STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. BCD-24-316

January 29, 2025

ANN CANNON, et al.,

Petitioners/Appellants,

vs.

TOWN OF MOUNT DESERT,

Respondent/Appellee

and

MOUNT DESERT 365

Party-in-Interest/Appellee

On appeal from the Business and Consumer Docket
Docket No. BCD-AP-24-2

PETITIONERS'/APPELLANTS' REPLY BRIEF

Grady R. Burns, Bar No. 6605

Attorney for Petitioners-Appellants

BERNSTEIN SHUR
100 Middle Street;
P.O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
grburns@bernsteinshur.com

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Respondent Town of Mount Desert ("Town") and Party-in-Interest Mount Desert 365 ("MD 365" and together the "Appellees") have raised some issues in their briefs that have not already been directly addressed by the Appellants Ann Cannon, Marc Cannon, Melissa Cannon Guzy, Lamont Harris, Stuart Janney, Joseph Ryerson, and Lynne Wheat (the "Appellants") in their Principal Brief. This Reply Brief addresses those issues.

I. Appellees mischaracterize the appropriate standard of review for this Court's resolution of the question of whether the proposed development creates new countable lots.

In its Brief, MD 365 characterizes the Court's review of the Planning Board's conclusion that the proposed development at issue would not create new "lots" under the Town's ordinances as one for abuse of discretion. (Party-in-Interest's Br. 15). This is incorrect. Because the issue is one that turns entirely on the terms of the Town's ordinances on one hand, and the terms of the Declaration of Condominium submitted by MD 365 on the other, the issue boils down to a question of law that must be reviewed by the Court de novo. *See Logan v, City of Biddeford*, 2006 ME 102, ¶ 8, 905 A.2d 293 (noting interpretation of ordinance is question of law reviewed de novo); *Richardson v. Winthrop Sch. Dep't*, 2009 ME 109, ¶ 9, 983 A.2d 400 (noting construction of unambiguous contract terms is question of law reviewed

de novo). The Planning Board's conclusions regarding this issue are not subject to deference—and certainly not deference in the manner of the "clear and manifest abuse" standard generally applied to matters within the discretion of a decisionmaker. *See C.N. Brown v. Gillen*, 569 A.2d 1206, 1209 (Me. 1990).

Rather, the Court reviews these legal matters afresh. Upon such review the Court will find that the unambiguous language of the Declaration reveals that "units" include the land beneath the residential structures in addition to the structures themselves; the Declaration distinguishes between the "unit" and the "improvements" placed upon the unit, and the Court's analysis need go no farther to determine that individual interests in land were intended to be conveyed. Within the Declaration, each owner would be explicitly responsible for "insuring their unit *and* the improvements thereupon, *as well as* any Limited Common Elements assigned to that Unit." (A. 227) (emphasis added).

Reading "Unit" as including *only* the "improvements" as MD 365 would have the Court do creates the absurd construction that the Declaration is describing improvements placed on top of other improvements. Much like a putting "a hat on a hat," MD 365's proposed interpretation of the Declaration creates unnecessary surplusage and must be rejected as an axiomatic matter of contract interpretation. *See Perry v. Buswell*, 94 A. 483, 484 (Me. 1915) ("The cardinal rule for the interpretation of deeds and other written instruments is the expressed intention of the

parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances."). The Unit *is* distinguishable in the contract from the improvements placed upon the Unit, which in turn means that the bounds of the Unit are delimited by the site—the land—itself.

MD 365 and a supportive Planning Board both understood during the Planning Board's review process that an admission that the proposed development created individual lots would trigger the applicability of Town's road standards, and in turn jeopardize the Project's approval. (*See* R. 258). It therefore makes perfect sense that the Appellees would assert then and now that the proposed development would create no new lots, and construe the Planning Board's conclusion on this issue as one to be afforded a high level of deference. These self-serving assertions do not carry the day, however, because the Court's de novo examination here must begin with the Declaration of Condominium itself, which is the document that sets out the rights of prospective owners. Because the Declaration unambiguously establishes the creation of separate legal lots as that term is defined in the Town's ordinances, the question must be resolved in favor of the Appellants, notwithstanding the Planning Board's conclusion below or MD 365's extrinsic assertions to the contrary.

II. A holding that the condominium form of ownership can shield developers from meeting otherwise applicable land use obligations would elevate form over substance and promote gamesmanship to avoid local land use regulations.

In their Brief, MD 365 contends that adopting Appellants' legal arguments would require "the Court to determine that *all* multi-building condominium developments on a single lot or parcel result in the creation of individual lots under the buildings." (Party-in-Interest's Br. 21). The Court need not reach this issue because the Declaration of Condominium unambiguously includes rights in the land as part of the "units" to be parceled off to prospective buyers, meeting the Town's ordinances' definition of a lot. However, the Appellants view the "horrible" hypothetical MD 365 presents here as promoting a virtue rather than a vice. A different outcome would allow developers to circumvent local land use regulation by gaming the development's ownership structure, resulting in an inconsistent application of those regulations against otherwise identical projects.

By adopting Appellees' construction, no subdivision of any size, number of houses, or number of individual homeowners need contain a subdivision road in the Town of Mount Desert in accordance with the Town's road standards so long as the developer adopts a condominium scheme whereby the underlying land remains at least nominally a common element. One can imagine a multi-acre development with hundreds of individually-owned homes, each set on the "common" land; one could

even imagine spacious lawns in front of each unit/house that are declared limited common elements remaining technical property of the condominium association but enjoyed by that homeowner alone. By the Appellees' interpretation, such a development would need not meet the Street Design and Construction Standards contained in Section 5.14.1 of the Town's Subdivision Ordinance ("SO") because no new lots were created, notwithstanding that this hypothetical "driveway" would serve hundreds of individually-owned detached homes. Such absurd results would be replicated for any local regulation whose application was derived from a certain number of "lots" rather than "dwelling units" being created. If one can parcel off as many fee ownership interests they wish so long as the underlying land remains commonly held, regulations defined by numbers of lots would lose all practical meaning.

This elevation of form over substance defies common sense and belies the diverse array of ways a lot may be created for subdivision or other purposes. Contrary to Appellees' arguments, (*see, e.g.*, Party-in-Interest's Br. 18; Respondent's Br. 7), a splitting off of property interests sufficient to create a lot does not require a particular form of ownership—for half a century Maine has defined a subdivision as including "the division of a tract or parcel of land into 3 or more lots . . . whether the division is accomplished by sale, lease, development, buildings or otherwise[,]" 30-A M.R.S. § 4401(4); *see Town of Arundel v. Swain*, 374 A.2d 317,

319 (Me. 1977) (citing same statutory language). To create a lot there thus need be only a sufficient splitting of interests on the ground, which can be accomplished in any number of ways—including by "development, buildings, or otherwise."

The statute was later amended to clarify that even when there is no splitting off of *any* interests on the ground a development will still be subject to subdivision review if it proposes the creation of three or more dwelling units, regardless of whether the construction of those units would create lots. *See* 30-A M.R.S. § 4401(4). Section 4401(4) as-amended establishes that on one hand a subdivision is created when a single parcel is divided into three or more lots—which may be accomplished in any manner that results in the creation of interests of "sufficient dignity" (i.e., some type of property interest) on the face of the earth; and on the other hand that even when no new splitting off of interests occurs, the mere placement of three or more dwelling units in any configuration on a property also results in a subdivision. The latter test depends only on the mechanical creation of dwelling units, and not in the creation of new unique property interests on the face of the earth.

These changes were precipitated by *Town of York v. Cragin*, 541 A.2d 932 (Me. 1988), which held that the original subdivision definition would not include single-building, multi-unit developments because the division of a single structure into multiple dwelling units would not result in the creation of new lots—at that time

a requirement for the creation of a subdivision. The amendments to the statute after *Cragin* thus solved the policy problems that that case revealed, but they did not abrogate the Court's prior holdings about the nature of "lots" and when they are created. One can easily imagine on one hand a multi-unit apartment building that creates new leasehold ownership interests but does not meet *Cragin*'s multi-structure mandate; and on the other imagine a single owner that places three detached accessory dwelling units on their property but retains full ownership of all of the structures such that no splitting off of property interests occurs. The post-*Cragin* revisions to the subdivision statute addressed both of these functional division scenarios where no new lots would be created, but this Project is not a functional division of the land—there is an *actual* splitting-off of property interests on the face of the earth even if one accepts *arguendo* that the Declaration bounds the ownership interests to just above the dirt.[1]

Appellees dramatically overstate *Cragin*'s holding that the division of *a single structure* does not create new lots to argue here that no new lots are created when (in their view) the proposed conveyance perpetually divides the property among numerous detached, individually owned dwellings, so long as the dirt underneath

[1] It is worth noting that the Subdivision Ordinance itself specifies that "non-land subdivisions" refer to "multiple units within a single structure." (SO, § 5.7.3; A. 90-91). MD 365 notes this ordinance provision in its Brief as support for its argument that the proposed subdivision is "developmental," but does not explain why the project should be treated as a "non-land" subdivision when that clause clearly does not describe the character of the project. (*See* Party-in-Interest's Br. 17).

these otherwise completely separate homes remains under common ownership. (Party-in-Interest's Br. 19-21). This is precisely the argument that the Superior Court rejected in *Windward Development LLC v. Cummings Road Business Park Association*, No. CV-04-63, 2005 WL 3678051, *3, 9-10 (Me. Super. Ct. Nov. 14, 2005),[2] and this Court's clarification that developers cannot avoid otherwise applicable land use regulations by hiding behind the condominium form of development would do no more than place condo developments on the same regulatory footing as any other form of development that resulted in the creation of any number of separately owned and separately sited houses.

III. The Town's ordinances demonstrate a legislative intent to balance its housing needs with explicit regulatory guardrails limiting density and preserving open space.

Finally, the Town spends a substantial amount of space in its Brief expounding on the housing shortage facing that community to tee up the uncontroversial point that workforce housing subdivisions are permitted in the Village Residential 1 ("VR1") zone. (Respondent's Br.9-12). It is equally uncontroversial that the Town subjects these subdivisions to specific regulations that are intended to balance the six purposes enumerated for those developments,

[2] The *Windward Development LLC* court made its holding notwithstanding that the plaintiff developer in that case asserted that "all of the [underlying] land will continue to be owned in common, as a unitary lot." Plaintiff's Trial Brief, *Windward Development LLC v. Cummings Road Business Park Association*, 2004 WL 5612910 (Me. Super Ct., Oct. 27, 2004).

including not only to create "housing that is more economically viable for the year-round working community[,]" but also to create developments that will result in "permanently protected open space and recreational areas" and "an environment in harmony with surrounding development and/or the traditional community characteristics." (SO § 5.16.1; A. 96). The Subdivision Ordinance creates a framework whereby these potentially conflicting purposes can be balanced and given substance. Those provisions are found in Section 5.16 of that ordinance. Much as the Town's Brief simply ignored the purpose statements in Section 5.16.1 that do not support its narrative, the Town willfully ignored the open space requirements contained in Section 5.16 that explicitly apply to workforce housing subdivisions. This willful blindness is the crux of the present appeal.

By selectively applying the ordinances that were applicable to this project, the Town approved a development that fails to strike the balance the ordinances require between growth and preservation. In doing so, the Town committed reversible error.

Conclusion

For these reasons, in addition to those raised in their Principal Brief, Appellants respectfully reiterate their request the Court grant their appeal and remand the matter back to the Planning Board with findings consistent with the legal determination that: (1) the Application proposes the creation of three or more lots pursuant to the Town's ordinances and state law; (2) the Town's Road Standards

contained in Section 5.14 of the Subdivision Ordinance are applicable to the Application; (3) the applicable workforce housing density bonus for the Project is 5 units; (4) the open space standards contained in Section 5.16.2.3 are applicable to the Application; and (5) the Planning Board may only impose a condition of approval in lieu of a performance guarantee if such condition requires the completion of all improvements—including the road—prior to the receipt of applicable permits and the sale of lots.

Dated at Portland, Maine, this 29th day of January 2025.

/s/ Grady R. Burns

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Grady R. Burns, Bar No. 6605

BERNSTEIN SHUR
100 Middle Street; P.O. Box 9729
Portland, Maine 04014-5029
207-774-1200
grburns@bernsteinshur.com

Attorney for Petitioners/Appellants Ann Cannon, Marc Cannon, Melissa Cannon Guzy, Lamont Harris, Stuart Janney, Joseph Ryerson, and Lynne Wheat