STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-23-395

THE VILLAGE AT OCEAN'S END
CONDOMINIUM ASSOCIATION

Appellant

v.

SOUTHWEST HARBOR PROPERTIES LLC, ET AL.

Appellees

ON APPEAL FROM THE BUSINESS AND CONSUMER DOCKET

BRIEF OF APPELLEES

Michael D. Traister
Nicholas J. Bernate
MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
(207) 773-5651

Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF FACTS

A. FACTUAL BACKGROUND

This case concerns the so-called Village at Ocean's End Condominium, ("Condominium") located on the upland side of State Route 102 in Southwest Harbor, Maine. *App.* at 170. The Condominium consists of free-standing homes and was originally to be developed by Jeff Crafts, whose family owned both the Condominium property and the subject shorefront parcel for generations. *App.* at 170-171. Mr. Crafts created the Condominium via recording of the original Declaration of the Village at Ocean's End Condominium ("Original Declaration") on May 5, 2009. *App.* at 171. At the time, through a separate entity, Mr. Crafts also owned .68 +/- acres of shorefront land across the street from the Condominium on the water side of Route 102 (the "Shorefront Parcel"). *App.* at 171.

Per the express terms of the Original Declaration and the Maine Condominium Act, 33 M.R.S.A. §§ 1601-101 et seq. (the "Act"), Mr. Crafts reserved both "development rights" and "special declarant rights" in not only the upland property first submitted by him to the Original Declaration, but also other land, including the Shorefront Parcel. *App.* at 171. These rights expressly included, without limitation, the right to both add and/or withdraw the Shorefront Parcel to and from the Condominium. 33 M.R.S.A. § 1601-103 (11) and (22) (defining both "development rights" and "special declarant rights"); 33 M.R.S.A. § 1602-110 (exercise of development rights). *App.* at 171. At no point has there been any modification to the

development rights or special declarant rights conferred via the Original Declaration. *App.* at 171.

Mr. Crafts was ultimately unsuccessful in his efforts to develop the Condominium, and his lender, The First, N.A. ("The First"), took the Condominium project from Mr. Crafts in December 2012 via a Deed in Lieu of Foreclosure with incorporated assignment of all development rights and special rights. *App.* at 172. As part of its workout with Mr. Crafts, The First required Mr. Crafts to add the Shorefront Parcel to the Condominium pursuant to the development rights reserved in the Declaration to thereby enhance the value of the Bank's collateral package. *App.* at 172. Accordingly, Mr. Crafts added the Shorefront Parcel to the Condominium via the *Third Amendment to the Declaration* ("Third Amendment") which was recorded in the Hancock County Registry of Deeds (the "Registry") in December 2012. *App.* at 172. The Third Amendment identified the Shorefront Parcel as being subject to Mr. Craft's development rights, including the right to withdraw the Shorefront Parcel. *App.* at 172, 233-236.

In August 2013, Southwest Harbor Properties LLC ("SWHP") purchased the Condominium project from The First, including the Shorefront Parcel, together with all associated development and other rights. *App.* at 172. A month later, in September 2013, SWHP exercised its development rights and withdrew the Shorefront Parcel from the Condominium by recording an appropriate *Fifth Amendment to the Declaration* ("Fifth Amendment") in the Registry. *App.* at 173. The

original Fifth Amendment to the Declaration contained a scrivener's error in that, although it was signed by Jeff Howland as Manager of SWHP, the amendment on Page 1 incorrectly referenced the declarant as being the original declarant, "The Village at Ocean's End, LLC." *App.* at 173. SWHP corrected this scrivener's error in April 2014, when it recorded a *Revised Fifth Amendment to the Declaration*. *App.* at 173. In addition, on September 17, 2013, SWHP recorded in the Registry a *Second Amended and Restated Plot Plan for the Condominium* ("Second Amended Plat"), which identifies the Shorefront Parcel and provides the following description "To be conveyed to Howland Real Estate, LLC." *App.* at 173.[1]

Ultimately, the Condominium included the Shorefront Parcel for a mere nine (9) months, during which time no Condominium unit was sold or purchased by any party. *App.* at 173.

On October 1, 2013, SWHP created a Public Offering Statement, as required by the Act, and included within it, *inter alia*, both the Fifth Amendment and the Second Amended Plat. *App.* at 171-172, 264-276.[2] The Public Offering Statement, which gives explicit notice that the Shorefront Parcel was briefly part of the Condominium, but had since been withdrawn, has been provided to all unit owners who bought their unit from SWHP. *App.* at 171-172.

---

[1] SWHP also recorded in the Registry a *Third Amended and Restated Plot Plan for the Condominium* which identifies the Shorefront Parcel as withdrawn and no longer part of the Condominium. *App.* at 173.

[2] VOEA did not include any of the exhibits attached to the Public Offering Statement in the Appendix.

At no time have any Condominium units ever been built or conveyed on the separate Shorefront Parcel and at no time did any Condominium unit owner purchase their unit at a time when the Shorefront Parcel formed part of the Condominium property. *App.* at 173. To wit, at the time the Shorefront Parcel was withdrawn from the Condominium by SWHP in September 2013, only two units had been built and a total of only three unit owners, namely, (1) SWHP, which owned Unit #1 (the original home on the Condominium property) and certain other declared units as a result of its purchase of the Condominium; (2) Dana and Gregory Moos, (collectively the "Mooses") who had purchased the model Condominium home constructed by Mr. Crafts (Unit #15); and (3) Mr. Crafts, who then-owned unbuilt Unit #10. *App.* at 172, 174, 284.

Prior to withdrawal, the Mooses were made aware by SWHP of its intention to withdraw the Shorefront Parcel in accordance with its reserved development rights and SWHP again made the Mooses aware of the withdrawal after it occurred. *App.* at 174. At no time did the Mooses ever object to the withdrawal and, as a result, SWHP always understood that the Mooses had no objection. *App.* at 174. By sworn affidavit, Dana Moos has confirmed that the Mooses never had any objection to

SWHP's withdrawal of the Shorefront Parcel and would have affirmatively consented to the withdrawal, if requested. *App.* at 174.[3]

Likewise, Mr. Crafts, who in fact suggested to SWHP that it withdraw the Shorefront Parcel from the Condominium to thereby restore the Condominium to what was originally intended, and who had prior knowledge of SWHP's intention to withdraw the parcel, also never objected to SWHP's withdrawal of the Shorefront Parcel at any time prior to The Village at Ocean's End Condominium Association's ("VOEA") filing of suit. *App.* at 174-175. To the contrary, Mr. Crafts affirmatively *participated* in such withdrawal by, among other things, selling the docks he had purchased for use at the Shorefront Parcel for continued use at such Parcel; overseeing improvements to the Shorefront Parcel after it was owned by Howland Real Estate ("HRE"); arranging for the transfer of a State Submerged Land Lease for the Parcel to HRE; and exploring various development concepts for the Shorefront Parcel on behalf of HRE. *App.* at 174-175. In addition, prior to SWHP's withdrawal of the Shorefront Parcel, Mr. Crafts entered into a contract with SWHP pursuant to which SWHP held all of Mr. Craft's Condominium voting rights of any kind or nature, and further by which Mr. Crafts expressly agreed as follows: "[Mr. Crafts] understands that SWHP wishes to remove the [Shorefront Parcel] from the

[3] In its Brief, VOEA claims the Trial Court improperly refused to strike Dana Moos's affidavit based on VOEA's Motion to Strike. Appellant Brief at 37. Maine Rule of Civil Procedure 56(i) specifically precludes parties from filing Motions to Strike. M. R. Civ. P. 56(i).

Condominium. [Mr. Crafts] herein confirms that [he] supports that action and, if requested, will vote in favor of such removal." *App.* at 175. Accordingly, at the time SWHP exercised its development rights and withdrew the Shorefront Parcel in September 2013, all three (3) unit owners (SWHP, Mr. Crafts and the Mooses) *de facto* agreed to the withdrawal. *App.* at 174-175.[4]

The foregoing notwithstanding, VOEA now, on behalf of its members, attempts to challenge the legality and effectiveness of SWHP's withdrawal of the Shorefront Parcel more than a decade ago, and to take ownership of the Parcel away from SWHP, without it or any of its members having paid any consideration of any kind for the Parcel.

B. PROCEDURAL HISTORY

1. The Parties' initial pleadings.

This appeal stems from a Complaint (the "Complaint") originally filed by VOEA in the Hancock County Superior Court (Docket No. CV-21-35) in August of 2021. *App.* at 48-58. On October 22, 2021, Appellees filed an Answer and Counterclaim. *App.* at 73-104. The case was subsequently transferred to the Business

[4] Following its withdrawal of the Shorefront Parcel from the Condominium, on October 16, 2013, SWHP conveyed the Parcel to HRE, as it had the right to do. *App.* at 173. Approximately a year later, HRE decided to lease the Shorefront Parcel to VOEA for its members' general recreational use at an initial nominal rent of $50/month per declared unit (the "Lease"). *App.* at 175. Between September 2013 and the filing of VOEA's Complaint in August 2021 (approx. 8 years), no objection either to SWHP's withdrawal of the Shorefront Parcel from the Condominium, or the Lease, was ever asserted by VOEA or any unit owner. App. at 175-176, 178. In addition, VOEA and its members annually approved budgets providing for the payment of rent on the Lease and enjoyed the use of the Shorefront Parcel per the Lease terms, all while HRE was investing approximately $120,000 in the parcel in significant part for the benefit of VOEA. *Id.*

and Consumer Docket and assigned to the Honorable Thomas McKeon (BCD-CIV-2022-00011). By their competing Complaint and Counterclaim, the parties each allege ownership of the Shorefront Parcel, which, at the time of filing, was owned by HRE. *App.* at 48-58, 73-104.

By Count I of its Complaint, VOEA claimed that, *almost a decade earlier,* in September 2013, SWHP had improperly withdrawn the Shorefront Parcel from the Condominium because, allegedly, SWHP failed to obtain the approval of 80% of the VOEA membership. *App.* at 55. In contrast, by their Counterclaim, Appellees sought judgment declaring that, because the Shorefront Parcel had, at all relevant times, been expressly subject to SWHP's development rights under the Maine Condominium Act, 33 M.R.S.A. §§ 1601-101 et seq. – which includes the explicit right to withdraw the Shorefront Parcel from the Condominium – SWHP was entitled to withdraw the Shorefront Parcel without approval from VOEA's members and, though not required, in fact had the approval of 100% of VOEA's membership at the time of withdrawal. *App.* at 87-98.

2. The Parties' competing First Motions for Partial Summary Judgment give rise to the immediate Appeal.

On December 28, 2022, VOEA filed a Motion for Partial Summary Judgment seeking, *inter alia*, an order declaring that SWHP's withdrawal of the Shorefront Parcel is null and void because of the alleged lack of 80% membership approval. *VOEA Motion for Partial Summary Judgment* ("VOEA First MPSJ"). *App.* 105-121. SWHP then

filed a Cross-Motion for Partial Summary Judgment on February 21, 2023, which sought, in addition to other relief, a declaratory judgment confirming that SWHP had properly exercised its development rights in its withdrawal of the Shorefront Parcel. *Defendants/Counterclaimants' Motion for Partial Summary Judgment* ("SWHP First MPSJ") [5]. *App.* at 137-156.

On April 12, 2023, Justice McKeon issued his Order resolving the parties' first MPSJs and competing claims to ownership of the Shorefront Parcel ("First MPSJ Order"). *App.* at 31-42. By Justice McKeon's Order, the Court granted SWHP's First MPSJ, in part, holding that SWHP had validly exercised its development rights by withdrawing the Shorefront Parcel from the Condominium in accordance with the amended Declaration and the Maine Condominium Act. *Id.*[6]

3. <u>All claims between the parties are waived, settled, and released, except as to ownership of the Shorefront Parcel.</u>

Just prior to commencement of trial on claims not concerning SWHP's withdrawal of the Shorefront Parcel, the parties entered into a settlement agreement ("Settlement Agreement") and placed it on the record before Justice McKeon. *Settlement Transcript of July 18, 2023* ("Settlement Transcript"). Pursuant to the Settlement Agreement, the parties agreed to waive, release, and settle all claims between them (including without limitation, all claims for damages, costs, and/or

[5] The Trial Court issued its ruling prior to SWHP having an opportunity to Reply in support of its Cross-Motion for Partial Summary Judgment, resulting in there being only three (3) Statements of Material Fact.

[6] This Order is the basis of VOEA's appeal.

attorneys' fees), with the sole exception of VOEA's right to appeal Justice McKeon's ruling that SWHP validly withdrew the Shorefront Parcel from the Condominium in fall 2013. *See* Settlement Transcript at 2:15-19 (Justice McKeon – "Therefore because everything's being released, the assumption is that when the Shorefront parcel matter goes up to the law court, if this Court's decision is reversed, there'd be **no further proceedings except to the extent it's necessary to reconvey the Shorefront parcel to the association**.") (emphasis added).

Following a dispute as to its terms, the parties filed competing motions to enforce the Settlement Agreement, eventually leading Justice McKeon to enter an *Order on Cross-Motions to Enforce Settlement Agreement and Final Judgment* ("Final Order"). The Final Order, dated October 3, 2023, states, in relevant part, "The transcribed settlement agreement constitutes the Judgment of the Court…Final Judgment is entered on the court's summary judgment order dated April 12, 2023, with respect to Count I of the Association's Complaint and Count I of Defendants' Counterclaim…The remaining counts are dismissed." *App.* at 47.

Thus, the only issue preserved by VOEA for this appeal is whether Justice McKeon erred in declaring that SWHP validly withdrew the Shorefront Parcel from the Condominium when it exercised its explicit development right to do so.

STATEMENT OF THE ISSUES

1. Whether SWHP/Appellee, as successor condominium declarant, lawfully and effectively withdrew the Shorefront Parcel from the Condominium pursuant to its development rights, where the subject Declaration explicitly granted SWHP/Appellee the development right to withdraw the Shorefront Parcel; where SWHP/Appellee withdrew the parcel within the specified period for exercise of its development rights; where no unit was purchased at a time when the Shorefront Parcel formed part of the Condominium; where no declared units existed within the Shorefront Parcel; and, though not required, where all unit owners consented to SWHP/Appellee's withdrawal at the time.

SUMMARY OF THE ARGUMENT

SWHP possessed an absolute right to withdraw the Shorefront Parcel.

First, the Maine Condominium Act, 33 M.R.S.A. §§ 1601-101 et seq., expressly allows a declarant to reserve the ability to withdraw certain land from the condominium as part of the declarant's "development rights," so long as said rights are properly set forth in the condominium declaration. The Original Declaration granted the declarant, including SWHP as successor declarant, the right to withdraw land from the Condominium. The Third Amended Declaration, which added the Shorefront Parcel, identified the Shorefront Parcel as being subject to SWHP's development rights, including, without limitation, the right to withdraw the Shorefront Parcel. SWHP validly exercised its right to withdraw the Shorefront Parcel by virtue of the Fifth Amendment.

Second, VOEA's claim that SWHP's withdrawal was invalid rests entirely upon its misplaced claim that 33 M.R.S.A. § 1603-112 requires "80% of the votes of the association," and that SWHP failed to obtain and record in the Registry written agreement by the requisite number of unit owners. VOEA's claim fails because it (a) ignores the development rights plainly granted to SWHP as declarant by virtue of the Declaration and the Act (33 M.R.S.A. §§ 1601-103(11), 1602-105(a)); (b) conflates the development rights the Act affords declarants in Article 2 of the Act with the rights/obligations of condominium associations set forth in Article 3; (c) leads to the

absurd conclusion that the very first unit owner of a condominium possessed absolute veto power over the declarant's development rights; and (d) ignores the sound conclusion of every out-of-state court to consider the issue that withdrawal of property from a condominium via a declarant's development rights is valid.

Third, while not required, the two unit owners other than SWHP at the time of the withdrawal (Mr. Crafts and the Mooses) in fact agreed to the withdrawal, even if said agreement was not placed in writing per M.R.S.A. § 1603-112(b). Mr. Crafts, as the original declarant, added the Shorefront Parcel, intimately participated in SWHP's withdrawal of the Parcel; granted SWHP his proxy vote; and contracted to support the withdrawal. The Mooses purchased their unit prior the Shorefront Parcel being added, acquiesced to its withdrawal, and now confirm they had no objection.

Fourth, *every* unit purchaser since the Mooses and Mr. Crafts bought their units *after* SWHP had withdrawn the Shorefront Parcel and with both actual and constructive notice of the withdrawal based on the recorded Fifth Amendment, the Second and Third Amended Plats, and the Public Offering Statement. Accordingly, there is no issue or claim in this case which in any manner implicates any reliance interest.

Fifth, even if the plain language of the Act and Declaration were ignored, as VOEA argues, such that SWHP was stripped of its expressly reserved development rights, or was otherwise obligated to obtain written consent from the VOEA membership before exercising those rights, VOEA's claims are nonetheless barred by

lack of standing, the doctrines of waiver/estoppel and laches, and the applicable statute of limitations.

Finally, VOEA's attempt to shoehorn in additional claims outside the narrow issue on appeal – i.e. whether SWHP validly withdrew the Shorefront Parcel – contradicts the plain and unambiguous terms of the parties' settlement. Stated simply, VOEA has expressly waived and released SWHP from all such claims.

STANDARD OF REVIEW

VOEA's appeal challenges the Business and Consumer Court's issuance of its First MPSJ Order, granting SWHP summary judgment on its claim for ownership of the Shorefront Parcel. As VOEA admits in its Brief, the facts material to the Trial Court's First MPSJ Order are not in dispute. Appellant Brief at 2. Only the Trial Court's interpretation and application of the relevant law surrounding SWHP's right to withdraw the Shorefront Parcel is at issue. As such, the standard of review is *de novo*. *Perry v. Dean*, 2017 ME 35, ¶ 11, 156 A3d 742.

ARGUMENT

A. THE TRIAL COURT'S ORDER CORRECTLY DETERMINED THAT SWHP'S 2013 WITHDRAWAL OF THE SHOREFRONT PARCEL WAS LEGAL AND VALID.

1. The Declaration and the Maine Condominium Act expressly enabled SWHP to withdraw the Shorefront Parcel without recording written approval by the VOEA membership.

The power given to a condominium declarant to create and manage the condominium's development is afforded to it by virtue of the Maine Condominium Act and the subject condominium's declaration. A condominium is first created by the act of a declarant recording a declaration "executed in the same manner as a deed, by all persons whose interests in the real estate will be conveyed to unit owners…." 33 M.R.S.A. § 1601-101. The Act establishes the requirements of a condominium declaration, see § 1602-105, and provides that it is the obligation of a declarant to include in a declaration: "A description of any development rights and other special declarant rights, section 1601-103, paragraph (25), reserved by the declarant, together

with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised." 33 M.R.S.A. § 1602-105(a)(8). The term "development rights" is specifically defined in the Act as being "any right or combination of rights reserved by a declarant in the declaration to add real estate to a condominium; to create units, common elements or limited common elements within a condominium; to subdivide units or convert units into common elements; ***or to withdraw real estate from a condominium***." 33 M.R.S.A. § 1601-103(11) (emphasis added).[7]

---

[7] The Maine Condominium Act was first enacted in 1981, and is premised on The Uniform Condominium Act, developed by the Uniform Law Commission ("ULC"). The ULC has continued to update and revise the Uniform Condominium Act, now titled the Uniform Common Interest Ownership Act ("UCIOA"), as well as provide commentary regarding its purpose and implementation.

As the comments to the 2021 UCIOA explain, Definition (16), "'Development rights,' includes a panoply of sophisticated development techniques he concept of 'development rights' lies at the heart of one of the principal goals of the Act, which is to maximize the flexibility available to a developer seeking to adjust the size and mix of a project … both before and after creation. The principal constraint on that flexibility is the obligation of disclosure…. Thus 'development rights' include the right to: (c) Reduce the size of a project by withdrawing real property – whether land, entire buildings, or particular units – from it. As a matter of simple logic, there are few other things that could be done to a real property regime which are not included within the concept of development rights." The comments also provide a helpful example of *when* a declarant may wish to exercise its right to add or withdraw:

> For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the common interest community by adding an additional building on Parcel B, containing additional units, as part of the same common interest community. If he reserves the right to do so, i.e., to "add real estate to a common interest community," he has reserved a "development right."
>
> In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the common interest community from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will expand into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the common interest community from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the common interest community and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from the common interest community." The portion of the garage which

The Act expressly grants development rights to a declarant without said rights being qualified by, or subject to, the provisions of § 1603-112, § 1602-107, or "subject to the approval of the unit owners"; or any requirement that such rights "may be exercised only if consented to by the unit owners"; or any limitation that said rights "may not be exercised if a unit has been sold." To the contrary, § 1602-117 *expressly exempts a declarant's exercise of development rights via amendment of a declaration per §1602-110* from the requirement that such amendment be approved by vote of the unit owners. 33 M.R.S.A. § 1602-117(a). ("Except in cases of amendments that may be executed by a declarant under section … 1602-110 [Exercise of development rights]; … and except as limited by subsection (d), the declaration, including the plats and plans, may be amended only by vote or agreement of the unit owners of units to which at least 67% of the votes in the association are allocated, or any larger majority the declaration specifies.").

Here, the Original Declaration expressly delineated the development rights of the declarant or its successor, in this case SWHP, such that all future purchasers had notice of such development rights. *App.* 207-230. More specifically, Article IV of the Declaration, titled "Development Rights, Special Declarant Rights, and Declarant

---

extends into Parcel B may be left in the common interest community (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements. § 1-103. Definitions., Unif. Common Interest Ownership Act 2021 § 1-103.

Control Period," describes the development rights held by SWHP, as the successor to the original declarant. Section 4.1 states the following, in relevant part:

> "The Declarant reserves to itself, and for the benefit of itself and its successors and assigns, the Development Rights … **to withdraw land from the Condominium….** The area subject to the Development Rights is the Property and also the Additional Land as more particularly described on Schedule B attached hereto." (emphasis added). *App.* at 208-209.

Schedule B to the Declaration for which development rights were reserved, including the right to add or withdraw land/area from the Condominium, expressly includes the Shorefront Parcel, said parcel identified as Item #3 in Schedule B: "The land conveyed to Crafts Family Reserve, LLC by the deed recorded in the Hancock Registry of Deeds in Book 4875, Page 292." *App.* at 229. Accordingly, development rights, including the right to add or withdraw the Shorefront Parcel from the Condominium, were validly reserved with respect to the Shorefront Parcel, and all purchasers of Condominium units had notice of the development rights, including the declarant's right to withdraw the Shorefront Parcel, by virtue of the recording of the Original Declaration in the Registry.

On September 26, 2013, only nine (9) months after the Shorefront Parcel was added to the Condominium, SWHP executed and recorded the Fifth Amendment, which validly and legally withdrew the Shorefront Parcel from the Condominium immediately upon recording, such that SWHP owned the Parcel outright, free and clear of all claims and interests of VOEA and its members. *App.* at 259-263. 33 M.R.S.A. § 1602-110.

2. VOEA's claim, that SWHP required 80% of the Association's membership to approve SWHP's withdrawal of the Shorefront Parcel, ignores the plain language of the Maine Condominium Act and the Declaration.

Contrary to VOEA's claims, the provisions of 33 M.R.S.A. §§ 1603-112 and/or 1602-107(e) do not require that a declarant obtain membership approval to exercise its development rights. *See* 33 M.R.S.A. § 1602-117(a).

a. *By its plain terms, § 1603-112 does not apply to declarants.*

A court's interpretation of a statute should stem, first and foremost, from its plain language. *See Burrill Nat. Bank v. Edminister*, 119 Me. 367, (1920) ("A statute which within itself is clear should be construed as it reads.")

The language of § 1603-112 plainly states that its requirements regarding the conveyance of association property applies to *associations* and have no bearing on a *declarant's* right to withdraw property. To wit, § 1603-112 of the Act states that "…common elements may be conveyed or subjected to a security interest **by the association**…" if 80% of the uninterested membership vote on the conveyance. (emphasis added). Nowhere in § 1603-112 does it state that the declarant's exercise of its development rights requires approval by the association membership.

b. *The structure of the Act supports the conclusion that the powers/obligations of a condominium association are separate and apart from those of the declarant.*

In assessing the meaning of a particular statute or provision of a statutory scheme, Maine law states that a court should consider the statutory context in which a

particular statute or provision lies. *Brooks v. Carson*, 2012 ME 97, ¶ 19. ("Even in a plain language reading of a statute, we will consider the provision at issue in the context of the entire relevant statutory scheme."); *Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, 2014 ME 6, ¶ 11 ("We will consider the whole statutory scheme for the section at issue in seeking to obtain a harmonious result.").

Here, the framework of the Act clearly indicates that SWHP's development rights stand entirely apart from, and are not subject to, the powers and obligations of VOEA. To wit, SWHP's right to withdraw is included in Article 2 of the Act, "Creation, Alteration, and Termination of Condominiums," which describes a condominium declarant's powers and obligations. Separate from that provision, Article 3 of the Act, "Management of the Condominium," sets forth the powers and obligations of the *association* in its management of the condominium. By example, as noted above, § 1603-112(a) of the Act, which is listed in Article 3, specifically limits its application to conveyance or encumbrance "by the association." As another example, no provision of the Act requires a *declarant* to provide notice to mortgage holders of its intent to exercise reserved development rights; whereas § 1602-119(4) expressly requires "*the association*" to provide prior notice to mortgage holders of any proposal by the association to convey or mortgage common elements pursuant to § 1603-112, and provides mortgage holders with the right to vote in place of unit owners with respect to any such proposal. The Act is replete with other examples of the Act's assignment of differing obligations to declarants versus associations, as set forth,

respectively, in Article 2 and Article 3.[8] The evident conclusion is that the powers afforded the declarant in Article 2, *e.g.* SWHP's power to withdraw the Shorefront Parcel, are intentionally separate and unimpeded by the voting scheme described in Article 3, § 1603-112.

c. ***The Act does not provide unit owners absolute veto power over a declarant's exercise of development rights.***

If VOEA's position in this matter were correct – that all conveyances and encumbrances of common elements were subject to the 80% voting requirement, *regardless* of a declarant's expressly-reserved development rights – that would mean a declarant such as SWHP would be beholden to unit owner approval for almost all aspects of standard condominium development. To wit, a declarant would be obligated to seek approval to build additional units (i.e. convert common land into units), finance their project, convert units to common elements, create common elements, or add or withdraw additional development phases to and from a condominium. Moreover, a declarant would be obligated to seek that approval immediately after the *first* unit was sold, such that the very first owner would have absolute control and veto power over the development of the entire condominium.[9]

---

[8] Though not an exhaustive list, other examples of the Act's differentiation between the powers/obligations of a declarant versus those of an association include (1) Article 2 of the Act's requirement that the declaration include a reallocation formula if units "may be added or withdrawn (33 M.R.S.A. § 1602-107(b)); (2) Article 4 of the Act specifically excludes real estate subject to withdrawal from § 1604-110's requirement that sellers record or furnish certain lien releases (33 M.R.S.A. § 1602-110); and (3) Article 1 of the Act's allocation of real estate tax obligations to the declarant (33 M.R.S.A. § 1601-105.)

[9] In fact, until there were five (5) units sold, any single unit owner would maintain absolute veto power over the declarant's exercise of its development rights under VOEA's theory.

By example, the first unit owner could simply decide they would not approve the conversion of common area to units and they would become the sole condominium member. Certainly, this result is entirely at odds with the Act's language, the core purpose of condominium development, and logic. The Act does not force a declarant to "go into business" and become a "business partner" with unit purchasers. VOEA's absurd interpretation is simply wrong as a matter of reason and law.

d. *Case law from other jurisdictions wholly supports the conclusion that SWHP's withdrawal was not subject to the provisions of § 1603-112 or § 1602-107 of the Act.*

While there does not appear to be any case law in Maine on the issue, every other court which has evaluated whether a declarant's exercise of its development rights is subject to the voting approval of association members, has found that no such approval is needed. In *Queler v. Skowron*, 438 Mass. 304, 780 N.E.2d 71 (2002), the Massachusetts Supreme Court considered whether a declarant's conveyance of a parcel to a condominium subject to subsequent conditions and subsequent removal violated the state's condominium law requiring 75% membership approval before any portion of a condominium could be removed. In determining that the declarant did not violate the voting requirement statute, the Massachusetts Supreme Court held that the condominium act is an "enabling statute" designed to provide flexibility to developers, that the declarant, having conveyed title to the condominium via *defeasible fee*, reserved removal rights such that the unit owners' title to common land was encumbered by and subject to such rights, which are separate and apart from title to

the common land.[10] *Queler v. Skowron*, 438 Mass. 304, 780 N.E.2d 71 (2002); see also *In re Skybridge Terrace, LLC Litig.*, 246 N.C. App. 489, 786 S.E.2d 5 (condominium developer entitled to withdraw portion of condominium property, despite objections of unit owners and absent approval of unit owners); *Puyallup Ridge, LLC v. Courtney Ridge Estates Owners Ass'n*, 195 Wash. App. 1055 (unpublished) (master deed/declaration amendment effectively removed units from condominium such that conveyance to new developer was fully severed without residual membership or ownership interest in original development common elements).[11]

Even more than the facts in *Queler* and *Skybridge*, the facts of this case support a finding that SWHP's withdrawal of the Shorefront Parcel is valid and legal. In those cases, the unit owners who challenged the removal of land by the declarant had purchased their units when the withdrawn land formed part of the condominium, *and still* the declarant was deemed entitled to withdraw land. Here, *not a single member of VOEA now, or ever, purchased their unit at a time when the Shorefront Parcel formed part of the*

[10] As explained by the *Queler* Court, all purchasers had notice of the declarant's reserved right to remove land from the condominium as a consequence of the recording of the master deed in the Registry of Deeds and exercise of such removal right does not constitute a partition of the common elements, because the declarant's retained right to remove land is an interest separate and apart from the common land such that exercise of the right is a removal or withdrawal of land and not a partition of common land.

[11] Additional cases also recognize a declarant's right to withdraw property from a condominium. *See Am. Condo. Ass'n, Inc. v. IDC, Inc.*, 844 A.2d 117, 131 (R.I. 2004), decision clarified on re-argument, 870 A.2d 434 (R.I. 2005) (withdrawal of portion of land by declarant precluded following expiration of declarant right period); *Alessi v. Bowen Court Condo.,* 44 A.3d 736, 741 (R.I. 2012) (foreclosure by mortgagee does not extend development right of withdrawal period; *In re 1801 Robert Fulton Drive, LLC*, 2012 WL 364251, at 4 (Bankr. E.D. Va. Feb. 2, 2012) (declarant's right to contract/withdraw property from condominium did not include right to withdraw previously allocated parking spaces).

Condominium. Further, SWHP's withdrawal of the Shorefront Parcel occurred in September 2013, well-within both "the declarant control period" and the period for exercise of the development rights provided for by Article 4 of the Declaration, and in the very early stages of development of the Condominium, when only two units had been built. *App.* at 171-175, 207-230. Moreover, the two unit owners other than SWHP at the time of withdrawal, the Mooses and Mr. Crafts, each had actual notice of the withdrawal both before and after it occurred and neither of them ever objected. *App.* at 174-175. As noted above, Dana Moos has now confirmed under oath that she and her husband never had any objection and would have consented to the withdrawal if so requested. *App.* at 174. Likewise, Mr. Crafts had signed a contract with SWHP, both granting SWHP proxy to vote Mr. Craft's interest with respect to any Condominium matter and stating that he supported the withdrawal of the Shorefront Parcel and would vote in favor of it, if requested. *App.* at 175. Mr. Crafts also affirmatively participated in the withdrawal and subsequent conveyance of the Parcel to HRE. *App.* at 175. Accordingly, even though SWHP did not need owner consent, SWHP possessed the *de facto* consent of both the Mooses and Mr. Crafts to its withdrawal and otherwise substantially complied with any provision of the Act that could possibly be construed to require owner consent to a declarant's exercise of their reserved development right to withdraw land.

In its Brief, VOEA argues that this Court should ignore the myriad of out-of-state cases supporting SWHP's position. However, it provides little argument for *why*

this Court should not adhere to the reasoning of those cases, especially as to the basic tenet that a declarant may exercise its development rights on common area condominium property without approval by the membership. The fact remains that every court to have considered this issue has sided with SWHP's position. In notable contrast, VOEA does not cite a single case, treatise, article, or any other source, in Maine or any other jurisdiction, which supports its claim that a declarant's development rights are subject to membership voting approval. Of course, the reason is that there are no such cases or other authorities which support VOEA's position.

Accordingly, SWHP had the legal right to withdraw the Shorefront Parcel from the Condominium without unit owner consent pursuant to either § 1603-112 or § 1602-107.

3. Even if SWHP was bound to obtain *written* membership consent to withdraw the Shorefront Parcel, VOEA's claims are nonetheless barred by SWHP's affirmative defenses.

For the stated reasons, SWHP possessed the statutory right to withdraw the Shorefront Parcel without approval from the VOEA membership and exercised that right validly. Nonetheless, assuming *arguendo*, that (a) SWHP was required to adhere to § 1603-112(a) to exercise its express development right to withdraw the Shorefront Parcel, and (b) the membership's approval at the time of withdrawal (i.e. the Mooses and Mr. Crafts) was deemed insufficient to comply with § 1603-112(b), because the approval was not placed in a recorded writing, VOEA's claim of ownership in this action is nonetheless barred and waived as a matter of law.

a. ***VOEA lacks standing because no unit owner purchased their unit prior to SWHP's withdrawal of the Shorefront Parcel.***

It is a fundamental principle of justiciability that a party seeking redress from the court must maintain standing. *Lamson v. Cote*, 2001 ME 109, ¶ 11 ("[S]tanding is a threshold issue bearing on the court's power to adjudicate disputes.") "The basic components of the requirement of standing are that the party seeking judicial relief show a redressable 'injury in fact' caused by defendant's actions and that the injury be direct, particular, or specific to the party." 2 Harvey & Merritt, *Maine Civil Practice* § 0:11 at 42 (3d ed. 2023). Because standing is a threshold jurisdictional requirement of justiciability, lack of standing may be raised by a party, or the Court *sua sponte*, at any time in a proceeding, including for the first time on appeal. *See Collins v. State*, 2000 ME 85, ¶ 5. ("We can raise the issue of standing *sua sponte* as it is jurisdictional.")[12]

VOEA lacks standing to challenge SWHP's withdrawal of the Shorefront Parcel. While VOEA is a nonprofit corporation, its membership and leadership are expressly restricted to unit owners. *App.* at 224. The power of VOEA to maintain this action, even in its own name, is effectively derivative of its membership and expressly limited to instituting litigation "on behalf of itself or 2 or more unit owners

[12] In fact, SWHP asserted its defense of lack of standing during oral argument on the parties' competing First Motions for Partial Summary Judgment. *Transcript of Hearing on First Motions for Partial Summary Judgment on March 6, 2023* at 44.

on matters affecting the condominium." 33 M.R.S.A. § 1603-102(a)(4). The logical corollary then is that VOEA lacks standing to assert claims for harm allegedly caused to non-unit owners, such as *former* unit owners.

Assuming, *in arguendo*, that VOEA could maintain a cognizable claim with respect to SWHP's withdrawal of the Shorefront Parcel, it can only do so on behalf of unit members who can claim injury, *i.e.* members who bought their units when the Shorefront Parcel was in the Condominium and who continued their ownership after it was removed.[13] No such unit owners exist. The Mooses purchased their unit *before* the Shorefront Parcel was added to the Condominium and sold her unit in late 2013.[14] *App.* at 172. In addition to the many other reasons described herein as to why Mr. Crafts lacks any claim, he too owned his unit before *he* added the Shorefront Parcel to the Condominium. Thus, as no unit owner (including VOEA's counsel) relied in any way on the Shorefront Parcel being part of the Condominium, nor paid a price for their unit which reflected the Shorefront Parcel being part of the Condominium, no VOEA member can claim to have been harmed by SWHP's legitimate withdrawal of the Shorefront Parcel, and VOEA cannot claim to have suffered any injury. As such, VOEA lacks standing, and its claim is barred.

---

[13] This is especially true because common elements, such as the Shorefront Parcel, are *not* owned by the Association, but are instead owned by the unit owners in proportion to percentages allocated by the applicable condominium declaration. 33 M.R.S.A. § 1602-107.

[14] The Mooses' claim would nonetheless be barred by, *inter alia*, the applicable six-year statute of limitations. 14 M.R.S.A. § 752.

b. *VOEA's claim is barred by the doctrine of laches.*

VOEA's claim is barred by the doctrine of laches. "The affirmative defense of laches applies when a party (1) has failed to assert a right for an unexplained and unreasonable length of time (2) under circumstances that have been prejudicial to an adverse party and (3) it would be inequitable to enforce the right." *Quirk v. Quirk*, 2020 ME 132, ¶ 11; *Stewart v. Grant*, 126 Me. 195, 137 A. 63, 66 (1927) ("Equity does not look with favor on the collection of stale demands.")

Here, SWHP withdrew the Shorefront Parcel on September 26, 2013. *App.* at 173. VOEA did not file its complaint until almost eight (8) years later, on August 11, 2021. *App.* at 48-58. Apart from the fact that neither VOEA nor any of its members possess standing – let alone a cognizable claim to challenge SWHP's withdrawal – in that eight-year period between the withdrawal and independent leadership of the condominium, each of the unit members maintained their own independent *right* to challenge the withdrawal, if they so desired. *Goldenfarb v. Land Design, Inc.*, 409 A.2d 662, 665 (Me. 1979). Meaning, the unit owners could have challenged the withdrawal independent of VOEA bringing a claim on their behalf. Yet for those eight years, *not one* unit owner, nor VOEA, took any action or even lodged an objection to SWHP's withdrawal of the Shorefront Parcel. *App.* at 177. As noted above, although § 1603-102(4) of the Act allows VOEA to maintain actions on behalf of itself, VOEA is, for all intents and purposes, a representative of the unit owners writ large, such that VOEA's claims are effectively derivative of its membership. Therefore, VOEA and

its unit owners' decision not to take action against SWHP, or even lodge an informal complaint against it, for eight years, *is* an unreasonable length of time for VOEA and its members to have waited to challenge SWHP's withdrawal.

It would be prejudicial to Appellees to allow VOEA to bring its claim. To wit, during the eight-year period, SWHP conveyed the Shorefront Parcel to HRE, which then made improvements to the Parcel, including installing utilities, a gazebo, walking paths, a large dock, and boat slips, much of which VOEA members were entitled to use pursuant to a lease between VOEA and HRE ("Lease"). *App.* at 175-176. HRE made these improvements, in part, based on (a) no member having ever objected to SWHP's withdrawal; (b) VOEA's use of the Shorefront Parcel pursuant to the Lease, until VOEA terminated the Lease on December 15, 2022, without objection from HRE; and (c) VOEA's ratification of the Lease by a completely independent Board. *App.* at 175-177. Under the circumstances, where every current member had notice of SWHP's withdrawal of the Shorefront Parcel prior to their unit purchase, made no objection to the withdrawal at any point, took no legal action to challenge the withdrawal for eight years, and enjoyed the benefits of HRE's improvements via the Lease, VOEA's claim is barred by the doctrine of laches.[15]

[15] The consequences of VOEA's unreasonable delay is further highlighted by the fact that, if the Court were to hold that VOEA has owned the Shorefront Parcel since 2013, the case would be subject to remand for the Trial Court to determine the cost of improvements and maintenance that HRE and SWHP provided to the Parcel from 2013 through termination of the Lease, approximately nine (9) years. This is because the remedy that VOEA is seeking in this matter is effectively restitution by rescission, and "[a] party seeking restitution by rescinding a transaction on grounds of mistake, fraud, and the like, must as a condition of obtaining restitution restore to the other party any benefit or thing of value received in the transactions.") Horton &

c. ***VOEA has waived its claim and is equitably estopped from claiming ownership of the Shorefront Parcel.***

The doctrine of equitable estoppel is premised on the "promot[ion] [of] the equity and justice of [a] case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth." *Martin v. Maine Cent. R. Co.*, 83 Me. 100 (1890); *see also Dep't of Health & Human Services v. Pelletier*, 2009 ME 11, ¶ 17 (equitable estoppel precludes a party "from asserting rights which might perhaps have otherwise existed ... against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right.").

In addition, waiver is "a voluntary or intentional relinquishment of a known right and may be inferred from the acts of the waiving party…. If a party in knowing possession of a right acts inconsistently with the right or that party's intention to rely on it, the right is deemed waived." *Interstate Indus. Unif. Rental Serv., Inc. v. Couri Pontiac, Inc.*, 355 A.2d 913, 919 (Me. 1976) (citations omitted).

VOEA and its members are estopped and have waived their claims against SWHP. First and foremost, again, by virtue of the Public Offering Statement, the recorded Fifth Amendment, the recorded Memorandum of Lease, the recorded

---

McGehee, *Maine Civil Remedies* § 7-5(f) at 181 (4th Ed. 2004).

Second Amended Plat, and the recorded Third Amended Plat, every single unit owner, prior to purchasing their unit, possessed both actual and constructive knowledge and notice that the Shorefront Parcel had been withdrawn from the Condominium in September 2013.[16] *App.* at 172-175. Despite such notice, they chose to purchase their units anyway. Indeed, not only did each member (including VOEA's counsel) buy their home knowing full-well that the Condominium did not include the Shorefront Parcel, but they also paid a price reflective of that fact. Second, *after* they purchased their units, the members continued to take actions contradictory to their current claim that SWHP's withdrawal was improper, including: (a) from SWHP's withdrawal of the Shorefront Parcel on September 26, 2023, to VOEA filing its Complaint on August 11, 2021, not one unit member took action to assert any claim that SWHP's withdrawal was invalid; (b) after the termination of the "declarant control period," in July 2018, VOEA voted to ratify its lease with HRE for use of the Parcel; and (c) after obtaining independent control, VOEA and its members declined to exercise their right under § 1603-105 of the Act to cancel the lease, until December 2022, sixteen (16) months after VOEA filed suit. *App.* at 48, 174, 177-178, 233. Each of these actions is clearly inconsistent with VOEA and its members' current claim of ownership over the Shorefront Parcel. Moreover, in reasonable reliance on VOEA's

[16] Although SWHP was not required to comply with 33 M.R.S.A. § 1603-112, all prospective purchasers would also have been on notice that there was no recorded instrument showing the membership had voted to convey the Shorefront Parcel.

and its members' actions and omissions, HRE modified its position by expending substantial sums to maintain and improve the Shorefront Parcel, including for use by VOEA's members pursuant to the Lease. SWHP similarly changed its position in reasonable reliance on the same actions and omissions; including, in part, by selling units at a price that reflected the Shorefront Parcel not being included in the Condominium. As such, both by waiver and estoppel, VOEA's claims are legally barred.[17]

B. VOEA'S CLAIMS UNRELATED TO OWNERSHIP OF THE SHOREFRONT PARCEL ARE SUBSTANTIVELY MERITLESS AND HAVE BEEN WAIVED, RELEASED, AND SETTLED.

In its Brief, VOEA correctly summarizes the status of this case before the Court – "[A] settlement was dictated into the recorded settling all issues between the parties except ownership of the Shorefront, which was agreed to be preserved on appeal to this Court." Appellant's Brief at 20. As VOEA describes it, this is an "undisputed fact."

The settlement between the parties is crystal clear – all the claims between them, excepting *ownership* of the Shorefront Parcel – were completely and fully settled and released. This fact is reflected in Justice McKeon's summary of the parties' settlement, whereby he specifically states that the only issue preserved on appeal, and

[17] VOEA's claim to void SWHP's September 2013 withdrawal is also barred by the applicable 6-year statute of limitations provided for by 14 M.R.S § 752. *See Dugan v. Martel*, 588 A.2d 744, 746 (Me. 1991) ("The accrual of a cause of action occurs at the time a judicially cognizable injury is sustained.").

not otherwise released and waived by the parties, is ownership of the Shorefront Parcel:

> THE COURT: Southwest Harbor Properties will pay the condominium association $40,000 to **settle all claims**, $24,000 to the declared units, $16,000 for rent. There will be a full release of both parties, a mutual release accepting (sic) the plaintiff's ability to appeal the Court's decision on summary judgment with respect to the Shorefront parcel. Therefore because everything's being released, the assumption is that when the Shorefront parcel matter goes up to the law court, if this Court's decision is reversed, **there'd be no further proceedings except to the extent it's necessary to reconvey the Shorefront parcel to the association**. The lease would be terminated or already is terminated… Is there anything else we need on the agreement? Attorney Kelm?
>
> MR. KELM: A time for payment.
>
> Settlement Transcript at 2:15-19 (emphasis added).

The settlement entered on the record before and by Justice McKeon, and later reiterated by Justice McKeon in the Court's Final Order, is simple: the sole, narrow issue before this Court is whether SWHP validly withdrew the Shorefront Parcel, nothing else. And yet, throughout its brief, VOEA has scattered a myriad of claims which it explicitly settled and waived; which are not properly before this Court, and regardless, which substantively have no merit.

1. SWHP does not owe VOEA a fiduciary duty to refrain from exercising its development rights and VOEA has waived and released its breach of fiduciary claims.

VOEA's claim that § 1603-103 of the Act caused SWHP and Jeff Howland to owe a blanket fiduciary duty which precluded SWHP, as *declarant*, from withdrawing the Shorefront Parcel is meritless. Although § 1603-103 extends fiduciary duties to

SWHP during such time as SWHP controlled the VOEA and its Board, that statute by its terms, applies *only to acts taken by the Board*. 33 M.R.S.A. § 1603-103(a) ("The declarant is a fiduciary for the unit owners with respect to actions taken or omitted at his direction **by officers and members of the executive board appointed by the declarant**, **and acting in those capacities**, or elected by the members at a time when more than 50% of the voting rights are held by the declarant.") (emphasis added). Section 1603-103 does not apply to independent actions taken by SWHP (or Jeff Howland on behalf of SWHP) to exercise its *development rights*, including without limitation, SWHP's withdrawal of the Shorefront Parcel and subsequent conveyance of the Parcel to HRE. Since no fiduciary duty applied to the withdrawal, no such duty has been breached. Any holding to the contrary would render a declarant's development rights void and inoperative, even though such rights are expressly granted to a declarant by the Act.[18]

The Court should also reject VOEA's interpretation of § 1603-103 because it would lead to an absurd and inherently consistent result. *See Convery v. Town of Wells*, 2022 ME 35, ¶ 10 ("In reviewing the plain language of a statute, we examine the statute in the context of the entire statutory scheme and will construe it so as 'to avoid absurd, illogical or inconsistent results.'") (internal citation omitted). Namely,

[18] Interpreting § 1603-112 as eliminating SWHP's right of withdrawal would violate the basic tenet that "[a]ll words in a statute are to be given meaning, and no words are to be treated as surplusage if they can be reasonably construed." *Cent. Maine Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 8, 68 A.3d 1262 (quotation marks omitted).

VOEA's claim is that the Act expressly grants declarants development rights which, when exercised, causes the declarant to then breach a fiduciary duty it purportedly owes to the association. VOEA's interpretation is irrational. The correct, logical interpretation is that § 1603-103 does not apply to the development rights granted declarants and SWHP owed no fiduciary duty to VOEA when it withdrew the Shorefront Parcel.[19]

In addition, excepting *ownership* of the Shorefront Parcel, VOEA's waiver and release of "all claims" against SWHP includes claims for breach of fiduciary duty. As such, to the degree VOEA maintained any cognizable claim against SWHP for breach of fiduciary duty, VOEA has nonetheless waived and released it.

2. VOEA waived and released its claims relating to the post-withdrawal Lease between HRE and VOEA.

In addition to its claim that SWHP and Jeff Howland breached their purported fiduciary duty to VOEA by having withdrawn the Shorefront Parcel, VOEA also attempts to argue on appeal that SWHP and Mr. Howland breached the same duty by participating in VOEA entering into the Lease. Once again, VOEA is attempting to assert a claim on appeal that it expressly waived and released. VOEA's claim is therefore barred.

[19] As Justice McKeon noted, a valid exercise of a statutorily granted right cannot constitute a breach of fiduciary duty.

VOEA may claim that, because the Final Order references the fact that "Count One" of the Complaint and Counterclaim were excepted from the Court's dismissal pursuant to the settlement agreement, VOEA somehow preserved its claim that the Lease constituted a breach of fiduciary duty. This argument is obviously meritless for two reasons. First, as highlighted above, the settlement transcript very clearly states that the *sole* issue preserved for appeal is ownership of the Shorefront Parcel. Again, VOEA admits as much numerous times in its Brief.[20] Second, the First MPSJ Order denied the parties' competing summary judgment motions relating to whether SWHP and Jeff Howland breached their fiduciary duties with respect to the Lease. *App.* at 31-42. This meant that when the parties were heading towards trial, and negotiating a settlement, the issue of whether SWHP validly withdrew the Shorefront Parcel had been resolved in SWHP's favor, but the issue of whether the Lease constituted a breach of fiduciary duty remained an issue for the jury. The very purpose of the parties' settlement was to resolve *all* remaining issues between them, including VOEA's fiduciary duty claims relating to the Lease, and that is precisely the reason Appellees agreed as part of the settlement to pay VOEA $16,000 for Lease rent paid by VOEA and its members. *See* Settlement Transcript. Again, the narrow exception to the settlement was VOEA's preservation of its right to appeal the Trial Court's First MPSJ Order solely as to SWHP's withdrawal of the Shorefront Parcel.

[20] As just one example, VOEA expressly admits in its Brief that claims relating to the validity of the Lease, "were released in settlement." Appellant Brief at 38.

Settlement Transcript at 2:15-19. That narrow exception is explicit. This is why Justice McKeon was so precise in stating that the only issue preserved for this Court was ownership of the Shorefront Parcel and that if remand was necessary, the only remaining steps for the Trial Court would be to reconvey the parcel to VOEA, nothing else. Settlement Transcript at 2:15-19.

VOEA's efforts to ignore the settlement agreement *and* Justice McKeon's Final Order enforcing said agreement, must be rejected.

3. VOEA waived and released its claim for attorneys' fees by the settlement and otherwise has no such claim.

VOEA's claim that it is entitled to attorneys' fee and costs in this action *regardless* of whether it prevails, is baseless for at least three (3) reasons. First and foremost, once more, VOEA waived all claims for any damages, costs, and/or attorneys' fees by virtue of the settlement. Nothing in the settlement agreement states that VOEA preserved its right to attorneys' fees on appeal. As the Trial Court made apparent, SWHP agreed to pay VOEA $40,000 to "**settle all claims**." Settlement Transcript at 2:15-19. VOEA's argument that "all claims" somehow excludes its claim for attorneys' fees is unreasonable and meritless. Second, contrary to VOEA's claim, § 1603-11 of the Act does not entitle an association to "automatic" attorneys' fees, "regardless of whether it prevails." 33 M.R.S.A. § 1603-111. Section § 1603-111 only concerns third-party tort or contract claims brought against a condominium association and provides only that a declarant is liable for all such third-party claims

accrued during the period of declarant control, together with costs and fees incurred, only in the event the declarant refuses an association's request to assume the defense of the claim. *See, e.g., Brown v. Compass Harbor Vill. Condo Ass'n*, 2020 ME 44, ¶ 26 at n. 6 (declarant liable to association pursuant to § 1603-111 for damages, costs and fees awarded to unit owner claimants for owners' breach of contract claim accruing during declarant control period). Section 1603-111 effectively allows an association to seek contribution and indemnification from declarants for liability incurred because of the declarant's actions or omissions.

Neither of the two cases cited by VOEA, *Seacoast Hangar Condo. II Ass'n v. Martel*, 2001 ME 112, ¶ 17 and *Bates Fabrics, Inc. v. LeVeen*, 590 A.2d 528, 531 (Me. 1991) support VOEA's misreading of § 1603-111. Those cases concern a non-profit corporation's duty to indemnify its officers and directors absent bad faith, willful misconduct, or gross negligence. Here, VOEA is seeking attorneys' fees for its direct action against SWHP and Jeff Howland, not as indemnification or contribution for any third-party claims.

In sum, even if VOEA had not clearly waived its claim for attorneys' fees (which it did), § 1603-111 is nonetheless wholly inapplicable to this case.

4. <u>VOEA waived and released any claims relating to the Public Offering Statement.</u>

VOEA's Brief appears to assert a claim that the Public Offering Statement issued by SWHP on October 1, 2013 (well before any current member purchased

their unit) was inaccurate, because it allegedly "did not disclose" that the Shorefront Parcel was once part of the Condominium, and that therefore, SWHP violated § 1604-102(c) of the Act. As VOEA never made any such claim in its Complaint or at any other time prior to this appeal, that issue is waived and is not before this Court. *App.* at 48-58. Nonetheless, VOEA's claim is also false. In fact, the Public Offering Statement included the Declaration and all amendments thereto, including, *inter alia*, the Third Amendment, which added the Shorefront Parcel, and the Fifth Amendment, which withdrew the Parcel. *App.* at 171-172, 264-276.[21] VOEA's claim is utterly meritless.

[21] VOEA did not include any of the exhibits attached to the Public Offering Statement in the Appendix.

CONCLUSION

For all of the reasons stated above, this Court must uphold and affirm the decision of the Trial Court and deny VOEA's appeal in full.

Dated: April 11, 2024

Michael D. Traister, Esq., Bar No. 8138
mtraister@mpmlaw.com
Nicholas J. Bernate, Esq., Bar No. 10238
nbernate@mpmlaw.com
Attorneys for Appellees Southwest Harbor Properties LLC, Howland Real Estate, LLC, and Jeff Howland

MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085
(207) 773-5651

CERTIFICATE OF SERVICE

I, Michael D. Traister, Esq., hereby certify that I have caused two copies of the brief of Defendants/Appellees to be served on Russell Kelm, Esq., counsel for Plaintiff/Appellant The Village at Ocean's End Condominium Association, by depositing conformed copies thereof in the U.S. Mail, first class and postage prepaid, to the following address:

Russell Kelm, Esq.
300 West Spring St., Unit 1801
Columbus, OH 43215

DATED: April 11, 2024

Michael D. Traister, Esq., Bar No. 8138
mtraister@mpmlaw.com
Attorneys for Appellees Southwest Harbor Properties LLC, Howland Real Estate, LLC, and Jeff Howland

MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085
(207) 773-5651