STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. BCD-24-316

November 22, 2024

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' BRIEF

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Summary of the Argument

Respondent/Appellee Town of Mount Desert erroneously approved a residential subdivision sought by Party-in-Interest/Appellee Mount Desert 365. Because that approval was based on several errors of law and abuses of discretion, this Court must grant the present appeal and remand the matter back to the Town of Mount Desert Planning Board for findings and decision consistent with this Court's correction of these errors.

Statement of Facts and Procedural History

The present appeal arises from an October 24, 2023 decision (the "Decision") by Respondent/Appellee Town of Mount Desert (the "Town") Planning Board (the "Planning Board" or "Board") approving an application for a residential subdivision development (the "Application") located on a currently single-family residential parcel at 5 Manchester Road, Map 23, Lot 25 (the "Property"). (Appendix ("A.") 75). The Property sits on the corner of Manchester Road and Neighborhood Road, in an area of Northeast Harbor comprising the base of a small peninsula known as Smallidge Point. (Administrative Record ("R.") 5, 6). Currently comprised of a historic single-family residence, a detached garage, and largely-wooded open space, the four corners of the Property occupy approximately .9 acres, which includes along its southern end an unpaved road which accesses both the Property and a number of abutters and for which abutters have deeded access. (R. 2, 34-40).

The Property sits in the Village Residential I ("VR1") District, (R. 18). Surrounding the Property are properties which are likewise predominantly single-family homes. (R. 41). Among the individuals residing in close proximity to the Property are the named Petitioners/Appellants Ann Cannon, Marc Cannon, Melissa Cannon Guzy, Lamont Harris, Stuart Janney, Joseph Ryerson, and Lynne Wheat (collectively the "Petitioners" or "Appellants"). (*See* R. 47-49). The Appellants include Joseph Ryerson, who is a direct abutter to the Property. *Id.*

The applicant, Party-in-Interest Mount Desert 365 ("MD 365"), proposed to construct a six-residence development comprised of four separate structures with separate building envelopes, with two duplexes and two-single family homes (the "Project"). (R. 16). The properties would be sold to prospective buyers based on certain income eligibility criteria. (R. 16). These residences would be located on what was currently wooded space, with one of the houses remaining on the footprint of the existing residence. (R. 191). From the outset, MD 365 maintained that notwithstanding the proposed creation of six individually owned residences across four separate structures on the Property, the "proposed subdivision will not create any new lots." (R. 19). Rather, in MD 365's formulation, the subdivision would be created as a condominium, whereby the residences would be marketed as "units," and the spaces outside of those areas designated as "units" would be held as common space. (*See* R. 51-56). Furthermore, the Project was proposed as a "workforce

housing subdivision," for which the Town's Subdivision Ordinance ("SO") confers specific density and design standards. (R. 23). The Application finally proposed that these six "units" would be served by a single "driveway" which would be called Heel Way, which would empty out onto Neighborhood Road. (R. 51). As proposed, "Heel Way" would penetrate through over half of the length of the Property, branching out into individual parking spots to each of the proposed "units" and dead-ending at the southern edge of the buildable area of the property. (R. 78).

Throughout the Planning Board proceedings, the Appellants raised a number of core concerns about the nature of the Project. Fundamental to those concerns was MD 365's contention notwithstanding the nature of the proposed development as a series of detached dwellings under separate ownership, that the development did not constitute a subdivision of land resulting in the creation of new lots for the purpose of subdivision review. (R. 253-263). While MD 365 conceded that subdivision review was nevertheless required, it maintained that the "units" did not create legal lots, resulting in a sporadic applicability of the Town's subdivision standards against the project.

Following the Planning Board's issuance of the Decision, the Appellants timely appealed to the Hancock County Superior Court, bringing forth the substantive issues on appeal pursuant to M.R. Civ. P. 80B. (A. 27-35). MD 365 applied for transfer to the Business and Consumer Docket on December 5, 2023, and

the matter was duly transferred. (A. 3-4). The court below denied the Appellants' appeal, issuing its Order on June 24, 2024. (A. 14-26). The Appellants timely filed their Notice of Appeal to this Court, and the present appeal followed.

Statement of Issues Presented

1. Did the Planning Board err in concluding that the Project would not create new countable lots on the Property for the purpose of determining the applicability of the Town's road standards to the project?
2. Did the Planning Board err in concluding that the Project would meet the Town's applicable density and open space requirements?
3. Did the Planning Board err or abuse its discretion by failing to require an adequate performance guarantee for the Project?

Standard of Review

As the parties bringing forward the appeal, the Appellants bear the burden of persuasion. *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024 (citing *Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179). Where the Planning Board made the operative decision, *see Stewart v. Town of Sedgewick*, 2000 ME 157, ¶¶ 4, 8 n. 4, 757 A.2d 773, the Court reviews the Planning Board's decision directly for "error of law, abuse of discretion or findings not supported by

substantial evidence in the record[,]" *Aydelott*, 2010 ME 25, ¶ 10, 990 A.2d 1024 (quoting *Yates v. Town of Southwest Harbor*, 2001 ME 2, ¶ 10, 763 A.2d 1168).

"Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion[,]" *Phiah v. Town of Fayette*, 2005 ME 20, ¶ 8, 866 A.2d 863 (quoting *Forbes v. Town of Southwest Harbor*, 2001 ME 9, ¶ 6, 763 A.2d 504), and while the reviewing court may not substitute its judgment for that of the Planning Board, *see id.* (citing *Perrin v. Town of Kittery*, 591 A.2d 861, 863 (Me. 1991)), the Court may not "make any findings other than those found explicitly or implicitly by the [Planning] Board," *id.*

On the other hand, the Court's review of "[t]he interpretation of a local ordinance is a question of law, and [the reviewing court] review[s] that determination de novo." *Id*. (quoting *Logan v. City of Biddeford*, 2006 ME 102, ¶ 8, 905 A.2d 293). In interpreting an ordinance, the Court must "look first to the plain meaning of its language, and if the meaning of the ordinance is clear, [the Court] need not look beyond the words themselves." *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶ 12, 153 A.3d 113 (internal quotations omitted). "Interpreting a statute's plain language involves considering its subject matter and purposes, and the consequences of a certain interpretation." *Id.* ¶ 17 (citing *Sabina v. JPMorgan Chase Bank, N.A.*, 2016 ME 141, ¶ 6, 148 A.3d 284). An unambiguous ordinance is interpreted based on its plain language "unless the result is illogical or absurd[,]"

Portland Regional Chamber of Commerce v. City of Portland, 2021 ME 34, ¶ 23, 253 A.3d 586 (internal quotation omitted), and the reviewing court must "construe words in an ordinance according to their plain meaning and construe undefined or ambiguous terms reasonably with regard to both the objects sought to be obtained and to the general structure of the ordinance as a whole[,]" *id.* ¶ 24 (internal quotation omitted). An ordinance is ambiguous "when it can reasonably be interpreted in more than one way." *Id.* (internal quotation omitted). If the language is of an ordinance is ambiguous, the reviewing court must "consider the statute's meaning in light of its legislative history and other indicia of legislative intent." *Wawenock, LLC v. Department of Transportation*, 2018 ME 83, ¶ 7, 187 A.3d 609 (internal quotation omitted).

Argument

A. The Planning Board erred in concluding that the Project would not create new countable lots on the Property for the purpose of determining the applicability of the Town's road standards to the project.

The Pursuant to the Town's Land Use Zoning Ordinance ("LUZO"), the Town's "Street Design and Construction Standards" (the "Road Standards") apply to "roads"—any paved vehicular access way serving three or more "lots."[1] The

[1] The LUZO defines a "road" as "[a] route or track consisting of a bed of exposed mineral soil, gravel, asphalt, or other surfacing material constructed for or created by the repeated passage of motorized vehicles, excluding a driveway as defined[,]" and then a "driveway" as "[a] route or track consisting of a bed of

Town's Subdivision Ordinance ("Subdivision Ordinance" or "SO") does not directly define a "lot," but does incorporate the LUZO by reference. SO, § 2.2.3; (A.80). The LUZO in turn provides a definition of a "lot." Pursuant to the LUZO, a "lot" is defined as

> A parcel of land described on a deed, plot, or similar legal document, and is all contiguous land within the same ownership, provided that lands located on opposite sides of a public or private road shall be considered each a separate parcel or tract of land unless such road was established by the owner of land on both sides of the road thereof after September 22, 1971.

LUZO, § 8; (A. 208-09).

The Planning Board concluded as a matter of law that the Road Standards were "not applicable" to the Project "because the proposed project is only a single lot condominium style of developmental subdivision so there is no street or road to be designed or constructed to serve three or more lots." (A. 66). However, the Project would create six discreet, identifiable, and individual sets of property interests on the face of the earth. Each of these properties would be served by a single accessway. As described below, the Planning Board erred in declaring the Project merely "developmental" and holding throughout their review that no new "lots" would be created by the Project because the unambiguous language of MD 365's proposed Declaration of Condominium describes conveying "units" that meet the ordinances'

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exposed mineral soil, gravel, asphalt, or other surfacing material constructed for or created by the repeated passage of motorized vehicles, serving not more than two lots." *Id.*; (A. 204, 214). Any "road" must be constructed according to the specifications of the Road Standards, which are substantially more robust than the standards for driveways. *Compare* SO, § 5.14; (A. 94-95); *with* LUZO § 6B.6; (A. 151).

definition of lots—and in turn the Planning Board erroneously failed to impose the Road Standards to the proposed Heel Way.

Under the LUZO definition above, the Planning Board was required to find that new lots were being created if the proposed "units" described in MD 365's Declaration of Condominium would each result in the creation of:

1. A parcel of contiguous land;
2. Described on a legal document, including a plot;
3. Within the same ownership.

LUZO, § 8, (A. 208).

The Declaration, like any declaration of rights in a condominium development, is a contract. *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 10, 878 A.2d 504 (citation omitted). When the Court is called upon to review a factfinder's interpretation of the language of a contract, the Court must first consider whether the contract's language is ambiguous. *Dahlem v. City of Saco*, 2024 ME 32, ¶ 22, 314 A.3d 280. "Whether contract language is ambiguous, meaning 'reasonably susceptible to different interpretations,' is a question of law" reviewed de novo by the Court. *Id.* (quoting *Richardson v. Winthrop Sch. Dep't*, 2009 ME 109, ¶ 9, 983 A.2d 400). "When a contract is unambiguous, its construction is also a question of law, and [courts] interpret the contract according to the plain meaning of its language, avoiding any interpretation that renders a provision meaningless." *Id.*

(internal quotations and citation omitted). It is only if the Court determines that a contract is ambiguous that "proper interpretation becomes a question of fact for the factfinder" afforded any deference at the level of appellate review. *Id.* (internal quotations and citation omitted).

The Court therefore must first determine whether the Declaration's language defining the boundaries of the units is reasonably susceptible to multiple interpretations. In its Declaration of Condominium, MD 365 states that the units "shall be bounded as depicted on the [subdivision] Plat and shall include *everything* located on the site including any buildings and/or structures and all other improvements now or hereafter located within said bounds." Declaration of Condominium. (A. 222) (emphasis added).[2] It is only those spaces "which do not lie within the boundaries of a 'Unit'" which are designated in the Declaration as common elements. *Id.*, (A. 223). The language sets a clear framework that anything and everything inside of a depicted unit boundary is part of the unit, and anything outside of a depicted boundary is a common element. The final Plat Plan for the Project likewise depicts the unit boundaries two-dimensionally on the face of the earth, and provides no additional language delimiting the unit boundaries apart from

[2] The Superior Court below noted that "[n]othing in the provision itself specifically states that a unit includes the land on which it sits." (A. 20). This is literally true but belied by the fact that the description includes *everything* on this site, which by extension necessarily includes the land located on the site. The Superior Court below compounded this misapprehension by treating the issue of whether the units divided an interest in land as a question of fact entitled to deference by the Planning Board. (A. 20).

the lines depicted on the Plan. (A. 236). There is no language in either the Declaration or the Plan that otherwise conflict with one another, and each support an interpretation that the whatever is located within the depicted boundary line is to be included in the ownership of the unit—effectively conveying a fee interest in anything upon the land within the boundary.

Any alternative interpretation that the description of the unit boundaries could be read to only include, for example, the interior space of a certain dwelling unit cannot be reasonably supported by the expansive language in the Declaration. Such an intent could have been easily evinced by using language similar to that found in the condominium declaration at issue in *Villas by the Sea Owners Association v. Garrity*, 2000 ME 48, 748 A.2d 457, in which that condominium's unit boundaries were specifically limited to the "interior unfinished surfaces of the floors, ceilings and walls separating the units from common areas or from other units." *Id.* ¶ 5. No such language exists here. (*See* A. 220). Rather, the present description simply includes "everything on the site" within the two-dimensional unit boundary. *Id.* This language, while broad, is not ambiguous.

Finally, the mere fact that the condominium form of ownership is contemplated does not affect the analysis here. The Maine Condominium Act, 33 M.R.S. §§ 1601-101 *et seq.*, which the Declaration notes governs the agreement, (A. 220), does not limit the scope of the real estate interests which may be conveyed in

a condominium form of ownership, but rather freely permits the conveyance of interests "in, over or under land, including structures, fixtures and other improvements and interest which by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance." 33 M.R.S. § 1601-103(21); 33 M.R.S. § 1601-105(a). This broad language permits a multitude of types and shades of ownership and therefore can be read in perfect harmony with the plain language contained in the Declaration.

Because the subject contract language is unambiguous, the Court reviews the language directly as a question of law to determine whether the proposed divisions would create lots for the purposes of the Town's ordinances. *Richardson*, 2009 ME 109, ¶ 9, 983 A.2d 400. There is no question that the units would be described on a legal document and would convey an interest to a distinct owner; leaving the operative question of whether the units would convey "parcels of land." *See* LUZO, § 8; (A. 208).

The ownership of an interest of an area of land bounded on the face of the earth and any improvements—singular or plural, in existence or hypothetical—on that discrete piece of earth *ipso facto* represents an interest in land itself. The Declaration itself differentiates between the "Unit" and the "improvements thereupon," (A. 227), and the application materials submitted by MD 365 do not even contain plans for the structures proposed to be built, much less integrate such

plans into the descriptions of the boundaries in the submitted Declaration. The prospective unit owner is therefore not entitled to any specific structure, improvement, or living space, but is rather entitled to possession of everything bounded within the lines of the site. The "Unit," which per its description is only bounded as provided on the Plat, contains no vertical boundaries.

The upshot is that the Declaration of Condominium and proposed Subdivision Plan placed in front of the Planning Board by MD 365 unambiguously depicts discreet, identifiable, contiguous property interests upon the land with no described vertical bounds that squarely fall within the definition of "lots" under the Town's own ordinances. The proposal to create a total of six such lots within the meaning of the Town's ordinances, therefore means that the proposed Heel Way serves three or more lots, in turn meaning Heel Way is a road that must have been subjected to review as such.

This conclusion comports with decades of Maine caselaw parsing the definition of a "lot" for subdivision purposes. Much like the Town's definition, this Court has long held that a new lot is created when there is a sufficient "splitting off of an interest in land and the creation . . . of an interest in another." *Town of Orrington v. Pease*, 660 A.2d 919, 922 (Me. 1995) (quoting *Arundel v. Swain*, 374 A.2d 317, 320 (Me. 1977)). While this Court has held that "the division of *a structure*, as distinguished from the division of a parcel of land" would not lead to

the creation of new "lots" for subdivision purposes, *Town of York v. Cragin*, 541 A.2d 932, 934 (Me. 1988) (emphasis added), the Court in *Cragin* noted that a splitting of a sufficient legal interest could be achieved through a multitude of means, including "sale, lease, development, buildings, or otherwise" so long as such division resulted in a division "on the ground," *id.* Indeed, in *Planning Board of Town of Naples v. Michaud*, 444 A.2d 40 (Me. 1982), the Court found that a scheme analogous to a "condominium conversion" whereby a campground owner sought to convey a series of common undivided interests in the campground which included a fee interest and the right to use a designated campsite constituted the creation of separate "lots" for subdivision purposes where the "purchasers acquired the perpetual right to exclusive use of particular campsites and were therefore persons whom the subdivision law was meant to protect." *Id.* at 42. There, as here, the purchasers would receive a fee ownership interest which was identifiable on the face of the earth, which, in turn, resulted in a sufficient splitting of interests to create "lots." *Id*. at 42-44.

Conversely, the division at issue in *Cragin* provides a useful counterexample. That case involved the separation of a *single* pre-existing structure into a ten-unit condominium. *Cragin*, 541 A.2d. at 933. In that case, the Court distinguished a division of that single structure into 10 units from a splitting off of interests across the property, holding that the former did not create sufficient changes to the interests

"on the ground" to constitute the splitting off of new lots. *Id.* at 934. The Court reasoned that while a division of a lot could occur though a myriad of ways including "sale, lease, development, buildings or otherwise," a division of "land," i.e., "an interest on the ground" was nevertheless required for the creation of a subdivision "lot." *Id.* at 934. The key distinction in *Cragin*, therefore, was not the use of a particular form of ownership structure, *see Cragin*, 541 A.2d 932 at 935-36 (Glassman, J., concurring in part and dissenting in part) (noting "[a] condominium involves the creation of separate fee simple interests in identifiable units of real estate"), but rather whether that splitting of interests made use of a single pre-existing structure to house multiple units that could not be demarcated on the ground.

Lower courts reviewing the *Michaud* and *Cragin* case lines have elaborated on this last point. In the Superior Court case *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), one of the issues before that court was whether a proposed creation of eight condominium "development pods" on a single parcel, each with a separate building envelope, would constitute the creation of separate "lots." In that case, as here, that court noted that "[e]ach unit could be mortgaged, taxed, sold or otherwise transferred independently of all other units in the project. Each unit could also be separately foreclosed upon." *Id.* at 3. The court in that case held that new lots would indeed be created where, as here, notwithstanding the

condominium form of ownership, the development would result in the "creation of identifiable parcels whose boundaries can be determined on the face of the earth." *Id.* at *9. That court distinguished the condominium development at issue there with that in *Cragin* on its facts, noting that *Cragin*:

> is distinguishable because in *Cragin* a single building was involved. The Law Court expressly held that the division of a structure, *as opposed to the division of a parcel of land into lots*, does not result in the creation of a subdivision) . . . The *Pease* and *Michaud* cases, in contrast, support the conclusion that what [plaintiff] contemplates here is the division of his parcel into separate lots.

Id. at *10 (internal quotations and citations omitted) (emphasis in original).[3]

The result of both a plain reading of the Town's ordinances and analogous case law is therefore that the Project, which proposes six separate divisions of identifiable pieces of land from a single parcel must constitute a division of "lots" as defined in the Town's ordinances. This division, by its own terms, unambiguously triggers review of the Project under the standards imposed by section 5.14 of the Subdivision Ordinance, which are required when, as here, the proposed accessway "from a public road or highway is required to serve 3 or more lots." SO, § 5.14, (A.

[3] It should be noted that 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). Even to the extent that MD 365 or the Town were to assert that the "unit" owners do not have ground rights under the current Declaration, and/or MD 365 later changed its Declaration to specify that the "unit" owner interests did not include the land below the building envelopes, the fact remains that the unit boundaries would be determinable on the face of the earth, and the analysis here, as in that case, would remain unchanged. The Court need not reach this question, however, because the Declaration of Condominium placed before the Planning Board unambiguously includes everything within the boundaries depicted on the Plan.

236). The failure, then, of the Planning Board to subject Heel Way to the Road Standards contained in SO § 5.14 was an error of law requiring remand to the Planning Board for review of these standards in relation to the Project.[4] Given that as proposed the Project would require six households in four separate building envelopes to utilize Heel Way, the practical outcome whereby MD 365 would be required to construct Heel Way to a standard that would allow safe ingress and egress from and onto the existing public way, as well as sufficient room for guests, emergency services, and other public services, makes perfect sense.

B. The Planning Board erred in concluding that the Project would meet the Town's applicable density and open space requirements.

The Town permitted MD 365 to increase the permitted density of the Property by utilizing a density bonus contained in the Subdivision Ordinance for "workforce subdivisions." However, the formulation adopted by the Town on one hand permitted a 100% increase in the permitted density on the Property where at most a 75% increase was permitted under the Subdivision Ordinance for a Workforce Subdivision, and on the other completely ignored a companion requirement that such the subdivision retain perpetually protected open space in proportion to the increased

[4] While the Project plainly cannot meet these standards, which include among other things the construction of a cul-de-sac and a minimum right-of-way of 50 feet, because the Planning Board failed to make any findings at all as to the Project's conformity with these standards, remand for additional findings is the proper procedural course here. *See Fissmer v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 17, 170 A.3d 797; *see also Appletree Cottage LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 169 A.3d 396; *Christian Fellowship & Renewal Ctr v. Town of Limington*, 2001 ME 16, ¶¶ 12-18, 769 A.2d 834.

lot density as a compromise for the nearly unlimited reduction in minimum lot size permitted by the Workforce Subdivision standards.

1. *The Planning Board erred in permitting a total of six dwellings to be located on the Property where at most five should have been permitted.*

Section 5, subsection 16 of the Subdivision Ordinance sets out two forms of development entitled to greater flexibility in the location and density of dwelling units: "Cluster Subdivisions" and "Workforce Subdivisions." SO, § 5.16, (A. 93-98). Section 5.16 first sets out a purpose for the subsection, declaring that:

> The purpose of the cluster and workforce subdivision standards is to encourage new concepts of cluster housing with maximum variations of design that will result in:
>
> 1. permanently protected open space and recreational areas;
>
> 2. a pattern of development that preserves the natural beauty of the site, trees, outstanding natural topography, wildlife habitat, and to prevent soil erosions;
>
> 3. an environment in harmony with surrounding development and/or the traditional community characteristics;
>
> 4. a more creatively designed development than would be possible through strict application of other sections of the Land Use Zoning Ordinance;
>
> 5. uses of land that promote efficiency in public services and facilities with small networks of utilities and streets;
>
> 6. development of housing that is more economically viable for the year-round working community.

Id. (A. 95-96).

The Subdivision Ordinance then permits each subdivision type to be located in any zone apart from shoreland, conservation, and resource protection areas. SO, § 5.16.2.1; (A. 236).

Cluster and Workforce subdivisions are then subjected to special density regulations under the Subdivision Ordinance which are made in reference to the general density requirements imposed by the LUZO. SO, § 5.16.2.2.a; (A. 236). Section 5.16.2.2.a first states that "[t]he density of the subdivision shall not exceed the density requirements of the zone in which it is located." *Id.* (A. 236). The paragraph then states the following:

> Density is calculated by applying the minimum lot sizes to the developable portion of the parcel (i.e. not wetland or steep slope). For the purpose of calculating density for subdivisions that include Workforce Housing, the area of the entire parcel may be used (i.e. including wetland and steep slopes). Workforce Housing will use the entire parcel.

Id. (A. 236).

The paragraph lastly states that "[d]ensity requirements and density bonuses for workforce housing shall be calculated from lines (A) and (B) of the minimum lot size standards in the LUZO Dimensional Requirements Section 3.6." *Id.* (A. 236). However, the current LUZO does not contain a Section 3.6, with the dimensional requirements table instead found in Section 3.5 of the LUZO. (A. 124). Lines (A) and (B) of the minimum lot size table for each district establish minimum lot sizes for general developments with or without sewer connections, with the minimum lot

size for in the VR1 district for a lot served by a public sewer listed 10,000 square feet. (A. 124).

Finally, Section 5.16.2.2.c of the Subdivision Ordinance sets out a density bonus for qualified Workforce Subdivisions:

> 1. An increase of up to 50% in the gross residential density of the site may be permitted if at least 50% of the residential units are conveyed with covenants designed to benefit the creation and preservation of workforce housing.
>
> 2. An increase of up to 75% in the gross residential density of the site may be permitted if 100% of the residential units are conveyed with covenants designed to benefit the creation and preservation of workforce housing.

(A. 97).

The above language in Section 5.16.2.2 attempts to set out a means for determining how dense a development may be permitted on a given parcel for a Workforce Subdivision. First, Section 5.16.2.2.a directs the reader to the density permitted in the relevant zone, here the VR1. Next, the ordinance sets out a ratio—the minimum lot size for the district to either the "developable portion of the parcel," or, for Workforce Subdivisions, the "entire parcel." (A. 96). This calculation is, in effect, a simple minimum lot size calculation: the base density would always be equal to the number of lots permitted on the parent parcel under the general district standards in the LUZO. Then, a multiplier of either 50% or 75% is applied to that base density to determine how many workforce housing units are permitted in the

subdivision.[5] Here, the Planning Board determined that the applicable lot size of the Property is .9 acres, or 39,204 square feet. (A. 35). The applicable minimum lot size is 10,000 square feet, so 39,204 is divided by 10,000. The gross residential density of the total parcel is therefore 3 units—this is the number of dwelling units that would be permitted without the application of a density bonus. The fractional remainder from dividing 39,204 by 10,000 would not be rounded up in calculating the permitted density of the parcel, as the minimum lot size for four parcels would be 40,000 square feet. LUZO § 3.5; (A. 124). The gross residential density of 3 dwelling units multiplied by the 75% density bonus yields 2 additional units, or 5 total units. This calculation may be illustrated as:

39,204 (lot area) / 10,000 (minimum lot size) = 3.9204 = 3 dwelling units permitted

3 units X 1.75 (density bonus) = 5.25 = 5 workforce units permitted

This was not the result calculated by the Planning Board. Rather, in its decision, the Planning Board adopted MD 365's self-serving interpretation that misrepresents the base gross residential density of the underlying parcel, which, when carried through the rest of the calculations, results in an additional dwelling unit. Specifically, the Planning Board relied on the following calculation:

39,204 sf/ 10,000 sf (VR1 Min per LUO Section 3.5) = 3.9 units

[5] There is no dispute among the parties that the Project proposes 100% workforce housing, and therefore a 75% density bonus would be permitted under the Subdivision Ordinance.

[39,204 sf X .75 = 29,403 sf
29,403 sf/ 10,000 sf = 2.9 bonus units]

3.9 units + 2.9 units = 6.8 units

-OR-

39,204 sf X 1.75 = 68,607 sf
68,607 sf/ 10,000 sf = 6.86 units

(A.66).

Both methods of the Planning Board's calculations result in permitting 6 units, and both methods are incorrect as matters of law. First, as noted above, the maximum number of units permitted for a lot sized 39,204 square feet per Section 3.5 is 3 units and no more. It is incorrect that 3.9 units are permitted in the underlying lot, as anything more than 3 is prohibited by function of the minimum lot size—any lot greater than 30,000 square feet and less than 40,000 square feet may support up to 3 dwellings. Next, Section 5.16.2.2 of the Subdivision Ordinance requires that the bonus density be calculated by applying the bonus to the "gross residential density of the site," but the Planning Board's calculation does not calculate the bonus density based on the *gross density* of the site but rather the total *lot size* of the site, and then applies the minimum lot size to that new number to arrive at the bonus density calculation. (A. 68).

This difference in methodology results in a significant difference in the outcome—while the underlying property has a maximum density of 3 units, the

Planning Board applied a 75% multiplier that alchemically results in the allowance of 6 units, or 100% more than originally permitted. This basic math problem should be fatal to the Planning Board's conclusions. In its decision, the Planning Board noted that it relied in part on Section 5.7.3(2)[6] and 5.73(3) of the Subdivision Ordinance, the latter of which states that "[o]verall net density shall be determined by the total number of proposed dwelling units and the total acreage (including open spaces and recreational areas) within the subdivision." Setting aside that this section discusses "net" and not "gross residential" density, that section simply mandates what is obvious—that one determines density by applying the proposed number of units to the lot size. This is the method employed by the Appellants, and not the method employed by the Town and MD 365, who instead determined the applicable density by applying the lot size to the density bonus multiplier and then applied the minimum lot size to that fictitious lot. Because a total of at most 5 workforce housing units were permitted to be placed on the Property under the applicable Subdivision Ordinance standards and the Planning Board approved the construction of 6, the Planning Board's decision must be reversed.

[6] It is worth noting that Section 5.7.3(2) refers to "non-land subdivisions" as "multiple units within *a single structure*," (emphasis added), which only serves to emphasize the logical leaps that the Town and MD 365 had to make in approving this project—provisions that did not support the Town's motivated reasoning were simply selectively ignored. This Project facially does not meet the Subdivision Ordinance's definition of a "non-land subdivision" supplied in this section. (A. 90)

2. *The Planning Board erred in failing to apply the open space standards contained in Section 5.16.2.3.a of the Subdivision Ordinance to the Project.*

As noted above, the explicitly stated first purpose of both the Cluster Subdivision and Workforce Subdivision regimes is to "encourage new concepts of cluster housing with maximum variations of design that will result in . . . permanently protected open space and recreational areas." SO, § 5.16.1; (A. 95-96). To that end, Section 5.16 contains a standalone set of open space requirements applied in conjunction with the density bonus discussed above. SO, § 5.16.2.3, (A. 96-97). While these open space standards explicitly apply to Workforce Subdivisions, the Planning Board in its Decision ultimately determined by a vote of 4-0 that these standards did not apply to the Project, which was otherwise classified as a Workforce Subdivision. (A. 69). This in turn allowed MD 365 the benefit of the Workforce Housing density bonus without imposing the corresponding requirement that open space be retained in proportion to the increased density on the parent parcel, and results in reversable error.

In its decision, the Planning Board concluded that Section 5.16.2 was applicable to the project, and in turn concluded that the ordinance "requires that, for such workforce housing subdivisions, that permanently protected open space and recreational areas be set aside" for the Project. (A. 67). Nevertheless, the Planning Board went on to conclude that the operative section mandating open space for

workforce housing subdivisions, Section 5.16.2.3 of the Subdivision Ordinance, did not apply to the Project. (A. 69).

The manner that the Planning Board arrived at this conclusion was attenuated. First, the Planning Board made an initial determination that the proposed subdivision was a "Workforce" not a "Cluster" Subdivision. (A. 69). The Planning Board then zeroed in on the first sentence of Section 5.16.2.3 which begins: "Open Space requirements: The cluster subdivision must include open space that meets the following requirements . . . ." SO, § 5.16.2.3, (A. 97). Based on this clause ("The cluster subdivision must include . . .") the Planning Board determined that Section 5.16.2.3 in its entirety was inapplicable to the Project. (A. 69). This conclusion was erroneous.

Undefined or ambiguous terms must be construed "reasonably with regard to both the objects sought to be obtained and to the general structure of the ordinance as a whole." *Portland Regional Chamber of Commerce*, 2021 ME 34, ¶ 24, 253 A.3d 586. Here, "Cluster Subdivision," and "Workforce Subdivision" are not defined in the Town's ordinances, and the term "cluster" is variously capitalized and uncapitalized when it is used in the ordinances. The use of the uncapitalized "cluster subdivision" in Section 5.16.2.3 is thus ambiguous and susceptible to two interpretations: either (1) the clause is referring to Workforce and Cluster Subdivisions collectively as "cluster subdivisions"; or (2) the clause is referring to

Cluster Subdivisions, alone. The Planning Board affirmatively adopted the latter interpretation. (A. 69). A cursory examination of the surrounding language of the section and ordinance as a whole, along with a review of similar uses of this language, however, forecloses any other interpretation than that both Workforce and Cluster Subdivisions are intended to be covered in this section, and that the ordinance treats "Cluster" and "Workforce" subdivisions as types of "cluster" subdivisions.

First and most basically, the first subsection within Section 5.16.2.3 explicitly sets out an "Open Space requirement for Workforce Housing"—setting specific standards for how the amount of required open space in a Workforce Subdivision must be calculated. (A. 97). This would be nonsensical in a section that only applied to Cluster Subdivisions. This alone should have provided the Planning Board with a sufficient contextual clue that the section was applicable to the Application, which was explicitly presented as a Workforce Subdivision.

To avoid this result, the Planning Board adopted the position that there were, in effect, three types of special subdivisions in the Ordinance: Cluster Subdivisions, Workforce Subdivisions, and "Cluster-Workforce Subdivisions," with only the latter subject to the open space standards. *See* (A. 68-69). Because the Planning Board determined that the Project was not a "Cluster Subdivision," they bootstrapped this conclusion to hold that the Workforce Subdivision that was being considered was

not a type of "cluster" subdivision at all, and that therefore any standard that was applicable to a type of "cluster" subdivision was not applicable to this "non-cluster Workforce Subdivision." *See id.* However, this formulation belies the nature of Workforce Subdivisions, the basic appeal of which is that, like with a Cluster Subdivision, the minimum lot size is reduced, allowing for closer development within a subdivision than would otherwise be permitted under the LUZO. *See* LUZO, § 3.5; (A. 124).[7]

Indeed, as noted above, MD 365 relied upon the reduced lot size allocation to inform its calculation of how many units were permitted as part of the Project. The LUZO itself places both Workforce and Cluster subdivisions under the "cluster" banner, stating that "Minimum Lot Size for Cluster Subdivision and Workforce Housing development shall only apply to lots in a subdivision that is approved by the Planning Board *under the cluster development provisions*." LUZO, § 3.5 n. (k); (A. 127) (emphasis added).

[7] In the Superior Court's decision below, that court concluded that this reading effectively makes "workforce housing a subset of cluster subdivision," noting that cluster and workforce subdivisions serve different purposes. (A. 23). It is true that a workforce development serves a different purpose than a more general cluster development, but the Subdivision Ordinance states explicitly that it is the purpose of *both* the cluster *and* workforce developments to "encourage new concepts of cluster housing" that result in "permanently protected open space and recreational areas." (A. 95-96).

While workforce housing subdivisions do serve to promote workforce housing, they do so by utilizing the same methods as more general cluster developments—increasing the permitted density of development in exchange for the reservation of some quantum of dedicated open space. Far from "defeat[ing] the purpose of workforce housing," (A. 24), the Planning Board itself acknowledged that the reservation of open space is *required* for workforce subdivisions—it simply failed to follow through with the logical result of that conclusion when it became apparent that MD 365 had failed to meet the standard, (A. 67).

Had the Planning Board actually grappled with Section 5.16.2.3 and rendered a finding as to how much open space was required under that section there would then be a question as to whether the board accurately calculated the appropriate amount of open space required for the Project, but whereas the Planning Board sidestepped the question completely on the grounds of the section's applicability, the Planning Board in the first instance must make this determination. Because the Planning Board erred in concluding that Section 5.16.2.3 of the Subdivision Ordinance did not apply to the proposed Workforce Subdivision, remand would be required here to allow the Planning Board to apply Section 5.16.2.3 to the Project and make a finding as to whether sufficient open space has been set aside. *Christian Fellowship and Renewal Center*, 201 ME 16, ¶¶ 15-18, 769 A.2d 834.

C. The Planning Board erred and abused its discretion by failing to require an adequate performance guarantee for the Project.

Finally, the Subdivision Ordinance sets out a requirement that in approving a subdivision application, the Planning Board may require an applicant to provide a performance guarantee "in an amount sufficient to defray all expenses of the proposed improvements[,]" SO, § 5.12.1; (A. 92), or alternatively, the Planning Board may "waive the requirement of a performance bond and recommend a properly executed conditional agreement with the Town" which,

> if executed . . . shall provide that the Board may approve the Final Plan or any part thereof, on the condition that no lot in the subdivision may be sold and no

> permit shall be issued for the construction of any building or any lot on any street in the subdivision until it shall have been certified in the manner set forth in paragraph 5.12.3 . . . that all improvements have been made within 2 years or such other period of time as the Board may require of the date of executing such conditional agreement.

SO, § 5.12.4; (A. 93).

The amount of the bond must be "at least equal to the total cost of furnishing, installing, connecting, and completing all of the street grading, paving, storm drainage and utilities or other improvements specified on the Final Plat Plan . . . ." *Id.*

In its Decision, the Planning Board did not require the issuance of a performance bond. (A. 65). While the Planning Board noted that the Subdivision Ordinance flatly requires that no lot or unit in the subdivision may be conveyed "before the improvements upon which the lot depends to be fully serviced (e.g. sewer, road, water, etc.) are completed in accordance with the provisions of the Ordinance[,]" (A. 65), the Board nevertheless imposed a condition of approval in lieu of a performance bond that explicitly excluded construction of a road, i.e., Heel Way, from the required "improvements" to be completed before the conveyance of lots. (A. 74).

The plain language of the Subdivision Ordinance permits the Planning Board to waive "the requirement of a performance bond" if a conditional agreement is

secured between the Town and developer ensuring that *all improvements* have been completed prior to the issuance of applicable permits or the sale of subdivision lots. This language ensures that, notwithstanding there being no performance guarantee, that the developer cannot wash its hands of the development before it has completed all of the improvements required for the project to move forward as approved by the Planning Board. Despite this requirement, the Planning Board is requiring neither a guarantee nor an agreement that comports with Section 5.12.4, effectively replacing the standard imposed by the ordinance with a lesser standard via the Board's condition of approval. Such an action is beyond the Planning Board's authority. *See Oeste v. Town of Camden*, 534 A.2d 683, 684 (Me. 1987) (noting that board's authority is proscribed by statute and ordinance). While the Subdivision Ordinance freely permits the Planning Board to impose a conditional agreement in lieu of a performance guarantee, the ordinance is unequivocal about that condition's contents.[8]

Because the Planning Board imposed a condition of approval beyond the scope of its lawful authority and thereby abused its discretion, the Decision of the Planning Board must be remanded with instructions to impose a requirement of

[8] The Superior Court below found that the parenthetical list provided by the Planning Board "is not clearly exhaustive," and therefore that the Planning Board did not abuse its discretion in granting the condition. (A. 26). While the Appellants support a conclusion in principle that construction of *all* improvements, including Heel Way, is required before any lots are conveyed, the Appellants respectfully disagree with the lower court's conclusion that the list, which begins with the word "specifically" can be reasonably read as non-exhaustive. (A. 74).

either a performance bond in conformity with Section 5.12.1 of the Subdivision Ordinance or a conditional agreement in conformance with Sections 5.12.3 and 5.12.4 of same.

Conclusion

For the foregoing reasons, the Appellants respectfully 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 22nd day of November 2024.

/s/ Grady R. Burns

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