

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2184CV00360

NEW ENGLAND CANNABIS CORPORATION, INC.,

PLAINTIFF,

vs.

MARK FORTUNE, MEMBER, CITY OF BOSTON ZONING BOARD OF APPEALS, & OTHERS,¹

DEFENDANT.

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

The plaintiff, New England Cannabis Corporation, Inc. (“NECC”) appeals from the decision of the City of Boston Zoning Board of Appeals (“ZBA” or “the Board”) denying NECC’s application for a conditional use permit for a marijuana dispensary at 204 North Beacon Street in the Brighton section of Boston (“the Property”). NECC contends that the ZBA’s decision to deny the conditional use permit was legally untenable and must be vacated. The defendants respond that the deference due to the Board’s interpretation of its own ordinance compels affirmance of its decision denying the permit. Alternatively, the Board argues that, if I find that its decision was legally untenable, I must remand the matter to the Board for further hearing. Because I conclude that NECC has established that the Board’s decision was legally untenable, it is **VACATED**. Because I further conclude that the Board offered no evidence at trial

¹ Christine Araujo, Mark Erlich, Kerry Walsh Logue, Tyrone Kindell, Jr., Edward Deveau, Joseph Ruggiero, Konstantino S. Ligirs, Jeanne Pinado, Eric Robinson, and Hansy Barraza, members of the City of Boston Zoning Board of Appeals, and the City of Boston Zoning Board of Appeals (“ZBA”).

warranting a remand for further proceedings, the matter is **REMANDED** to the ZBA, which is **ORDERED** to issue NECC a conditional use permit for its proposed retail cannabis establishment.

PROCEDURAL HISTORY

Sometime before July 30, 2018, NECC applied to the City of Boston for a license to operate a cannabis dispensary at 204 North Beacon Street in the Brighton section of Boston (“the Property”). On July 30, 2018, NECC received a refusal letter from the Inspectional Services Department. Three days later, on September 2, 2018, NECC appealed to the ZBA for a conditional use permit to operate a marijuana dispensary.

A Host Community Agreement (“HCA”) between the City of Boston and NECC was a predicate to the issuance of a conditional use permit. To secure an HCA, NECC was required to persuade the Boston Cannabis Board (“BCB”) that the Property was a suitable location for a cannabis dispensary. The BCB evaluates applications for cannabis dispensary licenses under the City of Boston’s Ordinance Establishing Equitable Regulation of the Cannabis Industry in the City of Boston (“Ordinance,” Exhibit 1²) and its own Rules and Regulations.

On September 16, 2020, the BCB voted to grant NECC a Retail Cannabis Dispensary License (“License”), provided that NECC engage dedicated security personnel to be on site during peak hours of operation. Two weeks later, on September 30, 2020, NECC entered into an HCA with the City of Boston to operate as a recreational marijuana retailer.

On October 1, 2020, NECC – having been declined approval by the Inspectional Services Department – appealed to the ZBA for a conditional use permit to operate a retail cannabis establishment. On November 17, 2020, the ZBA conducted a public hearing on NECC’s application. On January 22, 2021, the ZBA voted to dismiss NECC’s appeal of the Building Commissioner’s decision to deny NECC a conditional use permit – based,

² References to exhibits are to trial exhibits.

apparently, on the rejection of that application by the Inspectional Services Department. The ZBA concluded that NECC

did not advance sufficient reasons to satisfy the Board that all the conditions under which the Board may grant a conditional use permit pursuant to Article 51, Section 51-16, and Article 6, Section 6-3 of the Zoning Code have been met, nor to cause the Board to come to a conclusion that this is a case where the specific site is an appropriate location for such use, nor that the use will not adversely affect the neighborhood, nor that the use will not cause serious hazard to vehicles or pedestrians, nor that no nuisance will be created by the use, nor that adequate and appropriate facilities will be provided for the proper operation of the use.

Dec. at 1.³ The above-quoted portion of the Board's Decision is the entire substantive portion of the document. The Board neither found facts nor cited evidence regarding its conclusions set out above.

NECC filed this civil action on February 16, 2021. The Complaint asks the court to annul the decision of the ZBA and enter an order requiring it to issue the conditional use permit sought by NECC.

The case was tried before me over three days – from January 8 through January 10, 2024. The plaintiff called five witnesses: Kenneth Stevens, the principal owner of NECC, Ronald Lipof, a consultant in the cannabis industry, Michael P. Ross, an attorney specializing in the cannabis industry, Jasmin Winn, the manager of the Boston Cannabis Board ("BCB"), and William J. Scully, a transportation engineer. The defendants did not present testimony, relying instead on the submission of the administrative record (Exhibit 20A) and a compact disc ("CD") containing a recording of the hearing before the ZBA on November 17, 2020 (Exhibit 20B).

The parties submitted proposed findings of fact and rulings of law in February 2024.

³ References to the two-page Decision of the Board on the Appeal of 204 N. Beacon St., Ward 22 ("Decision"), which is appended to the plaintiff's Complaint (Paper No. 1) as Exhibit A, are denoted by the abbreviation, "Dec."

FINDINGS OF FACT⁴

A. The Property and the Proposed Cannabis Dispensary

The Property, located at 204 N. Beacon Street in Brighton, formerly was a dine-in restaurant. Facts at 1, ¶ 1. The property itself is approximately 6,560 square feet, and the building on the property is approximately 3,680 square feet. *Id.* at 1, ¶ 3. The Property is in the Neighborhood Shopping Subdistrict, Stip. at 1, ¶ 2, of the Allston/Brighton zoning district. Facts at 1, ¶ 4. This subdistrict allows retail cannabis establishments by conditional use permit. Stip. at 1, ¶ 2. The Property is bounded on three sides by commercial subdistricts – shopping subdistricts to the east and west and a Local Industrial Subdistrict to the north. Ross Test.⁵ On its southern side, the Property abuts a residential district. *Id.* NECC’s proposal for a cannabis dispensary incorporates the use of screens, such as plantings and a fence, between the Property and the residential district. *Id.* The Property is not located within one-half mile of any other permitted retail cannabis establishment. Stip. at 1, ¶ 2. Examples of businesses allowed by right in the Neighborhood Shopping Subdistrict where the Property is located are: banks, bars, bowling alleys, billiard parlors, private clubs serving alcohol, restaurants, take-out restaurants, restaurants with live entertainment not operating after 10:30 PM, funeral homes, and retail businesses, including liquor stores. Ross Test.

NECC proposes to operate a four-thousand-square-foot dispensary. Ross Test. NECC submitted a Security and Operations Plan with its application to the ZBA for a conditional use permit. Facts at 5, ¶ 33. It proposed to adopt a number of safety and

⁴ The facts are largely undisputed. References to the parties’ statement of Agreed Facts (“Facts,” Trial Exhibit 9) are denoted by the word, “Facts,” followed by page and paragraph citations. References to the parties’ Joint Stipulation of Undisputed Facts (“Stipulation” or “Stipulated Facts,” Trial Exhibit 10) are denoted by the abbreviation, “Stip.,” followed by page and paragraph citations. Factual findings not based on the parties’ agreed or stipulated facts are drawn from the testimony and exhibits.

⁵ Citations to witness testimony is designated by the witness’s surname, followed by the abbreviation, “Test.”

security measures – many of which are required by Massachusetts regulations – to insure the safety and security of its storage and sales of marijuana. Facts at 5, ¶ 34 – 6, ¶ 40.

B. Plaintiff’s Application for a Conditional Use Permit

Sometime before July 30, 2018, the plaintiff applied to the City of Boston for a Retail Cannabis Dispensary License (“License”) to operate a cannabis dispensary on the site. *Id.* at 3, ¶ 19. Initially, the Inspectional Services Department denied the application by letter dated July 30, 2018. *Id.*

As a result, on August 2, 2018, the plaintiff applied to the ZBA for a conditional use permit to operate the dispensary. *Id.* As part of this process, NECC sought to enter into an HCA with the City of Boston. *Id.* at 3, ¶ 17. This process required review by the BCB. *Id.* at 2, ¶ 7. Under the Ordinance, the BCB reviews whether an application for a license to operate a marijuana dispensary “would be appropriate in time, place, and manner and adhere[] to the spirit of the Ordinance.” *Id.* at 3, ¶ 13. In making this determination, the BCB is obligated – under the Ordinance – to consider: (1) the applicant’s diversity and inclusion plan; (2) its employment plan; (3) community feedback and public support; (4) the safety and security requirements of operating a dispensary in the location; and (5) the applicant’s parking and transportation plan. *Id.* at 2, ¶ 8. The BCB review process included a public community meeting. *Stip.* at 1, ¶ 1.

On September 16, 2020, the BCB voted to grant NECC a License, provided that NECC provide dedicated security personnel during peak operating hours.⁶ Facts at 3, ¶ 14. Two weeks later, on September 30, 2020, NECC entered into an HCA with the City of Boston to operate as a recreational marijuana retailer at the Property. *Id.* at 3, ¶ 17. On November 17, 2020, the ZBA conducted a public hearing on NECC’s application for a License. *Id.* at 4, ¶ 21.

⁶ In a letter dated November 16, 2020, the BCB reiterated its conclusion that NECC’s proposed marijuana dispensary “would be appropriate in time, place, and manner and adhered to the spirit of the Ordinance.” *Id.* at 3, ¶ 13.

NECC submitted several materials to the ZBA in connection with its application. *Id.* at 5, ¶¶ 31, 33; 9, ¶¶ 65-70; 10, ¶ 71. Among these were: a parking analysis prepared by Green International Affiliates, Inc. (“Green International”), *id.* at 5, ¶ 31; a Security and Operations Plan, *id.* at 5, ¶ 33; and a Traffic Impact and Access Study, also prepared by Green International, *id.* at 9, ¶¶ 65-70; 10, ¶ 71. Area residents submitted 598 letters to the ZBA supporting NECC’s application. *Id.* at 4, ¶ 25. At the hearing on November 17, 2020, several neighborhood residents spoke against NECC’s application. Ex. 20B. At the November 17, 2020, hearing, the ZBA voted unanimously to deny NECC’s application. *Id.* at 5, ¶ 26; Stip. at 7, ¶ 29. The Board issued its written decision dated January 22, 2021, and entered with the Inspectional Services Department on January 29, 2021.

C. Subsidiary Facts

According to the Boston Cannabis Board’s map of Host Community Agreements, the Property is within under two miles of seven retail cannabis establishments in the Allston/Brighton neighborhood, all of which received approval from both the BCB and ZBA to operate. Stip. at 2, ¶ 4. Additionally, the ZBA has previously issued zoning relief to retail cannabis establishments that, like the Property, are located in zoning subdistricts that directly abut residential neighborhoods. On at least one occasion, the ZBA issued zoning relief to a retail cannabis establishment within a residential district. *Id.* at 4, ¶ 12.

The traffic analysis submitted by Green International Affiliates to the ZBA concluded “that the proposed development project does not impact the surrounding roadways and intersections within the study area.” *Id.* at 4-5, ¶ 15. The analysis further concluded that “[t]here is no change in operational conditions (Level of Service) between No-Build and Build conditions under any peak hour for the study area intersections.” *Id.* at 5, ¶ 15.

RULINGS OF LAW

The plaintiff appeals, under the Enabling Act (§ 11 of Chapter 665 of the Acts of 1956), which established the ZBA as an administrative Board of the City of Boston charged with enforcing the City's Zoning Code. Section 11 of the Enabling Act provides for an appeal to the Superior Court of a decision of the ZBA. Enabling Act, § 11. The reviewing "court shall hear all pertinent evidence and determine the facts, and upon the facts as so determined annul such decision if found to exceed the authority of such board or make such other decree as justice and equity may require." *Id.*

Review of decisions under the Enabling Act is informed by decisions interpreting G. L. c. 40A, § 17, the judicial review provision of the Commonwealth's statewide zoning statute. See *Epstein v. Board of Appeal of Boston*, 77 Mass. App. Ct. 752, 756 (2010) ("The accumulated decisional law under c. 40, § 17, applies to questions under the enabling act."), citing *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427, 432-433 (1949); *Sherrill House, Inc. v. Board of Appeal of Boston*, 19 Mass. App. Ct. 274, 275 (1985); *McGee v. Board of Appeal of Boston*, 62 Mass. App. Ct. 930, 930 (2004). The reviewing court determines the relevant facts *de novo*. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica ("Wendy's")*, 454 Mass. 374, 381 (2009). See also *Mellendick v. Zoning Bd. of Appeals of Edgartown*, 69 Mass. App. Ct. 852, 857 (2007). That said, "[t]he reasonable construction that a zoning board of appeals gives to the by-laws it is charged with implementing is entitled to deference." *Mellendick*, 69 Mass. App. Ct. at 857. A court's review of the Board's interpretation of its own Ordinance is "highly deferential," *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003). Thus, a board's decision "'cannot be disturbed unless it is based on a legally untenable ground' or is based on an 'unreasonable, whimsical, capricious or arbitrary' exercise of its judgment in applying land use regulation to the facts as found by the judge." *Wendy's*, 454 Mass. at 381-382, quoting, *inter alia*, *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 487 (1999).

Under Section 6-3 of the Boston Zoning Code, the ZBA is required to grant a conditional use permit if it makes certain findings. Facts at 4, ¶ 22. As relevant in this case, those findings are:⁷

- (a) The specific site is an appropriate location for such use . . . ;
- (b) The use will not adversely affect the neighborhood;
- (c) There will be no serious hazard to vehicles or pedestrians from the use;
- (d) No nuisance will be created by the use; and
- (e) Adequate and appropriate facilities will be provided for the proper operation of the use

Id. In its Decision, the ZBA made no findings of fact. Instead, it simply restated the relevant legal standard and concluded that NECC had not satisfied the Board that its application satisfied each element of that standard.

I. Deference Due The Board's Decision

The Board's position at trial is, in essence, that the deference due its interpretation of the zoning bylaw it was constituted to apply compels a judgment for the defendant. NECC counters that no deference is due to a decision in which no facts are found and that merely recites – in conclusory fashion – that the applicant has failed to demonstrate that its application satisfies the standard for issuance of a conditional use permit. Indeed, NECC contends that the absence of any factual findings by the Board is, standing alone, sufficient grounds to enter judgment for the plaintiff. See *Wendy's*, 454 Mass. at 387 (“[W]here no such reasons are given [for the Board's decision] . . . a reviewing court cannot be satisfied that a board's actions are not arbitrary, a pretext, or otherwise impermissible.”) Although it is true that a court's review of the ZBA's interpretation of its zoning bylaw is “highly deferential,” *Britton*, 59 Mass. App. Ct. at 73, the court must nonetheless determine whether the board's decision is supported by a “rational view of the facts.” *Id.* at 74-75.

⁷ The parties have agreed that only the first clause of subsection (a) of Section 6-3 of the Boston Zoning Code applies to this case. Facts at 4, ¶ 23. Similarly, the parties have agreed that subsections (f) and (g) of Section 6-3 do not apply to this case. *Id.* at 4, ¶ 24.

In this case, the ZBA essentially asks this court to rubber-stamp its decision in the name of deference. As discussed in Section II, *infra*, the ZBA found no facts – and, indeed, presented little evidentiary support for its decision. In contrast, NECC has presented substantial evidence that its application for a License meets the criteria required for issuance of a conditional use permit. As a colleague on the Land Court has observed, “deference is not abdication; the board’s judgment must have a sound factual basis.” *Mohr v. Stroh*, 2013 WL 1946186 at *3 (2013) (Mass. Land Court May 10, 2013) (Long, J.) I conclude that, under the authority of *Wendy’s*, the Board’s failure to find any facts or cite any evidence is sufficient to warrant judgment for NECC. Even if this were not the case, however, I would conclude that – whatever deference is due to an entirely conclusory decision of the ZBA that an application does not satisfy the applicable criteria – it is insufficient, in this case, to justify the Board’s decision.

II. Application of the Facts to the Legal Standard

In evaluating an application for a conditional use permit, the Board is required to consider whether the proposed use of the site is appropriate for the location, will not adversely affect the neighborhood, will not create a hazard to motorists or pedestrians, will not create a nuisance, and will be accompanied by adequate and appropriate facilities for the use. Boston Zoning Code, § 6-3. See Facts at 4, § 22. At trial, NECC presented persuasive evidence that its application meets each of these criteria. The Board neither presented evidence to the contrary nor provided substantial reasons to question NECC’s evidence. Instead, the Board essentially relied on the deference due the Board’s decision to overcome NECC’s positions on each of these issues. In addition to the discussion in Section I, *supra*, of the degree of deference due a decision unsupported by factual finding, a review of the plaintiff’s evidence demonstrates why the Board’s position is unpersuasive.

A. Appropriateness of the Site

Absent findings, it is impossible to know how the Board concluded that NECC failed to establish that the Property is an appropriate site for a retail cannabis establishment. Indeed, the evidence presented by NECC supplies a sound basis for the

conclusion that it is. At the outset, NECC notes that the BCB, applying its criteria, concluded that the Property is “appropriate in time, place and manner and adhered to the Spirit of the Ordinance.” Facts at 3, ¶ 16. Although it is, of course, true that the criteria considered by the BCB are different than those the ZBA is charged with evaluating, it is certainly significant that the BCB gave its approval to the project.

Moreover, NECC points out – also persuasively – that the Property is within two miles of seven other retail cannabis establishments that have received approval from both the ZBA and the BCB.⁸ It is located in a neighborhood shopping district that allows for retail cannabis establishments by conditional use permit. Although it abuts a residential district, NECC points out that the ZBA has issued zoning relief to retail cannabis establishments that abut residential neighborhoods and, in one case, to an applicant for a license to operate a retail cannabis establishment within a residential neighborhood. Further, NECC contends – and the Board does not dispute – that none of the Ordinance’s categorical prohibitions (for example, location within one-half mile of a school) apply to NECC’s application. In light of this evidence – and absent any finding by the Board as to how NECC has failed to establish that the Property is an appropriate site for a retail cannabis establishment – I find that NECC has met its burden of establishing that the site is appropriate for such an establishment.

⁸ The Board counters that, in at least some of these cases, the applicants sought variances rather than conditional use permits. The Board further contends that, because the standard for obtaining a variance is different from that applicable to applications for conditional use permits, it is inappropriate to consider cases in which the zoning relief obtained was a variance. The Board, however, does not: (1) identify which cases involved variances, as opposed to conditional use permits; (2) set out the standard required to obtain a variance; (3) explain how the two standards are materially different in the context of this case; or (4) explain why it is inappropriate to compare the Board’s decisions on applications for variances as opposed to conditional use permits. Particularly in the absence of any findings by the Board as to why the Property is not an appropriate site for a commercial cannabis establishment, the Board’s argument on this point is unpersuasive.

B. Adverse Effect on the Neighborhood

The Board has not identified any adverse effect that the proposed retail cannabis dispensary will have on the neighborhood where the property is located. NECC introduced persuasive testimony – from both Ross and Winn – that indicated that concerns about unlawful purchases of cannabis by minors or increased crime resulting from the establishment of a cannabis dispensary are unfounded. Ross Test. and Winn Test. NECC also introduced testimony from Ross that regulations of the Cannabis Control Commission regarding the operation of retail cannabis establishments are designed to eliminate nuisances and other adverse impacts on the neighborhoods where they are located. Ross Test.

This testimony – particularly absent any findings supporting the Board’s decision to the contrary – persuades me that NECC has established that its retail cannabis establishment will not have an adverse impact on the neighborhood. There is certainly no evidence in the record suggesting that any such adverse impact is any greater than any such adverse impact caused by the proposed or existing cannabis establishments within two miles of the proposed site of NECC’s proposed dispensary to which the ZBA has extended zoning relief.

C. Impact on Motorists or Pedestrians

In order to address this criteria for the issuance of a conditional use permit, NECC submitted detailed traffic and parking studies. See Trial Exhibits 18, 19. The traffic study addressed both the motor vehicle and pedestrian traffic generated by NECC’s proposed cannabis dispensary.

The traffic study (Exhibit 19) considered existing traffic conditions, safety conditions including sight conditions, and future conditions. Ex. 19. Its overall conclusion is that NECC’s proposed cannabis dispensary does not substantially alter traffic patterns in the area of the Property. Ex. 19 at 1. The report indicates that the crash rate at the nearby intersection of Market Street and North Market Street is well below the average crash rate in the district. Ex. 19 at 10, Table 2. The same is true of the crash rate for the intersection

of the Property's driveway with North Beacon Street.⁹ *Id.* According to Scully, the Property has adequate and safe sight lines. Scully Test.

The traffic study also concluded that there would be only very small differences in traffic levels between the proposed cannabis dispensary and the pre-existing use of the Property as an eat-in restaurant. Ex. 19 at 14, Table 3. It further concluded that the proposed dispensary will result in "essentially no change" in traffic levels at the intersection of Market Street and North Beacon Street or at other nearby intersections. Ex. 19 at 19, Table 6. Further, Ms. Winn testified that there is no evidence of any increase in pedestrian accidents resulting from the establishment of cannabis dispensaries. Winn Test.

The parking study concluded that the existing twenty-four parking spaces that the proposed marijuana dispensary would share with another retail business on site would be more than sufficient to accommodate the anticipated vehicle traffic to the dispensary. Ex. 18. It also concluded that there does not appear to be any existing problem with automobiles cutting through the Property's parking lot to avoid the intersection at Market Street and North Beacon Street. Scully Test. It also notes that the NECC proposal includes the assignment of a parking lot attendant, which might help dissuade the practice. *Id.* The study further found that other options, such as adding signs and/or speed bumps or narrowing the curb cut are also available to dissuade drivers from cutting through the parking lot. *Id.* In any event, there is no reason to conclude that the proposed dispensary would add to whatever cut-through problem presently exists. *Id.*

Finally, NECC points out that the ZBA has issued zoning relief to other proposed dispensaries that have less parking than is available on the Property. Ross Test. NECC also points out that the Property has access to both on-street and off-site public parking options. Ex. 18.

⁹ There was no crash rate data for the intersection of the Property's other driveway on Market Street, indicating that there were no crashes reported at that intersection. Scully Test.

For its part, the Board contests none of these claims. Given the unrebutted conclusions of the detailed traffic and parking studies, I conclude that NECC has established that its proposed dispensary would have no adverse impact on traffic and parking in the area.

D. Nuisance

The City of Boston's Zoning Code does not define the word *nuisance* as used in the code. In the absence of such a definition, courts presume that the drafters intended to use the standard legal definition of the term. *Williams v. Board of Apps. of Norwell*, 490 Mass. 684, 695 (2022), (“[W]here statute does not define word, reviewing court gives word its usual and accepted meaning, which may be derived from dictionaries and other ‘sources presumably known to the statute’s enactors.’”), quoting *Commonwealth v. Keefner*, 461 Mass. 407, 513 n.3 (2012). “The Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of” appellate courts. *Commonwealth v. Montalvo*, 486 Mass. 535, 542 (2020). Thus, I look to the legal definition of a nuisance for the applicable definition.

“A public nuisance is an unreasonable interference with a right common to the general public.” *P.J. Keating Co. v. Acushnet*, 104 Mass. App. Ct. 65, 71 (2024), quoting, *inter alia*, *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court*, 448 Mass. 15, 34 (2006). In evaluating whether conduct constitutes a public nuisance, a court may consider “[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.” *Id.*, quoting *Sullivan*, 448 Mass. at 34.

As with the other criteria that an applicant for a conditional use permit must satisfy, the Board has not identified any respect in which NECC's proposed cannabis dispensary would adversely affect the public. In contrast, NECC presented testimony and other evidence – discussed in Sections A-C, *supra*, and D, *infra* – that strongly suggests that the proposed dispensary would not have a negative impact on the neighborhood, much less constitute a nuisance in the legal sense.

E. The Adequacy of the Proposed Dispensary's Facilities

The Board has not suggested any respect in which the facilities of the proposed dispensary are inadequate. Indeed, both the parking study (Exhibit 19) and NECC's detailed proposals regarding the layout of the dispensary and the safety and security features incorporated in the proposal establish that the dispensary's facilities are at least adequate to manage the flow of patrons and ensure the security of its stock of cannabis projects.

In the end, therefore, I find myself in a position recently described eloquently by a colleague. In *Holland Brands v. City of Boston Zoning Bd. of Apps.*, 2184CV01793 at 10 (Mass. Super. Ct. 2022 (Cowin, J.)), the Court observed that:

the dearth of evidence supporting the Board's decision, combined with the fact that the Board has allowed marijuana dispensaries at other locations that are similarly close to residential neighborhoods, and/or lack the amenities of the . . . [proposed] site (such as ample parking, space for queuing, and screening), lead inexorably to the conclusion that the Board's decision that the . . . [proposed] site is inappropriate for a dispensary is a pretext, and that the real reason for denial is not related to the purpose of the zoning law.

I, likewise, find that the Board's decision in this case is unsupported by any factual finding or citation to evidence pertinent to the purposes of the Ordinance. The extensive evidence submitted by NECC demonstrates that its proposal satisfies the criteria for issuance of a conditional use permit for a commercial cannabis establishment and that, therefore, the Board's conclusory rejection of NECC's application "is based on a legally untenable ground' or is based on an 'unreasonable, whimsical, capricious or arbitrary' exercise of its judgment in applying land use regulation to the facts as found by the judge." *Wendy's*, 454 Mass. at 381-382, quoting, *inter alia*, *Roberts*, 429 Mass. at 487.

III. The Board's Proposal for Remand

Having offered no testimony at trial, having not suggested – either at trial or in its written submissions – how the administrative record (including the recording of the hearing) refutes NECC's evidence, and having failed to identify how NECC's evidence fails to establish the sufficiency of its application, the defendants now suggest that the

appropriate remedy is to remand the matter to the Board for further consideration. I discern no basis for remand in this case.

The Board cites several cases in support of its argument for remand. Most significant among them is *Titcomb v. Board of Apps. of Sandwich*, 64 Mass. App. Ct. 725 (2005). In that case, in a footnote, the Appeals Court observed that “[a] reviewing judge’s authority [under G. L. c. 40, § 17], if he or she disagrees with the board’s findings and if the problem could be remedied, would be limited to remanding the application to the board for further consideration in light of the judge’s opinion.” *Titcomb*, 64 Mass. App. Ct. at 731 n.6 (citations omitted).

Titcomb is not controlling in this case, however, for two reasons. First, in this case, the Board made no findings. Merely restating the criteria set out in the Ordinance for issuance of a conditional use permit and then stating, as a conclusion, that NECC’s application did not satisfy those criteria is not finding facts. See *Wendy’s*, 454 Mass. at 386 (“When a decision contains conclusions that do nothing more than repeat regulatory phrases, and are unsupported by any facts in the record, we are constrained to conclude that the decision is ‘unreasonable, whimsical, capricious or arbitrary,’ and therefore invalid.”) (citations omitted). See *Meadowbrooke Day Care Ctr., Inc. v. Board of Assessors of Lowell*, 374 Mass. 509, 512 n. 3 (1978) (“[T]he board is not helped by the suggestion that a general or conclusory finding can import a finding of all facts necessary to support it which are consistent with the specific facts actually found.”) Second, the *Titcomb* Court made the observation cited by the Board in the context of noting that “[a] zoning board of appeals is entitled to ‘all rational presumptions in favor of its interpretation of its own by-law, [provided] there [is] a rational relation between its decision and the purpose of the regulations it is charged with enforcing.’” *Id.* at 730 (citations omitted) (brackets in original; emphasis supplied). As I have concluded, however, that the record demonstrates no rational relation between the ZBA’s decision on NECC’s application for a conditional use permit and the purposes of the Ordinance, there is no basis for a remand.

For the same reasons that the SJC in *Wendy’s* affirmed the trial judge’s decision not to remand that matter to the Board of Appeal of Billerica, I conclude that remand in this

case would be futile. As the ZBA concedes, Section 11 of the Enabling Act, like G. L. c. 40A, § 17, permits the reviewing court to “make such other decree as justice and equity may require.” In this case, as in *Wendy’s*, “remand to [the] . . . Board would be futile [as] . . . it is clear that remand would postpone an inevitable result.” 454 Mass. at 382-383. In this case, in which I have found that the Board’s decision was “‘based on a legally untenable ground’ [and was] . . . based on an ‘unreasonable, whimsical, capricious or arbitrary’ exercise of its judgment in applying land use regulation to the facts as found by the judge,” *Wendy’s*, 454 Mass. at 381, quoting, *inter alia*, *Roberts*, 429 Mass. at 487, remand would be futile.

CONCLUSION & ORDER

For the foregoing reasons, the Decision of the Zoning Board of Appeals is **ANULLED**. A judgment shall enter **ORDERING** the ZBA to issue NECC the conditional use permit for which it applied to operate a retail cannabis establishment at 204 North Beacon Street in the Brighton section of Boston.

/s/ David A. Deakin

David A. Deakin
Associate Justice

Dated: June 19, 2024