SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-25-327

PRESERVATION BATH, LLC d/b/a BATH GOLF CLUB

Plaintiff/Appellant

- v. -

CITY OF BATH

Defendant/Appellee

ON APPEAL FROM THE
MAINE BUSINESS AND CONSUMER COURT

REPLY BRIEF OF PLAINTIFF/APPELLANT

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REPLY ARGUMENT

I. Comprehensive Plans are binding and enforceable.

The City would have the Court believe that a comprehensive plan is not worth the paper it is printed on. *City. Br.* at 16, 18. And while comprehensive plans themselves lack "regulatory teeth," the Legislature made clear that zoning ordinances "*must* be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body." 30-A M.R.S. § 4352(2) (emphasis added). Further, to ensure consistency with this essential planning document, when any portion of an ordinance falls short of the consistency requirement, it "is no longer in effect 24 months after adoption of the plan." 30-A M.R.S. § 4314(2). It is here that a comprehensive plan bares its teeth and exerts its full weight.

The City asserts that the Bath voters were free to amend the LUC because the language of the 2023 Plan cannot "bind future legislative bodies." *City Br.* at 22-24. This argument misses its mark: while laws cannot be enacted to bind future legislatures, zoning ordinances and subsequent rezoning actions "*must be* pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body."[1] 30-A M.R.S. § 4352(2) (emphasis added). The City's legislative body is

[1] The City appears to argue that 30-A M.R.S. § 4352(2) does not apply to the LUC Amendments because a "zoning ordinance" does not include a "cluster development ordinance." *City Br.* at 24 (citing 30-A M.R.S. § 4352(2)). The City's LUC is not a "cluster development ordinance", but a comprehensive land use ordinance that governs all forms of development in Bath, including cluster developments. *See Superior Court Record* at 1-368. Moreover, arguments not raised at the trial court level are generally deemed waived and cannot be raised for the first time on appeal. *First Fin., Inc. v. Morrison*, 2019 ME 96, ¶ 14, 147 A.3d 1165.

not bound by the language of the 2023 Plan. However, if it wants to remove cluster developments as allowed in the GCD from the LUC, it must also amend the 2023 Plan to remove the allowed use. Unless and until that is done, the LUC Amendment remains inconsistent with the 2023 Plan. *See ALC Dev. Corp. v. Town of Scarborough*, No. CIV.A. CV-03-498, 2005 WL 2708349, at *4 (Me. Super. Feb. 15, 2005) ("To the extent that the Town's attitudes may have changed and its officials might wish to take the Town in a different direction, it would have been incumbent on the Town to amend its Comprehensive Plan.").

II. The 2023 Bath Comprehensive Plan clearly and explicitly allows cluster subdivisions in the Golf Course District.

The 2023 Plan holds the following for the GCD:

> This district is designed to maintain the Bath Golf Club Golf Course operation. It will protect the golf course from incompatible neighboring land uses and protect the surrounding Low-density Residential District from encroachment by incompatible uses at the golf course. This district allows the golf course to expand and allows accessory facilities at the golf course. Cluster Subdivisions are also allowed in this district.

App. I at 139. The City argues that the statement "Cluster Subdivisions are also allowed" is not mandatory or is in any way binding on the City, asserting the language is only a "present-tense statement" of an "existing state of facts." *City Br.* at 22-24. But the City's argument deprives the entire paragraph of any significance or meaning, as it is all in the present tense – *e.g.,* "This district is designed . . ."; "It will protect . . ."; "This district allows . . ."; "Cluster subdivisions are also allowed

. . . .” *App. I* at 139. Furthermore, inconsistent with its own argument, the City later relies on the other present tense language in the GCD paragraph to support that the 2023 Plan “clearly and explicitly sets forth a policy or goal of preserving existing golf course operations and the golf course in the GCD . . . .” *City Br.* at 24.

Preservation Bath agrees the 2023 Plan clearly and explicitly sets forth a policy and goal of preserving existing golf course operations and the golf course in the GCD. It also clearly and explicitly allows cluster subdivisions in the GCD, which is entirely consistent with the 2023 Plan’s goals of significantly increasing housing in Bath. *See Blue Br.* at 11-13. The two policies are not mutually exclusive.

The City’s argument allows it to exclude all forms of housing from the GCD in order to potentially mitigate impacts on golf course operations. This is inconsistent with its plain language of the 2023 Plan. *See State v. Conroy*, 2020 ME 22, ¶ 19, 225 A.3d 1011 (“We look first to the plain language of the statute to determine its meaning if we can do so while avoiding absurd, illogical, or inconsistent results.”); *see also Cent. Me. Power Co. v. Devereux Marine, Inc*., 2013 ME 37, ¶ 8, 68 A.3d 1262 (“All words in a statute are to be given meaning, and no words are to be treated as surplusage if they can be reasonably construed.”) (quotation marks omitted). To read “Cluster Subdivisions are also allowed” to mean something other than cluster subdivisions are allowed in the GCD is absurd,

illogical, and renders the entire sentence surplusage. *See ALC Dev. Corp. v. Town of Scarborough*, No. CIV.A. CV-03-498, 2005 WL 2708349, at *5 n. 5 (Me. Super. Feb. 15, 2005) ("if the use of 'should' in earlier sections of the plan were interpreted to make the plan permissive rather than mandatory, the entire plan would thereby be rendered toothless-notwithstanding the legislature's evident intention that comprehensive plans be binding and enforceable.") (citing 30-A M.R.S. § 4314(2)).

Removing cluster developments from the GCD in no way "protect[s] the golf course from incompatible neighboring land uses," nor does it "protect the surrounding Low-density Residential District from encroachment by incompatible uses at the golf course." *App. I* at 139; *Blue Br.* at 14-15. Moreover, there are numerous provisions in the 2023 Plan supporting increasing housing opportunities in Bath. *Blue Br.* at 11-13. Lowering barriers to housing is one of the primary goals of the 2023 Plan. *Id.* Brushing this all aside, the City claims that the removal of cluster developments in the GCD somehow advances the 2023 Plan's goal of climate resilience. *City Br.* at 19. Removing all housing uses from the GCD does not advance climate resilience, nor does it preserve open, natural spaces and recreation areas. *Blue Br. at 19.* Indeed, cluster developments are a form of subdivision that "allows a developer to create smaller lots in return for setting aside

a portion of the tract of land as permanent, undeveloped open space." *App. I* at 35; *see Blue Br.* at 19-20.

III. The LUC Amendment causes only dissonance with the 2023 Plan.

Far from "basic harmony," the LUC Amendment causes only dissonance with the 2023 Plan. It fails to legitimately fulfill any of the goals of the 2023 Plan while conflicting with its plain language and numerous provisions promoting increased housing in Bath. There is *no* evidence that the voters of Bath – acting as the legislative body – considered whether removing cluster development and multi-family dwelling uses from the GCD was consistent with the 2023 Plan.

While some members of the public had the opportunity to discuss the proposed changes before the Bath City Council, *Blue Br.* at 17-18, even if consistency with the comprehensive plan was discussed,[2] the meeting before the City Council did not provide the eventual legislative body – the voters of Bath – with notice and consideration of whether the LUC Amendment was consistent with the 2023 Plan. It was only after the City Council unanimously voted against the

[2] Before the Superior Court, the Parties agreed to judgment upon a stipulated record for Counts I and II. The Parties then provided a stipulated record in the nature of a numbered appendix and stipulated factual statements to provide context for the Superior Court's adjudication and decision. *See App.* at 16-20, 31-168; *App.* II. Had the City believed there was evidence in the record showing voters weighed consistency between the LUC Amendments and the 2023 Plan, the City should have had sought to have it included in the stipulated record, rather than now trying to introduce it in its brief and requesting that the Court take judicial notice. *See Beane v. Me. Ins. Guar. Ass'n*, 2005 ME 104, ¶ 9 ("On appeal, we will not consider new facts, new exhibits or other material relating to the merits of the appeal that was not presented to the trial court and included in the trial court record.").

Moreover, this issue is moot, as a hearing before the City Council regarding whether it would vote to approve the LUC Amendments cannot substitute consideration by the voters of Bath as the legislative body of whether the LUC Amendments are consistent with the 2023 Plan.

LUC Amendment on January 17, 2024, that this issue went before Bath voters in their capacity of the legislative body on June 11, 2024. *App. I* at 19 (*Stip. R.* ¶¶ 19-20). At no point did the voters of Bath as the legislative body consider the LUC Amendment's consistency with the 2023 Plan.

In *Dimoulas* the Court stated that "[i]n enacting the ordinance, the voters . . . determined that the proposed ordinance was in harmony with the Comprehensive Plan." *City of Old Town v. Dimoulas*, 2002 ME 133, ¶ 18, 803 A.2d 1018. The City argues the "outcome of the vote on the proposed amendment is sufficient for purpose of review for consistency" and that "[a]ny attempt to create a record as to the intent or understanding of actual voters would not only be unruly and unworkable, but also would fall foul of the right of voters to cast their votes on proposed ordinances by secret ballot." *City Br.* at 27 (citing 30-A M.R.S. § 3002(3)).

The City's argument conflates individual voter intent with overall legislative process requirements. The issue is not about probing the thoughts or motivations of individual voters but rather ensuring that the legislative process provides some basis for determining that comprehensive plan consistency was considered. This can be accomplished through various means, such as requiring initiative petitions to include statements regarding comprehensive plan consistency, public hearings that address consistency issues, or other procedural safeguards that create a record.

If *Dimoulas* stands for a rule that any ordinance enacted by voters, no matter how inconsistent with the comprehensive plan, is by default "in harmony," it creates a perverse incentive for citizens and interest groups to seek ordinance enactments and amendments through a petition process rather than before a representative legislative body for an ordinance that is otherwise inconsistent with the comprehensive plan. It also eliminates any incentive or requirement for communities with a Town Meeting form of government to consider whether an ordinance is consistent with the comprehensive plan before presenting the ordinance to the voters as the legislative body. Moreover, it would put *Dimoulas* in conflict with the body of case law that holds legislative bodies are only afforded deference if there is actual evidence before them supporting that the zoning is in basic harmony with the comprehensive plan. *See LaBonta v. City of Waterville*, 528 A.2d 1262, 1265 (Me. 1987) ("From the transcript of the hearings conducted by the city council, it is clear that the council recognized and acted upon its responsibility to amend the zoning ordinance only in a way consistent with the comprehensive plan and the multiple goals stated therein."); *Vella v. Town of Camden*, 677 A.2d 1051, 1053 (Me. 1996) ("In reviewing the record to determine whether, from the evidence before it, the legislative body of the Town could have determined that the amendments are in basic harmony with the comprehensive plan, we will not substitute our judgment for that of the legislative body.");

Friends of Motherhouse v. City of Portland, 2016 ME 178, ¶ 11, 152 A.3d 159 (evidence before city council included planning board report that rezoning was consistent with the comprehensive plan).

The matter before the Court is not the first time the citizen-petition process has been abused to stop housing development in a way that is inconsistent with a comprehensive plan. *See ALC Dev. Corp. v. Town of Scarborough*, No. CIV.A. CV-03-498, 2005 WL 2708349 (Me. Super. Feb. 15, 2005). The City argues that *ALC Dev. Corp* is not applicable here, as "the same facts and procedural posture are lacking in this case." *City Br.* at 25-26 n. 8. While the facts and procedural posture in *ALC Dev. Corp* may differ in some regards to this matter, fundamentally, both cases involve a citizen-petition that overturned the decision of the municipality's legislative council regarding land use zoning. Moreover, as is the case here, in *ALC Dev. Corp.*, while there was some language in the comprehensive plan that could have supported the citizen-petition action, ultimately, it was found to be inconsistent with the comprehensive plan.

ALC Dev. Corp was decided after *Dimoulas*. The Superior Court did not view the citizen-petition's vote as a de facto finding of consistency with the comprehensive plan. In fact, in finding the vote was inconsistent with the comprehensive plan, the Superior Court noted that "[t]o the extent that the Town's attitudes may have changed and its officials might wish to take the Town in a

different direction, it would have been incumbent on the Town to amend its Comprehensive Plan." *ALC Dev. Corp.*, No. CIV.A. CV-03-498, 2005 WL 2708349, at *4 (Me. Super. Feb. 15, 2005)). The same reasoning should apply here. If the City wants to remove cluster developments as an allowed use in the GCD from the LUC, it must also amend the 2023 Plan. Unless and until that is done, the LUC Amendment remains inconsistent with the 2023 Plan.

Dated at Ellsworth, Maine, this 3rd day of December, 2025.

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CERTIFICATE OF SERVICE

I, Patrick W. Lyons, hereby certify that an electronic copy of the Reply Brief of Plaintiff/Appellant was served on the following counsel at the address set forth below by email on the 3rd day of December, 2025:

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