MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. BCD-24-539

RICHARD G. TAPPEN, SHEILA M. TAPPEN, and TAPCO, LLC

Plaintiffs/Appellants

v.

CLARK T. HILL, MEREDITH A. INOCENCIO, RICHARD S. HILL, DIANNA S. KILGALLEN, BRIAN KILGALLEN, and HILL FAMILY COTTAGE CORP.

Defendants/Appellees

On appeal from the Business and Consumer Court

BRIEF OF APPELLEES

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INTRODUCTION

In the trial court, this case was about whether a person, in 1922, would reasonably expect to have access to the beach when purchasing land from a plan entitled "Popham Beach Estates" and if so, where on the beach does that use begin and end. If a party has the right to use a beach for recreational purposes, does that right include sitting in the dry sand above the high tide line, but below the dune grass?

The answer to both these questions was, of course "yes." A person buying property in "Popham Beach Estates" would reasonably assume to have use of the beach and to use that beach the way owners within the subdivision have been using the subdivision's beaches for more than a century – playing games, walking, swimming, and yes, sitting in the dry sand.

The question before this Court now is not what the Hills have a right to do on the Tappens' beach. The question is whether the trial court had before it sufficient evidence to support its ruling. Similarly, it is not this Court's task to draw a line in the sand, but rather to ask whether the trial court was justified in finding the that the Tappens had failed to draw one of their own.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Parties own property in Phippsburg, Maine depicted on a subdivision plan entitled "Plan Showing Property of Popham Beach Real Estate & Hotel Company at Popham Beach, Maine, 1893" (the "1893 Plan"). A. 75 ¶ 1; 81. The Parties' properties are also depicted on a later subdivision plan entitled "Plan Showing Property, Popham Beach Estates, Inc. Popham Beach, Maine, 1922" (the "1922 Plan").[1] A. 76 ¶ 2; 82. Lots 204 through 208—and additional lots extending further west—are setback from the low water mark of the Atlantic Ocean by an area depicted as "Sea Wall Beach" on the Popham Beach Estates subdivision plans. A. 81, 82.

Appellant Tapco, LLC ("Tapco") is the current owner of Lot 205. A. 84, 85, 88. The Tappen family originally acquired Lot 205 in 1950. Trial Tr. Vol I 102:19-20. In 2021, Appellants Richard and Sheila Tappen (the "Tappens") have no ownership interest in Tapco. Prior to the Tapco being joined in this matter, which did not occur until after the case was tried, no party to this case had any ownership interest in any of the 200 series lots, including the Tappens themselves. In 2021, the Tappens purchased a release deed from Mary Stimson McNamara, the successor-in-title to the original developer, purporting to convey a portion of Sea Wall Beach situated seaward of beachfront Lots 204 through 208, as depicted on the 1893 and

[1] The subdivision identified within the 1893 and 1922 Plans is hereafter referred to as the "Popham Beach Estates subdivision" and plans collectively referred to as the "Popham Beach Estates subdivision plans" or the "plans."

1922 Plans (the "Tappen Deed"). A. 78 ¶¶ 18, 20; 83. The Tappen Deed released 3.5 acres of oceanfront land for $15,000. A. 78 ¶ 19; 84. The Tappen Deed includes an attached survey plan identifying the conveyed parcel as extending from "THE LINE ALONG EDGE SANDY BEACH" to "APPROX MEAN LOW WATER," and included the area of dry sand lying above the mean high water mark. A. 84. The Tappen Deed explicitly exempts land previously conveyed by McNamara's predecessor-in-title between Lot 206 and the "high water mark of the Atlantic Ocean." A. 84, 87.

This dispute arose after the Tappens demanded that Appellees (the "Hill family") cease using the portion of Sea Wall Beach to which the Tappens now claim exclusive rights. A. 27 ¶ 20. The Tappens, through counsel, sent the Hill family a letter requesting $30,000 every summer for continued use of the disputed area subject to certain terms set forth by the Tappens. Trial Tr. Vol I 182:1-10. The Hill family assert a right to continued recreational use of the beach pursuant to an implied easement established by the common scheme of the Popham Beach Estates subdivision and decades of common use. A. 54-55 ¶¶ 14-17; 55-56 ¶¶ 18-22; 69-70 ¶¶ 13-16; 70 ¶¶ 17-21.

Named members of the Hill family and the Hill Family Cottage Corporation own one or more of Lots 74, 75, 76, 77, 176, 177, 178, 179, 180, 181, 182, 185, 187,

188, 189, 190,199, 200, 202, or 203. Trial Exs. 9-18. Each of these properties was conveyed by reference to the 1893 Plan, the 1922 Plan, or both. *Id*.

The Popham Beach Estates subdivision plans depict an open beach area labeled "Sea Wall Beach" and "Riverside Beach" situated between the numbered residential lots and the adjacent tidal waters of the Atlantic Ocean and the Kennebec River, respectively. A. 81, 82. These beaches are not subdivided into individual lots or otherwise marked for private ownership. *Id*. A road network depicted on the plans provides access from the interior lots to both Sea Wall Beach and Riverside Beach. *Id*. The 1893 Plan identifies the "SAND DUNES" as a natural landmark immediately adjacent to the boundary line separating the 200 Lots from Sea Wall Beach. A. 81. The titles of both plans specifically include the name "Popham Beach," underscoring the prominence of beach access in the subdivision's identity. A. 81. 82.

Photo evidence in the record shows recreational use of the beaches within the subdivision since as early as 1898. A. 90-97. The Parties and their families have been visiting the beaches within the Popham Beach Estates subdivision for generations. A. 92-97; Trial Tr. Vol I 134:7–136:5; Trial Tr. Vol II 33:15-22, 34:2-8, 38:24-39:3, 97:20-21, 117:20-21. The Tappen family has used Sea Wall Beach for recreational purposes since the 1950s. Trial Tr. Vol I 134:7–136:5. There were no claims of exclusivity or private ownership until the Tappens obtained the Tappen Deed. Trial Tr. Vol I 136:6-9, 138:9–138:11,159:3-8, 168:4-8; Trial Tr. Vol II 50:10-13, 101:8-

17, 119:17-19, 120:6-8. Until this litigation, nobody ever limited activity on Sea Wall Beach or Riverside Beach to any limited purposes, including fishing, fowling, or navigation. Trial Tr. Vol I 136:13-15, 167:25-168:3, 168:9-10; Trial Tr. Vol II 50:18-20, 102:2-10.

STATEMENT OF THE ISSUES

1. Whether the Tappens' challenge to the sufficiency of the trial court's findings is untimely where they failed to file a Rule 52 motion for specific findings and conclusions of law.
2. Whether the trial court had sufficient evidence to conclude that the original developer of the Popham Beach Estates subdivision intended to grant all lot owners an implied easement for recreational use of Sea Wall Beach and Riverside Beach.
3. Whether the trial court had the discretion to find that the Tappens did not meet their burden of proof to show the location of the upland boundary to the land they are claiming.

STANDARD OF REVIEW

This appeal challenges factual findings and the sufficiency of the evidence supporting the trial court's judgment. Where a plan is ambiguous, the trial court's interpretation is a question of fact reviewed by this Court for clear error. Similarly, where property boundaries lie on the face of the earth is a factual question reviewed by this Court pursuant to the clear error standard. *Grondin v. Hanscom*, 2014 ME 148, ¶ 8, 106 A.3d 1150. "A factual finding is clearly erroneous only if no competent evidence supports it." *Id.*

"When the appellant had the burden of proof at trial, [this Court] will overturn a finding that the appellant failed to prove facts that would support the elements of his or her claim only if the appellant can demonstrate that a contrary finding is compelled by the evidence." *Gravison v. Fisher*, 2016 ME 35, ¶ 31, 134 A.3d 857 (quotation marks omitted).

"If the trial court makes [written factual] findings . . . and there was no request for further findings under Rule 52(b), we will infer that the trial court found all the facts necessary to support its judgment, if those findings are supported by competent evidence in the record." *In re Christian D.*, 2025 ME 16, ¶ 7, 331 A.3d 409 (emphasis removed) (quotation marks omitted).

SUMMARY OF ARGUMENT

The trial court correctly concluded, based on the face of the 1893 and 1922 subdivision plans, that the developer of Popham Beach Estates intended to provide all lot owners with a right to use the named beaches—"Sea Wall Beach" and "Riverside Beach"—within the subdivision for recreational purposes. A. 19. That ruling was supported by the plans themselves, which prominently depict the named beach areas, show a road network connecting the interior lots to these beaches, and are specifically titled to include Popham Beach.

The Tappens argue the trial court lacked sufficient evidence to find an implied easement, specifically demanding the court cite "affirmative proof" of the developer's intent. Blue Br. 17. At bottom, notwithstanding the standards of review and that appellate courts do not find facts, they ask this Court to make different factual findings than the ones made by the trial judge based on competent evidence, the plans. Fatal to their argument quibbling with the trial court's findings, however, is that the Tappens failed to file a motion pursuant to Rule 52(b) to alter or amend the findings. M.R. Civ. P. 52(b). To challenge factual findings pursuant to Rule 52(b), a party must move for further findings within ten days of judgment. The Tappens made no such motion. As a result, the court's findings must be upheld unless clearly erroneous, and this Court must presume the trial court made all findings necessary to support its decision. *See Markley v. Semle*, 1998 ME 145, ¶ 4, 713 A.2d 945. The

Tappens' challenge to the sufficiency of the court's findings is thus untimely, waived, and therefore unpreserved for appellate review.

Even if preserved, the trial court's ruling was fully supported by the record. Maine law recognizes that when land is sold by reference to a plan showing common areas, an implied easement arises for the benefit of lot owners. *See Arnold v. Boulay*, 147 Me. 116, 121, 83 A.2d 574, 577 (1951). The plans labeled the beaches and designed access roads leading directly to them—indicating the developer's intent to create a beach-centered subdivision. A. 81, 82. Effectively, any potential purchaser reviewing the Popham Beach Estates subdivision plans would be induced by the plans common scheme to conclude they were purchasing a right to use the beaches for recreational purposes. Trial Tr. Vol II 106:1-6. The trial court properly applied this doctrine to conclude that Sea Wall Beach was intended as a shared amenity.

The Tappens also argue that the court erred in failing to fix the upland boundary of Sea Wall Beach at the high tide line. But the burden to prove the boundary rested with the Tappens as plaintiffs in a declaratory judgment action. *See Markley*, 1998 ME 145, ¶ 5, 713 A.2d 945. The court found they failed to offer sufficient evidence to establish the location of the boundary. A. 20-21. Because the Tappens failed to meet their burden, the trial court correctly declined to fix the boundary based on speculation. A. 20. The court's refusal to adopt the Tappens'

boundary theory—one that contradicts their own deed, surveys, and prior use of the land—is fully supported by the record.

ARGUMENT

I. THE TRIAL COURT HAD SUFFICIENT EVIDENCE TO FIND AN IMPLIED EASEMENT FOR RECREATIONAL USE OF SEA WALL BEACH.

This case was about whether or not someone purchasing a lot off a plan called "Popham Beach Estates" would reasonably conclude the purchase of that lot would include access to, and use of, Popham Beach. The answer is unquestionably yes. While any reasonable fact finder could reach this conclusion based on the plan itself, as the trial court did here, the trial court also had before it volumes of information from the Hill family demonstrating nearly 100 years of recreational use. The Tappens' argument that the court lacked "affirmative proof" is not only contrary to logic, it is also untimely.

A. *The Tappens' objections to the sufficiency of the factual finding supporting the trial court's decision has been waived and is unpreserved for appellate review.*

As an initial matter, the Tappens' objections to the trial court's findings and the basis thereof, come approximately five months too late. Rule 52(b) provides:

> The court may, upon motion of a party filed not later than 14 days after entry of judgment, amend its findings or make additional findings and may amend the judgment if appropriate. The motion may be made with a motion for a new trial or a motion to alter or amend the judgment pursuant to Rule 59. Any motion made pursuant to Rule 52(b) must include the proposed findings of fact and conclusions of law requested.

M.R. Civ. P. 52(b).

When a party fails to file such a motion—as the Tappens did here—the Court must presume that the trial court found all facts necessary to support its judgment. *See In re Christian D.*, 2025 ME 16, ¶ 7, 331 A.3d 409; *see also Markley*, 1998 ME 145, ¶ 4, 713 A. 2d 945 (quoting *Mariello v. Giguere*, 667 A.2d 588, 591 (Me. 1995)). This Court must affirm the trial court's findings on appeal unless "there is no credible evidence on the record to support them . . . or . . . the court bases its findings of fact upon a clear misapprehension of the meaning of the evidence." *Coombs v. Grindle*, 1998 ME 230, ¶ 7, 718 A.2d 1107 (quoting *Baptist Youth Camp v. Robinson*, 1998 ME 175, ¶ 7, 714 A.2d 809.

Moreover, if the Tappens took issue with the express findings made, they were required to raise those arguments to the trial court via a Rule 52(b) motion and a Rule 59 motion to reconsider. *See* M.R. Civ. P. 52(b) (requiring motion be brought with Rule 59 motion). Failure to raise an argument at the trial court level means the argument is waived and unpreserved for appellate review. *See, e.g.*, *First Fin., Inc. v. Morrison*, 2019 ME 96, ¶ 14, 210 A.3d 811 ("[A] party waives an issue on appeal by failing to raise it in the trial court, even where the issue relates to a constitutional protection." (citation and quotation marks omitted)); *York Cty. v. Property Info Corp.*, 2019 ME 12, ¶ 13 n.4, 200 A.3d 803 (appellant waived argument "by failing to argue it to the Superior Court"); *Cote Corp. v. Kelley Earthworks, Inc.*, 2014 ME

93, ¶ 10, 97 A.3d 127 (failure to raise argument in motion before trial court waived the argument on appeal).

Because they failed to file a motion for further findings of fact, the Tappens cannot claim there was insufficient evidence to support the Court's conclusions. The trial court concluded "that all of the residents of the subdivision depicted in the 1893 and 1922 plans enjoy an implied easement to use Sea Wall Beach for recreational purposes consistent with beach use." A. 19. If the Tappens have concerns regarding the sufficiency of the evidence and facts to support that judgment, the time to register that concern and request specific findings lapsed ten days after the court issued its opinion.

Even if a timely Rule 52(b) motion were filed, and the issue preserved in this appeal, the court could only elaborate on the competent evidence supporting that conclusion—the 1893 and 1922 subdivision plans. The court concluded that "all of the residents of the subdivision depicted in the 1893 and 2022 plans enjoy an implied easement to use 'Seawall Beach' for recreational purposes . . ." *Id*. To reach this conclusion the Court heard testimony and examined the plans, ultimately finding that "the Plan's road network is clearly designed to provide all residents with access to the beach." *Id*. Responding to the Tappens' expert's testimony that such access would have been limited to "fishing, fowling, and navigation," (Trial Tr. Vol I 55:5-8) the court disagreed, noting that nothing on the plan can lead the court to "infer

that the Developer's Plan was to limit the residents' use to 'fishing, fowling and navigating' . . ." *Id*. That sort of factual determination—assigning weight to the evidence and making a credibility determination—is a core trial court function, not to be second-guessed on appeal. *See Markley*, 1998 ME 145, ¶ 19, 713 A.2d 945 ("The sifting and weighing of evidence is peculiarly the function of the trier.").

The Tappens misrepresent the trial court's decision by arguing that the court "did not find that the 1893 Plan contained evidence sufficient to prove that the developer intended to create a recreational easement . . ." Blue Br. 14. The trial court expressly stated that its conclusion was reached "after review of the plan itself," and by reference to the existence of a network of roads all connecting the lots to the beach. If the Tappens require more than that, the time to ask for it was in November of 2024, not March of 2025.

B. *The trial court correctly found that the developer intended to grant an implied easement over Sea Wall Beach and Riverside Beach for recreational use.*

When a subdivision plan contains features "calculated to give additional value to the lots delineated thereon, and then conveys those lots by reference to the map, [the developer] becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated." *Arnold v. Boulay*, 147 Me. 116, 121, 83 A.2d 574, 577 (1951) (quoting *Lennig v. Ocean City Ass'n*, 41 N.J. Eq. 606, 608, 7 A. 491, 493 (1886)); *see also Chase v. Eastman*, 563 A.2d 1099,

1102 n.2 (Me. 1989) ("The sale of lots by reference to a plan conveys to the grantees and their successors the right to use the streets and other areas set aside on the plan."); *Bacon v. Onset Bay Grove Ass'n*, 241 Mass. 417, 136 N.E. 813 (1922). This principle protects the expectations of lot purchasers and secures the benefits that reasonably induced them to buy into the subdivision. *Arnold*, 147 Me. at 121, 83 A.2d at 577 (quoting *Lennig*, 41 N.J. Eq. at 609, 7 A. at 493); *see also Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 13, 953 A.2d 378; *Edwards v. Blackman*, 2015 ME 165, ¶ 34, 129 A.3d 971; *Gravison*, 2016 ME 35, ¶ 37, 134 A.3d 857.

The plans for Popham Beach Estates reflect a clear intent to make beach access and use a defining feature of the subdivision.[2] The subdivision plans include a road network that provides all residents access to "Sea Wall Beach" and "Riverside Beach." This is a critical feature as it directly links the lots to the beach, suggesting that the beaches were integral to the value and appeal of the properties. The plan's title—"Popham Beach Estates"— further emphasizes that the beaches are the centerpiece of the development's value. Trial Tr. Vol II 106:3-6. The developer sent a clear signal that it was providing beach use as a feature in the community it was

[2] The Sagadahoc County Superior Court previously recognized the importance of the beach to Popham Beach Estates in *Brooks v. Carson*, stating, "The paramount benefit of owning a lot in the Popham Beach Estates subdivision is that it affords ready and convenient access by various means to the ocean and the beaches along the ocean." *Brooks v. Carson*, 2011 Me. Super. LEXIS 157, at *21-22 (Aug. 23, 2011). The trial court in this case appropriately reached the same conclusion.

marketing for sale by specifically identifying the named beaches on the plan and designing a road network leading directly to those beaches.

The Tappens' argument that the removal of certain natural features—such as pine groves and wooded areas—from later versions of the plan is an unduly narrow interpretation of the developer's intent, failing to recognize the integral portions of the plan, and essentially invites this Court to assign different weight to the evidence and resolve conflicts differently to make different findings. Blue Br. 15. Each subsequent plan retained references to Sea Wall Beach and Riverside Beach, the main attractions to the beach community, but removed general references to insignificant natural features. This distinction only strengthens the argument that the developer's focus remained on providing beach use as the focal point of the subdivision's appeal as the trial court found. There is no implied easement over the wooded areas because the Popham Beach Estates plan was designed to attract buyers by offering use of the beaches, not the natural wooded areas. If the developer had intended to offer access to wooded land, he would have preserved references to it or perhaps even titled the plan differently—something like "Popham Woods Estates." Instead, the developer preserved the beaches, provided them with distinctive names, and designed the subdivision's layout to make them accessible to all lot owners, reinforcing his intent to provide easement rights over the beach as a shared benefit.

The trial court heard extensive testimony regarding the historical use of Sea Wall Beach by both parties going back decades, including the Tappens' themselves. Mr. Tappen testified that his family used Sea Wall Beach for recreational purposes since the 1950s, and that no one ever claimed the beach was private and they never treated it as such until they purchased the land. Trial Tr. Vol I 134:7–136:9, 138:9–138:11. Mr. Tappen's testimony is critical to understanding how the beach has been treated by residents and the parties involved, which in turn echoes the apparent intent of the parties during the relevant time period. The Tappens' own use of Sea Wall Beach demonstrates the presence of an implied easement they now seek to prevent others from using. The long history of use reinforces the idea that the beach is a shared amenity for the subdivision burdened by an implied easement for recreational use.

C. *The Tappen's argument that applied easements only apply to roads is completely unsupported.*

The Tappens would have this Court adopt a rule, out of thin air, that easements implied from features on a subdivision plan can only apply to roads. Blue Br. 12. No case says that. None.

The Tappens read *Arnold* and other subdivision and sale cases, as being limited to the roads on the plan, and nothing else. Blue Br. 12-13. That reading ignores the decision's clear language extending implied easement rights to "streets,

parks, squares, or other general areas." *Arnold*, 147 Me. at 121, 83 A.2d at 577. Moreover, such a rule would effectively thwart the parties' intent and the purpose of the rule—which is to protect the reasonable expectations of the purchasers of the lots that they would enjoy the benefit of shared amenities on the plan.

The Tappens fail to point to any case law that explicitly limits implied easements by subdivision and sale to roads alone.[3] To the contrary, this Court and others have consistently recognized implied easements over areas beyond roads—such as parks, open spaces, and common facilities—when such features were part of a subdivision plan that induced purchasers to buy. *See Nelson*, 2008 ME 91, ¶ 14, 953 A.2d 378 (recognizing "particular rights to make use of the remaining lands of the Bayroot subdivision"); *Bacon*, 241 Mass. at 424, 136 N.E. at 816 (finding implied easements over parks and squares depicted on "a systematic plan of development of a summer and vacation resort"); *Lennig*, 41 N.J. Eq. at 609, 7 A. at 493 (holding that open areas such as an auditorium, camping grounds, and assembly spaces were intended to remain open for communal use). The Tappens acknowledge these established precedents and make an unpersuasive argument to the contrary unsupported by any legal authority.

[3] Curiously, the Tappens rely on *Harris v. South Portland*, 118 Me. 356, 358, 108 A. 326, 327 (1919) for the proposition that the Maine Supreme Judicial Court has considered and rejected multiple attempts to apply subdivision and sale to imply easements for uses other than roads. Blue Br. 12. Harris was an adverse possession case concerning roads within a subdivision plan and which bears no relevance to the creation of implied easements which is the issue before this Court.

Arnold concerned an 80' wide strip of shorefront land labeled on a subdivision plan as "Lake Shore Road." *Arnold*, 147 Me. at 117, 83 A.2d at 575. The plaintiff in that case claimed the right to not just use the road for ingress and egress, but also for "for recreation and as a park and as an open unbuilt upon area between their lot and Tacoma Lake." *Id*. (internal quotations omitted). The *Arnold* court emphasized that the developer of the subdivision must have understood that leaving an area of land open for recreational or general use would increase the value of the lots, benefiting the purchasers, by providing open, accessible land along the shore. *Id*., 147 Me. at 119-20, 83 A.2d at 576.

The *Arnold* court rejected the idea that the developer intended to set the shorefront land aside for future sales reasoning that "the Company at that time did not intend to lull [the purchasers] with a false promise of an open shore front available to all." *Id*. The Court rejected the idea that the developer misled the buyers into thinking they would have free use of the shorefront.

While the Tappens are correct that *Arnold* was about land labeled "road" compared to land labeled "beach," that is where the distinctions end. Both *Arnold* and this case deal with a piece of shorefront land drawn on a plan that would give the purchaser a reasonable expectation that his purchase included the recreational use of that land. In *Arnold*, the Court found the unallocated space near the shore was left open and accessible for the recreational use of lot owners. Similarly, in the

Popham Beach Estates, the subdivision plans from 1893 and 1922 depict the named beaches between the lots and the water. Like the lot owners in *Arnold*, the residents of Popham Beach Estates purchased their properties with the reasonable expectation that they could use the beaches depicted on the subdivision plan.

The Tappens argue the original developers intended to reserve the beach for future sale thereby denying recreational use of the beach for everyone else. This Court should not imply such a false promise on the part of the developers of "Popham Beach Estates."

II. THE TAPPENS' FAILED TO MEET THEIR BURDEN TO SHOW THE UPLAND BOUNDARY OF THE LAND THEY CLAIM.

The Tappens argue that because the trial court rejected the Hill family's arguments regarding the location of the upland boundary of Sea Wall Beach, they win by default and are therefore relieved of the burden of proving their own case. This argument is based on the logical fallacy of title disputes being a binary, win or lose proposition—they are not. *See, e.g.*, *Markley*, 1998 ME 145, ¶ 18, 713 A.2d 945; *Blance v. Alley*, 330 A.2d 796, 798 (Me. 1975) ("It is a familiar rule that the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant.") Under Maine law and longstanding principles of adjudication of title disputes, the court may conclude that neither party has met their burden of proof and to decline to render a finding or conclusion on a contested

issue. That is precisely what the trial court did, and like it or not, the court acted within its authority based on the findings and applicable burdens of persuasion.

A. *The Tappens improperly attempt to shift the burden from their responsibility to demonstrate ownership of the land they claim.*

In boundary line disputes, a plaintiff may proceed under either Maine's quiet title statute, 14 M.R.S.A. §§ 6651–6661, or the declaratory judgment statute, 14 M.R.S.A. §§ 5951–5963. *See Dowley v. Morency*, 1999 ME 137, ¶ 11, 737 A.2d 1061. Regardless of the legal theory chosen, the party asserting the affirmative of the controlling issue in the case bears the risk of non-persuasion. *See Markley*, 1998 ME 145, ¶ 5, 713 A.2d 945 (citing *Hodgdon v. Campbell*, 411 A.2d 667, 670–71 (Me. 1980)). Plaintiff must prove both the location of the boundary and the superiority of their title. *See id*. (citing *Hodgdon,* 411 A.2d at 671); *Ollison v. Village of Climax Springs,* 916 S.W.2d 198, 203 (Mo. 1996) (en banc); *Chappell v. Donnelly*, 113 N.C. App. 626, 439 S.E.2d 802, 805 (1994) (stating that in a quiet title action the plaintiff bears the burden of establishing the on-the-ground location of the boundary lines that he or she asserts).

The Tappens' complaint initiating this litigation sought a declaratory judgment asserting that the Hill family have encroached upon land owned by the Tappens and requested that the court enjoin the Hill family from using the disputed land. A. 28 – 29 ¶¶ 29 – 34. The Tappens' claim presents a fundamental boundary

dispute that requires them to affirmatively demonstrate the limits of their property and the legal basis for excluding others from it. That burden never passed or shifted to the Hill family, particularly since the Hill family is not claiming ownership of the disputed land, but rather an easement over land that the Tappens claim to own and purport to have a right to exclude them from.

In no way do the Hill family's counterclaims relieve the Tappens of the burden to prove the boundary's location or establish that they hold superior title to the disputed land. *See Markley*, 1998 ME 145, ¶ 5, 713 A.2d 945. The Hill family claims an implied easement over Sea Wall Beach based on a theory of subdivision and sale. This defense does not require them to prove ownership or the precise location of the boundary. It simply requires that they demonstrate a legal right to use the area, regardless of where the boundary line lies.

The land released by Ms. McNamara to the Tappens included the dry sand portion of Sea Wall Beach all the way to dune line. This was evidenced in both the recorded deed and in the survey attached to the Tappens' Complaint. A. 32, 83-84. Yet at trial, the Tappens claimed the boundary of the land they supposedly purchased only extended to the high tide line.[4] The evidence the Tappens' mustered in support

[4] As the case progressed, it likely became apparent that should the Hill family secure an implied easement, the other members of the Tappen family (holding the property as "Tapco, LLC") would lose the ability to remove people sitting in the dry sand in front of their property (Lot 205). For strategic reasons, the Tappens sought to limit their exposure to the implied easement by arguing the land they claimed to purchase from McNamara was actually much smaller and stopped at the high tide line. If they won this

of their position did not persuade the court. The Tappens failed to offer any factual evidence establishing the location of the boundary other than their deeply misplaced argument that "beach" can only ever have one meaning as a matter of law regardless of actual intent.

The trial court found that "neither party has provided sufficient evidence of where the northerly boundary line was located either in 1893 or today." A. 21. However, the burden of proof rested solely with the Tappens to prove their claim with competent evidence to support the declaratory judgment that they sought. Because the Tappens failed to meet their burden, the court could not establish the definitive location of the boundary line.

B. *The Tappens now urge this Court to adopt, on legal grounds, the exact same argument they tried to make in the trial court on factual grounds.*

In an attempt to get a second bite, the Tappens now ask this Court to adopt—on legal grounds—the very same argument they previously argued as a factual matter in the trial court. They likely have taken this approach recognizing that the argument, if presented on appeal as an issue of fact, would be doomed given the applicable standard of review.

In boundary disputes, Maine courts distinguish between questions of law and questions of fact. "What the boundaries are is a question of law, but the location of

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argument, it would contain the damage of an implied easement by confining the other subdivision owners to the wet sand only.

the boundaries on the face of the earth is a question of fact." *Markley*, 1998 ME 145, ¶ 4, 713 A. 2d 945 (emphasis added) (quoting *White v. Zela*, 1997 ME 8, ¶ 3, 687 A.2d 645); *see also Blance*, 330 A.2d at 799. The trial court's factual findings about boundary location are reviewed for clear error. *Baptist Youth Camp*, 1998 ME 175, ¶ 7, 714 A.2d 809. A court may reject even uncontradicted evidence, as it is the fact-finder's role to assess credibility and weigh the evidence. *See Markley*, 1998 ME 145, ¶ 19, 713 A. 2d 945.

The Tappens present the same argument their expert, attorney Christopher Pazar, previously offered as fact on the witness stand at trial. Whether presented as fact-then or as law-now, the argument fails. Pazar did not rely on the physical features of the property but instead on a legal interpretation of *Almeder v. Town of Kennebunk*. In that case, the Court construed ambiguous deed language with calls to "the beach" to mean the high water mark. *See Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 8, 217 A.2d. 1111. Similarly, in *Doane v. Willcutt*, 71 Mass. 328 (1855), the term "beach" was used to fix a property line when referenced in a deed.

In contrast, the Popham Beach Estates' deeds do not use the term "beach" to define a boundary. Instead, they reference specific lot numbers from a recorded subdivision plan, leaving no ambiguity within the deeds themselves.

Sea Wall Beach is a named feature in the subdivision plan, it is not used in the deeds themselves to define lot boundaries. The trial court correctly recognized that

a named beach—like Goose Rocks Beach in *Almeder* or Sea Wall Beach here—can include both dry sand and upland areas. A. 20; *see Almeder*, 2019 ME 151, ¶ 8, n.1, 217 A.2d. 1111. ("In our case law, 'beach' is defined as the land lying between the high and low water marks, and we use the word with that definition in mind. However, when referring to the general Goose Rocks Beach area, which includes land that is not in dispute, we use the capitalized word 'Beach.'). The subdivision plan provides context that Sea Wall Beach is a defined feature of the development, and it is appropriate to consider the named beach as encompassing both the dry sand and the upland portions of the beach. Unlike *Almeder*, there is no need to resolve an ambiguity through interpretation of the word "beach" in a deed, because the deeds here are unambiguous and refer directly to plan.

The Tappens' reliance on factual testimony to establish their boundary fails as well. Their expert witness and second professional land surveyor to make a determination on the boundary, John Schwanda (PLS# 1252), testified that the 1893 plan, when scaled, placed the boundary upland from the high water mark. Trial Tr. Vol I 24:5-16. Schwanda's survey depicts the boundary along the "BASE OF DUNE SLOPE," approximately 140' from the "MEAN HIGH WATER ELEVATION." A. 88. The "Exhibit A" plan included in the Tappens' deed also depicts the boundary where the dune meets the dry sand as "THE LINE ALONG THE EDGE SANDY BEACH." A. 84.

The Schwanda survey and the deed's Exhibit A plan each reference a previous conveyance of a portion of dry sand beach between Lot 206 and the high water line from the original developer's successor-in-title to the current owner of Lot 206. A. 88. That grant conveyed "all the land and beach area lying southerly of lot no. 206 as shown on said Plan [of Popham Beach Estates] carrying the same width as lot no. 206 to high water mark of the Atlantic Ocean." A. 87 (emphasis added). This deed shows that the developer's successors and the Tappens' predecessor recognized the boundary between the numbered lots and Sea Wall Beach was located north of the high water mark—consistent with the Schwanda survey and Tappen Deed.

The 1893 subdivision plan supports this interpretation. The plan explicitly identifies "SAND DUNES" just adjacent to the boundary, again consistent with Schwanda's survey and the deed's Exhibit A suggesting the boundary lies where the dune meets the dry sand beach. A. 81, 84, 88.

The court had ample reason to reject the Tappens' legal theory and to conclude they failed remotely establish any facts necessary to definitively locate the boundary. The trial court's conclusion that it cannot affirmatively adopt either parties position "without resorting to speculation" is fully supported by the record. A. 20.

CONCLUSION

For the reasons set forth above, the Court should affirm the trial court's ruling that the Hill family, and the Popham Beach Estates subdivision owners, hold an easement by subdivision and sale to use Sea Wall Beach for recreational purposes. The Court should also affirm the trial court's finding that the Tappens' did not meet their burden to fix the boundary line of Sea Wall Beach at the mean high water mark.

Dated in Portland, Maine this 6th day of May 2025.

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