, 78 n.4 (Me. 1991) (noting that only when a subsequent "application [is] substantially different from the first application" does administrative res judicata not bar a board from hearing the subsequent application).

reconsider the Application at the April 11 meeting or to consider his public comment.

Rather, members of the public who oppose a project are entitled to be heard. *See Duffy v. Town of Berwick*, 2013 ME 105, ¶ 15, 82 A.3d 148. For abutters, this entitlement is a bedrock principle. *C.f. Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 7, 746 A.2d 368 ("Because of the abutter's proximate location, a minor adverse consequence affecting the party's property, pecuniary or personal rights is all that is required for the abutting landowner to have standing"); *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 12, 974 A.2d 903 ("An abutter generally has standing to participate in . . . local administrative decision-making regarding zoning and land use issues").

Further, in holding a reconsideration vote, boards "must comply with "'statutory and constitutional law.'" *Lane v. Town of Millinocket*, No. CIV. A. AP-01-35, 2002 WL 2014977, at *7 (Me. Super. May 20, 2002) (quoting *Jackson v. Town of Kennebunk*, 530 A.2d 717, 717-718 (Me.1987)). Such compliance requires providing notice of the upcoming vote to abutters, giving those abutters an opportunity to be heard and to have their comments considered, and adhering to a board's own procedural rules. *See, e.g.*, *Town of Wiscasset v. Bd. of Env't Prot.*, 471 A.2d 1045, 1047-1049 (Me. 1984) (reconsideration vote satisfied due process and "any similar concept of procedural fairness" because agency gave prior notice of its

reconsideration vote, gave notice of the process it would follow, conducted a full hearing on the merits, and did not violate any of its own procedural rules); *Jackson*, 530 A.2d at 717-718 (no violation of due process where after the failure of the application, the applicant modified the proposal, interested parties were given an opportunity to comment, and the board then proceeded to reconsider the application and did not violate any of its own procedural rules); *Jadd, LLC v. Inhabitants of the Town of Old Orchard Beach*, No. AP-09-024, 2010 WL 3218038, at *1 (Me. Super. Apr. 14, 2010) (finding no "fundamental unfairness" where the interested party was "present and able to participate" in the reconsideration vote and the board did not violate any of its own rules).

In each of the above-cited cases, the courts upheld the boards' reconsideration votes because the boards did not violate any of their own rules and the interested parties had notice of, and opportunity to comment on, the reconsideration proceedings. Conversely, here, the Board violated the procedures it prescribed in Bylaws Section 17, and, while it gave Mr. Newson notice of the prior meetings, it never noticed him of the April 11 reconsideration vote. Contrary to the Town's argument, the Board's vote to "continue review to the next available meeting," was not an indication that it intended to reconsider and revote the failed Application. (Town Br. 12; A. 101).

Moreover, the Board failed to include Mr. Newson's earlier public comment in the April 11 meeting materials, further depriving Mr. Newson of his opportunity to be heard. (*See* A. 136-137.) The Town contends that "there is nothing that requires the Board to have public comments in all future packets relating to the same application." (Town Br. 14). But failure to include Mr. Newson's comment in the subsequent reconsideration hearing, particularly where the makeup of the quorum had changed (A. 101, 131), is tantamount to having never considered his comment at all. Thus, regardless of any notice of earlier meetings, the Board failed to conform to the standards of due process and fundamental procedural fairness outlined in *Town of Wiscasset*, *Jackson*, and *Jadd*, depriving Mr. Newson of his basic right as an abutter to have his concerns over the impacts on his property heard.[4]

CONCLUSION

For all the foregoing reasons, Plaintiff / Appellant David Newson respectfully requests that this Court reverse the April 11, 2024 decision of the Town of Kittery Planning Board.

[4] The Applicant also argues that the April 11 vote was not merely a reconsideration vote, but instead a "dual" motion to reconsider the boundary line extension and to approve the final Application. (Applicant Br. 18-20.) But approval of the boundary line extension was a necessary condition for approval of the final Application (*see* A. 90, 101), and a failure to notice Mr. Newson of a vote on the final Application does not somehow cure the Board's procedural errors with respect to the boundary line extension vote.

Dated: March 19, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Zachary B. Brandwein, hereby certify that on this 19th day of March, 2025, I served two copies of the foregoing Plaintiff / Appellant David Newson's Reply Brief on Defendant / Appellee Town of Kittery and Party-in-Interest IDC 5 LLC below by electronic mail and first class mail, postage-prepaid:

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