No. _____

In The
Supreme Court of the United States

DARLENE F. EDWARDS, et al.,

Petitioners,

v.

CYNTHIA S. BLACKMAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Maine Supreme Judicial Court effect a "judicial taking" in violation of the Fifth and Fourteenth Amendments to the United States Constitution when it upheld the Superior Court's reliance upon extrinsic evidence of the intent of petitioner's deceased predecessor in title, John McLoon, to determine that the dedication and acceptance of "Coopers Beach Road" as a public way included the Petitioner's driveway despite the fact that the dedication petition itself failed to specifically describe the driveway or the location of the driveway as required by the applicable state statute?

2. Did the Maine Supreme Judicial Court's approval of the Superior Court's reliance upon extrinsic evidence of Mr. McLoon's intent in derogation of the express specificity requirements of the state statute arbitrarily deprive the Petitioners of their property in violation of the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Darlene F. Edwards and Lewis M. Edwards, III (the "Edwards") were the original plaintiffs in the trial court and were the appellants in the Maine Supreme Judicial Court. The Edwards are the petitioners in this appeal. Cynthia S. Blackman, Nathalie M. Scott, Willis A. Scott, Jr., Eliot A. Scott, Constance M. Scott (the "Individual Defendants") and the Inhabitants of the Town of Owls Head, Maine were the defendants in the trial court, the appellees in the Maine Supreme Judicial Court, and are the Respondents in this appeal.

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PETITION FOR A WRIT OF CERTIORARI

The Edwards respectfully petition the Court for a writ of certiorari to review the Decision of the Maine Supreme Judicial Court.

OPINIONS BELOW

The petitioners commenced this suit in Maine Superior Court seeking declaratory relief. The petitioners moved for summary judgment, which the Maine Superior Court denied in an unreported order. (Reproduced beginning at App. 54.) After a bench trial, the Maine Superior Court entered judgment for the respondents on the petitioners' dedication and acceptance claim. (Reproduced beginning at App. 24.) The decision and judgment of the Maine Superior Court is unpublished but available at 2014 WL 7920831. The petitioners appealed to the Maine Supreme Judicial Court, which affirmed. The Maine Supreme Judicial Court's judgment with opinion is reported at 2015 ME 165, 129 A.3d 971. (Reproduced beginning at App. 1.) The Maine Supreme Judicial Court summarily denied the motion for reconsideration on February 1, 2016 in an unreported order. (Reproduced beginning at App. 70.)

JURISDICTION

The Maine Supreme Judicial Court issued its Decision on December 31, 2015. Petitioners filed a timely motion for reconsideration on January 12, 2016. That

motion was denied by the Maine Supreme Judicial Court on February 1, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject of the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Title 23, Section 3025 of the Maine Revised Statutes provides:

> No property or interests therein may be dedicated for highway purposes unless the owner of such property or interest has filed with the municipal officers a petition, agreement, deed, affidavit or other writing specifically describing the property or interest and its location, and stating that the owner voluntarily offers to transfer such interests to the municipality without claim for damages, or has filed in the registry of deeds an approved subdivision plot plan which describes property to be appropriated for public use.
>
> A municipality may accept a dedication of property or interests therein by an affirmative vote of its legislative body.

STATEMENT OF THE CASE

A. The Facts

This case arises from the efforts of the Individual Defendants, who own a "back lot" in the "Coopers Beach" neighborhood of Owl's Head, Maine to use portions of

the waterfront property owned by Petitioners Darlene and Lewis Edwards. In 2011, the Edwards moved into a quiet beach house located at the end of a private, dead-end road known as "Coopers Beach Road." (App. 6, 24, 31.) The Edwards' property and the surrounding area are depicted on Town of Owl's Head Tax Map number thirteen. A copy of the 2010 version of Tax Map 13 can be found at the end of the appendix. (App. 82.) The Edwards' property is shown on the 2010 version of Tax Map 13 as Lot 67. (App. 6.) The property owned by the Individual Defendants is shown on Tax Map 13 as Lot 58-2. The Property owned by the Edwards' neighbors, the Titcombs, is shown on Tax map 13 as Lot 68.

"Coopers Beach Road" is an unpaved neighborhood road. The Edwards' property is located adjacent to the northern terminus of "Coopers Beach Road." (App. 2, 29, 82.) The Edwards' driveway was paved in the 1980s by the Edwards' predecessor-in-title, John McLoon. The Edwards' driveway extends to the west from "Coopers Beach Road," runs across the Edwards' front yard (between the Edwards' home and the ocean) approximately 25 feet away from the front of the Edwards' home and terminates in a circular turn-around on the western boundary of the Edwards' property. (App. 2, 6, 82.) The turn-around is located partially on the land of the Edwards' neighbors the Titcombs. (App. 2.) The Edwards' driveway provides the only access to the Titcomb property, and there is easement language in the Edwards' deed granting the Titcombs the right to use the Edwards' driveway to access the Titcomb property. (App. 25.) When the Edwards purchased their

home, they assumed that the driveway was their private property subject only to the rights of their next-door neighbors, the Titcombs, to use it for access to their property.

Soon after the Edwards moved into their new home, Respondent Nathalie Scott pulled up a "No Trespassing" sign on the Edwards' property, and began driving back and forth across the Edwards' driveway along with the other Individual Defendants multiple times each day. This resulted in a dispute between the Edwards and the Individual Defendants regarding what rights, if any, the Individual Defendants had to use the Edwards' driveway. (App. 7.) The Town weighed in by declaring that the Edwards' driveway was subject to a public easement pursuant to a 1986 dedication and acceptance of "Coopers Beach Road" as a public way. (App. 25.) Dedication and acceptance is a statutory procedure by which a real property owner can formally dedicate some or all of that real property for public use and the municipality in which that property is located can formally accept the property that has been dedicated. (App. 10-11.) The Maine road dedication statute (the "Statute") requires a dedication in writing "specifically describing the property or interest ***and*** its location." 23 M.R.S. § 3025 (2014) (emphasis added).

B. The Trial

In November 2011, the Edwards filed a three-count Complaint asking the Knox County Maine Superior Court to declare *inter alia* that neither the general

public nor any of the Individual Defendants has any right to use or go onto the Edwards' driveway. (App. 7.) The Individual Defendants asserted counterclaims seeking a declaration of their right to use the Edwards' driveway. (App. 7.) The Town did not assert any counterclaims but argued that the public had acquired a right to use the Edwards' driveway through both dedication and acceptance and prescription. (App. 7.)

The sole factual basis for the Town's claim that the Edwards' driveway had been dedicated as a public way is a dedication petition signed in 1986 (the "1986 Petition") by the Edwards' predecessor in title John McLoon. (App. 4, 27-28.) Mr. McLoon died in 1987. (App. 34.) The only description in the 1986 Petition of the property to be dedicated is the words "Coopers Beach Road." (App. 4, 28.) The 1986 Petition does not indicate where "Coopers Beach Road" starts and ends and does not contain a metes and bounds description of "Coopers Beach Road." (App. 14, 61.) There is nothing in the Town Warrant for the Special Town Meeting at which a vote was taken to accept the dedication of "Coopers Beach Road" that describes the location or boundaries of "Coopers Beach Road." (App. 32, 60.) There also is nothing in the minutes of that Special Town Meeting that describes the location or boundaries of "Coopers Beach Road." (App. 32, 60.)

On October 3, 2012, the Edwards moved for summary judgment on the issue of dedication and acceptance based upon the fact that the 1986 Petition fails to specifically describe the Edwards' driveway as part of "Coopers Beach Road" as is required by the

Statute to legally affect a dedication of the Edwards' driveway. (App. 7.) On May 7, 2013, the Superior Court denied the Edwards' request for summary judgment and ruled that the words "Coopers Beach Road" in the 1986 Petition "met the statutory requirement that the terms of the dedication must 'specifically describe' the location of the dedicated property" despite the fact that "[a]t least one aspect of the location of Coopers Beach Road – namely, the northern terminus – is open to legitimate dispute." (App. 7, 61.) The Superior Court also stated in the Summary Judgment Order that

> [t]he complete location of Cooper's [sic] Beach Road remains to be determined in this action. The pendency of that determination, however, does not detract from the fact that the location of the public easement is identical to the location of the road. The location is therefore "specifically" described in those terms. Once the terminus of Cooper's [sic] Beach Road is established by court order or otherwise, then the location of the public easement will also necessarily be established.

(App. 62.)

The Edwards asked the Superior Court to reconsider its decision on the grounds that the 1986 Petition is insufficient as a matter of law to accomplish a dedication of the Edwards' driveway because the words "Coopers Beach Road" provide, at best a "general" description of the driveway rather than a specific description as required by the Statute and because the words "Coopers Beach Road" provide no description whatsoever of the location of the driveway. (App. 79-80.) The

Superior Court summarily denied the motion for reconsideration. (App. 81.)

The case proceeded to a bench trial. At trial, William J. Leppanen, who has served as the Town Road Commissioner since 1981, testified that he has no idea where the northern terminus of "Coopers Beach Road" is located and is not aware of any evidence that would demonstrate where the northern terminus of "Coopers Beach Road" is located. First Selectman Richard A. Carver also testified that he has no idea where the northern terminus of "Coopers Beach Road" is located. Despite this testimony and the statutory requirement of specificity, the Superior Court ruled at the conclusion of the trial that the Edwards' driveway is subject to a public easement as a result of the 1986 dedication and acceptance of "Coopers Beach Road." (App. 37.) That ruling was premised solely upon a finding by the Superior Court based upon extrinsic evidence that Mr. McLoon intended to dedicate his driveway for public use when he signed the 1986 Petition. (App. 34-35.) The Edwards appealed that ruling to the Maine Supreme Judicial Court. (App. 9.)

C. The Appeal

Two of the issues presented to the Supreme Judicial Court for review were whether the Superior Court erred when it decided that the 1986 Petition was sufficiently specific to satisfy the statutory requirements for dedicating a public easement over the Edwards' driveway and whether the Superior Court erred by considering extrinsic evidence of the intent of the Edwards' predecessor-in-title, John McLoon to determine

whether the words "Coopers Beach Road" specifically described the Edwards' driveway. (App. 10, 13.) The Supreme Judicial Court affirmed the Superior Court's ruling that the dedication of "Coopers Beach Road" included a dedication of the Edwards' driveway. (App. 16-17.) In so doing, the Supreme Judicial Court acknowledged that the 1986 Petition was "ambiguous" and used that ambiguity as the justification for the Superior Court's consideration of extrinsic evidence to determine the location of "Coopers Beach Road" based upon Mr. McLoon's intent when he signed the 1986 Petition. (App. 14-15.) Significantly, the Supreme Judicial Court did not find that there was sufficient evidence in the record to prove that the dedication of "Coopers Beach Road" in 1986 contained a specific description of the Edwards' driveway and its location.

The Edwards timely filed a motion for reconsideration pursuant to Maine Rule of Appellate Procedure 14(b) asking the Supreme Judicial Court to reconsider its decision based upon the fact that the court had merely reviewed for clear error the Superior Court's factual findings derived from the extrinsic evidence and had not addressed the threshold question of whether it was proper for the Superior Court to have considered extrinsic evidence of Mr. McLoon's intent when he signed the 1986 Petition as a means to determine whether the description of the property to be dedicated as "Coopers Beach Road" satisfied the specificity requirements of the Statute with regard to the Edwards' driveway. (App. 71-72.) In their motion for reconsideration, the Edwards raised the issue of a judicial taking by pointing out to the Supreme Judicial

Court that its approval of the Superior Court's disregard of the specificity requirements of the Statute and its departure from its prior decisions in which it had required strict compliance with statutory requirements regarding the description of a property interest subject to divestiture, had created a situation which the Edwards never could have anticipated when they purchased their property, and would upset the settled expectations of property owners throughout the State of Maine.[1] (App. 76.) The Supreme Judicial Court summarily denied the Edwards' motion for reconsideration. (App. 70.)

[1] The Edwards' motion for reconsideration adequately raised their judicial takings claim. A judicial takings claim is timely presented if raised in a petition for rehearing or reconsideration to a state's highest court. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 712 n.4 (2010); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980) ("[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."). Furthermore, to raise an issue, a party need not use any particular "magic" words. "It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, '[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time.'" *PruneYard Shopping Ctr.*, 447 U.S. at 85 n.9 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because: 1) the Maine Supreme Judicial Court's Decision disregarded the plain language of the Maine road dedication statute and its own judicial precedent, has upset the settled expectations of property owners throughout the State of Maine, and has resulted in a "judicial taking" of the Edwards' property without due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and 2) there is a split among the lower courts over the applicability of this Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702 (2010), to situations in which state courts impinge upon established private property rights.

A. The Maine Supreme Judicial Court's Decision was a Judicial Taking.

The Maine Supreme Judicial Court's Decision was a judicial taking because it created a public right of way over the Edwards' private driveway by dedication and acceptance despite the fact that both the Superior Court and the Maine Supreme Judicial Court expressly found that the language of the 1986 Petition failed to satisfy the specificity requirements of the Maine road dedication statute. This result was contrary to established precedent in which the Maine Supreme Judicial Court had required strict compliance with statutory requirements regarding the description

of a property interest subject to divestiture. This drastic departure from both the statutory language and the judicial precedent upset the settled expectations of property owners throughout the State of Maine and affected a "judicial taking" of the Edwards' property without due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Prior to the decision of the Maine Supreme Judicial Court in this case, neither the Edwards, nor anyone else, would have had the slightest hint upon reviewing the applicable Town records – the 1986 Petition, the Town Warrant for the Special Town Meeting at which a vote was taken to accept the dedication of "Coopers Beach Road" and the Minutes of that meeting – that the Edwards' driveway had been dedicated and accepted as a public way. After the Supreme Judicial Court's Decision, the general public has a legal right to physically invade the Edwards' driveway at any time of day or night, traveling by foot or vehicle across the Edwards' front yard approximately 25 feet from their home.

To establish a public way by dedication and acceptance, a town must prove that the owner of the property in question dedicated it to the town and the town accepted the dedication. *See Comber v. Inhabitants of Denistown*, 398 A.2d 376, 378 (Me. 1979). The intent of the owners to dedicate the property in question "must be unequivocally and satisfactorily proved." *Littlefield v. Hubbard*, 124 Me. 299, 128 A. 285, 287 (Me. 1925); *see also Town of Kittery v. MacKenzie*,

2001 ME 170, ¶ 10, 785 A.2d 1251, 1254 ("To prove dedication, it must be clear that the grantor intended to dedicate the land in question for a public purpose."). Pursuant to the Maine road dedication statute in effect at the time the 1986 Petition was signed, the proof of a property owner's intent to dedicate his or her property for public use must be contained in a writing "specifically describing the property or interest and its location." 23 M.R.S. § 3025 (2014).

The Statute requires a dedication in writing "specifically describing the property or interest ***and*** its location" 23 M.R.S. § 3025 (2014) (emphasis added). This requirement is intended to ensure that the intent of individuals making the dedication is clear and unambiguous, and to avoid situations similar to the one presented by the case at bar in which litigants ask the courts to second-guess the scope of a dedication made many years ago by a person who is long-since dead.

In the instant case, the Town admitted at trial that the only description in the 1986 Petition of the property to be dedicated is the words "Coopers Beach Road." The 1986 Petition does not indicate where "Coopers Beach Road" starts or ends and does not contain any metes and bounds description of "Coopers Beach Road." Thus, on its face, the 1986 Petition fails to satisfy the statutory requirements for a dedication of the Edwards' driveway.

The Superior Court ruled in response to the Edwards' motion for summary judgment that "as a matter of law" the words "Coopers Beach Road" "met the statutory requirement that the terms of the dedication must 'specifically describe' the location of the dedicated property" despite the fact that "[a]t least one aspect of the location of Cooper's [sic] Beach Road – namely, the northern terminus – is open to legitimate dispute." This was an error of law. Once the Superior Court determined that the location of the northern terminus of "Coopers Beach Road" was "open to legitimate dispute" it should have ruled that the 1986 Dedication was invalid with regard to the dedication of the Edwards' driveway as part of "Coopers Beach Road" because it failed to "specifically" describe the driveway and its location as required by 23 M.R.S. § 3025 (2014). The statute does not call for a general description of the location, it requires a specific description. In this case, the term "Coopers Beach Road" in the 1986 Petition is not specific enough to indicate whether the "road" includes Mr. McLoon's driveway or not, and that should have ended the inquiry because, on its face, the 1986 Petition fails to satisfy the statutory requirements for a dedication of the driveway.

At trial, the Town's Road Commissioner and its First Selectman both testified that they had no idea whether "Coopers Beach Road" included the Edwards' driveway. Despite the fact that the evidence presented at trial clearly indicated that the 1986 Petition failed to satisfy the statutory requirements, the Superior Court ruled, based solely upon extrinsic evidence, that

the Edwards' driveway was subject to a public easement because Mr. McLoon intended to dedicate the driveway for public use when he signed the 1986 Petition. The Maine Supreme Judicial Court upheld this ruling despite the fact that it expressly found in its Decision that the 1986 Petition was "ambiguous." Indeed, it used this ambiguity to justify the reliance upon extrinsic evidence to divine the intent of Mr. McLoon when he signed the 1986 Petition. The Maine Supreme Judicial Court's disregard of the plain language of the Statute also was inconsistent with its prior decisions.

This has resulted in a "judicial taking" of the Edwards' property without due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and has upset the settled expectations of property owners throughout the State of Maine. In the past, under similar circumstances, the Supreme Judicial Court has required strict compliance with statutory requirements regarding the description of a property interest subject to divestiture. *See Nadeau v. Town of Oakfield*, 572 A.2d 491 (Me. 1990). In *Nadeau*, the Court upheld a Superior Court decision invalidating two tax lien certificates from the early 1950's that failed to satisfy the statutory requirement of "a description of the real estate sufficiently accurate to identify it." *Nadeau*, 572 A.2d at 492 ("Because these statutes authorized a divestiture of land, it was necessary for the Town to comply strictly with the statutes' requirements.").

Similarly, in construing the application of the statute of frauds to an agreement for the purchase and sale of real estate, the Maine Supreme Judicial Court stated "[a]s we explained more than a century ago, although a contract for the sale of land need not include a metes and bounds description, it 'should . . . describe [] the land with such certainty, that it could be understood from the writing itself, without parol proof; unless that appears in the writing, or by some reference, contained in it, to something else, which is certain, it does not comply with the statute. . . .'" *Gagne v. Stevens*, 1997 ME 88, ¶ 9, 696 A.2d 411, 414. The rationale provided by the Maine Supreme Judicial Court for the application of this strict standard of review was "to prevent enforcement through fraud or perjury of contracts never in fact made." *Id.*

Based upon these past decisions, it would not be reasonable to expect that the Edwards, or anyone else, would have had the slightest hint upon reviewing the applicable Town records – the 1986 Petition, the Town Warrant for the Special Town Meeting at which a vote was taken to accept the dedication of "Coopers Beach Road" and the Minutes of that meeting – that the Edwards' driveway had been dedicated and accepted as a public way. By basing its decision on the intent of Mr. McLoon when he signed the 1986 Petition rather than upon whether the contents of the 1986 Petition satisfied the statutory requirement to specifically describe the driveway and its location in a way that would put the Edwards on notice that a dedication and acceptance of the driveway had occurred, the Supreme

Judicial Court deprived the Edwards of their reasonable and settled expectation that they owned the driveway in front of their house. Accordingly, the Court should grant the petition because the Maine Supreme Judicial Court's Decision affected a "judicial taking" the constitutionality of which should be reviewed by this Court.[2]

B. There is a split among the lower courts over the applicability of this Court's decision in *Stop the Beach* to situations in which state courts impinge upon established private property rights.

It is important for this Court to accept the above-captioned case for review in order to clarify the law regarding the constitutionality of state court decisions that eliminate or impinge upon existing private property rights. In this Court's 2010 decision in *Stop the Beach*, eight justices issued three separate opinions which were based upon several potential legal theories that could support the finding of an unconstitutional "judicial taking." Ultimately, the Court found that,

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[2] Because the Edwards were parties to the Maine case, seeking certiorari before this Court is the proper route to pursue their judicial takings claim. *See Stop the Beach Renourishment, Inc.*, 560 U.S. at 727 (finality principles "would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court."). Indeed, pursuit of the Edwards' judicial takings claim in the Maine courts would be futile, given that Maine's highest court has already pronounced the change in established law that deprived the Edwards of their property.

based upon the facts of the case, a judicial taking had not occurred. Thus, currently, it is not clear under what circumstances a state court decision that eliminates or impinges upon existing private property rights can violate the Takings Clause of the Fifth Amendment to the United States Constitution or the Due Process Clause of the Fourteenth Amendment.

At least three Circuit Courts have found that state court decisions that affect private property rights may violate the Takings Clause. In *Smith v. United States*, the Federal Circuit concluded that a "judicial takings" claim exists for purposes of determining the period of limitations under the Tucker Act. 709 F.3d 1114, 1116-17 (Fed. Cir. 2013), *cert. denied*, No. 13-5260, 2013 WL 3489701 (Oct. 7, 2013). The Federal Circuit said, "[t]he Court in *Stop the Beach* did not create this law, but applied it." *Id.* at 1117. In *Vandevere v. Lloyd*, the Ninth Circuit, citing *Stop the Beach*, said that "any branch of state government could . . . effect a taking." 644 F.3d 957, 963 n.4 (9th Cir. 2011). Further, the Ninth Circuit stated, "[w]e also note that a federal court remains free to conclude that a state supreme court's purported definition of a property right really amounts to a subterfuge for removing a pre-existing, state-recognized property right." *Id*. The Third Circuit also has implicitly stated that a judicial action may be a taking. *See In re Lazy Days' RV Center, Inc.*, 724 F.3d 418, 425 (3d Cir. 2013). In *Lazy Days*, one of the parties argued that a bankruptcy court order was a taking. *Id*. The Third Circuit did not dismiss the notion that a judicial action could not be a taking but concluded that the particular

judicial action at issue was not a taking. *Id.* Similarly, the Texas Supreme Court, relying on *Stop the Beach*, implicitly recognized the existence of a "judicial taking" when it stated that "merely pronouncing . . . a limitation on property rights, whether by judicial decree or executive fiat, would raise serious, constitutional concerns." *Severance v. Patterson*, 370 S.W.3d 705, 710 n.5 (Tex. 2012).

In contrast to the cases discussed above, the Supreme Court of Kansas has rejected the notion of a judicial taking, stating that *Stop the Beach* has no precedential value as to that issue. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 P.3d 1106, 1127 (Kan. 2013), *cert. denied*, No. 12-1436, 2013 WL 2903456 (Oct. 7, 2013). The Court of Appeals of Maryland, with no explanation as to whether it was rejecting the theory of judicial taking or the merits of the claim, also has rejected a judicial takings claim premised on *Stop the Beach*, "[w]e are unpersuaded by Appellees' thin argument on this score. . . ." *Exxon Mobil Corp. v. Albright*, 71 A.3d 150, 151 n.1 (Md. 2013). The Maryland federal courts also seem to be confused by the opinion in *Stop the Beach*. *See, e.g.*, *Weigel v. Maryland*, Civ. No. WDQ-12-2723, 2013 WL 3157517, *8 (D. Md., June 19, 2013) ("There is some – contested – authority that a federal district court may declare unconstitutional a state court decision that effects a Fifth Amendment takings.") (citing *Stop the Beach*, 130 S. Ct. at 2601); *Shinnecock Indian Nations v. United States*, 112 Fed. Cl. 369, 385 (2013) ("[T]he portion of the Supreme Court's decision in *Stop the Beach* that

discussed the standard for finding that a judicial taking had occurred and stated that a judicial taking was a valid cause of action was signed by only four justices and therefore did not create binding precedent.") (citations omitted); *see also Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 435 n.5 (7th Cir. 2011) (Hamilton, J., concurring in part and dissenting in part) (recognizing that *Stop the Beach* did not produce a majority opinion on whether a court decision can effect a compensable taking of property); Josh Patashnik, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 260-64 (2012) (discussing what, if any, controlling law was created by *Stop the Beach*).

Accordingly, the Court should grant the petition because there is confusion among the lower courts over the applicability of this Court's decision in *Stop the Beach* to situations in which state courts impinge upon established private property rights and that confusion should be resolved.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for writ of certiorari on the questions presented.

Respectfully submitted,

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MAINE SUPREME JUDICIAL COURT
Decision: 2015 ME 165
Docket: Kno-14-358
Argued: April 9, 2015
Decided: December 31, 2015

Panel: SAUFLEY, C.J., and ALEXANDER, MEAD, GORMAN, and JABAR, JJ.

DARLENE F. EDWARDS et al.

v.

CYNTHIA S. BLACKMAN et al.

JABAR, J.

[¶1] Darlene F. Edwards and Lewis M. Edwards III appeal from a judgment entered in the Superior Court (Knox County, *Hjelm, J.*) concluding, inter alia, that (1) a 1986 dedication and its acceptance by the Town of Owls Head created a public easement over the way and cul-de-sac located on the Edwardses' property; and (2) a 1924 conveyance created an easement over the beach located on the Edwardses' property, benefiting the property currently owned by Cynthia S. Blackman; her brother, Eliot A. Scott; and their parents, Nathalie M. Scott and Willis A. Scott Jr. (collectively, the Scotts). The Edwardses argue that the court erred in finding that their predecessor intended to create a public easement over the way and cul-de-sac, and in concluding that the dedication petition sufficiently described the property. The Edwardses also contend that any beach easement rights created by the 1924 conveyance neither burden

their property nor benefit the property owned by the Scotts.

[¶2] We reject these contentions and affirm the judgment in its entirety.

I. BACKGROUND

[¶3] The following facts were found by the court and are supported by the evidence presented at trial. *See Testa's, Inc. v. Coopersmith*, 2014 ME 137, ¶ 2, 105 A.3d 1037. The Scotts jointly own inland property located at 34 Coopers Beach Road in Owls Head[1] The Edwardses jointly own waterfront property located at 70 Coopers Beach Road, near the Scotts' property. From Coopers Beach Road a way extends across the Edwardses' property, terminating in a cul-de-sac that is located partly on the Edwardses' property and partly on the property of the abutting landowner, the Arthur Titcomb Living Trust (Titcomb).[2]

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[1] Although Eliot Scott's wife, Constance Scott, was named as a defendant, there is no evidence that she has a record ownership interest in the property located at 34 Coopers Beach Road, and she does not claim any interest in either the way and cul-de-sac or the land above the high-water mark on the Edwardses' property. Because Constance's interests differ from the interests of the other individual defendants, references to "the Scotts" herein do not include her.

[2] Titcomb is not a party to this action; its rights to use the way and cul-de-sac are not in issue here.

A. The 1924 Conveyance

[¶4] The properties now owned by the Scotts and the Edwardses formerly were included in a tract of land owned by Cora E. Perry. In 1924, Perry conveyed a portion of her tract to Ensign Otis. Perry's deed to Otis described the property conveyed by reference to a plan of Coopers Beach "made by A.D. Blackin[ ]ton in 1882" (the Blackinton Plan). Otis's deed also granted the "privileges of all streets laid out on said plan and the free use of the beach for bathing and boating purposes." Otis's deed did not describe the location of "the beach," nor did the Blackinton Plan label or otherwise designate the location of a particular beach area.

[¶5] The Scotts' property at 34 Coopers Beach Road includes some of the land that Perry conveyed to Otis in 1924, and some land that was not involved in that 1924 conveyance. The Scotts' deed to 34 Coopers Beach Road expressly conveys only a single easement providing "a right-of-way over the Coopers Beach Road" to the property; it does not mention any beach rights.

[¶6] At the time of her 1924 conveyance to Otis, Perry's holdings included the waterfront property that is now owned by the Edwardses. The Blackinton Plan depicts a waterfront lot, numbered 24, contiguous to the Edwardses' property. These adjacent properties have differently described waterfront boundaries. The deeds in the Edwardses' chain of title describe their property's waterfront boundary in a manner that

locates that boundary at the low-water mark. The deeds in the chain of title for the land corresponding to lot 24 describe that lot's waterfront boundary in a manner that locates that boundary at the high-water mark.

B. The 1986 Dedication and Acceptance

[¶7] From 1973 to 1986, the Town of Owls Head (the Town) hired contractors to sand and snowplow Coopers Beach Road, which was then a private road composed of four separate branches. During this period, the Town included in its winter maintenance of Coopers Beach Road the way and cul-de-sac located on the Edwardses' property. After learning that it was not allowed to expend public funds to maintain private roads, the Town announced its intent to cease plowing private roads at the end of the 1985 to 1986 winter season.

[¶8] In 1986, twenty-two individuals signed a two-page petition proposing that the Town accept the dedication of "Coopers Beach Road" as a public easement. The petition's first page identified its signatories as "owners of property consisting of Coopers Beach Road." The petition's second page identified a different group of signatories as "abutting property owners on Coopers Beach Road." Five individuals signed the first page and seventeen signed the second.

[¶9] In 1986, John McLoon owned the property that is now owned by the Edwardses. When the dedication petition was circulating, a Town official spoke

with McLoon about the petition's purpose and consequences. The official told McLoon that if the road were accepted as a public easement, the Town would continue to plow and sand it, and others would be allowed to use it. The official explained that McLoon would need to sign the petition if he wanted the road to be dedicated, and McLoon signed the petition's second page.[3]

[¶10] In August 1986, the Town held a special meeting to vote on the acceptance of multiple public easement roads, and voters accepted the dedication of public easements over ten private roads, including Coopers Beach Road. Since that vote, the Town has treated the way and cul-de-sac located on the Edwardses' property in the same manner that it has treated all parts of the network of roads that were formerly collectively called Coopers Beach Road.

[¶11] The record also supports the following facts, which were found by the court in an order entered on May 7, 2013.

[¶12] In 1996, the Town voted to approve the 1986 acceptance of a public easement over Coopers Beach Road. Available at the 1996 meeting were tax maps that a selectman had "marked to depict the location of the Cooper's Beach Road dedication based on his understanding of the 1986 acceptance." One of

[3] Titcomb's predecessor-in-title did not sign any part of the petition.

these maps was admitted as an exhibit at trial and shows a hand-drawn line (beginning at lot 57) that runs the length of Coopers Beach Road and extends over the way and cul-de-sac located on the Edwardses' property (lot 67).[4]

[¶13] To assist the reader, we include a black and white copy of that tax map below.

[4] At trial, Darlene Edwards and her title expert both testified that the Town's tax map shows the Edwardses' property at lot 67, the Titcomb property at lot 68, and the Scotts' property at lot 58-2.

C. Procedural History

[¶14] In November 2011, the Edwardses sued the Scotts and the Town, seeking a declaratory judgment that the Scotts have no right to use and the Town has no interest in the Edwardses' property. The Scotts counterclaimed, asserting rights to the way and beach located on the Edwardses' property by virtue of prescriptive and deeded easements and common law rights to the intertidal zone. The Town did not file a counterclaim but contested the Edwardses' claim that it had not acquired a public easement over the way and cul-de-sac located on the Edwardses' property.

[¶15] In October 2012, the Edwardses moved for summary judgment on their claims against the Town, arguing that the 1986 dedication petition had not described the location of the dedicated property with enough specificity to satisfy 23 M.R.S. § 3025 (2014), which sets out the process by which property is dedicated and accepted for highway purposes. In an order entered on May 7, 2013, the court ruled that, although the northern terminus of the road remained to be determined, the description of the dedicated way as "Coopers Beach Road" was sufficient to meet the statutory standard for an acceptance.

[¶16] The court held a six-day bench trial in December 2013 and January 2014. In its post-trial brief, the Town argued that the Edwardses' challenge to the validity of the dedication was barred by, among other things, the thirty-day limitations period for

review of governmental action contained in M.R. Civ. P. 80B(b). In its judgment, entered on July 30, 2014, the court reached the merits of the dedication issue, reasoning that the Rule 80B deadline would only apply if the dedication had "aggrieved" the Edwardses' predecessor by creating an easement over the way and cul-de-sac. *See* 23 M.R.S. § 3029 (2014) (allowing any person "aggrieved" by an act of the municipal legislative body in a dedication proceeding to bring an appeal to the Superior Court pursuant to M.R. Civ. P. 80B).

[¶17] On the merits of the dedication issue, the court found that, at the time of the dedication, Coopers Beach Road had included the way and cul-de-sac located on the Edwardses' property, and that the Edwardses' predecessor, McLoon, had intended to dedicate the disputed way to public use. Reiterating its earlier ruling as to the dedication's statutory sufficiency, the court concluded that the Town had acquired, by dedication and acceptance, a public easement over the way and cul-de-sac located on the Edwardses' property.[5]

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[5] In light of its conclusion that the Town had acquired a public easement over the Edwardses' way and cul-de-sac by dedication and acceptance, the court did not consider whether the Town or the Scotts also hold prescriptive easements over the way and cul-de-sac, or whether the Scotts hold a deeded easement over the way and cul-de-sac. Because Titcomb was not a party, the court was careful not to determine the Town's rights, if any, to the part of the cul-de-sac located on Titcomb's property. *See Laux v. Harrington*, 2012 ME 18, ¶¶ 24-25, 38 A.3d 318

(Continued on following page)

[¶18] On the merits of the Scotts' beach easement claims, the court found that Perry had intended to grant Otis an easement over the beach that is now owned by the Edwardses, and determined that the benefits of that easement had become appurtenant to Otis's land and run with that land through its division and partial incorporation into the property that is now owned by the Scotts. Based on this analysis, the court ruled that the Scotts hold record easement rights to use the Edwardses' intertidal beach area "for bathing and boating purposes."[6]

[¶19] The Edwardses timely moved for additional findings and the court denied the motion. The Edwardses then appealed, challenging the court's determinations as to the validity and location of both the public easement claimed by the Town and the beach easement claimed by the Scotts.

(concluding that although the court mentioned non-parties' properties in discussing the factual issue of an easement's course, the court's formal declaration of the easement's location properly referred only to the parties' properties).

[6] The court also concluded that the Scotts do not have prescriptive rights to use the Edwardses' beach, but that they do have the right to use the Edwardses' beach to the extent allowed by Maine common law. Neither the Scotts nor the Edwardses challenge these conclusions on appeal.

II. DISCUSSION

A. Status of the Way and Cul-de-sac

1. Validity of the Dedication Process

[¶20] We begin our analysis of the status of the way and cul-de-sac by considering the operative legal consequences of the Town's vote to accept a dedicated public easement over "Coopers Beach Road."[7] The Edwardses challenge the court's conclusion that the 1986 petition specifically described the location of the dedicated property as required by 23 M.R.S. § 3025. The Town contends that the Edwardses' challenge to the dedication's statutory sufficiency is time-barred by M.R. Civ. P. 80B. We review the interpretation of statutes and the Maine Rules of Civil Procedure de novo as a matter of law. *Gorham v. Androscoggin Cty.*, 2011 ME 63, ¶ 9, 21 A.3d 115; *J.A. Rapaport Family L.P. v. City of Brewer*, 2005 ME 89, ¶ 4, 877 A.2d 1077.

[¶21] Title 23 M.R.S. § 3025 imposes descriptive requirements[8] on a dedication for "highway purposes,"

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[7] Pursuant to 23 M.R.S. § 3025 (2014), "Unless specifically provided by the municipality, title to property accepted for highway purposes after December 31, 1976 shall be in fee simple." Here, the minutes for the special meeting held by the Town of Owls Head on August 19, 1986, reflect that the Town specifically voted to accept the dedication of a public easement over Coopers Beach Road, rather than fee simple title to the road.

[8] With added emphasis, 23 M.R.S. § 3025 provides in relevant part:

(Continued on following page)

which purposes are defined to include "use as a town way[9] and those things incidental to the . . . maintenance . . . of town ways," 23 M.R.S. § 3021(1) (2014). A dedication for highway purposes must be formally manifested by a writing or subdivision plot plan that describes the property to be dedicated for public use. 23 M.R.S. § 3025. When a dedication is manifested in writing, the writing must specifically describe the location and the property interest that is the subject of the dedicatory offer. *Id.* Municipal acceptance of a dedication may be accomplished by an affirmative vote on an article in a town meeting warrant. *Vachon v. Town of Lisbon*, 295 A.2d 255, 260 (Me. 1972). A person aggrieved by a municipality's acceptance of a dedication may appeal to the Superior Court pursuant to Rule 80B. *See* 23 M.R.S. § 3029. Because section 3029 contains no time limit, an appeal from an acceptance accomplished by vote must be brought

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> No property or interests therein may be dedicated for highway purposes unless the owner of such property or interest has filed with the municipal officers a petition . . . or other writing *specifically describing the property or interest and its location*, and stating that the owner voluntarily offers to transfer such interests to the municipality without claim for damages, or has filed in the registry of deeds an approved subdivision plot plan which describes property to be appropriated for public use.

[9] "Town way" is defined as, among other things, an "area or strip of land designated and held by a municipality for the passage and use of the general public by motor vehicle." 23 M.R.S. § 3021(3) (2014).

within thirty days after the vote. *See* M.R. Civ. P. 80B(b).

[¶22] The record here demonstrates that the Town held a meeting in August 1986, during which residents accepted by vote a public easement over "Coopers Beach Road." Any person aggrieved by the Town's acceptance of the dedication had thirty days from the date of the vote within which to appeal. The deadline for appealing the Town's acceptance thus expired in September 1986.

[¶23] The Edwardses contend that their claims are timely because they seek declaratory relief as to the location of the Town's easement over Coopers Beach Road. However, the Edwardses also plainly challenge the description of the proposed dedication as inconsistent with statutory requirements. "Such challenges are the essence of matters that must be brought pursuant to Rule 80B to question whether the particular action of a municipal[ity] . . . is consistent with the requirements of law." *Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 13, 868 A.2d 172. Rule 80B is the sole means for seeking Superior Court review of the legality of an act by a municipal body, "whether such review is specifically authorized by statute or is otherwise available by law." *Id.* (quotation marks omitted). Moreover, "a declaratory judgment action cannot be used to revive a [Rule 80B claim] that is otherwise barred by the passage of time." *Id.* ¶ 10.

[¶24] Because no appeal was taken within the time prescribed by Rule 80B, the validity of the 1986 dedication cannot be challenged now. *See Whalen v. Town of Livermore*, 588 A.2d 319, 321 n.3 (Me. 1991); *Goucher v. Hanson*, 537 A.2d 1142, 1142-43 (Me. 1988); *Town of Fayette v. Manter*, 528 A.2d 887, 889 (Me. 1987). The Town's votes must therefore "be presumed to have the operative consequences apparently intended": to accept an easement over "Coopers Beach Road." *Manter*, 528 A.2d at 889; *see also Goucher*, 537 A.2d at 1143.

2. Location of the Public Easement[10]

[¶25] The Edwardses next challenge the court's conclusion that the Town's easement extends over the way and cul-de-sac located on their property. They argue that the dedication petition plainly demonstrates McLoon's intent to grant an easement over only the part of the road "abutting" his property, and that the court erred by considering evidence of McLoon's intent extrinsic to the petition.

[¶26] To prove a dedication, it must be clearly shown that the grantor intended to dedicate the property at issue for a public purpose. *Town of Kittery v. MacKenzie*, 2001 ME 170, ¶ 10, 785 A.2d 1251. The

[10] Though the Edwardses are time-barred from challenging the validity of the dedicatory description on statutory grounds, Rule 80B does not bar the Edwardses' argument that that description was not intended to include the way and cul-de-sac.

construction of a petition to dedicate an easement is ordinarily a matter of law. *See Testa's, Inc.*, 2014 ME 137, ¶ 11, 105 A.3d 1037. However, if the petition is ambiguous, its construction is a question of fact. *See id.* If the language of the petition is susceptible to more than one interpretation, it "must be read in the light of the circumstances surrounding its execution to effectuate its main end." *Callahan v. Ganneston Park Dev. Corp.*, 245 A.2d 274, 276 (Me. 1968) (quotation marks omitted). In such cases, "[t]he meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party." *Id.* at 277 (quotation marks omitted). We will uphold the court's determination regarding the parties' intent unless it is clearly erroneous. *Anchors v. Manter*, 1998 ME 152, ¶ 16, 714 A.2d 134.

[¶27] Here, the second page of the petition states, "We the undersigned, abutting property owners on Coopers Beach Road, are in agreement with having the Town of Owl's Head accept the road as a public easement, without claim for damages." McLoon's signature under this language clearly demonstrates that he intended to grant the Town an easement over "Coopers Beach Road." However, this language does not indicate the parties' understanding as to the road's location on the face of the earth. The significance that the parties would have attached to the term "abutter" and their understanding as to whether the road included the way and cul-de-sac cannot be determined by reading the petition in the abstract. Contrary to the Edwardses' contention, the

petition is ambiguous and the court did not err in considering extrinsic evidence.

[¶28] Competent evidence supports the court's findings that (1) the Town had historically snowplowed and sanded Coopers Beach Road up to and including the way and cul-de-sac; (2) the petition was circulated after the Town announced its intent to cease maintaining private roads; and (3) McLoon was aware of the Town's announcement and understood that by signing the petition he could secure the continued provision of Town plowing, but would give up the right to exclude others. The record also supports the court's finding that, at the time of the dedication, the Town used the disputed way in the same manner that it used the entire road network that was formerly collectively called Coopers Beach Road.

[¶29] That the road was dedicated to secure continued snowplowing by the Town and that the way and cul-de-sac had historically benefited from those services suggests that the way and cul-de-sac were to be included in the dedication. That McLoon signed the petition with awareness of the dedication's purpose and consequences indicates that he intended to give up privacy in the way and cul-de-sac in exchange for the continued benefit of having the Town snowplow those areas. That the Town used the disputed way in a manner indistinguishable from its use of other parts of the Coopers Beach Road network also supports a determination that the Town understood that Coopers Beach Road included the disputed way.

[¶30] In sum, there was ample evidence to support the court's finding that, at the time of the dedication, McLoon and the Town both understood "Coopers Beach Road" to include the way and cul-de-sac.[11] Though the record also contains conflicting evidence, the court did not clearly err in finding that McLoon intended to grant the Town an easement over the way and cul-de-sac, and that the northern terminus of the public easement over "Coopers Beach Road" therefore includes the way and cul-de-sac located on the Edwardses' property. *See D'Angelo v. McNutt*, 2005 ME 31, ¶ 6, 868 A.2d 239 ("[T]he trial court's . . . findings of fact [are] reviewed for clear error and will be affirmed if there is competent evidence in the record to support the finding[s] even if the evidence might support alternative findings of fact." (alteration omitted) (quotation marks omitted)).

[¶31] Because the statutory validity of the dedicatory description is no longer open to challenge, the only issue is the location of the dedicated property. Discerning no error in the court's interpretation of the dedication petition, we affirm the conclusion that

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[11] This conclusion as to the Town's understanding of the location of Coopers Beach Road is further supported by the tax map made available at the 1996 meeting, which is displayed *supra* ¶ 13. The record supports the court's finding that that tax map had been marked by a selectman "to depict the location of the Cooper's Beach Road dedication based on his understanding of the 1986 acceptance." The map depicts a hand-drawn line running the length of Coopers Beach Road and extending over the way and cul-de-sac located on the Edwardses' property.

the 1986 dedication created a public easement that extends over the way and cul-de-sac located on the Edwardses' land.[12]

B. Status of the Edwardses' Beach

[¶32] The Edwardses contest the court's determination that Cora Perry intended to grant Ensign Otis an easement over the beach located on their property. They challenge the court's conclusion that the beach easement passed through subsequent transfers of Otis's estate as an appurtenance. They also contend that the beach easement, even if it were appurtenant and even if it included their beach, is not enforceable against them because they acquired their property without notice of the encumbrance. Because the Edwardses failed to present their contentions regarding lack of notice to the trial court, we do not consider this issue on appeal.[13]

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[12] In light of our conclusion that the Town acquired a public easement over the way and cul-de-sac by dedication and acceptance, we do not address the Town's alternative claim that it acquired a public easement over the way and cul-de-sac by prescription.

[13] Both before and after trial, the Edwardses argued that the Scotts' predecessors-in-title had not transferred any beach rights to the Scotts, and that even if the Scotts had acquired such rights, the beach area subject to that encumbrance was not located on the Edwardses' property. The first time that the Edwardses raised lack of notice as a discrete issue regarding the beach easement's viability was on appeal in their reply brief. We will not review this case on a theory different from that on

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1. Construction of Perry's 1924 Deed to Otis

[¶33] We begin our analysis of the status of the Edwardses' beach by addressing the operative legal consequences of Perry's 1924 deed to Otis. We review the construction of deeds "de novo as a question of law." *Tarason v. Wesson Realty, LLC*, 2012 ME 47, ¶ 18, 40 A.3d 1005. In construing deeds, we strive to "determine the intentions of the parties to the deed as expressed in the instrument." *Reed v. A.C. McLoon & Co.*, 311 A.2d 548, 551 (Me. 1973).

[¶34] A deed may create an easement "by grant, express or implied, where the grantor benefits the conveyed land with an easement over land retained by the grantor." *O'Connell v. Larkin*, 532 A.2d 1039, 1042 (Me. 1987). An easement is created by express grant in a deed when the deed's explicit language evidences the grantor's intent to create an easement for the benefit of the grantee. *See Reed*, 311 A.2d at 551. When a deed conveys lots by reference to a plan depicting features designed to increase the lots' value, the law may imply an easement in those features in order to secure to the grantee "those benefits, the promise of which, it is reasonable to infer, has induced [him] to buy portions of a tract laid out on the plan indicated." *Arnold v. Boulay*, 147 Me. 116, 121, 83 A.2d 574, 577 (1951) (quotation marks omitted).

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which it was tried in the trial court. *See Teel v. Colson*, 396 A.2d 529, 534 (Me. 1979)

[¶35] Perry's deed to Otis conveyed three lots, described as (1) "lot No. 12 on plan of [Coopers] Beach made by A.D. Blackinton," (2) "lot No. 13 on the [same] plan," and (3) "the triangular strip shown on the [same] plan." After describing the property conveyed, the deed also granted the "privileges of all streets laid out on said plan and the free use of the beach for bathing and boating purposes." Though the 1924 deed conveyed property by reference to a plan depicting an intertidal area, the deed did not give rise to a beach easement by implication. By explicitly granting Otis beach rights, Perry created an express easement appurtenant to the lots that she conveyed to Otis. *See ALC Dev. Corp. v. Walker*, 2002 ME 11, ¶ 14, 787 A.2d 770 ("Whenever possible an easement should be fairly construed to be appurtenant to the land of the person for whose use the easement is created.").

2. Succession of the Beach Easement as an Appurtenance

[¶36] The Edwardses challenge the court's conclusion that Otis's beach easement passed through subsequent transfers of Otis's estate as an appurtenance thereof, survived the division of that estate, and today benefits the Scotts' property.

[¶37] An appurtenant easement is created to benefit a dominant estate and generally passes with that estate, *id.*, regardless of whether the easement is expressly mentioned in later conveyances of the

dominant estate, *Cole v. Bradbury*, 86 Me. 380, 384, 29 A. 1097, 1098 (1894), and regardless of whether later conveyances divide the dominant estate, Restatement (Third) of Property: Servitudes § 5.7 (Am. Law Inst. 2000); *see also Cleaves v. Braman*, 103 Me. 154, 161, 68 A. 857, 860 (1907). However, an appurtenant easement can be terminated by an act of the dominant owner demonstrating a clear intention to extinguish the easement. *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 94 (Me. 1996). Except as limited by the terms of an easement's creation or transfer, the dominant owner can apportion appurtenant benefits to some parts of the estate and extinguish those benefits as to other parts. Restatement (First) of Property § 488 cmt. a (Am. Law Inst. 1944). The effectiveness of an extinguishment depends upon a finding of the dominant owner's intent. *Great Cove Boat Club*, 672 A.2d at 94.

[¶38] The Edwardses contend that the Scotts' grantors intended to apportion their beach rights to the property that they retained, and to extinguish those rights as to the property that they conveyed to the Scotts. They argue that this intent is demonstrated by the Scotts' deed. That deed (1) conveys a portion of Otis's estate and land that was not included in Otis's estate, (2) grants an express easement of access, and (3) is silent as to the beach. We are unpersuaded. Neither the express access easement nor the division of Otis's estate manifests a clear intention to extinguish the beach easement. Though the admixture of a part of Otis's estate and property not included

in Otis's estate might suggest an intention to extinguish appurtenances of Otis's estate, the court did not err in determining, in the absence of other indicia of intent, that the Scotts' grantors did not extinguish the easement. *Cf id.* at 95 (concluding that an instrument evidenced an intent to extinguish an easement when the instrument's terms were inconsistent with the easement's continued existence).

3. Location of the Beach Easement

[¶39] The Edwardses finally contend that the court erred in its location of the beach easement and in its determination that that easement burdens their property. Specifically, the Edwardses argue that Otis's deed is ambiguous as to the precise location of "the beach," and that the court erred by disregarding extrinsic evidence that Perry intended to burden only the beach in front of lot 24 as depicted on the Blackinton Plan.

[¶40] Here, the 1924 deed conveys the "privileges of all streets laid out on [the Blackinton Plan] and the free use of the beach for bathing and boating purposes." The deed expressly refers to the plan for the purpose of locating an easement over particular streets and, in the same sentence, grants use of "the beach." This language indicates that Perry intended to designate the location of the beach by reference to the Blackinton Plan, which depicts an intertidal area without labels or limitations. The record establishes that the Edwardses' beach was included in the

intertidal area shown on the plan, and that Perry owned the Edwardses' beach at the time of her 1924 conveyance to Otis.

[¶41] Considering the plain meaning of the deed's language and the plan's illustration, we conclude that those documents are not ambiguous as to the location of "the beach." When construed in conjunction with the plan's unrestricted depiction of an intertidal area, the deed's reference to "the beach" has a plain and obvious meaning: to grant rights to the intertidal area depicted on the plan. In view of these consistent and clear indications as to the location of "the beach," the court did not err in disregarding extrinsic evidence of Perry's intent, or in concluding that "the beach" easement includes the Edwardses' intertidal area.

[¶42] The court correctly determined that the beach easement passed with the portion of Otis's estate that is now included in the Scotts' property, and correctly construed Otis's deed to grant rights over the intertidal area located on the Edwardses' property. We therefore uphold the court's conclusion that the Scotts have a right to use the Edwardses' beach for "bathing and boating purposes."

The entry is:

Judgment affirmed.

On the briefs:

David A. Soley, Esq., and Glenn Israel, Esq., Bernstein Shur, Portland, for appellants Darlene F. Edwards and Lewis M. Edwards III

William H. Dale, Esq., and Mark A. Bower, Esq., Jensen Baird Gardner & Henry, Portland, for appellee Town of Owls Head

Judy A.S. Metcalf, Esq., and Ryan P. Dumais, Esq., Eaton Peabody, Brunswick, for appellees Cynthia S. Blackman, Nathalie M. Scott, Willis A. Scott Jr., Eliot A. Scott, and Constance M. Scott

At oral argument:

David A. Soley, Esq., for appellants Darlene F. Edwards and Lewis M. Edwards III

William H. Dale, Esq., for appellee Town of Owls Head

Judy A.S. Metcalf, Esq., for appellees Cynthia S. Blackman, Nathalie M. Scott, Willis A. Scott Jr., Eliot A. Scott, and Constance M. Scott

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STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-11-47

Darlene F. Edwards et al.,
Plaintiffs

v.

Cynthia S. Blackman et al.,
Defendants

Decision and Judgment

(Filed Jul. 30, 2014)

Trial on the complaint and counterclaim was held on December 16, 17, 19 and 23, 2013, and January 27, 2014. On each hearing date, all parties appeared with or through counsel. Following the trial, the parties supplemented the record with additional transcribed testimony and submitted written argument. This order adjudicates all claims.

Plaintiffs and counterclaim defendants Darlene F. Edwards and Lewis M. Edwards jointly own contiguous parcels of waterfront land in Owls Head. A way passes over their land and ends in a cul-de-sac that is partly on their land and partly on the land of the abutting landowner, the Arthur Titcomb Living Trust. The way is either part of or an extension of the Cooper's Beach Road (an issue in dispute here). The individual defendants and counterclaim plaintiffs have ownership interests in various parcels of land located near the Edwardses' property. Cynthia S. Blackman and her brother, Eliot A. Scott, jointly own land located at 15 Water's Edge Lane in Owls Head; Blackman also owns land located at 24 Montgomery Lane; and Blackman, Eliot Scott and their parents,

Nathalie M. Scott and Willis A. Scott, Jr., jointly own land located at 34 Cooper's Beach Road.[1] The claims in this action center on the question of whether persons other than the Edwardses have the right to use the Edwardses' land. The Edwardses contend that no such rights exist,[2] except for certain common law rights held by the public to use the intertidal zone, which the Edwardses have not contested in this action. The Town of Owls Head contests the Edwardses' claim that it did not acquire rights to the way located on their property by dedication and acceptance, and the Town contests the Edwardses' claim that the Town has not acquired a public

[1] The remaining individual defendant is Constance Scott, Eliot's wife. There is no evidence that she has a record interest in any of the parcels at issue in this action. Also, the parties have stipulated that she is not making a claim that she holds any interest in the way that passes over the Edwardses' house or in any land above the high-water mark of the shore. The court can only assume that the Edwardses have joined her as a party-defendant because of any marital interest she may have in the land through her husband. In the end, it appears that the only claim in which she has an active interest is the assertion of common law rights to the intertidal area on the Edwardses' land. The Edwardses have not opposed this limited claim. Nonetheless, for ease of reference in this order, the court's allusions to the "individual defendants" are intended to mean the other defendants/counterclaim plaintiffs.

[2] The Titcomb Trust holds easement rights over the Edwardses' land. The Titcomb Trust is not a party to this action, and its rights over the Edwardses' land as the servient estate are not at issue here.

easement over the way.[3] The individual defendants contend that they have rights to use the way over the Edwardses' property and the beach located on their property by virtue of public and private prescriptive easement rights appurtenant and in gross, and also by deed.

The court first addresses the land use rights implicated by the Edwardses' claims against the Town and then the claims between the Edwardses and the individual defendants.

A. Claims against the Town

The dispute between the Edwardses and the Town of Owls Head is whether the way that passes over the Edwardses' land became a public easement road by dedication and acceptance, and separately whether the public has acquired prescriptive rights over the way. The court concludes that the way is a public easement road pursuant to dedication and acceptance.

A public way may be created by dedication from the landowners and acceptance by the municipality when

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[3] These issues have been framed entirely by the Edwardses' complaint: the Town did not file a counterclaim asserting a public interest directly. Thus, as a matter of pleading, those issues are presented here in the negative rather than in the affirmative.

> the owner of such property or interest has filed with the municipal officers a petition, agreement, deed, affidavit or other writing specifically describing the property or interest and its location, and stating that the owner voluntarily offers to transfer such interests to the municipality without claim for damages, or has filed in the registry of deeds an approved subdivision plot plan which describes property to be appropriated for public use.
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> A municipality may accept a dedication of property or interests therein by an affirmative vote of its legislative body.

23 M.R.S. § 3025. To establish dedication and acceptance, the grantor's intention to dedicate the land for public use must be clear. *Town of Kittery v. MacKenzie*, 2001 ME 170, ¶ 10, 785 A.2d 1251, 1254. A municipality may accept a dedication by means of a vote of approval included in a warrant. *Vachon v. Inhabitants of the Town of Lisbon*, 295 A.2d 255, 260 (Me. 1972). The party seeking to assert the public interest by dedication has the burden of proof. *See Comber v. Inhabitants of the Plantation of Dennistown*, 398 A.2d 376, 378 (Me. 1979). Consequently, as the proponent of the claim that the way is public, the Town bears the burden of proof.

Here, the Town relies on municipal action that was taken at a town meeting held in August 1986, when the "Town voted by hand to accept the dedication of a public [e]asement over Cooper's Beach Road."

This action was predicated on two written "agreement[s]" signed by people who lived on or near Cooper's Beach Road. One instrument identifies its group of signatories as "owners of property consisting of Coopers Beach Road. . . ." The second identifies another group of different signatories as "abutting property owners on Coopers Beach Road." The texts of the two documents are otherwise identical and recite their agreement that the Town would accept the road "as a public easement, without claim for damage." In 1986, one John McLoon owned the land now owned by the Edwardses. He signed the abutters' petition in support of the easement dedication.

The Town makes several arguments that the court should not reach the merits of the dedication issue. It contends first that the Edwardses are time-barred from challenging the 1986 acceptance, because any such challenge amounts to an appeal from final governmental action and is therefore governed by M.R.Civ.P.80B, which requires an appeal to be filed within 30 days of notice of the underling action. Because no such appeal was filed, the Town argues that the Edwardses cannot do so now.

In 1986, "Cooper's Beach Road" actually consisted of a cluster of roads that now have four different names. All of the people who signed the dedication agreement as "owners" had parcels of property located on what is now Water's Edge Lane. Those who signed as "abutters," including McLoon, owned land on what is now Cooper's Beach Road, Osprey Lane, Montgomery Lane as well as the remaining parcels

on Water's Edge Lane. One of the Edwardses' arguments is that the dedication did not adequately identify which way or ways were offered to the Town as public roads. They argue that because McLoon identified himself as an abutter to the way that was the subject of the dedication, he understood that Cooper's Beach Road ended at his southerly property line and did not cross onto his land. In this way, his property would abut the terminus of Cooper's Beach Road. If this contention is correct, then the dedicated way is not located on the Edwardses' property, and McLoon would have had no reason to appeal, because the Town's acceptance of Cooper's Beach Road as a public way would not have aggrieved him or his successors-in-interest. On the other hand, if Cooper's Beach Road as accepted by the Town extended across the Edwardses' property to and including the cul-de-sac,[4] then any appeal from the 1986 acceptance would have been subject to the filing deadline prescribed by rule 80B. Therefore, there is an analytical identity between the procedural argument advanced by the Town and the merits of the dedication issue: if the Town is correct on the merits, then it is also correct in its argument that the claim is time-barred. Thus, consideration of the latter requires consideration of the former.

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[4] It bears note that the then-owner of the Titcomb Trust property did not sign either of the 1986 agreements. Because the Trust is not a party to this action and because the issue has not been raised, the court does not address the Town's rights, if any, to the part of the cul-de-sac that is located on the Trust's land.

The Town also argues that the Edwardses are barred from contesting the Town's claim of a public interest in the disputed way, because it has been prejudiced by the delay in their initiation of the challenge (laches), and because they and their predecessors have accepted the benefit of it in the meantime in the form of snowplowing services subsidized by the Town (estoppel). Laches and estoppel are defenses of avoidance on which the Town bears the burden of proof. *See Hansen v. Sunday River Skiway Corp.*, 1999 ME 45, ¶ 11, n.2, 726 A.2d 220, 223.

The Town has proven neither defense. As an element of laches, the proponent must show, among other things, that the delay in asserting a legal claim has prejudiced the respondent. *See Van Dam v. Spickler*, 2009 ME 36, ¶ 12, 968 A.2d 1040, 1044. Here, the Town complains primarily that because McLoon died in 1987, the Town cannot present direct evidence about his intention when he signed the abutters' petition. However, the Edwards' are similarly deprived of that evidence. Further, there does exist extrinsic evidence on that point, including testimony from the person who discussed the petition with McLoon when he signed it and the fact that McLoon signed the dedication agreement. Beyond this, because the Town has not shown that it has lost evidence that would have been favorable, its laches argument is not persuasive.

Similarly, the Town has not proven that the Town's use of the road to plow snow has created such a benefit to the Edwardses and their predecessors

that they are now estopped from claiming that the way is not public. The Edwardses have owned the property since 2011 but use it only seasonally, so snowplowing has not benefitted them significantly. The magnitude of any such benefit accruing to prior owners is not clear in the record. Further, the length of the way on their land is not particularly long, and the plowing contractors needed to plow it anyway in order to be able to plow the portion of Cooper's Beach Road that is not at issue here, because the plows use the cul-de-sac to turn around. Therefore, the Town has not established that the Edwardses are equitably estopped from seeking an adjudication that the way located on their property is not public. *See Blue Star Corp. v. CKF Properties, LLC*, 2009 ME 101, ¶ 27, 980 A.2d 1270, 1277.

This leads to the merits of the dedication and acceptance issue, where the Town has the burden of proving that the interest dedicated by McLoon was the portion of the way that crossed over his land (now the Edwardses') and that the description of the way accepted by the Town clearly described this portion of it. The court finds that the Town has proven these points.

Both aspects of the dedication and acceptance issue must be considered in light of the historical background of the way at issue. Through contractors that it hired, since at least 1973 the Town continuously had plowed and sanded the way over the Edwardses' land and the cul-de-sac, as well as the other sections of the Cooper's Beach Road network.

The Town announced its intention to stop that arrangement for all private ways located in the municipality at the end of the 1985-86 winter season, after it had learned that public funds could not be used for a benefit that was deemed private because the roads themselves were private. In response, at a special town meeting held in August 1986, members of the Town's voting public considered petitions to accept at least eleven private ways as public easement roads.[5] A way described as "Cooper's Beach Road" was one of them. In addition to listing these proposed dedications, the warrant for the special town meeting called for consideration of a proposal to establish standards that the roads would need to meet. The voters approved the standards, accepted at least ten of the roads (one was not accepted because of an "improper dedication"), and approved an appropriation of money from the Town's budget to cover plowing and sanding of the roads that became public easement roads.

Prior to the meeting, McLoon and twenty-one other people signed written agreements as owners or abutters of property on "Coopers Beach Road" for the Town to accept the road as a public easement. As is noted above, McLoon signed the abutters' endorsement. However, only five people signed as owners. They were owners of land located in the middle and

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[5] The minutes from the Town meeting note ten ways that were accepted as public easement roads. *See* plaintiffs' exhibit 30. The 1986 annual report refers to twelve such ways. *See* Town's exhibit 73.

toward the end of what is now Water's Edge. The other signatories, including McLoon, owned property associated with the other branches of the road network, over which one was required to travel to get to the land owned by those who signed the owners' endorsement. The court does not place weight on this ostensible allocation between "owners" and "abutters" in those instruments. If the signatories attached meaning to those characterizations, then that means that they would have to have researched the extent of their ownership interests to make legal judgments about whether they truly held title to a portion of the private road or whether the land they held in fee ended at the edge of the way. There is no evidence that this occurred, and the court finds it unlikely that it did. Thus, the court does not attach material weight to McLoon's identification of himself as an abutter of Cooper's Beach Road rather than as an owner of the land underneath the way.

The best and most reasonable assessment of the dedication process is that it represented an effort of those who owned property in the Cooper's Beach Road neighborhood to maintain the status quo: they wanted the Town to continue to provide plowing and sanding services. Nothing in the record meaningfully suggests that any of those who signed the agreement wanted to change the long-standing arrangement. The dedication temporally followed the Town's determination that it could not provide those services unless the roads became public easement roads. There had been a long-standing history of those Town

services, and when the Town expressed a conditional intention to terminate those services, those who would be affected by that municipal action responded to create a situation that would allow the services to continue. The near universal agreement of all affected property owners demonstrates a unified desire for that to happen.

The evidence also reveals McLoon's specific intent to dedicate the way passing over his property as a public easement road. Because McLoon died in 1987, he was not available at trial to provide direct evidence about his understanding and intention when he signed the agreement. There exists, however, indirect evidence on this point. The fact that he executed the agreement in the circumstances note [sic] above is corroborative evidence that he wanted the Town to continue to plow the road on his land. Additionally, Edward Dodge, a town official who held several positions there, was the person who approached McLoon about this issue. Although, understandably, Dodge does not recall their conversation verbatim, he explained to Dodge the purpose of the proposed agreement – that the Town would plow and sand the road, that others could then use it, but that Dodge would need to sign the document if he wanted this arrangement. (The 1986 annual Town report corroborates the information that Dodge communicated to McLoon, that one effect of a dedication would be the loss of privacy on the dedicated road.) The court credits Dodge's testimony that McLoon appeared to

understand what Dodge told him when he executed it.

This evidence demonstrates that McLoon clearly expressed his intent to dedicate the way over his land as a public easement road.

In the order on summary judgment issued May 7, 2013, the court ruled that as a matter of law, the description of the dedicated way as "Cooper's Beach Road" was sufficient to meet the statutory standard for an acceptance, subject only to the factual determination of locating the terminus of the northerly end of the way.[6] The better evidence demonstrates that Cooper's Beach Road in fact encompasses the way that passes over the land now owned by the Edwardses. That proof largely consists of the way the road has been used. Primarily, the Town has used in a way that is materially indistinguishable from the way it has used other portions of the network of roads formerly all called Cooper's Beach Road (now with separate names). This was true even in 1986, at the

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[6] Even if the court had denied this aspect of the summary judgment motion so that this issue would have been subject to litigation at trial (and in fact the Edwardses presented evidence during trial and argued the question of whether the proposed road was specifically described as section 3025 requires), that evidence would support the same conclusion that the location of the road was specifically described in the dedication, because the location of the road is where Cooper's Beach Road lies on the face of the earth. Except for the question of whether the way passing over the Edwardses' land is a portion of that road, the location of the road is not subject to legitimate dispute.

time the dedication was offered to the Town. Further, although the extent and quality of use is subject to some dispute, it is clear that people other than the owners of the land have used it. And as Darlene Edwards testified, the physical address of her house is 70 Cooper's Beach Road.

The Edwardses point to maps and diagrams of roads that existed in and prior to 1986, arguing that none of them showed that Cooper's Beach Road extended onto their property or included the cul-de-sac. In fact, some of those documents are not clear on the point. However, to the extent that they may depict a way that falls short of the Edwardses' land, the court has considered that evidence and does not give it such weight as to defeat the better evidence noted above. Further, any weight it deserves is mitigated by maps and diagrams created after 1986 showing the entire way as it has existed at all times relevant to this case. Also, there is no evidence that after the Town accepted "Cooper's Beach Road" in 1986 as a public easement road, McLoon or any of the subsequent owners, up to the Edwardses, complained that the dedicated road did not include the road on the land now owned by the Edwardses.[7]

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[7] There is evidence that Elliot H. Mednick and Josephine H. Mednick, who owned the land between 2005 and 2010, posted a no trespassing sign on the property. There is no evidence, however, that they opposed municipal snowplowing services or that they held the view that the road itself ended at their boundary line.

For these reasons, the court finds that as at the time the Town accepted the dedication of Cooper's Beach Road as a public easement road, it included the portion way located on the Edwardses' property. The dedication was supported by the specific description of the road as Coopers Beach Road. Because Cooper's Beach Road extended to the cul-de-sac on the Edwardses' land, this means that this portion of the road was included in the dedication and acceptance and that the way located on their land is a public easement road.

By law, when a way located on private property is encumbered by a public easement, the way may be used in any way that a public way itself may be used. *See MacKenna v. Inhabitants of the Town of Searsport*, 349 A.2d 760, 762-63 (Me. 1976). When a municipality acquires a prescriptive public easement over a private way, the nature of the public's use is not limited to the character of the prescriptive use. *See id.*, 349 A.2d at 763. Here, because the Town accepted the road statutorily and without the need to prove prescriptive use, the nature of the use is not an element of its proof and does not need to be considered. Thus, either under the *McKenna* analysis, or because the the [sic] Town created the public easement through a non-prescriptive means that did not limit the nature of the use, the way may be used in any manner that "is not inconsistent with a public way." *Id.*

Because the Town has established that the road on the Edwardses' land is burdened by a public

easement created through dedication and acceptance, in the context of the Town's separate argument the court need not and does not reach the alternative issue of whether the same rights were created prescriptively. However, the individual defendants have adopted and incorporated the Town's prescriptive public easement contention as their own, and the court addresses it below in conjunction with their own claims that go beyond the Town's.

B. Claims between the Edwardses and the individual defendants

The claims between the Edwardses and the individual defendants, excepting Constance Scott, *see* note 1 *supra*, are best categorized as ones based on prescription and others based on deeded rights. The court considers these categories of contentions separately.

1. Prescription-based claims

The individual defendants claim rights to use the way and the beach owned by the Edwardses based on public prescriptive rights, private prescriptive rights appurtenant to the parcels of the land they own, and private prescriptive rights in gross. For the reasons set out above, the way that passes over the Edwardses' land is subject to a public easement. The court therefore need not and does not address the question of whether there is a separate, prescriptive basis for the rights claimed by the individual defendants over that

way, because any such rights would be no more extensive than the rights they would be entitled to exercise on the way as a result of the Town's acceptance of it. The court therefore addresses the contentions of the Edwardses and the individual defendants as they concern the beach that is part of the Edwardses' land. The court ultimately concludes that they do not hold prescriptive rights to use the beach.

The proponent of a private prescriptive interest must prove by a preponderance of the evidence that the land has been subject to use for at least 20 years; that the land was used under a claim of right adverse to the property owner; and that the land was used in that way with the owner's knowledge and acquiescence, or with a use so open, notorious, visible and uninterrupted that the owner's knowledge and acquiescence will be presumed. *See Androkites v. White*, 2010 ME 133, ¶ 14, 10 A.3d 677, 681. Although most Law Court opinions examining easements in gross address deeded or recorded easement rights, here the parties have not argued that there is a difference between the proof of a prescriptive easement appurtenant and a prescriptive easement in gross. Although the former benefits the dominant estate and the latter benefits a particular person and does not attach to the land, *see Stickney v. City of Saco*, 2001 ME 69, 55 31-32, 770 A.2d 592, 605, the court examines the bases for those two types of easement interests without a distinction that is material here. (In any event, Nathalie Scott and Willis Scott are the

only parties who claim prescriptive easements in gross, and they also claim that they hold prescriptive easements appurtenant to their property.) Finally, a public prescriptive easement arises under the same circumstances as a private prescriptive easement, except that the creation of a public easement requires proof of public use. *See Jordan v. Shea*, 2002 ME 36, ¶ 22, 791 A.2d 116, 122. Therefore, the court addresses the dispositive aspects of all three types of prescription claims identically.

Despite the similarities between private and public easements noted above, there are certain presumptions and burdens of proof that differ between them. If the proponent of a private prescriptive easement establishes use for the requisite period of time and further proves that the use was accompanied by the owner's actual or constructive knowledge and acquiescence (in other words, proving the first and third elements of a private prescription claim), then there will arise a presumption that the use was under a claim of right adverse to the owner (the second element of such a claim). *See Riffle v. Smith*, 2014 ME 21, ¶ 6, 86 A.3d 1165, 1167. "This means that in most cases permission becomes the defense to a prescriptive easement claim." *Lyons v. Baptist School of Christian Training*, 2002 ME 137, ¶ 35, 804 A.2d 364, 374 (Calkins, J., dissenting). However, that presumption of adversity will not arise in the first place "if there is an explanation of the use that contradicts the rationale of the presumption. . . ." *Riffle*,

2014 ME 21, ¶ 6, 86 A.3d at 1167 (citation and internal punctuation omitted).

In contrast, in cases adjudicating the claim of a public easement over open, unposted land that the public uses recreationally, regardless of the character of the land itself, there is a presumption that the use is permissive. *Lyons*, 2002 ME 137, ¶¶ 24-25, 804 A.2d at 372. This means that in cases where a public easement is claimed, a presumption of permissive use arising from the public's recreational use of open, unposted land operates to negate the presumption of adversity that arises in other contexts. *Riffle*, 2014 ME 21, ¶ 5, n.1, 86 A.3d at 1167; *Lyons*, 2002 ME 137, ¶ 25, 804 A.2d at 372. In this class of cases involving the public's recreational use of open land, the claimant is therefore left to affirmatively prove "adversity through a claim of right hostile to the owner's interest, without benefit of any presumption of adversity arising from long term public recreational uses of the land." *Lyons*, 2002 ME 137, ¶ 25, 804 A.2d at 372.

The adverse use of land under a claim of right occurs "when the claimant has received no permission from the owner of the soil, and uses the [land] as the owner would use it, disregarding the owner's claims entirely, using it as though she owned the property herself." *Androkites*, 2010 ME 133, ¶ 16, 10 A.3d at 682. The permissive use of land that negates a claim of adversity may be express or implied. *Lyons*, 2002 ME 137, ¶ 26, 804 A.2d at 372.

Here, those who used the beach did so with at least the implied permission of those who owned the Edwardses' land, until they took steps to foreclose that use beginning within the past 20 years. The Cooper's Beach neighborhood has been described as a colony, for good reason. Homeowners, both year-round and seasonal, have developed strong friendships with each other. As an aspect of the relationships among them, they sometimes walk on or otherwise use each other's property. Families visited with each other, and there were neighborhood parties and events. Children from different families played with each other and during the day and at sleepovers. No express permission to use another's property was requested, because none is needed. Rather, implied permission arises from the communal atmosphere.

The same was true with the beach now owned by the Edwardses. During the time that is within the prescriptive period urged by the individual defendants, local residents and others freely used the beach for various recreational purposes. At times, people from beyond the immediate neighborhood did the same.[8] The freely exercised use of the beach by at least the local residents is a long-standing circumstance. Because of this, the court finds that the people who owned the Edwardses' property prior to

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[8] The court need not and does not reach the question of whether the use by people who did not live in the Cooper's Beach Road area amounts to public use. *See Stickney*, 2001 ME 69, ¶ 18, 770 A.2d at 601.

2005, which is when the Mednicks acquired the land and, at some point during their ownership, put up a "no trespassing sign," at least impliedly permitted that use. This permission was different than simply passively assenting or submitting to the use of the beach, which constitutes mere acquiescence and falls short of permission. *See Lyons*, 2002 ME 137, ¶ 35, n.7, 804 A.2d at 374 (Calkins, J., dissenting); *Dowley v. Morency*, 1999 ME 137, ¶ 23, 737 A.2d 1061, 1069. Here, the prior owners' inclusion in the neighborhood community reveals that the use of the beach was part of a larger practice of local residents to use the local area, including but not limited to the beach, as an asset they were all free to enjoy.

When the facts are framed by the claim that the beach is subject to a public easement, the claimants would not be entitled to a presumption of adversity because the land at issue was open and used recreationally. This means that the individual defendants would be required to prove non-permissive adverse use of the land under a claim of right. They have not done so, which defeats their claim for a public easement.

When one assesses their claim for a private prescriptive easement (either appurtenant or in gross), then whether or not the individual defendants are entitled to the benefit of the presumption discussed in *Androkites*, their claim fails. Even if the presumption applies, the evidence of permissive use overcomes it. Further, the presumption may not arise in the first place, because as the *Androkites* Court

casts the issue, the rationale for the presumption of adversity may not be supported in the circumstances of this case because of the communal use of the land in the Cooper's Beach environs. In *Androkites*, the Court recognized an inference that when family members used land owned by other family members, the presumption of adversity did not arise because the landowners could be expected to accommodate or permit their relatives to use the land without a suggestion of adversity. 2010 ME 133, ¶ 18, 10 A.3d at 683. If the analogous "friendly neighbor" exception to the presumption of adversity represents good law in Maine (an issue the Law Court reserved in *Riffle*, 2014 ME 21, ¶ 9, 86 A.3d at 1167), then there is a strong argument that it would apply here. However, resolution of the private prescriptive easement claims is not dependent on that outstanding legal issue, because even with a presumption of adversity, the best evidence demonstrates that the beach was used permissively, thus defeating the claim that it is subject to private prescriptive interests, whether those interests were appurtenant or in gross.

2. Record-based claims

The individual defendants (again, except for Constance Scott) argue alternatively that pursuant to the construction of their deed to 34 Cooper's Beach Road and the history of that land's ownership, they

have record rights to use the beach that is part of the Edwardses' holdings.[9] The court agrees.

The land now located at 34 Cooper's Beach Road was once part of a larger parcel owned by Cora E. Perry. In 1924, she conveyed a portion of her larger holding to Ensign Otis. Part of that outconveyance consists of a portion of the lot at 34 Cooper's Beach Road (in other words, part of the land that Perry conveyed to Otis is not part of 34 Cooper's Beach Road, and part of 34 Cooper's Beach Road was not part of the land conveyed to Otis). The land was described in the deed by reference to the Blackinton Plan. In addition to conveying land, the deed to the 1924 conveyance also recited a transfer of "privileges of all streets laid out on said plan [the Blackinton Plan] and the free use of the beach for bathing and boating purposes."[10] Subsequent conveyances of land

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[9] This claim is set out in count 1 of the counterclaim. In their counterclaim, Cynthia Blackman and Eliot Scott do not allege that they hold a record easement to the beach as part of their ownership of land located at 15 Water's Edge Lane and 24 Montgomery Lane. Further, they have not made such an argument in response to the Edwardses' more generalized claims for declaratory judgment, Consequently, the only question presented here is whether ownership of the land located at 34 Cooper's Beach Road carries record easement rights to use the beach that is part of the Edwardses' parcel.

[10] The court does not reach the question of whether this express grant to the use of the roads, and a similar grant found in the deed from Robert Hurtig and Marie Hurtig to the individual defendants, give the individual defendants record rights to use the way located on the Edwardses' land. Because that way is part of a public easement road, there is no further relief that can

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located at 34 Cooper's Beach Road did not expressly convey those beach rights. The only easement right expressed in the deed given to the individual defendants when they acquired the lot was "a right-of-way over the Cooper's Beach Road to the" parcel. This clearly would not include rights to use the beach.

The individual defendants contend that although the record easement creating rights to use the beach is not set out in their own deed, they nonetheless hold that right because a [sic] it was expressly made appurtenant to a portion of the same land when it was owned by a predecessor-in-title, namely, Ensign Otis.

An easement over a way in a development is created "by implication based upon estoppel," when the deed of conveyance describes the lot by reference to the plan that also shows the way. *Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274, 278 (Me. 1968). Those easement rights are protected from subsequent interference. *Id.* The rationale for this protection given to the grantee is "to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated." *Id.* (citation and internal punctuation omitted).

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be granted through adjudication of the deeded easement issue as that issue pertains to the way.

The same principle applies here: Otis acquired land with a promise that it would give him rights to use "the beach" for bathing and boating. That record easement thereby becomes appurtenant to the parcel of land itself, and it runs with the land even though subsequent deeds make no reference to it. *Cole v. Bradbury*, 86 Me. 380 (Me. 1894). Further, the existence and enforceability of the easement is not limited by its nature. The easement in *Callahan* was a right-of-way. In *Cole*, water rights were at issue. More generally, the Law Court has held that the nature of the easement does not need to be tied to the grantee's enjoyment of the land. *See Dority v. Dunning*, 78 Me. 384 (Me. 1886). This suggests breadth in the nature of the easement rights that become appurtenant in a prior grant and would include beach rights to property that is close to the water but otherwise without ocean frontage.

In the order dated May 7, 2013, the court denied the Edwardses' motion for judgment on the pleadings to resolve this part of the case. The obstacle to adjudication was the fact that the individual defendants own only a portion of the land that benefited from the grant of beach rights and it would be unclear whether the easement should continue to benefit the parcel that was severed from the larger lot. The resulting question was whether an easement appurtenant is conveyed by operation of law when only a portion of the dominant estate is conveyed. That question has now been resolved in two ways. First, the Edwardses' expert on property issues has established that it does.

Additionally, further secondary authority cited by the individual defendants confirms that this result obtains. *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 5.7 (2000).

The Edwardses argue that because *Callahan* was a case decided decades after Perry granted the record easement to Otis, its doctrine cannot be used to analyze the effect of that provision of the deed. However, *Callahan* did not purport to create new law. And in fact, the legal foundation for that opinion consists of caselaw that predated the 1924 conveyance. The *Callahan* Court cited caselaw from 1919 *(Harris v. South Portland*, 118 Me. 356 (Me. 1919)) and from even earlier (*Lennig v. Ocean City Association*, 7 A. 491 (N.J. 1886).

The court is also not persuaded by the Edwardses' argument that because the individual defendants acquired an express easement giving them access to their property, any implied easements are nullified. The easements are different and have different purposes. Further, affirmative Maine law as set out in *Callahan* and the authority on which it rests entitles the individual defendants to the beach rights they seek in this action.

Consequently, the facts of the case and governing law combine to establish that the land located at 34 Cooper's Beach Road benefits from an easement to use "the beach" freely for bathing and boating. The next question is, where is the beach that they have the record right to enjoy? In their written summation,

the individual defendants acknowledge that they have the burden of proving the nature and extent of their record rights, and the court imposes that burden on them.

The deed from Perry to Otis did not describe the location of the beach, and the Blackinton Plan, which is used to describe the location of the lot that Otis acquired, does not expressly designate the location of any particular beach area. In legal terms, the word "beach" has a "fixed and definite meaning" and, when associated with areas near the sea, simply refers to the intertidal zone. *See Hodge v. Boothby*, 48 Me. 68 (1861). The Edwardses contend that the "beach" referenced in Perry's deed to Otis is located immediately in front of lot 24 as shown on the Blackinton Plan and did not extend onto the land they now own. When Perry conveyed land to Otis and gave Otis beach rights, Perry also owned the land that is now the Edwardses. Lot 24 on the Blackinton Plan is contiguous to the Edwardses' land. Both lot 24 and the land retained by Perry have intertidal areas. There is nothing in the deed or in the Blackinton Plan itself that purports to limit the "beach" as referenced in the former, to the intertidal area in front of lot 24. Rather, the grant is to the "beach" without limitation. This constitutes persuasive evidence that the grantor of the easement did not intend to limit the area of the "beach" that Otis (and therefore his successors-in-title) would be entitled to enjoy.

The Edwardses' strongest argument to support their claim that the intended beach is the area in

front of lot 24 is based on the location of the [sic] that lot's boundary closest to the water. The relevant boundary for that parcel is the high-water mark. In contrast, the Edwardses' boundary is the low-water mark, described in the deed as the waters of Rockland Harbor. From this, the Edwardses contend that Perry must have intended to allow other landowners to use the beach for lot 24 that was not part of that parcel but intended to exclude the easement grantees from the beach that she continued to own. This argument has two flaws. First, the question here is one of use and not ownership. Thus, when she conveyed land and beach rights to Otis in 1924, even though Perry retained ownership of the land now owned by the Edwardses (she remained the owner of the parcels now owned by the Edwardses until at least 1927), that retention of title is not a limitation of the use of that retained land by others. Second, if Perry did not convey the beach in front of lot 24, then as the grantor she would have retained title to it, just as she retained title to the beach area in front of the property that the Edwardses now own. There is no meaningful evidence that Perry would have intended to grant rights to some of the beach area that she owned but intended to deny the same rights to another area of the beach that she also owned and that was immediately adjacent to it.

The weight of the evidence is therefore sufficient to establish that the individual defendants have record rights to the free use of the beach, namely, the

intertidal area, that the Edwardses own "for bathing and boating purposes."[11]

3. Common law claims

In count 6 of their counterclaim, all individual defendants seek a declaration that under Maine common law they are entitled to use the intertidal area on the Edwardses' land. The individual defendants are entitled to use that area to the extent allowed by the holdings in *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620; *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989), and other applicable cases.

C. Costs of court

The allocation of costs of court is based on a functional analysis of which party prevailed when the action is viewed as a whole. *See Flaherty v. Muther*,

[11] In this order, the court has addressed the question of whether the individual defendants hold prescriptive easement rights to use the beach. The court did so, even though it also concluded that those parties hold record easement rights by implication, because the record easement rights entitle them to use the beach for purposes of "bathing and boating." If the claimed prescriptive rights were no greater than the record rights, then in the present circumstances there would not be any need for the court to address the former. On the other hand, if the prescriptive rights claimed by the individual defendants are more extensive than their record rights to bathe and boat, then the determination that they have those record rights would not fully address the issues in this case. Because of that possibility, the court has gone ahead to analyze both sets of claims.

2011 ME 32, ¶ 89, 17 A.3d 640, 663. When the resolution of the parties' claims is viewed in that light, the court concludes that the Town and the individual defendants are entitled to an award of costs.

The entry shall be:

Judgment issued by the court. For the reasons set out therein, the way located on the land owned by the plaintiffs, described in a deed recorded at book 4357 page 190 of the Knox County Registry of Deeds, is a public easement road pursuant to 23 M.R.S. § 3025.

Defendants and counterclaim plaintiffs Cynthia S. Blackman, Eliot A. Scott, Nathalie M. Scott and Willis A. Scott, Jr., as owners of land located at 34 Cooper's Beach Road and described in a deed recorded at book 1857 page 87 of the Knox County Registry of Deeds, hold easement rights to freely use the intertidal beach area located on the plaintiffs' land for bathing and boating purposes. They and defendant and counterclaim Constance Scott also are entitled to use said area to the extent allowed by Maine common law.

All other claims are either denied, or not reached and dismissed as moot.

All pending rule 50(d) pending [sic] for judgment as a matter of law are dismissed as moot.

The Town of Owls Head, Cynthia S. Blackman, Eliot A. Scott, Nathalie M. Scott, Willis A. Scott, Jr. and Constance Scott are awarded their costs of court.

Dated: July 30, 2014 /s/ Jeffrey Hjelm
Justice, Maine
Superior Court

STATE OF MAINE KNOX, SS.	SUPERIOR COURT CIVIL ACTION Docket No. RE-11-47
Darlene F. Edwards et al., Plaintiffs v. Cynthia S. Blackman et al., Defendants	Order (Motion for Judgment on the Pleadings; Motion for Summary Judgment' Motion to Strike Jury Demand)

Pending before the court are three motions: first, the plaintiffs' motion for judgment on the pleadings on count 1 of the counterclaim filed by the individual counterclaim plaintiffs (defendants); second, the plaintiffs' motion for summary judgment on counts 2 and 3 of the complaint, which are directed against defendant Inhabitants of the Town of Owl's Head, Maine, and the associated cross-motion of the Town for summary judgment on count 2 of the plaintiffs' complaint; and third, the plaintiffs' motion to strike the jury trial demand filed by the Town. This order addresses each of these motions.

A. Motion for judgment on the pleadings

A motion for judgment on the pleadings is analytically identical to a motion to dismiss for failure to state a claim. *Cunningham v. Haza*, 538 A.2d 265, 267 (Me. 1988). In both instances, the allegations are taken as true, and the complaint is then examined "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or

alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994). A dismissal is proper "only when it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Hall v. Board of Environmental Protection*, 498 A.2d 260, 266 (Me. 1985).

In count 1 of the counterclaim, counterclaim plaintiffs Cynthia S. Blackman, Nathalie M. Scott, Willis A. Scott, Jr. and Elliot A. Scott (collectively, the Blackman defendants) seek a judicial declaration that they have deeded non-ownership interests, including easements, over the property owned by plaintiffs Darlene F. Edwards and Lewis M. Edwards, III (collectively, the Edwardses). In their motion, the Edwardses argue that the pleadings establish that the Blackman defendants do not have any such deeded interests encumbering or otherwise affecting their property, and they seek judgment based on those pleadings.

The allegations in the counterclaim, supplemented by deeds on which both sets of parties rely, establish that the deed itself received by the Blackman defendants from their predecessors-in-title did not convey an easement interest or other rights over the Edwardses' land. However, the deed to the Blackman defendants' grantors, Robert S. Hurtig and Marie E. Hurtig, included such language: it granted to the Hurtigs an easement and right to use "all streets or ways laid out in the Blackington plan . . . and the use

of the beach for boating and bathing purposes and all riparian rights in common with others appurtenant to said land." Eventually, the Hurtigs conveyed a portion of their land to the Blackman defendants. Here, the Blackman defendants argue that even though their own deed did not include this language, their successor ownership of the Hurtig property gives them the same record easement rights as the Hurtigs enjoyed.

In support of this analysis, the Blackman defendants rely on *Cole v. Bradford*, 86 Me. 380 (1894), where the Law Court held that "when an easement, although not originally belonging to an estate, has become appurtenant to it either by grant or prescription, a conveyance of that estate will carry with it such easement whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee." *Id.* at 384. As is noted above, however, the Blackman defendants did not acquire all of the Hurtigs' land that benefited from the deeded easement rights. Rather, they acquired only a portion of that land. Therefore, the *Cole* holding is not squarely applicable, because the Blackman defendants are not the owner of "that estate," which included an interest that was not conveyed to the Blackman defendants.

In their reply to the Blackman defendants' opposition to their motion, the Edwardses pick up on the lack of full correlation between the Hurtigs' interests and the Blackman defendants'. From this, they raise questions about which part of the Hurtigs' property

benefitted from the easement: was it the part of their land that they conveyed to the Blackman defendants, or was it a different portion of their holding? The Blackman defendants also make an argument implicating the question of intent: which part of the Hurtigs' land was intended to be benefitted by the deeded easement rights established in their deed?

Neither set of parties has provided legal authority establishing whether the *Cole* holding applies only when the entire estate that enjoys the record easement rights is conveyed, notwithstanding the omission of easement language in the deed, or whether it also applies when only a portion of the dominant estate is conveyed. Particularly in the absence of legal argument on this point, the court need not address the issue here. The Edwardses themselves have identified factual issues – namely, questions of the intention of the parties to prior conveyances – that may bear on the question of whether count 1 of the counterclaim has a sufficient legal basis. For purposes of this motion, the court accepts the Edwardses' identification of factual issues that need to be developed to determine the merits of the Blackman defendants' claim in count 1 of their counterclaim. Count 1 of the counterclaim does not preclude the existence of facts that would support that claim, as the Edwardses have framed the issue. Under the above-noted deferential standard that controls an analysis of a motion for judgment on the pleadings, the court must deny the Edwardses' motion.

B. Motion for summary judgment: count 2

The Edwardses next seek summary judgment on count 2 of their complaint, where they seek declaratory judgment that the Town does not hold a public easement over their land. In their argument, the Edwardses focus on one of the three ways a municipality can acquire a public easement: dedication and acceptance. In its objection to the Eswardses' motion, the Town has addressed that issue and also argues that a second basis for a public easement, namely, public easement by prescription, not only is sufficient to defeat the Edwardses' motion but also entitles it to summary judgment. *See* M.R.Civ.P. 56(c). Here, the court addresses public easement by dedication and acceptance, and then a prescriptive public easement.

(a) Dedication and acceptance

Title 23 M.R.S. § 3025 provides:

> No property or interests therein may be dedicated for highway purposes unless the owner of such property or interest has filed with the municipal officers a petition, agreement, deed, affidavit or other writing specifically describing the property or interest and its location, and stating that the owner voluntarily offers to transfer such interests to the municipality without claim for damages, or has filed in the registry of deeds an approved subdivision plot plan which

> describes property to be appropriated for public use.
>
> A municipality may accept a dedication of property or interests therein by an affirmative vote of its legislative body.
>
> Unless specifically provided by the municipality, title to property accepted for highway purposes after December 31, 1976 shall be in fee simple.

The central question presented here is whether the dedication that the Town argues is the predicate for a prescriptive public easement met the statutory standard that such a dedication must "specifically" describe the location of the property at issue. The factual context for this question is a dispute between the Edwardses and the Town about whether Cooper's Beach Road extends onto the Edwardses' property.

The record on summary judgment establishes that Cooper's Beach Road is privately owned. In 1986, after the Town learned that it could not lawfully use public funds for winter maintenance (plowing and sanding) of private ways, five owners of property that included Cooper's Beach Road filed the following petition: "We the undersigned, owners of property consisting of Coopers Beach Road . . . ask the Town to accept the road as a public easement. . . ." The petition was accompanied by a document in which "abutting property owners on Cooper's Beach Road" stated their agreement with the petition of the property owners seeking municipal acceptance of the road as a

public easement. The Edwardses' predecessor-in-title was among these self-described "abutters." At a special town meeting, residents passed a measure "to accept a public easement over Cooper's Beach Road" and several other privately owned ways. The Town continued to provide winter maintenance, which included plowing on the land now owned by the Edwardses and using a turnaround that is at least located partly on their land.

In 1996, the Town's attorney advised the Board of Selectmen that the public easements that had been accepted ten years earlier were affected by a "problem" because they were not adequately described. A special town meeting was held in November 1996. The warrant included tax maps that a selectman marked to depict the location of the Cooper's Beach Road dedication based on his understanding of the 1986 acceptance. He created that visual aid for the benefit of voters attending the special town meeting. At the meeting, Town voters approved the acceptance of 13 public easements, ten of which (including Cooper's Beach Road) had been the subject of the 1986 acceptance.

William Leppanen has served as the Town's road commissioner since 1981. Neither he nor the Town's current first selectman knows where Cooper's Beach Road ends, and neither of them knows of any evidence that would signify the location of that terminus.

These facts are undisputed and established in the record on summary judgment. What remains is the question of whether these undisputed factual terms and circumstances of the dedication made by the property owners and abutters to the Town in 1986 met the statutory requirement that the terms of the dedication must "specifically describe" the location of the dedicated property.[1] The court concludes that, as a matter of law, the dedication was supported by a specific description of the proposed location of the public easement.

The specific location of that interest is described specifically as the Cooper's Beach Road.[2] At least one aspect of the location of Cooper's Beach Road – namely, the northern terminus is open to legitimate dispute.

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[1] Although the Town argues in part that the 1996 events bear on the legal sufficiency of the 1986 dedication, they do not. The 1996 events may be relevant to the Town's acceptance of the dedication. However, a dedication is distinct from the acceptance of that dedication. The only dedication was made in 1986, and so the sufficiency of that dedication must be evaluated on its own terms.

[2] The Edwardses repeatedly note that the dedication extended to the Town did not contain a metes and bounds description of the location of the proposed public easement or other particularized information, such as a reference to a plan or survey, about the road's location. Section 3025 does not expressly require that type of information. A specific description of the location of the subject land certainly could be provided both in the form that the Edwardses suggest, but a specific description can also be made in other ways. Thus, the absence of the information proposed by the Edwardses is not the end of the inquiry.

This is demonstrated the facts noted above, including both the assessment of the Town's attorney that the Town's acceptance of the dedication in 1986 may not have satisfied the requirements of section 3025 because of insufficient descriptions of the locations of the public easements, leading to the Town's decision to revisit the issue in 1996, and by the lack of any knowledge expressed by Town officials (more particularly, two of the officials whom one would expect to know about the matter) about the location of the endpoint of Cooper's Beach Road.

However, that pending issue that is the subject of this action does not defeat the specific description of the location of the proposed public easement, because that location as stated in the dedication is the same as the location of Cooper's Beach Road. The complete location of Cooper's Beach Road remains to be determined in this action. The pendency of that determination, however, does not detract from the fact that the location of the public easement is identical to the location of the road. The location is therefore "specifically" described in those terms. Once the terminus of Cooper's Beach Road is established by court order or otherwise, then the location of the public easement will also necessarily be established.

This analysis reveals that the Edwardses are not entitled to judgment as a matter of law on their contention that the Town did not acquire a public easement over their land as the result of a dedication and acceptance under section 3025.

(b) Prescriptive public easement

In its cross-motion for summary judgment, the Town argues that a public easement over Cooper's Beach Road was created by prescription. With this argument, the Town not only seeks to defeat the Edwardses' summary judgment motion on count 2 of the complaint but also seeks summary judgment of its own to establish as a matter of law the existence of that public easement by prescription.

The Law Court has held:

> The party asserting a public, prescriptive easement must prove: (1) continuous use; (2) by people who are not separable from the public generally; (3) for at least twenty years; (4) under a claim of right adverse to the owner; (5) with the owner's knowledge and acquiescence; or (6) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed.

Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, ¶ 15, 804 A.2d 364, 369.

As the Town has framed its case for a prescriptive easement, it must establish that it has plowed the disputed way for the prescriptive period of twenty years. To establish this factual element, the Town relies on affidavits of Irving Smith, Uno Ilvonen and Jack Barbour, who stated that they were responsible for plowing the Town's roads, including Cooper's Beach Road, during three consecutive periods of time

from 1974 to the present. To support factual assertions arising from their statements, the Town has submitted affidavits from each of them. Two of the affidavits are affected by a facial discrepancy that precludes their consideration here. The affidavits of Ilvonen and Smith purport to have been signed on dates different from the ones on which they appeared before an authorized person to swear to the truth of the contents of the affidavits. This means, at the very least, that the person administering the oath did not witness Ilvonen or Smith execute the affidavit. The court does not consider these affidavits to be in proper form and thus does not consider them. This leaves only Smith's affidavit, which does not suffer from the same formal defect. Even when combined with the remaining evidence contained in the record on summary judgment, Smith's affidavit is insufficient to establish public use of the disputed section of the way for the full prescriptive period. Therefore, the Town is not entitled to summary judgment on its argument that it has acquired a prescriptive easement for public use over the way that is present on the Edwardses' land.

C. Motion for summary judgment: count 3

In count 3 of the complaint, the Edwardses challenge the Town's October 2011 decision to accept a public easement over the contested portion of the way. This challenge in count 3 takes the form of an administrative appeal under M.R.Civ.P. 80B. The Town seeks summary judgment, arguing that the

proper way to raise the issue is through the arguments for declaratory relief that the Edwardses have already articulated in count 2 of their complaint. With this understanding, the Edwardses do not oppose dismissal of count 3, leaving them with the remaining vehicle in count 2 to seek the same relief that they requested in count 3. Accordingly, summary judgment is granted to the Town on count 3.

D. Motion to strike jury demand

In September 2012, the Town filed a demand for trial by jury. By motion, the Edwardses seek to strike that demand, contending that none of the issues to be tried trigger the right to a jury trial and arguing that the case must proceed to a bench trial. Both the Town and the Blackman defendants oppose the Edwardses' motion.

Because the Blackman defendants did not file a jury demand, the court need look only to the claims asserted by the Edwardses against the Town to determine if any part of this case may be tried to a jury. *See* M.R.Civ.P. 38(d) ("The failure of a party to make a demand and pay the fee as required by this rule constitutes a waiver by that party of trial by jury. . . ."). Because there are no claims between the Town and the Blackman defendants, the Town's assertion of any jury rights is limited to those claims encompassed in count 2 of the complaint and is, in effect, a jury demand only as it relates to those claims. Therefore, the jury demand filed by the Town

cannot be treated to invoke a jury hearing on any issues between the Edwardses and the Blackman defendants, as set out in the complaint or counter-claim, that go beyond the ones implicated in count 2. The provisions of rule 38(c) and the May 1, 1999, Advisory Committee's Notes to rule 38 state that if a plaintiff demands a jury trial without limiting its demand to certain issues, then the defendant need not file a separate jury trial demand. On the other hand, if the plaintiff's jury demand is limited to certain issues, then in order to secure jury rights to other issues, the defendant must file its own demand. Here, The Town's demand is limited to issues that have been raised between it and the Edwardses and therefore does not extend to any claims involving the Blackman defendants aside from those associated with count 2.[3]

In their remaining claim against the Town, set out in count 2 of the complaint, the Edwardses' sole contention is that they are entitled to a judicial declaration that their property is not encumbered by a public easement. A party to an equitable claim is

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[3] Even if the remaining claims between the Edwardses and the Blackman defendants (such as claims for and against a private easement) were brought into the Town's jury demand, those claims do not trigger a jury right because those claims are equitable, just as the ones that are within the scope of the Town's jury demand. For the same reasons why the Town does not have a right to trial by jury on count 2, the qualitatively similar claims between the Edwardses and the Blackman defendants do not allow trial by jury.

not entitled to a jury trial. To determine if a claim is equitable or legal, one must look at "the basic nature of the issue presented and the remedy sought by the plaintiff." *See Thompson v. Pendleton*, 1997 ME 127, ¶ 10, 697 A.2d 56, 58. The Law Court has observed that an action affecting equitable servitudes and implied easements is equitable and does not give rise to a jury right. *See id,* ¶ 9, 697 A.2d at 58. In that analysis, the Court favorably recognized caselaw from other jurisdictions holding that claims for prescriptive easements and public easements are not the proper subject of trials by jury. *Id.*, 697 A.2d at 58. These are precisely the nature of the issues pending between the Edwardses and the Town. Under the *Thompson* analysis, the nature of the claims in this case does not allow trial by jury. This is true notwithstanding factual disputes that may need to be adjudicated at trial, both in the context of the claims themselves and any defenses the Town has pleaded. *See Thompson, id.*, ¶¶ 10-11, 697 A.2d at 58-59 (discussion of court's factual findings in contested case); *cf. Morris v. Resolution Trust Corp.*, 622 A.2d 708, 716 (Me. 1993) ("An issue legal in nature is not attended by a right to jury trial when it is raised as a defense to an equitable issue.").

The Town's attempts to cast this claim as one involving title to the property or involving a tort claim for trespass, which are claims that activate a party's jury rights, are not a correct characterization of the nature of count 2. The Edwardses do not raise any issue about the title to their property or anyone

else's. Rather, this action revolves solely around the question of access to and use of land. Further, although the Edwardses allege that people have entered onto their property without permission or legal authority, those allegations are little more than background to the essential claim in this case, which is to seek a determination of whether others – either any of the Blackman defendants or members of the public generally – are legally entitled to use the Edwardses' property as they claim such people have done in the past. Accordingly, the Edwardses do not seek money damages from any person or entity. Rather, they seek an equitable adjudication of property rights.

The nature of the issues raised in this action and the form of relief sought by all parties demonstrates that this is an action in equity and not in law. Accordingly, the Town does not have a right to a jury trial, and the case will proceed to a bench trial.

The entry shall be:

The plaintiffs' motions for judgment on the pleadings and for summary judgment are denied. The cross-motion for summary judgment filed by defendant Town of Owls Head is granted in part and denied in part: judgment on count 3 of the complaint is entered for the Town, and the motion beyond this is denied.

The plaintiffs' motion to strike the Town's jury demand is granted. The Town does not have the right

to trial by jury. The trial of all claims in this action shall be before a justice only.

Dated: May 7, 2013

/s/ Jeffrey Hjelm
Justice, Maine Superior Court

MAINE SUPREME
JUDICIAL COURT
Sitting as the Law Court

Docket No. Kno-14-358
Decision No. 2015 ME 165

Darlene F. Edwards et al.

v.

Cynthia S. Blackman et al.

ORDER DENYING MOTION TO RECONSIDER

Darlene F. Edwards and Lewis M. Edwards III have moved for reconsideration of the Court's decision dated December 31, 2015. The motion has been reviewed and considered by the panel that decided the original appeal.

The motion is DENIED.

Dated: February 1, 2016

For the Court,

/s/ Matthew Pollack
Matthew Pollack
Clerk of the Law Court
Pursuant to M.R. App. P. 12A(b)(4)

STATE OF MAINE **SUPREME JUDICIAL COURT**
SITTING AS THE LAW COURT
DOCKET NO. KNO-14-358

DARLENE F. EDWARDS AND LEWIS M. EDWARDS, III, Plaintiffs/Appellants, v. CYNTHIA S. BLACKMAN, NATHALIE M. SCOTT, WILLIS A. SCOTT, JR., ELIOT A. SCOTT, CONSTANCE M. SCOTT, and THE INHABITANTS OF THE TOWN OF OWLS HEAD, MAINE, Defendants/Appellees.	PLAINTIFFS/ APPELLANTS' MOTION FOR RECONSIDERATION (Memorandum Incorporated)

Plaintiffs/Appellants Darlene F. Edwards and Lewis M. Edwards III respectfully request that the Court reconsider Section II(A)(2) of its Decision dated December 31, 2015 regarding the scope and effect of the dedication and acceptance of "Coopers Beach Road." The basis for this request is that the Court misapprehended the appropriate standard of review that should have been applied by the Superior Court to a dispute regarding the scope of a dedication made pursuant to 23 M.R.S. § 3025 (2013) (the "Statute"). The Court erred when it upheld the validity of the Superior Court's consideration of extrinsic evidence and its application of common law principals [sic] of deed

interpretation to resolve the ambiguity in the dedication petition. The standard that should have been applied by the Superior Court is whether there was sufficient evidence in the record to demonstrate that Mr. McLoon's driveway and its location were specifically described in the dedication petition as required by the Statute. As argued by the Edwards in their post-trial brief and in their appeal, extrinsic evidence regarding Mr. McLoon's subjective intent never should have been considered. Doing so has created a precedent that will have negative consequences for property owners and municipalities throughout Maine.

The Statute states that "no property or interests therein may be dedicated for highway purposes unless the owner of such property or interest has filed with the municipal officer a petition . . . specifically describing the property or interest and its location." It has been determined by both the Superior Court and this Court that the description of Coopers Beach Road in the dedication petition is ***ambiguous*** with regard to whether it includes the portion of Mr. McLoon's property that he paved at his own expense in the early 1980s (Ex. 5, 65, A. 203, 350; V:232, A. 173) and identified as his "driveway" in his September 1984 filing with the DEP (Ex. 58, A. 349). Thus, it is undisputed that, on its face, the dedication petition does not "specifically describe" the driveway or its location.

This Court also found that, while the record contains evidence that could support a finding that

the driveway was included in the dedication, it also contains evidence that could support a contrary finding. *Decision* at 15. The standard of review applied by this Court in this case was a deferential review of the factual finding by the Superior Court which was based upon its consideration of extrinsic evidence and application of common law principles of deed interpretation. *Decision* at 13. The application of the "clearly erroneous" standard of review by this Court was improper and inconsistent with its prior decisions. In reviewing de novo the Superior Court's interpretation of the Statute, this Court should have required the Superior Court to limit its inquiry to whether the record evidence demonstrated that the language of the dedication petition satisfied the requirements of the Statute. This Court should not have permitted the Superior Court to rely upon extrinsic evidence and common law principals [sic] of deed interpretation to divine Mr. McLoon's subjective intent when he signed the dedication petition in 1986.

In the past, under similar circumstances, this Court has required strict compliance with statutory requirements regarding the description of a property interest subject to divestiture. *See Nadeau v. Town of Oakfield*, 572 A.2d 491 (Me. 1990). In *Nadeau*, the Court upheld a Superior Court decision invalidating two tax lien certificates from the early 1950's that failed to satisfy the statutory requirement of "a description of the real estate sufficiently accurate to identify it." *Nadeau* 572 A.2d at 492 ("[b]ecause these statutes authorized a divestiture of land, it was

necessary for the Town to comply strictly with the statutes' requirements.")

Similarly, in construing the application of the statute of frauds to an agreement for the purchase and sale of real estate, this Court stated "[a]s we explained more than a century ago, although a contract for the sale of land need not include a metes and bounds description, it 'should . . . describe [ ] the land with such certainty, that it could be understood from the writing itself, without parol proof; unless that appears in the writing, or by some reference, contained in it, to something else, which is certain, it does not comply with the statute . . . " *Gagne v. Stevens*, 1997 ME 88, ¶ 9, 696 A.2d 411, 414. The rational provided by this Court for the application of this strict standard of review was "to prevent enforcement through fraud or perjury of contracts never in fact made." *Id.* That rational is equally applicable to the instant case.

The Superior Court's decision in the instant case is based exclusively upon an illogical assumption supported only by circumstantial evidence. The basis upon which the Superior Court determined that Mr. McLoon intended to dedicate his driveway for use as a public way was: 1) the testimony of Ed Dodge indicates that Mr. McLoon understood that the reason for the dedication was to enable the Town to continue to plow Coopers Beach Road; 2) the testimony of Ed Dodge indicates that Mr. McLoon understood that a dedication and acceptance would result in a loss of privacy with regard to Coopers Beach Road;

and 3) the Superior Court assumed that Mr. McLoon must have intended to include his private driveway in the dedication because he must have wanted to continue to have his driveway plowed for free. *Superior Court Decision dated July 30, 2014* at 7, A. 35. It is significant that Mr. McLoon died in 1987 and there is not a single piece of evidence in the record that directly reflects Mr. McLoon's intent when he signed the dedication petition in 1986 or any evidence that indicates that he ever believed that his driveway was part of Coopers Beach Road.

The Superior Court itself characterized the evidence upon which it relied as "indirect evidence." *Id.* Indirect or circumstantial evidence is "[e]vidence of some collateral fact from which the existence or non-existence of some fact in question may be inferred as a probable consequence." William P. Richardson, *The Law of Evidence* § 111, at 68 (3d ed. 1928). In the instant case, the Edwards have been deprived of their private driveway and the public will forever be permitted to travel back and forth over their front lawn because the Superior Court made the illogical assumption that Mr. McLoon intended to willingly give up a valuable strip of waterfront real estate directly in front of his home in exchange for free snow plowing. It would be a miscarriage of justice for this Court's review of the Superior Court's illogical assumption to be limited to a "clearly erroneous" standard. Because this Court's review of the Superior Court's interpretation of the Statute is de novo, however, that need not be the case.

The Court's departure in the instant case from the express requirements of the Statute and from its previous decisions has created a situation that the Edwards' never could have anticipated when they purchased their property. The Court's decision also will open the door for disputes over the scope and effect of old dedications across the State of Maine which will upset the settled expectations of property owners and lead to a flood of litigation. Additionally, in the future, land owners will be reluctant to sign dedication petitions for fear that their intent will be subject to scrutiny and revision based upon extrinsic parol evidence long after they are dead. Because the Court's de novo review and interpretation of the Statute is inconsistent with its prior decisions and has created a precedent that will have negative consequences for Maine property owners and Maine municipalities, the Court should reconsider its Decision, follow its past precedent, apply the appropriate statutory standard, and determine that, with regard to Mr. McLoon's driveway, the dedication petition does not satisfy the statutory standard because there is insufficient evidence in the record to demonstrate that the petition specifically describes the driveway and its location.

WHEREFORE, Plaintiffs/Appellants Darlene F. Edwards and Lewis M. Edwards III respectfully request that the Court vacate Section II(A)(2) of its Decision and determine that the Superior Court erred when it declared that the Edwards' driveway was part of Coopers Beach Road because there is insufficient

evidence in the record to support a factual determination that the dedication petition specifically describes the driveway and its location as required by 23 M.R.S. § 3025.

Dated at Portland, Maine this 12th day of January 2016.

/s/ Glenn Israel
David A. Soley, Bar No 6799
Glenn Israel, Bar No. 7876
Attorneys for Appellants
Darlene F. Edwards and
Lewis M. Edwards, III

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STATE OF MAINE KNOX, ss	SUPERIOR COURT CIVIL ACTION DOCKET NO. RE-11-47
DARLENE F. EDWARDS and LEWIS M. EDWARDS, III, Plaintiffs, v. CYNTHIA S. BLACKMAN, NATHALIE M. SCOTT, WILLIS A. SCOTT, JR., ELIOT A. SCOTT, CONSTANCE M. SCOTT, and the INHABITANTS OF THE TOWN OF OWL'S HEAD, MAINE, Defendants.	PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE ORDER DATED MAY 7, 2013 (Filed May 14, 2013)

Plaintiffs respectfully request that the Court reconsider its conclusion on page 5 of the Order dated May 7, 2013 (the "Order") that "as a matter of law, the dedication was supported by a specific description of the proposed location of the public easement." The applicable statute requires a dedication in writing "specifically describing the property or interest ***and*** its location" (emphasis added). This requirement is intended to ensure that the intent of individuals making the dedication is clear and unambiguous, and to avoid situations similar to the one presented by the above-captioned action in which litigants ask the Court to second-guess the scope of a dedication made

many years ago by a party or parties who are long-since dead..

While the words "Cooper's Beach Road" may or may not provide an adequate description of the "property or interest" that was intended to be dedicated in 1986, it provides no indication whatsoever of the ***location*** of that property or interest on the face of the earth. Unless the Town can demonstrate the specific intent of Mr. McLoon, who signed the dedication with regard to what is now the Edwards' property, as to the specific location of the northern terminus of Cooper's Beach Road then the dedication is invalid as to the Edwards' property because it fails to ***specifically*** describe the location of Cooper's Beach Road. The case law is clear that the intent to dedicate private property to public use "must be unequivocally and satisfactorily proved." *Littlefield v. Hubbard*, 128 A. 285, 287 (Me. 1925). Because the Town has failed to produce sufficient evidence in response to Plaintiffs' motion for summary judgment to meet this standard, summary judgment should be entered in favor of Plaintiffs.

In the Order, the Court recognizes that currently there is a dispute as to the location of the northern terminus of Cooper's Beach Road. The Court indicates in the Order that it can resolve this dispute as part of the above-captioned action and, thus, determine the specific location of the northern terminus of Cooper's Beach Road. However, that would not satisfy the express requirements of the statute. The statute requires that the dedication documents themselves

must specifically describe the property or interest to be dedicated ***and*** the location of that property or interest. The statute does not call for a "general" description of the location, it requires a ***specific*** description. In this case, the petitions are ***not*** specific and that should end the inquiry because, on their face, they fail to satisfy the statute. The Town's own attorney admitted as much in 1996 when he opined that there was a "problem" with the 1986 dedication petition.

To the extent that the Court is inclined to examine extrinsic evidence to determine whether the phrase "Cooper's Beach Road" in the 1986 dedication was specific enough to satisfy the statute (an examination that Plaintiffs do not believe is permitted by the plain language of the statute), the evidence considered by the Court must be limited to evidence that demonstrates the intent of Mr. McLoon at the time he signed the dedication in 1986. Any other evidence would be irrelevant. Moreover, because the Town has failed to present any evidence of Mr. McLoon's intent, summary judgment should be entered in favor of the Plaintiffs on Count 2 of the Complaint.[1]

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[1] Additionally, summary judgment should be entered with regard to the dedication and acceptance of the portion of Cooper's Beach Road that the Town claims crosses the Titcomb property because it is undisputed that no one with any ownership interest in that property ever signed the 1986 dedication petition. SMF ¶ 39; OSMP ¶ 39.

Dated this 13th day of May 2013.

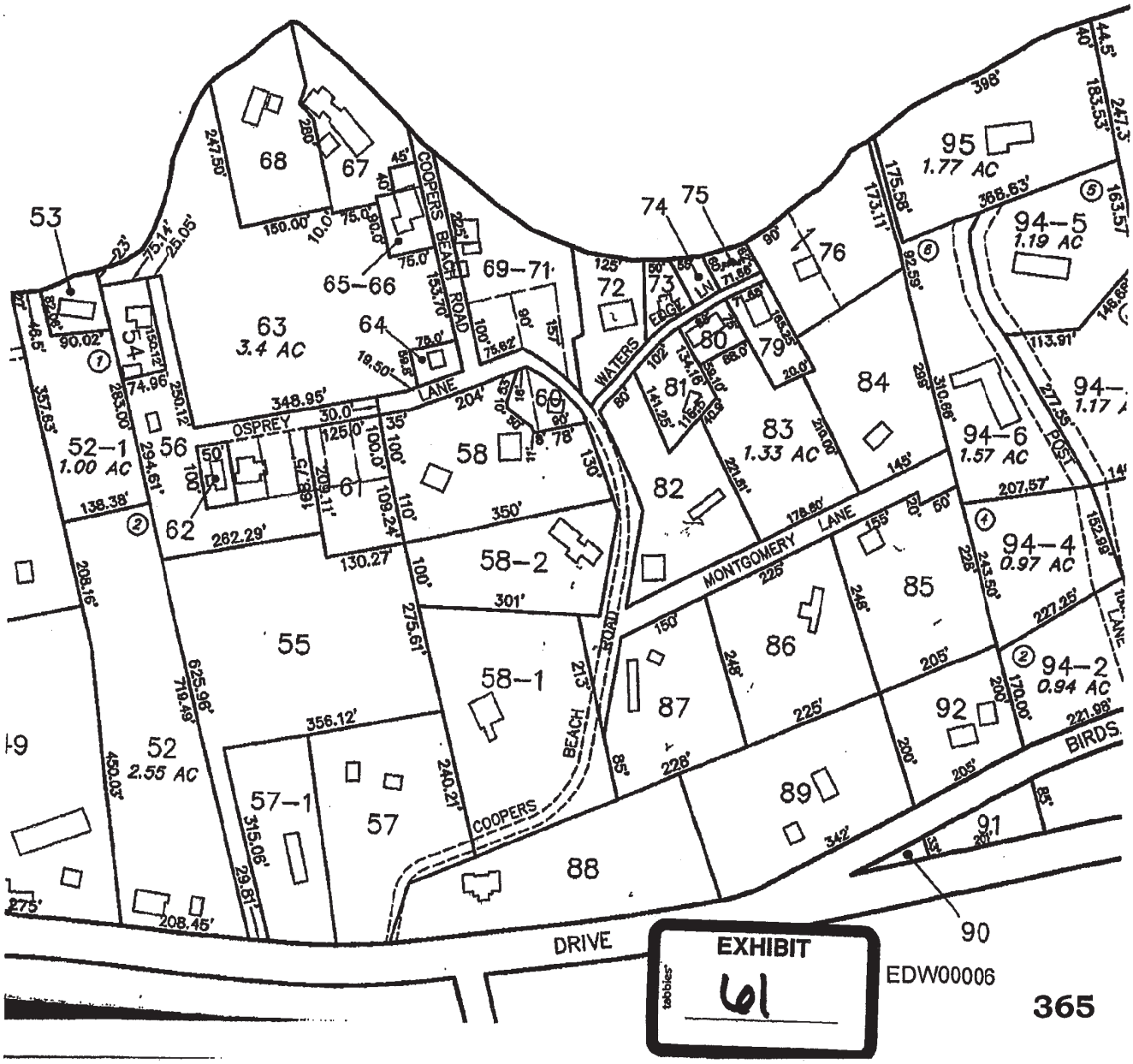
/s/ David A. Soley
David A. Soley, Bar No. 6799
Travis M. Brennan, Bar # 4525
Bernstein Shur
100 Middle Street; PO Box 9729
Portland, Maine 04104
207-774-1200

IMPORTANT NOTICE

MATTER IN OPPOSITION TO THIS MOTION PURSUANT TO SUBDIVISION (C) OF RULE 7 OF THE MAINE RULES OF CIVIL PROCEDURE MUST BE FILED NOT LATER THAN 21 DAYS AFTER THE FILING OF THIS MOTION UNLESS ANOTHER TIME IS PROVIDED BY THE MAINE RULES OF CIVIL PROCEDURE OR SET BY THE COURT. FAILURE TO FILE TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THE MOTION, WHICH MAY BE GRANTED WITHOUT FURTHER NOTICE OR HEARING.

[7/30/13
Motion denied
/s/ Justice Hjelm

MAP 13
-2010-



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