STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No.: BCD-24-316

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

PARTY-IN-INTEREST/APPELLEE'S BRIEF

DANIEL A. PILEGGI, ESQ., Bar No. 3858
ACADIA LAW GROUP, LLC
P. O. Box 723
Ellsworth, ME 04605
Tel: (207) 667-7121
E-SERVE: dan@algmaine.com
Attorney for Party-in-Interest/Appellee
Mount Desert 365

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs have appealed this matter from a June 24, 2024 decision by the Business and Consumer Court, affirming the Town of Mount Desert Planning Board's approval of Mount Desert 365's subdivision application. *(Appendix, pp. 14-26).* That application sought municipal permission to develop a .9-acre parcel of land in the Town's Village Residential 1 zoning district into a workforce affordable housing condominium on a single lot containing six residential dwelling units. *(Appendix, p. 15, 36).* The proposed subdivision plan that the Planning Board members ultimately signed contains a two-dimensional depiction of six "homes" situated on the single parcel of land. *(Appendix, p. 236).* The approved subdivision plan is not a condominium plat, and does not depict building elevations. *Id.*

The Town's ordinance structure defines the proposed multi-unit condominium as a non-land subdivision, subject to the municipal Subdivision Ordinance. The Planning Board accepted evidence and conducted a thorough review of the proposed development's adherence to 81 review standards articulated expressly within that ordinance, or as incorporated by reference from the municipal Land Use Zoning Ordinance ("LUZO") and Maine Municipal Subdivision Act, 30-A M.R.S. § 4404. *(Appendix, pp. 36-75).* The Board issued a 40-page decision containing

detailed factual findings and legal conclusions associated with each applicable standard, from which Plaintiffs appealed to this Court. *Id.*

Appellants do not contest that the property at issue has an area of .90 acres, or 39,204 square feet. *(Appendix, p. 36).* It is located in the Town's Village Residential One zoning district ("VR1"), in which the LUZO establishes a standard minimum lot size of 10,000 square feet per dwelling, if served by municipal sewer. *(Appendix, p. 124).* That district is identified within the LUZO as "deemed appropriate for *intensive residential development*." *(Appendix, p. 112) (emphasis added).* The VR1 district allows one-and two-family dwelling units, along with "cluster and workforce subdivisions." *(Appendix, p. 117).* The Town's Subdivision Ordinance ("SO"), in sections 5.16.1 and 5.16.2.1, identifies the VR1 district as one that is appropriate for workforce housing, with a defined goal: the "development of housing that is more economically viable for the year-round working community." *(Appendix, pp. 95-96).*

The LUZO differentiates between workforce subdivisions and other cluster subdivisions by establishing a minimum lot area for workforce subdivisions as "State Minimum", while that for a "cluster subdivision" with sewer is 5,000 square feet. *Id.* At the time of the development application's consideration, Maine's statutory framework for municipal

subdivisions contained no mandatory minimum lot size for municipal residential development. See generally, 30-A M.R.S. §§ 4401-4408.

At the time of the Planning Board's consideration, the Town's SO Section 5.16.2 allowed workforce affordable housing developments a "density bonus" of 75 percent over the *gross* residential density of a property when all of the residential or dwelling units are earmarked for the "creation and preservation of workforce housing." *(Appendix, pp. 96-97).* Workforce housing is defined in LUZO as "[h]ousing that is economically viable for the year-round working community." *(Appendix, p. 218).* The permitted density bonus for a property is calculated "by applying the minimum lot sizes to the developable portion of the parcel." *(Appendix, p. 97).* The same ordinance section specifically defines the developable portion of a parcel to be used for workforce housing density calculations as "the entire parcel". *Id.*

Since the Planning Board's approval of this development, the Legislature has mandated an *increased* density for affordable multifamily housing projects of at least 2.5 times greater than the zoning district's standard minimum lot size. See, 30-A M.R.S. § 4364(2). In the Town's VR1 district, application of the current State minimum lot density to the

property's 39,204 square feet would allow *nine* dwelling units on the lot. (39,204 / 10,000 standard minimum area = 3.9 units x 2.5 = 9.8 units).

The proposed development consists of a single lot condominium that will ultimately contain six dwelling units. *(Appendix, pp. 220, 221, 230-236).* The LUZO defines "Lot" to include "all contiguous land within the same ownership." *(Appendix, p. 208).* In support of its application for municipal subdivision approval, Mount Desert 365 presented a subdivision plan that the Planning Board members ultimately approved and executed. *(Appendix, p. 236).* That two-dimensional plan contained all information required by the SO, including basic outlines of each structure's proposed location, denoting each residential structure as a "home" situated on the commonly-owned lot, and *not* a condominium unit. *Id.* The executed subdivision plan is *not* a condominium plat or plan as defined by 33 M.R.S. §1602-109, and as such omits a number of statutorily-required elements, including the location and dimensions of each unit's vertical or horizontal boundaries, and the location and dimensions of limited common elements. *Id.*

The Condominium Declaration identifies "unit boundaries" as including "everything *on* the site including any buildings and/or structures *and all other improvements now or hereafter located within said bounds."*

(Appendix, p. 222) (emphasis added). "Common Elements", in which ownership is shared among all unit owners, are defined as all portions of the condominium which do not lie within the boundaries of a Unit or a designated storage unit. *(Appendix, p. 223).* "Limited Common Elements" include those parts of the condominium property underneath unit boundaries, and are commonly owned, but are used exclusively by one or more owners. *(Appendix, p. 221).*

Those areas are also defined by statute, in 33 M.R.S. § 1601-103(16). Common and limited common elements include all of the land outside of, and under, each unit. Mount Desert 365's summary declaration expressly noted that "[t]he six homeowners will share ownership of the land, with both common elements and limited common elements. All portions of the subdivision which do not lie within the boundaries of a designated home or a designated storage area are to be owned in common." *(Record, p. 51).*

Like the LUZO, the Condominium Declaration defines "Lot" as the "parcel or parcels of land upon which the condominium is to be developed." *(Appendix, p. 221).* It also defines "Property" as the overall, entire parcel of real estate upon which the development will rest. *Id.* Nothing within the Declaration requires or allows Mount Desert 365 to convey any portion of

the Property to any individual unit owner or owners, except as common elements. *(Appendix, pp. 220-229).*

In its lengthy decision, the Planning Board recognized that the property to be developed would remain a single lot, and made factual findings based upon that determination. *(Appendix, pp. 36-75).* In addition to its 40-page decision, the Board conducted an exhaustive review of the application in the context of each review standard, in a process that spanned three separate meetings. *(Record, pp. 546-557, 563-590, 590-623).* Planning Board minutes reflect thoughtful and comprehensive consideration of the plan's every aspect. *Id.* Ultimately, the Board's decision demonstrates a lengthy and detailed analysis of the application's adherence to each applicable ordinance and statutory standard, along with a subdivision plan approval, subject to conditions. The approval and conditions are denoted upon the executed subdivision plan. *(Appendix, p. 236).*

STATEMENT OF ISSUES

1. The Planning Board did not abuse its discretion in determining that the proposed development will be comprised of a single real estate lot, and did not err in defining the access road as a driveway.

2. The Planning Board did not err in applying municipal density and open space requirements to the application.

3. The Planning Board did not abuse its discretion in its waiver of a performance bond and approval of infrastructure construction conditions.

SUMMARY OF ARGUMENT

The Mount Desert Planning Board's 40-page findings and decision, supported by attached appendices, reflects an extraordinarily intensive and complete review of Mount Desert 365's workforce housing developmental subdivision application. All aspects of the findings are supported by specific record evidence; and the decision is entirely consistent with all applicable ordinance and statutory requirements. Notwithstanding Appellants' "not in my back yard" objections, the proposed workforce housing condominium constitutes exactly the type of intensive, affordable, year-round residential development that is appropriate in the Town's VR1 zoning district, at a density consistent with ordinance standards, and substantially *lower* than that which the Legislature has subsequently mandated.

The Planning Board relied upon substantial record evidence to find that Mount Desert 365's plan contemplates a non-land subdivision, with six condominium units on a single lot. Further, the plan complies with all applicable standards, and is less dense, with fewer residential dwellings, than is permitted by current Maine affordable housing legislation. The proposed subdivision adheres to express open space standards that the municipal subdivision ordinance makes applicable to affordable, workforce

housing developments. Finally, the Planning Board's imposition of conditions mandating construction of subdivision infrastructure is entirely consistent with its discretion and applicable ordinance standards.

As the Planning Board properly applied each review standard to Mount Desert 365's workforce housing development plan, and approved the plan's compliance with each standard based upon articulated record evidence, Appellants cannot meet, and have not met, their burden of proof. Accordingly, the appeal should be denied, and the Planning Board's decision affirmed. No other result shall be consistent with the Town's Subdivision Ordinance or Maine law.

ARGUMENT

I. Standard of Review

Appellants bear the burden of persuasion as to all issues presented on appeal. Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden, 2000 ME 179, ¶ 13 (citing Toussaint v. Town of Harpswell, 1997 ME 189, ¶ 6). Where, as here, the Superior Court acts as an appellate court, this Court directly reviews the Town's operative decision. Stewart v. Town of Sedgewick, 2000 ME 157, ¶ 4.

The Court must affirm the Planning Board's decision if the Appellants fail to prove "error of law, abuse of discretion or findings not supported by substantial evidence in the record." Davis v. SBA Towers II, LLC, 2009 ME 82, ¶ 10 (citing Veilleux v. City of Augusta, 684 A.2d 413, 415 (Me. 1996); Gensheimer v. Town of Phippsburg, 2005 ME 22, ¶ 7). Substantial evidence exists "when a reasonable mind would rely on that evidence as sufficient support for a conclusion." Wister v. Town of Mt. Desert, 2009 ME 66, ¶ 27 (citing Camp v. Town of Shapleigh, 2008 ME 53, ¶ 9). The fact that inconsistent conclusions might be drawn from evidence does not mean that a finding is unsupported by substantial evidence. Friends of Lamoine v Town of Lamoine, 2020 ME 70, ¶21. The Court may not substitute its judgment for that of the municipal board. Wister, 2009 ME 66, ¶ 27.

This Court is bound to affirm the Town's municipal land use regulation determination as long as it is not "unlawful, arbitrary, capricious or unreasonable." Driscoll v. Gheewalla, 441 A.2d 1023, 1029 (Me. 1982). The Court may not vacate the Planning Board's findings absent a determination that they are supported by no competent evidence. Adelman v. Town of Baldwin, 2000 ME 91, ¶ 12.

The interpretation of a municipal ordinance is a question of law subject to de novo review. Logan v. City of Biddeford, 2006 ME 102, ¶ 8. The Court must first look to the ordinance provisions' plain meaning, as construed reasonably with regard to the ordinance's structure, and the objectives to be obtained. Gensheimer, 2005 ME 22 at ¶ 22. In reviewing a municipality's application of an ordinance, the Court must accord substantial deference to the agency's, or board's, characterizations and findings as to whether ordinance standards have been met. Fissmer v. Town of Cape Elizabeth, 2017 ME 195, ¶ 13.

II. The Planning Board did not abuse its discretion in determining that the proposed development will be comprised of a single real estate lot, and did not err in defining the access road as a driveway.

Contrary to Appellants' argument, the Planning Board's determination that the Mount Desert 365 subdivision plan will be on a single lot served by a driveway is well-supported. Street design and

construction standards contained within Section 5.14 of the Town's Subdivision Ordinance address various design and construction requirements for new roads. *(Appendix, pp. 94-95).* While "street" and "road" are undefined within that ordinance, the LUZO defines "street" by referring to the "road" definition. *(Appendix, p. 216).* For municipal land use purposes, a "road" is a route or track consisting of surfacing material and "constructed for or created by the repeated passage of motorized vehicles, *excluding a driveway as defined." (Appendix, p. 214) (emphasis added).*

The LUZO defines "driveway" in a manner identical to its definition of road, except that it serves "not more than two lots." *(Appendix, p. 204).* Street design and construction standards are not applicable to, and need not be met by, driveways. Contrary to Appellants' argument, the proposed development contains no new roads, and only a driveway serving the single .90-acre property on which the proposed homes will be built. Accordingly, the Planning Board correctly determined that SO Section 5.14 was inapplicable to the subdivision approval analysis. *(Appendix, pp. 66, 236).*

Mount Desert 365 submitted a developmental subdivision application under the municipal subdivision ordinance to develop a six-unit condominium on a single, .90-acre lot in Mount Desert's VR1 zoning

district. The Subdivision Ordinance adopts municipal Land Use and Zoning Ordinance definitions, that include the following description of "Lot":

> 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

(Appendix, p. 208). As is discussed above, that definition is consistent with the Condominium Declaration's definition of "Property", all of which the Declaration mandates will remain in common ownership among the various unit owners. *(Appendix, p. 220).*

In establishing statutory subdivision requirements, the Legislature has expressly recognized developmental subdivisions as both allowed, and different in character from land subdivisions. The former is defined as "the construction or placement of 3 or more dwelling units on a single tract or parcel of land." 30-A M.R.S. §4401(4). The Town's SO, in Section 5.7.3, reflects the same distinction in defining and differentiating between a "land subdivision and a "non-land subdivision." *(Appendix, pp. 90-91).*

Appellants simply ignore the fact that all land within the property's boundaries will remain in common ownership. The application expressly notes that the proposed subdivision "will not create any new lots," but will

add two duplex structures and one additional single-family home to the existing lot. *(Record, p. 19)*. The Condominium Declaration's definition of "unit", each of which will be individually owned, expressly excludes the land, which shall remain undivided. Instead, each unit shall be comprised only of the material existing on top of the land, and in particular the "buildings and/or structures and all other improvements." *(Appendix, p. 222)*.

The approved subdivision plan does not depict units, but instead reflects the two-dimensional outline of each structure, existing or to be built, on the property, each referenced as a "home." *(Appendix, p. 236)*. The plan does not contain land division lines within the clearly-marked perimeter property boundary lines surrounding the full .90-acre lot. *Id.* In sum, the proposed condominium subdivision does not contemplate any further land division of the condominium lot proposed for the Heel Way subdivision. The plan's proposed driveway serves only one lot, and will not serve more than two lots. It is therefore not a "road", and is thus definitionally exempt from municipal street design standards.

This Court has never held that a non-land subdivision must create separate, individual lots. To do so would defy the Legislature's unambiguous distinction between land and non-land subdivision

regulation, and the Town's ordinance structure. In Planning Bd. of Naples v. Michaud, 444 A.2d 40 (Me. 1982), this Court found that a developer's permanent conveyance of specific portions of a campground's *land* constituted the creation of separate interests in land to implicate subdivision regulations. Id. at 42. There the court noted its earlier decision in Town of Arundel v. Swain, 374 A.2d 317 (Me. 1977), holding that conveyance of even *leasehold* interests in specific portions of a larger parcel created a division to which the subdivision statute applied. Id. (quoting Swain, 374 A.2d at 320). The context of those decisions was the Court's determination that even non-land, multi-unit developments should undergo the rigorous municipal subdivision analysis required by State subdivision legislation. Since those decisions, and presumably in response, the Legislature expressly incorporated its regulation of non-land subdivisions into Maine's subdivision statutes, subjecting them to the level of municipal scrutiny that the Planning Board's 40-page decision demonstrates occurred in this instance.

In the slightly more recent decision in Town of York v. Cragin, 541 A.2d 932 (Me. 1988), involving the development of a former barn, the Court held that the division of a structure, "as distinguished from the division of a parcel of land into lots, does not result in the creation of a

subdivision" under Maine's subdivision laws. Id. at 934. The Court noted the distinction between a functional division of land use, as opposed to the actual division of separate lots. Id. Importantly, the Cragin, Swain and Michaud decisions were focused exclusively on the issue of whether or not State subdivision statutes should apply to various development activities, and *not* whether a functional use division triggered Mount Desert's street design regulations.[1] The Legislature has ensured subdivision review for developments that do not divide land, by enacting 30-A M.R.S. § 4401(4), to be applicable to single-parcel developments.

The Legislature cleared up the distinction between lot creation and functional use divisions by ensuring that *both* are expressly subject to State subdivision oversight. 30-A M.R.S. § 4401(4) now defines subdivisions to include "the construction or placement of 3 or more dwelling units on a single tract or parcel of land," as Mount Desert 365 has proposed. The approved plan is for a developmental or functional subdivision and not a land subdivision. The key principle of Cragin remains intact. The mere functional division of land use by development of residential buildings on the same lot or parcel does not by itself legally divide land into separate

[1] Appellants' citation to a 2005 Superior Court decision involving substantial factual distinctions, including the inapplicability of Mount Desert's ordinance structure, is unhelpful. That decision is factually dissimilar, has no precedential value, and *ignores* the Legislature's clear recognition and regulation of non-land subdivisions in 30-A M.R.S. § 4401(4).

parcels or lots. Petitioners' argument requires 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, rendering the portions of Section 4401(4) mere surplusage. Such a result is legally insupportable. The Maine Condominium Act allows Mount Desert 365 as Declarant to implement the Declaration's section 2.1.11, defining "lot" to mean "the parcel or parcels of land on which the condominium is to be developed." *(Appendix, p. 221)*. That the proposed Heel Way subdivision contemplates a single lot containing multiple dwelling units is entirely consistent with the Act.

Here, the subdivision plan does not contemplate the conveyance of real estate under any unit exclusively to that unit's owner. The application and approved plan clearly and unambiguously establish that the entire development parcel will be commonly owned by all unit owners, and that the only individually-owned interests will be within the envelopes of the individual dwelling and storage units located on and above the land's surface. The Condominium Declaration's definition of unit boundaries unequivocally limits each unit to buildings, structures and "all other improvements" located within the bounds to be identified on the condominium plat. The Declaration contains no language contemplating

the conveyance of real estate, and references no metes and bounds description of land, except for the single lot's perimeter. Likewise, it incorporates none of the conveyance terms contemplated by the Maine Short Forms Deed Act, 12 M.R.S. § 761 et seq.

The Planning Board's determination was premised upon substantial record evidence. That evidence does not compel a contrary result. Because the Board's evidence-based determination was that the contemplated development is comprised of a single lot, the Subdivision Ordinance's plain language compelled the Planning Board to define the access way as a driveway, and to regulate it accordingly.

The Planning Board's decision clearly reflects that the Board read LUZO Section 6B.11 standards in full, reviewed the application and all dimensional and road requirements, and referenced those specific standards by attaching them as Exhibit B of the decision's appendix. *(Record, p. 635).* The Board's findings summarize aspects of its review in connection with specific record evidence, while reflecting its consideration of each enumerated standard, and determination that each had been met. *Id.* Appellants cannot meet their burden of proof; and the Planning Board's carefully considered decision should be upheld.

III. The Planning Board did not err in applying municipal density and open space requirements to the application.

While judicial interpretation of municipal ordinance terms is a question of law, the Court is required to "look first to the plain meaning of the terms of the ordinance to give effect to the legislative intent." Lane Constr. Corp. v. Town of Washington, 2007 ME 31 ¶7. If the meaning of ordinance provisions is clear the Court "need not look beyond the words themselves." Wister v. Town of Mt. Desert, 2009 ME 66 ¶ 17. Mount Desert's SO is unambiguous in its requirements for subdivision and development density and open space. The Planning Board correctly applied that plain language to MD365's application, and properly found that the proposed plan met both standards.

A. Density

Subdivision Ordinance Section 5.16.2.2 provides unambiguous direction regarding lot density requirements:

> a. The density of the subdivision shall not exceed the density requirements of the zone in which it is located. 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. Density 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 [sic][2]....

[2] Lot dimensional standards are currently found at LUZO section 3.5 and not section 3.6.

c. Workforce Housing Density Bonuses: Projects that include covenants held by a qualified workforce housing entity may receive density bonus as follows: …

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.

(R., pp. 797-798) (emphasis added).

It is undisputed that Mount Desert 365's application contains covenants restricting 100 percent of the development to workforce housing. As discussed above, LUZO Section 3.5 establishes a standard 10,000 square foot lot size per dwelling unit, and modifies that density to the "State minimum" lot area for workforce housing projects. Appropriately, the Planning Board referred to LUZO Section 3.5, and its VR1 district standards, to apply that 10,000 square foot minimum lot area per dwelling unit. Neither that section nor SO Section 5.16.2.2 directs applicants or the Planning Board to round base density down to nearest whole numbers in conducting final lot density calculations. (*Appendix, pp. 96-97).* In fact, Section 5.16.2.2.c.2 expressly mandates the exact *opposite* approach, requiring the Planning Board to apply the density multiplier to the lot's *gross* residential density, and not to some fraction thereof. *Id.*

The Planning Board's lengthy density calculations demonstrate that it properly applied a lot size of 39,204 square feet, to a minimum density of 10,000 square feet per dwelling unit, and multiplied the result by the SO's workforce housing density bonus, arriving at an allowed density of 6.86 units:

> 39,204 sf/10,000 sf (VR1 Min per LUO Section 3.5) = 3.9 units
>
> [39,204 sf X .75= 29,403 square feet
> 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.

(Appendix, pp. 68-69).

The Planning Board then properly invoked the plain language of all applicable ordinance standards, expressly requiring that the workforce density bonus calculation be based on the total lot area, "with no deductions and no rounding down." *(Appendix, p. 69).* Application of plain ordinance language unambiguously results in a permitted lot density of 6.8 dwelling units. Mount Desert 365 cannot build only eight-tenths of a unit; and application of SO Section 5.16.2.2 plainly permits its proposed lot density of six workforce housing units. In other words, as long as the

developmental subdivision application proposed a lot density of 6.86 units *or fewer*, density standards would have been met.

Appellants' argument that the Planning Board should have effectively rounded down to whole units in mid-calculation is simply unsupported by any ordinance terms. Their brief offers no explanation for their decision to ignore SO Section 5.16.2.2.c.2 and its mandate that density be calculated using the lot's gross base density, or their advocacy for the use of an unsupported whole-number net density to which the workforce housing bonus should then be applied. No such direction is contained in the ordinance's express language.

The Board's adoption of Appellants' proposed approach would have contradicted the plain language of two ordinances, and effectively calculated density limitations based upon *less* than the total lot size, contrary to express legislative mandates. [3]

Appellants' argument is not supported by legal authority or express ordinance terms. No lot dimensional standard directs the Planning Board to conduct density calculations using only whole numbers. Appellants have cited no Maine judicial opinion interpreting similar ordinance terms in

[3] Utilizing the current affordable housing density formula established by 30-A M.R.S. § 4364(2), application of Appellants' preferred practice of rounding down to the nearest whole number still results in a statutory allowable density for workforce affordable housing of 7 dwelling units per 39,204 ft lot size (39,204/10,000= 3.9; 3x 2.5=7.5), a number higher than the proposed development here.

such a fashion. A fractional gross lot density calculation is neither illogical nor inconsistent with municipal land use planning. As long as a proposed development provides for a density within the calculated maximum allowable dwelling units, it must be found to meet applicable standards. While the Mount Desert voters could have approved ordinance provisions requiring that density calculations be conducted only in whole numbers, or that base density be rounded up or down to the nearest whole number before applying density bonuses, they did not do so.

Absent plain legislative direction to the contrary, the Planning Board here was compelled to find a maximum allowable lot density of 6.8 units, and to find that MD365's proposed six-unit development fell within allowable density standards. No other result may be fairly derived from the application and unambiguous ordinance terms; and the Board's decision should be upheld.

B. Open Space

The Planning Board conducted a painstakingly thorough evaluation of evidence relating to the open space requirements of SO Section 5.16.2.3. *(Appendix, p. 69).* Importantly, it distinguished between workforce housing and cluster developments, that are treated independently throughout the municipal ordinance structure. *Id.* LUZO Section 3.5, in

which lot dimensional standards are expressed, unambiguously regulates each differently. In the VR1 district, for example, Section 3.5 provides for different and independent minimum lot areas for cluster subdivisions with and without sewer, and for workforce subdivisions.

Subdivision Ordinance Section 5.16.2 describes plan design requirements for both cluster and workforce housing subdivisions. Section 5.16.2.3.a notes a specific open space standard applicable only to workforce housing subdivisions:

> The total area dedicated for open space *must equal or exceed the sum of the area by which the building lots are reduced below the minimum lot size* otherwise required for the respective zone (i.e. the non-cluster subdivision minimum lots size). Open Space requirement for Workforce Housing: When calculating the open space requirement for qualified workforce housing development, *the density bonus units shall be excluded. (Appendix, p. 97) (emphasis added).*

As is discussed at length above, the VR1 zone standard minimum lot size is 10,000 square feet per dwelling unit. Mount Desert 365's lot contains 39,204 square feet, meaning that three of its proposed units are the result of its workforce housing density bonus. Following the ordinance subsection's direction, those three units are excluded from open space requirement calculations. The three remaining proposed dwelling units are allowed on the lot *without any reduction* of standard lot size requirements. (39,204 sf / 10,000 sf = 3.92 units). As the proposed development contains three non-bonus units, all of

which are permitted without lot size reduction based upon the plain language of LUZO Section 3.5, the ordinance mandates the creation of *no* dedicated open space.

The Planning Board was compelled to interpret SO Section 5.16.2.3.a and its plain language in a manner that gives meaning to the express provision excluding workforce housing density bonus units from open space calculations. Clearly the ordinance, as adopted, unambiguously intended to apply open space requirements *differently* for workforce housing developments than for any other type of residential subdivision. Appellants urged the Planning Board, and now the Court, to improperly ignore that express language of Section 5.16.2.3.a.

As the Superior Court's decision noted, the workforce, or affordable housing, covenants, conditions and restrictions imposed upon the current subdivision application, are intended to create affordable year-round housing in a Town that has increasingly lost such housing stock to seasonal, part-time residential use. *(Appendix, p. 24).* To encourage developers' adoption of restrictions necessary to make that housing permanently affordable and available, and to maximize the number of available workforce housing units, the Town's ordinance structure permits substantially greater lot density to workforce housing developments than

would otherwise apply. *Id.* In order to accomplish those goals, for workforce housing, SO Section 5.16.2.3.a expressly restricts the mandatory open space requirements otherwise applicable to other cluster housing. *Id.* The Planning Board correctly found that the ordinance mandated no preserved open space for this workforce subdivision.

Importantly, the Planning Board used the terms of a different Subdivision Ordinance section to protect commonly-owned open areas on the lot for recreation and common use. *(Appendix, p. 62).* Section 5.10.2 permits the Planning Board to mandate the preservation of an area of land as "an open space and/or recreational area for use by property owners in the subdivision." *(Appendix, p. 92).* Under that ordinance section, the property owners must be responsible for all costs of developing and maintaining the reserved land; and that obligation must be included as a covenant in any conveyance to owners. *Id.*

Here, the Board determined that open space identified on the plan was preserved for common open recreational use, including an approximately 1,600 square foot area identified as a wooded buffer preserve, and found that MD365's Condominium Declaration expressly provided for mandatory common area maintenance by all of the common owners. *(Appendix, p. 62).* Notably, Declaration Section 3.4 allocates to

each unit an equal percentage of all common elements and equal responsibility for common expenses. *(Appendix, p. 222).* The condominium's owners' association is tasked with responsibility for "maintenance, repair or replacement of the common elements," including limited common elements. *(Appendix, p. 223).* Declaration Section 7.1 expressly allocates to each unit a percentage of financial responsibility for common expenses; and Section 7.4 ensures that unit owners are personally liable for their share of such costs. *(Appendix, p. 224).* Common access to the preserved open areas, for use and maintenance, is assured through the express easement terms contained in Declaration Article 8. *(Appendix, pp. 225-226).*

The Planning Board's findings and conclusions with respect to open space preservation are entirely consistent with the Subdivision Ordinance's plain language. The proposed workforce housing condominium contains substantial commonly-owned open areas available for resident enjoyment, including an approximately 1,600 square foot wooded area designated as a wooded buffer preserve. The Board made permanent preservation of that area a condition of approval; and the condition is included on the final subdivision plan. *(Appendix, p. 236).* Financial and personal responsibility for maintaining those spaces is vested permanently in unit owners via the

Condominium Declaration, that the Legislature mandates must be recorded in the Registry of Deeds. 33 M.R.S. § 1602-101(a). Based upon its careful analysis and the Subdivision Ordinance's plain language, the Planning Board's open space determinations are based upon substantial evidence, consistent with ordinance standards, and must be upheld.

IV. The Planning Board did not abuse its discretion in its waiver of a performance bond and approval of infrastructure construction conditions.

Appellants' contention that the Planning Board erroneously applied Subdivision Ordinance Section 5.12.4 is inconsistent with that section's plain language, and the ordinance structure's intent. Municipal ordinance terms must be construed "reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole." Gensheimer v. Town of Phippsburg, 2007 ME 85, ¶ 8 (quoting Gerald v. Town of York, 589 A.2d 1272, 1274 (Me. 1991)). The Planning Board's infrastructure protection considerations here reflect its proper interpretation of ordinance terms.

Section 5.12.1 grants the Board discretion in some instances to require that a subdivider obtain a performance guarantee in an amount sufficient to defray expenses of completing and creating "street grading, paving, storm drainage and utilities" specified on the final plat plan.

(Appendix, pp. 92-93). That the section is discretionary is evident from the ordinance's use of the term "may" in describing the Board's authority, rather than the mandatory term "shall". Additionally, Section 5.12.4 provides the Board with additional discretionary authority to "recommend a properly executed conditional agreement with the Town", as an alternative manner of ensuring the required infrastructure's installation. *(Appendix, p. 93).* In the event of such an agreement, the terms must be noted in writing on the final plan, and be subject to the requirement that no building permit may be issued until all such improvements have been made. *Id.* Such an agreement was imposed here as a condition of approval, and that condition appears on the approved plan.

The clear intent of SO Section 5.12 is to ensure financial responsibility for the installation of common infrastructure necessary to the subdivision's completion, thereby protecting subdivision unit owners from a defunct developer. Here, the Planning Board acknowledged that development of individual units before completion of that infrastructure is also prohibited by SO Section 7.2. *(Appendix, pp. 64-65, 101).* To effectuate the intent of Section 5.12.4, the Board then imposed a condition of plan approval as follows:

> Before any unit in the subdivision may be sold and before the construction of any new buildings (excepting only the storage/utility

building), the Board will require certification from the Code Enforcement Officer to the effect that *all improvements have been satisfactorily completed in accordance with all applicable standards (State, Federal, and local codes, Ordinances, law, and regulations).*

This Condition shall be noted in writing on the Final Plat Plan and shall provide that no unit in the subdivision may be sold and no permit shall be issued for the construction of any new buildings (excepting only the Storage/Utility Building) in the subdivision until it shall have been certified in the manner set forth above that *all infrastructure improvements* (specifically, water, sewer, electric, stormwater, and adequate construction access) have been made within 2 years of the final approval of the Project (including the resolution of any appeals such that the Board's approval becomes final).

(Appendix, p. 65) (emphasis added). As has been noted, the final subdivision plan reflects that condition. *(Appendix, p. 236).*

The Board's determination followed extensive consideration of Section 5.12.4 and its purpose, as applied to the subdivision plan. *(Record, pp. 597-601).* For example, board member Randolph noted that a performance bond is intended to protect the Town if the Applicant fails to complete the project, and that here, Mount Desert 365 is required by ordinance section 7.2 to develop *all* of the subdivision infrastructure before building even the first unit. *(Record, p. 599).* Mount Desert 365's project engineer confirmed its intent to have all infrastructure in place before seeking building permits, that will offer unit-purchasers' confidence in the entire project's completion. *(Record, p. 599).*

Appellants' argument that the Board's action was somehow insufficient ignores both the purpose and discretionary nature of Section 5.12. The Planning Board's imposition of a condition of approval in conjunction with mandatory ordinance provisions preventing dwelling unit development before underlying infrastructure's completion constitutes an authorized, appropriate exercise of Board discretion, consistent with the section's intent. The imposed condition is expressly authorized by Section 5.12.4; and the Board's action should be upheld.

Conclusion

For the reasons stated above, Appellants cannot meet their burden of proof. The Mount Desert Planning Board's 40-page decision, with addenda, reflects an extraordinary degree of factfinding by a volunteer municipal board, and a careful analysis of Mount Desert 365's non-land, workforce housing subdivision application. The Board properly applied all applicable statutory and ordinance standards, and did not abuse its discretion in approving the application based upon the record. Accordingly, the appeal should be denied, and the Board's decision affirmed. No other result shall be just, proper, or in accordance with applicable Maine law.

Date: January _9_, 2025

Respectfully submitted,

/s/ Daniel A. Pileggi, Esq.

DANIEL A. PILEGGI, ESQUIRE,
Bar No. 3858
ACADIA LAW GROUP, LLC
P. O. Box 723
Ellsworth, ME 04605
Tel: (207) 667-7121
E-SERVE:dan@algmaine.com
karen@algmaine.com
Attorney for Appellee, Mount Desert 365

CERTIFICATE OF SERVICE

I hereby certify that I have made due service of two copies of the foregoing Party-in-Interest/Appellee's Brief to Appellants through counsel Grady R. Burns, Bernstein, Shur, 100 Middle Street, P.O. Box 9729, Portland, ME 04104 by mail, and an electronic copy to his stated email address: gburns@bernstein.com, and to Appellee, Town of Mount Desert, through counsel, P. Andrew Hamilton, Esq., Eaton Peabody, 80 Exchange St., #8, Bangor, ME 04401, by mail, and an electronic copy to his stated email address: ahamilton@eatonpeabody.com this 9th day of January, 2025.

/s/ Daniel A. Pileggi, Esq.
DANIEL A. PILEGGI, ESQ. 3858